

# Commentary

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## **Gifford v. USGBC: LEED Certification Challenged**

**By**  
**James Stewart**  
**and**  
**Robbie J. Vargo**

*[Editor's Note: James Stewart is a member at Lowenstein Sandler in Roseland, N.J. He has extensive experience in environmental issues and complex litigation, with an emphasis on environmental litigation and class-action toxic torts, as well as experience with renewable energy issues, particularly solar energy projects. He can be reached at 973-597-2522 or jstewart@lowenstein.com. Robbie J. Vargo is an associate in Lowenstein Sandler's Construction Law and Business Litigation Groups. His experience includes construction contract drafting and complex litigation, with an emphasis on construction and business litigation. He is a LEED Green Associate, which denotes knowledge of green design, construction and operations. He can be reached at 973-597-6178 or rvargo@lowenstein.com. Copyright 2011 by the authors. Replies to this commentary are welcome.]*

On October 8, 2010, Henry Gifford and Gifford Fuel Savings, Inc. filed a class action lawsuit in the Southern District of New York against the U.S. Green Building Council ("USGBC").<sup>1</sup> Essentially, Gifford alleges that the USGBC has engaged in, among other things, deceptive trade practices, false advertising, and anti-trust activities by promoting the Leadership in Energy and Environmental Design ("LEED") rating system. Gifford further alleges that the USGBC defrauded municipalities and private entities because the LEED rating system does not meet the predicted and advertised energy savings. The class of plaintiffs identified in the lawsuit represents a wide range of individuals. In addition to Gifford, the lawsuit includes all persons who have paid for LEED certification, all persons whose livelihoods are injured by the USGBC's assertedly misleading representations, and taxpayers whose

city and state tax dollars were spent on obtaining LEED certification in publically-commissioned buildings. Gifford is demanding \$100 million in damages, cessation of alleged deceptive and fraudulent practices, and payment of legal fees.

The allegations in the lawsuit rest in large part on Gifford's analysis of a 2008 New Buildings Institute ("NBI") study comparing predicted energy use in LEED-certified buildings with actual energy use. In that study, the NBI concluded that LEED buildings are, on average, 25% to 30% more efficient than the national average — a conclusion that directly contradicted Gifford's analysis that LEED-certified buildings used 29% more energy than the national average. In the lawsuit, Gifford claims that the USGBC's use of the NBI study is a fraudulent misrepresentation intended to mislead the consumer and monopolize the market for energy-efficient building design.

Gifford asserts that the NBI study produced grossly misleading results because the NBI utilized a skewed underlying sample and concealed "the fact that the NBI study compared the median energy use of the LEED buildings to the mean energy use of the [United State Energy Information Administration's Commercial Buildings Energy Consumption Survey] buildings." In particular, Gifford alleges that the USGBC fraudulently misled the consumer by omitting the fact that the NBI study sample was comprised of just 22% of LEED certified buildings, not all LEED certified buildings. Gifford further asserted that the NBI study was skewed because less than half of the LEED-certified buildings responded to the survey, and because LEED building

owners have a “vested interest in boosting the value of the LEED certification.”

While the majority of Gifford's allegations relate to the NBI study, Gifford also asserts that the USGBC essentially allows applicants to self-certify with little or no oversight from the USGBC. Gifford indicates that the USGBC claims on its website that the LEED system is “providing third-party verification that a building or community was designed and built using strategies aimed at improving performance across all the metrics that matter most: energy savings . . . .” The suit alleges that this claim is false on its face in several ways: (1) LEED certification does not require any verification of the data submitted in certification application; (2) LEED certification does not require actual energy use data at any stage; (3) LEED certification is not based on actual building performance data, but rather on projected energy use; and (4) USGBC does not have the staff or experience to evaluate these applications. Gifford maintains that the use of the term “verification” is false and intended to mislead the consumer and monopolize the market for energy-efficient building design.

This class action is the culmination of a long-standing dispute between the USGBC and Henry Gifford. Previously, Gifford wrote an article claiming that LEED rated buildings used 29% *more* energy than conventional buildings. In that article, Gifford generally challenged the way the USGBC promoted energy efficiency, stating that, “[t]he answer is that attention is focused on the appearance of energy efficiency, not its accomplishment. The LEED system does this by rewarding designers for predicting that a building will save energy, not for proving that a building actually saves energy.”<sup>2</sup>

Gifford's evaluation is in stark contrast to how the USGBC calculates the energy savings to be achieved from following its rating system. In response to Gifford's article, the USGBC responded with a stern and forceful e-mail to all of the USGBC Chapter Leaders dissecting Gifford's opinions and providing a rebuttal to nearly every point he raised. The USGBC stated that it welcomes “thoughtful critiques, but [it] remains committed to decisions based on facts, not opinions.” In particular, the USGBC contended that, “Gifford's assertions are based on serious misrepresentations of the data and on analytical biases that both USGBC and [the New Buildings Institute] have raised with

the author for correction prior to publication. These factual corrections were not included in the document published on Gifford's website.”<sup>3</sup>

Although the USGBC has not yet answered Gifford's Complaint, we expect the USGBC to assert that it does not guarantee performance of the LEED-certified projects, and that LEED performance is dependent on the actual use by the owner, not just the design. Michael Italiano, the only key USGBC founder not named as a defendant in the lawsuit, explained to the Environmental Building News, that “LEED doesn't guarantee anything, and I think LEED gives people the tools to understand that.”<sup>4</sup> Italiano further stated that, “[t]o me [the lawsuit] sounds frivolous and doesn't have much of a chance.”<sup>5</sup>

The LEED rating system provides building owners with the structure for implementing functional and measurable green building design, construction, operations and maintenance solutions.<sup>6</sup> According to the USGBC, the LEED rating system “provid[es] third-party verification that a building or community was designed and built using strategies aimed at improving performance across all the metrics that matter most: energy savings, water efficiency, CO2 emissions reduction, improved indoor environmental quality, and stewardship of resources and sensitivity to their impacts.”<sup>7</sup> To ensure that each project is constructed in accordance with the LEED rating system, the USGBC utilizes an independent, third-party organization called the Green Building Certification Institute (“GBCI”). The GBCI administers the LEED certification process and ensures the precision in design, development, and the implementation of procedures used to measure performance.

While the outcome of the lawsuit remains uncertain, it is clear that this will be an interesting time for both proponents and detractors of the LEED rating system.

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## Endnotes

1. *Gifford v. U.S. Green Building Council*, No. 10 CIV 7747 (S.D.N.Y. Oct. 8, 2010).
2. Henry Gifford, *A Better Way to Rate Green Buildings*, available at [HenryGifford.com](http://HenryGifford.com).

3. The e-mail assertedly written by the USGBC can be found at HenryGifford.com.
4. Tristan Roberts, *USGBC, LEED Target by Class-Action Suit*, ENVIRONMENTAL BUILDING NEWS, Oct. 14, 2010.
5. *Id.*
6. [www.USGBC.org](http://www.USGBC.org)
7. *Id.* ■