

Green Building Litigation: Summary of Cases and Analysis of Trends

By David C. Longinotti, Annette K. Mathai-Jackson
& Derek Schaible



Hanson Bridgett Real Estate Practice Group
HANSONBRIDGETT.COM

Following the development and popularization of green building design standards, many industry watchers predicted an onslaught of green building litigation. The actual volume of green building litigation, however, has not lived up to expectations. The amount of green building litigation (actions directly related to a project's green building certification, consequences for failing to obtain green building certification, or for defective design or construction of green elements) has been particularly underwhelming. The green building-related claims that have made their way through courts thus far have varied greatly. Generally, LEED® certification claims have been a part of larger cases against builders or designers. The green building cases that have generated the most legal significance – those that with some sort of appellate decision – have been against state and local governments that have enacted new energy conservation requirements. As non-federal regulations develop, further legal challenges across jurisdictions are likely.

LEED® Certification

The lack of litigation attributable to certification has been at least partially attributed to the US Green Building Council's (USGBC) flexibility in granting certifications, as well as the swift development of best practices for green building contracting following the introduction of LEED® standards. The USGBC is continually training industry professionals and updating its certification standards in response to industry feedback as well as technological development. The continuing evolution of the LEED® program has likely helped to prevent disputes. While not particularly numerous, there are a handful of cases related to a failure to achieve LEED® certification. Below are summaries of a sample of suits against a builder, a developer and an architect.

- *Shaw Development v. Southern Builders*; Somerset County, MD Case # 19-07-011405

Shaw involved a suit for damages resulting from significant delays in the construction of a condominium complex. The claims made by

the developer included the loss of tax credits following failure to obtain LEED® certification. Maryland offered tax credits to building projects that obtained LEED® certification. In order to receive the tax credit, a builder must submit an initial application followed by certification that the final construction meets LEED® standards. While a requirement to build to LEED® Silver standards was included in the project manual and the scope of work accompanying the construction contract, the builder did not construct the building to comply with LEED® requirements. Additionally, following significant delays in construction, the builder did not attempt to seek final LEED® certification. The suit sought to recover \$635,000 for the loss of the LEED®-related tax credits. The parties ultimately settled the suit.

- *Gidumal v. Site 16/17 Development LLC*; NY Supreme Court Docket #105958/2010

Gidumal involved plaintiff purchasers of a condo in an upscale New York City complex. The complaint's laundry list of allegations included an assertion that the building does not meet its stated goal of LEED® Gold certification. The plaintiffs cited uninsulated pipes and excessive airflow from outside the building as evidence that the building does not meet LEED® Gold standards. The action did not survive defendant's motion to dismiss on forum grounds.

- *Bain v. Vertex Architects*; Cook County, IL Case # 2010L012695

Bain was one of the first instances of a building owner bringing suit against a design professional (in this case, an architect) for failing to gain LEED® certification for a home. Among a variety of breach of contract claims, the suit alleged that the architect failed to obtain a certification under the LEED® for Homes program. The docket from the Cook County Clerk's Office indicates that the parties went through discovery and depositions. Eventually, the case also added a consulting firm defendant. In March, the court granted a plaintiff-filed motion to dismiss with prejudice.

It appears that in the limited number of cases that have been filed, LEED®-certification-related allegations have been tacked on to more traditional allegations of breach of contract. When LEED®-related allegations are the bulk of the complaint, they are tied to other damages experienced by the plaintiff, such as the loss of tax credits. LEED®-certification breaches have yet to stand alone as a viable cause of action.

Building Codes

- *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*; 835 F.Supp.2d 1133

In an effort to promote energy efficiency, the City of Albuquerque enacted a set of energy standards for HVAC equipment that were more stringent than federal regulations. In 2008, a group of HVAC trade associations obtained a preliminary injunction to prevent the new regulations from coming into force. The plaintiffs argued that because the Albuquerque codes imposed greater efficiency requirements than existing federal regulations, the city's regulations were preempted. In 2010, the New Mexico district court granted the plaintiff's motion for summary judgment finding that the "prescriptive" compliance paths in the regulations – those that required HVAC products meet higher efficiency standards than federal regulations – were indeed preempted. Earlier this year, the same court found that the prescriptive compliance paths were not severable from the "performance" compliance paths, and invalidated the new regulations as a whole without addressing whether the "performance" paths were preempted by federal law.

- *Building Industry Association v. Washington State Building Council*; 683 F.3d 1144

On June 25, 2012, the Ninth Circuit affirmed a district court finding somewhat contrary to the holding in the Albuquerque case discussed above. In 2009, Washington revised its building codes seeking to reduce overall energy consumption in new construction. The new code outlined options available to builders to meet new reduced energy consumption targets. Among these options was the use of appliances that exceeded federal energy efficiency standards. Use of such appliances also happened to be easiest and most economical way for builders to meet the state's new energy consumption requirements. The National Energy Conservation Policy Act, which sets mandatory 'Minimum Energy Performance Standards' for consumer products, explicitly preempts more stringent state regulation of appliance energy efficiency. The Ninth Circuit held that an NECPA provision allows for cities and states to impose new construction energy efficiency standards that are more restrictive than federal regulations *so long as* it is possible for builders to meet the standards by using products that comply with the less-restrictive federal standards. Because the Washington regulations offer (less economical) pathways for compliance that do not require builders to use appliances that exceed federal efficiency standards, the Ninth Circuit found that the new Washington building code was not preempted by federal law.

This area of green building litigation has the potential to develop further. Already, a split between jurisdictions on the issue of preemption has occurred. More and more cities and states are certain to follow Washington and Albuquerque's lead in enacting new codes or laws more stringent than federal requirements. Challenges to any new codes or laws could result in numerous new lawsuits.

Green Bonds

- *Destiny USA*

An IRS audit of a shopping center's compliance with green bond requirements is notable because of the amount of money it involved. In 2007, a large mall in Syracuse, NY obtained \$228 million in green bonds through a federal program that encouraged developments to make use of modern sustainable building techniques and technologies. Destiny USA was to have included a 45 megawatt biofuel power station as well as, what was at the time, the nation's largest fuel cell installation.¹ The project's compliance with the requirements for the tax-exempt status of the bonds came into question when the mall's developer reported to the IRS that, due to the economic downturn, it was no longer planning to include as much (or any) of green building technologies included in the plan submitted to apply for the bonds. The statute establishing the green bond program requires a description of the energy efficient technologies to be included in applicant developments. The statute does not, the developer argued, require that the described efficiencies actually be included in the building. Following an investigation, the IRS allowed the bonds to retain their tax-exempt status.²

USGBC

- *Gifford v. US Green Building Council*; 101 U.S.P.Q.2D (BNA) 2053

There has been one notable action brought against the promulgator of LEED® certification system: the US Green Building Council. *Gifford* began as a class action against the USGBC but, eventually, the complaint was amended to include only three individuals as plaintiffs. The plaintiffs alleged a variety of antitrust claims against the USGBC. The Southern District of New York found that the plaintiffs did not have standing to bring antitrust claims under the Lantham or Sherman Acts against the USGBC because they were not direct competitors of the USGBC. The court further found that the plaintiffs did not have standing because they could not allege any commercial interest that

1 http://www.syracuse.com/news/index.ssf/2011/02/faded_green_promises_could_cos.html

2 http://www.syracuse.com/news/index.ssf/2012/03/irs_says_destiny_usa_green_bon.html

was damaged by a supposedly false statement of the USGBC. Because the case was dismissed because the plaintiffs lacked standing, the court did not address the merits of the plaintiffs' claims.

Miscellaneous

In *Hampton Techs., Inc. v. Dep't of Gen. Servs.*, 610 Pa. 541, a contractor sought to enjoin the award of a contract for electrical work on a new Philadelphia courthouse to a competitor. Though the plaintiff contractor had submitted the lowest bid on the project, it was not awarded the contract because the awarding agency chose a contractor with greater experience on LEED® projects. The Pennsylvania Supreme Court, without opinion, refused to grant the injunction.

Overall, there has been a surprisingly small number of green building cases. The number of actions that have actually had judgment entered is even lower. The handful of cases detailed above have largely focused on the secondary impacts of green building standards. However, as cities, counties, and states begin to develop their own regulations, more legal challenges to the new regulations are likely.

SAN FRANCISCO

425 Market Street, 26th floor
San Francisco, CA 94105
TEL 415-777-3200
FAX 415-541-9366

NORTH BAY

Wood Island
80 E. Sir Francis Drake Blvd., Ste. 3E
Larkspur, CA 94939
TEL 415-925-8400
TEL 707-546-9000
FAX 415-925-8409

SACRAMENTO

500 Capitol Mall, Ste. 1500
Sacramento, CA 95814
TEL 916-442-3333
FAX 916-442-2348

SILICON VALLEY

950 Tower Lane, Ste. 925
Foster City, CA 94404
TEL 650-349-4440
FAX 650-349-4443

EAST BAY

1676 N. California Blvd., Ste. 620
Walnut Creek, CA 94596
TEL 925-746-8460
FAX 925-746-8490