

2011

A Yellow Light for “Green Zoning”: Some Words of Caution About Incorporating Green Building Standards into Local Land Use Law

Michael Allan Wolf

University of Florida Levin College of Law, wolfm@law.ufl.edu

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>

 Part of the [Land Use Planning Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Michael A. Wolf, *A Yellow Light for “Green Zoning”: Some Words of Caution About Incorporating Green Building Standards into Local Land Use Law*, 43 *Urb. Law.* 949 (2011), available at <http://scholarship.law.ufl.edu/facultypub/300>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

A Yellow Light for “Green Zoning”: Some Words of Caution About Incorporating Green Building Standards into Local Land Use Law

Michael Allan Wolf*

I. Introduction: Professor Party Pooper, a.k.a. Dr. Killjoy

THE POPULARITY OF GREEN BUILDING IS UNDENIABLE. In a real estate market (and a concomitant real estate law practice market) best described by the word “doldrums,” it is hard to find any topic that generates enthusiasm. Therefore, we should be thankful that the interest among real estate professionals (builders, architects, lawyers, planners, brokers, and others) in efforts to design and implement strategies for using building design and construction practices to reduce energy consumption and minimize waste generation is keen and widespread.

It takes but one visit to the web site of the U.S. Green Building Council (“USGBC”)—“a 501(c)(3) non-profit community of leaders working to make green buildings available to everyone within a generation”—to catch the green fever.¹ USGBC, the organization that developed the highly popular LEED (Leadership in Energy and Environmental Design) rating systems, has been a major force for developing and spreading the green building gospel. One helpful and comprehensive feature of the USGBC web site is the ever-expanding list of “Public Policies Adopting or Referencing LEED,” with short descriptions of programs at the federal, state, and local levels.² The printer-friendly version of the document fills over 100 pages and reports that:

*Richard E. Nelson Chair in Local Government Law, University of Florida Levin College of Law. The author would like to thank the organizers of the excellent joint program at the AALS Annual Meeting in January 2011—Patty Salkin and Wilson Freyermuth. This essay is a modified version of my presentation during that program. Paul D’Alessandro provided exemplary legal research, and Mary Jane Angelo, the esteemed colleague who occupies the office next to mine, allowed me to pester her with questions and provided insightful answers.

1. U.S. GREEN BUILDING COUNCIL, <http://www.usgbc.org> (last visited Sept. 28, 2011).

2. *Public Policies Adopting or Referencing LEED*, U.S. GREEN BUILDING COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852> (last visited Sept. 28, 2011).

Various LEED initiatives including legislation, executive orders, resolutions, ordinances, policies, and incentives are found in 45 states, including 442 localities (384 cities/towns and 58 counties), 35 state governments (including the Commonwealth of Puerto Rico), 14 federal agencies or departments, and numerous public school jurisdictions and institutions of higher education across the United States.³

The focus of this essay is a growing practice to which we can attach the label “Green Zoning”—the incorporation of LEED and competing privately generated standards into local government law, as part of the existing zoning or land use ordinance, or as a free-standing green building ordinance.

Because local governments have developed a great variety of programs designed to encourage or require green building methods, it would take several pages to catalogue the various iterations on the Green Zoning theme. For purposes of this essay, it is helpful to keep in mind a couple of examples, both of which require compliance with LEED standards. The first comes from Article 22.000, “Sustainable Design and Development,” an amendment to the City of Cambridge zoning ordinance that the city council of that Massachusetts city adopted on August 2, 2010.⁴ Key language from the new law, which requires compliance with LEED standards regardless of location within the city, reads as follows:

22.20 GREEN BUILDING REQUIREMENTS. . .

22.22 Applicability. Any new construction, or any substantial rehabilitation of an existing building for an existing or new use, that totals 25,000 square feet of Gross Floor Area or more and that (1) requires the issuance of a special permit under any provision of this Zoning Ordinance (including but not limited to special permits required in Article 13.000—Planned Unit Development Districts, Section 19.20—Project Review Special Permit, and Section 5.28.2—Conversion of Non-Residential Structures to Residential Use) or (2) is subject to the provisions of Section 19.50—Building and Site Plan Requirements, shall be subject to the requirements of this Section 22.20.

22.23 Requirement. LEED, when used in this Section 22.20, refers to the Leadership in Energy and Environmental Design Green Building Rating System as developed and revised from time to time by the United States Green Building Council (USGBC).

1. *For construction of at least 25,000 square feet of gross floor area but less than 50,000 square feet.*

Such projects shall be required to meet the requirements of the most current applicable LEED building rating system at the level ‘Certified’ or better.

2. *For construction of 50,000 square feet or more of gross floor area.*

3. *LEED Public Policies*, U.S. GREEN BUILDING COUNCIL (Sept. 24, 2010), <https://www.usgbc.org/ShowFile.aspx?DocumentID=7922>.

4. *Index to the On-Line Zoning Ordinance and Associated Maps*, DEP’T OF CAMBRIDGE COMMUNITY DEV., <http://www2.cambridgema.gov/cdd/cp/zng/zord/index.html#view> (last visited Sept. 28, 2011).

Such projects, shall be required to meet the requirements of the most current applicable LEED building rating system at the level ‘Silver’ or better. There shall be a period of twelve months from the time of adoption of a new version of LEED, during which projects shall have the option to file under either the old or newly-adopted version. . . .⁵

The second example can be found in Zoning Code for the Town of Normal, Illinois, which requires LEED certification only within a targeted area—the central business district:

SEC. 15.17-14—ENVIRONMENTALLY SENSITIVE DESIGN. The Town mandates that all new construction with more than 7,500 square feet at the ground level in the B-2 [Central Business] District at least achieve enough LEED points to attain LEED “Certified” status. This requirement does not apply to stand-alone parking decks nor to portions of a building that are a parking deck. As used herein, LEED means the most current version of the Leadership in Energy and Environmental Design rating systems published by the United States Green Building Council. A copy of the most current versions of such publication shall be kept on file in the Office of the Town Clerk. (Amended 5/18/09 by Ord. No. 5258).⁶

In these and other ways, communities throughout the nation are seeking to incorporate LEED and similar standards into official local law.⁷

The new and widespread recognition that buildings are major contributors to our global warming woes is a very positive development. Nevertheless, I am afraid that turning industry-generated standards into local law is problematic at best and illegal at worst. If this means that I am the pooper (or killjoy) at the green building party, so be it. Even if, as clever lawyers, we can provide airtight defenses for local government officials who choose to “outsource” their land use lawmaking in this fashion, there is an important lesson to be learned from this ongoing experiment about the importance of adhering to the spirit of the law.

After reviewing some of the pertinent literature on this topic, this essay will highlight and provide illustrations of six problems with Green Zoning practices:

1. *The Delegation Problem*—Can and should local laws be based on a moving target (standards set by private parties that continue to change and evolve)?
2. *The Compatibility Problem*—Are some green building standards inconsistent with good planning practices?

5. CAMBRIDGE, MASS., ZONING ORDINANCE § 22.000 (2011), available at http://www2.cambridgema.gov/cdd/cp/zng/zord/zo_article22_1341.pdf.

6. NORMAL ILL., CODE § 15.17-14 (1969), available at <http://www.normal.org/code/Chp15/Chp15.17.pdf#15.17-14>.

7. For a list of additional city ordinances, see *Public Policies Adopting or Referencing LEED*, U.S. GREEN BUILDING COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852> (last visited Sept. 28, 2011).

3. *The Expertise Problem*—Are already overburdened local officials up to the task of incorporating, administering, and overseeing Green Zoning?
4. *The Eco-Political Problem*—How or should local officials factor in the battles waged over green building standards?
5. *The Laboratory Problem*—Are variations from locality to locality a good idea, or do state standards make more sense in this area?
6. *The Philosophical Problem*—What role should builders, architects, and industry experts play in shaping zoning and planning ordinances?

This essay is in no way intended to serve as an exhaustive exploration of the topic. Instead, it is hoped that, by identifying and seriously considering some of the challenges faced by local governments that hope to jump on the ever-more-crowded green building bandwagon, we can begin a healthy debate about the best ways to accomplish the laudable goal of reducing many of the negative environmental externalities of new and renovated structures.

II. Some Helpful Research Leads (on LEEDs)

Thanks to a solid (though certainly not exhaustive) set of published works on the legal aspects of green buildings, there is no need here to reinvent the wheel by explaining the history behind, development of, and operation of LEED and other certification systems. The author has provided his own introduction as a free-standing chapter in *Powell on Real Property*, which discusses state mandates for public buildings, state and local tax and regulatory incentives for green building practices, and local zoning and land use provisions, all of which incorporate LEED and comparable standards.⁸

Similarly, the American Bar Association Section of State and Local Government, which sponsors this journal, has published *From Sprawl to Sustainability*,⁹ a volume that includes an informative introduction to green building rating standards and complementary government pro-

8. *Green Buildings*, in POWELL ON REAL PROPERTY ch. 78B (Michael Allan Wolf ed., 2011).

9. ROBERT H. FREILICH, ROBERT J. SITKOWSKI & SETH D. MENNILLO, FROM SPRAWL TO SUSTAINABILITY: SMART GROWTH, NEW URBANISM, GREEN DEVELOPMENT, AND RENEWABLE ENERGY (2d ed. 2010) (containing most pertinent information in chapter 7, *Sustainability: Green Development and Renewable Energy*); see also Robert H. Freilich & Neil M. Popwitz, *The Umbrella of Sustainability: Smart Growth, New Urbanism, Renewable Energy and Green Development in 21st Century*, 42 URB. LAW. 1 (2010).

grams. On the growing use of density bonuses and streamlined permitting for green construction, Robert Freilich and his co-authors astutely note:

The importance of local green building incentives should not be underestimated. Since developers and investors are driven primarily by financial returns on investment, they tend to be wary of the perceived upfront cost premiums associated with green building. . . . Density bonuses allow developers to increase the size of their projects and sell or lease additional space without purchasing additional land. Priority and single step entitlement processing can significantly shorten the predevelopment phase of a project, allowing the developer to maximize the project's return on investment over a shorter period and thus earn a higher return on their capital. Government incentives translate directly into higher profits and upfront cost saving, and will undoubtedly spur investors and developers to engage in additional green development.¹⁰

With due respect to these distinguished authors, given the nation's significant oversupply of commercial and residential stock,¹¹ until existing buildings are utilized and those under construction are either completed or razed, environmentally and socioeconomically sound public policy would caution against incentivizing new construction. But this is just one reason why we need to be cautious about proceeding too swiftly down the Green Zoning path.

The subtitle of *The Law of Green Buildings* accurately conveys the breadth of this highly topical and valuable collection compiled and edited by J. Cullen Howe and Michael B. Gerrard: "*Regulatory and Legal Issues in Design, Construction, Operations, and Financing*."¹² In their chapter reviewing "State and Local Green Building Laws and Initiatives," Stephen Del Percio and Preston D. Koerner identify two areas of concern.¹³ First, the authors explain that, "[w]hile state and local legislation premised on USGBC's LEED system has been enacted with dizzying furor, some commentators have questioned the logic of legislating a third-party rating system which has yet to offer unequivocal proof that

10. FREILICH, *supra* note 9, at 202.

11. See, e.g., George Ratiu, *Economic Activity Accelerates in Fourth Quarter 2010*, COM. REAL ESTATE OUTLOOK (Nat'l Ass'n of Realtors), Feb. 2011, at 4, available at <http://www.realtor.org/wps/wcm/connect/6b01a80045faef3c8fa3bfce195c5fb4/CREO+2011+February.pdf?MOD=AJPERES&CACHEID=6b01a80045faef3c8fa3bfce195c5fb4> (reporting the following vacancy rates for the fourth quarter of 2010: office 16.4%, industrial 14.3%, retail 13%, and multi-family 6%).

12. THE LAW OF GREEN BUILDINGS: REGULATORY AND LEGAL ISSUES IN DESIGN, CONSTRUCTION, OPERATIONS, AND FINANCING (J. Cullen Howe & Michael B. Gerrard eds., 2010) [hereinafter LAW OF GREEN BUILDINGS].

13. Stephen Del Percio & Preston D. Koerner, *State and Local Green Building Laws and Initiatives*, in LAW OF GREEN BUILDINGS, *supra* note 12.

it creates higher-performing buildings.”¹⁴ Del Percio and Koerner cite the strong criticisms found in a report issued by the National Institute of Building Sciences (NIBS) in 2009:

The report represented the effort of a group of architects, contractors, and building operators who spent one year reviewing various rating systems, including LEED. With respect to data on which policy decisions are being made, the report concluded that “[t]here is [*sic*] very limited data that correlates verifiable improvements in building performance with building rating/certification system requirements. Many people view the few data sets that do exist as controversial in terms of methodologies and conclusions drawn from them.” Consequently, the report stated that “[t]here are growing concerns that the implied guarantee of building energy performance emanating from building rating/certification/labeling systems may confuse or mislead policy makers and the public.”¹⁵

More significantly for purposes of this essay, the NIBS reported: “There is significant discomfort in the building community about building rating/certification systems, intended for voluntary use, being adopted for unintended, mandatory uses, such as building codes, building standards or similar regulatory requirements.”¹⁶ Even if we characterize the report’s conclusions regarding building performance as exaggerated, it is undeniable that LEED and other green building standards were not *designed* to be used for land use planning purposes or to have the force of law.

Del Percio and Koerner also spend a few pages highlighting constitutional and statutory problems with “incorporat[ing] third-party green building rating systems, including LEED, into legislation.”¹⁷ They note the potential for legal challenges to Green Zoning based on improper delegation of legislative power to private parties, the vagueness of key legislative terms, the unavailability of state immunity from federal anti-trust laws, and the reality of one successful preemption lawsuit.¹⁸ The first challenge is potentially the most serious. “[T]he non-delegation doctrine,” the authors explain,

14. *Id.* at 86.

15. *Id.* at 87 (footnotes omitted) (quoting NAT’L INST. OF BUILDING SCI., REPORT ON BUILDING RATING AND CERTIFICATION IN THE U.S. BUILDING COMMUNITY 3, 5 (2009) [hereinafter NIBS REPORT]).

16. NIBS REPORT, *supra* note 15, at 4.

17. Del Percio & Koerner, *supra* note 13, at 87-92.

18. See *id.* at 89-90 (discussing Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 2008 U.S. Dist. LEXIS 106706 (D.N.M. Oct. 3, 2008) (granting a preliminary injunction that prevented the city from enforcing Volumes I and II of the city’s Energy Conservation Code and its High Performance Building Ordinance, both of which required either LEED certification or a performance-based option for compliance, because of preemption issues posed by the federal Energy Policy and Conservation Act)).

prohibits a government from delegating legislative functions to non-legislative branch entities, including private, third-party organizations. By essentially handing supervision of a local green building code over to USGBC or another third-party organization that is responsible for conferring formal certification, the local government has transferred compliance with that code to a third party entity.¹⁹

The potential hazards of Green Zoning are explored in great detail by Professor Sarah Schindler in a 2010 article published in the *Florida Law Review* that should be the starting point for lawyers, judges, and law students interested in an informative and provocative overview of the topic.²⁰ Professor Schindler is certainly aware of the negative environmental effects caused by the construction and use of buildings:

Construction and demolition waste make up approximately one-third of all landfilled materials. Stormwater runoff from roofs containing asbestos degrades local stream and river quality, as does erosion and sediment from building construction practices. Buildings and infrastructure contain up to 90% of all materials that have ever been extracted from the environment, and in the United States, buildings consume nearly 40% of all primary energy. On an even broader scale, building construction activities and the energy used to operate those buildings contribute more than any other source to man-made carbon dioxide production, and thus to climate change.²¹

While she concedes that “the encouragement of green buildings at the local level is certainly a step in the right direction toward lessening the negative environmental impacts of buildings,” she also expresses strong concern about “ordinances that force private developers to comply with uniform standards developed by a private building-industry organization.”²²

Instead of such Green Zoning practices, which lead to the false belief that a city “has sufficiently addressed its environmental concerns,” she proposes an alternative path:

If cities are going to create a green building regime based on requirements, rather than incentives, they should promulgate those requirements locally, taking into account specific local building-related and environmental concerns. Moreover, the development should take place under the auspices of public governmental bodies, not private, industry-based organizations. Using these methods will result in a green building requirements regime that ensures stronger protection against climate change and local environmental harms, as well as a transparent and democratic governmental process resistant to industry capture.²³

It remains to be seen whether local politicians—those who are sincerely concerned about the need to confront the challenges of climate change

19. *Id.* at 88 (footnote omitted).

20. Sarah B. Schindler, *Following Industry's LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285 (2010).

21. *Id.* at 288 (footnotes omitted).

22. *Id.* at 290.

23. *Id.* at 293.

and energy independence, and their “greenwashing”²⁴ colleagues who see Green Zoning as an effective way to make environmentally minded voters think they are governing responsibly—will have what it takes in terms of energy, enthusiasm, and a political capital reserve to realize Professor Schindler’s visions.

Another practical problem with incorporating LEED and competing standards into municipal land use law is that these voluntary, industry-generated standards are, to use Professor Schindler’s words, “for the most part easy to meet, but not strict enough to solve any real environmental problems.”²⁵ Professor Schindler is also troubled with the fact that industry standards are not developed through the local, democratic process employed in traditional lawmaking.²⁶ While it is easy to overstate the importance local residents play in making state and local law, it is undeniable that our legal system mandates that they be provided the *opportunity* to voice their concerns in public hearings and using the ballot to reward or punish officials for their acts and omissions. The USGBC does not (and should not) provide the same kind of public access in its private standard-setting.

Finally, Professor Schindler exposes what is most likely the Achilles heel of Green Zoning—the practice of including in municipal (or state) law a standard that is likely to be modified by its nonpublic creator:

The USGBC’s LEED standards are not static. Green building technology, as with all construction and architectural technology, is constantly evolving. As new methods of recycling, materials reuse, and energy conservation are developed, the design of green buildings will also change. In recognition of this, the USGBC did not create LEED to be a static system. LEED for New Construction began with Version 1.0, moved through Versions 2.0, 2.1, and 2.2, and now the next version of LEED, 3.0, is online. While the USGBC’s recognition of emerging technologies is important, many cities that have adopted LEED into their Codes have overlooked, or not yet addressed, this point.²⁷

Is the relevant standard the one in place when the local ordinance was enacted, when the owner seeks development permission, or at some other time? Is it practical, useful, or even legal to force compliance with a shifting standard? In their haste to make (or appear to make) their zoning and land use laws sustainable, local officials are engaging in

24. See, e.g., David Hoch & Robert Franz, *Eco-Porn versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441, 441 (1994) (“Greenwash, or eco-pornography, is the advertising of a product as ‘environmentally friendly’ when some aspect of the product (or its distribution) has, in fact, deleterious effects on the environment.”).

25. Schindler, *supra* note 20, at 329.

26. See *id.* at 335-36, 339-40.

27. *Id.* at 344 (footnote omitted).

practices that should cause us to question the very legitimacy of Green Zoning.

Thanks to the legal literature on green building, we have been duly warned about the practical and legal hazards of incorporating industry standards into local law. It is time to consider this party pooper's six-pack of special problems.

III. *The Delegation Problem—Can and should local laws be based on a moving target (standards set by private parties that continue to change and evolve)?*

It is not unusual—or even inadvisable—for municipal lawmakers, when drafting zoning and planning law, to rely on the work product of their counterparts in other localities or on uniform code language. Wheel reinvention is universally condemned as a waste of time, and for good reason. Local officials can learn from the experiences of their counterparts, and state officials and academics often play an important part in circulating best practices and code language to municipalities that have neither the time nor the legal budget to start at square one.

It is one thing for one local legislature to “borrow” a legal definition of a “green roof” from another,²⁸ and then subject the proposed language to the normal procedures for making new law—public hearings, multiple readings, debates, and votes. It is quite another for that same city commission or village counsel to outsource its lawmaking to the very industry group that is regulated by that law. The incorporation of LEED and other green building standards raises not only the usual concerns associated with industry “capture,”²⁹ but also, in those localities that require compliance with the “current version” of LEED or other standards, the particularly troublesome possibility that the substance of this privately generated law might change without official legislative action—not even a pro forma vote. Stated otherwise, the legal problem of improper delegation is exacerbated by enforcing a new standard that was not even in existence at the time the ordinance went into effect against an unwilling owner or developer that has access to a skilled member of the bar.³⁰

28. See, e.g., LYNNWOOD, WASH., MUN. CODE § 21.60.100 (“‘Green roof’ means a roof designed with principles of environmental sustainability, involving the use of vegetation and storm water collection and cleaning. It may or may not be accessible.”). The identical language can be found in § 18.29.040 of the Auburn [Washington] City Code.

29. See, e.g., Schindler, *supra* note 20, at 328-33.

30. See *id.* at 344-47 and nn.268, 272-73 & 273 (citing delegation cases).

At this point, it is helpful to consider how green building standards are developed. The USGBC, for example, has explained:

The LEED rating systems are developed through an open, consensus-based process led by LEED committees, diverse groups of volunteers representing a cross-section of *the building and construction industry*. Key elements of the process include a balanced and transparent committee structure, technical advisory groups that ensure scientific consistency and rigor, opportunities for stakeholder comment and review, member ballot of new rating systems, and fair and open appeals.³¹

LEED 2009 for New Construction and Major Renovations Rating System (LEED 2009 NC), which was approved in November, 2008, followed the LEED Pilot Project Program (1998), and LEED Versions 2.0 (2000), 2.1 (2002), and 2.2 (2005).³² At the time this essay was written, USGBC was in the process of developing a new rating system projected for completion in November, 2012.³³ In communities such as Cambridge, Massachusetts, the changes occasioned by new versions of LEED would go into legal effect without any official action by the local government.³⁴

It would be disingenuous (and inaccurate) for me to assert that including LEED standards in a local code is *indubitably* or even *very likely* a violation of the principle that local governments cannot delegate their legislative responsibilities to private entities.³⁵ Local (and state) governments appear to stand on firmer ground when the standard generated by the outside entity is fixed at a certain point in time and not subject to change.³⁶

Though the non-delegation is not as thoroughly discredited on the state and local level as it has long been in the federal arena,³⁷ one would

31. *What LEED Is*, U.S. GREEN BUILDING COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1988> (last visited Sept. 28, 2011) (emphasis added).

32. U.S. GREEN BUILDING COUNCIL, *LEED 2009 FOR NEW CONSTRUCTION AND MAJOR RENOVATIONS RATING SYSTEM* (updated Nov. 2011), *available at* <http://www.usgbc.org/ShowFile.aspx?DocumentID=8868> [hereinafter LEED 2009 NC].

33. *LEED Rating System Development*, U.S. GREEN BUILDING COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2360> (last visited Sept. 28, 2011).

34. See *supra* note 5 and accompanying text.

35. As one recent study explained, "While generally adoption of promulgations of private entities is found to be unconstitutional, in other cases it is not." F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201, 1259 (2008).

36. See *id.* at 1259 n.233 (citing cases in which state courts have expressed concern over automatic approval of changes in the future).

37. See, e.g., Gary Larson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002). While Professor Lawson notes that "[a]fter 1935, the [U.S. Supreme] Court abandoned any serious nondelegation analysis," he also cleverly observes: "The non-delegation doctrine, however, is the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going." *Id.* at 371, 331. For my own take on the attempted revival of the doctrine to strike down

be hard-pressed to find a recent case that matches, in all of its fundamental aspects, a hypothetical challenge brought by a developer who does not want to comply with a local requirement of compliance with standards developed and amended by the building industry. At best, one can find dictum suggesting the inappropriateness of local lawmakers incorporating privately generated standards that are subject to change.³⁸

The fact that it would be difficult for a disgruntled developer to bring a successful illegal-delegation-based challenge does diminish the importance of the principle undergirding the delegation doctrine—the spirit as opposed to the letter of the law. Because of “the important physical, economic, ecological, psychological and philosophical aspects of land—raw and developed,”³⁹ rules regarding the use of real property that carry the force of law should be made by duly elected public officials in public settings with the opportunity for citizen feedback. When there are serious questions concerning the use of LEED and other standards to achieve the purposes for which they were intended—as industry-generated building *rating* systems—there seems to be little justification for expanding their zone of influence.⁴⁰

IV. *The Compatibility Problem*—Are some green building standards inconsistent with good planning practices?

The disconnect between green building standards and planning and zoning law becomes apparent when surveying some, but certainly not

environmental regulation, see Michael Allan Wolf, *“They Endured”*: Mining the U.S. Supreme Court’s Serviceable Past, in STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 41, 57-63 (Michael Allan Wolf ed., 2005).

38. See, e.g., *N. Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, 1181 n.3 (Ala. 1977) (“Adopting a code written by a private national organization generally does not raise delegation of authority problems as long as the code, organization and edition are clearly specified, and no attempt is made to adopt future amendments.”) (cited by Schindler, *supra* note 20, at 346 n.268).

39. Michael Allan Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355, 1361 (2000).

40. See *supra* notes 16-17 and accompanying text. It should be evident that this is not simply the environmental law equivalent of physicians who engage in off-label use. See, e.g., Richard C. Ausness, *“There’s Danger Here, Cherie!” Liability for the Promotion and Marketing of Drugs and Medical Devices for Off-Label Uses*, 73 BROOK. L. REV. 1253, 1253 (2008) (“Physicians often prescribe prescription drugs and other medications for uses that are not approved by the Food and Drug Administration (‘FDA’), and such ‘off label’ prescription is widely accepted within the medical community as a legitimate form of treatment.”). Unlike the physician who is using a drug that was developed and was approved by government *to be used as a drug*, the local government that incorporates green building standards into law is using a standard that was developed by a private organization *to be used for another purpose*.

all, of the subjects for which points are awarded to builders and renovators. In *LEED 2009 NC*,⁴¹ 2-4 points are available for “Water Use Reduction,” which can be achieved by pursuing the following suggested strategies:

WaterSense-certified fixtures and fixture fittings should be used where available. Use high-efficiency fixtures (e.g., water closets and urinals) and dry fixtures, such as toilets attached to composting systems, to reduce potable water demand. Consider using alternative on-site sources of water (e.g., rainwater, stormwater, and air conditioner condensate) and graywater for nonpotable applications such as custodial uses and toilet and urinal flushing. The quality of any alternative source of water being used must be taken into consideration based on its application or use.⁴²

These strategies advance the same goals of local government programs that provide rebates to homeowners who replace their toilets with new models that feature EPA’s WaterSense label.⁴³

Similarly, local lawmakers and constituents concerned about tobacco smoke in the workplace may be surprised to learn that LEED certification will *require* the implementation of an environmental tobacco smoke (ETS) control strategy.⁴⁴ Applicants for nonresidential projects, for example, are given the option of prohibiting smoking within or near the building or providing “designated smoking rooms designed to contain, capture and remove ETS from the building.”⁴⁵

Some points are awarded for aspects of the project that have little or nothing to do with zoning and planning. Perhaps the most obvious example is the one point available under *LEED 2009 NC* for including a LEED Accredited Professional as “[a]t least 1 principal participant on the project team.”⁴⁶

Sometimes the connection between green building strategies and sound planning decision-making is harder to find. For example, LEED makes two points available for the use of “building materials or products that have been extracted, harvested or recovered, as well as manu-

41. See *LEED 2009 NC*, *supra* note 32, at 1.

42. *Id.* at 26.

43. See, e.g., *WaterSense Toilet Rebate Program*, EVERETT, WASH., USA, <http://www.ci.everett.wa.us/default.aspx?ID=1401> (last visited Oct. 22, 2011); *WaterSense Toilet Rebate Program*, RALEIGH, N.C., USA, <http://www.raleighnc.gov/services/content/PubUtilAdmin/Articles/WaterSenseToiletReplac.html> (last visited Oct. 22, 2011); *WaterSense High Efficiency Toilet Rebate*, JAMES CITY SERVICE AUTHORITY, <http://www.bewatersmart.org/RebatePrograms/WaterSenseHigEfficiencyToilets/Toilets.html> (last visited Oct. 22, 2011). Details on the WaterSense program can be found at *WaterSense: An EPA Partnership Program*, EPA, <http://www.epa.gov/WaterSense/> (last visited Oct. 22, 2011).

44. *LEED 2009 NC*, *supra*, note 32, at 63-65 (IEQ Prerequisite 2: Environmental Tobacco Smoke (ETS) Control).

45. *Id.* at 63.

46. *Id.* at 98 (ID Credit 2: LEED Accredited Professional).

factured, within 500 miles . . . of the project site for a minimum of 10% or 20%, based on cost, of the total materials value.”⁴⁷ While conserving fossil fuels is often a sound idea, do we want to encourage builders to put pressure on local and regional land use authorities to permit gravel pits, quarries, factories, and other manufacturing close by so that it will be easier to earn these precious (if not crucial) points? Do we want the cement truck’s tail(pipe) wagging this sound planning dog?

There are also “hotspots” of incompatibility between historic preservation and green building. For example, reuse of building materials and products can yield valuable points under LEED,⁴⁸ a practice that the National Trust for Historic Preservation endorses very tentatively:

only as a last resort when the continued use or adaptive use of the older or historic building is not possible. We recognize the environmental benefits of reducing impacts to landfills and we support the reuse of older and historic building materials and architectural detail. We also recognize that deconstruction can provide a source of materials for rehabilitating other buildings in a historic neighborhood, and this may serve to help protect community character. At the same time, we believe that deconstruction should only be considered as the last of the following three options:

Option 1: Reuse and Repair the Building in its Existing Location . . .

Option 2: Move the Building to a New Location . . .

Option 3: Deconstruct and Carefully Salvage Materials.⁴⁹

Preservationists have also raised concerns about the compatibility of renewable energy strategies (such as solar panels, wind turbines, geothermal heat pump systems) and window replacement with historic and architectural preservation and the protection of cultural landscapes and architectural resources.⁵⁰

Local government programs designed to foster affordable housing may also face an obstacle in green zoning requirements. Despite studies that seek to establish the cost neutrality or even advantage of green building,⁵¹ potential homebuyers and residential builders have

47. *Id.* at 57.

48. *See, e.g., id.* at 51 (MR Credit 3: Materials Reuse).

49. *Position Statement: Deconstruction*, NAT’L TRUST FOR HISTORIC PRESERVATION, <http://www.preservationnation.org/issues/sustainability/position-statements/position-statement-deconstruction.html> (last visited Oct. 22, 2011).

50. *See, e.g., Sustainability and Historic Federal Buildings*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, May 2, 2011, at 17-19, available at <http://www.achp.gov/docs/SustainabilityAndHP.pdf>.

51. *See, e.g., Fact Sheets: How Much Does Green Building Really Cost?*, NAT. RESOURCES DEF. COUNCIL, <http://www.nrdc.org/buildinggreen/factsheets/cost.asp> (last visited Oct. 22, 2011) (citing DAVIS LANGDON ET AL., *COSTING GREEN: A COMPREHENSIVE COST DATABASE AND BUDGETING METHODOLOGY* (July 2004), available at http://www.usgbc.org/Docs/Resources/Cost_of_Green_Full.pdf);

Green building skeptics sometimes argue that it’s difficult or even impossible to build green without paying a big cost premium. But real-world examples show that you can

expressed concerns that it might be too expensive to build or purchase green homes. A 2010 survey of builders, conducted on behalf of Habitat for Humanity and the Whirlpool Corporation by the NAHB Research Center, found a stark contrast between the perceived costs of *living in* and *building/purchasing* a green home:

87 percent believe green homes are affordable for middle income families to live in, while 30 percent felt green homes were too expensive for the segment to purchase or build. For low-income families, 70 percent of home builders believe green homes are affordable to live in, and nearly 60 percent of builders thought green homes were too expensive for low-income families to purchase or build.⁵²

The USBGC, joined by the Congress for the New Urbanism (“CNU”) and the Natural Resources Defense Council (“NRDC”), demonstrated their awareness of the affordability issue in developing *LEED 2009 for Neighborhood Development*.⁵³ For example, up to seven points are available under NPD (Neighborhood Pattern Design) Credit 4: Mixed-Income in an attempt “[t]o promote socially equitable and engaging communities by enabling residents from a wide range of economic levels, household sizes, and age groups to live in a community.”⁵⁴ One “Affordable Housing” option (1-3 points available) involves “[i]nclud[ing] a proportion of new rental and/or for-sale dwelling units priced for households earning [40 or 20 percent] below the *area median income* (AMI). Rental units must be maintained at affordable levels for a minimum of 15 years.”⁵⁵

Even if LEED’s Neighborhood Development initiative is incorporated into local law at the same pace as building-specific rating systems, builders’ and consumers’ concerns about costs, even unrealistic ones, are problematic, because in this area perception is the reality. In other words, unless state or local governments match green zoning with up-

complete a LEED-certified green building project for an average of 2 percent more in upfront costs, and sometimes even below standard market construction costs. Plus, any extra first costs you pay can be recovered through faster lease-up rates, rental premiums and increased market valuation. And by making experienced green building professionals a part of your team and learning to control costs, you can escape paying any green premium at all as early as your second green building project.

52. *Builders and Consumers Perceive Green Homes as Affordable to Live in But Expensive to Build: New Survey from Whirlpool Corporation and Habitat for Humanity Also Find Consumers Believe Savings May Be Worth the Expense*, WHIRLPOOL CORP., (Nov. 16, 2010), <http://investors.whirlpoolcorp.com/releasedetail.cfm?ReleaseID=533505>.

53. LEED 2009 FOR NEIGHBORHOOD DEVELOPMENT RATING SYSTEM, U.S. GREEN BUILDING COUNCIL ET AL. (updated Nov. 2011), *available at* <http://www.usgbc.org/ShowFile.aspx?DocumentID=9907> [hereinafter LEED ND].

54. *Id.* at 57.

55. *Id.* at 58.

front subsidies (such as tax credits and abatements),⁵⁶ municipalities will have a hard time reaching their affordable housing targets.

The line between private green building standards and public controls is hard to distinguish at times. For example, one point is available for Bicycle Storage and Changing Rooms,⁵⁷ features that today are addressed in zoning ordinances.⁵⁸ Moreover, there are examples of “reverse incorporation,” whereby green building standards encourage the use of certain techniques found in zoning ordinances. For example, *LEED 2009 NC* rewards compliance with the minimum parking capacity requirements found in a local zoning ordinance⁵⁹ and sets the open space benchmark at 25% above the level required by the local zoning ordinance.⁶⁰

Other standards come uncomfortably close to being substitutes for local planning and zoning laws. For example, in *LEED 2009 NC*—which was designed for commercial office buildings but has been used for institutional buildings, hotels, and multi-family residential buildings of at least four stories⁶¹—the Community Connectivity option under SS Credit 2 awards five points for a construction or renovation project that

- Is located on a previously developed site
- Is *within 1/2 mile . . . of a residential area or neighborhood* with an average density of 10 units per acre net
- Is *within 1/2 mile . . . of at least 10 basic services*⁶² [and]
- Has *pedestrian access* between the building and the services.⁶³

Separation of nonresidential and residential uses, like sidewalks and other means of pedestrian access, is normally the bailiwick of public officials responsible for writing and enacting zoning and planning laws.

56. See, e.g., POWELL ON REAL PROPERTY, *supra* note 8, at § 78B.03[1] (discussing several state tax credit programs).

57. See, e.g., LEED 2009 NC, *supra* note 32, at 7 (SS Credit 4.2).

58. See, e.g., PITTSBURGH, PA. ZONING CODE § 914.05, *available at* http://www.city.pittsburgh.pa.us/cp/assets/bicycle/Bicycle_Parking_Ordinance.1.pdf; SACRAMENTO CNTY., CAL., ZONING REQUIREMENTS art. 6, *available at* http://www.sacbike.org/sacbiking/parking/county_zoning_bike_parking.shtml.

59. See LEED 2009 NC, *supra* note 32, at 10 (SS Credit 4.4: Alternative Transportation—Parking Capacity) (“Size parking capacity to meet but not exceed minimum local zoning requirements.”).

60. See *id.* at 14 (SS Credit 5.2: Site Development—Maximize Open Space, Case 1).

61. *Id.* at xiv.

62. *Id.* at 4. The drafters provided several examples of such “basic services,” including banks, places of worship, convenience groceries, day care centers, cleaners, fire stations, and beauty salons, among many others.

63. *Id.* (emphasis added).

V. *The Expertise Problem*—Are already overburdened local officials up to the task of incorporating, administering, and overseeing Green Zoning?

The use of energy saving strategies and devices is not the only feature that makes a building green. In *LEED 2009 NC*, for example, in addition to Energy and Atmosphere, the other areas in which points can be earned are Sustainable Sites (SS), Water Efficiency (WE), Materials and Resources (MR), Indoor Environmental Quality (IEQ), and Innovation in Design (ID).⁶⁴ Some features of LEED-certified buildings either relate to pre-construction activities (for example, MR Credit 2: Construction Waste Management⁶⁵) or are likely to remain static during the life of the building (SS Credit 2: Development Density and Community Connectivity⁶⁶). In contrast, for many more features there are no guarantees that, in the absence of regular and effective enforcement by local government, the community will continue to receive the benefits attributable to Green Zoning. What assurances do we have, for example, that the current or future owner will not remove a tree canopy (SS Credit 7.1: Heat Island Effect—Nonroof, Option 1⁶⁷); will not replace a vegetated roof (SS Credit 7.2: Heat Island Effect—Roof, Option 2⁶⁸); will maintain automatic devices that reduce the input power of interior lighting (SS Credit 8: Light Pollution Reduction, Option 1 for Interior Lighting⁶⁹); will not replace toilets, faucets, and urinals (WE Prerequisite 1: Water Use Reduction⁷⁰); or will not discontinue the use of potentially harmful adhesives, sealants, paints, coatings, carpets, flooring, and finishes (IEQ Credits 4.1, 4.2, and 4.3: Low-Emitting Materials—Adhesives and Sealants, Low-Emitting Materials—Paints and Coatings, Low-Emitting Materials—Flooring Systems⁷¹)? We could always rely on the good faith of green building owners, but that is not how their non-green counterparts are treated under our traditional zoning and land-use regulatory system.

64. LEED 2009 NC, *supra* note 32, at vi-vii.

65. *Id.* at 54.

66. *Id.* at 4.

67. *Id.* at 17.

68. *Id.* at 20.

69. *Id.* at 21.

70. LEED 2009 NC, *supra* note 32, at 25-26; *see also* Peter A. Nelson, Note, *Measuring from the High Watermark: Defining Baselines for Water Efficiency in Green Buildings*, 11 N.Y.U.J. LEGIS. & PUB. POL'Y 105, 139 n.202 (2008) (noting that “[a] ‘black market’ in old, high-flow toilets (often imported from Canada) has arisen in response because some of the new, low-flow toilets are not sufficiently powerful.”).

71. *Id.* at 78-83.

For decades, property owners have been subject to public sanction for violating the height, area, and use restrictions that we collectively call “Euclidean zoning.”⁷² An owner who desires to add an extra story or an extension to the rear of her house, for example, will be required to secure a variance if the construction plans will take the structure beyond the bounds of the zoning “envelope.” Similarly, if she desires to open a business in her residentially zoned property, she will first have to secure a use variance (if it is legally available) or a rezoning. Zoning code enforcement, enhanced by vigilant (or nosy) neighbors, is a familiar part of local government law. To implement effective regulatory oversight to the green building features noted in the previous paragraph (and to several others not mentioned) would require the expenditure of significant sums for (1) the retraining of current employees (zoning regulators or building inspectors), (2) the hiring of additional employees to inspect buildings at regular intervals, and (3) the processing and resolution of actions brought by those seeking “green variances” or against those who have made unauthorized changes. We should have genuine concerns about county and city governments (which are experiencing budget cuts and personnel layoffs as a result of the severe economic downturn in the wake of the fiscal crisis that began in 2008⁷³) taking on these additional functions.

Moreover, as I have pointed out elsewhere,⁷⁴ local environmental regulation, in which city and county regulators extended their reach beyond their comfort zone of expertise, training, and experience, has resulted in a series of regulatory takings challenges in the United States

72. See, e.g., Michael Allan Wolf, *“Fruits of the Impenetrable Jungle”: Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U.J. URB. & CONTEMP. L. 5, 12 and n.32 (1996).

73. See, e.g., Michael Cooper, *Mayors See No End to Hard Choices for Cities*, N.Y. TIMES, Jan. 21, 2011, at A11 (“Many mayors have already raised taxes, cut services and laid off workers, even police and firefighters.”); Michael A. Fletcher, *Harrisburg, Pa., Other Cities Overwhelmed by Economic Downturn and Debt*, WASH. POST, June 21, 2010, at A01 (“[C]oncerns are deepening that the debt burden is too large for some municipalities to handle, forcing them into draconian service cuts or large tax increases, both of which would be a drag on the sputtering recovery.”).

74. See, e.g., Michael Allan Wolf, *Earning Deference: Reflections on the Merger of Environmental and Land-Use Law*, 20 PACE ENVTL. L. REV. 253 (2002):

[I]t is more important than ever that local government officials—who are often (though, certainly, not always justifiably) viewed as occupying the bottom rungs of the ladder of governmental competence—take special care when operating beyond the scope of their “traditional” regulatory tasks. Local environmental law . . . is perhaps the most important area in which local officials are stretching beyond their conventional roles.

Id. at 253.

Supreme Court,⁷⁵ and in hundreds of state and lower federal court cases. This soft underbelly of local land use regulation has also exposed local governments to countless threats of takings lawsuits that have resulted in concessions to landowners who routinely assert that local environmental controls are oppressive, burdensome, and confiscatory.

With Green Zoning this serious problem of local government overreaching is exacerbated, because it is not even duly elected or appointed public officials who are prescribing or mandating good practices. For example, under *LEED 2009 NC*, one point is available for efforts designed “[t]o conserve existing natural areas and restore damaged areas to provide habitat and promote biodiversity.”⁷⁶ Far be it from me to criticize efforts to save energy and promote biodiversity (let me enter into the record that some of my best friends are endangered species). Nevertheless, do we really want builders and architects—most of whom make their living by paving over or designing structures that will replace the unbuilt environment—determining best natural resources protection practices?

VI. *The Eco-Political Problem*—How or should local officials factor in the battles waged over green building standards?

Before engaging in Green Zoning, local officials and their constituents need to understand that green building standards are neither noncontroversial nor apolitical. Perhaps the best illustration of this point can be found in the heated dispute over which wood products fulfill green goals. Consider the following excerpt from an editorial entitled “End the Battle of FSC vs. SFI Wood in LEED” which appeared in a building industry publication:

Enough already! For the past decade, the USGBC has given the Forest Stewardship Council a monopoly on wood from its forests being used in LEED projects. It’s time for the USGBC to open the door to other wood certification programs.

Consider this: Sixty percent of FSC-certified wood comes from outside the U.S. and Canada. Why does the USGBC encourage the importation of FSC wood from thousands of miles away, when at the same time it offers a credit for using locally produced materials—the so-called “500-mile rule”?

Wouldn’t it be more environmentally beneficial to use locally grown wood, shipped over much shorter distances? Between them, the Sustainable Forestry Initiative (SFI) and the Canadian Standards Association (CSA) have 373 million acres

75. Successful takings challenges against local environmental regulation in the Supreme Court include *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

76. *LEED 2009 NC*, *supra* note 32, at 12.

of certified forests. SFI alone has about 80% of the certified woodlands in North America, while FSC has only 18%. Building Teams in the U.S. and Canada are being forced in many cases to go overseas instead of being able to use certified wood from their own backyards.

Here's another inconsistency: Why doesn't the USGBC require other building products to "prove" their environmental bona fides to the same extent that it does wood products? Why do steel and glass and ceiling tiles and hundreds of other building products get a pass, while wood has to go through 49 mandatory benchmarks to be considered for use under LEED? Are all these products and materials so environmentally pure?⁷⁷

Under LEED 2009 NC, MR (Materials & Resources) Credit 7 (Certified Wood) seeks "[t]o encourage environmentally responsible forest management" by allotting one point for projects that "[u]se a minimum of 50% (based on cost) of wood-based materials and products that are certified in accordance with the Forest Stewardship Council's [FSC's] principles and criteria, for wood building components."⁷⁸ According to the Council's web site, the FSC—"an independent, non-governmental, not-for-profit organization established to promote the responsible management of the world's forests"—was "[e]stablished in 1993 as a response to concerns over global deforestation" and "is a pioneer forum where the global consensus on responsible forest management convenes and through democratic process effects solutions to the pressures facing the world's forests and forest-dependent communities."⁷⁹

Green Globes, the competing green building rating system developed in Canada and operated in the United States under the auspices of the Green Building Initiative (GBI),⁸⁰ takes a broader view and "does not discriminate between preferred wood product rating systems; rather, it awards credits for wood products that are certified by FSC, SFI [Sustainable Forestry Initiative], or the Canadian Standards Association ('CSA')."⁸¹ Some environmentalists have criticized this broader approach, expressing concerns about the legitimacy of "SFI standards [that] were developed by the American Forest and Paper Association,

77. Robert Cassidy, *End the Battle of FSC vs. SFI Wood in LEED*, BLDG. DESIGN & CONSTR., March 1, 2010, at 9. On the question of whether LEED is actually engaging in monopolistic behavior, see Stephen Del Percio, *Revisiting Allied Tube and Noerr: The Antitrust Implications of Green Building Legislation and Case Law Considerations for Policymakers*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 239 (2009).

78. LEED 2009 NC, *supra* note 32, at 60.

79. *About FSC*, FOREST STEWARDSHIP COUNCIL, <http://www.fsc.org/about-fsc.html> (last visited Oct. 22, 2011).

80. *See What is Green Globes?* GREEN GLOBES, <http://www.greenglobes.com/about.asp> (last visited Oct. 22, 2011); *Green Globes*, GREEN BLDG. INITIATIVE, <http://www.thegbi.org/green-globes/> (last visited Oct. 22, 2011).

81. Del Percio, *supra* note 77, at 241.

which was made up of 200 of the largest companies in the forestry industry.”⁸²

The fight over forestry certification has been carried to state legislative chambers as well, resulting in statutes that modify the LEED standards to include FSC as a choice, not a requirement. For example, one of several “supplemental provisions specific to state building projects” that Arkansas lawmakers have authorized specifies that:

Under LEED MR Credit 7 . . . Certification programs include, but are not limited to, the Forest Stewardship Council, the Sustainable Forestry Initiative, the American Tree Farm System, the Canadian Standards Association, the Organic Trade Association, and the Association for Bamboo in Construction.⁸³

Maryland lawmakers have similarly reached beyond the FSC standards in determining eligibility for that state’s green building property tax credit.⁸⁴ As one commentator has noted:

The battle over which types of wood products qualify for certain credits under LEED is taking place in the shadows, but at stake is a significant piece of market share for North America’s billion dollar timber industry. This battle is becoming more acute as an increasing number of state and local governments choose to exclusively adopt the LEED rating system into legislation and effectively exclude non-FSC-certified wood products from the marketplace.⁸⁵

It should now be evident that incorporating green building standards into local law is not necessarily the simple task of merging objective, apolitical, and uncontroversial environmental standards into existing codes.

VII. *The Laboratory Problem*—Are variations from locality to locality a good idea, or do state standards make more sense in this area?

At this point, states are not yet requiring their political subdivisions to include in their zoning or planning codes a mandate that private builders and developers use LEED or competing standards. As noted previously, in the absence of such a state requirement, a growing number of cities, towns, and counties throughout the nation have embarked on their own

82. Schindler, *supra* note 20, at 330 n.207.

83. ARK. CODE ANN. § 22-3-1804(b)(1) (2011).

84. See MD. CODE ANN. TAX-PROP. § 9-242(a)(1)-(2) (2011) (providing that for purposes of determining tax credit for “high performance buildings,” “under LEED Credit MR7 or a similar criterion in a comparable rating system, credit may be awarded for the use of wood-based materials derived from all credible sources, including the Sustainable Forestry Initiative Program, the Canadian Standards Association, the American Tree Farm System, and other credible certified sources programs.”).

85. Del Percio, *supra* note 77, at 242.

Green Zoning experiments.⁸⁶ Given the serious (and perhaps soon to be dire) state of local government finance, there is little likelihood that a significant number of cities will set aside funds for the development of jurisdiction-specific green building standards that match local needs and aspirations. The challenge then becomes identifying the next-best approach. It would appear that, short of doing nothing, there are three basic options: (1) mimicking the practice of incorporating LEED (or competing standards) as is or with minor tampering,⁸⁷ (2) relying on a body of independent experts to develop a model or uniform approach, or (3) including energy conservation and environmental protection features into state building codes.

It is my hope that by now the reader has been convinced that there are serious problems with the first option. In an effort to “offer a framework that can enable local governments to implement and enforce the effective and efficient use of renewable energy resources,” Columbia School’s Center for Climate Change Law (CCCL) has drafted three model ordinances—the Model Municipal Wind Siting Ordinance, the Model Small-Scale Solar Siting Ordinance, and the Model Municipal Green Building Ordinance (MMGBO).⁸⁸ All three model ordinances include language from existing ordinances within and outside the state of New York, but the MMGBO is the only one of the three that takes the incorporation shortcut. The drafters of the MMGBO—though mindful of important legal issues such as improper delegation, antitrust, and preemption⁸⁹—unfortunately opted to recommend the incorporation of

86. See *supra* note 2 and accompanying text.

87. For an example of a zoning ordinance that complements LEED standards with a local add-on, see BOSTON, MASS., ZONING CODE, art 37, available at <http://www.bostonredevelopmentauthority.org/pdf/zoningcode/article37.pdf>. Appendix A makes up to four points available as Boston Green Building Credits, available in the following categories: Modern Grid, Historic Preservation, Groundwater Recharge, and Modern Mobility.

88. Ctr. For Climate Change Law, *Model Ordinances*, COLUM. L. SCH., <http://www.law.columbia.edu/centers/climatechange/resources/municipal> (last visited Sept. 28, 2011).

89. JASON JAMES, CTR. FOR CLIMATE CHANGE LAW, *LEGAL ANALYSIS OF MODEL MUNICIPAL GREEN BUILDING ORDINANCE* (last updated Oct. 25, 2010), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=541484. See, e.g., *id.* at 3 (emphasis added):

[T]he model ordinance does not delegate municipal power to third parties. The municipality adopts certain standards that have been formulated by USGBC, EPA, and DOE, but does not give these or other third parties the power to change those standards. *Instead, an affirmative act of the municipality is required to adopt any revisions to the LEED standards.* Technical qualifications are set forth for persons to perform certain functions. Even if these provisions were somehow deemed to be delegation, such delegation is appropriately circumscribed by the model ordinance’s exemptions, waivers, and appeal procedures.

third-party, private standards into local law, as evidenced by the following key provisions:

4. Green Building Rating Systems

A. The [city/town/village] hereby adopts the USGBC's LEED for New Construction (LEEDNC) Rating System, Version 3.0. The [city/town/village] also adopts the USGBC's LEED for Schools Rating System, Version 3.0. The [city/town/village] also adopts the EPA Energy Star Rating System in effect on the date of adoption of this article. [The city/town/village] also adopts the USGBC's LEED for Existing Buildings: Operations and Maintenance (LEED EB:OM) Rating System, Version 3.0.] The [municipal clerk] shall maintain copies of the current green building standards in effect under this article and any additional documents necessary for applicants to comply with the standards of this article. . . .

5. Standards for compliance

A. All new construction of and major renovations to covered buildings must comply with the following standards:

1. All municipal buildings greater than 5,000 square feet of conditioned space must be LEED Silver certifiable.
2. All commercial and high rise multi-family residential buildings greater than 5,000 square feet of conditioned space must be LEED Silver certifiable.⁹⁰

While the CCCL is to be commended for taking on the task of helping local government's "green" their laws, in this instance the widespread adoption of its MMGBO would make a tenuous situation worse.

The second option—a model ordinance—has a rich history in American zoning and planning lore. In fact, the Standard State Zoning Enabling Act, produced in the 1920s by the Advisory Committee on Building Codes and Zoning as part of an effort by the U.S. Department of Commerce to stimulate home construction, formed the foundation for much of American zoning, and its influence can be found even in current laws.⁹¹ More recently, the American Planning Association has packaged a set of environmentally sensitive model statutes along with other helpful materials in its *Growing Smart Legislative Guidebook*, an ambitious effort that "was intended to provide a modern update of the Standard Act. . . ."⁹² A model Green Zoning ordinance drafted by

90. CTR. FOR CLIMATE CHANGE LAW, MODEL MUNICIPAL GREEN BUILDING ORDINANCE 5-6 (last updated Oct. 6, 2010), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=55679 [hereinafter CCCL MMGBO].

91. See Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, LAND USE L. & ZONING DIG., Feb. 1996, at 3.

92. Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POL'Y 157, 165 (2009). The authors explain:

Recognizing that "the planning approaches of the 1920s are incapable of meeting the challenges of the twenty-first century[,] the American Planning Association decided

experts drawn from such fields as energy conservation, environmental design, construction, landscaping, law, real estate, and local government would have several advantages over the wholesale incorporation featured in most extant versions. These drafters could pick and choose the features of various green building standards that have proven to be most effective in yielding energy savings and environmental protection and most consistent with good planning practices and with the structure and content of existing local zoning and planning laws, while avoiding the political disputes and the point-hunting strategies that LEED and other systems produce. Because it is unlikely that local governments will have the ability (or desire) to direct significant additional resources to enforcing Green Zoning provisions once construction has been completed, drafters of the model ordinance should think carefully about requiring interior and exterior building features that could easily be modified or eliminated once initial government approval has been secured. The work product of this diverse group of experts would comprise a set of provisions that could either be included within relevant sections of existing zoning ordinances (for example, green building requirements most suitable for commercial structures could be included in those sections of the zoning ordinance describing the use, area, height, and other restrictions imposed in commercial zones) or used to supplement the existing ordinance as a form of overlay zoning.⁹³

to develop a new set of model guidelines. The product culminated in the *Growing Smart Legislative Guidebook*, which contains model planning statutes and commentary to help explain their purposes and applications.

Id. at 165 n. 30 (quoting AM. PLANNING ASS'N, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE XXIX* (2002)).

93. See, e.g., John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 391 (2002):

Overlay zoning is a flexible zoning technique that allows a municipality to limit development in certain environmentally sensitive areas. An overlay zone is a mapped overlay district superimposed on one or more established zoning districts. Environmental overlay district boundaries may be drawn to follow the boundaries of a natural resource, such as a watershed or floodplain. An overlay zone supplements the underlying zoning standards with additional requirements that can be designed to protect the natural features in an important environmental area. A parcel within the overlay zone is regulated simultaneously by two sets of zoning regulations: the underlying zoning district provisions and the overlay zoning requirements. A unique natural or aesthetic resource area, such as a pine barren, wetland resource area, watershed, or tidal basin, can be identified and protected in this way.

Id. (citation omitted).

The third option would eschew tampering with local zoning and planning laws, turning instead to state building codes. California is the first state to take this ambitious, and I would say logical, step, by adopting the California Green Building Standards Code.⁹⁴ There is precedent for making distinctions between zoning ordinances and building codes. In 1995, the United States Supreme Court decided in *City of Edmonds v. Oxford House, Inc.*⁹⁵ that a local zoning provision defining a family unit was not exempt from the Fair Housing Act's (FHA's) prohibition against certain forms of discrimination.⁹⁶ In her opinion for the majority, Justice Ruth Bader Ginsburg included an instructive discussion of what she termed the "evident distinction between municipal land-use restrictions and occupancy restrictions."⁹⁷ On the one hand, "[l]and-use restrictions designate 'districts in which only compatible uses are allowed and incompatible uses are excluded'" and "typically categorize uses as single-family residential, multiple-family residential, commercial, or industrial."⁹⁸ On the other hand, the "[m]aximum occupancy restrictions" that are typically found in building codes, which "cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms[.]" further the purpose of "protect[ing] health and safety by preventing dwelling overcrowding."⁹⁹

A similar distinction would be appropriate in the green building area. States concerned about the impact of buildings on climate change and other environmental harms should seriously consider following California's lead. Del Percio and Koerner explain,

The California Green Building Code seeks to reduce energy use by 15 percent above current [state regulatory] requirements, reduce water use by 20 percent, reduce water use for landscaping by 50 percent, and recycle or salvage for reuse a minimum of 50 percent of non-hazardous construction and demolition debris. The code *does not support or adopt any existing green building certification*, although Energy Star equipment is required where applicable, and *certain LEED prerequisites and requirements appear in the Code without specifically mentioning LEED.*¹⁰⁰

94. CAL. CODE REGS. tit. 24., pt. 11 (2010), available at http://www.documents.dgs.ca.gov/bsc/CALGreen/2010_CA_Green_Bldg.pdf. The Code was produced by the California Building Standards Commission.

95. 514 U.S. 725 (1995).

96. See Fair Housing Act, 42 U.S.C. § 3607(b)(1) (2011).

97. *Edmonds*, 514 U.S. at 732.

98. *Id.* (quoting DANIEL R. MANDELKER, LAND USE LAW § 4.16, at 113-14 (3d ed. 1993)).

99. *Id.* at 733.

100. Del Percio & Koerner, *supra* note 13, at 72 (emphasis added) (footnotes omitted).

While local governments are to be commended for attempting to do their part to face serious challenges such as climate change, in the long run it may well make more sense politically, practically, and legally, for proponents of green building practices to direct their energy, expertise, and lobbying efforts toward the goal of “greening” statewide building regulations.

VIII. *The Philosophical Problem*—What role should builders, architects, and industry experts play in shaping zoning and planning ordinances?

In some ways, Green Zoning is just the latest step in the evolution of American zoning. From its humble though significant origins in the 1920s as a method for controlling height, area, and use,¹⁰¹ zoning ordinances in the twenty-first century often feature such post-Euclidean features such as development agreements, transferable development rights, conditional zoning, incentive zoning, performance zoning, mixed-use development, planned-unit development (PUD), and traditional neighborhood development (TND).¹⁰²

Many of these new techniques have been embraced by “smart growth” and “New Urbanist” advocates, one of whose leading lights, the architect Andres Duany, has pointed the finger of blame directly at traditional public controls:

It is legally difficult to build good urban places in the United States. The vast majority of conventional zoning codes prohibit the replication of our best examples of urbanism—places like Nantucket, Williamsburg, or even “Main Street U.S.A.” in Disneyland. This situation has been profoundly damaging. Our current codes are based on a theory of urbanism that is decidedly anti-urban. They separate land uses, decrease densities, and increase the amount of land devoted to car travel, prohibiting the kind of urbanism that typifies our most beloved urban places.¹⁰³

One solution to this problem is the form-based code, a “prescriptive” (as opposed to “prospective”) approach that it is

packed with specific instructions, details, and unique graphics and illustrations, the majority of which are geared toward the design of physical space. This is intended to rectify the problems with current regulations: “[t]he many words in conventional zoning codes are often incomprehensible to all but the legal experts; drawings can com-

101. See generally, MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: Euclid v. Ambler* (2008).

102. See, e.g., CHARLES M. HAAR & MICHAEL ALLAN WOLF, *LAND USE PLANNING AND THE ENVIRONMENT: A CASEBOOK* 223-29 (2010).

103. Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 *FORDHAM URB. L.J.* 1445, 1445 (2002).

municate much more clearly what is permitted under or sought by the code.” . . . The advantage to this approach is that form-based codes are easy to understand and may be easier to use than conventional regulations.¹⁰⁴

Unfortunately, a major defect of this New Urbanist approach, a defect that design codes have in common with Green Zoning, is that they are both examples of private lawmaking by architects and developers. These two groups are not the only shareholders entitled to a voice in the local lawmaking process, and they are not necessarily familiar with the important distinctions between private and public controls.¹⁰⁵

There are and should be concrete differences between a design plan for a development (even a large-scale one) and the requirements and content of a zoning ordinance. Similarly, there are meaningful gaps between LEED and competing standards—which are designed to spur and recognize certain building and design “best practices,” as determined by a self-selected group of building and architecture professionals—and planning and zoning laws (even those with a post-Euclidean provenance). The conceptual, legal, and practical problems attending the most common form of Green Zoning—the incorporation of privately generated standards into public law—manifest the problems encountered when critical distinctions between the public and private realms

104. Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVTL. L. 395, 401-02 (2008) (footnotes omitted) (quoting Victor Dover, *Alternative Methods of Land Development Regulation*, SPIKOWSKI PLANNING ASSOCIATES (Sept. 2, 1996), www.spikowski.com/victor_dover.htm).

105. *See id.*

There is . . . confusion among many practitioners about the term “code” as used by Duany Plater-Zyberk & Company. This confusion stems from what appears to be a fundamental misunderstanding of the distinction between private covenants and public law. Professor Jerold Kayden, in moderating a panel at a recent conference held at the Harvard Design School, attempted to unravel much of this confusion, to no avail. Professor Kayden did, however, set the stage for Mr. Duany to articulate some definitions in his highly advanced model of what he terms “regulatory codes.” These “codes” are, in reality, designed to be private covenants. Mr. Duany took the opportunity to explain his understanding of the difference between a “code” and an “ordinance,” stating that the former implements the master plan and is not binding except by agreement. Ordinances, on the other hand, are codes that have been “subjected to democracy.”

Id. at 400-01 (quoting Robert Sitkowski, Address at the International Municipal Lawyers Association: The New Urbanism for Municipal Lawyers, (Apr. 12, 1999), [available at http://www.imla.org/members/mlpaperindex/papers/s99sitkowski.htm](http://www.imla.org/members/mlpaperindex/papers/s99sitkowski.htm)).

are not respected. Even if legal commentators and judges decide that Green Zoning practices do not violate the *letter* of the law (although they might),¹⁰⁶ the likelihood that they violate the law's *spirit* should give us pause and induce us to seek less problematic and more effective alternatives.

106. Cf. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369-70 (2003):

Despite privatization's political and practical ubiquity, . . . recognition of the extensive intermixing of public and private has failed to permeate thinking about U.S. constitutional law. A foundational premise of our constitutional order is that public and private are distinct spheres, with public agencies and employees being subject to constitutional constraints while private entities and individuals are not.

Id. at 1369-70; see also Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000) ("A careful inquiry into the private role in governance reveals not only its pervasiveness, but also the extent to which it operates symbiotically with public authority."); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 647 (1986) ("[I]f privatization proposals should involve governmental powers, the legal problems become considerably more formidable. The transfer of governmental powers raises the issue of to what extent it is constitutionally permissible to delegate those powers to private actors.").

