

The Shadow Government

With little public oversight, the organization that invented the LEED system is remaking an industry.

by Michael Liu AIA, NCARB



In October 2010, Henry Gifford, perennial scourge of LEED, filed a class-action suit against the US Green Building Council (USGBC) in US District Court, citing a heady mix of allegations including monopolization through fraud, deceptive trade practices, and unjust enrichment. (Gifford also included an allegation of wire fraud for good measure.) A mechanical designer and contractor, he purports that the USGBC's claims of improved energy performance of LEED-certified buildings are unsubstantiated and that the organization has defrauded the public with a system that promotes implementation of expensive green technologies while positioning itself as a lucrative fee-generating monopoly. He has since amended the complaint to one of false advertising and deceptive trade practices, maintaining that he and other professionals implementing alternative sustainable strategies have been harmed.

While *EcoBuilding Today* has tartly observed that Gifford is no Rosa Parks, it was perhaps inevitable that the emergence of the USGBC, a nongovernmental private organization, and its LEED rating system as the dominant arbiter of sustainability would come under challenge. The shrill original allegations aside, at its core, the case raises the question of whether it is appropriate for a private fee-generating nongovernmental organization to assume what amounts to a regulatory role in the building industry.

Certainly examples of government regulators relying on private profit and not-for-profit institutions abound, both in the certification of professionals and in the promulgation of standards. Few would quarrel with the role of organizations such as ASTM International (formerly American Society for Testing and Materials) or American National Standards Institute (ANSI) and the incorporation of their standards in countless governmental regulations. In fact, the National Technology Transfer and Advancement Act of 1996 requires the federal government to use such privately developed "consensus" standards where possible. Other organizations whose varying degrees of self-interest are generally not questioned also come to mind: the National Fire Protection Association is one, Underwriters Laboratories is another. The difference between these institutions and the USGBC is that while government regulators rely on the standards, regulations, and research such organizations produce, the USGBC has become, in effect, a regulator itself.

On a federal level, LEED certification has been adopted as either an outright requirement or a programmatic goal by any number of governmental

agencies including four branches of the armed forces, the General Services Administration, the State Department, and the Department of the Interior. At least nine states require actual certification for public building projects, while another half dozen, including Massachusetts, are presently considering such requirements. Still others do not require certification but promote the use of LEED guidelines or encourage certification by offering tax credits or other incentives. Many municipalities and some county governments also require certification. Countless private institutions, such as the Partners HealthCare system, pursue LEED certification of their building projects as a matter of policy. For projects over a certain size, Boston requires building projects to be LEED "certifiable," which is a significant distinction in that it adopts the standard but not the process.

The issue then is not the LEED rating system, the virtues and shortcomings of which can be separately discussed, but the process of certifying buildings and the creation of a fee-generating bureaucratic structure to do so. Along with this has come the creation of a new class of professional to administer that process and, as of 2008, the creation of the Green Building Certification Institute (GBCI), a separate subsidiary organization to grant, administer, and maintain the accreditation of these new professionals. It is the accreditation of LEED professionals in particular that has evolved into an ever more elaborate administrative process.

Proponents of the building certification process argue that the USGBC's LEED system offers what other programs do not: disinterested third-party verification that buildings live up to points claimed under the rating system. Disinterested in this case means a private non-governmental entity.

Recent embarrassments to the Energy Star program, which was created and is administered jointly by the Environmental Protection Agency and the Department of Energy, argue in favor of such third-party non-governmental verification. The vulnerability of the Energy Star program to fraud was tested by the Government Accountability Office (GAO) last year. The GAO, not usually known for its comic flair, submitted and won Energy Star certification for several bogus products including an "air purifier" constructed of a space heater with fly paper and a feather duster attached.

On the other hand, compliance with the building code is administered and monitored by public servants, relying in part on their oversight and in part on the professionalism of the architects and engineers who must certify the compliance of their designs. To date,

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The issue is the process of certifying buildings and the creation of a fee-generating bureaucratic structure, along with a new class of professional to administer it.


there has been no movement to privatize the review and issuance of building-permit applications, and it is hard to imagine that it would be considered a good idea. The Massachusetts building code includes an energy code and, within the energy code, provisions to build an admittedly crude energy model via Comcheck or similar software programs. The “stretch code,” an adjunct code adopted by 63 communities at the time of this writing, raises the energy-savings bar and requires a more sophisticated energy model. Such programs determine whether the proposed design passes or fails. They don’t particularly raise the consciousness of the designer or owner with regard to sustainability issues, but they do have the advantage of being straightforward.


Another rigorous governmentally administered energy compliance process is the Massachusetts Environmental Protection Act’s (MEPA’s) Greenhouse Gas Emissions Policy and Protocol of 2010, which applies to all projects that require an Environmental Impact

Report. The MEPA process, which considers many of the same sustainability issues addressed by LEED but is more design-oriented, also involves the construction of a sophisticated energy model, based on one of the same computer modeling programs used in the LEED process.

Unlike the MEPA process or the stretch code, LEED follows the life of a project from inception through construction, requiring ongoing documentation and adjudication of points (functions that could be added to the governmental processes). This can be considered either more effective or more cumbersome, depending on one’s point of view, but certainly it requires a greater degree of bureaucracy on both the reviewer’s and proponent’s behalf. Such a bureaucracy, however, does not necessarily require administration by a separate and new class of professional, the creation and maintenance of which is perhaps the most controversial aspect of the USGBC program.

The certification and licensure of professionals is a function that has long been contracted out to nongovernmental organizations to varying degrees. Doctors, lawyers, and hairdressers all have to pass examinations that are developed by private organizations under governmental oversight. The problem of self-declared professional certifications is that the

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organizations that create and regulate them tend to become ends in themselves.

As first conceived, the LEED Accredited Professional (AP) was a generalist, having passed a one-time examination that granted a LEED point in the rating system and allowed the individual to use the LEED AP credential indefinitely. After July 2009, however, new LEED AP designations (LEED AP+) were granted within five specialties. To maintain the accreditation, the individual was obliged to either pass biennial exams or, more likely, participate in continuing-education programs via USGBC's Credentialing Maintenance Program (CMP). The continuing-education program for a single specialty is 30 hours over a two-year period, graduated to a maximum of 54 hours if a candidate is accredited in all five specialties.

The rigors of maintaining multiple specialties seems designed to winnow the field of prospective candidates, especially among rank-and-file practicing architects, engineers and contractors. Some legacy LEED APs, those generalists who were accredited prior to July 2009, speculate that their designation is destined to be phased out altogether. The prospect then is that LEED AP+ accreditation becomes less generalized throughout the design and construction industry to become a distinct

occupation. It is telling that up to 50 percent of possible continuing-education hours can be granted for giving presentations, serving on committees, and authorship related to LEED programs, activities one would associate with a full-time sustainability consultant.

In addition to specialization, a tiered accreditation program was introduced. Now candidates can be accredited as a LEED Green Associate (the required precursor to a LEED AP+), a LEED AP+ or, soon, a LEED Fellow, which parallels the AIA designation. According to the GBCI, the LEED Fellow is its "new and most prestigious professional designation." It seems fair to ask whether so much administrative complexity and hierarchy actually advances the cause of sustainability.

Since the 1980s, Americans' distrust of government has been expressed as contempt, perhaps justifiable, of its inefficiency. The privatization of roles formerly the province of government was celebrated as the remedy and has remained received truth in American political thinking ever since. However, although the USGBC's LEED system has done more to bring the cause of sustainability into the public consciousness than any other, perhaps the time has come to revisit that assumption in the case of a private regulatory body that is not answerable to governmental authority. ■



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