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NEW LACBA PROFESSIONAL LIABILITY PROGRAM
FEATURES

20 Delta Blues
BY BRUCE TEPPER
As supplies dwindle, the legislature is requiring ever-greater specificity for water resources in the land use planning process

27 The Green Zone
BY JONATHAN RIKER
At the state and local level, governments are adopting increasingly aggressive environmental land use mandates

Plus: Earn MCLE credit. MCLE Test No. 166 appears on page 29.

34 Wind Advisory
BY HOWARD E. SUSMAN AND KATHLEEN J. DOLL
The terms of an agreement to locate a wind farm can have substantial effects on a project’s economic viability

DEPARTMENTS

8 Barristers Tips
Updating projects to meet the new California Building Code
BY THOMAS F. QUILLING

10 Practice Tips
Managing the risks of LEED certification
BY JEFFREY S. CONNER

15 Tax Tips
Tax and financial incentives for green building
BY JASON R. BUSCH, ROSEMARY A. COLLIVER, AND JANET F. JACOBS

44 Closing Argument
Accept the challenge to become a green lawyer
BY DANIKA VITTITOE AND MATTHEW HEARTNEY

42 Classifieds
Asset Protection Planning Now Can Insulate Your Clients’ Assets From Future Judgments

Yes, it’s true. By properly restructuring your clients’ estate plan, their assets and the assets they leave to their family will be protected from judgment creditors. Here are some of the situations in which our plan can help protect your clients’ assets:

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- Children suing each other over your client’s estate.
- A current spouse and children from a prior marriage suing each other over your client’s estate.
- A child’s inheritance or the income from that inheritance being awarded to the child’s former spouse.

Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.
This month, in Los Angeles Lawyer’s 23rd annual Real Estate Law special issue, we present something old, something new, something borrowed—and something green. A continual challenge for builders is to create and adopt better ways to put together four walls and a roof.

The definition of “better,” however, changes over time. Cost, safety, durability, and appearance have all had their turn in the spotlight. Lately, the focus is on green.

In its current usage, green building includes an evaluation of the entire environmental footprint of a project. The finished product, including design and mechanical systems, should create a healthy environment for the occupants and its neighbors. Green building also includes an emphasis on the overall environmental impact of the construction materials used in the project. From the project’s raw materials through their fabrication, installation, and disposal, green building involves looking into whether renewable resources have been used, the amount of energy expended to fabricate the materials, and whether the finished product can be easily recycled at the end of its useful life.

To examine the green building trend, we offer a variety of articles. Jeffrey S. Conner presents an overview of the U.S. Green Building Council’s LEED certification system, which builders may adopt to quantify the environmentally friendly nature of their projects. LEED—an acronym for Leadership in Energy and Environmental Design—is an evolving standard and not without some elements of subjectivity.

Jonathan Riker, in this month’s MCLE article, helps to fill in the picture on the current state of green building in California and examines the applicable regulations and policy mandates. Jason R. Busch, Rosemary A. Colliver, and Janet F. Jacobs analyze the tax and cash incentives that make green building attractive. Federal, state, and local agencies are adding their voices to the discussion.

An old touchstone in the rules for construction has been the Building Code. Out in the field, where the nails meet the wood, the code is the guide. As Thomas F. Quilling notes in his article, California is adopting the International Building Code, International Fire Code, and various other codes as part of the 2007 California Building Standards Code.

Let us not forget about wind and water. Howard E. Susman and Kathleen J. Doll touch upon a number of issues critical to site selection for wind energy projects. Water, however, is life, and as it becomes increasingly scarce the battle to control this resource will not be pleasant. Bruce Tepper adds the blues to this green edition of Los Angeles Lawyer with his article, in which he relates the regulatory realities of water supply issues in real estate development.

We all should remember that being green is an activity in which we can all directly participate. Danika Vittitoe and Matthew Heartney discuss how law firms can be part of the green building movement. We encourage everyone to continue to stay abreast of the latest developments.

R. J. Comer is a partner at Armbruster & Goldsmith LLP, where he specializes in land use law and municipal advocacy. Gordon Eng is a shareholder at Brown Winfield Canzoneri Abram Inc., where his practice includes real estate and business transactional matters. Ted M. Handel is of counsel at Landmark Law Group LLP, where he represents clients on affordable housing projects and other transactional real estate matters. Comer, Eng, and Handel are the coordinating editors of the 23rd annual Real Estate Law issue.
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2007 . . .
Updating Projects to Meet the New California Building Code

STARTING ON JANUARY 1, 2008, all building projects submitted for plan check to permitting agencies must comply with the new 2007 California Building Standards Code (CBSC), Title 24 of the California Code of Regulations. The new code differs significantly from prior California building codes due principally to the adoption of the International Code Council’s International Building Code and International Fire Code, the International Association of Plumbing and Mechanical Officials’ Uniform Plumbing Code and Uniform Mechanical Code, and the National Fire Protection Association’s National Electrical Code, with specific amendments to each.

The California Building Standards Code applies to all occupancies in California. Contrary to popular belief, a model code is not directly adopted by local jurisdictions in California. The model codes are adopted into the CBSC, which regulates California construction. Thereafter, a local jurisdiction may amend its code with more restrictive amendments to the CBSC, but a local jurisdiction must at a minimum enforce the CBSC in full.

Now that California has adopted the 2007 CBSC, each jurisdiction will in turn be required to adopt the code, with an opportunity to add amendments based on local geographical, climatic, and topographical conditions. The law requires local jurisdictions to put the new CBSC into effect within a minimum of 30 days after the official adoption on January 31, 2008. Based on this requirement, the permit application for a project designed using the 2001 California Building Code will have to be submitted to the enforcing agency prior to the effective date of the newer code.

The application of the 2007 CBSC will be a challenge for the building industry and will likely trigger claims relating to the following or similar designer contract language: “The Construction Documents shall comply with all applicable governmental laws, codes, ordinances, and regulations and be complete and coordinated in all respects. Any errors, omissions, or ambiguities shall be resolved by the Architect at no cost to the Owner.” An attorney’s responsibility is to advise the client to comply with the current code, not just the addition, alteration, or tenant improvement. Communications with building officials and is currently serving as the assistant vice president of the Barristers.

The law requires local jurisdictions to put the new CBSC into effect within a minimum of 30 days after the official adoption.

The new code will be effective at the time of submittal, formal application for plan check, and payment of fees—not the date of obtaining a permit. If the designer or owner has a project in plan check before the effective date of the new code, it will remain under the 2001 code until the building permit is obtained. However, caution should be exercised not to let the plan check period expire. The designer, builder, or attorney should approach officials if a need for additional time arises. The law allows for the building official to grant one extension for an additional 180 days to the developer or owner, unless the delays are caused by the jurisdiction in the processing of the project, in which case additional extensions may be granted.

Changes to a permitted project. Changes to a project under construction or an already permitted project are processed by the jurisdiction as revisions unless they represent a change in scope to the project. Examples of scope changes are the addition of square footage, change in building footprint, or change in use and occupancy. Should the change in the scope occur, the changes will likely be required to meet the requirements of the new code.

Additions, alterations, and tenant improvements. These three scenarios are by far the most challenging. Changes to a building that require a permit must be based on the current code, not just the alteration, addition, or tenant improvement. Many building officials offer preliminary code reviews and use alternate methods and materials provisions in the code to address such situations. Communications with building officials should help avoid surprises and assist in attaining a compliant project.

 Clients, attorneys, building officials, designers, and others involved in the building construction industry will have to become familiar with different wind, seismic, and material design standards (concrete, masonry, steel, and wood). Interestingly, the new fire resistant design requirements result in an overall decrease in requirements. It is clear that the adoption of the 2007 CBSC is likely to create problems for clients in the building industry. Training will be required to understand the changes in the new CBSC and for the California building industry to grasp fully not only which code version applies but also what the new code requires.

1 HEALTH & SAFETY CODE §§18941.5, 17958.7.
2 HEALTH & SAFETY CODE §18938.5(a).

Thomas F. Quilling is an associate with Brown Winfield Canzoneri Abram, Inc. and is currently serving as the assistant vice president of the Barristers.
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GREEN BUILDINGS ARE now a quantifiable product. Their presence in the real estate arena represents an extraordinary shift in the way the public sector, the private sector, and consumers perceive finished construction projects. Green building protocols are certainly one of the most important construction trends in the last 50 years—and they are almost entirely driven by a voluntary, nonprofit organization.

Individuals and corporations who support the concepts of sustainability and green building are a rare confluence of those whose primary interest is financial with those whose primary interest is environmental. The term “sustainability” refers to the physical development of natural resources that meets the needs of present users but does not compromise the ability of future generations to effectively use those resources as well. Sustainable practices support ecological, human, and economic health and viability. Sustainability is a broad concept and encompasses more than designing green buildings or maintaining natural reserves.

The terms “green architecture” or “green building” in reference to an integrated design philosophy have emerged recently. The first references to “green architecture” and “green building label” reportedly appeared in the British publication The Independent in early 1990, followed by the first American use of the term “green architecture” in mid-1990 on the editor’s page of Architecture magazine.

In 1993, the U.S. Green Building Council (USGBC) was formed by fewer than a dozen stakeholders. It is a nonprofit organization now based in Washington, D.C., composed of more than 10,000 organizations from every sector of the building industry. Though it attracted new members and interest in green construction in the years following its creation, the USGBC initially struggled in its attempts to precisely define exactly what makes a building green. To answer its own question, the organization’s members devised a rating system to provide uniformity and accountability to the field of green design. In 2000, the USGBC unveiled LEED, a voluntary, consensus-based national rating system for developing green buildings.

LEED—the USGBC’s acronym for Leadership in Energy and Environmental Design—is a point system that many consider to be the definitive, nationally accepted benchmark for the design, construction, and operation of green buildings. LEED provides a road map for measuring and documenting every type of building and every phase of its construction. The LEED system contains several categories of projects, including new commercial construction and major renovation, existing building operations and maintenance, commercial interiors, core and shell development, homes, neighborhood development, multiple buildings and on-campus building projects, schools, and retail.

The LEED system is intended to give building owners and operators the tools they need to gauge the performance of their buildings. It promotes a whole-building approach to sustainability by awarding points for achievement in five key areas affecting human and environmental health: sustainable site development (14 possible points), water savings (5 possible points), energy efficiency (17 possible points), materials selection (13 possible points), and indoor environmental quality (15 possible points). The system also awards points for innovation and design (5 possible points).

A project is judged by the number of points it tallies on a LEED checklist. For new construction, there are approximately 69 points in six categories. A LEED Certified designation requires 26 to 32 points; LEED Silver, 33 to 38 points; LEED Gold, 39 to 51 points; and LEED Platinum, 52 to 69 points.

Two other nonprofit entities paved the way in promoting green building. The American Institute of Architects (AIA), as part of its Green Challenge Initiative and its Committee on the Environment, created a thoughtful and detailed policy on sustainability and green building. The AIA initiative includes a resource center that provides tools online for architectural clients—including educational and cultural institutions, companies, and agencies—that are seeking proposals or qualifications from architects and other design professionals as well as development, construction, and construction management services. In addition, various AIA chapters devote significant resources to the promotion of green building practices. For example, the Santa Barbara AIA has a Built Green program that promotes resource efficient development, design, and construction. Its suggested Green Building practices not only feature energy and water conservation but...
also environmentally sensitive site planning, resource efficient building materials, and superior indoor air environment quality.⁴ Since 2000 the University of California has also made great strides in encouraging sustainability and green building. Many of the university’s constituents—which include more than 214,000 currently enrolled students, 170,000 faculty and staff, 37,000 retirees, and more than 1.5 million living alumni—supported and collaborated on sustainability programs and influenced the UC Board of Regents to make policy changes throughout programs and influenced the UC Board of Regents to make policy changes throughout the university system.² Their efforts reached a peak in January 2002 with the presentation of a research paper on sustainability to UC President Robert Dynes by David Belk, a leading facilities administrator. Moreover, the UC Regents adopted a green building and clean energy policy in July 2003 to minimize the university’s adverse environmental impact. In June 2004, Dynes issued the UC’s Policy on Green Building Design and Clean Energy Standards.

Legal Issues

Those involved with green building not only face liability emerging from contractual obligations but also must consider and comply with case law and emerging federal, state, and local mandates. The determination of liability in the green building arena is complex. The evolution of green building practices most definitely involves trial and error. Clients may truly believe in the long-term benefits of green building practices but, at the same time, it is highly unlikely that they want their reputations and bank accounts at risk for a test case of even the most worthy goal.

The Bush administration has leveraged the federal government’s status as the largest landlord in the United States by drafting its Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings as part of a memorandum of understanding. On January 24, 2006, 19 federal agencies signed on to the effort to define minimum standards for green building. The Guiding Principles were elevated to a federal mandate on January 24, 2007, via Executive Order 13423, “Strengthening Federal Environmental, Energy, and Transportation Management.”

The executive order consolidates and updates the goals, practices, and reporting requirements of five existing executive orders and two presidential memoranda of understanding. The aim is to ensure that 1) new construction and major renovation of agency buildings comply with the Guiding Principles in the 2006 memorandum of understanding, and 2) 15 percent of the existing federal capital asset building inventory incorporates the sustainable practices in the Guiding Principles by the end of fiscal year 2015.

In California, there are more than 7,000 public entities, including the state, counties, cities (charter and general), joint powers authorities, and special districts, among others. Most are required to adhere to the Public Contract Code, but almost all also have entity-specific regulations and ordinances plus unique internal procedures governing public works projects.

Governor Arnold Schwarzenegger has been active in promoting green building at the state level. His Executive Order S-20-04 generally provides that all new and renovated state-owned facilities that are paid for with state funds must have a LEED Silver or higher certification. In addition, state government has begun to promulgate its own standards on green building. The state has created specific supplements, addenda, and best practices guides to coexist with the USGBC’s protocol for green certification.⁶

What happens when a contractor is chosen to construct a building that will achieve a particular level of green certification, and the certification is denied? If the contract documents set out clear goals and responsibilities, the ascertainment of liability may not require litigation. If the contract documents are not sufficiently precise, the courts will no doubt become the forum for determining liability.

The most common cause of disputes on public projects is the quality of the plans and specifications (including geotechnical information) included in the bid materials. Lawsuits focus on errors and omissions, lack of constructability, lack of timely responses to submissions and requests for information, and differing site conditions. It is clear that future scenarios will emerge from seemingly successful projects when—18 months after project participants have dispersed along with their site photographs and daily logs, and take-out financing and tenants are in place—the USGBC awards LEED certifications at a level lower than the owners were anticipating, or no certification at all. The differences in the certifications can come down to a mere one or two points on the LEED checklist.

Consequently, practitioners must analyze the well-established legal principles regarding design and performance specifications as well as the interplay of an owner’s expectations, the design documents, and the contractor’s scope of work, including change orders.² This type of legal analysis, as embodied in case law, most likely will be used in disputes over liability for a party’s failure to achieve LEED certification.

Carefully drafted contracts are key. Practitioners will have to fashion their own provisions, because most of the trade associations in the design or construction industries have not developed appropriate language to include in their standard contracts or attachments. Counsel should stay up-to-date with these associations because they are likely to develop new green building liability clauses soon.

Issues for Owners

Well before initiating a project, public agencies or private owners should first broadly memorialize their green building goals in a document akin to a mission statement. No project is exactly the same as another, so each Request for Proposal or Request for Qualifications presented by agencies or owners should be unique as well. These requests should include the aspects of sustainable design and planning that are appropriate to the project as well as its site and region. Owners and agencies should specifically address LEED certification and the certification goal. They must decide whether their bid packages provide for the acceptability of a minimum LEED certification level or state precisely which level must be achieved.

Counsel can assist their owner or agency clients in minimizing or managing green building risk. This requires gathering information and carefully crafting proposals and contracts. Counsel should ensure that their clients:

• Consider their goals and explore the alternatives.

• Specify responsibility and who is at risk for different types of failure to meet green standards. For example, in LEED certification some of the points that may be acquired are related to design and specifications, while others are based more on construction and performance. These determinations will pinpoint who among the various professionals involved in a project may be liable.

• Contractually obligate the design professionals and general contractor to follow the requirements necessary to achieve a specific level of green certification.

• Clearly identify design and performance specifications.

• Consider whether a liquidated damages provision is appropriate. An owner constructing a building to a specific certification in order to obtain government approvals or support may find that the damages incurred due to lack of certification are much higher than a traditional liquidated damages amount based on the contractor’s profit.

• Offer significant bonuses as a way to encourage the construction team to pursue a cutting edge project.

• Consider a design-build or turnkey project delivery method. By doing so, the owner is attempting to streamline delivery of the project as well as focus more upon the end product rather than the design and construction processes by having one party responsible
for both (though arguably at a higher price).
• Determine whether to adopt a wait-and-see approach regarding certification or choose a less onerous certification level.

Protecting Contractors
Within the construction community, a general perception exists that the contractor does not contribute much to the green building process. This is not true. Indeed, the contractor plays a crucial role on all LEED projects. While architects may capture much of the glory for creating innovative designs to achieve a green building goal, the contractor has to implement that design to build a viable structure. Moreover, contractors have invaluable experience to draw upon when working with and recommending various construction materials. Also, contractors must communicate with and motivate subcontractors and suppliers, collect LEED documents, and meet all contractually mandated LEED performance-based requirements.

Counsel can assist contractors in minimizing or managing their risk by ensuring that they:
• Understand the specific green building protocol that they must follow.
• Make sure senior staff in charge of implementing the green program is appropriately educated and experienced.
• Pursue well capitalized and green savvy subcontractors, particularly when an owner requires the project to obtain a specified green certification.
• Analyze internal processes and procedures to see if they are compatible with the selected green standards. For example, the paperwork requirements for a specified LEED certification may require a contractor to adopt new procedures.
• Consider shifting the general contractor’s green building risks in contracts to subcontractors.
• Work carefully with insurance professionals to determine if any applicable exclusions or endorsements should be obtained to help offset some of the risks of building according to new standards.
• Determine whether forming independent “green division” entities to concentrate expertise and liability is desirable.
• Consider hiring an in-house green building expert.
• Do not agree to a consequential damages provision in a contract with an agency or owner.
• If a project becomes a green building project in the middle of its construction, argue that this constitutes a cardinal change. By doing so, the contractor can assert that the original contract is no longer valid, and negotiations for a new contract are necessary.
• If the project is a public work, refocus on
the issue of false claims and take appropriate actions. If a specific green certification level is required, liability may arise when the contractor becomes aware that the certification will not be obtained but does not advise the owner and continues to submit bills for work.

Contractors must be aware of the special provisions for each LEED point and certification. These provisions may not be in the specifications. In addition, contractors need to be informed and included by the owner in the LEED process at its commencement. Contractors should have clear contract language for green building in place for subcontractors so that the subcontractors will know what is expected of them. This is in lieu of simply binding the subcontractors to the terms of the prime contract between the contractor and the owner or agency.

Risks for Design Professionals
In general, the architect or engineer may be sued by the owner or the contractor for negligence or for breach regarding the failure to perform contractual obligations. The architect or engineer may face lawsuits by contractors that claim to be third-party beneficiaries of the agreement between the owner and the architect or engineer.

Within the green community, a perception has emerged that design professionals are the most ideologically committed to the concepts of green building. Design professionals also are typically those most at risk in the context of a green building project. After all, LEED is the USGBC’s acronym for Leadership in Energy and Environmental Design.

Since green building standards are new and evolving, design professionals often play the role of adviser as well as designer. The advisory role may lead to documentation that describes an anticipated level of LEED certification as a performance specification. For design professionals this is an area of concern, because these provisions may give rise to a warranty regarding performance that not only exposes design professionals to greater potential liability but also to the risk that the liability may not be covered by their professional liability insurance. Moreover, the issues of warranty and guaranty may lead to exposure for design professionals as a result of the language adopted in the certification documents submitted to the USGBC as part of the LEED certification process.

In 2004, the AIA released its B214 2004 Standard Form of Architect’s Services: LEED Certification, which provides the architect’s scope of services for a green building project. B214 establishes the duties and responsibilities of the architect when an owner seeks certification from the USGBC.

The services include conducting a pre-
design workshop, in which the parties will review the LEED system and establish targets for achieving LEED points. Other services involve preparing a LEED certification plan, monitoring the LEED certification process, providing LEED specifications for inclusion in the contract documents, and preparing a LEED certification report describing the LEED rating that the project achieved.

The architect must manage the owner’s expectations and not get caught up in “green-wash”—a term describing the actions of an owner that advertises its positive environmental practices while actually performing in a contrary manner. Design professionals must ensure that owners recognize the money and resources that are necessary to achieve a specific green building goal. Since a green building involves a certification process, it will be more expensive than a traditionally constructed building—at least regarding its initial construction costs.

Counsel can assist their design professional clients in managing risk by ensuring that they:
- Study local AIA resources, blogs, and seminars for the latest guidance and developments on green building issues.
- When contracts are being negotiated, consider assuming the risk and insisting on getting paid for doing so, because future design defects that prevent owners from achieving green certification can lead to lawsuits.
- Follow developments in the standard of conduct for design professionals in California and the local area in which the project will be constructed.
- Work closely with an insurance professional to evaluate the limits of coverage available for design work on a green building and whether the work to be performed is covered by the design professional’s policy.
- Understand the risk that typical green building forms, letters, and related contract provisions may create regarding actual or perceived warranties. Design professionals should be advised on the ramifications of these provisions and the need for disclaimers or other protective language.
- Determine whether to request an extension of the applicable statute of limitations period due to the significant amount of time that generally elapses between project completion and the final certification decision by the USGBC or other entity.
- Consider including a liquidated damages provision in agreements with owners.
- See if using design “charrettes” for key green building elements of plans is productive.

It is an exciting time to be a construction law practitioner who can integrate the concepts of sustainability and green building into his or her daily practice. Green building can provide a variety of benefits to clients and the community. However, clients should clearly understand the risks associated with green building and approach their contracts and procedures accordingly.

3 Id.
6 See http://www.ci.wm.ca.gov/greenbuilding/design/performance.htm#rating.
8 The term evolved at the École des Beaux Arts in France to refer to an intense, collaborative design exercise and creative process akin to brainstorming that is used to develop solutions to a design problem within a limited time.
Tax and Financial Incentives for Green Building

TWENTY YEARS AGO, when green building was first conceived, this innovative construction concept received little public notice. Today, however, developers acknowledge that green building offers an opportunity to reduce adverse effects on the environment while improving the bottom line. By integrating siting, design, construction, operation, maintenance, and waste management practices, developers can realize long-term positive returns from improved efficiencies. Developers are also taking advantage of short-term financial incentives provided by federal tax law and state and local governments to promote green buildings.

The concept of green building has expanded beyond design and materials to include integrated systems and life cycle analyses, site selection and use of passive elements, energy efficiency and renewable energy production, water conservation, waste reduction, indoor environment improvement, and smart growth and sustainable development.

While green building may have once been more expensive than traditional building techniques, this is no longer necessarily true. On the contrary, “[t]he financial payoff from green building will be multifaceted, comprising direct savings from reduced energy use, higher value in the real estate market (including resale value), increased employee retention and productivity, and potential carbon credits from reduced CO₂ emissions.”1 To realize these benefits, however, owners and developers must retain professionals who understand the many evolving options available for green building projects and can apply the appropriate choices to the project at hand.

Because an integrated design approach is essential to developing a green building, up-front design costs (or soft costs) are increased by as much as 1 to 15 percent. Nevertheless, by devoting more time in the beginning on the proper design of a project, a corresponding reduction in future construction problems—including defects and delays—and an improvement in long-term building operations can be attained, most notably over the life cycle of the building. As the prices of conventional fuels rise, greenhouse gas emissions become regulated, and clean water becomes scarce, the value of investments that promote energy and water efficiency should increase. Efficiency may be viewed from two perspectives: first, as using less of a resource, and second, as using more sustainable forms of that resource (e.g., renewable energy and rainwater rather than fossil fuels and potable water). Federal, state, and local agencies (especially in California) now recognize the multifaceted benefits of sustainable development and are providing a variety of incentives to promote the use of efficiency measures.

Federal Tax Incentive

Internal Revenue Code Section 179D allows a commercial building owner to deduct all or a portion of the cost of certain “energy efficient commercial building property” placed in service after December 31, 2005, and before January 1, 2009. An “energy efficient commercial building property” is one that generally meets the following criteria:

- The property is depreciable or amortizable.
- The installation is within the scope of Standard 90.1–2001 of the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America in effect as of April 2, 2003.
- The property is part of the interior lighting system or the heating, cooling, ventilation, and hot water system of a building or building envelope.
- The building meets certification requirements.

In order for the building to qualify for the credit, it must be designed according to a plan that achieves a reduction of 50 percent or more in total annual energy costs, attained solely from interior lighting and heating, cooling, ventilation, and hot water systems, as compared to a reference building meeting the minimum requirements of Standard 90.1–2001. A qualified individual using designated software must complete the certification, including inspecting the building and performing certain tests to ensure compliance with energy savings plans and targets.

The amount of the tax deduction varies depending on the energy reductions that are achieved. If the building meets or exceeds the 50 percent threshold, the deduction equates to the cost of the energy efficient commercial building property placed in service during the taxable year subject to a limit of $1.80 per square foot. For buildings that achieve a documented savings of 16% percent but less than 50 percent, the deduction is set at $.60 per square foot. Finally, under the interim rules published in June 2006 under Notice 2006-52, an interior lighting system installed before the date that final regulations are published in the Federal Register, must achieve a reduction in lighting power density of at least 25 percent (50 percent for warehouses) compared against the minimum requirements in Standard 90.1–2001, among others. No date has been set for finalizing these rules.

The deduction is restricted in other ways. First, while more than one taxpayer may claim the deduction, the aggregate amount claimed cannot exceed the lifetime per-building cap. Thereafter, the tax basis of the property for purposes of calculating depreciation deductions and gain or loss on any disposition is reduced by the amount of any Section 179D deduction claimed by the building owner.

Similarly, residential property builders may take a one-time tax credit of up to $2,000 under IRC Section 45L for “qualified new energy efficient homes,” including manufactured homes meeting the Federal Manufactured Home Construction and Safety Standards. A qualified new home is one located in the United States constructed substantially after August 8, 2005, that satisfies certain energy savings requirements and that was acquired from an eligible builder after December 31, 2005, and before January 1, 2009, for use as a residence.

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A home qualifies for the entire credit if 1) the building is certified as reducing energy consumption by 50 percent compared to a home constructed in accordance with certain national and international standards, and 2) building envelope improvements (e.g., thermal resistance of the outer structural materials, window placement and coatings or glazing, and roof strategies such as reductions to the heat island effect through the use of light or reflective materials) account for at least one-fifth of the 30 percent reduction. A manufactured home may qualify for a $1,000 credit if it is certified as reducing energy consumption by at least 30 percent and building envelope improvements account for at least one-third of the 30 percent reduction or if the home complies with requirements under the Energy Star Labeled Homes program. A person accredited or authorized by the Residential Energy Services Network (or an equivalent rating network performing such certifications) using software approved by the IRS must perform the certification in order for the home to qualify for the credit.

For any commercial or residential building that incorporates solar energy equipment, the property may also qualify for enhanced tax benefits that help offset the overall cost of the equipment. IRC Section 48 provides a nonrefundable income tax credit equal to 30 percent of the tax basis of any energy property, including certain solar energy equipment. This credit is available for any property placed in service before January 1, 2009. Beginning January 1, 2009, the credit amount is decreased to 10 percent and equipment using solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight will no longer qualify for the credit.

“Energy property” is defined as depreciable equipment using solar energy to generate electricity, heat or cool a structure, deliver hot water to a structure, provide solar process heat, or illuminate the inside of a structure using fiber-optic distributed sunlight. Solar equipment used to heat a swimming pool is excluded. If a taxpayer finances the project in whole or in part with subsidized energy financing or tax-exempt private activity bonds, the basis upon which the credit is calculated is reduced.

Solar energy property may also qualify for greatly accelerated depreciation deductions. A deduction may be taken over five years using the double declining balance method for solar energy property qualifying for the tax credit, which can also create significant tax savings.

California Tax Incentives

California currently offers two incentives in the Revenue and Taxation Code to encourage green building. The first permits the entire cash value of a solar energy system installed on or before December 31, 2009, to be excluded for purposes of calculating property taxes. While the addition of a solar energy system increases the appraised value of the property on which it is installed, state law provides that no corresponding increase will be recognized in the property’s assessed value for tax purposes over the system’s operational life. A qualifying system or “active solar energy system” is one that uses solar devices that are “thermally isolated from living space or any other area where the energy is used, to provide for the collection, storage, or distribution of solar energy.” Energy systems used to support the production of electricity, heat, mechanical energy, air conditioning, and domestic, recreational, therapeutic, or service water heating are each acceptable.

Storage devices, power conditioning, and transfer equipment are also eligible for the exemption. Dual-use parts, apparatus, pipes, and ducts—those carrying both solar-derived energy and non-solar-derived energy—only qualify for an exemption equal to 75 percent of their full cash value. Finally, as under federal law, systems used to heat swimming pools and hot tubs are excluded. The exemption applies to property taxes first assessed on or after January 1, 1999. This statute is scheduled to expire on December 31, 2009. The exemption applies to residential, commercial, and industrial property.

The second incentive entitles residential property owners to deduct interest paid on loans taken out with investor-owned utilities to purchase energy-efficient systems or products. This includes energy-efficient heating systems, ventilation, air conditioning, lighting, solar systems, advanced metering of energy usage, windows, insulation, zone heating products, and weatherization systems. Consumers whose utilities do not offer such financing may be able to deduct the interest on home equity or improvement loans used to make similar purchases. To claim the deduction, the utility must issue an IRS Form 1098 or similar document notifying customers of their eligibility for this deduction. Further, the credit may not be taken if another tax credit is taken for purchasing the same equipment.

The increasing desire to apply green building concepts is attributable in part to public policies that promote renewable energy production and energy conservation, and non-tax-based financial incentive programs consistent with those policies. California’s Renewables Portfolio Standard (RPS), adopted by the California legislature in 2001, is illustrative of these policies. The RPS program applies to investor-owned utilities, electric service providers, small and multi-jurisdictional utilities, and community choice aggregators. It requires these electric utilities to increase their use of eligible renewable energy resources as a means of meeting power demand by at least 1 percent per year, with the goal that 20 percent come from renewable energy resources by 2010. As a result of these goals and Governor Arnold Schwarzenegger’s long-term commitment to increase this level to 33 percent by 2020, there has been a corresponding growth in development of renewable energy projects, including residential and commercial-scale projects.

Numerous financial incentive programs are offered at the local and state level to promote green building, energy efficiency, and renewable energy. Programs usually target specific sectors of development—such as new residential, commercial, industrial, or public buildings—but often apply equally to each. While most programs are characterized as either green building incentives or development of renewable energy facilities, the two overlap. By current standards, the concept of green building encompasses self-generation of energy from renewable sources such as the sun or wind. Indeed, the more ambitious green building programs set “net zero” goals for energy and water use by a building and require that it be entirely self-sufficient. This is accomplished by on-site energy generation (also known as distributed generation) and the use of storm water, gray water, and waste water reclamation systems.

Many local governments sponsor incentive programs. The San Diego County Green Building Incentive Program and Marin County’s BEST (Building Energy Efficient Structures Today) Program are two examples. The San Diego program is designed to promote the use of resource efficient construction materials, water conservation, and energy efficiency in new and remodeled residential and commercial buildings. Under the program, the county will waive the fee for the building permit and plan check for a photovoltaic system. In addition, for qualifying resource conservation measures, the county will reduce building permit and plan check fees by 7.5 percent and grant expedited plan checks, saving approximately 7 to 10 days on a project time line. To qualify for these conservation incentives, the project must comply with the program requirements for either natural resources conservation, water conservation, or energy conservation.

Similarly, Marin County’s Community Development Agency developed BEST to enhance energy efficiency and conservation in residential, commercial, and community facilities. The program promotes green building by waiving the Title 24 (California Building Code) and related permitting and plan check fees for projects that comply with BEST standards.
Energy Efficiency Standards) energy fee and providing a fast track permitting process and free technical assistance. To take advantage of this program, a project must exceed Title 24 requirements by 20 percent, meet certain criteria in a checklist designed for the specific project category, or involve the installation of an on-site renewable energy system producing a minimum of 7.5 percent of the annual energy use for the building and site amenities.6

The California Energy Commission (CEC) administers a popular program called the California Energy Efficiency Financing Program. This program provides schools, local governments, and public hospitals with access to long-term, low-rate loans for efficiency technologies, including lighting and lighting sensors, furnaces, boilers, and energy management systems and building controls.7 The program has $26 million available for loans and promotes efficiency measures in the public sector by providing 15-year loans at a fixed interest rate of 3.95 percent with a maximum loan amount of $3 million per project.8

The state's net metering rules may be the most important source for promoting small-scale renewable energy generation.9 Net metering allows small generators of on-site renewable energy to reduce their electric bill by delivering surplus energy back to the grid. The utility pays the customer-generator for the surplus energy and, by doing so, reduces, if not eliminates, the customer's electric bill. All forms of property development qualify for this program. All electric utilities are required to offer net metering to any customer who generates up to one megawatt (MW) from a solar or wind-energy system. The vast majority of commercial-scale solar systems fall well below this standard. Investor-owned utilities must also offer net metering for biogas-electric systems and fuel cells.10 A 50-MW statewide limit applies to net-metered biogas digesters. In 2006, the aggregate limit of net-metered systems within a utility's service territory was increased from .5 percent to 2.5 percent of the utility's aggregate customer peak demand. Replacing the original .5 percent limit with a 2.5 percent aggregate limit significantly raises the ceiling on how much renewable energy will be eligible for net metering. Because the net metering law is intended to promote energy self-sufficiency, net excess generation (NEG) at the end of the year is transferred to the utility. NEG refers to the electricity generated by the small generator in excess of the amount required by that generator. NEG is carried forward to a customer's next bill for up to 12 months, at which time any remaining NEG is granted to the customer's utility. Customers subject to time-of-use rates are entitled to deliver electricity back to the utility for the same time-of-use rate that they pay for purchases. However, time-of-use customers choosing to use net metering must pay for the necessary equipment. Customer-generators retain ownership of all renewable energy credits (RECs) associated with their on-site generation.11

While net metering is available for energy generation from a variety of renewable energy sources, California offers several programs specifically promoting the development of solar energy. Distributed solar energy generation in California will be an increasingly important, and prevalent, green-building element given the recent decision of the California Public Utility Commission (CPUC) to adopt stringent programmatic initiatives, including the goal that all new residential construction in California will be zero-net energy by 2020, and all new commercial construction will be zero-net energy by 2030.12

Solar Power Rebates

In January 2006, the CPUC adopted a state rebate program called the California Solar Initiative (CSI).13 With a program budget of $3.3 billion for 10 years for solar projects, the CSI's objective is to provide 3,000 MW of solar capacity by 2017. CSI will first fund solar photovoltaics and then other solar technologies. The initiative is divided into two separate programs. The CPUC manages the program for nonresidential and existing residential customers, while the California Energy Commission oversees the New Solar Homes Partnership targeting the residential new construction market. CSI has already been expanded and now requires that municipal utilities offer incentives beginning this year (nearly $800 million).

Under the CPUC's program, the amount of incentive dollars available to any installation will be based on its size and performance or expected performance. For systems under 100 kilowatts (kW), the incentive is paid by the CPUC in a one-time, upfront payment, based on expected performance, with some differences depending on whether the owner is a nonprofit or governmental entity, or a residential or for-profit commercial owner. For systems 100 kW and larger, the incentive is paid monthly based on actual energy production over five years. In 2007, CSI incentives began at the following levels:

- Expected performance-based buydown for systems under 100 kW.
- $2.50 per watt for residential and commercial systems, adjusted based on expected performance.
- $3.25 per watt for government entities and nonprofits, adjusted based on expected performance.

Incentives will be awarded as a one-time, up-front payment based on expected performance, which will be calculated using equipment ratings and installation factors, such as geographic location, tilt, orientation, and shading.

Performance-based incentives for systems 100 kW and larger will include:

- $.39 per kilowatt hour (kWh) for first five years for taxable entities.
- $.50 per kWh for first five years for government entities and nonprofits.
- Incentives will be paid monthly based on the actual energy produced for a period of five years. Residential and small commercial projects can also choose to opt in to this performance-based incentive payment approach.

The solar project's site must be within the service territory of, and receive current or future retail-level electric service from, Pacific Gas and Electric Company (PG&E), Southern California Edison (SCE), or San Diego Gas and Electric Company (PG&E, SCE), and the San Diego Regional Energy Office will manage the programs on a regional basis.14 Beginning in 2008, municipal utilities will qualify for CSI incentives but many in California offer similar ones.

The New Solar Homes Partnership program, administered by the CEC, targets single-family, low-income, and multifamily housing markets. The $400 million allocated under CSI for this program focuses on encouraging solar installations in the residential new construction market. The program goal is to achieve 400 MW in solar power generation and have solar power facilities installed on 50 percent of new homes by the end of 2016. As of January 1, 2007, the CEC began managing a 10-year program to encourage the use of solar power in new home construction. The CEC works with builders and developers to incorporate high-performing solar power systems in residential development to create a sustainable solar market. Recognizing that virtually all renewable energy development is supported today by subsidies, the goal of a sustainable solar market, if not all renewable sources, is to bring their cost into parity with traditional energy sources and make them sustainable on a long-term basis without the need for subsidies. The CEC must approve projects before they receive a funding allocation for project completion, and projects are granted approval on a first-come, first-served basis.

The applicant's level of commitment to solar and energy efficiency and the expected performance of the system determine the amount of each incentive. The expected performance depends on specific factors related to equipment efficiency and the system's design and installation. Two performance levels can be achieved. Tier I is a 15 percent reduction in the use of energy from a com-
bination of space heating, cooling, and water heating as compared to current state standards. Tier II is met when a 35 percent reduction is accomplished in these same areas, together with a 40 percent reduction in energy usage for air conditioning. In addition, for either Tier I or Tier II, each appliance provided by the builder must be Energy Star qualified, if applicable for that appliance. Once the system is installed and operational and has met all program requirements, the appropriate incentive is paid.

Two levels of incentive are available. The base incentive, starting in 2007 for a reference system in San Jose, is $2.50 per watt. The actual amount for a particular system is dependent on the Expected Performance Based Incentive (EPBI) calculation, which is based on geographic location, orientation, tilt, shading, and time-dependent valuation, as compared to the reference system. The base incentive applies to custom homes, small developments (fewer than six homes), housing developments in which solar is offered as an option, and residential developments in which solar will be installed on less than 50 percent of the homes in the development.

The second level is the “solar as a standard feature” incentive. Its reference system amount is $2.60 per watt. The actual amount is dependent on the EPBI calculation of the system’s performance compared to the reference system. To qualify, a builder of six or more homes in a development must commit to ensuring that 50 percent of the units or homes will have solar systems that meet or exceed the California Flexible Installation criteria. The California Flexible Installation criteria were developed by the CEC’s Building Standards Office to encourage partnership participation by large housing developers.

The CPUC has also authorized $2.6 million to be used for a pilot solar water heating program. Of that amount, $1.5 million is earmarked for incentives, with the remainder set aside for other costs. The program—administered by the California Center for Sustainable Energy—is only available to retrofits of existing residential, commercial, agricultural, and industrial electricity customers of San Diego Gas and Electric. Incentives range from $1,300 for residential and small commercial systems up to $75,000 for large commercial systems. Incentives are paid to qualified, licensed contractors to be passed through to the customer or directly to owners of self-installed systems.

The public goods surcharge also funds several incentive programs. Under the electric utility restructuring legislation (AB 1890) enacted in 1996, the state’s investor-owned utilities collected a surcharge based on customer electricity use between 1998 and 2001. Based on allocations made by the CPUC, the proceeds now fund programs devoted to renewable energy ($540 million), energy efficiency ($872 million), and research, development, and demonstration ($62.5 million). In 2000, the legislature extended the programs for 10 years beginning in 2002, with annual funding of approximately $1.50 million for 2007 through 2011, and $228 million for energy efficiency programs. In September 2003, the CPUC boosted energy efficiency funding to $2 billion for 2006-08.

The renewables funds are managed through four programs:

- Existing Renewable Facilities Program, 10 percent ($15 million per year).
- New Renewables Facilities Program, 1.5 percent ($77.2 million per year).
- Emerging Renewables Program, 37.5 percent ($56.2 million per year).
- Consumer Education Program, 1 percent ($1.6 million per year).

From the standpoint of green building in California, the Emerging Renewables Program is perhaps the most important. The CEC offers cash incentives to promote the installation of grid-connected small wind and fuel cell renewable-energy electricity generating systems through this program. Commercial, industrial, residential, schools, low-income residential, agriculture, and institutions are eligible sectors.

Funding levels for the Emerging Renewables Program are:

- Small wind turbines (up to 50 kW): $2.50 per watt for first 7.5 kW and $1.50 per watt for increments greater than 7.5 kW and less than 30 kW.
- Fuel cells (less than 30 kW) using renewable fuels: $3 per watt for systems less than 30 kW.

The renewable energy system must generate electricity to offset the load, and the anticipated output cannot exceed a customer’s historical or projected electricity needs.

The CPUC initiated another distributed generation incentive program in 2001, called the Self-Generation Incentive Program (SGIP). SGIP provides incentives to customers who produce electricity with microturbines, gas turbines, wind turbines, fuel cells, and internal combustion engines. The incentive payments for renewable energy systems range from $1 per watt to $4.50 per watt, and are paid by PG&E, SCE, SoCalGas, and the San Diego Regional Energy Office. Retail electric and gas customers of the investor-owned utilities are eligible for the SGIP. The three utilities administer the SGIP program in their service territories, and the San Diego Regional Energy Office administers the program in San Diego Gas and Electric’s territory.

The following technologies and corresponding incentive amounts apply to the SGIP, effective January 1, 2007. First, technologies using renewable fuels include:
Wind turbines (minimum of 30 kW): $1.50 per watt.
Fuel cells (minimum of 30 kW): $4.50 per watt.
Microturbines and small gas turbines: $1.30 per watt.
Internal combustion engines and large gas turbines: $1 per watt.

Regarding technologies that use nonrenewable fuels, the incentive amounts are:
Fuel cells: $2.50 per watt.
Microturbines and small gas turbines: $.80 per watt.
Internal combustion engines and large gas turbines: $.60 per watt.

The maximum eligible system size is 5 MW, although the incentive payment remains capped at 1 MW.

When it was first created, green building may have received scant attention because the concept was viewed as uneconomic or infeasible or both. Experience has demonstrated otherwise. Owners and developers now recognize that projects are more likely to make financial sense when the appropriate green building concepts are applied. Both have also been supported by a myriad of tax and other financial incentives that promote the use of energy efficient technologies. While the private sector has realized a considerable benefit in its bottom line, the public has also gained through the reduction in the use of scarce resources and improvements in the environment. For all concerned, green is not only today’s gold but will remain so for the foreseeable future.

2 REV. & TAX. CODE §73.
3 Id.
4 REV. & TAX. CODE §17208.1.
5 See http://www.sdcounty.ca.gov.
8 For more information, contact California Energy Commission, 1516 Ninth Street, MS-42, Sacramento, CA 95814-5512. Phone: (916) 654-4147. Web: http://www.energy.ca.gov.
9 PUB. UTIL. CODE §2827.
10 A fuel cell is a highly efficient device that produces an electric current through the reaction of a fuel and chemical.
11 See note 7, supra.
12 See http://www.cpuc.ca.gov/puc.
15 For more information, contact California Center for Sustainable Energy, 8680 Balboa Avenue, Suite 100, San Diego, CA 92123. Phone: (866) 733-6374. Web: http://www.energycenter.org.
Recent court decisions have placed the flow of water from the Sacramento Delta to Southern California in jeopardy.
The availability and distribution of water in Southern California has been a paramount concern of the California Legislature and the courts for more than a century. But public awareness of water supply issues has increased markedly in the past two years with decisions rendered by two federal district courts in the Eastern District of California and in an Alameda County Superior Court case now on appeal. Two of these cases involve water flowing south out of the Sacramento-San Joaquin Delta into the State Water Project (SWP), which supplies most of Southern California’s water. Several other cases involving Delta water are moving along, ready to surface soon with their decisions.

Collectively, the federal cases will result in significant changes in the operations of the Friant Dam, which controls the flow of water along the San Joaquin River in the Central Valley’s rich agricultural belt and in the four Delta pumping stations controlling the flow of SWP water into Southern California. As a result, Southern California may lose as much as 30 percent of SWP water. State court action also could affect southern water flow from the SWP if the Harvey O. Banks Pumping Plant, located at the southern part of the Delta, is ordered to shut down periodically.

The danger for Southern California water users has been building for a while. The 1992 Central Valley Project Improvement Act and the 1998 CALFED Bay-Delta Program led to diminished surface water diversions. Moreover, the state is currently undergoing another period of extended drought. Adding further volatility is the ever-increasing demand for water by new residential, commercial, industrial, and other development throughout the state. Against this backdrop, as the legislature and courts address a range of water challenges, the flow of water in California from north to south is imperiled to an extent heretofore unseen.

The legislature has attempted to address issues of water supply and distribution in California seriatim and slowly. The salient principle of the legislature, as reflected by case law interpreting its actions, is the need to identify available “real” or “wet” water (as opposed to “paper” water) prior to the entitlement of large residential developments. In 1995, SB 901 was enacted to create a methodology for addressing water requirements for proposed major developments. SB 901—which is codified at Part 2.10 of the Water Code—requires any city or county preparing an environmental impact report (EIR) for a qualifying project to request each potential water supplier for a water supply assessment (WSA). The assessment is based on the supplier’s most recent urban water management plan (UWMP) and indicates whether the supplier can meet the water supply needs of the project. However, SB 901 applies only to certain types of projects exceeding a defined size. The WSA must indicate whether sufficient water will be available to meet the project’s needs over a projected 20-year period, including single-dry and multiple-dry water years. If the supplies are inadequate, the lead agency conducting the environmental review must be so notified. The lead agency is required to include the information it receives as a result of the assessment in the EIR.

After reviewing the assessment, the lead agency must make a determination whether a sufficient water supply is available to meet the anticipated demand of the project. SB 901 contains no provisions to ensure that water suppliers provide water assessments and fails to address what can be done if water suppliers fail to provide assessments by the statutory deadlines.

In 2001 the legislature enacted two bills, SB 221 and SB 610, designed to correct deficiencies in SB 901. SB 221, applicable to proposed residential subdivisions of more than 500 residential units, requires that cities and counties demonstrate an adequate water supply before they approve a tentative map for a residential development. A government can establish the adequacy of the water supply by obtaining written verification from a public water supplier confirming that the total water supplies available within a 20-year period are sufficient to meet the projected demand associated with the proposed subdivision.

SB 610 requires that before approving any projects within its scope—which, unlike SB 221, includes commercial and industrial developments generating demand of water comparable to 500 residential units—cities and counties must request a WSA from the water supplier most likely to serve the project, and the assessment must be included in any environmental documents. If the city or county is unable to identify a potential water supplier, it must prepare the required WSA in consultation with the local agency formation commission and any water supplier with a service area that overlaps or is adjacent to the project site. The assessment—like the one required under SB 221—must evaluate whether the total water supplies during a 20-year period will meet the projected water demand of the proposed project.

California has vested local and regional water agencies with the power to act affirmatively to plan for, secure, and distribute water for pressing and future needs. It has empowered water districts and irrigation districts to “do [whatever is] necessary to furnish sufficient water in the district for any present beneficial use.” Water agencies and districts have interpreted this delegation of power as a “duty to serve,” limited only by a finding that “there would be insufficient water for human consumption, sanitation and fire protection.”

In land use planning, consultation among water supply agencies and land use agencies is required at all levels of the approval process, beginning with the consideration of whether to “adopt or substantially amend a general plan.” A “public water system” with 3,000 or more service connections to customers within its area is required to consult with the proponent of the general plan or amendment. In response to a proposal to adopt or substantially amend a general plan, the public water system must provide a report that includes its most recent UWMP, capital improvement program, source of available water, and all proposed additional sources of water, among other items. A city or county receiving this information must review and evaluate the water supply and demand information as appropriate.

Baseline Document and Assessments

The UWMP—the structure and contents of which are dictated by the Urban Water Management Planning Act (UWMPA)—is the baseline document for water planning. An UWMP must be prepared by an “urban water supplier,” which includes water agencies. They are required to prepare these plans every five years for a 20-year planning horizon “or as far as data is available.” The UWMP is a water management planning tool that must “describe and evaluate sources of supply, reasonable and practical efficient uses, [and] reclamation and demand management activity.” It is not “a detailed project, detailed development, or action.” The UWMPA requires these plans to address specific issues and establishes the procedural manual required to be followed when preparing, reviewing, and amending the plans.

The contents of an UWMP generally must include 1) a description of water supply and demand, 2) a water conservation notice, and 3) water supply reliability and water shortage contingency notice. Plans adopted under the UWMPA are exempt from the California Environmental Quality Act (CEQA) but are not immune from judicial review.

While UWMPs may be considered analogous to general plans since both examine overall water supplies and demands, WSAs and water supply verifications (WSVs) are analogous to specific plans for projects seeking entitlement. Water agencies must generate WSAs and WSVs to determine whether sufficient water supplies exist to meet the demands of a proposed development project. WSAs also are
required to accompany any environmental review of projects with more than 500 residential units. Further, WSAs are required for any project that is subject to CEQA and involves a water demand equivalent to 500 dwelling units—including hotels and business establishments with industrial buildings of a certain magnitude. On the other hand, WSVs—which are not required until the tentative parcel map stage of the entitlement process—are limited to consideration of projects with subdivisions of more than 500 dwelling units. A project that includes a WSA finding of inadequate water supply may nevertheless be approved. A project with a WSV noting inadequate supplies may not be approved until the necessary water is found.

The contents of WSAs and WSVs are essentially the same. They must determine whether “total projected water supplies available during normal, single dry and multiple dry water years during a 20-year projection will meet the projected water demand associated with the proposed project, in addition to the public water system’s existing projection will meet the projected water demand associated with the proposed project, in addition to the public water system’s existing projection will meet the projected water demand associated with the proposed project, in addition to the public water system’s existing projection will meet the projected water demand associated with the proposed project, in addition to the public water system’s existing projection will meet the projected water demand associated with the proposed project, in addition to the public water system’s existing projection will meet the".

The State Supreme Court and Water Supply

In early 2007, the California Supreme Court surveyed for the first time the interplay between Water Code provisions on water supply and land use planning and CEQA case law and environmental policy. The case, Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, involved the assessment of an environmental review for a proposed phased development of 6,000 rural acres in eastern Sacramento County that included 22,000 residential units housing as many as 60,000 people as well as schools, parks, and office and commercial uses occupying 40 acres of land. In Vineyard Area Citizens, the supreme court articulated four principles that it had extracted out of five prior appellate court decisions (Santiago County Water District v. County of Orange; Stanislaus Natural Heritage Project v. County of Stanislaus; Santa Clarita Organization for Planning the Environment (SCOPE) v. County of Los Angeles; Napa Citizens for Honest Government v. Napa Board of Supervisors; California Oak Foundation v. City of Santa Clarita).

1. CEQA’s informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. Decision makers must, under the law, be presented with sufficient facts “to evaluate the pros and cons of supplying the amount of water that the project will need.”

2. An adequate environmental impact analysis for a large project, to be built and occupied over a number of years, cannot be limited to the water supply for the first few years. While proper tiering of environmental review allows an agency to defer an analysis of certain details of the later phases of long-term linked or complex projects until these phases are up for approval, CEQA’s demand for meaningful information “is not satisfied by simply stating information will be provided in the future” (citations to SCOPE omitted). But the future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis. An EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project (citations to Stanislaus Natural Heritage omitted).

3. The future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations (“paper water”) are insufficient bases for decisionmaking under CEQA (citation to SCOPE omitted). An EIR for a land use project must address the impacts of likely future water sources, and the EIR’s discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water’s availability (citation to California Oak Foundation omitted).

4. Where, despite a full discussion, it is impossible to confidently determine the anticipated future water sources that would be available, CEQA requires some discussion of possible replacement sources or alternatives to use the anticipated water, and of the environmental consequences of those contingencies (citation to Napa Citizens omitted). The law’s informational demands may not be met, in this context, simply by providing that future development will not proceed if the anticipated water supply fails to materialize. But when an EIR makes a sincere and reasoned attempt to analyze the water sources the project is likely to use, but acknowledges the remaining uncertainty, a measure for curtailing development if the intended sources fail to materialize may play a role in the impact analysis (citation to Napa Citizens omitted).

The court next undertook a survey of the recent legislation concerning WSAs, WSVs and UWMPs. It observed that “water supplies must be identified with more specificity at each step as land use planning and water supply planning move forward from general phases to more specific phases.” Amplifying, the court stated that “plans and estimates that Water Code section 10910 mandates for future water supplies [i.e., WSAs] at the time of any approval subject to CEQA must, under Government Code section 66473.7, be replaced by firm assurances at the subdivision map approval stage [i.e., WSVs].” The court further highlighted this point:

“[W]e emphasize that the burden of identifying likely water sources for a project varies with the stage of project approval involved; the necessary degree of confidence involved for the approval of the conceptual plan is much lower than for issuance of building permits. The ultimate question under CEQA, moreover, is not whether an EIR establishes a likely source of water but whether it adequately addresses the reasonably foreseeable impacts of supplying water to the project. If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact. (Section 21100, subd(b)).”

In an attempt to mitigate the avalanche of paper anticipated for
WSAs and WSVs and related water analyses, the court suggested that CEQA lead agencies and urban water suppliers rely on UWMPs, generated every five years, as a basis for the water information they need. Although the court suggested otherwise, the dissent correctly noted that the water analysis required by CEQA for long-range projects not only requires a demonstration of "a reasonable likelihood that there is water for the project at issue but there is water for hypothetical future projects near by, including those no entity has yet planned to build." The certainty and viability of this type of long-term analysis, based on the 20-year projections of UWMPs, is an issue yet to be explored by courts or by water agencies.

Federal Court Decisions

However, two federal court decisions enforcing the federal Endangered Species Act have adversely affected the ability of lead agencies conducting environmental review and urban water suppliers creating WSAs and WSVs to predict with any meaningful degree of reasonable certainty the short-term and long-term availability of water. In July 2007, a federal district court in Fresno, in Natural Resources Defense Council v. Kemphorne,55 ordered periodic modifications to pumping operations within the Sacramento Bay Delta to preserve the Delta smelt, a protected species. The court rejected the validity of biological opinions issued by federal agencies covering the ongoing Joint Operating Criteria and Plan for the federal Bureau of Reclamation's Central Valley Project and the state Department of Water Resources's (DWR) SWP. The biological opinions were held to be unlawful and inadequate because of their 1) uncertain mitigation notice, 2) failure to use the best available science, including the science of climate change, 3) flawed approach to setting a "take" limit, and 4) inadequate consideration of impacts to critical habitat.

Some have estimated that the decision in this case will have an impact on 30 percent of the water flowing south through the Delta in the SWP. The defendants, in response to the federal court order, are preparing a new biological opinion.

As if to emphasize the precarious prospect of any water being pumped out of the Delta, in April 2007 a superior court in Alameda, in Watershed Enforcers v. Department of Water Resources,66 issued a writ of mandate periodically prohibiting the pumping of water to the SWP through the Harvey O. Banks Pumping Plant at the toe of the Delta. The court took this action in response to the DWR's failure to obtain a take permit for Delta smelt as well as spring run and winter run Chinook salmon from the Department of Fish and Game under the California Endangered Species Act. According to the court, none of the three possible exceptions to the prohibition on the taking of California-listed threatened or endangered species was applicable, and therefore the operation of the Banks Plant was an illegal take of the three species. The matter has been appealed by the DWR, among others. Theperfecting of the appeal has the effect of staying the writ, currently on appeal.

Searching for Certainty

In Water Code Sections 10910 to 10912 (WSAs), Water Code Sections 10610 to 10657 (UWMPs), and Government Code Section 66473.7 (WSVs), the California Legislature is requiring an ever-increasing level of certainty concerning water supplies “as land use planning and water supply planning move forward from general phases to more specific phases.” The California Supreme Court in Vineyard Area Citizens has determined that water supply certainty is a requirement of environmental review under CEQA in the short term and to a lesser extent in the long term.

While the viability of any existing UWMP should not be jeopardized by Vineyard Area Citizens, future WSAs and WSVs, at least in the short term, may not be possible. Although adequate water conservation may occur through strong water retention policies, waste water treatment, and residential and agricultural conservation programs, water agencies will find they have very little wiggle room statutorily to allow them the flexibility in the planning process that is suggested by the courts.

There is even a movement afoot to circumvent all the endangered species in the Delta by reviving the peripheral canal. While the recent federal and state decisions jeopardizing water flow through the Delta have led Governor Arnold Schwarzenegger and members of the legislature to revive interest in the canal, concerns remain about damage to the Delta ecosystem.

The nonlegal components in any determinant of certainty are constantly changing because population growth increases demand for water, and the physical limitations on the SWP flow of water from north to south are significant. In this climate of uncertainty, an assessment of water supply will fail—as a matter of law—to measure up to the standard of adequacy set out by the Vineyard Area Citizens court unless California changes the manner in which it uses and distributes its water. Absent these changes, the assessments mandated by the legislature and the courts will become futile exercises.
East Bay Municipal Utility District and the Association of California Water Agencies, both of which supported the bill, 2) the California Building Industry Association, and 3) local government associations (including the League of California Cities).

The Urban Water Management Planning Act, WATER CODE §§10610-10657. The UWMPA requires every “urban water supplier” to prepare and adopt an “urban water management plan,” with certain specified requirements. WATER CODE §10610. An urban water management plan is required to project in five-year increments for 20 years or the life of the plan. See Friends of the Santa Clara River v. Castaic Lake Water Agency, 123 Cal. App. 4th 1, 12 (2004).

Covered projects include residential developments of more than 500 units; shopping centers or business establishments employing more than 1,000 persons or containing more than 500,000 square feet of floor areas; office buildings employing more than 1,000 persons or containing more than 250,000 square feet of floor area; hotels or motels containing more than 500 rooms; industrial, manufacturing, or processing plants or industrial parks housing more than 1,000 persons occupying more than 40 acres or containing more than 650,000 square feet of floor area; or mixed-use projects that demand as much or more water than a 500-unit residential project.

If the supplier fails to provide the assessment within 30 days, the lead agency is required to assume that the supplier has no information to submit. WATER CODE §§10910(g)(2), (3).

WATER CODE §10911(b).

Id.

See generally R.C. Morrison & D.D. Doporto, Opening a Pandora’s Box, 12 ENVTL. L. NEWS 15, 16 (2003).

WATER CODE §§10910-10915; PUBLIC RES. CODE §21159.1.

The 500-unit threshold has prompted commentators to suggest that efforts by developers to evade SB 221 requirements will result in large multiphase residential projects being “piecemealed” into separate projects of 499 units or less. These actions, which are proscribed under CEQA, would generate litigation. See, e.g., Epstein & Kibel, supra note 10, at 9. See also McCarroll Kidman, WATER SUPPLY AND LAND USE 2 (2002).

WATER CODE §§66473.7(a)(1), 66473.7(b)(1).

WATER CODE §§66473.7(a)(2), 66473.7(b)(1).

WATER CODE §10911(b).

Id.

WATER CODE §10910(A)(4).

WATER CODE §65302(b).

Health & Safety Code §116275(a) defines “public water system” as “a system for the provision of water for human consumption through pipes or other constructed conveyances that has 15 or more service connections or regularly serves at least 25 individuals daily at least 60 days out of the year.”

WATER CODE §§65352.5(c).

WATER CODE §§10610 et seq.

WATER CODE §§65352.5(c).

WATER CODE §65302(b).

The Urban Water Management Planning Act, WATER CODE §§10610 et seq.

An “urban water supplier” generally is defined as a “supplier, either publicly or privately owned, providing water for municipal purposes either directly or indirectly to more than 3,000 customers or supplying more than 3,000 acre-feet of water annually.” WATER
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Green building requirements must strike a balance between market economics and social needs

With the landmark signing of AB 32, the Global Warming Solutions Act, in 2006, California established the most comprehensive greenhouse gas (GHG) emissions reduction program in the nation’s history. Combining regulatory and marketplace mechanisms, the program sets an ambitious goal of reducing the state’s GHG emissions by 25 percent by 2020. To achieve this goal, state and local governments are designing regulations that apply to all GHG-producing industries, and a major part of this effort involves establishing programs that reduce GHG emissions attributed to the building industry.

By encouraging—and in some cases requiring—environmentally responsible “green building” practices in building design, government regulations are playing a key role in GHG reduction in California. In fact, environmentally sensitive building regulations predate the recent trend to combat GHG emissions. Strict state energy efficiency standards have been applied to new buildings as far back as 1978, when the Title 24 building codes were first implemented. In 2004, Executive Order S-20-04 created the Green Action Team to mandate higher efficiency measures for state-owned buildings.

In addition to state regulations, numerous municipalities in California have adopted local green building programs and ordinances that mandate application of green building standards for government-owned buildings. The city of West Hollywood has just established perhaps the most aggressive green building program in the nation, which includes significant mandatory provisions for private development projects in addition to government buildings. The city of Los Angeles is in the process of designing the city’s first comprehensive green build-

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ing program, and it too is likely to require green building features for certain private-sector projects. As green building regulations become more commonplace, government officials must strike the appropriate balance between market place enhancements and regulatory requirements when drafting green building regulations. Real estate and land use attorneys in government and private practice should advise their clients of new requirements and ensure that these regulations are legally enforceable. Furthermore, lawyers who are well versed in green building mandates and techniques can help real estate developers navigate through the ever-evolving maze of green building regulations.

Principles and Methods

Though definitions vary, green building, also known as sustainable building or development, is the practice of increasing the efficiency with which buildings use energy, water, and materials to reduce their impact on the environment and human health. There are five generally accepted principles of green building: site selection, resource efficiency, energy conservation, water conservation, and indoor environmental quality. Green building programs apply these principles to encourage architects, designers, builders, building owners, and tenants to pay attention to the impact of all resources used to construct and operate buildings on health and environmental quality and to foster more livable communities.

The U.S. Green Building Council (USGBC) is a private, nonprofit corporation, founded in 1993, that established the first nationwide green building rating system, Leadership in Energy and Environmental Design (LEED). The USGBC's LEED rating system is a voluntary, consensus-based national standard for developing sustainable buildings. Although other rating systems exist, the USGBC's system is by far the most widely recognized and utilized. LEED also serves as a third-party certification program for government agencies to verify that a green building conforms to its standards.

The USGBC has developed seven LEED rating systems, each geared toward specific types of projects. These include the LEED-NC (new commercial construction and major renovation projects), the LEED-EB (existing building operations), the LEED-CI (commercial interior projects), the LEED-CS (core and shell projects), the LEED-S (schools), the LEED-H (homes), and the LEED-ND (neighborhood development). The USGBC certifies projects as LEED compliant by obtaining written verification from project architects that design elements meet established LEED goals. The LEED system awards points for achieving certain environmental and efficiency standards, including some pre-requisite green practices as well as energy-efficiency benchmarks. Points are also awarded for innovations in green technology.

Projects that obtain the highest number of points under the applicable LEED standard merit a LEED Platinum designation. Fewer points earn a LEED Gold or Silver ranking, or are referred to simply as LEED Certified. The average LEED Certified building uses 32 percent less electricity than nongreen buildings and saves 350 metric tons of CO2 emissions annually. The application of green building techniques is important because buildings in the United States use one-third of the nation’s total energy output, including two-thirds of its electricity, and produce 30 to 40 percent of all GHG emissions—more than any other economic sector. Although estimates of costs to comply with LEED certification vary, California’s Integrated Waste Management Board estimates that compliance would add only 2 percent to design and construction costs.

State Green Building Regulations

Well before AB 32, California already had one of the strictest building energy codes in the country—the Energy Efficiency Standards for Residential and Nonresidential Buildings, known as Title 24. Established in 1978 to reduce California’s energy consumption, Title 24 includes standards for energy-efficient heating and cooling systems, insulation, roof- ing materials, and electrical systems. These standards are updated periodically (most recently on January 1, 2008) to allow incorporation of new energy-saving technologies and methods. Title 24 applies to all new construction, alterations, or additions, excluding qualified state historic buildings. For each proposed new building, the California Energy Commission (CEC) establishes an energy “budget” based on a computer simulation of the building’s one-year energy use. The energy budget is used to establish specific component requirements. Designers of a building can either implement the specific energy-saving features prescribed by the CEC to comply with Title 24 or they can select alternate components, as long as the new design meets or exceeds the energy-saving performance standards outlined in the energy budget.

Title 24 has many efficiency standards that are considered green standards, and the periodic development of improved building standards within Title 24 is essential to the state’s efforts to reduce GHG emissions. However, to be considered a truly “green” building, as defined by LEED or other rating programs, a new building must be even more energy efficient than Title 24 requires. Of the five accepted principles of green buildings, only energy and water conservation are the primary focus of Title 24. Therefore, aggressive regulations that include green building standards not typically addressed within Title 24 must be cumulatively applied with Title 24 to achieve California’s GHG reduction goals.

In recognition of the need to go beyond Title 24 to dramatically improve energy efficiency, Governor Arnold Schwarzenegger established green building as a priority with Executive Order S-20-04 in July 2004. This Green Building Initiative sets a goal of improving energy efficiency in all state-owned buildings by 20 percent by 2015 and requires state-owned facilities to be designed, constructed, operated, and renovated at LEED Silver levels or higher. The executive order created a cabinet-level Green Action Team, led by the State and Consumer Services Agency (SCSA), to monitor progress. The California Building Standards Commission, an independent board within the SCSA that administers Title 24, has also established a Green Building Code Advisory Committee, which includes private-sector representatives who advise the commission on matters relating to proposed green building standards.

In the 2007 legislative session, two bills attempted to expand California’s green building regulatory efforts into the private sector. AB 888 would have mandated that certain privately developed commercial buildings, including banks and car dealerships greater than 50,000 square feet, meet the equivalent of a LEED Gold rating under a standard that the state Environmental Protection Agency will develop and implement by 2013. AB 1058 would have directed the state EPA to develop, adopt, and make available a set of voluntary green building best practices for residential home construction. Citing a bias for foreign green building materials over local products and a reliance on national standards that conflict with California’s programs, among other reasons, the governor vetoed these bills. However, additional attempts by the legislature to require statewide public sector green building standards are likely to follow in upcoming legislative sessions.

Local Green Building Programs

Local governments throughout the nation and in California have developed green building programs. The city of Austin, Texas, created the nation’s first green building program in 1991, and today 113 municipalities across the country, including 32 in California, have green building programs. A variety of policy vehicles are used to implement these programs, including guidelines, executive orders, initiatives, ordinances, and resolutions. These vehicles determine whether green building
1. A goal of AB 32 is to reduce California’s greenhouse gas (GHG) emissions by 25 percent by 2020.
   True. False.
2. Which of the following is not one of the five generally accepted principles of green building?
   A. Site selection.
   B. Resource efficiency.
   C. Reduction of GHG emissions.
   D. Water conservation.
   True. False.
3. The U.S. Green Building Council (USGBC) has developed seven LEED rating systems, including LEED-MU (mixed-use).
   True. False.
4. Conforming to Title 24 efficiency standards will meet the requirements for LEED certification.
   True. False.
5. Title 24 applies to all new construction, alterations, or additions, excluding qualified state historic buildings.
   True. False.
6. Which of the five accepted principles of green buildings is also a primary focus of Title 24?
   A. Site selection.
   B. Resource efficiency.
   C. Water conservation.
   D. All of the above.
   True. False.
7. California requires all new state-owned buildings to achieve a LEED Silver level or higher.
   True. False.
8. The Caltrans District 7 Headquarters Building in Los Angeles exceeds Title 24 requirements by 35 percent.
   True. False.
9. AB 888, signed by Governor Arnold Schwarzenegger in October 2007, mandates that certain private commercial buildings meet the equivalent of a LEED Gold rating by 2013.
   True. False.
10. West Hollywood requires all new commercial buildings and residential buildings of three or more units to include green building features.
    True. False.
11. Pasadena requires city-owned buildings with 5,000 square feet or more of new construction to obtain LEED Silver certification.
    True. False.
12. Santa Monica requires commercial and multifamily buildings to achieve energy performance levels beyond Title 24’s standards.
    True. False.
13. Which of the following is an example of a green building incentive offered by the city of Los Angeles?
    A. Reduced plan check permit fees, depending upon the level of sustainability achieved.
    B. Priority plan check for projects meeting the LEED Silver standard.
    C. Department of Water and Power financial incentives for new construction projects that are LEED Certified.
    D. A and B.
    E. B and C.
    True. False.
14. On November 15, 2007, the Los Angeles City Council adopted a green building ordinance requiring private sector projects exceeding 50,000 square feet or 50 units to be LEED Certified.
    True. False.
15. The California Constitution authorizes cities and counties to enact and enforce all land use regulations not in conflict with general state laws.
    True. False.
16. As a general rule, any exaction or condition of approval—including a requirement to comply with an applicable green building standard—must advance a substantial governmental interest.
    True. False.
17. A study demonstrating the rough proportionality of fees imposed by a city’s green building ordinance to impacts created by projects that do not comply with the ordinance is helpful to establishing an essential nexus.
    True. False.
18. Which of the following is not a legally enforceable method for applying a green building standard to a project?
    A. As a condition of approval required by an adopted green building ordinance linked to a city’s general plan.
    B. As an impact mitigation fee, when rough proportionality of the fee to the project’s impact has been demonstrated by a nexus study.
    C. In an EIR, in which a lead agency has determined that a project’s GHG emissions will not create any global warming impacts.
    D. As an agreed-upon term in a development agreement.
    True. False.
19. In a development agreement, a city grants a vested right to a developer to go forward with a project as proposed, unless future changes in the city’s land use or zoning laws interfere with the project’s implementation.
    True. False.
20. LEED certification determinations are not appealable.
    True. False.
programs have been enacted by 35 local governments in the United States. Some approaches are mandatory, while others implement primarily incentive-based programs. Real estate developers typically view expedited municipal processing as the most valuable expedite. However, it is sometimes difficult to receive expedited processing consistently from all municipal departments due to lack of coordination or staff. Other incentives are energy efficiency rebates, reduced permit fees, property tax reductions, density or floor area ratio bonuses, and parking policies are mandatory or voluntary, if they

will address both new construction and remodeling projects, and the building sectors to which they apply.

Of the 113 municipal programs, 101 are based on the LEED green building rating system. Seventy-three municipalities require certification through USGBC for at least one of their building sectors (often denoted as municipal, commercial, multifamily, residential, and industrial). A popular approach for many communities is to require LEED certification for municipal buildings but offer voluntary programs with incentives for the private sector. Fifty-five percent of municipalities with green building programs have policies for private commercial development.

Cities typically turn to LEED for private sector commercial and mixed-use projects but often include other rating systems for residential development. Some of the more established residential certification programs include the U.S. Environmental Protection Agency’s Energy Star Home program, the National Association of Home Builders’ Model Green Home Building Guidelines, and the Alameda County Waste Management Authority’s New Home Green Building Guidelines.

Although LEED certification is well established as the rating system of choice, there are some concerns with the administration and costs of the process. The LEED certification process can be time-consuming, and delays in processing applications may deter developers from pursuing a LEED project. The city of West Hollywood has recently adopted one of the most aggressive mandatory green building programs in the nation. The program—which became effective on October 1, 2007—was established by an ordinance that adds a new Green Building section to the city’s zoning regulations. Under the new regulations, all public buildings must meet LEED Certified standards, and all new residential buildings of three or more units and all new commercial buildings must comply with a Green Building Point System. Projects must achieve at least 60 of the 160 total points available in order to comply with the city’s regulations. Incentives too are provided for projects that achieve 90 points or higher. All renovations and tenant improvements must comply with baseline standards.

The West Hollywood point system resembles the LEED checklist but is unique to West Hollywood. Specifically, the point system was designed to emphasize locally available materials, encourage green elements to be incorporated early into the project design process, and provide flexibility in altering green elements as the project evolves. Certain green building practices are mandated, but flexibility is enhanced by allowing points to be earned in a variety of categories. Flexibility is also built into the program by awarding additional points for incremental energy performance increases beyond California’s Title 24 levels.

These decisions emerged from an extensive outreach process. The city formed a Green Building Team composed of city staff and a Green Ribbon Committee composed of external stakeholders. These two groups helped to identify the goals, limitations, and priorities of the program, which was developed through a series of meetings and workshops over nine months.

In contrast to mandatory approaches, the city of Pasadena’s green building program is a more modest, primarily incentive-based program. Implemented by ordinance and incorporated into the city’s Municipal Code in 2005, the program requires new city-owned buildings that are more than 4,999 square feet to obtain LEED certification. New nonresidential buildings that are 25,000 square feet or more and mixed-use or multifamily residential buildings that are four stories or taller qualify for incentives if the buildings meet LEED certification. These incentives include a rebate from Pasadena Water and Power of $15,000 for LEED Certified projects, $20,000 for LEED Silver, $25,000 for LEED Gold, and $30,000 for those projects that achieve a LEED Platinum level. Additionally, LEED projects that include affordable housing units earn a construction tax rebate of $1,000 per unit.

Santa Monica’s green building program includes a complex combination of required and incentive-based regulations and policies. All new construction and major renovations of city facilities are required to meet the LEED Silver standard. Additional requirements apply to privately owned commercial, light industrial, and multifamily buildings as outlined in two different city ordinances. The city’s Green Building Ordinance, adopted in 1999, requires construction and substantial remodels of commercial and multifamily buildings to achieve energy performance levels beyond California’s Title 24 standards and to use construction materials with recycled content. In addition, the Construction and Demolition Waste Ordinance requires projects valued over $50,000 to divert at least 60 percent of construction and demolition waste from landfills.

Santa Monica also is offering expedited plan checks as well as financial incentives for buildings registered for LEED certification. Grants for private-sector buildings start at $20,000 for a LEED Certified building and increase up to $35,000 for LEED Platinum. All new construction and major renovation projects that fall in the commercial, affordable housing, mixed-use, and multifamily residential categories are eligible. The grants help cover the additional costs of designing a LEED Certified building. The same types of projects are also eligible for the city’s Innovative Technology Grants.

The city of Los Angeles does not yet have a comprehensive green building program.
However, in 2004, the City Council required all new municipal facilities to meet LEED standards, and the city has constructed, or is in the process of constructing, 47 LEED Certified buildings. In the private sector, Los Angeles has established a priority plan checking system for green building designs meeting LEED Silver standards. The Department of Water and Power also offers priority service planning for electrical and water service for these buildings. Launched in December 2006, the DWP's Green Building Incentive Program also provides financial incentives for new construction and major rehabilitation projects that are LEED Certified. Payments are calculated using a simple formula on a cents per square foot basis using the number of points earned in the LEED energy category. The incentive rate increases for each additional point earned (for example, $.30 per square foot for 1 point, $.40 per square foot for 2 points, and so on) as projects save more energy. There is no cap per project. Therefore, a 1 million square foot development that earns four points in the energy category can receive $600,000 from the DWP.

Los Angeles's green building policies are likely to expand in the near future. In May 2007, Mayor Antonio Villaraigosa announced his Green LA Action Plan, with a goal of reducing the city’s GHG emissions by 2030 to 35 percent below 1990 levels. In line with SB 32, this goal will require expanded efforts to reduce GHGs associated with the building industry. Included in the mayor's plan is a strategy of setting new standards for green building and land use planning and reviewing current zoning and building codes to minimize the impact of GHG. As a result, Los Angeles is in the process of creating its first comprehensive green building program. In addition, a green building implementing ordinance will likely be enacted to ensure the effectiveness of the program.

On November 15, 2007, the Los Angeles City Planning Commission unanimously recommended adopting a green building ordinance that would require private sector projects exceeding 50,000 square feet of floor area or 50 residential units to meet the LEED Certified standard. The ordinance would also establish incentives for projects meeting higher levels of sustainability. The Los Angeles City Council is expected to vote on the ordinance in February 2008.

When a local government develops a green building program, it must decide whether its guidelines and regulations will be mandatory or voluntary, or a combination of both. The main advantage of the mandatory approach is that it provides a level of certainty—for the city, regarding achievement of its goals, and for developers, regarding what
they must do to gain project approval. However, if the requirements of the mandatory approach are too onerous, the real estate market may not be able to absorb the costs, or the costs will be passed on to the ultimate consumer, thus inflating real estate prices. The advantage of the incentive-based approach is that a city may be able to realize its goals without creating negative consequences for the real estate market.

Legally Defensible

City attorneys and private practitioners are often the first to test whether a municipal green building program conflicts with other state or local regulations. The California Constitution authorizes cities and counties to enact and enforce all local police, sanitary, and other ordinances and regulations, including land use regulations, as long as they are not in conflict with general state laws.34 The legal authority of the state, as the higher level of government, preempts a subordinate local government’s regulatory power.35 State green building laws preempt all local conflicting laws. Consequently, a local regulation can generally impose greater requirements for green buildings than state law, but a local regulation cannot directly conflict with or reduce state requirements. Therefore, as state green building programs emerge along with local programs, it is important for practitioners who are involved in drafting local ordinances to stay up-to-date on the progress of state regulations.

To ensure that a mandatory green building ordinance is legally enforceable, ordinance drafters must demonstrate a link or nexus between the conditions imposed by the ordinance and the government policies justifying these conditions. Failure to do so could result in unlawful conditions of approval imposed on development projects. As a general rule, any exaction or condition of approval, including a requirement to comply with an applicable green building standard, must substantially advance a legitimate governmental interest.36 This first test is often called the essential nexus rule. Furthermore, the condition or exaction must be roughly proportional to the burden or impact created by the development.37

A legally defensible green building ordinance should be based on principles enunciated in the municipality’s general plan.38 Goals justifying adoption of a green building ordinance, such as the improvement of energy efficiency or the reduction of GHG emissions associated with land development, may already exist as part of the general plan. The City of Los Angeles General Plan Housing Element, for example, includes Goal 2—which involves taking steps to preserve, stabilize, and enhance livability and sustainability in all neighborhoods throughout the city—and Objective 2.1—which focuses on promoting housing strategies that enhance neighborhood sustainability.39 In Los Angeles, additional policy goals would likely be necessary, however, to more effectively link a green building ordinance to the city’s general plan. Once linked to the general plan, the green building ordinance would simply become a tool needed to implement the general plan’s land use program. This would establish the essential nexus between the environmental policies enunciated in the general plan and the conditions imposed by the ordinance on individual projects to implement the policies.

A nexus study is an analysis that quantifies the connection between a government policy and the tools used to advance the policy.40 For green building programs, a nexus study could provide data to demonstrate how the continued construction of buildings under current policies would increase the production of GHGs that contribute to global warming. The study then would detail how the green building ordinance will reduce the emissions to acceptable levels. Nexus studies are especially valuable for programs that assess impact fees for projects that do not conform to adopted green building standards. This type of fee generally varies depending upon the amount of emissions produced by the project beyond acceptable levels. A municipality usually will complete a nexus study as part of the ordinance implementation process and publish its findings in an attached memorandum or as an appendix to the ordinance.

When a green building ordinance has not been adopted, several legally defensible methods are available to cities seeking to apply green building standards to individual projects. First, the California Environmental Quality Act (CEQA)41 compliance process for development projects can involve green building mitigation measures. This is especially true when the developer must prepare an Environmental Impact Report (EIR). CEQA requires feasible mitigation measures when a lead agency determines that a project’s GHG emissions may create a significant impact on global warming, either individually or cumulatively.42

Every new building constructed will conceivably generate GHGs. The likelihood, however, that GHG emissions from one project, especially a small project, would significantly contribute to global warming is minimal. When considered cumulatively with the GHG emissions from related projects in an EIR, the possibility that the one project would contribute enough GHGs to increase global warming is more likely. This possibility is compounded further when considering the cumulative effect of all new development planned within a jurisdiction, such as a county, city, or community plan area. Recently, the California attorney general and the county of San Bernardino settled a lawsuit alleging that the county did not take global warming into consideration when it drafted its new growth plan.43 As a result, the potential impact of GHG emissions from new development on global warming must now be addressed and mitigated in the plan’s EIR.

A common justification found in recent EIRs for reaching the opposite conclusion—that a project’s GHG emissions should not be considered cumulatively—is that the project implements some of California’s GHG reduction strategies. One strategy is to promote green building practices and design within the proposed project. Implementing this strategy as mitigation will reduce impacts on global warming. Mitigation also can apply to all new development within a geographic area where the area’s growth plan EIR analyzes the potential cumulative impact of the development on global warming.

Another option for municipalities seeking to introduce green building features into the local process is to do so as part of a Development Agreement (DA),44 a Disposition and Development Agreement (DDA), or an Owner Participation Agreement (OPA).45 These agreements are feasible when a city’s Community Redevelopment Agency has jurisdiction over a proposed project. A DA is essentially a contract between a city or city agency and a developer. The city or the city’s agency grants a vested right to the developer to go forward with a project as proposed, irrespective of any future changes in the city’s land use or zoning laws that might otherwise interfere with the project’s implementation.46 A DA thus provides a level of certainty to the developer. In consideration for this certainty, the developer agrees to provide one or more “extraordinary public benefits” to the city. An extraordinary public benefit in a DA is something that cannot otherwise be required of the developer by the city as a condition of approval or a mitigation measure. One such public benefit could be to include green building practices and design into the proposed project. By agreeing to include green building features in exchange for a vested development right, the developer and the city will have mutually consented to a bargained-for term in the DA that is legally enforceable, much like an agreed-upon term in a simple contract.

Counsel for real estate developers should understand the spectrum of green building programs, including each program’s unique requirements and incentives. Land use counsel should advise their clients whether green building programs applicable to a development project are mandatory or voluntary.
before the project design and site plan is prepared and filed with the local jurisdiction. Even when green building programs are voluntary, finding a way to include green design features could spell the difference between success and failure for a controversial project as it maneuvers through the contentious entitlement process. Interest in green building is high among local officials and government planning staff. Therefore, developers have a valuable opportunity to gain allies by including green features in their projects. Environmental activists, a traditional enemy of real estate developers, may be mollified by the proposal of environmentally sensitive designs.

Expertise in green technologies also will allow land use counsel to advise clients appropriately regarding the costs and feasibility of different measures. Land use lawyers can deliver valuable advice about meeting applicable compliance standards. They can help clients with LEED—a quasi-legal process that involves the presentation of evidence by applicants, a compliance determination, and an internal appeals process. Attorneys who understand the process can make the difference between certification and noncertification for their developer clients.

Green development is not just a popular slogan. As government officials implement strategies and programs to combat global warming, reduce energy consumption, and preserve natural resources, green building programs will continue to be an essential component of the development process. The number of green building programs has expanded dramatically in recent years, and the inclusion of mandatory green building features in local programs is a growing trend. Land use practitioners must take the lead in understanding this unfolding new era of environmental compliance. By understanding the regulations that implement green building programs as well as the technologies that make these programs successful, government and private land use lawyers can help to ensure that these programs are legally enforceable, fair, and effective. 

1 Health & Safety Code §§38500 et seq.
3 CAL. CODE REGS. tit. 24, pt. 6.
5 Los Angeles City Council Motion, File No. 07-0705.
7 Id.
12 CAL. CODE REGS. tit. 24, pt. 6.
13 CAL. CODE REGS. tit. 24, pt. 6, subch. I, §100(a) 3.B.
15 The results of these efforts have produced at least 10 state buildings that have received LEED Certified status or higher, including the LEED Silver Caltrans District 7 Headquarters Building in Los Angeles, which exceeds Title 24 energy efficiency requirements by 35 percent. See California Department of General Services, at http://www.green.ca.gov/GreenBuildings/leedcertbldgs.htm.
17 Government Green Building Inventory, University of Wisconsin-Extension (July 2007).
18 See id.
19 See id.
21 See, e.g., West Hollywood, Cal., Ordinance No. 07-762. If developers are pursuing LEED certification, they must retain a LEED accredited professional, register the project with the USGBC, and submit a LEED checklist and documentation with the initial green building plan to the city.
22 See, e.g., Burbank, Cal., Ordinance No. 3652. Builders can receive reduced plan check permit fees, depending upon the project’s achieved level of sustainability.
23 WEST HOLLYWOOD MUNICIPAL CODE §19.20.060.
27 Santa Monica City Ordinance No. 2165/CCS.
28 SANTA MONICA MUNICIPAL CODE ch. 7.60.
29 See note 10, supra.
30 L.A. City Council File No. 06-0411 (Aug. 21, 2006).
31 See note 10, supra.
32 Id.
34 CAL. CONST. art. XI, §7.
38 See Gover’t Code §65300, which requires that each city adopt a general plan to guide the long-term physical development of the city.
40 Impact fees based on a general legislative determination, including those supported by a nexus study, are not subject to heightened scrutiny and are almost always within the power of a local government to impose. Elrich v. City of Culver City, 12 Cal. 4th 854 (1996).
41 The California Environmental Quality Act (CEQA), PUB. RES. CODE §§21000 et seq., CAL. CODE REGS. §§15000 et seq.
42 CAL. CODE REGS. §13126.4(a).
44 Gover’t Code §356.86(d-4).
45 Health & Safety Code §§33000 et seq.
46 Gover’t Code §65864.
Spurred by enactment of the Global Warming Solutions Act of 2006, California’s investor-owned utilities are accelerating the transition from fossil fuels to satisfy caps on carbon emissions from generating plants and meet a mandate that, by 2010, they obtain 20 percent of their delivered electricity from renewable energy resources. According to the California Wind Energy Association (CalWEA), California has sufficient renewable energy resources to meet this goal, and by 2020 wind energy alone could satisfy the objective. To accomplish this, 20,000 megawatts (MW) of wind capacity would need to be generated. While this translates into a tenfold increase in today’s capacity, “a total of 17,000 MW of proposed projects inside or near the border of California have already submitted applications for grid interconnection at the California ISO (as of June 2007). Along with the 2,400 MW already operating, these wind energy projects in the pipeline are nearly enough to meet the 20% goal.”

The issue, however, is not a lack of wind energy sources within California and neighboring states but rather accessi-
The availability of wind, solar, geothermal, and tidal power in California is not in doubt. Instead, as CalWEA notes, a critical issue is securing locations where such resources can be harnessed. The question of location involves more than finding the windiest ridgeline or the sunniest desert. Once a suitable site is identified, the issue turns to who owns and controls that site. After the site’s title is researched, the developer must engage in negotiation to secure the property rights afforded by California law that will allow the energy to be harvested. If these negotiations are successful, attention must then be given to permitting issues and the proximity of transmission access. And last, the resolution of these issues must be structured in a way that will permit the developer to take full advantage of the financial and statutory incentives available for renewable energy projects.

While a blustery site is a necessity for a wind energy project, there are less apparent but equally significant characteristics that determine if a site will be suitable, including wind speeds, the times of day and seasons during which the wind blows at various speeds, air density, directionality, and turbulence. A developer also needs to know the site’s geology, because that may impact foundation design, site access, project layout, and construction. In addition, environmental factors—including wildlife and flooding exposure—weigh on project feasibility. This entire body of information and more must be known before a successful wind energy project may proceed. Before conducting this due diligence, however, the developer must first gain the necessary rights to the site. Until site control (the rights to long-term use) is secured, there is little or no value in assessing a prospective site for development.

Site control is accomplished through two commonly accepted alternatives. The first is an option to acquire long-term rights through a lease, easement, or fee interest. During the option term, the developer optionee may be granted a license or an easement in gross to access the property, erect and monitor meteorological data-gathering equipment, conduct geotechnical studies and archaeological and biological investigations, and apply for land use permits and other rights or authorizations for the potential project. These investigations, together with community outreach and the search for permanent financing, typically take three to five years. The option term is also set accordingly. Option fees depend on the region, the relative strength of the expected wind resource, and the value of the site based on its present use.

The second means of controlling the target property without making a long-term commitment upfront is a multiterm or staged period lease. The tenant is not only granted the right to evaluate the feasibility of project development on the site but also has the opportunity to terminate the lease during the first few years at little or no cost. Rent during a so-called initial term or development period is essentially equivalent to an option fee and is evaluated similarly in the marketplace. Energy project developers rarely acquire site rights by purchasing a fee interest. Doing so may cause an imbalance in project financial models, because the capital expense of—and corresponding equity investment in—a project is increased substantially, without the tax benefits of depreciation, since real property is a nondepreciable asset.

Of the two alternatives, leases and easements (in gross) are the ones most commonly used in the wind power industry to secure site rights. For a developer, the issue then becomes what interest the property owner is willing to convey for what period of time. A lease vests exclusive possession of the property in the lessee against all persons, including the owner of the fee interest, for a defined period. By comparison, an easement merely gives the holder a right to use the property; the owner of the underlying fee retains the right of possession subject to the holder’s use. California courts, like most jurisdictions, are not likely to rely on the title of the conveyance instrument but instead will look to the covenants and conditions of the contract to determine if an agreement constitutes a lease or an easement.

A number of other factors may also influence the pursuit of a particular legal course toward site development. The historical practice of the project participants, the personal preference of counsel, and state and federal statutes restricting foreign ownership of land interests or requiring disclosure of such interests may influence the choice of conveyance. Some energy developers are based outside the United States. Finally, and perhaps most important, site conditions may decide which course is best. For example, if a wind energy project will be operated on a ranch or farm, a lease provision granting an exclusive right of occupancy may seem inappropriate. In actuality, however, agricultural landowners and the financial community accept wind project leases as an appropriate instrument for establishing the necessary site rights.

**Advantages and Disadvantages**

Leases and easements also have other advantages and disadvantages. In California, a lease for a term exceeding 35 years, including extension rights, is deemed a change in ownership and is subject to property tax reassessment. As property values statewide have skyrocketed over the past 10 years, and many rural parcels have not changed ownership in decades, project developers and landowners set lease terms, including extensions, to conform to the 35-year limit. On their face, easements would appear to be exempt from this limitation. No clear precedent exists in which a taxing authority has attempted to reassess a property subject to an easement for wind development exceeding 35 years. However, given the courts’ policy of relying on the covenants and conditions of the contract, including the grant of possessory rights and the term, no assurance can be given that a contract described as an easement will afford protection against reassessment and the attendant increase in property taxes.

On the other hand, a lease grants the lessee authority that is not available to an easement holder. If the land is leased or subject to a lease option, a prudent energy project developer has the opportunity to divide the site so it can be developed in phases or through separate financing structures. In addition, under California law, a developer who is a lessee has the inherent authority to grant easements, including ones for transmission access. Easements may also be created to benefit other adjacent or nearby projects. For example, projects developed in phases may use a common facility for connection to the electrical grid. If the project phases are not under common ownership, one project owner may need to grant the other a right of access to roads and transmission lines.

In contrast, state law treats an easement as merely an interest in real property and not an estate. Because an easement can be created only by the holder of an estate in real property, an easement holder lacks the authority to grant an easement for the benefit of another. By definition, this principle precludes an easement holder from granting a subeasement. Although there is no statutory authority for the proposition, California courts and the Restatement of Property have stated that an easement in gross may be apportioned, thereby creating a separate interest in the real property if 1) the apportionment or division does not result in a surcharge on the servient tenement and 2) the division does not contradict the intent of the parties when the easement was created (as evidenced by the grant of an exclusive easement). In the context of a wind energy project, a typical easement may grant a project developer the exclusive right to develop and generate wind energy from a site but convey only nonexclusive rights for access and transmission.

Under certain circumstances, the holders of nonexclusive easements may learn that they acquired less than expected. The right to respond to an encroaching structure on a project site is one example. Since a lessee has
a right of exclusive possession or occupation of the property, its remedies include ejectment, trespass, and corresponding injunctions to protect the integrity of the grant of basic site rights.\textsuperscript{11}

Because an easement holder has only a right of use, the holder’s remedy is to file an action for nuisance based on interference with that person’s use and enjoyment of a property right.\textsuperscript{12} Fixed structures such as buildings or public utilities that physically encroach on another person’s property are considered permanent nuisances.\textsuperscript{13} An easement holder will not be able to seek injunctive relief from these structures because only damages are available to alleviate permanent nuisances.\textsuperscript{14} Damages are measured by the diminution in the value of the easement holder’s interest that results from the nuisance.\textsuperscript{15} In calculating damages to a wind energy development, a developer would likely use wind data collected by an independent engineer to assess the impact of interfering structures and determine the energy lost from the project as a result. Because a lessee has a right to injunctive relief, a lease may provide greater protection to the developer’s interests than an easement, with less risk of interference and injury to the developer’s rights.

The rights afforded lessees under the federal bankruptcy law illustrates another advantage of using a lease. Under the statute governing assumption and rejection of executory contracts of the bankruptcy estate, a debtor, “subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.”\textsuperscript{16} However, the Bankruptcy Code provides an exception for leases and protects the rights of a lessee of real property in the event a lessor rejects the lease.\textsuperscript{17} In those situations, the lessee may elect to retain its rights of use, possession, payment terms, and assignment for the balance of the term. No such exception exists for easements. On the contrary, the characterization of a wind energy project easement as executory seems inescapable, given the typical provision in easements for periodic payments or royalties. Since these payments continue to be made before the end of the easement term, the contract remains partially unperformed and, by definition, executory. Thus, a lease creates a more reliable instrument for preserving a project developer’s rights in the event of a landowner’s bankruptcy.

The Bundle

A project’s site agreement is but one element in a bundle of contractual rights and hard assets (e.g., fixtures and equipment) essential to the successful development and operation of a wind energy facility. For each stick in the bundle, the essential question remains, “Does the asset have the characteristics necessary for use as collateral in structured financing?” The site agreement must include certain provisions that recognize the typical nonrecourse nature of project finance. Accordingly, the site agreement must be suitable collateral for long-term debt.

A wind energy project’s value lies in the amount and consistency of wind that flows across a project site and the energy that can be generated through wind turbines (also known as wind energy converters or WECs). Consequently, any risk of interference with, or obstruction in, the free flow of wind across the project property must be considered and eliminated or otherwise protected against through the use of wind easements and non-interference provisions in leases. Thus, a lessor will typically covenant not to permit the erection or maintenance, generally, of any structure that could cause turbulence or reduce effective wind speed nor permit any structure to be erected that is greater than 30 feet in height on the leased premises and any adjoining property owned by the lessor.

Similarly, the financing of a project could be adversely affected if the property owner retains certain rights to use the project property in a way that is incompatible with a

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Developers must also satisfy lender concerns about rights held by third parties that could interfere with a project’s operations. In the 1990s, early wind project developers in California and elsewhere frequently secured open-ended options to develop projects over large swaths of land across some of the windiest portions of the state. These wind energy developers subsequently declared bankruptcy, merged with third-party entities, or sold their assets to other developers. Nevertheless, their options to lease properties survived. Today there may be a risk that the developers or their successors could construct facilities on lands adjacent to a project that would impede the free flow of wind to a project’s wind turbines. Similarly, a neighboring landowner may not have land that is ideal for wind project development but is suitable for the construction of a large silo, biofuels facility, or mining operation. Further, third parties may have perpetual mining rights, which may be exercised at any time. Any one of these scenarios poses a risk of interference with a project and could prevent project financing.

For these reasons, a developer must become thoroughly familiar with the ownership history of the property on which it proposes to develop a project by engaging in detailed and exhaustive title work. Additionally, the developer should expect its lenders to require a surveyor’s certificate and a title insurance policy the terms of which extend for the duration of the power purchase agreement between the project operator and any power purchaser (also known as an offtaker).

If a third party retains certain superior rights over the project property, a developer will find it beneficial to enter into a subordination, nondisturbance, and attornment agreement (SNDA) with that party. Under a SNDA, the senior rights holder agrees to subordinate its interests to those of the project developer and not interfere with the developer’s project. However, many senior right holders—especially large entities with a multiplicity of such interests—may have little motivation to execute a SNDA. In such cases, a nondisturbance and consent agreement will provide similar protections in terms of non-interference without requiring the superior party to subordinate its rights to those of the project developer.

Developers must also be cognizant of
activities or development on neighboring properties. This risk may be reduced through the use of good neighbor agreements, setback waivers, and wind easements. To protect a project and provide assurances to lenders, any agreement should incorporate the detailed terms of the wind easement. In addition, the instrument should define as specifically as possible the uses allowed or not allowed in the easement area to prevent any adverse effects to the project. Other title obstacles, such as existing utility, transmission, or other rights on or across the property, may be reduced or eliminated through the use of crossing agreements, shared use agreements, or consent agreements. A project lender's risk tolerance or aversion will typically dictate the number and level of detail of these protective agreements.

Finally, absolute unrestricted ingress to and egress from a project site is critical for practical and financial reasons. Lenders typically will not finance, nor title insurers insure, projects that purport to rely on prescriptive easements, adverse possession, or other undocumented or unrecorded uses. Access must be fully insurable—that is, free of any risk of interference, usurpation from senior right holders, or obstruction. Close attention to title and survey work and lease or easement agreements that provide for access for the life of a project are critical to financing and insuring a project.

As wind energy projects have become more prevalent and more visible, their opposition has increased. In California, opponents to wind energy developments have attempted to advance their goals through the environmental review process. Neighboring landowners have asserted such issues as the failure to adequately examine visual impacts in an environmental impact report (EIR) under the California Environmental Quality Act. Similarly, wildlife advocates have claimed inadequate analysis of a project's effects on avian life. Wildlife and recreational interests have sought to protect its interests through many customary provisions, including:

- The opportunity to cure defaults within an extended period and the right to direct notice of defaults.
- An agreement by the landowner allowing the lender to “step into the shoes” of the lessee or easement holder if the project entity defaults under any loan agreements.
- The right to enter into a new site control agreement if the developer files for bankruptcy.
- A limitation of project entity liability and landowner indemnities regarding the presence of hazardous materials.
- A minimum of restrictions on the ability to assign the site control agreement and an absence of any requirement that the landowner consent to any restructuring of the financing of the project.

**Regulation of Foreign Interests**

The wind energy industry is consolidating. Larger project developers are acquiring smaller ones or merging. Over the past three years, the number of foreign entities acquiring a majority or sole interest in domestic wind developers has increased. As a result of these transactions, the requirements of the federal Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA) may be triggered. AFIDA provides that any time a foreign person acquires or transfers any interest in agricultural land, the foreign person must report the transaction to the U.S. Department of Agriculture, through the local county Farm Service Agency (FSA), within 90 days of the transaction.

“Foreign person” is defined to include corporations and limited liability companies created or organized under the laws of a foreign government, and corporations and limited liability companies organized or created under the laws of a U.S. state when “any interest” either direct or indirect, of 10 percent or more of that business is held by a corporation or other entity created or organized under the laws of a foreign government.

Failure to comply with AFIDA's reporting...
requirements may result in a penalty of up to 25 percent of the fair market value of the foreign person’s interest in the land. Submission of an incomplete, false, or misleading report, or failing to report an acquisition or transfer, is subject to an automatic penalty of 25 percent of the fair market value, as determined by the FSA, of the foreign person’s interest in the agricultural land involved in the violation. Foreign persons who violate the statute by filing reports after the reporting deadline may be subject to a penalty of one tenth of 1 percent of the fair market value, as determined by the FSA, of the foreign person’s interest in the agricultural land for each week that the violation continues; however, the total penalty may not exceed 25 percent of the fair market value of the interest. The penalties are subject to downward adjustments based on: 1) the total time the violation existed, 2) the method by which the violation was discovered, 3) any extenuating circumstances concerning the violation, and 4) the nature of the information misstated or not reported. Under AFIDA, a foreign person is exempt from reporting if its interest is 1) a security interest, 2) a leasehold of less than 10 years, 3) a contingent future interest, 4) a noncontingent future interest that does not become possessory upon termination of the present estate, 5) a nonagricultural easement or right-of-way, or 6) an interest solely in mineral rights. If a project developer uses a standard hybrid land lease-wind easement agreement, it may be considered a lease because it creates a landlord-tenant relationship over a term of years. At the same time it may also operate as an easement because the use of the land is limited and the property owner has a concurrent right to use the real property for agricultural purposes. Project developers should work closely with counsel to determine the applicability of AFIDA to their interests and report their interests or transfer of interests as applicable under the statute.

Successful wind energy projects are developed and financed on a foundation of clear, well-established site rights. Ensuring exclusive rights to the development and use of wind resources on the land requires keen attention to the particularities of the property and an understanding of state, federal, and local laws that could affect the developer’s real property interests. In siting wind energy projects, location is everything, and a wind energy developer with aspirations of turning wind into profit must have an instrument that clearly protects its rights to occupy the property and finance its project.

6 CAL. CONST. art. XIIIA; REV. & TAX. CODE §§60, 61(c); E. Gottschalk & Co., Inc. v. County of Merced, 196 Cal. App. 3d 1375, 1385-86 (1987).
7 CIV. CODE §§761(3), 804.
8 CIV. CODE §801.
12 CIV. CODE §§3479, 3481.
14 Spaulding v. Cameron, 38 Cal. 2d 265, 267-68 (1952).
18 CIV. CODE §801.
21 “Agricultural land” is defined as all land in excess of 10 acres used for forestry production, farming, ranching, or timber production within the last five years. 7 C.F.R. §781.2(b). Land used for forestry production means lands exceeding 10 acres in which 10 percent is “stocked by trees of any size, including land that formerly had such tree cover and that will be naturally or artificially regenerated.” Id.
22 7 C.F.R. §781.1.
23 “Any interest” is defined broadly to include everything except 1) security interests, 2) leaseholds of less than 10 years, 3) contingent future interests, 4) non-contingent future interests that do not become possessory upon the termination of the present possessory estate, 5) surface or subsurface easements and rights-of-way used for a purpose unrelated to agricultural production, and 6) an interest solely in mineral rights. 7 C.F.R. §781.2(c).
24 7 C.F.R. §781.2(g), (k).
25 Fair market value is determined by the FSA according to the value of the land on the date the penalty is assessed. If the land is no longer used for agricultural purposes, the fair market value is based on the value as of the last date the land was used as agricultural land. 7 C.F.R. §781.4(c).
27 7 C.F.R. §781.4(b)(2).
28 7 C.F.R. §781.1(b).
29 7 C.F.R. §781.4(b)(3).
30 7 C.F.R. §781.2(c).
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Perhaps you drive a hybrid. Your bath towels are made from bamboo. And, as you read this, you’re sipping Fair Trade coffee topped off with organic milk. In your personal life, the same ideals that led you to become a lawyer guide you in making choices that respect the environment. But when you’re practicing law, it’s tough to put the environment first.

Where would our offices be without Redwells full of pleadings, contracts, agreements, and letters stacked floor to ceiling? As lawyers, we each produce between 20,000 and 100,000 pages of paper per year, or 10 to 50 pages per billable hour. This not only destroys many trees—the paper industry is a principal contributor to worldwide deforestation—but the processes used to produce paper also make that industry the number-one consumer of fresh water in the world, and the paper industry is the third largest industrial generator of greenhouse gases that contribute to global warming.

The Law Office Climate Challenge, a voluntary program developed jointly by the American Bar Association Section of Environment, Energy, and Resources and the U.S. Environmental Protection Agency, asks lawyers to do something about this. The program recognizes those who have accepted the challenge by listing them on the ABA’s Climate Challenge Web page. The Waste Wise initiative, one of three Law Office Challenge programs, asks participants to adopt simple, cost-effective best practices for law office paper management, including reducing paper usage, increasing use of recycled paper, and improving recycling efforts. The ABA will recognize a law office as a Climate Challenge Leader if two of the following best practices are adopted:

- Employ double-sided copying for at least 50 percent of the pages in internal and draft documents.
- Assure that at least 90 percent of the paper used in the office has, in total, a minimum of 30 percent postconsumer recycled content.
- Recycle at least 90 percent of discarded office paper.

The Law Office Climate Challenge also recognizes law offices that participate in Green Power Partnership or Energy Star initiatives. Green Power Partnership participants support the growing market for renewable energy while reducing demand for polluting conventional power sources by purchasing energy generated by wind, solar, or water power or buying “offset credits” to support these energy sources. Energy Star participants pledge to reduce their energy usage by 10 percent through such means as purchasing energy efficient equipment and appliances and using motion sensor lights that shut off automatically. More information on the ABA-EPA Law Office Climate Challenge can be found on the ABA’s Web page.

Whether your law office employs five hundred lawyers or just five, these and other actions can reduce environmental impacts, save money on office supplies and energy, and use environmental stewardship as a marketing tool with existing and potential clients. Many businesses have adopted environmental initiatives of their own, including giving preferential consideration to business partners who have made a similar commitment.

A lawyer’s desire to improve the environment is hardly restricted to the four corners of his or her office space. By reducing the number of cars on the road, air quality can be improved significantly. Your office can encourage employees to telecommute one or more days per week or subsidize their use of public transportation, such as by purchasing and distributing monthly Metrorail cards and organizing carpools for people who commute from the same parts of town. And your office could even consider making a small contribution toward the purchase of energy-efficient hybrid vehicles by employees.

A second step that law offices can take is to purchase and distribute compact fluorescent light (CFL) bulbs for use in the homes of firm personnel. These bulbs provide the same amount of light as incandescent light bulbs at a fourth to a fifth of the energy cost, and they last longer. If every U.S. household replaced just one incandescent light bulb with a CFL, that step would eliminate roughly the equivalent of the emissions generated by one million cars. And keep in mind that most homes use 15 to 30 bulbs.

Recycling bottles and cans is a third step. If your office’s building services does not offer that capability, you can provide depositories and ask volunteers to take bottles and cans to recycling centers at the end of each week. As many parents know, schools today often conduct fundraising by asking students to recycle and collect the deposit on bottles and cans. Your office can help.

There is no need to limit your environmental efforts to recycling on the back end. Your office can do the most environmental good by reducing the waste it creates in the first place. Try eliminating the creation of beverage container waste by stocking office kitchens with ceramic coffee mugs instead of paper cups. When holding an office lunch meeting, avoid the need for disposable plates and cutlery by having the caterer—perhaps one that prepares organic foods—provide reusable plates and silverware.

Challenge yourself by asking what actions your office—and you individually—can take to improve the environment.
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