

# Going... Going... Green!

By **Jeremy R. Moss, ESQ.**

The environmental movement had its beginnings as a grassroots effort in the late 1960s. What began as a campaign for environmental awareness and activism has now matured into a full-fledged social movement, oftentimes called the green movement. Popularized by award-winning documentaries, celebrity endorsements, and government incentive programs, the green movement has worked its way into main-stream culture.

Almost every major U.S. industry has already been affected by the green movement. Automobile and other major manufacturing industries have changed product design and manufacturing processes to maximize environmental efficiency; major airlines have spent billions to build more efficient fleets; and chemical companies have invested equal amounts to make their products more environmentally friendly.

It is not surprising that the green movement has made its way into the residential building industry. According to the U.S. Environmental Protection Agency, residential buildings accounted for more than one-fifth of the total energy consumption in the United States as of 2002. The Smart Communities Network, a Web site run by the National Center for Appropriate Technology, estimates that buildings account for almost half of all sulfur dioxide emissions, one-quarter of all nitrous oxide emissions, and one-tenth of the particulate matter in the atmosphere around the United States.

The desire to make a significant impact on the quality of the environment has inspired individuals, developers, lawmakers and yes, environmentally-conscious community associations, to make a push for the construction and conversion of "green condominiums."

## What is a "Green" Condominium?

The most accepted standard for "green" construction in the United States is the Leadership in Energy and Environmental Design Certification, commonly referred to as LEED or LEED certification. LEED certification is a nationally accepted benchmark for the design, construction, and operation of buildings in the United States and is overseen by the United States Green Building Council (USGBC). LEED was established, in part, to define what constitutes a "green building."



The first LEED condominium in Virginia

Applications submitted to the USGBC for LEED certification are awarded points based on a number of factors, including sustainability of the site, water efficiency, energy efficiency, atmospheric impact, use of materials and resources, indoor environmental quality, and building innovation and design.

A building's total points are tallied and the building is certified based on the following scale:

- 26 to 32 points – LEED Certified;
- 33 to 38 points – LEED Silver;
- 39 to 51 points – LEED Gold;
- 52 to 69 points – LEED Platinum.

There are different versions of the LEED rating system for specific project types. The most common LEED certification rating system for a condominium is either LEED for *New Construction* or LEED for *Existing Buildings*, depending on the stage of development.

### LEED for New Construction

LEED certification for *New Construction* is the rating system used to certify new commercial, institutional, and residential building projects. Developers seeking LEED certification for a new condominium building must follow the LEED for New Construction rating system. The rating system scale matches the scale set forth above that ranges from LEED Certified to LEED Platinum.

In order to achieve LEED for New Construction certification, the developer must follow a number of steps. First, the developer must register the eligible condominium on the USGBC's Web site ([www.usgbc.com](http://www.usgbc.com)).

The developer must then identify and put into operation the improvements and upgrades necessary to obtain certification. After the improvements and upgrades are in place, the developer should then complete a LEED for New Construction application.

The application should document all available building performance data and operational methods. After the application is complete, the application must be submitted to the USGBC for an initial review, along with any supplemental information the LEED reviewers request.

Finally, the USGBC will conduct and prepare a final LEED certification review of the project and determine certification status depending on the number of points awarded.

### LEED for Existing Buildings

LEED certification for *Existing Buildings* is substantially different from LEED certification for New Construction outlined above. Whereas LEED for New Construction is a one-time act (the construction or major renovation of a building), LEED for Existing Buildings is an on-going process that certifies that the operation and maintenance program of a building maximizes operational efficiency while minimizing a building's impact on the environment.

While the actual certification process is very similar to the process described for LEED for New Construction, many would describe LEED for Existing Buildings as the more complicated process. Inherently involved in the decision to seek LEED certification, especially in an existing condominium, are conflicting interests. Factions supporting certification or opposing the cost of certification may make the necessary consensus impossible. An association considering whether to seek LEED certification should first conduct an initial self-evaluation process.

An association may wish to establish a committee to review the LEED rating system to evaluate the potential for attaining certification. Then, an association or its appointed committee, should set a certification goal based on its review of the LEED rating system. After a goal is set, an association should assess current equipment and determine what equipment can and should be upgraded or replaced. Next, an association should assign the responsibility for writing green maintenance and operation policies. The drafting of these policies can be done in-house, or can be contracted out to a qualified professional.

Once an association has completed the initial review, performed an equipment audit, and created new green policies, the association should prepare a budget and time-line for the certification



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process. If necessary, the association should consult a professional to assist in developing a budget and, as always, should be realistic. Once those steps are completed, the association can then register the project with the USGBC and begin to take advantage of the resources the USGBC provides.

As with all board and committee meetings, LEED committee meetings must be open to all unit owners, including open forum, during which unit owners can comment on the LEED certification process and decision.

LEED certification is a quasi-judicial process. Although the process is separate from the Federal and state court systems, it is subject to the presentation of evidence, a determination on the facts presented, and an appeals process. The process of obtaining LEED certification requires careful attention from the applicant and even more careful record keeping and documentation. Many LEED applicants employ the assistance of an environmental or LEED consulting group, or an attorney who specializes in the LEED application process, to assist in the application for certification.

**In Virginia, a public offering statement is required to include, among other things, provisions of any warranties provided by the developer on the units or common elements other than the warranty against structural defects. In a green condominium, these warranties may be far reaching and the public offering statement may characterize the condominium based on its achieved or desired LEED certification.**

LEED has been criticized by some as costly, bureaucratic, and inflexible. For some, especially existing condominium unit owner associations, seeking LEED certification may not make sense. Careful analysis should be given to the issue by an association board of directors prior to seeking LEED certification, weighing the costs and benefits of the LEED designation, and considering the consequences if the project fails to achieve certification.

Although LEED is perhaps the best-known rating system, other rating systems exist. Even so, a condominium does not have to be certified or rated to become more “green.” Many condominiums have and will choose to work outside of the rating systems to become more efficient and environmentally friendly.

### The Public Offering Statement

The developers of residential condominiums in Virginia, Washington, DC, and Maryland are required to prepare and provide to prospective purchasers a public offering statement. The public offering statement contains information important to a prospective initial purchaser in a condominium. The purpose of the public offering statement is to disclose fully and accurately the characteristics of a condominium as well as the unusual, unique, and material features of the condominium. Public offering statements are only required to be provided to those who purchase units directly from a developer – either in a new condominium or a conversion condominium.

The public offering statement in a green condominium is an important document, but poses several legal issues. In Virginia, a public offering statement is required to include, among other things, provisions of any warranties provided by the developer on the units or common elements other than the warranty against structural defects. In a green condominium, these warranties may be far reaching and the public offering statement may characterize the condominium based on its achieved or desired LEED certification.

The drafter of a public offering statement must give special consideration to the claims and warranties made in the public offering. The public offering statement is at the same time a sales document and a document that creates legal rights and obligations. In determining the level of detail describing the scope and efficiency of certain improvements, the draftsman must balance these sometimes conflicting interests.

The public offering statement for a LEED certified condominium should detail amenities and features that garnished points during the LEED certification process. These features were carefully documented and recorded during the LEED application and review process and there is little chance that they will be misrepresented.

There is no need to warrant, or disclaim, that a condominium may or may not continue to be LEED certified. Currently, LEED certification for New Construction is a one-time application. There is currently no mechanism in place with the USGBC to follow up with and re-certify LEED for New Construction buildings. However, certain warranties or disclaimers might be made in the efficiency or operation of certain special components.

### Drafting or Amending Condominium Instruments

Use restrictions and other provisions contained in typical condominium instruments can create a number of obstacles for an association wishing to achieve LEED certification. For the drafter of documents for a new condominium, the job of preparing green-friendly condominium instruments is relatively easy. The drafter, considering the advice of an environmental or LEED professional, should draft the condominium instruments with the flexibility and authority to maintain LEED certification. For existing condominiums, the board of directors and association legal counsel may find it necessary to prepare significant amendments to allow the association to pursue LEED certification or some other form of “going green.”

Despite being in different stages of a condominium’s life-cycle, both an initial draftsman and an association considering amendment to their condominium instruments have similar challenges in drafting green-friendly condominium instruments.

Typical condominium instrument models contain provisions that make it difficult for a condominium to go green. Prohibitions on solar panels, clotheslines, and rain barrels are just a handful of restrictions that have made recent headlines. The drafter of green-friendly condominium instruments must balance the benefits and desire of being environmentally friendly with the need to maintain property values and the aesthetic quality of a particular building. Changing these more obvious provisions is just the first step in creating a green condominium. For those developers or associations seeking LEED certification, more extensive provisions may have to be included in the drafting or revision of a set of condominium instruments.

Bill Cromley, the developer of Cromley Lofts, a LEED Gold certified condominium in Alexandria, Virginia and the first LEED



certified condominium in Virginia ([www.cromleylofts.com](http://www.cromleylofts.com)) commented that, "Looking at a set of condominium documents, it would be difficult to pick out some of the restrictions required for LEED certification." As an example, LEED certification sometimes requires restrictions on smoking in units and on the common elements of a condominium in order to preserve indoor air quality. On its face, a smoking restriction may not be immediately apparent that

its purpose is for LEED certification.

Aside from use restrictions, the drafter must also provide enough flexibility in the operation provisions of the condominium instruments to pursue and/or maintain LEED certification. These provisions may include language authorizing or requiring the association board of directors to apply for and/or recertify LEED certification. Other provisions that may be included is the express authorization for the association to hire an environmental or energy auditor, LEED professional or legal counsel who specializes in LEED certification. Also, a green certification committee may be expressly created and its powers and duties set forth directly in the condominium instruments.

The drafter preparing the condominium instruments for a new (or conversion) green condominium must provide for the flexibility necessary to achieve and maintain LEED certification.

### Local Government Approval and Incentives

Many local governments throughout the Washington metropolitan region have adopted the USGBC's LEED rating system as a method of measuring the environmental performance of the area buildings. Along with the adoption of the LEED rating system, many local governments have also established incentive programs for builders to build environmentally friendly buildings. Some local governments have taken more significant steps than others.

Arlington County, Virginia has adopted the USGBC's LEED certification and offers an incentive program to developers who commit to the rating system. In Arlington, a private developer may apply for an additional density allowance if the project achieves LEED certification. For those developers in Arlington who do not commit to achieving LEED certification, the County requires the developer to contribute three cents per square foot to the County's Green Building Fund. The fund is used to provide education and outreach to both developers and the community on green building.

The Commonwealth of Virginia allows any counties, cities, or towns to exempt or partially exempt solar energy or recycling equipment from local property taxes. For large scale condominiums, these tax incentives may add up for association residents. A number of Northern Virginia counties and cities offer at least partial exemption for solar energy and recycling equipment: Alexandria, Fairfax, Falls Church, Loudoun, Prince William, and Spotsylvania. The

amount of the tax benefit for each city and county varies; more information can be found through the Virginia Department of Mines, Minerals and Energy (<http://www.mme.state.va.us/>).

In 2004, the Maryland legislature began to offer a similar optional tax credit for high performance buildings from local real estate taxes. Also, for a time, the Maryland Energy Administration offered a tax credit for the construction of green buildings in the state that met certain criteria. However, for at least the time being, the Energy Administration is no longer accepting applications for the tax credit. More information about the credit or possible future credits is available at the Maryland Energy Administration's Web site (<http://www.energy.state.md.us/programs/commercial/green/building/index.html>).

### CAI Joins the Green Movement

On a national level, CAI has been active and is becoming more intent on developing awareness of how community associations can join the green movement. CAI has issued an official statement supporting environmental stewardship and stressing the importance of homeowners making informed decisions on environmental issues that meet their community's needs and preferences. Also, the Foundation for Community Association Research, an affiliate of CAI, worked with the U.S. Department of Energy to release a best practices report pertaining to energy efficiency in 2002, and re-released an updated report in 2007. This spring, CAI is launching an organization-wide *green communities initiative* to address environmental issues in community associations on a number of different levels.

### Conclusion

With its widespread press and appeal, "going green" has become both fashionable and beneficial for community associations and condominium communities in particular. Whether it's becoming "green" through a formal certification process or a more informal, grassroots approach to becoming more environmentally aware, developers and community leaders must consider the many legal and practical considerations that affect "going green." Associated with these legal considerations is an assessment and determination of legal costs, risks, and benefits. Costs, risks, and benefits should be carefully analyzed and weighed by a developer or community board of directors and discussed with legal counsel or other qualified professionals when appropriate. ☐



Jeremy R. Moss is a 2007 graduate of the Columbus School of Law at the Catholic University of America in Washington, D.C. and an associate at MercerTrigiani in Alexandria, Virginia. Jeremy's practice focuses on general representation of common interest community associations, including advising community associations with respect to daily business operations, contract matters, voting and proxy issues, and quorum and meeting requirements. Jeremy is also member of the Chapter's Publications and Community Relations committees.