

States Starting to Require Architects and Contractors to Design and Construct Public Buildings to Achieve LEED Silver Certification

By Angela Stephens, Stites & Harbison, PLLC

While many local jurisdictions and cities across the country have started passing regulations which implement and require sustainable design and construction practices, relatively few states have taken steps to mandate that certain public buildings achieve certain levels of LEED® Certification.

Eighteen states (Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Maryland, New Jersey, New Mexico, Nevada, Rhode Island, South Carolina, South Dakota, Utah, Virginia, and Washington) have adopted laws and regulations mandating that the construction of public buildings achieve LEED Silver Certification. Although the majority of States do not yet require that public buildings be designed and constructed to achieve a LEED Silver Certification, many of these States encourage their agencies to use green building practices or use LEED as a guideline.

The Kentucky law is illustrative of those states that have enacted a LEED requirement on public buildings. Kentucky requires that, after July 1, 2009, all public buildings (for which fifty percent (50%) or more of the total capital cost is paid by the Commonwealth of Kentucky) shall be designed and constructed in accordance with Kentucky's new High Performance Building Regulations.

Under Kentucky's new regulations, all public buildings (as defined above) worth \$25 million or more in budget "shall be designed, built, and submitted for certification to achieve a rating of Silver Level or higher" using LEED 2009. Public buildings between \$5 million and \$25 million shall be designed, built, and submitted for certification to achieve a rating of LEED Certified or higher. Additionally, public buildings greater than \$5 million shall achieve a minimum of 7 points under the LEED Energy and Atmosphere Credit 1, Optimize Energy Performance. Public buildings between \$600,000 and \$5 million in budget shall be designed and built using the LEED rating system as guidance.

There are two exceptions to the new regulations. The first exception applies when a public building fails to achieve the LEED rating due to the sole failure to receive a point for Material and Resource Credit 7 regarding certified wood. Under this first exception, the building will be deemed to meet the LEED rating required, if the project used wood products certified under the American Tree Farm System or the Sustainable Forestry Initiative.

Under the second exception, a building which is required to meet the high performance building standards may be granted an exemption if there is an "extraordinary undue burden on the agency if project compliance is required." Factors that will be considered in determining if such an extraordinary undue burden exists include whether (1) the cost of compliance exceeds a building's life cycle cost savings, (2) compliance increases costs beyond the funding capacity for the project, (3) compliance compromises the historic nature of a building, (4) compliance will violate any laws, (5) the unique nature of a project makes it impractical, or (6) the building will use another high

performance building program such as Energy Star or Green Globes.

In addition to the requirements mentioned above, all public buildings (as defined above) shall be designed and constructed so that they are capable of being rated as Energy Star buildings. However, unlike the requirements discussed above, an exemption cannot be granted from this requirement.

For more information about these regulations or other green initiatives which may impact your business, please contact Angela Stephens at astephens@stites.com or at 502-681-0388.

About the Author: Stites & Harbison, PLLC has a Green Law Practice Group which is devoted to the unique legal issues associated with green initiatives and new regulations addressing environmental stewardship and sustainability. The Green Law Group is comprised of attorneys including construction attorneys, business and finance attorneys, tax attorneys, and environmental attorneys. Within this group, 10 attorneys are LEED Accredited Professionals (APs), and one attorney is a LEED Green Associate (GA). LEED AP and GA attorneys have demonstrated a thorough understanding of green building practices and principles and have the tested ability to apply the LEED Rating System standards to designing and building projects. For more information visit www.stites.com.

Notes:

1. See <http://www.usgbc.org/Display-Page.aspx?CMSPageID=1852> (last visited October 14, 2009).
2. KRS 56.775.
3. 200 KAR 6:070 Section 2(1) High Performance Building Standards.
4. *Id.* at Section 2(2).
5. *Id.* at Section 2(3).
6. *Id.* at Section 2(4).
7. *Id.* at Section 3(2).
8. *Id.* at Section 4.
9. *Id.*

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