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In Third Parties We Trust? The Growing Antitrust Impact of Third-Party Green Building Certification Systems for State and Local Governments

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Traditionally, state and local government building codes have served as the minimum standards in the United States for the construction industry; however, with the recent nationwide emphasis on more environmentally friendly building policies, many governments have turned to third-party verification programs to ensure that real estate development meets green building objectives.[1] Based on their inherent police powers, state and local governments are able to exercise land use regulation to restrict private interests on property so long as the regulation protects the health, safety, morals, and general welfare of the public.[2] Many local governments exercise this power on private real property through zoning ordinances and building codes.[3]

Some of the earliest examples of zoning in the United States include ordinances aimed at health and safety concerns.[4] Likewise, many state and local governments decided to require and incentivize high performance or green building components for development

1 BROOKS RAINWATER WITH COOPER MARTIN & BRENDAN KARA, LOCAL LEADERS IN SUSTAINABILITY: GREEN BUILDING POLICY IN A CHANGING ECONOMIC ENVIRONMENT 4 (2009), http://www.aia.org/aiaucmp/groups/aia/documents/document/aiab081614.pdf (explaining that the number of municipalities with green building programs increased from 92 to 138 between 2007 and 2009. This fifty percent increase coincided with the detail that "24 of the 25 most populated metropolitan regions in the United States are built around cities with a green building policy.").

2 ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 9 (2d ed. 1993).

3 *Id.*

4 *Id.* § 9.3 ("[T]he British colonies frequently enacted regulatory ordinances banning slaughter houses, gunpowder mills, and the like to the outskirts of the municipality.").

projects within their jurisdictions due to safety and productivity concerns for their residents and the local environment.[5]

Depending on a given government's strategy and limitations, it will choose different approaches for accomplishing these policy objectives. In some instances, the government will choose to develop its own standards for determining whether a project conforms to its goals. Other times, it may select standards developed by an independent and private third-party organization.

With these recent trends as a backdrop, scholarly legal literature has only started to explore the statutes, ordinances, and regulations that compel or incentivize private developers to obtain recognition from private third-party verification organizations. Additionally, possible antitrust implications could arise among those government entities seeking to promote green building initiatives, the third parties providing standards, and private sector real estate and construction stakeholders. This Article seeks to address these issues. In Part I we present current green building regulatory structures, including an in-depth discussion of both third-party and government-designed programs.[6] In Part II we examine the various requirements and incentives that the three levels of government—federal, state, and local—consider when implementing green building initiatives.[7] In Part III we explore and analyze the antitrust implications that may develop in the relationship between private third-party programs engaged in green building initiatives with various levels of government.[8] We conclude this part with a discussion of where these relationships may proceed with little risk of antitrust liability, as well as those relationships where risk may indeed exist. Finally, in Part IV we assess government adoption standards.[9]

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5 *See, e.g.*, SAN FRANCISCO, CAL., BLDG. CODE ch. 13C, § 101.2 (2010), *available at* http://www.energy.ca.gov/title24/2008standards/ordinances/sanfrancisco/2010-12-29_San_Francisco_Green_Building_amendments.pdf ("The purpose of this chapter [imposing green building requirements on private development] is to promote the health, safety and welfare of San Francisco residents, workers, and visitors by minimizing the use and waste of energy, water and other resources in the construction and operation of buildings in the City and County of San Francisco and by providing a healthy indoor environment.").

6 *See infra* text accompanying notes 10–86.

7 *See infra* text accompanying notes 87–175.

8 *See infra* text accompanying notes 175–261.

9 *See infra* text accompanying notes 262–67.

I
CURRENT GREEN BUILDING REGULATORY STRUCTURES

Once a jurisdiction decides to pursue environmental policies that coincide with sustainable development or green building, either an owner seeking to take advantage of an offered incentive or the sponsoring governmental entity must decide on how to achieve compliance. Usually, the offered program prescribes a specific method for compliance or provides for alternatives. In choosing a program, the sponsoring governmental entity must select between the classic business options of whether to develop a compliance standard internally or select one created by an independent third party. Accordingly, we will evaluate the major national third-party programs adopted by many jurisdictions, as well as some noteworthy governmental standards.

A. Third-Party Programs Available for Adoption

While interest in green building in the United States dates back to the late nineteenth century, there was a modern resurgence after the energy crisis of the 1970s.[10] Many of the major environmental organizations began insisting upon holistic methods and requirements in designs for their office buildings.[11] These efforts led to the "Architecture at Crossroads" meeting in 1993 where the International Union of Architects and the American Institute of Architects (AIA) put forward the Declaration of Interdependence for a Sustainable Future.[12] This document established fundamental principles and practices to enable sustainable development.[13]

Subsequently, the AIA published its "Environmental Resources Guide" in 1994, with a more in-depth update in 1996.[14] The Rocky Mountain Institute released its own publication called "A Primer on Sustainable Building" in 1995, and a joint effort by the U.S. Department of Energy and Public Technology, Inc. created the "Sustainable Building Technical Manual" in 1996.[15] From these initial efforts, several organizations determined the need to provide a

10 CHARLES K. KIBERT, SUSTAINABLE CONSTRUCTION: GREEN BUILDING DESIGN AND DELIVERY 47–49 (John Wiley & Sons 2d. ed. 2007).

11 *Id.* at 47.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

recognizable system that could quantify and verify the sustainability features within a given construction project.

1. United States Green Building Counsel—Leadership in Energy and Environmental Design

The now ubiquitous Leadership in Energy and Environmental Design (LEED) green building rating system was created by the United States Green Building Council (USGBC) in 1998. Generally considered to be the predominant green building assessment tool, it was the product of a thorough development process that took place over four years under the direction of Rob Watson of the Natural Resources Defense Council.[16] During this time, the USGBC members involved with LEED's development decided to pursue a market-driven approach through which individual building owners would decide the program's fate, rather than compelling compliance through regulations.[17] In addition, LEED's early developers sought a broad-based program that could meet the diverse needs of various participants in the building industry to ensure its acceptance as a workable system.[18]

As such, the LEED program encompasses a collection of rating systems that provide measurements of a building's green features.[19] Within this collection, the LEED program maintains different certification tracks for New Construction (NC), Existing Buildings: Operations and Maintenance (EB: O&M), Commercial Interiors (CI), Core and Shell (CS), Homes (H), and Neighborhood Development (ND).[20] Even though the developers of the program originally intended it to apply to office buildings, the program has expanded to include applications for lodging, retail stores, school campuses, volume building programs, healthcare facilities, laboratories, and multifamily residences.[21]

Guided by the LEED program type, a governing committee established by the USGBC creates tailored requirements for certification through a template that distributes points into several

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16 *See id.* at 56, 77 (noting that another program actually preceded LEED, but it failed due to the decision to create a system based on the standards structure of the ASTM).

17 *Id.* at 56.

18 *Id.* at 57.

19 *Id.*

20 *See Rating Systems*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222 (last visited Apr. 13, 2012).

21 *Id.*

categories based on consensus-driven sustainable practices.[22] The points assigned to each category create a weighting system—based on the developing committee's judgment—for the various attributes and set forth minimum standards for compliance.[23] A project may achieve certification when it demonstrates that all of the points earned in each of the different categories surpass the thresholds established by the committee.[24] The LEED program also allows for additional recognition noted as Silver, Gold, or Platinum when a project attains higher point totals than required for basic certification.[25]

To determine whether a project meets the certification standard, the LEED program utilizes a documentation-based verification approach.[26] A project must meet certain basic prerequisites for sustainable practices, while the program also provides options in other areas for an adaptable compliance standard against a set menu of choices.[27] By allowing this flexibility, the LEED program standard takes into account geographic variability while ensuring a level of sustainable compliance for each project it endorses through certification.

To start the process, an applicant must first register the project through LEED Online.[28] At that time, the applicant will provide identifying information for the project; the applicant must consent to the LEED Project Registration Agreement and pay the registration fee.[29] As the design and construction process proceeds, the applicant will apply for LEED certification and technical review. When an applicant submits for this recognition, the verification process

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22 *LEED Committees*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1750 (last visited Apr. 13, 2012). *See also What LEED Measures*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1989 (last visited Apr. 13, 2012) (noting that LEED promotes a whole building design approach by recognizing critical inputs from fundamental areas such as siting, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, locations and linkages, awareness and education, innovation in design, and regional priorities).

23 *See How to Achieve Certification*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1991 (last visited Apr. 13, 2012).

24 GREEN BLDG. CERTIFICATION INST., LEED CERTIFICATION POLICY MANUAL 4 (2011), *available at* http://www.gbci.org/Libraries/Certification_Resources/LEED_ND_Certification_Policy_Manual.sflb.ashx.

25 *Id.*

26 *Id.* at ¶ 11.

27 *Id.*

28 *Id.* ¶ 9.

29 *Id.*

requires corroborating evidence through documents, attestations, data, and other information that supports compliance with each point applied toward the total needed for certification.[30] Upon a final review, a project will receive a determination as to the certification, level awarded, or denial of overall certification or individual credits.[31]

Given the flexibility and thoroughness of the LEED program, many different governmental entities found the verification and certification aspects of the LEED program sufficiently rigorous and reliable; as a result, they have adopted it for use within their own jurisdictions to promote sustainable policy objectives.

2. Green Building Institute—Green Globes

Offering its own approach to assessing a building's sustainable characteristics, Green Globes is another popular rating system that has achieved sizeable market penetration in North America. This system is derived from the United Kingdom's Building Research Establishment's Environmental Assessment Method (BREEAM) developed in 1992. It encompasses the oldest efforts—dating back to 1988—to advance high performance standards when constructing office buildings in England.[32] The Canadian government and trade organizations adopted this program using the name Go Green Plus, which grew to be very popular.[33] In the United States, the Green Building Institute (GBI) owns and operates the Green Globes system—the first third-party verification approach to receive accreditation by the American National Standards Institute (ANSI).[34]

As is common with assessment standards produced by governmental building research organizations, the Green Globes system provides a tool to assist developers in meeting market demand for environmentally sensitive buildings.[35] The current programs offer rating systems for new construction and for the continual

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30 *Id.* at 13. Since LEED now encompasses a collection of rating systems, the requirements, schedule, and policies will vary accordingly. *Id.* at 18.

31 *Id.* at 18–20 (explaining that the process does allow a project to file an appeal for further consideration should a dispute occur).

32 *See* KIBERT, *supra* note 10, at 65.

33 *See What is Green Globes?*, GREEN GLOBES, http://www.greenglobes.com/about.asp (last visited Apr. 13, 2012); *see also Green Globes Tools*, ANSI/GBI STANDARD, http://www.thegbi.org/green-globes/ansi-gbi-standard.asp (last visited Apr. 13, 2012).

34 *Id.* (noting that the USGBC did not achieve this designation until 2009, and the LEED system itself is not ANSI-accredited).

35 *See* KIBERT, *supra* note 10, at 56.

improvement of existing buildings.[36] In rating a project, the system utilizes a questionnaire-based method where the construction documents section of the program provides the source for attaining a given level of qualification.[37] In other words, qualification is based on self-assessment. Nonetheless, a GBI authorized assessor must validate the qualification to promote a building as Green Globes-certified.[38]

More specifically, Green Globes evaluates a project based on an assignment of points for the following categories: the Project Management Policies and Practices; the chosen Site; an Energy component; a Water factor; the use of Resources, Building Materials, and Solid Waste; an evaluation of Emissions and Effluents; and the Indoor Environment.[39] When the project achieves a minimum of thirty-five percent of the available points, it qualifies for formal certification.[40] At that time, an independent third-party assessor reviews the documentation and actually visits the project to complete an evaluation.[41] The assessor then gives a recommendation to the GBI for the appropriate level of certification for the project on a scale of one to four green globes.[42]

Commentator and academic Charles Kibert points out some of the distinctive aspects of the Green Globes system in contrast to LEED.[43] He explains that, in the LEED system, a project team completes and submits documents electronically to an evaluation group, but those with intimate knowledge of the project neither contact nor discuss the project and its green features with the reviewers.[44] Furthermore, the independent assessor in Green Globes physically examines the project to determine whether what was promised was actually built in the

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36 *Green Globes Overview*, GREEN BLDG. INITIATIVE, http://www.TheGBI.org /green-globes/ (last visited Apr. 13, 2011) [hereinafter *Green Globes*].

37 *Green Globes New Construction*, GREEN GLOBES INITIATIVE, http://www.thegbi.org /green-globes/new-construction.shtml (last visited Apr. 13, 2011) [hereinafter *Green Globes New Construction*]; *Green Globes Continual Improvement of Existing Buildings*, GREEN BLDG. INITIATIVE, http://www.TheGBI.org/green-globes/continual-improvement -for-existing-buildings.asp (last visited Apr. 13, 2012) [hereinafter *Green Globes Continual Improvement of Existing Buildings*].

38 *See Green Globes*, *supra* note 36.

39 *See Green Globes New Construction* & *Green Globes Continual Improvement of Existing Buildings*, *supra* note 37 (noting that the Green Globes Continual Improvement of Existing Buildings contains the same categories minus the one for siting).

40 *See Green Globes*, *supra* note 36.

41 *Id.*

42 *Id.*

43 *See* KIBERT, *supra* note 10, at 65.

44 *Id.*

field, a step that is not required under current versions of LEED.[45] Finally, Green Globes uses a variable method to calculate the total achievable points, whereas LEED utilizes a fixed system.[46] Accordingly, Green Globes includes only those categories and subcategories available to a project; the LEED system does not reduce its certification criteria for characteristics that may be outside of a development's control.[47]

Hence, Green Globes limits its scope to the work of the project team while ignoring issues outside its control to provide a viable and robust third-party evaluation system for jurisdictions looking to include a compliance aspect to their green or high performance building policies.

3. National Association of Home Builders—ICC 700

In an attempt to provide a more specific third-party verification system for homes across the country, the National Association of Home Builders (NAHB) unveiled its latest initiative to provide residential green building certification.[48] The NAHB partnered with the International Code Council (ICC)[49] to create the ICC 700 National Green Building Standard in 2007.[50] The ICC 700 was the first residential green building rating system accredited by the American National Standards Institute (ANSI),[51] and it continues to battle USGBC's LEED for Homes rating system for overall market share.

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45 *Id.*

46 *Id.*

47 *Id.* (citing situations like building on a brownfield or not locating a project near a bus stop as examples where Green Globes adjusts the achievable point total in contrast to the lack of flexibility contained in the LEED program).

48 *See generally About NAHB Model Green*, NAT'L GREEN BLDG. PROGRAM, http://www.nahbgreen.org/AboutNAHBGreen/default.aspx (last visited Feb. 28, 2012).

49 *About ICC*, INT'L CODE COUNCIL, http://www.iccsafe.org/AboutICC/Pages/default.aspx (last visited Apr. 13, 2012) ("The International Code Council (ICC) was established in 1994 as a non-profit organization dedicated to developing a single set of comprehensive and coordinated national model construction codes.").

50 *ICC 700 National Green Building Standard*, NAT'L GREEN BLDG. PROGRAM, http://www.nahbgreen.org/NGBS/default.aspx (last visited Apr. 13, 2012). The NAHB initially launched its program in 2006 without the ICC. *See* Darren A. Prum, *Green Buildings, High Performance Buildings, and Sustainable Construction: Does it Really Matter What We Call Them?*, 21 VILL. ENVTL. L.J. 1, 26 (2010) (noting that in its original form, the National Green Building program offered a builder a checklist of requirements with different levels of achievement that allowed for self-certification instead of the current method that provides third-party verification).

51 *Id.*

In putting together its program, the NAHB incorporated mandatory prerequisites that all projects must achieve in order to earn certification.[52] Projects must also earn points from all six of the program's categories to maintain certification.[53] These categories include "lot and site development; energy, water, and resource efficiency; indoor environmental quality; and homeowner education."[54]

Similar to other programs, a project can earn Bronze, Silver, Gold, or Emerald certification based on overall green building features incorporated into the structure.[55] The Emerald certification, which is the highest, requires a home to incorporate energy savings of sixty percent over the baseline.[56] However, in a stark contrast to other rating systems, an ICC 700 project's highest level of certification is set by its lowest category score level.[57]

Distinct from the other private, third-party verification systems, the NAHB program has unique characteristics due to its relationship with the ICC and ANSI. The ICC relationship means that most of the provisions in the NAHB program will work together with other ICC building codes. This unique aspect provides a local government with the flexibility to incorporate all or part of the program into a local building code because, unlike LEED and Green Globes, the NAHB drafted the ICC 700 program with code-compliant language. Moreover, ANSI's accreditation process mandates that the NAHB program will undergo regular reviews, which include opportunities for public comments.[58] The NAHB's ICC 700 program thus provides a strong residential green building rating system that offers jurisdictions a well-intentioned, consensus-developed, flexible, voluntary, and third-party verified certificate for promoting sustainable construction policies.

Each of these rigorous third-party verification systems offer governmental policy decision makers the opportunity to implement a

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52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 AIA CINCINNATI, COMPARISON OF UNITED STATES GREEN BUILDING COUNSEL'S LEED FOR HOMES AND NATIONAL ASSOCIATION OF HOME BUILDERS NATIONAL GREEN BUILDING STANDARD 11 (2010), *available at* http://www.greenresourcecouncil.org/AIA%20Cinci%20NGBS%20LEED.pdf.

58 *See ICC 700 Nat'l Green Building Standard*, *supra* note 50.

public-private relationship that promotes sustainable goals without the need to maintain the specialized knowledge, expertise, and care required in this quickly developing field.

B. Government-Designed Programs

In several instances, state and local governments have decided to create their own programs to determine whether a building qualifies for special treatment. Each of the following pieces of legislation was enacted in response to the unique circumstances in each jurisdiction, creating captive programs for their distinct environmental needs.

1. Austin Energy Green Building

In 1985, the City Council of Austin, Texas, started the Austin Energy Green Building program (AEGB), which pioneered the country's first comprehensive rating system for evaluating the sustainability of buildings due to more stringent government requirements at the local level.[59] In this groundbreaking initiative, the developers created a system that scored a building on a five star scale for its impact on the environment and community.[60] The original program presented a novel approach that considered many complex and contributing features (e.g., climate, building and energy efficiency, water and materials, durability, health, and safety) for commercial, multifamily, and residential properties within the rating system.[61]

Currently, the AEGB comprises three different programs: Commercial Green Building, Single-Family Green Building, and Multifamily Green Building.[62] At the center of these programs is a computerized rating system that awards points for following sustainable practices; the points are verified by site visits.[63] An AEGB

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59 Mary Tuma, *Nation Follows Austin's LEED*, COMTY. IMPACT NEWSPAPER, Jan. 15, 2010, *available at* http://www.impactnews.com/articles/nation-follows-austin%27s-leed (noting that the AEGB program rated its first building two years before the USGBC came into existence). AEGB became a charter member of the USGBC, hosted the inaugural convention for the fledgling organization, and allowed its staff to participate in the development and creation of the LEED program. *Id.*

60 *Id.*

61 *Id.*

62 *See Building Professionals*, AUSTIN ENERGY GREEN BLDG., https://my.austinenergy.com/wps/portal/aegb/aegb/programs (last visited Apr. 13, 2012).

63 AUSTIN ENERGY GREEN BLDG., COMMERCIAL GUIDEBOOK V2010_02, 3, 4 (2010), *available at* http://my.austinenergy.com/wps/wcm/connect/3241bd0043363fddb3e4f3ac1623868e/aegbCommercialGuidebook.pdf.pdf?MOD=AJPERES, [hereinafter

representative will examine the site throughout the project and will visit, at a minimum, during early, middle, and final/completion stages of construction to ensure compliance.[64]

Within the rating system, these programs also allow applicants to select between Performance or Prescriptive tracks for earning credits.[65] If an applicant chooses the Prescriptive direction, then the program dictates a precise solution for receiving the point.[66] In contrast, the Performance approach allows an applicant the latitude to select other methods to fulfill the requirement, but the applicant must also demonstrate equivalency to other sustainable practices in order to receive the credit.[67] With this flexibility, the rating program assesses the building and awards it a star level based on the total points achieved.[68] If a building meets the basic prerequisites, it receives one star.[69] Additional stars awarded to a building signify an increase in the building's green features.[70]

Recently, the AEGB and NAHB programs decided to offer a dual certification for projects in central Texas so buildings can receive recognition by both organizations and avoid duplicative effort, inspections, and paperwork.[71] By taking such an action, the AEGB looked to gain broader national attention for its pioneering program, while the NAHB sought to expand its understanding of how a program needs to adapt due to changing times and technology.

COMMERCIAL GUIDEBOOK]; AUSTIN ENERGY GREEN BLDG., GUIDE TO THE SINGLE-FAMILY HOME RATING VERSION 2010.1, 5, 6 (2010), *available at* https://my.austinenergy.com/wps/wcm/connect/b9a73300433640a6b40ef7ac1623868e/aegbSingleFamilyHomeRatingGuide.pdf?MOD=AJPERES [hereinafter FAMILY HOME RATING GUIDE]; AUSTIN ENERGY GREEN BLDG., MULTIFAMILY GUIDEBOOK V2010_02, 2–6 (2010), *available at* https://my.austinenergy.com/wps/wcm/connect/dbb29e0043364031b3f1f3ac1623868e/aegbMultifamilyGuidebook.pdf.pdf?MOD=AJPERES [hereinafter MULTIFAMILY GUIDEBOOK].

64 *See* COMMERCIAL GUIDEBOOK, FAMILY HOME RATING GUIDE, & MULTIFAMILY GUIDEBOOK, *supra* note 64.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 Press Release, City of Austin, Texas, Austin Energy Green Building to Offer Dual-Certification with National Green Building Standard (Nov. 3, 2010), *available at* http://www.austinenergy.com/About%20Us/Newsroom/Press%20Releases/Press%20Release%20Archive/2010/greenBuildingStandard.htm.

The AEGB program thus created a novel and rigorous approach to incorporating sustainable practices into the construction industry that ignited a movement many years later and inspired several other third-party verification systems across the country.

2. State of New York

Originally conceived in 1995, the State of New York instituted the nation's first tax-based incentive program for green buildings in 2000.[72] In taking this action, the drafters of the legislation tackled the thorny issue of determining qualifications for the tax credit.[73] However, due to a state law preventing the use of third-party benchmarks that may change over time and some issues associated with the fledgling LEED program, New York chose to prescribe its own requirements.[74]

Under the Green Building Tax Credit (GBTC), the state directly stipulated requirements for compliance.[75] While this strategy for achieving a green building differs from the alternative-based LEED program, it also maintains some similarities as well.[76]

Beginning with the energy consumption component, the GBTC determines compliance based on the structure's energy usage, whereas LEED uses material costs as a basis for its choices.[77] Moreover, the GBTC requires an indoor air quality plan prior to and during construction as well as in the operation and maintenance of the building following its commissioning, but a LEED rated building need not complete one in order to be deemed compliant.[78]

In addition, the GBTC requires participants to keep track of the performance of buildings and tenants in the program.[79] This recordkeeping covers performance reports for indoor air quality and energy.[80] The documents that fall into these categories include findings from annual air monitoring evaluations together with

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72 *See, e.g.*, CRAIG KNEELAND, N.Y. STATE ENERGY RESEARCH & DEV. AUTH., NEW YORK STATE'S GREEN BUILDING TAX CREDIT 1 (2006), http://epa.gov/statelocalclimate/documents/pdf/4_20_06_Austin_GBTC_paper_Kneeland.pdf.

73 *Id.*

74 *See id.* at 5.

75 *Id.*

76 *Id.*

77 *Id.* at 5–6.

78 *Id.* at 6.

79 *Id.*

80 *Id.*

verification that smoking provisions were enforced and that those responsible resolved any requests to sort out any indoor air quality issues.[81] Also, the monthly and initial performance results of photovoltaic and fuel cell technologies as well as the annual energy consumption for the building must be documented. But the regulations leave any comparisons between theoretical and actual performance to research projects.[82]

While the New York compliance program for a green building sets forth its own requirements, it also maintains a few areas in conjunction with the LEED program. This occurs with the use of refrigerants and associated equipment.[83] In these situations, the regulations turn to the LEED rating system's language for compliance.[84] Likewise, the enabling legislation also requires the GBTC to follow the LEED program in building materials, finishes, and furnishings.[85] Ultimately, the GBTC program generally corresponds with the LEED requirements as long as they also include the Additional Commissioning Credit with Systems and an Energy Management manual and post-occupancy review.[86]

Hence, the AEGB and GBTC pioneered the modern movement of assessing and evaluating green or high performance buildings in order to further more environmentally friendly policies while using financial incentives to motivate market participants to voluntarily support and promote sustainability across the construction industry.

II
GOVERNMENT REQUIREMENTS AND INCENTIVES

Because different buildings negatively impact the environment in different ways, the majority of those involved with climate change initiatives call for an international, or at the very least a national, approach when addressing issues like sustainable construction because of the large-scale nature of environmental degradation caused by development activities.[87] Called the Matching Principle, this

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81 *Id.*

82 *Id.*

83 *See Energy and Climate*, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/60.html (last visited Apr. 13, 2011).

84 *Id.*

85 *See* KNEELAND, *supra* note 72, at 5.

86 *Id.* at 6.

87 *See* Sarah B. Schindler, *Following Industry's LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285, 296 (2010).

position is also supported by other theories like the Race to the Bottom, where higher tiered governments try to set broader environmental policy goals to prevent competition among lower level jurisdictions that set regulations with progressively lower compliance thresholds in order to attract development.[88] However, the Matching Principle theory argues that most of the impacts from real estate development create local-level, negative environmental externalities (like stormwater runoff, construction debris, and negative air quality), bolstering the belief in marrying purely local environmental issues like land use with the appropriate level of government response.[89]

Government programs that provide incentives for green and high performing buildings, as currently constituted, tend to fall into three distinct categories based on the programs' tier level. At the federal level, the efforts tend to focus on government-constructed and government-occupied buildings without addressing a regulatory framework for the private sector. At the state level, a variety of different programs have been implemented to induce participation in green buildings from the private sector, but none compel compliance from nongovernmental developers. Finally, local governments appear to have taken the most detailed approach in their codes: they provide the main interface with private development projects located within their jurisdiction. Note that this last structure comports with the notion that the Matching Principle demands a more local-level approach to regulating the negative environmental impact of buildings and development.

A. Federal

The federal government's programs focus on internal activities that reduce its environmental footprint.[90] The recent approach for the federal government's involvement with third-party standards begins with the Energy Policy Act of 2005. Congress instructed the National

88 *Id.* at 301–03.

89 *Id.* at 296–300.

90 *See* KIBERT, *supra* note 10, at 48 (pointing out that one commentator explained that the 1993 "Greening of the White House" became one of the early undertakings to gain publicity regarding the federal government's efforts towards sustainable construction projects). These efforts showed dramatic energy cost savings of around $300,000 per year, decreases in emissions of approximately 767 metric tons of carbon per year, and substantial reductions in the related costs for water and solid waste. *Id.* These achievements led to new efforts in other parts of the executive branch of the government like the U.S. Post Office, the Department of Defense, the Department of Energy, and the General Services Administration. *Id.*

Institute of Building Sciences to determine whether the currently applied benchmarks incorporated the latest technological standards.[91] Then, the Office of the Federal Environmental Executive (OFEE) conceived and brought Executive Order (EO) 13423 to President George W. Bush for his signature on January 24, 2007.[92] This directive reinforced and provided instructions for all parts of the executive branch of government to adhere to the Federal Leadership in High Performance and Sustainable Buildings Memorandum of Understanding previously agreed upon by nineteen different agencies in January 2006.[93]

Subsequently, Congress turned many parts of EO 13423 into law when it passed the Energy Independence and Security Act of 2007 (EISA).[94] Through this legislation, Congress revised sections of the National Energy Conservation Policy Act and mandated energy management goals across the federal government.[95] Moreover, the EISA instructed different organizations within the government like the General Services Administration (GSA) and the Department of Energy (DOE) to take action with regard to high performance and green buildings.[96]

Most recently, President Barack Obama signed EO 13514, which includes additional goals and objectives applicable to high performance buildings for all parts of the executive branch of the government.[97] Beyond the existing goals in EO 13423, EO 13514 reiterates the necessity of achieving fifteen percent of an agency's existing building inventory via sustainable practices. It also instructs the executive branch to make annual progress toward one-hundred percent conformance with the guiding principles established in the 2006 Memorandum of Understanding.[98]

As a result of all these actions, the Environmental Protection Agency, the OFEE, and the Whole Building Design Guide of the

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91 Energy Policy Act of 2005, Pub. L. No. 109-058, 119 Stat. 594, § 914 (2005).

92 Exec. Order No. 13,423, 72 Fed. Reg. 3,919 (Jan. 26, 2007).

93 *Id.*

94 GEN. SERVS. ADMIN., SUSTAINABILITY MATTERS 13 (2008), *available at* http://www.gsa.gov/graphics/pbs/Sustainability_Matters_508.pdf.

95 Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 437, 121 Stat. 1492, 1619–20 (2007).

96 *Id.*

97 Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (Oct. 5, 2009).

98 Exec. Order No. 13,423, 72 Fed. Reg. 3,919 (Jan. 26, 2007); Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,119 (2009).

National Institute of Building Sciences came to together to issue the Federal Green Construction Guide for Specifiers.[99] In this document, the government created recommendations for internal use when listing specifications for a project to ensure compliance with all applicable high performance and green building directives.[100]

The Federal Green Construction Guide for Specifiers turns to independent verification requirements with details encompassing directives from different parts of the government.[101] The Specifier Note begins by explaining that after modification in 2002, OMB A-11 now states, "Agencies are encouraged to incorporate Energy Star or LEED building standards into up-front design concepts for new construction and/or building renovations."[102] It further explains that since 2003, the GSA supports conformance with the USGBC's LEED program and the availability of other systems.[103] The note specifically mentions other programs like the Austin Green Building Program and Green Globes, while the guide contains language for these as well as the ASTM 2430 and ICC 700-2008 National Green Building Standards.[104]

While the GSA promotes LEED as its main program for high performance or green buildings,[105] the program is not an exclusive one for the federal government. Other departments within the executive branch, like the Department of Veterans Affairs, chose to use Green Globes as the standard for complying with the goals of EO 13423 when building facilities across the country.[106]

The goals of EO 13423 and EO 13514 have become the paramount guiding forces in changing the types of buildings that the federal government constructs. They also demonstrate that the third-party

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99 *Federal Green Construction Guide for Specifiers*, WHOLE BLDG. DESIGN GUIDE, http://www.wbdg.org/ccb/browse_org.php?o=84 (last visited Apr. 13, 2012).

100 *See id.*

101 U.S. ENVTL. PROT. AGENCY, OFFICE OF THE FED. ENVTL. EXEC., & WHOLE BLDG. DESIGN GUIDE, FEDERAL GREEN CONSTRUCTION GUIDE FOR SPECIFIERS, 01 10 00-3 (2010).

102 *Id.* OMB A-11 provides guidance to the executive branch of the government in completing the budget process.

103 *Id.*

104 *Id.*

105 *See Sustainable Design Program*, U.S. GEN. SERVS. ADMIN., http://www.gsa.gov/portal/category/21083 (last visited Apr. 13, 2012).

106 *See* Press Release, U.S. Dep't of Veterans Affairs, Green Globe Certification Awarded to 15 VA Medical Centers (Jan. 7, 2010), http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1837.

verification requirement allows for flexibility in program selection given the diverse types of structures needed by the government.

B. State

At the state level, the only mandatory green building requirements are for public projects. However, several states choose to incentivize private developers through various strategies like tax incentives and priority permit processing in order to accomplish a broader environmental agenda.[107]

In addition to the previously discussed New York program,[108] many other states have opted to attach their financial incentives to a preexisting third-party verification system rather than create their own standard. Oregon and Maryland became the first two states to take this approach in 2001.[109] Under the Oregon Revised Statutes, the Director of the State Department of Energy adopts the rules and standards for performance in order to qualify for the tax credit.[110] Following this statutory directive, the State Department of Energy issued regulations that adopted the USGBC's LEED program as the applicable standard to meet to receive the tax credit.[111] On the other hand, the administrative rules also consider sustainable buildings that are "rated and certified by a program approved by the Department that provides comparable performance on environmental measures and equivalent or better energy performance as documented by whole building energy modeling, is commissioned and is verified by an independent third party."[112]

However, the next subsections give details for specific LEED requirements, which would probably need translation into another third-party program's requirements should a party bring the issue forward.[113] This language leaves open the door of opportunity for other third-party programs to gain acceptance by the agency. Thus, Oregon ties its program requirements strongly to LEED while allowing the possibility of other third-party systems to qualify as well.

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107 *See generally* Darren A. Prum, *Creating State Incentives for Commercial Green Buildings: Did the Nevada Experience Set an Example or Alter the Approach of Other Jurisdictions?*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 171 (2009).

108 *See supra* Part I.B.2.

109 *See* Prum, *supra* note 107, at 192–93.

110 OR. REV. STAT. §§ 469.185-225, 315.354, 315.356 (2011).

111 OR. ADMIN. R. 330-090-0110(71) (2010).

112 *Id.* at (71)(a).

113 *Id.* at (71)(a)(A)–(B).

Maryland also created its own unique program somewhere in between the methods employed by New York and Oregon. Maryland's approach uses tax credits combined with limitations for allowable costs combined with an annual aggregate amount over the program's existence in a manner similar to the New York method.[114] However, like Oregon's decision to employ an external standard, Maryland also chose to integrate the LEED Gold standard into its requirements.[115] The Maryland Energy Administration (MEA) manages the program and determines the credit based on allowable costs but provides no additional incentives for projects attaining a level higher than Gold.[116] This means that certification by the USGBC becomes unnecessary because a project only needs to meet the LEED standards according to the MEA.[117] Consequently, the achievement of a LEED rating through the USGBC is only a guideline in Maryland because the MEA will ultimately determine compliance for the program it administrates.

Following New York, Oregon, and Maryland, Nevada created its original incentive program in 2005 only to modify it in 2007. This was due to an overly generous set of benefits and misapplications by the agencies charged with implementation.[118] The original legislation called for a project to meet or exceed the LEED Silver rating to qualify for the financial incentives.[119] Upon issuing its first regulations for qualification, the Director of the Office of Energy adopted LEED Version 2 for existing buildings, operations, and maintenance as well as Version 2.1 and 2.2 for any new construction.[120] Furthermore, the directive provided for the Nevada program to automatically update to the latest version put forward by the USGBC unless the Director took action to the contrary.

However, when a new governor and appointed Director came into power, the Office of Energy adopted a new regulation that changed

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114 MD. CODE ANN., TAX-GEN., 10-722(k) (2009).

115 MD. CODE REGS. 14.26.02.04 (2011).

116 *Id.*

117 *Green Building Tax Credit: Overview*, MD. ENERGY ADMIN., http://www.energy.state.md.us/Business/documents/FrequentlyAskedQuestions.pdf (last visited Apr. 13, 2012).

118 *See generally* Prum, *supra* note 107.

119 2005 22d Spec. Sess. Nev. Stat. 68, 69.

120 *See Adopted Regulation of the Director of the Office of Energy File No. R025-06*, NEV. OFFICE OF ENERGY (June 28, 2006), *available at* http://www.leg.state.nv.us/register/2006Register/R025-06A.pdf.

the fundamental approach and allowed credits from one building in a larger development to share credits with other structures in the same project in order qualify for the tax credit.[121] This continued to make LEED the standard to achieve for the state's financial incentives but made certification from the USGBC unnecessary.[122] More importantly, this action coupled with the Nevada Tax Commission qualifying any project in existence prior to a specific date[123] opened the floodgates for massive revenue shortfalls to the state and local governments because of the property tax abatement and sales tax reduction.[124]

As a result, the Nevada Legislature revised its program in 2007 to only allow a less generous and more limited property tax abatement.[125] This time the Office of Energy adopted new regulations that selected the LEED system as developed by the USGBC for Nevada and required the Director to review its applicability at least once a year.[126] In order for the Director to adopt a newer version of the LEED program, the update must have been in existence for more than two years and cannot apply toward homes.[127] Moreover, the financial incentive requires specific points for energy conservation with a greater benefit for higher levels of LEED achievement.[128] Hence, Nevada's approach now solely relies on the LEED program and requires certification by the USGBC as well as the official documents explaining the different point totals used to attain a compliance level.

After Nevada's painful experience, and with an eye to avoiding similar situations, several other states also decided to stimulate green

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121 *See* NEV. OFFICE OF ENERGY ADOPTED REGULATION R170-06 § 1(6) (Mar. 23, 2007).

122 *Id.*; *see also* Neff, *infra* note 123 (demonstrating that many assailed this change by the Office of Energy as a move to assist gaming developers qualify for the state's financial incentives while allowing smoking in the casinos); the LEED standard for "Indoor Air Quality" focuses on the health effects related to ventilation and airflow in conjunction with the sources for contamination like tobacco smoke. Christopher P. Perzan, *Environmental Protection: What You Should Know About Green Building*, CBA REC., Nov. 2006, at 39.

123 *See* Erin Neff, Editorial, *Carson City's Own Green Monster*, LAS VEGAS REV. J., May 20, 2007, http://www.lvrj.com/opinion/7598327.html.

124 *See* Dan Musgrove, *Encouraging Sustainable Development*, N. NEV. BUS. WKLY., May 19, 2008, http://nnbw.com/ArticleRead.aspx?storyID-11110.

125 Nev. Assemb. B. No. 621, 74th Gen. Assemb., Reg. Sess. (Nov. 2007).

126 Adopted Regulation R116-07 (2007) (codified as amended at NEV. ADMIN. CODE § 701A.010-§ 701A.290 (2008)).

127 *Id.* § 701A.210.

128 *Id.*

building construction with more precise programs.[129] In the most unique approach to incentivizing developers, Hawaii directed all counties that issue building, construction, or development related permits to establish a mechanism for expedited processing when a project includes energy or environmental design standards.[130]

In giving this 2006 directive to the counties, the Hawaii Legislature qualified projects that meet "the leadership in energy and environmental design [LEED] silver or two green globes rating system or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system."[131] This language shows the Hawaii Legislature's understanding that standards will evolve and provides its lower tiers of government flexibility to accomplish the larger policy goals.

While this approach seems like it benefits all involved, one commentator pointed out some of its negative attributes.[132] Carl Circo mentions that the governmental entity will need to maintain qualified personnel to comprehend and administer the program's goals as well as provide a substantial enough benefit so as to encourage participation.[133] Moreover, some complex projects will require the involvement of multiple governmental agencies.[134] Some of these agencies may not participate in the expediting process, so the cost savings in terms of speed may not be enough to encourage participation.[135] When considering the size of the local governments within the state and the need for sustainable practices in the island setting, Hawaii achieves environmental gains in the short and long terms while putting forward a flexible requirement for the verification of its goals.

In 2007, New Mexico enacted legislation that created the "Sustainable Building Tax Credit" and placed the Energy, Minerals,

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129 *Mins Assemb. Comm. On Commerce & Labor: Hearing on A.B. 621 Before the Assemb. Comm. On Commerce & Labor*, 2007 Leg., 74th Sess. 10 (Nev. 2007), *available at* www.leg.state.nv.us/74th/Minutes/Assembly/CMC/Final/1387.pdf (statement of Pamela Vilkin, President, Las Vegas Regional Chapter, United States Green Building Council).

130 HAW. REV. STAT. § 46-19.6 (2011).

131 *Id.* § 46-19.6(b).

132 *See* Carl J. Circo, *Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives?*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 55, 64–65 (2009).

133 *Id.*

134 *Id.*

135 *Id.*

and Natural Resources Department in charge of its administration.[136] Like New York and Maryland, New Mexico also placed financial limitations on its program.[137] For a project to be eligible, it must receive a LEED Silver or higher-level certification from the USGBC.[138] As part of the submission package, the agency requires a copy of the LEED certificate from the USGBC.[139] This means that participation in the LEED program provides the only method for obtaining New Mexico's tax credit incentive. Correspondingly, the New Mexico approach exclusively relies on LEED to provide compliance validation with its program.

Finally, Virginia decided to create a separate class of real property for energy efficient buildings in an approach very similar to Nevada's.[140] The 2008 legislation looked to incentivize energy efficient buildings by allowing the local governments the option to levy equal or lesser property taxes that obtained this new classification.[141] The benchmark for determining an energy efficient building requires the performance in the new structure to exceed the Virginia Uniform Statewide Building Code by over thirty percent through the use of a third-party verification system.[142] To assist in making this determination, the Virginia statute allows many different programs like LEED, Energy Star (from the U.S. Environmental Protection Agency), Green Globes (from the Green Building Initiative), or the EarthCraft House Program.[143] Accordingly, the Virginia program appears to cast a wide net in allowing participation from many different third-party verification standards.

The various state programs show a variety of different strategies with respect to third-party verification standards. Almost all of the state programs mention LEED in some manner. Many states predicate their incentive programs on compliance with the USGBC's LEED system either directly or through its own administrative review

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136 2007 N.M. Laws 2714, 2734–35 (2007).

137 *Id.*

138 N.M. ADMIN. CODE § 3.4.17.11, 13 (note that the state does provide an alternative method for satisfying the energy reduction requirement outside of the LEED Program). This remedy is limited to situations where the building type occurs outside the normal scope of the modeling programs. *Id.*

139 *Id.*

140 *See* H.B. 239, 2008 Gen. Assemb., Reg. Sess. (Va. 2008) (codified at VA. CODE ANN. § 58.1-3221.2 (2009)).

141 VA. CODE ANN. § 58.1-3221.2 (2009).

142 *Id.*

143 *Id.*

process. This generally appears as the default option in many jurisdictions; however, the enabling directives often allow other third-party verification programs as possible alternatives should a project owner wish to forge new ground within the agency providing the administration. Furthermore, this ability to qualify through programs other than LEED shows how the authors of the legislation or regulations understand the evolving nature of sustainable construction projects. In some jurisdictions, the environmental demands can change drastically and some third-party programs may not cover all situations or all types of structures. This built-in flexibility demonstrates the complexity of these types of incentives when applied to practice.

Therefore, the best approaches by states to incentivize sustainable construction appear to require adherence and certification by a third-party standard in such a manner that the administrative agencies can accept different programs but cannot deviate within one for political gain.

C. Local

As the tier of government that deals most directly with developers, local governments create and terminate a wide variety of programs to encourage their policy objectives. Due to the numerous locales trying to promote sustainable development through policy goals, our approach for evaluating the choices by local governmental entities in selecting third-party verification systems will focus more on the types of incentives offered, with an examination of the more prominent jurisdictional choices rather than the differences between and within the many locations. With this in mind, we separated the programs on the basis of whether the government provides financial or nonfinancial incentives, with the exclusion of technical and marketing assistance, since they generally will not provide an exclusive type of encouragement.

1. Nonfinancial Incentives

An incentive that provides something of value to a developer will sometimes create more of an inducement than the use of a financial offering. Depending on the jurisdiction, the length of time to receive approval for a project differs; in some locations, this may take prolonged periods of time, which causes delays and increased costs to a developer. By offering expedited reviews as an inducement in order to promote green building, a jurisdiction may encourage sustainable

practices without giving direct financial incentives to developers of green buildings.[144]

While the legislature in Hawaii directed its local governments to provide expedited reviews for projects including energy and environmental design standards, many municipalities took this action on their own accord.[145] The jurisdictions that follow this approach do so by either offering a priority building permit process or expediting the development plan review.[146] In this type of program, the jurisdiction creates screening criteria that enable the applicable government agency to process the project in a faster manner.[147] Similarly, but with a different fundamental approach, other jurisdictions manifest preferences for those plans that exhibit certain sustainable development characteristics and allow the overseeing agency to administrate the submissions quicker.[148] However, as explained earlier,[149] this type of approach also faces a number of challenges that need resolution in order to provide an effective incentive. As such, this type of incentive may prove difficult to implement, but if done correctly, it can provide a cost-effective incentive that will further the local government's policy goals.

In a different nonfinancial approach, other jurisdictions choose to offer density bonuses for those developers who voluntarily adhere to a sustainable construction program. One observer has noted that many jurisdictions like to use this approach because it has relatively no costs for everyone involved.[150] Moreover, local governments will often set public policy priorities in their zoning based on densities or height, so a relaxation of those requirements when a developer provides a host of other environmentally friendly benefits as a trade-

144 *See* BROOKS RAINWATER, AM. INST. OF ARCHITECTS, LOCAL LEADERS IN SUSTAINABILITY: A STUDY OF GREEN BLDG. PROGRAMS IN OUR NATION'S CMTYS. 18 (2008), *available at* http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aias075288.pdf.

145 *See* YUDELSON ASSOCS., THE NAT'L ASS'N OF INDUS. & OFFICE PROPS. RESEARCH FOUND., GREEN BUILDING INCENTIVES THAT WORK: A LOOK AT HOW LOCAL GOVERNMENTS ARE INCENTIVIZING GREEN DEVELOPMENT 23 (2007), *available at* http://www.naiop.org/foundation/greenincentives.pdf.

146 *Id.* at 27.

147 *See id.*; *see also* U.S. GREEN BLDG. COUNCIL, *Green Building Incentive Strategies*, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2078#exp (last visited Apr. 13, 2012) [hereinafter *Incentive Strategies*].

148 *Incentive Strategies*, *supra* note 147.

149 *See supra* Part II.B.

150 *See* Circo, *supra* note 132, at 67.

off makes sense on both sides.[151] As a result, this method provides the developer a possibility of extra income through rental or sales of the additional units while encouraging private parties to assist in accomplishing the local government's policy goals.[152]

A closer look at the different jurisdictions' program requirements reveals that the governments that provide an expedited permit process tend to have one feature in common. All require LEED certification exclusively or in conjunction with a local program like the Green Built North Texas, Built Green in Washington, or the Florida Green Building Coalition's Green Home Designation Standard.[153] Furthermore, in examining the representative governments that allow density bonuses, these jurisdictions also chose to solely require LEED compliance without including any other programs.[154]

Thus, the two types of nonfinancial incentives offered by the various local governments to promote sustainable development projects lack even token flexibility compared to the various programs available across the country. Local governments fail to allow developers to select a verifiable alternative based on a project's unique characteristics.

2. Financial Incentives

Frequently, there needs to be a financial incentive in order to gain voluntary support by private industry for a policy and its associated goals. In the real estate industry, the main consideration for most participants is profit. Because the costs to achieve a certification level may not make financial sense to developers, many governmental leaders turn to financial incentives in order to advance the jurisdiction's environmental policy goals. As such, the four main strategies include reducing fees associated with construction, tax credits and abatements, sustainability grants, and revolving loans.

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151 *See* RAINWATER, *supra* note 144, at 19.

152 *See Incentive Strategies*, *supra* note 147.

153 *See, e.g.*, City of Dallas, Tex., Ordinance 27131 (Apr. 9, 2008); City of Gainesville, Fla., Ordinance 001835 (Oct. 14, 2002); County of Hillsborough, Fla., Dev. Rev. Proc. Man. § 4.1.5.1.2 (adopted Oct. 9, 2007); City of Issaquah, Wash., Resolution 2004-11 Attch. A § (4)(B)(iv) (Dec. 21, 2004); City of Los Angeles, Cal., Ordinance 179820 (Apr. 22, 2008); SANTA MONICA, Cal., MUNICIPAL CODE § 8.108.050 (2010); County of Sarasota, Fla., Resolution R2006-174 (Aug. 22, 2006).

154 *See Incentive Strategies*, *supra* note 147.

One of the low-cost approaches endorsed by many jurisdictions involves reducing fees owed by the developer to the government.[155] In these types of situations, the applicable jurisdiction may charge a litany of fees for the various necessary permits or processing of the project through the agency reviews.[156] When a project meets certain green building or high performance conditions, either before, during, or after construction, the agency collecting the fees either reduces the applicable charges or returns them at the appropriate time.[157]

One commentator cautions that the reductions in fees will also decrease government revenue.[158] Accordingly, this incentive and the associated decrease in revenue must correspond with an increase in revenue or expenditure cuts somewhere else in the agency's budget.[159] This action, called "cost shifting," may create opportunities for legal challenges where a developer believes the fees for not building green or high performance become excessive to compensate for the green building agenda.[160]

In addition, some jurisdictions offer revolving loans to projects that meet certain green or high performance criteria. In these programs, the jurisdiction looks to overcome some of the increased expenses associated with attaining a green or high performance standard.[161]

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155 *See* Circo, *supra* note 132, at 66.

156 *See Incentive Strategies*, *supra* note 147.

157 *See, e.g.*, Arlington County, Va., County Board Agenda Item Meeting of March 14, 2009 (demonstrating that Arlington County, Virginia, projects pay a fee ($0.045 per square foot of gross floor area) to supply the county's green building fund for educational purposes, and developers that attain LEED certification become eligible for a refund of that fee); Green Building Density Incentive Policy for Site Plan Projects 2 (Feb. 27, 2009); Babylon, N.Y., Code ch. 89, art. VIII, § 89-96 (2006) (offers a rebate for projects that achieve LEED certification); Burbank, Cal., Municipal Code tit. 9, ch.1, art. 10 § 10-1008 (effective Dec. 21, 2007) (provides a reduced permit and plan review fee for participants in the Green Building and Sustainable Architecture Program); Livermore, Cal., Municipal Code tit. 15, ch. 15.76, § 15.76.070 (2009) (reduces the applicable fees when LEED or GreenPoint standards are met); Eagle County, Colo., Land Use Regulations art. 4, §§ 4-820, 4-920 (2008) (establishes building permit rebates based on the achievement of "ECOBuild" points); Borough of Doylestown, Pa., Ordinance 2008-8 (Apr. 21, 2008) (reduces permit fees based on attaining the Green Points program and meeting LEED requirements). Other jurisdictions that take this same approach consist of: the City of Sacramento as well as San Diego and Santa Barbara Counties, California; the City of Gainesville and Sarasota County, Florida; Mecklenberg County, North Carolina; the City of San Antonio, Texas. *See* YUDELSON ASSOCS., *supra* note 145, at 28, 29; *see Incentive Strategies*, *supra* note 147.

158 *See* Circo, *supra* note 132, at 66–67.

159 *Id.*

160 *Id.*

161 *See Incentive Strategies*, *supra* note 147.

These loans offer a subsidized interest rate based on and below the financial gains realized through the operational side of the building.[162] This enables the fund and building owner to share financially in each month's performance benefits over a traditional structure.[163] As a result, the fund is regularly replenished from successful endeavors and can fund new loans, while the building owner eliminates the additional financial burdens associated with the higher level of construction.[164]

Many local governments utilize the more financially aggressive system of tax credits and abatements discussed previously to promote green buildings in their jurisdictions.[165] In using this strategy, the local government immediately loses revenue with the expectation that a high performance or green building will increase in value over the long term and allow for higher assessments in the future.[166] Depending on how the incentive is structured, a tax credit works by reducing an existing tax liability, while abatements exempt taxpayers from a given responsibility for a set duration of time.[167]

Furthermore, some jurisdictions provide grants as a method to encourage reluctant developers to choose a green or high performance alternative. In this type of approach, the local government awards developers money toward specific green or high performance outcomes.[168] This type of program tries to offset the above normal costs associated with the design and construction of sustainable developments.[169]

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162 *Id.*

163 *Id.*

164 *Id.*; *see* YUDELSON ASSOCS., *supra* note 145, at 25–28. (describing how the following jurisdictions embrace this type of program: Phoenix, Arizona; the Cities of Alameda and Berkeley as well as Sonoma County, California; Babylon, New York; and Milwaukee, Wisconsin).

165 *See supra* Part II.B.

166 *See Incentive Strategies*, *supra* note 147.

167 *Id.*; *see* YUDELSON ASSOCS., *supra* note 145, at 28 (demonstrating that some representative jurisdictions of this approach include Pasadena, California; Chatham County, Georgia; Honolulu, Hawaii; Baltimore and Howard County, Maryland; Cincinnati, Ohio; and Harris County, Texas).

168 *See Incentive Strategies*, *supra* note 147; *see also* YUDELSON ASSOCS., *supra* note 145, at 29 (some of the jurisdictions that take this approach comprise: Alameda County and the Cities of Los Angeles, Pasadena, and Santa Monica, California; Cincinnati, Ohio; Portland, Oregon; El Paso, Texas; and King County and the City of Seattle, Washington).

169 *See Incentive Strategies*, *supra* note 147.

Tax incentives and grants offer tremendous potential for achieving many of the desired local government policy goals.[170] Even though the programs will create political controversy, tax incentives and grants will "revolutionize industry practices and . . . bring about a level of investment in green building design and construction practices that will assure true sustainability in the generational and global sense promoted by the international sustainability movement."[171]

An examination of the various local financial incentive programs reveals that most governments turn to LEED exclusively for their third-party verification, with the exception of the revolving loan programs. Just like the nonfinancial incentives, tax credits, fee reductions, and grants almost exclusively across all the representational jurisdictions stipulate LEED without even a consideration for the other programs.[172] The only notable exceptions occur in the now ended program in Mecklenburg County, North Carolina, where the government allowed Green Globes, the NAHB program, and EarthCraft homes as well as the Florida jurisdictions that currently provide for the Florida Green Building Coalition's Green Home Designation Standard.[173]

In contrast, the revolving loan programs tend to encompass green or high performance building as part of a larger policy goal. These

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170 *See* Circo, *supra* note 132, at 71, 72.

171 *Id.*

172 *See, e.g.*, BABYLON, N.Y., CODE ch. 89, art. VIII, § 89-96 (2006); BALITMORE, MD., ORD. 78-07 (Oct. 15, 2007); Minutes of the Reg. Meeting of the Bd. of Comm'r of Chatham County, (May 12, 2006) (Chatham County, Ga.); CINCINNATI, OH., ORD. 446-2007 (Dec. 12, 2007); EL PASO, TEX., ORDINANCE No. 28908 (June 10, 2008); Guidelines & Criteria for Granting Tax Abatement in a Reinvestment Zone Created in Harris County (May 20, 2008) (Harris County, Tex.); GAINESVILLE, FLA., ORD. 001,835 (Oct. 14, 2002); HILLSBOROUGH, FLA., DEV. REV. PROC. MANUAL. § 4.1.5.1.2 (Adopted Oct. 9, 2007); HONOLULU, HAW., B. 69 (2004); HOWARD, MD., B. 49-2007 (2007); PASADENA, CAL. MUN. CODE ch. 14.90 (2010); LOS ANGELES, CAL., ORD. 179,820 (Apr. 22, 2008); SANTA MONICA, CAL., MUN. CODE § 8.108.050 (2010); SARASOTA, FLA., RESOL. R2006-174 (Aug. 22, 2006).

173 *See* Mecklenberg, N.C., Action Item 22 (Dec. 18, 2007); GAINESVILLE, FLA., ORD. 001835 (Oct. 14, 2002); HILLSBOROUGH, FLA., DEV. REV. PROC. MANUAL § 4.1.5.1.2 (Oct. 9, 2007); SARASOTA, FLA., RESOL. R2006-174 (Aug. 22, 2006). Interestingly, the Mecklenberg County Board of Commissioners terminated the program on April 20, 2010, after noting that economic pressures slowed construction projects and caused a shortfall in the code enforcement budget while leaving a balance of $800,000 available for green building rebates. Mecklenberg, N.C., Action Item 15 (Apr. 20, 2010). Thus, the government swept into the general code enforcement budget the monies set aside to encourage green or high performance buildings. *Id.*

programs often focus on energy efficiency as the main objective, but they also recognize how a green or high performance building will further the goals of a larger project.[174] As such, the revolving loan programs tend to qualify projects based on criteria other than a specific green or high performance building program.[175]

The main types of financial incentives used by local governments to encourage green or high performance buildings provide little or no flexibility with regard to program choices. Both the nonfinancial and financial programs tend to favor almost exclusively the LEED program within the municipal and county jurisdictions while failing to provide options either administratively or otherwise for alternative and competing third-party verification systems that approach the goal with a different formula for compliance.

Therefore, a private party wishing to develop a green or high performance building must generally turn to the LEED program for verification and compliance or risk not qualifying for any of the incentive programs offered by the state or local jurisdictions.

III
ANTITRUST LEGISLATION

Given the booming market for green building materials and products fueled, in part, by regulatory requirements, it is conceivable that antitrust issues could arise in the future among competing, privately owned, environmental standard-setting organizations. This may occur when these organizations promote their respective systems to state and local governmental officials in an effort to convince them to incorporate their particular standards into building codes and other legislation, as well as when they advise and assess governments on green building initiatives. In the end, however, only one organization, such as the USGBC or Green Building Initiative,[176] may successfully insert its rating system into the legislation, thus creating the specter of illegal monopolization or other illegal antitrust practices occurring between the winning third party and the government that selected it. Already, a representative of the Green Building Initiative has questioned the widespread permeation of LEED into state and local

174 *See generally* Prum, *supra* note 107.

175 *Id.*

176 *See supra* text accompanying notes 6–30.

legislation from the perspective of unfair competition.[177] Accordingly, these antitrust legal concerns have the potential for sustained growth as state and local governments continue to enact green building legislation at a rapid pace. Moreover, some literature has already suggested that a local government's adoption of a particular green building rating system into legislation may effectively exclude certain products endorsed by that system from the local marketplace.[178] This development may further the perception of unfair and collusive practices, particularly if those organizations engage in political or lobbying activity in support of their specific rating system.[179] The following part of this Article examines the relevant antitrust laws and case law that may play a role in the future legal environment between local governments and third-party environmental standard-setting organizations such as the USGBC or the Green Building Initiative.

The Sherman Antitrust Act, passed in 1890, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."[180] Initially, the Sherman Act did not apply to the economic activities of state and local governments because the Commerce Clause was at that time interpreted narrowly. However, in 1937, the Commerce Clause was greatly expanded to encompass all activities that affected interstate commerce, as articulated in the watershed case of *NLRB v. Jones & Laughlin Steel Co.*[181]

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177 *See* Stephen Del Percio, *Revisiting Allied Tube and Noerr: The Antitrust Implications of Green Building Legislation & Case Law Considerations for Policymakers*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 239 at 245 n.37 (2009) (quoting GBI official discussing Boston legislation incorporating LEED and stating that "there is clear legal precedent that prohibits the government from crafting a law to mandate one business or organization over another" and that although "GBI 'doesn't disagree at the core' with laws mandating LEED," it "just feels it's not the right way to go").

178 *See, e.g.*, *id.* (noting that the LEED system, as presently drafted, including under the LEED Version 3.0 rating system, will only award points under its Materials & Resources credit category for wood products that are certified by the Forest Stewardship Council, which has caused a major controversy across the North American timber community). The Supreme Court has called organizations similar to USGBC "traditional objects of antitrust scrutiny." *Id.* at 242. *See also infra* text accompanying notes 226–29; Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509–11 (1988).

179 *See supra* text accompanying notes 177–79.

180 15 U.S.C. § 1 (2010); *see also id.* § 2 (2010) ("[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .").

181 *See generally* 301 U.S. 1 (1937).

Several years later, the Supreme Court ruled in *Parker v. Brown* that certain actions of a state government were immune from the Sherman Act.[182] The holding in *Parker*, which related to California's attempts to control raisin prices, came to be known as the state-action immunity or *Parker* Doctrine.[183] With respect to local governments, however, the legal environment remained uncertain. This changed in 1978 when the Court imposed a more restrictive standard in *City of Lafayette v. Louisiana Power & Light Co*.[184] In that case, a group of private utilities counterclaimed against the City of Lafayette and other municipalities in south Louisiana.[185] The utilities asserted that these local governments were monopolizing in violation of the Sherman Act by restricting the utilities' attempts to compete in these markets.[186] The Court ruled against the city and municipalities, citing a mistrust of local governments when handling economic issues.[187] The Court voiced concern that they might commit acts that could hinder the broader national interest of promoting interstate commerce.[188] To allay this fear, the Court held that, for a local government to be immune from antitrust scrutiny a state must delegate authority to engage in a particular activity.[189]

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182 317 U.S. 341, 351 (1943) (emphasizing that the Sherman Act's text and legislative history only applied to the actions of "business combinations").

183 *See* Hillary Greene, *Articulating Trade-Offs: The Political Economy Of State Action Immunity*, 2006 UTAH L. REV. 827, 828 (2006). ("State action immunity is a judicially created doctrine originating in the Supreme Court's ruling in Parker v. Brown (Parker). *Parker* broadly articulated the need to subordinate national competition policy, as embodied in the Sherman Act, to a state's right to assert regulatory autonomy in areas that the federal government had not preempted through antitrust or otherwise. The principle animating *Parker* was and remains clear: federalism.").

184 435 U.S. 389 (1978). *See also* California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 U.S. 97 (1980) (rearticulating and further strengthening the rule laid out in *City of Lafayette*).

185 *City of Lafayette*, 435 U.S. at 392.

186 *Id.* at 392 n.5.

187 *Id.* at 408 ("If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.").

188 *Id.* at 403 (a plurality stating that municipalities were no "more likely to comport with the broader interests of national economic well-being than are those of private corporations").

189 *Id.* at 415. The state-action immunity doctrine requires that municipalities act pursuant to "clearly articulated and affirmatively expressed . . . state policy that authorizes" their actions. *Id.* at 410.

Despite *City of Lafayette*, several more Supreme Court cases,[190] and a federal statute,[191] the status of local government immunity from antitrust law still remained unclear. In 1991, however, in the pivotal *City of Columbia v. Omni Outdoor Advertising, Inc.*,[192] the Court provided a clearer legal environment for local governments and private businesses, but one still rife with controversy.

A. City of Columbia v. Omni Outdoor Advertising, Inc.

In *City of Columbia v. Omni Outdoor Advertising, Inc.* (*Omni*), the city government of Columbia, South Carolina, was sued for alleged antitrust violations over its preferential dealings with Columbia Outdoor Advertising, Inc. (COA).[193] COA controlled over ninety-five percent of the billboard market in the city.[194] Moreover, the company's influence in the community was widespread.[195] Company officers were heavily involved in local politics, contributing funds and free billboard space to city officials campaigning for office.[196] The majority owner was also reputed to be friends with the mayor and city council members.[197] When Omni attempted to gain a foothold in the Columbia billboard market, COA sought the assistance of city officials to pass zoning ordinances prohibiting new billboard

190 *See* Cmty. Comm. Co., Inc. v. City of Boulder, 455 U.S. 40, 54 (1982) (ruling that a local ordinance restricting competition must respond to a "clearly articulated and affirmatively expressed" state public policy to be immune from antitrust liability); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42 (1985) (limiting the stricter rule in *City of Boulder* by stating the state law must clearly contemplate the anticompetitive effect rather than be affirmatively expressed). *See generally* Brent S. Kinkade, Note, *Municipal Antitrust Immunity after* City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 67 WASH. L. REV. 479, 486 (1992).

191 15 U.S.C. §§ 34–36 (1991). This statute mainly eliminated treble damages against local governments, but did not provide total immunity. *See* Kinkade, *supra* note 190, at 481.

192 *See generally* 499 U.S. 365 (1991).

193 *Id.* at 365.

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.* at 367 ("The mayor and other members of the city's council were personal friends of COA's majority owner, and the owner, and the company and its officers occasionally contributed funds and free billboard space to their campaigns." *Id. See also* Case Comment, *Antitrust Immunity:* City of Columbia v. Omni Outdoor Advertising, Inc., 105 HARV. L. REV. 360 (1991)).

construction. A state court, however, quashed the ordinance.[198] In response, the city passed a new ordinance restricting the billboards' size, location, and spacing.[199] Although the newer ordinance was different, it essentially created the same anticompetitive effect as the first one.[200] This time, however, Omni initiated a suit against the City of Columbia in federal court alleging violations of both sections one and two of the Sherman Antitrust Act[201] and contending that the city did not possess immunity under *Parker*.[202] Omni also asserted that the "sham" exception to the *Noerr-Pennington* doctrine, a corollary to *Parker*[203] that was first developed in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[204] applied to COA's activities with the city.

The Court applied a two-prong test requiring (1) that the state has legal authority to implement the laws and (2) foreseeability that the activities in question will be anticompetitive.[205] Once these elements are satisfied, a company's actions would fall under the protection of *Parker*. With respect to the parties in *Omni*, this meant the city must possess "unquestioned zoning power over the size, location, and spacing of billboards,"[206] a routine and common right the states bestow upon their local governments. The Court further stated that authority must be "clearly articulated."[207] However, this prong can be satisfied when "suppression of competition is the 'foreseeable result'

198 *Omni*, 499 U.S. at 368. (describing how the state court "invalidated this ordinance on the ground that its conferral of unconstrained discretion upon the city council violated both the South Carolina and Federal Constitutions").

199 *Id.* at 368.

200 Kinkade, *supra* note 190, at 361.

201 *Omni*, 499 U.S. at 369.

202 *Id.* ("Omni contended, in particular, that the city's billboard ordinances were the result of an anticompetitive conspiracy between city officials and COA that stripped both parties of any immunity they might otherwise enjoy from the federal antitrust laws.").

203 *Id.* at 383 (explaining that "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government"; *see* E. R.R. Pres. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961*). See also* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965) (extending *Noerr* immunity from antitrust law to petitioning activities by a labor union aimed at influencing federal government decisions).

204 365 U.S. 127 (1961); *see* Del Percio, *supra* note 177 (note that *Noerr* immunity would likely protect an organization such as USGBC from lobbying a local government to insert its rating system into local legislation).

205 *Omni*, 499 U.S. at 373.

206 *Id*. at 372.

207 *Id*. at 390.

of what the statute authorizes," the test's second prong.[208] In *Omni*, the Court found that the zoning laws in question were both authorized and were not only foreseeable as a means of suppressing competition among competing land uses but were in fact created for that expressed purpose.[209]

The Court also rejected the argument that certain exceptions should apply to the actions of the City of Columbia. The Court directly denied that a conspiracy exception existed in *Parker*. Indeed, in strongly worded language the Court argued that no exceptions exist because "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them."[210] The Court also contended that allowing even inquiries into whether illegal conspiracies occurred "would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid."[211]

Lastly, the Court rejected the argument that the city's actions fell within the so-called sham exception created in the *Noerr-Pennington* cases.[212] The Court repeated that the general rule, as first articulated in the *Pennington* case, is that "[f]ederal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government."[213] Even so, the *Omni* Court recognized that there is, under *Noerr*, a sham exception to the *Noerr-Pennington*

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208 *Id.* at 373 (quoting Hallie v. Eau Claire, 471 U.S. 34, 41–42 (1985)).

209 *Id.* ("That condition is amply met here. The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers.").

210 *Id.* at 377 (justifying such activities by local governments by stating "[t]he fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners").

211 *Id.* at 377–78 (stating that even bribes would not be actionable under *Parker*, but that other federal laws, citing as an example, the Hobbs Act, that might provide a remedy for such actions).

212 *See supra* text accompanying note 203.

213 *Omni*, 499 U.S. at 379–80 (quoting *E. R.R. Pres. Conference*, 365 U.S. at 141) (stating further that "this doctrine, like *Parker*, rests ultimately upon a recognition that the antitrust laws, 'tailored as they are for the business world, are not at all appropriate for application in the political arena"); MCI Comm., Corp. v. Am. Tele. & Tele. Co., 708 F.2d 1081, 1153 (7th Cir. 1983) (justifying *Noerr-Pennington* protection through "the need to construe the antitrust laws in such a way as to avoid a conflict with the right to petition the government protected under the First Amendment").

doctrine.[214] The sham exception, the Court explained, "encompasses situations in which persons use the governmental *processs*—as opposed to the *outcome* of that process—as an anticompetitive weapon."[215] A classic example, it noted, "is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay."[216] Thus, even a defendant company that "genuinely seeks to achieve [its] governmental result, but does so *through improper means*" is still protected from antitrust law.[217] In applying this line of reasoning to *Omni*, the Court maintained that although COA was attempting to eliminate competition to its billboard business in Columbia, "it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances."[218] Stated differently, the means are always proper as long as the scrutinized activity is meant to accomplish legitimate ends.[219]

The Court also rejected the argument, relied upon by the Court of Appeals, "that COA's purposes were to delay Omni's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora."[220] This, it was argued, occurred when COA engaged in aggressive lobbying with the city government and its officials. Lobbying and similar activity, the Court repeated, is not a sham "unless the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks."[221]

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214 *Omni*, 499 U.S. at 380 (quoting *E. R.R. Pres. Conference*, 365 U.S. at 141) ("There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act . . .").

215 *Id.* at 380.

216 *Id.*

217 *Id.* (quoting Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 465, n.5 (C.A.9 1987). *See also* Lawrence A. Sullivan, *Developments in the Noerr Doctrine*, 56 ANTITRUST L.J. 361, 362 (1987).

218 *Omni*, 499 U.S. at 381.

219 *See supra* text accompanying note 162.

220 *Omni*, 499 U.S. at 381 (quoting Omni Outdoor Advert., Co. v. Columbia Outdoor Advert., Co., 891 F.2d 1127, 1139 (1989)).

221 *Id.* (finding that the facts in the case did not suggest that such a sham existed).

The Supreme Court's opinion in *Omni* significantly clarified the issue of antitrust laws' applicability to local governments. This occurred despite the appearance of possibly unethical practices by Columbia's elected city officials. Thus, the Court generally left the states and their municipalities alone to engage in business with the private sector as they saw fit, even if it might result in private sector actors egregiously violating antitrust law. [222]

B. Electrical Inspectors, Inc. v. Village of East Hills

In the more recent case of *Electrical Inspectors, Inc. v. Village of East Hills*, the Second Circuit applied the state action immunity doctrine in a factual posture that is instructive for state and local governments considering the adoption of a green building program that includes a privately developed third-party rating system. [223]

In *Electrical Inspectors*, a Long Island village adopted state-mandated legislation requiring building owners to obtain certificates of occupancy from the village upon completion of an electrical inspection performed by a nonprofit inspection agency.[224] The plaintiff, as a for-profit electrical company, alleged that it was effectively excluded from the market for local electrical inspection services.[225]

The Second Circuit applied the two-pronged *Parker* test and determined that the municipality's conduct had, in fact, satisfied the *Parker* inquiry.[226] However, it remanded the case to the district court

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222 *Id.* at 372 (stating that interfering with the activities of state as well as local governments would undermine "the very interests of federalism [that Parker was] designed to protect").

223 *See generally* 320 F.3d 110 (2d Cir. 2002).

224 *Id.* at 114 ("The defendant Village of Islandia (the 'Village') is a municipality located on New York's Long Island. In 1988, the Village adopted a policy of requiring building owners to obtain certificates of occupancy from the Village, and conditioning the issuance of such certificates on the positive results of an electrical wiring inspection conducted by the not-for-profit defendant New York Board of Fire Underwriters (the 'Board'). Any property owner who wishes to use or occupy a building is required to submit to and pay the Board for the Board's inspection.").

225 *Id.* ("The plaintiff, a for-profit corporation that also provides electrical inspection services in the State of New York, brought suit against both the Village and the Board in the United States District Court for the Eastern District of New York alleging that this arrangement resulted in violations of the Sherman Act and other federal and state laws.").

226 *Id.* ("We agree with the district court that for purposes of the state-action immunity doctrine, [compliance with the two-prong test] the state authorized the Village to pass the ordinance that gave the Board exclusivity with respect to the performance of wiring inspections in Islandia.").

to determine whether the village was actively supervising the inspection services.[227]

The *Electrical Inspectors* decision is noteworthy in the context of green building policy because a private, third-party environmental standard-setting organization may now be considered a private actor for purposes of the state action immunity doctrine. Thus, any government that includes a green building rating system within legislation should actively strive to supervise the administration of that rating system in order to avoid any allegations of anticompetitive effect.

C. Allied Tube & Conduit v. Indian Head, Inc.

As presented in the foregoing discussion, both the *Omni* and *Noerr-Pennington* cases laid out the basic rules applicable to antitrust immunity for private companies, including private third-party providers of green building rating systems who are competing to gain business relationships with local governments. The 1988 Supreme Court decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.* clarified these decisions regarding antitrust immunity, albeit from a slightly different factual posture.[228] In *Allied Tube*, plaintiff Indian Head, Inc., a producer of polyvinyl chloride (plastic) conduits, sued Allied Tube and other manufacturers for violating section 1 of the Sherman Act.[229] Allied Tube was the largest producer of steel conduit in the country and, together with several other steel conduit manufacturers, used its membership in the National Fire Protection Association (NFPA) to keep Indian Head from having its product listed on the National Electric Code.[230] Allied and other steel competitors recruited 230 new members and packed the 1980 NFPA

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227 *Id.* at 129 ("But the question of the need for an injunction will arise in this case only if the district court ultimately determines that the Board is not actively supervised and thus not immune, and that there has in fact been a violation of the antitrust laws. We therefore decline to decide this issue since it may prove unnecessary to the disposition of the case."). *See* Patrick v. Burget, 486 U.S. 94, 101 (1988) (discussing the issue of supervision to assure that the local government is in compliance with the state's public policy).

228 486 U.S. 492 (1988). *See also* Am. Soc. of Mechanical Eng'rs, Inc., v. Hyrolevel Corp., 456 U.S. 556 (1982) (ruling that volunteer members of ASME who intentionally thwarted their employer's competitor in a draft statement had violated federal antitrust laws on a theory of apparent authority).

229 *Allied Tube*, 486 U.S. at 497.

230 *Id.* at 496.

meeting, resulting in a narrow—394 to 390—defeat of Indian Head's proposed bid to have its conduits listed in the Code.[231]

The economic fallout to Indian Head was palpable. A product not listed in the Code might not be included on lists compiled by private, national certification laboratories, such as the critically important Underwriters Laboratories (UL), and therefore would likely not be used by electrical contractors or distributors.[232] Moreover, insurers are also reluctant to underwrite buildings with components not on the UL list.[233] As importantly, state and local governments routinely adopt the Code, often with few changes.[234]

Prior to *Allied Tube*, the Supreme Court and lower federal courts adopted the position that private standard-setting organizations, like the NFPA, were quasi-legislative.[235] This meant that they too would be protected under the *Noerr-Pennington* doctrine because attempts to influence them would be equivalent to lobbying a governmental entity. For example, in the 1976 case of *Rush-Hampton Industries, Inc. v. Home Ventilating Institute*,[236] a federal district court ruled against the plaintiff, a maker of ductless bathroom fans, who sued a trade association for slander and for the trade association's activities in constructing the meaning of ventilating devices in its building code used by state and local governments.[237] The court explained that the defendant Institute's activities were legislative and adjudicatory in nature and, therefore, attempts to influence the Institute would be protected as if the Institute were a governmental body.[238]

The Supreme Court's ruling in *Allied Tube* assumed a different view and clarified how private standard-setting organizations should be examined. The Court held that a distinction must be drawn between those activities that are political versus those that are

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231 *Id.* at 496–97.

232 *Id.* at 495–96.

233 *Id.*

234 *Id.* at 495.

235 *See, e.g.*, Wheeling-Pittsburg Steel Corp. v. Allied Tube & Conduit Corp., 573 F.Supp. 833, 838 (N.D. Ill. 1983); Rush-Hampton Indus. Inc. v. Home Ventilating Inst., 419 F. Supp. 19, 24 (M.D. Fla. 1976). *See generally*, Kurt J. Lindower, Note, *Noerr-Pennington Antitrust Immunity and Private Standard-Setting:* Allied Tube & Conduit Corp. v. Indian Head, Inc., 58 U. CIN. L. REV. 341, 346 (1989).

236 419 F. Supp. 19, 19 (M.D. Fla. 1976).

237 *Id.* at 20.

238 *See id.* at 25; *see also Wheeling-Pittburgh Steel Corp.*, 573 F. Supp. at 833 (Allied Tube sued Wheeling alleging that Wheeling's activities in actions by Underwriters Laboratories (UL) that delayed its product's entry into the market).

commercial.[239] The inquiry was necessary to determine whether a private standard-setting organization should be provided *Noerr-Pennington* protection from antitrust laws.[240] To make the distinction, the Court examined three factors: the source, the context, and the nature of the organization's activities.[241]

With respect to source, the Court noted that these organizations provide pro-competitive benefits.[242] Still, their activities must be scrutinized because they consist of economically interested companies with vertical and horizontal relationships.[243] The Court stated this scrutiny was necessary because these organizations, in effect, create an "[a]greement on a product standard [which] . . . implicitly [is] an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny."[244]

Regarding context, the Court noted that Allied Tube's activities did not involve the kind of debates and review typically found in the political arena.[245] In fact, the Court concluded "[w]hatever *de facto* [governmental] authority the Association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade."[246] In this case, the Court noted, "the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, [thus] we have no difficulty concluding that the restraint has resulted from private action."[247]

Lastly, in looking at the nature of Allied's activities, the Court saw those who deal with these organizations as more engaged in decision making than petitioning. As the Court explained,

> [the] petitioner did not confine itself to efforts to persuade an independent decisionmaker, . . . rather, it organized and orchestrated the actual exercise of the Association's decisionmaking authority in

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239 *See Allied Tube*, 486 U.S. at 499–500.

240 *Id.*

241 *Id*. at 499. *See also* Lindower, *supra* note 236, at 350.

242 *Allied Tube*, 486 U.S. at 500.

243 *Id.*

244 *Id.*

245 *Id*. at 501.

246 *Id.*

247 *Id.* at 502.

> setting a standard. Nor can the setting of the Association's Code be characterized as merely an exercise of the power of persuasion, for it in part involves the exercise of market power.[248]

Furthermore, the Court reasoned that, "[t]he Association's members, after all, include consumers, distributors, and manufacturers of electrical conduit, and any agreement to exclude polyvinyl chloride conduit from the Code is in part an implicit agreement not to trade in that type of electrical conduit."[249]

D. Third-Party Providers and Antitrust Laws: Lessons to be Learned from **Omni** *and* **Allied Tube**

Third-party providers of green building initiatives must now maneuver in a similar, albeit not identical, antitrust legal environment as those parties discussed in the foregoing cases. The following discussion should provide helpful guidance to both national umbrella organizations such as the USGBC and GBI and their myriad local chapters, which now exist in virtually every major city across the country.

The evolution of cases from *Parker* to *Omni* essentially creates three possible scenarios.[250] The first is the most obvious and long-standing: when a state, acting as a sovereign, directly restrains trade, antitrust laws are not applied.[251] This must be contrasted with situations when public and private entities with a direct financial interest restrain trade.[252] Or when, as explained in one case, these entities' activities simply provide "a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[253] Lastly, when a local government with no financial interests restrains trade in concert with a private party but does so under clearly articulated state

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248 *Allied Tube*, 486 U.S. at 507.

249 *Id.*

250 *See generally* Stephanie Ames, *City of Columbia v. Omni Outdoor Advertising, Inc.: The Expansion of State Action Immunity to Municipal Regulation*, 18 J. CONTEMP. L. 309, 314 (1992) (outlining scenarios stemming from the Parker-Omni transition).

251 *See supra* Part III.A. (discussing the Parker case in which California directly attempted to control the price of raisins under its California Agricultural Prorate Act). *See also* Hoover v. Ronwin, 466 U.S. 588 (1988) (examining direct state legislation regulating bar admissions in Arizona).

252 *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (discussing a state agency passively accepting a public utility's tariffs). *See also supra* Part III.C. (discussing *Allied Tube* and the activities of private organizations engaged in restrains in trade).

253 *California Retail Liquor Dealers*, 445 U.S. at 98. *Cf.* Ames, *supra* note 250, at 314 (outlining relationship between states involvement and development of antitrust laws).

authorization, antitrust laws do not generally apply, although they are subject to the so-called sham exception.[254]

A related issue that third-party providers must also heed is the rule articulated in *Allied Tube*. Under that case's logic, if providers are engaged in writing standards and codes, they must differentiate their activities between those that are commercial and those that are political.[255] The activities of third-party providers of green building standards, such as reviewing applications, rendering project-specific advice, and conferring formal certification, would likely be subject to the third scenario. As with the Columbia Outdoor Advertising Company, which aggressively lobbied the City of Columbia, third-party providers will likely be protected from antitrust laws. As the Court clearly pointed out in *Omni*, as long as a private organization is pursuing a desired *outcome*, even one which enriches it by thwarting its competition, it will not be subject to antitrust liability.[256] This assumes of course, that the government in question is acting on clearly articulated state authority that is designed to actually accomplish an anticompetitive outcome.[257] It is only when a third-party organization, such as the USGBC, as a pretense to legitimate lobbying efforts, engages in a quasi-battle of attrition that the process would be viewed as falling within the sham exception as provided under the *Noerr-Pennington* doctrine. These efforts might include making frivolous claims that its competition is not adhering to licensing and other requirements in order to create implementation delays and added expenses.[258]

When private third-party organizations develop and draft rating systems that are subsequently adopted into state and local building codes, the rationale of *Allied Tube* will likely apply. Allied Tube and others conspired with like-minded private companies to eliminate a product manufactured by the Indian Head Company from being included in a building code promulgated by a private trade association. The items endorsed by the code were components used in private construction that were adopted by many cities and

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254 *See supra* Part III.A. (discussing *Omni* as well as the important sham exception articulated under the *Noerr-Pennington* doctrine).

255 *See supra* Part III.

256 *See supra* Part II.C.2. (discussing the Court's language in *Omni*).

257 *Id.*

258 *See supra* Part III.A. (discussing the *Omni* Court's application of the *Noerr-Pennington* doctrine to the Columbia Outdoor Advertising's lobbying activities and why it did not constitute a sham).

municipalities. Exclusion from the list meant that if a contractor used Indian Head's plastic conduit pipes it would not be "up to code," thereby dissuading contractors from using Indian Head pipes. Because Allied Tube's collusive and anticompetitive activities were not political (i.e., not in concert with a local government, but commercial with fellow competitors) those activities were not protected from antitrust laws.[259]

Third-party organizations typically develop and draft the parameters of the rating systems that they promulgate, such as what types of materials are proper to attain a certain level of certification. Indeed, the LEED program creates express requirements for certification, such as what is necessary to attain a Platinum, Gold, or Silver rating. However, if an independent organization promulgates a code for green construction and the USGBC (or its member constituents) attempts to use its influence to suppress the inclusion of certain building materials or products it has a commercial interest to exclude, this would likely be illegal. This is because, under the reasoning of *Allied Tube*, such dealings would likely be viewed as more commercial than political in nature.[260]

Although there is no evidence that the USGBC or any other private organization that promulgates a third-party green building rating system has engaged in such conduct, the USGBC has advocated for the inclusion of LEED within local legislation.[261] This type of activity could be protected under the *Noerr-Pennington* doctrine, but it could also be indicative of the type of collusive efforts that might present antitrust problems similar to those implicated under *Allied Tube*.[262] For example, USGBC's member organizations "participate in annual meetings, educational seminars, and actively champion the development process for the suite of LEED rating systems."[263] The horizontal and vertical business relationships that exist within the green building community could thus present the opportunity for

259 *See supra* Part III.C. (discussing the *Allied Tube* Court's rule differentiating political from commercial activities).

260 *Id.*

261 *See* Del Percio, *supra* note 177, at 254 (stating that "[i]n early 2009, the Cascadia chapter of the USGBC e-mailed its members and asked them to call state legislators to lobby for them to exclude Green Globes from state-level legislation").

262 *See Allied Tube*, 486 U.S. at 506 (noting conduct that does "not take place in the open political arena, where partisanship is the hallmark of decision-making, but within the confines of a private standard-setting process").

263 *See* Del Percio, *supra* note 177, at 252.

negative influences to exclude certain products or materials from future versions of LEED.

However, it is critical to note that the USGBC states explicitly on its website that

> [it] does not certify, endorse or promote products, services or companies. . . . We do not award credits based on the use of particular products but rather upon meeting the performance standards set forth in our rating systems. It is up to project teams to determine which products are most appropriate for credit achievement and program requirements.[264]

Whether this ban will remain in future versions of LEED or other third-party rating systems is unclear. Nevertheless, the LEED system currently only recognizes wood products certified by the Forest Stewardship Council for its Materials and Resources Credit Number 7.[265] Accordingly, as an increasing number of state and local governments incorporate the LEED system into legislation, a potential antitrust plaintiff could gain ammunition to claim that its products or materials are being excluded from the marketplace.

For example, in *Allied Tube*, the Court noted the "predicable adoption of the Code into law by a large number of state and local governments" as the basis for proof of anticompetitive market effect.[266] According to the most recent statistics from USGBC, 36 states and 190 local governments have adopted LEED into legislation in some capacity. Whether these numbers would be sufficient for purposes of maintaining an antitrust claim is unclear, but *Allied Tube* does suggest that policymakers should be flexible in implementing green building legislation in order to ensure that a broad range of products or materials can be used in a given jurisdiction in order to avoid the types of allegations that were advanced in *Allied Tube*.

IV
ASSESSING GOVERNMENT ADOPTION STANDARDS

Decision makers in jurisdictions looking to add a green or high performance building component to their public policy initiatives, or to reevaluate those already in place, must consider two different issues. First, they need to consider those programs that provide a

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264 *LEED Frequently Asked Questions*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1819 (last visited Apr. 13, 2012).

265 *See* Del Percio, *supra* note 177, at 243–44.

266 *Id*. at 249 (citing *Allied Tube*, 486 U.S. at 502–03).

reliable and high quality system for verifying sustainable construction practices.[267] Second, they must consider the legal implications of their decision, including antitrust issues, in order to avoid costly legal battles despite their best intentions.[268]

In considering the first issue, many of the early jurisdictional adopters of sustainable construction practices chose to invent their own programs due to the novelty of their actions or because of legal impediments. The AEGB forged new ground when it created its one of a kind system in 1985 and gave birth to an innovative approach to construction that did not begin to enter the mainstream for another fifteen years.[269] Similarly, the GBTC chose to create its own program as well; LEED was in its infancy when New York decided to pioneer financial incentives as an inducement tool for developers who use sustainable practices in their projects.[270]

Later jurisdictions chose to utilize the LEED program from the USGBC exclusively, as many decision makers noticed its track record in delivering strong results on both quality and reliability. However, as competing programs became viable alternatives, a few jurisdictions either evaluated the policy implications of allowing different third-party programs to provide compliance standards or chose to offer dual certifications.[271]

Moreover, this natural evolution coincides with the natural segmentation of the different construction markets and subspecialties. For example, some commentators point out that the LEED program provides a better assessment tool for luxury custom residences with builders seeking to differentiate themselves from their competition, while the NAHB ICC 700 certification excels in evaluating production homes and will have a broader impact upon the public.[272]

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267 *E.g.*, AIA CINCINNATI, *supra* note 57.

268 Other legal issues, which are beyond the scope of this particular Article, include non-delegation doctrine concerns (handing control of legislation over to a private, unregulated third-party entity) and void for vagueness (much green building legislation has been written and adopted quickly). *See* Stephen Del Percio, *Legal Issues Arising Out of Green Building Legislation*, 33 REAL ESTATE ISSUES, No. 3 2008, *available at* www.cre.org/memberdata/pdfs/Legal_Issues.pdf.

269 *See* Tuma, *supra* note 59.

270 *See* Kneeland, *supra* note 72, at 5.

271 *E.g.*, AIA CINCINNATI, *supra* note 57; City of Austin, *supra* note 71.

272 *See Green Rating Systems for Home Building*, GREEN BLDG. ADVISOR, *available at* http://www.greenbuildingadvisor.com/green-basics/green-rating-systems-home-building (last visited Apr. 13, 2012) (subscription available through author).

As such, a jurisdiction must evaluate its decision to use third-party verification systems to further its environmental goals with a broader market perspective. As with any community that contains its share of commercial and residential zoning coupled with affordable and affluent subsections, the decision makers need to employ a comprehensive strategy. There are positives and negatives with any given program, but a jurisdiction needs to mold a policy around a variety of third-party systems and not rely on a single provider. This way, the marketplace may select an appropriate fit for a given project and geographic location while the incentivizing governmental entity can rest easy that a certain level of performance will occur.

In evaluating antitrust and other legal implications of legislating green, a jurisdiction must consider the possibility that it may face implementation issues—including the possibility of litigation—if it selects a single third-party verification system.

V
CONCLUSION

For many jurisdictions, the importance of developing a viable program for green building underpinned by a viable certification process to ensure its continuing credibility is critical. Yet, like any new system, its evolution must be carefully monitored so that it is not undermined by unethical and illegal practices among governmental bodies, third-party providers, and private sector developers. While the default rule is that local governments—the most important consumers of the services delivered by third-party providers—are immune from antitrust liability, major and potentially dangerous legal exceptions exist. As we discuss in this Article, these exceptions range from the sham exception to the *Noerr-Pennington* doctrine to objectionable activities by third parties that develop and draft rating systems for builders and other trades, as discussed in *Allied Tube*. Failing to take these considerations seriously could impede the impressive progress of the green building industry and the undeniable importance that it continues to provide to the construction and real estate sectors.