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BEAN KINNEY & KORMAN PC
ATTORNEYS

Land Use and Zoning Newsletter

Inside This Issue:

Our Practice Areas:

BUSINESS & CORPORATE

- Appellate Practice
- Business Services
- Construction Law
- Copyright/Trademark
- Creditors' Rights
- E-Commerce
- Employment Law
- Government Contracts
- Immigration
- Land-Use, Zoning, & Local Government
- Landlord/Tenant
- Lending Services
- Litigation
- Mergers and Acquisitions
- Nonprofit Organizations
- Real Estate Services
- Title Insurance

INDIVIDUAL SERVICES

- Alternative Dispute Resolution
- Domestic Relations
- Negligence/Personal Injury
- Wealth Management & Asset Protection
- Wills, Trusts & Estates

Redefining Green: LEED Version 3 Unveiled

by Fred R. Taylor, Esq. and Jonathan C. Kinney, Esq.

"Green" is so yesterday. The word is being overworked to a point that many products profess, without substance, to be green in some manner. As a result, the term has been diluted by its overuse. Whether it's a discussion of the national budget or the recently unveiled Leadership in Environmental Energy and Design (LEED) Version 3 rating system, the hot button word and operative term now is "carbon footprint."

Although green is not going away as an underlying theme put forward by the U.S. Green Building Council (USGBC), in the newest version of the LEED reference guide a quantum shift is taking place. The change weighs certain LEED credits more strongly than others. Now, certain actions that diminish the carbon footprint and therefore lessen the impact on climate change will be more generously rewarded than those actions that could just be described in some manner as being environmentally friendly.

The new LEED v3 rating system is described by its authors as "a more holistic and more integrated way" of addressing the impact of building on the environment. It is a system designed to grow and evolve along with improvements in building science through the emergence of new technologies and a better understanding in the marketplace of green projects.

In the pre-LEED v3 (PLv3) world there existed a litany of individual credits. Some, seemingly created in their own vacuum, did not take into consideration other LEED credits or were, in fact, in direct conflict with other credits. Under the new rating system, the credits exist as one integrated whole. The interrelationship of credits is part of a general strategy towards achieving a synergistic, balanced approach of sound, environmentally considerate construction.

LEED v3 differs from its predecessors by emphasizing "Harmonization," "Weightings" and "Regionalization." These distinctions seem to make sense. PLv3 was represented by a checklist of credits, most of equal value, regardless of the relative importance, effort or cost of attaining the credit. As an example, providing a set of bike racks resulted in obtaining one credit.

Locating and constructing a building adjacent to a metro stop also earned one credit. Under LEED v3, providing bike racks still obtains one credit, but locating a building in the right place can now generate up to eleven credits (with an additional five credits available for creating parking policies that encourage the use of fuel

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Redefining Green: LEED Version 3 Unveiled
Continued from Page 1

efficient cars, rewards carpooling, etc). Carbon footprint. Points awarded for energy efficiency, more environmentally friendly refrigeration and on-site renewable energy have been increased. Again, carbon footprint.

Regionalization is the new mantra: PLv3 was "one size fits all." Natural ventilation might have been looked upon differently in Anchorage than in Miami or tidal energy might be more relevant along the Carolinas coast than, say, Nebraska, but no distinction existed. Now, by going to the USGBC website and entering a zip code, regionalized credits will be available to the particular site. For instance in the 22201 zip code where Bean, Kinney & Korman is located, regional priority points can be obtained for protecting or restoring the habitat, reducing water usage by 40%, improving energy efficiency by 40% or more, and using 1% of renewable energy onsite. Priorities will obviously vary for different areas of the country.

The new system will be based on a 100-point system plus 10 bonus point, six of which are for innovation in operations or deign and four for regional priorities. Certification under the new rating system can be achieved by obtaining 40 points, while 50 points achieves Silver, 60 points achieves Gold and 80 points achieves Platinum. Most of the additional points have been targeted at mitigating and reducing energy and water usage.

In addition to changes in the point system, one major change is that certification will be undertaken by a group of private certifying bodies rather than the USGBC in order to increase the speed and efficiency of the certification process.

Some day, we'll be talking about pre-LEEDv4. That will be progress. The LEED concept, as it evolved in earlier iterations became a benchmark, a basis of comparison and a road map for environmentally sound development. This is all a learning process. Interested people are learning on the job and their experiences will be reflected in LEED, as it changes. In the meanwhile, standing in the front line of LEED, knowing and adapting to the "predictable" changes contemplated by the LEED authors, as they come along, will hopefully lead to a competitive advantage and a better quality of life. Bean, Kinney & Korman is striving to be at the front of that line.

After June 26, all new LEED projects are required to register under the LEED v3 rating system. If you wish to download the LEED 2009 rating system documents and view additional information about LEED v3, please go to the USGBC website at www.usgbc.org and click on the LEED tab. Virginia now has 18 LEED Accredited Professionals who are attorneys. Bean, Kinney & Korman has nine LEED Accredited Professionals – Jonathan C. Kinney, Richard "Tad" Lunger, Frederick Taylor, Lori Murphy, David Hannah, Raighne Delaney, Heidi Meinzer, Sean Kumar, Timothy Hughes – more than any other firm in Virginia, D.C. or Maryland.

If you have any questions regarding LEED v3, please do not hesitate to call any of the LEED Accredited Professionals listed above at (703) 525-4000. If you would like a free seminar or update for your employees on the new changes, please call us.

County to Raise Taxes for Affordable Housing Condominiums
by Lori K. Murphy, Esq.

Due to a recent ruling, Arlington County may soon be required to assess affordable housing condominiums at the same real estate tax rate as a regular condominium. In *T.B. Venture LLC v. Arlington County*, an Arlington County Circuit Court judge entered an Order on May 8, 2009 denying T.B. Venture's request that the real estate tax rate take into account the fact that the condominiums were being used solely for a community-benefit housing program for the next 40 years.

In the case at hand, a condition of the site plan approval required the condominium complex to provide affordable housing in twenty-one of its units. In fact, this community-benefit condition was enforced by a separate contract between the owner and the County. To memorialize that agreement, a memorandum was recorded in the Arlington County Land Records: an important fact, since any commercial or investment purchaser would be unable to purchase the entire condominium complex and then turn it into fair market value, income producing rental property.

T.B. Venture argued that affordable housing condominiums should be assessed at a real estate tax rate that takes into consideration the encumbrances associated with the units – i.e. that the units could

County to Raise Taxes for Affordable Housing Condominiums
Continued from Page 2

only be used for affordable housing. Thus, even if the current owner sold the property in an arms-length transaction, the buyer would still be required to rent the units at affordable-housing rent prices for the balance of the forty years. Thus, it makes sense that the real estate tax assessment not be equal to a similarly-sized and similarly-located unit that did not have the same restriction. And, since real estate tax assessments are intended to relate to the real world (real market or fair market value), this approach makes sense.

Nonetheless, the judge threw out the argument that an affordable housing unit's tax assessment should take into consideration that the unit cannot be sold or leased to anyone other a qualifying affordable-housing resident. The judge instead ruled that all of the affordable condominium units should be assessed as if they were unencumbered.

This will have a large impact on owners of community-benefit condominiums since the two largest expenses associated with condominiums are condominium fees and taxes. We believe this recent ruling will be appealed by T.B. Venture.

Expanded Review of Columbia Pike Revitalization District
By Jonathan C. Kinney, Esq.

Arlington County Planning and Housing Office has indicated it will undertake an expanded review of the Columbia Pike Planning Study Areas. When Columbia Pike was originally reviewed the revitalization district was planned and the Form Based Code was adopted. The primary emphasis was on properties that fronted onto Columbia Pike and areas back one or two blocks from Columbia Pike. This new phase will go more into the multifamily districts that stretch along Columbia Pike, including the Barcroft Apartments, Fillmore Gardens, and Foxcroft Heights.

It is currently uncertain what recommendation will be made as to these properties. Owners and developers interested in properties in this area should attempt to follow the County planning process, which is well-documented online through the Department of Community Planning, Housing and Development pages of the official website of Arlington County: www.arlingtonva.us/Department/CPHD.

Legislative Update
by Jonathan C. Kinney, Esq.

The reduced volume of legislation introduced and passed during the 2009 session of the Virginia General Assembly was largely as a result of the session's focus on the budget and new rules governing the administration of bills. Of note in the land use and zoning areas are several bills indicative of the current economic conditions. Certain preliminary and recorded plats, final site plans and other land use approvals are automatically extended until July 1, 2014. Similarly, the validity of plats for phased developments is extended by a period of 5 years. And finally, the bonding requirement has been reduced from 25% to 10% of estimated construction costs.

Changes Afoot in Arlington's Master Transportation Plan
by Tad Lunger, Esq.

Arlington County has been going through the public process of updating its Master Transportation Plan with regard to the Parking and Curb Space Management Element. When somebody starts talking about parking and curbs most of us glaze over, but if you are still reading this article it is because you are one of our clients that is routinely in the process of building the County its new streetscape and parking structures, or have "volunteered" to pay for it, or of course, both. If you are one of these folks, you should know that the County is now talking about requiring commercial developers to purchase and install new metering equipment and systems which include communications and electronic components to handle non-cash payments and real-time parking occupancy rates. In practice, this has already been required. On the upside, however, it looks like the County will accept a new policy which will allow developers to only have to build within 2% of the approved amount of parking without having to go back to the County Board to have an amendment approved. This is a common sense approach which should allow for necessary final garage design flexibility and a more efficient post-approval process.

Most notably, however, the County is looking at fine-tuning and changing its parking ratio requirements based on a proposed development's location, occupancy, use,

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Changes Afoot in Arlington's Master Transportation Plan

Continued from Page 3

etc. The County has acknowledged that the current parking ratio's, particularly in our urban corridors, result in over-parking and discourages people from going on a car-free diet. I know what you are thinking: "Great! Now I won't have to build all those parking spaces nobody needs!" Don't we all wish it was that simple in Arlington County? Here's the rub: the County wants to charge you a sum, per space, equal to what it would have cost you to build that space. I know- thanks for nothing Arlington, this could actually be worse than having to build the spaces. A developer should not be charged a fee for not building spaces that are unneeded based upon a ratio that is unwarrented.

Maybe it would make more sense to look at some of the practices that many of the so-called "progressive" jurisdictions have adopted by lowering the parking ratios to a range that actually makes sense? Why not allow a flexible range within the metro area and an updated ratio of one space per 800 to 1,000 SF for office, and a range of 1 to 0.75 spaces per unit for residential buildings? If a developer wants to build outside that range of flexibilty, maybe at that point it would be more appropriate to be discussing some kind of fee as compensation for under-parking a site. At a minimum, however, no fees for building less parking than what is currently required should be imposed until the parking ratios have been updated and reduced (including by right parking ratios).

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