

# GREEN OVERGROWTH

by Timothy R. Hughes Esquire, LEED AP<sup>®</sup>

In an otherwise moribund construction economy, green construction in general and construction certified under the standards of the United States Green Building Council (USGBC) in particular stand out as one bright spot. Federal stimulus dollars expressly dedicated to green construction projects are adding fuel to this fire. In addition, governmental bodies across the country and here locally are rapidly increasing their focus on encouraging and even requiring green construction. Many jurisdictions are relying on USGBC certifications under the Leadership in Energy and Environmental Design (LEED<sup>®</sup>) program to define their green building requirements.

Contractors interested in working in the green building sector need to understand green building requirements, specifications and their implementation, and the requirements of each applicable local jurisdiction. Further, contractors need to be aware that the explosive success and growth of the USGBC and its LEED certification programs are creating review and certification delays. These bottlenecks may be warning signs of future problems and liability exposure.

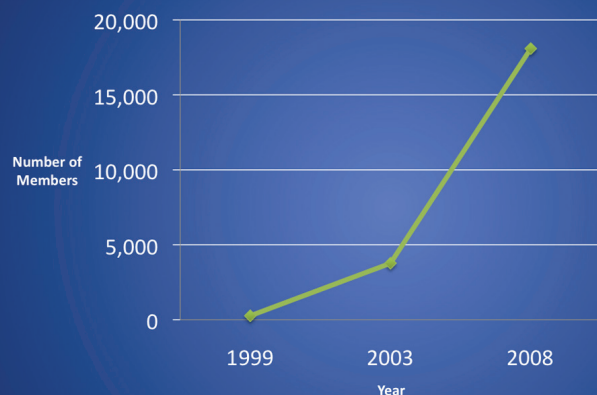
## Growth in Green Building Interest

The explosion of interest in green building can be dramatically seen simply by reviewing the statistics issued by the USGBC. The USGBC reported 268 members in 1999.

In 2003, that number had impressively increased by more than 14 times to 3,772. As of December 31, 2008, USGBC reported 18,086 members, another increase of more than 500 percent in five years.

The number of USGBC certified and registered commercial projects reflect similar trends. In 2004, just under 200 projects were certified. This number has climbed to 2,193 as of December 2008. In 2004, just over 2,000 projects were registered with USGBC. This number has grown to 16,992 in 2008.

## Growth in USGBC Members



## Governmental Encouragement, Governmental Requirement

The recent federal stimulus bill, the American Recovery and Reinvestment Act of 2009, contains significant elements of funding directed towards green-related projects. (See related story, "ARRA: Hope Coupled with Caution for Merit Shop Contractors," *Building Washington*, Volume 24, Number 2, pages 10-15.) The availability of government funding and incentives is a strong boost to green-focused projects, especially in light of the anemic performance of other sectors of the construction economy.

Further, governmental bodies are encouraging and even requiring LEED certification. For example, many federal contracts that are currently released for request for proposal include explicit LEED certification requirements. Indeed, the U.S. General Services Administration (GSA) is requiring that, "As a means of evaluating and measuring our green building achievements, all GSA new construction projects and substantial renovations must achieve silver certification through the LEED green building rating system of the USGBC. Projects are encouraged to exceed LEED silver and achieve LEED gold."

### Maryland

On the regional level, various governmental bodies have embraced green construction as well. In 2008, Maryland passed a requirement that buildings over 7,500 square feet with state funding for either new construction or renovation must be certified LEED silver or achieve a similar designation from another acceptable standard. Maryland also imposed the same requirement on public schools using state funds effective July 2009; this requirement included partial reimbursement of local funding costs.



Maryland localities have adopted some goal-based measures, but Annapolis stepped up further by adopting an ordinance imposing requirements that mirror the state's public construction standards and extends further to commercial and residential projects over 7,500 square feet. Annapolis also imposed requirements that apply to construction or major modifications to five or more single-family homes.

Montgomery County requires that all non-residential or multi-family residential projects over 10,000 square feet must meet LEED certification standards. The county offers a tax credit for exceeding the requirements or for meeting green standards when not mandated under the ordinance. Taking another approach, Prince George's County established green building goals in its "Goes Green Annual Report," published in the spring of 2009. (The sidebar contains links to all of these codes and reports, as well as resolutions passed by the City of Bowie and Town of La Plata and a tax incentive plan passed in Howard County.)

### District of Columbia

The District of Columbia has also passed specific requirements that apply to new construction and substantial improvements to city-owned projects funded by the 2008 fiscal year budget. These projects must achieve 75 points on the U.S. Environmental Protection Agency national energy performance rating system if they are over 10,000 square feet. Non-residential projects, except schools, must meet or exceed LEED New Construction 2.2 (LEED-NC) or Core and Shell 2.0 (LEED-CS) standards for silver certification. Residential projects must meet the city's "Green Communities" standards. Additional types of projects are required to meet the standards over time. By 2012, all private development projects are required to meet the specified LEED standards.

### Virginia

In Virginia, Governor Timothy M. Kaine released Executive Order No. 82 (2009) requiring all executive branch agencies and institutions entering the design phase for construction of buildings over 5,000 square feet, or renovations with costs over 50 percent of the building value, to meet energy and water conservation standards. In addition, absent express exemption based on special circumstances warranting a finding of impracticability, all such buildings are required to comply with LEED silver or Green Globes two-globe standards. The executive order also offered explicit direction with regards to procurement, use of fuel-efficient vehicles, energy efficiency in government, and other matters.

On the local level, Virginia jurisdictions have traditionally encouraged rather than mandated green building. This flows in part from the more limited powers granted to localities

under Virginia law compared to Maryland and the District of Columbia. Arlington County in particular has encouraged a significant number of LEED certified projects through incentives tied to bonus density. Fairfax County issued a policy that all county buildings over 10,000 square feet must reach LEED silver certification. That requirement does not apply to single-family homes, townhomes, or low-rise, multi-family buildings. The City of Alexandria recently issued a requirement that all new developments requiring a site plan or special use permit must achieve a LEED silver or equivalent rating for non-residential and a LEED certified rating for residential development.

## LEED Submittals and Review

The LEED process involves submittal, review and ultimate decisions as to whether a project meets the requirements for the specific credits sought. USGBC allows for two phases of submittals, design and construction. According to the USGBC website, preliminary design reviews are estimated at 25 business days. Final design phase reviews are estimated at 15 business days. Similarly, preliminary construction phase reviews are estimated at 25 business days and final construction reviews are estimated at 15 business days.

In theory, a split review of design and construction submittals can be quite advantageous. When using the split review, the project administrator can request review of design phase submittals and obtain a preliminary reaction as to the likelihood of obtaining the sought after credits before design is complete. The balance of the project documentation can then be submitted during "construction" submittals. The split review allows for a chance to maximize credits by permitting design changes after feedback and prior to project completion.

Owners and builders depending on the split review process must understand that USGBC estimates, but does not guarantee, response times to submittals. The group acknowledges on its website that it is currently suffering delays beyond its quoted estimates. The website states that, "[D]ue to increasing review volume, review results may be delayed by up to six weeks." In conversations with USGBC staff, these estimates climb to 12 weeks for review of design and construction phase submittals.

Even these USGBC staff estimates may be overly optimistic. A recent article in the *Washington Business Journal* by Vandana Sinha, "D.C. Area Buildings Constructed to Meet Green Standards Face Certification Lag," (May 29, 2009) cites delays that extend the certification process, "from what should be five weeks [to] closer to five months." The report provided specific examples of projects struggling to achieve final certification in a timely fashion and the associated heartburn of project officials.

## Potential Impacts of Delays

Delays can mean that design reviews are not completed before the construction phase begins. This eliminates the advantage of the two-stage design and construction review option. Without design phase reaction, designers and owners do not know which design credits their project is likely to achieve. When the design phase submittal responses are received after construction documents are completed, or even during the construction of the project as is now sometimes the case, redesign may be difficult or prohibitively expensive. There are far fewer spare points to go after during construction, jeopardizing the project's ability to meet its certification goal and potentially leading to serious monetary impacts.

The *Washington Business Journal* article reflects that some owners are further concerned that delays in obtaining final LEED certification will hamper their ability to timely and effectively market their buildings. There are other serious direct financial impacts that could flow from delays in certification. Delays in certification can cause ripples into overall project accounting and corporate accounting if anticipated tax credits are delayed or even denied. In addition, delays in certification can tie up anticipated contracts, occupancy dates or overall project approvals if the approvals are tied to certification. Such delays could conceivably lead to delay claims or even terminated leases for tenants.

USGBC appears to be struggling with its own success. The huge growth in LEED registered projects, USGBC members, and certified buildings is straining the LEED certification system. To address this growing strain, USGBC reports that certifications will be farmed out to certified third parties with the advent of LEED-NC 3.0, which applies to new projects registered after June 26, 2009. Given the governmental push for LEED certified buildings, the numerical pressure on USGBC is sure to increase. It remains to be seen how well the system reacts.

## The Future is Green

Green building represents one bright spot in a fairly depressed construction market. As federal, state and local governments implement and expand requirements for green building, it appears that this trend will continue moving forward. It is clear that construction industry players need to educate themselves on green building standards and LEED in particular to maintain a competitive edge. The alternative is to be left behind at the station while the rest of the industry, including competitors, moves forward into a new green building based economy.

Educated owners, designers, contractors and involved parties should plan and schedule for actual submittal and certification



turnaround times to avoid potentially devastating delays. The best advice is to assume you will face substantial delays in receiving a response to your design submittals and build this time into your schedule. Then you will have a far better chance of avoiding the extremely harsh consequences that some projects may face if the LEED certification log jam continues.



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## SIDEBAR

Want to read the fine print on local area requirements for green building? Check out these helpful links.

### MARYLAND

The Maryland State Code is available at [michie.lexisnexis.com/Maryland](http://michie.lexisnexis.com/Maryland). Search for these relevant sections: State Finance and Procurement, § 3-602.1, and Education, § 5-312.

Maryland green building tax credit information is available at [energy.maryland.gov/incentives/business/greenbuilding/index.asp](http://energy.maryland.gov/incentives/business/greenbuilding/index.asp).

#### Annapolis

[www.ci.annapolis.md.us/upload/images/government/council/Adopted/O5607.pdf](http://www.ci.annapolis.md.us/upload/images/government/council/Adopted/O5607.pdf)

#### City of Bowie Resolution

[chapters.usgbc.org/baltimore/pdf/advocacy/Bowie\\_SIGNE-DR-15-03.pdf](http://chapters.usgbc.org/baltimore/pdf/advocacy/Bowie_SIGNE-DR-15-03.pdf)

#### Howard County

[www.howardcountymd.gov/DPZ/Environment/green\\_building.htm](http://www.howardcountymd.gov/DPZ/Environment/green_building.htm)

[www.howardcountymd.gov/DPZ/DPZDocs/CouncilBill49\\_2007.pdf](http://www.howardcountymd.gov/DPZ/DPZDocs/CouncilBill49_2007.pdf)

#### Montgomery County Legislation

[permittingservices.montgomerycountymd.gov/17-06.pdf](http://permittingservices.montgomerycountymd.gov/17-06.pdf)

#### Prince George's County Goes Green Annual Report

[www.princegeorgescoutymd.gov/Government/AgencyIndex/GoingGreen/pdf/2009-annual-green-report.pdf](http://www.princegeorgescoutymd.gov/Government/AgencyIndex/GoingGreen/pdf/2009-annual-green-report.pdf)

#### Town of La Plata Resolution

[bit.ly/Wq7kF](http://bit.ly/Wq7kF)

### VIRGINIA

Governor Kaine's Executive Order No. 82 (2009), which sets out the green building requirements for state buildings, can be found at [www.governor.virginia.gov/Initiatives/ExecutiveOrders/2009/EO\\_82.cfm](http://www.governor.virginia.gov/Initiatives/ExecutiveOrders/2009/EO_82.cfm).

#### Arlington

[www.arlingtonva.us/DEPARTMENTS/EnvironmentalServices/epo/EnvironmentalServicesEpoGreenBuildings.aspx](http://www.arlingtonva.us/DEPARTMENTS/EnvironmentalServices/epo/EnvironmentalServicesEpoGreenBuildings.aspx)

#### Alexandria Green Building Policy

[alexandriava.gov/GreenBuilding](http://alexandriava.gov/GreenBuilding)

#### Fairfax County Green Building Policy

[www.fairfaxcounty.gov/news/2008/030.htm](http://www.fairfaxcounty.gov/news/2008/030.htm)

### DISTRICT OF COLUMBIA

#### DC Green Building Act

[green.dc.gov/green/lib/green/pdfs/GreenBuilding\\_act06.pdf](http://green.dc.gov/green/lib/green/pdfs/GreenBuilding_act06.pdf)

#### DC Green Building Fact Sheet

[dcra.dc.gov/dcra/lib/dcra/information/publications/green\\_building.pdf](http://dcra.dc.gov/dcra/lib/dcra/information/publications/green_building.pdf)

#### DC Green Information

[green.dc.gov/green/cwp/view,a,1231,q,460953.asp](http://green.dc.gov/green/cwp/view,a,1231,q,460953.asp)

#### Green Communities Program

[www.greencommunitiesonline.org](http://www.greencommunitiesonline.org)

### GENERAL RESOURCES

#### Environmental Protection Agency Energy Star Program

[www.energystar.gov/ia/business/healthcare/natl\\_energy\\_rating\\_system.pdf](http://www.energystar.gov/ia/business/healthcare/natl_energy_rating_system.pdf)

[www.energystar.gov/benchmark](http://www.energystar.gov/benchmark)

#### General Services Administration Sustainability Program

[www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA\\_OVERVIEW&contentId=8154](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=8154)

### GREEN GLOBES

[www.greenglobes.com](http://www.greenglobes.com) ■