

RETAIL PERSPECTIVES

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SCORE ONE FOR THE RETAILERS: CALIFORNIA APPEALS COURT CLARIFIES STANDARDS FOR SUPPLEMENTAL EIRs INVOLVING SUPERCENTERS

BY: ANNE CLINTON

Across California, the approvals for developments involving big box stores and so-called “supercenters” are being challenged by labor unions, environmentalists and others. A recent California Court of Appeals case gives a boost to developers and retailers by finding that the mere presence of a so-called supercenter in a revised project does not automatically trigger a requirement for a supplemental environmental impact report (“EIR”) to examine possible urban decay effects.

In *Patricia Melom v. City of Madera*, Case No. MCV037268 (Cal.App.5th, March 24, 2010), plaintiff Melom claimed that the City of Madera (“City”) violated the California Environmental Quality Act (“CEQA”) and the City’s Municipal Code when it approved a commercial shopping center without first preparing a subsequent or supplemental EIR after the site plan changed to accommodate a SuperTarget.

In November 2006, the City certified an EIR for the proposed retail center. The conceptual site plan in the EIR showed approximately 30 retail spaces, the largest of which was 125,000 square feet. In March 2007, the developer submitted a “refined” site plan with the largest retail space described as approximately 198,500 square feet, plus a 10,900 square foot garden center. The total retail square footage of the project remained relatively unchanged (in fact, it decreased by about 4,000 square feet). In June 2007, the City prepared an addendum to the EIR which concluded that there were no substantial changes proposed to the project and therefore no new

THE “GREENING” OF DEVELOPMENT (PART 2 OF 2): A PRIMER ON THE NEW LEED 2009 PROJECT AND STORE CERTIFICATION RATING SYSTEMS

BY: BOB SYKES

The United States Green Building Council (USGBC) announced the adoption of its new Leadership in Energy and Environmental Design (LEED®) 2009 rating systems. The new LEED 2009 rating systems are applicable to projects registered for LEED certification with the USGBC after June 27, 2009. LEED 2009 changes the credit weighting from prior versions of LEED, placing more emphasis on energy savings and the reduction of greenhouse gases. LEED 2009 contains regional priority credits in which certain credits are given additional weight due to their importance to the region in which the project is located. Under LEED 2009, all LEED rating systems are now based upon 100 possible points, plus 10 possible bonus points. Finally, LEED 2009 updates the LEED rating systems based upon current industry standards.

This is the second part of a two-part article discussing the “greening” of development – i.e., sustainable development (Part 1 was published in the Winter 2009 issue of Retail Perspectives).¹

Prior Versions of LEED

While there are other standards by which projects are measured in relation to environmental benchmarks/goals, the LEED standard, developed and originally unveiled by USGBC in 2000, is by far the most widely recognized and commonly accepted. The USGBC is a Washington D.C. based non-profit organization committed to encouraging cost-efficient and energy-saving green buildings. With a community comprising 78 local affiliates and more than 20,000 member companies and organizations, the USGBC is the driving force behind sustainable development in United

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States. There are currently over 28,000 projects comprising over 6 billion square feet of construction space that are seeking or have obtained LEED certification. LEED provides third-party verification that a building or community was designed and built using strategies aimed at energy savings, water efficiency, CO₂ emissions reduction, improved indoor environmental quality, and stewardship of resources and sensitivity to their impacts. The LEED for New Construction (LEED-NC) has been updated by the USGBC periodically since its inception in 2000. Prior to the adoption of LEED 2009, the current version of LEED-NC was version 2.2.

The most popular LEED rating systems, in terms of number of projects registered for certification, have been LEED-NC and LEED for Core & Shell (LEED-CS). Although LEED-NC was designed for new construction or major renovations of office buildings, it may be used for any type of commercial building (e.g., industrial warehouses, hotels, and retail buildings) or institutional building (libraries, museums, churches, etc.) in which the owner or developer will occupy more than 50% of the building's leasable square footage. LEED-NC may also be used for new construction or major renovations of residential buildings of at least four habitable stories. The USGBC defines a major renovation as involving major heating, ventilation and air conditioning (HVAC) renovation, significant building envelope modifications, and major interior rehabilitation. If the project scope does not involve significant design and construction activities and focuses more on operation and maintenance activities, then LEED for Existing Buildings: Operations and Maintenance (LEED-EBOM) is more appropriate because it addresses operation and maintenance issues of existing buildings.

LEED-CS is intended for new construction or major renovations of commercial buildings in which the owner or developer will occupy 50% or less of the building's leasable square footage. LEED-CS is used by developers of spec buildings who do not directly control the design and construction of the interior tenant improvements to certify a building's core and shell. While the USGBC awards LEED-NC certification upon completion of construction, LEED-CS allows a spec building developer to obtain a pre-certification at the end of project's design phase. This allows the spec developer to market the project as LEED-certified while the developer is leasing the project prior to completion of construction.

LEED 2009 for Commercial Interiors (LEED-CI) provides for LEED certification of commercial tenant spaces. Commercial tenants who lease their space or do not occupy the entire building are eligible. LEED-CI was designed to work hand-in-hand with the LEED-CS certification system, however, it is not required that the project have achieved LEED-CS certification for a tenant to obtain LEED-CI certification.

Although LEED-NC may be used for the new construction or major renovation of any commercial or institutional building, the USGBC developed rating systems designed specifically for schools (LEED for Schools) and healthcare buildings (LEED for Healthcare). Recently, the USGBC adopted LEED ratings systems for retail buildings and retail tenant spaces (LEED for Retail, discussed below). There are also LEED for Homes and LEED for Neighborhood Development. Under prior versions of LEED, each rating system had its own reference guide with its own standards for project certification.

LEED is a point-based certification system in which the level of LEED certification depends on the number of points achieved. All LEED-certified projects must satisfy certain mandatory prerequisites, such as all LEED-NC projects must have a construction erosion and sedimentation control plan to reduce pollution from construction activities by controlling soil erosion, waterway sedimentation and airborne dust generation. Despite the fact that each LEED rating system contains prescriptive requirements, LEED is primarily performance oriented – LEED awards additional points in many environmental categories based upon the level of performance. For instance, LEED awards increasing numbers of points based upon the energy savings anticipated from a building's systems. The previous versions of the LEED rating systems each contained a different number of possible points and points required for each level of certification. Under the prior LEED-NC version 2.2, there was a total of 69 points possible and the number of points for the four certification levels were as follows: (a) basic certification (26-32 points), (b) silver (33-38 points), (c) gold (39-51 points), and (d) platinum (52-69 points). Under LEED-CS version 2.0 (the last version published prior to LEED 2009), however, there was a total of only 61 possible points and the number of points for the four certification levels were as follows: (a) certified (23-27 points), (b) silver (38-33 points), (c) gold (34-44 points), and (d) platinum (45-61 points).

LEED 2009

LEED 2009 retains LEED-NC, LEED-CS, and the other LEED rating systems, but LEED 2009 combines similar rating systems into a single reference guide. For instance, the standards for LEED-NC, LEED-CS, LEED for Schools, and LEED for Healthcare have been consolidated into a single Green Building Design & Construction Reference Guide (2009 Edition). These rating systems all follow the same basic standards in the Green Building Design & Construction Reference Guide, but

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the reference guide contains exceptions or additional options for points, where applicable, for each rating system. LEED 2009 retains the five basic environmental categories in which points are awarded as the prior versions of LEED: Sustainable Sites, Water Efficiency, Energy and Atmosphere, Materials and Resources, and Indoor Environmental Quality. Consistent with prior versions of LEED, LEED 2009 also contains an additional category, Innovation in Design, which addresses building expertise as well as measures not covered under the five basic environmental categories.

LEED 2009 allows for bonus points to be earned in a new category – Regional Priority. According to the USGBC, to provide incentive to address geographically specific environmental issues, USGBC regional councils and chapters have identified 6 credits per rating system that are of particular importance to specific areas. Each Regional Priority credit is worth an additional 1 point, and a total of 4 regional priority points may be earned.

The following summarizes the categories under LEED 2009 (which are essentially the same as the prior version of LEED, except for Regional Priority):

- **Sustainable Sites (SS):** Avoid development on environmentally sensitive sites; encourage development density to promote urban infill development and Brownfield redevelopment; promote alternative transportation by locating near public transportation, and encourage use of hybrid vehicles, bicycle commuting, and carpools; preserve and create open space; reduce impact on stormwater systems and urban runoff; minimize heat island effect (the tendency of urban development to retain heat); and reduce light pollution from development.
- **Water Efficiency (WE):** Encourage use of water efficient landscaping; reduce wastewater through use of innovative wastewater technologies; and reduce water use through water efficient plumbing fixtures and use of reclaimed water and on-site treatment of wastewater.
- **Energy and Atmosphere (EA):** Achieve energy conservation through optimal energy performance; encourage use of on-site renewable energy; enhanced commissioning (i.e., third party review of building systems' design) to optimize building system performance; enhanced refrigerant management to minimize emissions of greenhouse gases and ozone depleting CFC's; measurement and verification of building systems; and use of green power (solar and wind).
- **Materials and Resources (MR):** Minimize use of new materials through reuse of existing building materials and use of recycled materials; construction waste management; minimize environmental impacts by using regional materials; and reduce forest impacts through use of certified wood.
- **Indoor Environmental Quality (EQ):** Improve indoor environmental quality by monitoring outdoor air delivery to ensure that fresh air is being circulated in the building and increased building ventilation; indoor air quality management during construction; use of low-VOC emitting materials; indoor chemical and pollutant source control; individual user controllability of heating system; and daylight and views to promote a more comfortable working environment.
- **Innovation in Design (ID):** Additional points awarded for exemplary performance or innovation in design.
- **Regional Priority (RP):** Additional points awarded in categories considered to have additional regional significance.

The mandatory project requirements under LEED 2009 are virtually the same as prior versions of LEED, except LEED 2009 requires that all LEED-certified projects achieve at least a 10% energy savings over comparable standard commercial buildings. There are a total of 100 possible points and 10 possible bonus points under each LEED 2009 rating system, and the same number of points is required for each level of certification: (a) certified (40-49 points), (b) silver (50-59 points), (c) gold (60-79 points), and (d) platinum (80 or more points). The number of points for each of the above environmental categories was changed in LEED 2009, as compared to prior versions of LEED, according to the significance of the category's environmental impacts, using a lifecycle assessment tool developed by the U.S. Environmental Protection Agency (EPA) and applied to the LEED system by the USGBC. According to the USGBC:

“With revised credit weightings, LEED now awards more points for strategies that will have greater positive impacts on what matters most: energy efficiency and carbon dioxide reductions. Each credit was evaluated against a list of 13 environmental impact categories, including climate change, indoor environmental quality, resource depletion and water intake, among many others. The impact categories were prioritized, and credits were assigned a value based on how they contributed to mitigating each impact. The result revealed each credit's portion of the big picture, giving the most value to credits that have the highest potential for making the biggest change.”

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To illustrate the changes in credit weighing, the following is a comparison of the possible points by category for LEED-NC 2009 and LEED-NC version 2.2, and the possible points by credit category as a percentage of the total possible base points:

Category	LEED v2.2	LEED 2009
SS	14 (22%)	26 (26%)
WE	5 (8%)	10 (10%)
EA	17 (27%)	35 (35%)
MR	13 (20%)	14 (14%)
EQ	15 (23%)	16 (16%)
Base Points	64 (100%)	100 (100%)
ID	5 (8%)	6 (6%)
RP	0 (0%)	4 (4%)
Total	69 (108%)	110 (110%)

The side table highlights the increased emphasis placed on developing projects on Sustainable Sites, which increased from 22% to 26% of the total possible base points, and on reducing a project’s impact on the Energy and Atmosphere, which increased from 27% to 35% of the total possible base points.

LEED 2009 adds “Minimum Program Requirements,” which define the minimum characteristics that a project must possess in order to be eligible for certification under LEED 2009. Notably, LEED-certified projects now must share with the USGBC all available project energy and water usable data for a period of at least 5 years. This requirement is intended to provide the USGBC with a database to monitor how LEED projects are actually performing in comparison to the intended energy and water savings.

LEED 2009 also updates the performance standards for several of the credit categories to current industry standards. For example, the primary energy performance standard has been updated from the American Society of Heating, Refrigerating and Air-Conditioning Engineers’ (ASHRAE) Standard 90.1-2004 to ASHRAE Standard 90.1-2007. This change requires an additional 5%-8% energy savings. However, California projects are still permitted to comply with Title 24, which is considered by the USGBC to be comparable to ASHRAE Standard 90.1-2007.

LEED for Retail

As of December 2008, only 200 retail projects had registered for certification under the LEED-New Construction (NC) or LEED-Core & Shell (CS) rating systems, compared with 15,000 total projects registered. The biggest reason for the lack of retail project registrations is the split incentives for retail landlords and tenants. Under the typical “triple net” retail lease, the landlord would pay for capital improvements intended to reduce energy or water use, but the tenant would realize the operating cost savings (e.g., reduced energy and water use costs) resulting from such improvements. Consequently, retail landlords had little financial incentive to develop sustainable, LEED-certified shopping centers.

However, as discussed in our article “2009 ICSC Retail Green Conference: There’s Green in Going Green,” published in the December 2009 Green Perspectives, retailers have now caught the “green wave” that is rolling through the U.S. Retailers recognize the marketing benefits of going green. Most major retailers have adopted corporate responsibility programs which include sustainable store development and operations; in part because customers and employees desire to shop at or work for socially responsible companies. For instance, there is growing evidence that sustainable stores which utilize daylighting achieve average sales that are 5% higher than typical stores that use incandescent lighting. Moreover, studies have shown that green stores achieve improved productivity and reduced health impacts from building operations.

As more retailers have decided to go green, so have shopping center owners and developers. The shopping center industry’s move to sustainable development isn’t occurring only for social responsibility reasons – economic factors are a driving force as well. Shopping center owners now recognize that by going green they can achieve substantially reduced energy and water usage costs, higher rents, increased building value through higher net operating income (NOI), improved sales and lease-up of properties, marketing benefits, and public relations benefits, especially in obtaining project approvals in cities focused on sustainability. Additionally, shopping center developers are benefitting from increased use of utility and tax incentives for energy conservation. Even though green projects typically cost 2%-3% more than traditional developments, they can achieve energy savings alone of 35%. As a result of the green movement in the shopping center industry, as of August 4, 2009, 4,343 (15.7%) of the total 27,691 registered projects are retail projects.

The two LEED 2009 rating systems for new construction and major renovations -- LEED 2009 for New Construction (LEED-NC) and LEED 2009 for Core & Shell (LEED-CS) – and their predecessor versions were designed primarily for office buildings, and in several cases, do not reflect the unique aspects of shopping centers and retail buildings. For instance, a multi-story office building will generally have a centralized HVAC system that is much different than the individual roof-top HVAC units on the typical single-story retail store. Most office buildings have more employees than customers as occupants,

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while the opposite is true for retail. Because a retail store has more customers than employees, it has different energy, ventilation and water use requirements than an office building. There are vast differences in the energy, water use, and HVAC requirements among retail stores and restaurants, depending upon the particular use of the premises. For example, a restaurant with a commercial kitchen has significantly different energy and water use requirements than a retail store, much less an office building. A supermarket needs a substantial amount of refrigeration because of perishable goods, floral departments and frozen products. An apparel store requires high-intensity lighting to display its clothing lines. Neither LEED 2009 nor the previous versions of LEED address the unique characteristics of retail stores or restaurants.

In response to the demand for a LEED rating system that is tailored for the retail industry, the USGBC initiated a LEED for Retail pilot program in 2007. This program tested changes to the LEED-NC and LEED-CI rating systems for the retail industry. Over 80 retail projects participated in the LEED for Retail pilot program. The projects ranged from free-standing stores to shopping centers. The pilot project teams provided feedback on how to apply LEED-NC and LEED-CI to retail spaces. The beta version of LEED for Retail underwent several revisions based upon input from the pilot project teams and public comment.

On March 11, 2010, the USGBC approved two LEED for Retail rating systems – LEED 2009 for Retail: New Construction and LEED 2009 for Retail: Commercial Interiors. The LEED for Retail rating systems will launch in late 2010. In the meantime, retail projects will continue to register under LEED 2009 for New Construction or LEED 2009 for Commercial Interiors. Any project that wants to register under one of the LEED for Retail rating systems will need to wait until the launch.

The two new LEED for Retail ratings systems, LEED-NC for Retail and LEED-CI for Retail, generally contain the same requirements and performance standards as LEED-NC and LEED-CI, respectively, for all commercial buildings. The two new LEED for Retail rating systems, however, contain additional point options that are customized for retail buildings and interior spaces. LEED-NC for Retail includes several additional options for points for “multi-tenant retail complexes,” which are defined as “a site that was master-planned for the development of stores, restaurants and other businesses” in which “retailers may share one or more services or common areas.” For instance, LEED for Retail Sustainable Sites Credit 5.2 (Maximize Open Space) allows a retail building seeking certification to receive credit for its share of open space in a shopping center, even if the open space is not adjacent to the retail store. Likewise, stores within a shopping center may meet the credit requirements of Sustainable Sites Credits 6.1 (Stormwater Design – Quantity Control) and 6.2 (Stormwater Design – Quality Control) by considering the stormwater design of the entire shopping center, and not simply the design of the stormwater system serving the particular store.

LEED-NC for Retail was designed primarily for user-occupied retail buildings. At this point, shopping center owners and developers will still need to use the LEED 2009 for Core & Shell to obtain certification of a shopping center in which more than 50% of the center will be leased.

The following is a list of cost-effective measures for LEED-NC for Retail according to Jerry Udelson, ICSC Research Scholar for Retail Real Estate Sustainability:

Sustainable Sites

1. Choose location near public transit, either existing or planned (and budgeted).
2. Provide bicycle racks and electric vehicle charging stations.
3. Size parking capacity to meet zoning, and provide preferred parking for carpools/vanpools.
4. Preserve/restore open space where possible; landscape with native and adapted plants.
5. Provide passive stormwater management, including on-site infiltration where appropriate, along with bioswales in parking lots.
6. Provide structured or shaded parking where possible; combine parking with photovoltaic solar systems.

Water Efficiency

1. Reduce water use by up to 40% by installing water-conserving fixtures, including high efficiency toilets and urinals, along with low-use faucets.
2. Landscape with native/adapted plants; use drip irrigation or no permanent irrigation system.
3. Meter all specific water-using departments.

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Energy Efficiency

1. Improve building envelope for greater efficiency.
2. Install high-efficiency lighting, including LEDs.
3. Install daylight integration systems.
4. Use zoned occupancy sensors where appropriate.
5. Decrease energy use more than 15% below applicable standards.
6. Use onsite renewable energy systems provided by a third-party vendor.
7. Buy Renewable Energy Credits (RECs) or energy from green power sources.

Materials and Resource Conservation

1. Recycle more than 75% of construction waste.
2. Use 10% or more recycled content materials.
3. Use 20% or more local/regional materials.

Indoor Environmental Quality

1. Install carbon dioxide sensors to regulate ventilation by occupancy levels (this also saves energy).
2. Use non-toxic adhesives, sealants, paints, coatings, carpets in construction.
3. Use best indoor construction air quality maintenance practices.
4. Use daylighting throughout the store.
5. Commit to thermal comfort monitoring and surveys.

Innovations and Regional Priorities

1. Adopt public education program.
2. Buy more green power or Renewable Energy Certificates (RECs).
3. Report carbon emissions to appropriate organizations.
4. Include a LEED Accredited Professional in your project team.
5. Achieve points for regional priority credits.

Conclusion

LEED 2009 represents an update and relatively minor revision, not an overhaul, of the LEED certification system. LEED 2009 puts all of the LEED rating systems on the same 100 point scale, with 10 additional points available for innovation in design and regional priority credits. LEED 2009 re-weights credits – giving more points to those credits intended to achieve energy savings or reduce greenhouse gases. It requires LEED-certified projects to report their actual energy and water usage to the USGBC, which will give the USGBC a database of information to make further refinements to the LEED certification system in the future. LEED for Retail gives additional options for points for retail stores and retailers who construct their own tenant improvements.

Bob Sykes will be giving a presentation on *LEED 2009: A Primer on the New LEED 2009 Project and Store Certification Rating Systems* at 2 p.m. on Monday, May 24, 2010, at the Green Pavilion at the ICSC RECon in Las Vegas. ►

1 Although there is no standard definition of “sustainable development” – to some it may mean minimizing the impact of development on existing resources; to others it may mean reduction in greenhouse gases – according to the United Nations Brundtland Commission Report of 1997, “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

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impacts that would require major revisions of the previous EIR. The City then approved the EIR addendum and passed an ordinance approving and adopting a development agreement between the City and the developer, thus allowing the project to proceed.

Melom immediately filed suit challenging the City's approval of the revised site plan with a supercenter without preparation of a subsequent or supplemental EIR. Melom argued that whenever a governmental entity approves a project with a "supercenter", the approval presumptively requires an EIR that analyzes the potential "urban decay" effects. Since the original EIR did not evaluate urban decay, a subsequent or supplemental EIR, and not an addendum, was required. Melom pointed to *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184 (2004) ("Bakersfield Citizens"), and *American Canyon Community United for Responsible Growth v. City of American Canyon*, 145 Cal.App.4th 1062 (2006) ("American Canyon") (collectively, the "Prior Cases") as evidence for this presumptive requirement. The trial court disagreed with Melom's interpretation, and found that no supplemental EIR was required. Melom appealed.

The Appeals Court affirmed the trial court's ruling, and stated that nothing in the Prior Cases supports - or even implies support for - Melom's proposed automatic requirement for an EIR urban decay analysis for any project with a supercenter. The Court explained that unlike *American Canyon*, where the project at issue increased in size, the overall square footage of the Madera project did not increase. And unlike *Bakersfield Citizens*, where expert testimony was proffered regarding the adverse effects of supercenters, there was no expert evidence presented in the Madera case that suggested that revising the site plan to include a supercenter would cause urban decay. In fact, the Court noted, there was no evidence presented that the addition of a supercenter at the project could cause changes that might eventually lead to urban decay.

The Court went on to expressly limit statements in the Prior Cases that suggested that "supercenters" are a unique use, which would thereby trigger a supplemental EIR to examine whether there are unique impacts. The Court pointed out that there is no definition of the term "supercenter" in the CEQA statutes, CEQA guidelines or in the Prior Cases, implying that an automatic urban decay analysis for any supercenter is untenable given the vague nature of the concept. Furthermore, the Court noted that the Madera supercenter would be limited to the same operating hours as other retail and restaurant uses in the area, and therefore there was no support for Melom's suggestion that the supercenter would in fact have any unique impacts. The Court stated that when an EIR has already been prepared and certified and there is a subsequent change, the inquiry into whether a supplemental EIR is required turns on the project itself or the change in the project - not whether the project or change in the project is of a certain type (e.g., a supercenter). The Court specifically stated that *Bakersfield Citizens* should not be interpreted as requiring otherwise, and expressly declined to adopt Melom's proposed automatic requirement for an EIR urban decay analysis for any project with a supercenter.

If you would like more information regarding this case or how it may affect your project, please contact us. ►

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the team

The Retail Group of Cox, Castle & Nicholson LLP has extensive experience in acquiring, developing, constructing, leasing, financing and disposing of all types of retail projects, including regional enclosed malls, lifestyle community centers, neighborhood centers, and mixed-use projects. Members of the Retail Group include attorneys who are experts in sales and acquisitions, design, engineering, and construction contracts, reciprocal easement agreements, development and management agreements, and leasing.

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