

GREENSHEET

THE ENVIRONMENTAL FRONT OF DC REAL ESTATE

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Green Historic Preservation

Washington DC is one of the leading cities in the US voluntarily adopting green building standards — and more recently, aggressive municipal laws for both public and private sector green development. It is also, of course, the nation's capital. These two facts are not unrelated, says National Capital Planning Commission Executive Director Marcel Acosta. In general, capital cities around the world are assuming leadership in green development, Acosta reports. "They are very aware of their role as showcase or example for the rest of their country and region."



Progress
lies not in
enhancing
what is, but
in advancing
toward what
will be.

 Kahlil Gibran



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Acosta, center, should know: The NCPC just wrapped up Capitals Alliance 2008, a meeting of delegates from several capital cities around the world. This year's theme was "Greening the World's Capital Cities." With him at the meeting: Katy Moss Warner, former director of horticulture and environmental initiatives, Walt Disney Company; and Robert Stacey, executive director of 1,000 Friends of Oregon. The session ended last week with a promise among the delegates — who came from Abu Dhabi, Bogotá, Brasilia, Canberra, Copenhagen, Helsinki, Islamabad, Moscow, Oslo, Ottawa, Paris, Stockholm, Tshwane, and Vienna — to continue to promote green in their respective cities' developments.

While such efforts do not have the weight of, say, local laws or new building codes, the group's influence is nonetheless significant, especially when the delegates get together to compare progress.

For instance, one area of focus in this year's meeting was best practices in integrating green redevelopment with historical preservation — an issue that is of concern to just about every capital city around the world, Acosta says. "Many buildings in these cities are historic given the role they have played in their country's development."

The US, naturally, is no different. In Washington, Acosta says, the GSA has been focusing on greening the federal buildings in such a way that leaves their historical footprint intact. The Herbert Hoover building on 14th and Penn — home to the Department of Commerce — for instance, is currently undergoing renovations and is expected to receive a LEED Silver rating.

The next gathering is tentatively scheduled to take place in Brasilia in March of 2010.

Legal Liability and Green Building

If you are a LEED consultant on a building project and it doesn't achieve Gold or Platinum certification from USGBC, are you on the hook? What if a tenant develops an illness that possibly could have been caused from your building — a building you represented as healthy? What if you don't maintain your LEED certification — can tenants bolt their leases without penalty? Do you have a fiduciary responsibility to investment stakeholders to stay on top of the latest changes to LEED?

Companies active in development are hardly strangers to the concept of liability. So they shouldn't be surprised that more and more questions about liability are being posed about green development specifically — especially as more cities implement green building rules. A handful of civil suits have already found their way into courts in Maryland, Colorado and Arizona, and most attorneys expect to see more in the coming years.

"Right now we are in middle ground where people are feeling their way through these issues and trying to put good contracts in place in which risk is fairly identified and allocated among the project's stakeholders," says Lisa Wing Stone in O'Melveny & Myers's DC Office

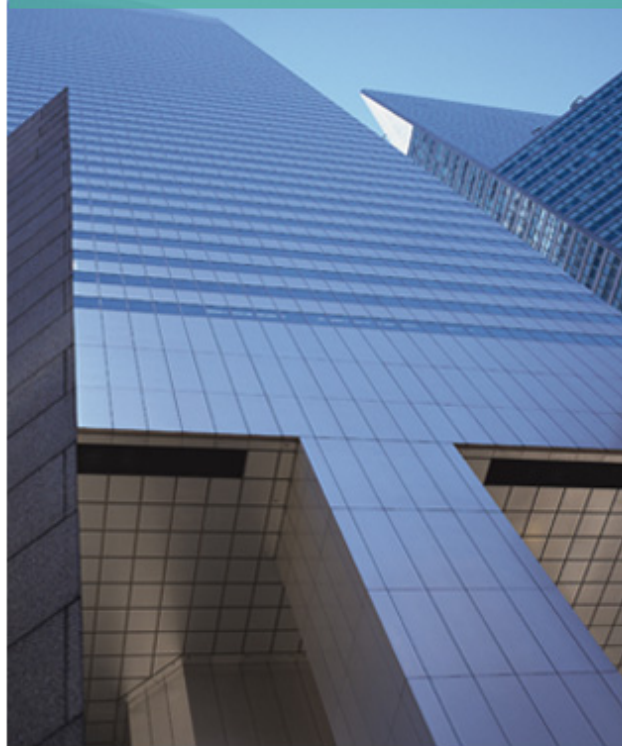
Until definitive — and consensus — understanding about these risks is reached, developers will have to adopt a much more granular and detailed level of thinking about their green projects, she says, pointing to one of the cases pending now, which revolves around a dispute over losses of green building tax credits between the owner and contractor of an apartment building. The construction agreement was not clear about who was responsible for that paperwork. "Construction schedules are always tight but now must be even

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more so if a project's underwriting hinges on getting a certificate of occupancy by a certain date."

Another problem is that there is not enough clarity about the term "green" when referring to building, says Heather Himes, a LEED AP and senior associate with Akerman Senterfitt, out of the Orlando office. To an informed layperson, a LEED certified building "could mean energy efficiency to one person, clean water or clear air to another."

A lack of a uniform definition, coupled with the still emerging science of green building could leave developers open to liability exposure if they are not careful in their marketing, attorneys contacted for this article say. So if a developer markets a building as being designed to Silver LEED standards and signs up a number of pre-leases or condo sales — but then fails to achieve that certification — it could conceivably be argued in court that the new owners or tenants did not understand the difference between "designed-for LEED" and "certified for LEED" because the industry is still new.

It is easy to lose sight of this when you are steeped in the lingo and concepts, Himes notes. "But there are all kinds of different green certification programs and if you don't clearly state what it means for the end user it could be possible that the marketing is misconstrued."

It all depends on how contracts are written, of course, but service providers that don't deliver on their promises — such as guarantees that a developer will reach a certain level of LEED — could possibly find themselves in court, says Tricia Sadd of Montgomery McCracken in Philadelphia, one of the 40-something LEED AP-accredited attorneys in the country. The same is true for a developer, she continues, pointing to studies that suggest student and teacher performance is better in green-designed schools. "USGBC talks about this issue regularly. For developers, though, making promises about performance is a sure path to litigation."

Indeed, much of this theorizing is just that — theories that haven't been tested in court yet. If there is any one area, though, that is likely to attract either legal action or attention by the regulatory authorities it will be deceptive marketing claims, says Gail Suchman, special counsel based in the New York office Stroock & Stroock & Lavan and professor at Columbia Law School.

The FTC, for instance, is in the process of reviewing its green guides and is taking into account building practices, she says. Besides the feds, Suchman says, building owners may have to contend with irate investors. As the standards continue to evolve — USGBC is weighing LEED v.3 right now — it may well be that a building designed to LEED Silver a few years ago in five years would be considered next to obsolete.

DC's Bike Station

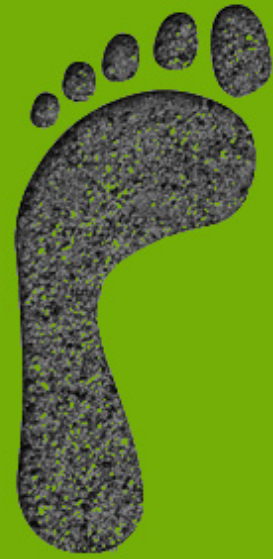
Mayor Fenty was on hand for ceremonies to begin development on the East Coast's first bike transition station on Friday. Located at Union Station, the (what else?) helmet-shaped facility is being constructed by DC's Department of Transportation for \$4 million. People will be able to rent bikes, have repairs done, buy accessories, and of course, park their bikes at the glass-enclosed building.



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