CAN WE (ANTI)TRUST LEED?:
AN ANALYSIS OF THE ANTITRUST IMPLICATIONS FOR THE GREEN BUILDING MOVEMENT

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Abstract: Sustainable construction and energy efficient structures are en vogue, and a “green building movement” has produced buildings all over the country and the world that are constructed from sustainable, energy efficient materials meant to minimize the building’s impact on the environment. A leader in this movement is the U.S. Green Building Council (USGBC), a private, non-profit organization that stresses sustainability in all areas of construction. The USGBC’s flagship work is a rating system called Leadership in Environmental Design (LEED) that measures and endorses the sustainability of a building. The success of this movement in general and the LEED rating in particular could be compromised, however, by the possibility of antitrust liability deriving from the widespread adoption of the LEED standard. This Note examines the green building movement and relevant antitrust case law and recommends ways that the USGBC can avoid antitrust scrutiny and continue its important work.

INTRODUCTION

In 2011, famed sustainable architect Luis de Garrido unveiled a twenty-five bedroom home built in the shape of the ancient Egyptian symbol of protection, power, and health, the Eye of Horus.¹ Despite the unique and luxurious architecture, perhaps the most impressive aspect of this stunning mansion is its complete self-sufficiency.² The outline of the structure is made of photovoltaic panels that work in conjunction with a geothermal system to provide all the


energy needed for the home to operate. This means that the massive home requires no electrical grid connections to provide heating or cooling. Furthermore, the structure boasts both a rainwater harvesting system for collecting water and a biological treatment system for treating waste water. This ingenious, self-reliant design is the product of a movement toward sustainability in construction that has gained popularity in response to concerns regarding pollution and diminishing sources of energy.

In the 1970s, interest grew surrounding sustainable building practices, and by the 1990s a movement, which became known as the green building movement, had taken shape. With a focus on energy efficiency and the use of environmentally friendly building techniques and materials, the green building movement seeks to reduce the negative impact that green buildings have on the environment. The continued growth and innovation of this movement has created masterpieces and marvels such as Garrido’s Eye of Horus, the Wat Pa Maha Chedio Kaew Temple in Thailand (made of more than 1.5 million recycled glass bottles), and a 632-meter-tall skyscraper with its own rainwater recovery and wind energy harvesting systems.

This Note presents an overview of green buildings and examines what this term has come to mean, the history of the green building movement, and the costs and benefits of green construction. Next, this Note explores the ways in which green building initiatives have been adopted by various cities, as well as governmental involvement in encouraging this movement at the federal, state, and local levels. This Note then analyzes the arena of antitrust law

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3 Id.
5 Mawani, *supra* note 1.
8 Mark J. Bennett et al., *Green Buildings and Sustainable Development, in 2008 EMERGING ISSUES* 282, § 1.01(1) at 1 (2008). Like any other building, a green building can have a disruptive impact on the surrounding environment, but green builders seek to reduce this impact in every way possible. Id.
10 See infra notes 14–81 and accompanying text.
11 See infra notes 82–132 and accompanying text.
that could potentially impact the trajectory of the green building movement. Finally, this Note articulates ways that the green building movement generally and the United States Green Building Council (USGBC) in particular can avoid antitrust liability for their Leadership in Energy and Environmental Design (LEED) standard.

I. GREEN BUILDINGS OVERVIEW

A. What Are Green Buildings?

The green building movement focuses on reducing the overall environmental impact of new and existing buildings through various methods, such as the use of recycled materials, energy efficient design, and water protection and conservation. The terms “green buildings” or “green construction” refer to buildings and projects designed with a special focus on efficiency and sustainability. As this movement has begun to gain momentum, various bodies have emerged to promote, substantiate, and verify the legitimacy and benefits of green construction.

The most prominent of these groups is the USGBC, a non-governmental, non-profit organization focused on improving the way that buildings are built and maintained so as to make them more environmentally friendly and sustainable. This group’s flagship work is the development and administration of the LEED certification system. LEED’s 110-point commercial rating scale is regarded as the “standard for measuring building sustainability.” More than 130 countries use this voluntary, third-party verification system that focuses on social responsibility in building construction. Although the certification sys-

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12 See infra notes 133–69 and accompanying text.
13 See infra notes 170–253 and accompanying text.
14 Bennett et al., supra note 8, § 1.01(1) at 1.
18 Bennett et al., supra note 8, §§ 1.03–.04(3) at 5–8; see About USGBC, supra note 17.
20 LEED, supra note 19.
tem has rating scales addressing the retrofitting of existing buildings, the most widely used rating scale is sustainable new construction.\textsuperscript{21} In addition to LEED’s general rating systems for new construction and retrofitting, the USGBC promulgates rating systems that specifically address home, school, retail, and healthcare construction, among others.\textsuperscript{22} Obtaining LEED certification for a building demonstrates a commitment to environmental stewardship, leadership, and innovation in construction.\textsuperscript{23}

Although LEED is the most well-known certification system for green buildings, it is not the only avenue through which buildings can receive third-party verification of their environmental integrity.\textsuperscript{24} For example, Green Seal is an organization that develops sustainability standards for products and services to help create and encourage a green economy by identifying for consumers products that are credibly environmentally friendly.\textsuperscript{25} Whereas LEED focuses on construction of new buildings, Green Seal concentrates on the operation and maintenance of existing structures.\textsuperscript{26} Green Seal developed manuals for guiding the operation and maintenance of green buildings in three regions, namely the northern, southeast and southwest regions of the United States.\textsuperscript{27} These manuals are geared toward public housing but can be applied to other buildings.\textsuperscript{28} Each manual offers guidance in areas such as landscaping, lighting, roofing maintenance, water fixtures, water conservation, heating, ventila-

\textsuperscript{21} Bennett et al., supra note 8, § 1.04(1) at 6; LEED Certification Information, supra note 16; LEED Green Building Rating Systems, USGBC, http://new.usgbc.org/leed/rating-systems (last visited Apr. 9, 2013), available at http://perma.cc/ED34-TT3F.

\textsuperscript{22} LEED Green Building Rating Systems, supra note 21.

\textsuperscript{23} LEED, supra note 19.

\textsuperscript{24} Bennett et al., supra note 8, § 1.04.1 at 6; see About Green Seal, GREEN SEAL, http://www.greenseal.org/AboutGreenSeal.aspx (last visited Apr. 9, 2013), available at http://perma.cc/NTM9-CBNM.

\textsuperscript{25} About Green Seal, supra note 24.


\textsuperscript{27} Green Business, supra note 26; see ANDREW BEAUCHAMP ET AL., GREEN BUILDING OPERATIONS AND MAINTENANCE MANUAL: A GUIDE FOR PUBLIC HOUSING AUTHORITIES IN THE NORTHERN CLIMATE REGION (Green Seal & Siemens eds., 2011) [hereinafter NORTHERN MANUAL]; ANDREW BEAUCHAMP ET AL., GREEN BUILDING OPERATIONS AND MAINTENANCE MANUAL: A GUIDE FOR PUBLIC HOUSING AUTHORITIES IN THE SOUTHEAST CLIMATE REGION (Green Seal & Siemens eds., 2011) [hereinafter SOUTHEAST MANUAL]; ANDREW BEAUCHAMP ET AL., GREEN BUILDING OPERATIONS AND MAINTENANCE MANUAL: A GUIDE FOR PUBLIC HOUSING AUTHORITIES IN THE SOUTHWEST CLIMATE REGION (Green Seal & Siemens eds., 2011) [hereinafter SOUTHWEST MANUAL].

\textsuperscript{28} Green Business, supra note 26; see NORTHERN MANUAL, supra note 27; SOUTHEAST MANUAL, supra note 27; SOUTHWEST MANUAL, supra note 27.
tion, and air conditioning, and each manual responds to the specific demands of the different regions.\textsuperscript{29}

In addition to private organizations such as the USGBC and Green Seal, there are government initiatives aimed at promoting and certifying green projects, including green construction.\textsuperscript{30} Prominent among these is ENERGY STAR, a joint program between the EPA and the Department of Energy.\textsuperscript{31} Like the programs discussed above, ENERGY STAR certifies products as meeting certain efficiency standards and provides guidance for the construction and maintenance of green buildings.\textsuperscript{32}

In addition to the various forms of green certification, another recently popular innovation of the green building movement is the incorporation of green roofs.\textsuperscript{33} Green roofs at least partially cover the roof of a building with vegetation such as trees, shrubs, and gardens.\textsuperscript{34} Among other things, green roofs provide additional green space in areas that normally lack it, reduce the energy consumption of the buildings upon which they are located, diminish the amount of storm water runoff, and can increase the lifespan of the roof.\textsuperscript{35} Adding a green roof component can also maximize the useful space of the building by offering a local source for food production.\textsuperscript{36} Green roofs also reduce the “heat island” effect in urban areas.\textsuperscript{37} While traditional buildings make urban

\textsuperscript{29} Green Business, supra note 26; see NORTHERN MANUAL, supra note 27; SOUTHWEST MANUAL, supra note 27; SOUTHEAST MANUAL, supra note 27.


\textsuperscript{33} J. Cullen Howe, Green Roofs, 2008 EMERGING ISSUES 3069 at 2.

\textsuperscript{34} Id. at 1.

\textsuperscript{35} Id. at 2; Green Roof Benefits, GREEN ROOFS FOR HEALTHY CITIES, http://www.greenroofs.org/index.php/about/greenroofbenefits (last visited Apr. 9, 2013), available at http://perma.cc/G8JT-3SZW. Other possible benefits of green roofs include providing a habitat for birds and butterflies and improving air quality. Howe, supra note 33, at 2.

\textsuperscript{36} Howe, supra note 33, at 2.

\textsuperscript{37} Id. The heat island effect can raise temperatures to uncomfortably high or dangerous levels for residents of urban areas, increase summertime peak energy demand, and increase air conditioning costs, among other things. Heat Island Effect, ENVTL. PROT. AGENCY, http://www.epa.gov/heatisland/index.htm (last visited Jan. 23, 2014), available at http://perma.cc/J4CP-FXMZ.
areas hotter by soaking up the Sun’s heat and radiating it back out, roofs covered in vegetation radiate less heat back into the air. For example, at Chicago’s City Hall temperatures of twenty-five to eighty degrees cooler were measured on green roofs as opposed to nearby traditional roofs.

A guiding force behind these various programs is the lifecycle approach. Under this method, companies develop and implement a plan, evaluate its progress, and execute necessary improvements in a continuous, cyclical pattern. In this way, organizations promoting green buildings and green construction can assess the effect of their work throughout the life of a building and continue to improve the efficiency of their standards by incorporating new innovations and technologies as they become available. For example, the USGBC uses standing committees to review new data and refine LEED standards. These committees, comprised of volunteers and experts in the many disciplines necessary to set standards for all areas covered by LEED, help LEED standards to remain at the forefront of the field.

B. The History of Green Buildings

Like many environmental movements, the green building movement’s roots can be traced back to the 1970s, when high oil prices and general awareness of environmental concerns spurred the earliest experiments in green building. It was not until the 1990s, however, that a true movement focused on green construction began to form.

From its inception, this movement has combined both governmental and privately backed initiatives. An important early federal milestone was the

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38 Id.  
39 Id.  
40 Bennett et al., supra note 8, § 1.02 at 3; see About Green Seal, supra note 24; Guidelines for Energy Management Overview, supra note 32; LEED, supra note 19; LEED Certification Information, supra note 16.  
41 Guidelines for Energy Management Overview, supra note 32.  
44 Id.; Developing LEED, supra note 42.  
46 Green Building Basic Information, supra note 45.  
47 See id.
launch of the ENERGY STAR program by the EPA and Department of Energy in 1992. Additionally, the success of President Bill Clinton’s project to “Green the White House” brought national attention to the importance of green construction and prompted other “greening” projects in government buildings. Following these projects was a flurry of Executive Orders requiring action and research to improve the nation’s environment, many of which focused on sustainable building techniques.

In combination with this intense federal focus on green construction, a serious private effort also began with the founding of the USGBC in 1993. In its brief history, this organization has been recognized as “one of the most successful examples of nonprofit membership organization development in recent history.” In 1998, the USGBC launched the first version of the LEED rating system, and by 2003, 948 projects were registered in the program. Although LEED is considered the most widely known program of its kind, it is not alone; during the course of this movement, several other private systems with a similar focus have emerged and grown.

C. Costs and Benefits of Green Construction

1. Benefits of Green Construction

With a focus on sustainable and efficient growth, the green building movement’s benefits spread across environmental, economic, and social arenas. While satisfying the primary goal of achieving environmental benefits,

Reducing a building’s negative impact on the environment is a central aim of green construction.\footnote{Bennett et al., supra note 8, § 1.01(1) at 1.} All buildings draw on many resources, such as raw materials, electricity, and water, and can create harmful environmental impacts such as debris created during construction and greenhouse gases emitted during use.\footnote{Id. § 1.01(2) at 2.} Green construction puts an emphasis on minimizing the various adverse environmental impacts of a building through practices focused on energy, materials, and water efficiency.\footnote{Id. § 1.01(1) at 1.} The siting of a project is also important in green construction.\footnote{Id.; LEED Green Building Rating Systems, supra note 21.} For green construction, considerations regarding the location of a new building take into account minimizing the disturbance it will have on the environment and existing infrastructure of the surrounding area, both during construction and during the life of the building.\footnote{Bennett et al., supra note 8, § 1.02 at 3; see LEED Green Building Rating Systems, supra note 21.}

Although the green building movement might have originated to benefit the environment, the most frequently cited benefit of green construction is the long-term cost savings to the building’s owner.\footnote{Bennett et al., supra note 8, § 1.01(3) at 2; Robin Suttell, The True Costs of Building Green, BUILDINGS (Apr. 3, 2006), http://www.buildings.com/article-details/articleid/3029/title/the%20true%20costs%20of%20building%20green.aspx, available at http://perma.cc/T6EF-C32S; Green Building Costs, CITY OF BLOOMINGTON, http://bloomington.in.gov/green-building-costs (last visited Feb. 26, 2014), available at http://perma.cc/S6YV-VRNA; The Business Case for Green Building, supra note 56.} Because energy efficiency is a central tenet of green construction, the operating costs of buildings with LEED certification are meant to be noticeably lower than uncertified buildings.\footnote{Bennett et al., supra note 8, § 1.01(3) at 2; The Business Case for Green Building, supra note 56.} Although results can vary across different types of buildings, a 2003 report found an overall decrease in operating costs of 13.6% and 8.5% for new and existing buildings, respectively, when employing LEED-recognized green methods.\footnote{Press Release, McGraw Hill Construction, Green Building Market Grows 50% in Two Years Despite Recession, Says McGraw-Hill Construction Report (Nov. 12, 2010), available at http://construction.com/aboutus/2010/1112pr.asp and http://perma.cc/K59T-BHCL; The Business Case for Green Building, supra note 56.} In addition to the lower operating costs, the same 2003 report found that tenants are typically more willing to pay higher rents for green buildings,
and occupancy rates for such buildings increase by 6.4% for new buildings and 2.5% for existing projects.\textsuperscript{65}

An additional advantage of green construction is the social benefit.\textsuperscript{66} For example, occupants and employees in green buildings often have a better quality of life and fewer health problems, including fewer communicable respiratory illnesses and decreases in allergy and asthma symptoms.\textsuperscript{67} Additionally, the focus on appropriate siting for green buildings prevents new construction from stressing the established infrastructure where it is located.\textsuperscript{68} Furthermore, obtaining a form of third-party verification such as a Green Seal or LEED certification communicates a company’s commitment to sustainable development, which can increase goodwill toward the company.\textsuperscript{69}

Overall, green buildings offer important, yet often unquantifiable, advantages such as minimized environmental impacts and social benefits.\textsuperscript{70} Of critical importance, however, are the more easily measurable economic benefits.\textsuperscript{71} Because green construction can increase a business’s bottom line, this movement has been able to gain popularity among many of the nation’s, and the world’s, biggest energy consumers.\textsuperscript{72}

2. Costs of Green Construction

Although the benefits of green construction are substantial, there are some moderate associated costs.\textsuperscript{73} Many people mistakenly believe the cost associated with green construction to be prohibitively high, when in actuality the “green premium” is much lower than expected.\textsuperscript{74} Furthermore, data suggests that as builders gain experience in green construction, the upfront cost to

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\textsuperscript{65} The Business Case for Green Building, supra note 56.

\textsuperscript{66} Bennett et al., supra note 8, § 1.01(3) at 2.


\textsuperscript{68} Bennett et al., supra note 8, § 1.01(3) at 2.

\textsuperscript{69} LEED, supra note 19; The Business Case for Green Building, supra note 56; see About USGBC, supra note 17; LEED Is Good for Business, USGBC, http://new.usgbc.org/leed/applying-leed/leed-for-business (last visited Apr. 9, 2013), available at http://perma.cc/Y8KC-NCEB.

\textsuperscript{70} LEED Is Good for Business, supra note 69; see Bennett et al., supra note 8, § 1.01(3) at 2.

\textsuperscript{71} Bennett et al., supra note 8, § 1.01(3) at 2; see LEED is Good for Business, supra note 69.

\textsuperscript{72} See Fisk, supra note 67; LEED Is Good for Business, supra note 69. IBM, Toyota, and Ford are among companies that have constructed green buildings. KATS, supra note 56, at vi.


\textsuperscript{74} KATS, supra note 56, at 12, 18.
Researchers often have difficulty calculating precisely how much more expensive, if at all, green construction projects are. Among other reasons, this is a result of certification programs not requiring cost information in the certification process and many businesses desiring to keep this information private. Data is growing regarding this question, however, and some real-world examples show that a green building can be built for an average of two percent more than typical construction. But as green materials become more mainstream and designers and architects more experienced, even this modest cost increase might come to overstate the true additional cost of green construction.

There is more certainty among researchers that regardless of the extent of additional initial costs of green construction, such costs will be recovered or exceeded over the life of the building. For example, a study on LEED certification found that an upfront investment of an additional 2% resulted in life cycle savings of 20%. Therefore, green construction currently comes with a modest premium that is typically outweighed considerably by the cost savings throughout the life of the building. Specifically, one comprehensive study concluded plainly that “green building is cost-effective and makes financial sense today.”

II. THE GREEN BUILDING MOVEMENT IN ACTION

A. Cities with Successful Green Building Initiatives

To understand the success of the green building movement, it is important to learn about examples of its real-world effectiveness. Cities such as Chicago, Portland, and New York have taken the initiative to make green construc-

75 Id. at 17, 18.
76 Id. at 12.
77 Id. Other factors that make quantifying the cost of green construction difficult include green buildings being built as showcase pieces, the learning curve for green construction, the newness of many green technologies, and the immaturity of designers’ knowledge about such technologies. Id. at 13.
78 Id.; Fact Sheets: How Much Does Green Building Really Cost?, supra note 73.
80 KATS, supra note 56, at ii; Bennett et al., supra note 8, § 1.01(3) at 2; Fact Sheets: How Much Does Green Building Really Cost?, supra note 73.
81 The Business Case for Green Building, supra note 56.
82 See Bennett et al., supra note 8, § 1.01(3) at 2; KATS, supra note 56, at ii; The Business Case for Green Building, supra note 56.
83 KATS, supra note 56, at ix.
84 See infra notes 88–110 and accompanying text.
tion a citywide focus. Each of these cities has developed a comprehensive plan through which the city demonstrates and executes its commitment to green construction and overall sustainability throughout the city. These cities allow the rest of the nation to observe the benefits of pursuing green construction and create spillover effects through setting examples.

1. Chicago

Chicago’s green building initiatives focus heavily on Leadership in Energy and Environmental Design (LEED) certification, and the city recently led the nation in the number of LEED certified projects, at 295. It may be surprising to learn that a city full of skyscrapers is so committed to green building initiatives, but Chicago stands tall with 124 LEED certified buildings as of 2010. Furthermore, Chicago’s buildings boast more than four million square feet of green roofing, which cools the city and absorbs rainwater. In 2004, the city’s leaders declared that all new or retrofitted city buildings would be LEED certified. This push to green the public sector came from an understanding that the city officials should not encourage the private sector to do what it was unwilling to do itself. Chicago now has a Sustainable Development Policy in place that requires any projects receiving public funding to incorporate sustainable elements or designs.

This concerted effort has made building contractors more proficient in green construction techniques and has made the expense for constructing a LEED certifiable building nearly the same as a non-LEED version. This type

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85 See Bennett et al., supra note 8, § 1.07(2) at 18–19; infra notes 88–110 and accompanying text.
89 Richardson, supra note 87.
90 Id.
91 Id.
92 Id.
93 Id.; see CITY OF CHICAGO, supra note 86.
94 Richardson, supra note 87.
of success did not go unnoticed, and now cities such as Portland, Oregon and Atlanta, Georgia are seeking to compete with Chicago’s sustainable leadership.95

2. Portland

Portland, Oregon is home to dozens of LEED Platinum96 certified buildings ranging from private residences to university buildings.97 One impressive success story of LEED Platinum certification is Oregon Health and Science University’s sixteen-story Center for Health and Healing (“Center”), which projected a total of 61% energy savings and 56% water savings.98 This research facility incorporates extensive sustainable techniques aimed at harnessing nature’s “free resources” such as solar power and harvesting of rainwater.99 The Center is one of the largest facilities in the country to achieve LEED Platinum certification and was the first medical facility to be certified Platinum.100 Perhaps most impressively, this building, which has such significantly reduced operating costs, was constructed on a conventional budget.101

This commitment to sustainable building can be seen elsewhere in the city through Portland’s “Grey to Green” initiative.102 The goals of this citywide effort toward sustainability include adding more than forty new acres of green roofing, planting tens of thousands of trees throughout the city, and constructing more than 900 new green facilities.103

3. New York City

Another major metropolis that implemented a citywide initiative to focus on environmental consciousness is New York City, through its PlaNYC 2030

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95 Id.
96 Platinum is LEED’s highest ranking. Bennett et al., supra note 8, § 1.03 at 5; LEED Certification Information, supra note 16.
98 Case Studies, supra note 97.
99 Id.
101 See Case Studies, supra note 97.
102 Grey to Green Accomplishments, supra note 86.
103 Id.
Launched in 2007, this program goes beyond green buildings alone to incorporate environmentalism into all aspects of city life, from food to parklands to waste management. The updated plan for 2013 included 132 initiatives in a wide array of areas and more than four hundred milestones that the city hoped to reach by the end of that year.

Much like the LEED certification system, the green building portion of PlaNYC 2030 is a multifaceted approach that addresses water and energy efficiency, air quality, climate change, and integration with existing infrastructure. This portion of the program contains specific goals for reducing environmental impacts such as decreasing greenhouse gas emissions by thirty percent below 2007 levels by 2030 and retrofitting existing buildings once every ten years.

As of September 2011, four years after the plan launched, the city was on track to reduce greenhouse gas emissions by thirty percent by 2017, well ahead of the proposed schedule. Furthermore, half a million trees had been planted in the city since 2007.

B. Legislative Initiatives

Interest in participating in the green building movement is apparent at all levels of government. This allows for a wide variety of programs and incen-

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105 The Plan, supra note 104; see CITY OF NEW YORK, supra note 86.

106 The Plan, supra note 104; see CITY OF NEW YORK, supra note 86. As of late January 2014, no new initiatives or milestones had been announced for 2014. Id.

107 CITY OF NEW YORK, supra note 86, at 168; see LEED Green Building Rating Systems, supra note 21.


110 Id.

tives based on the powers vested in the varying types of government. Additionally, LEED certification plays a prominent role in green building legislation at all levels of government.

1. Federal Legislative Initiatives

The federal government’s involvement in the green building movement is perhaps most recognizable through the ENERGY STAR program, which was developed by the EPA and the Department of Energy. The ENERGY STAR program promotes the use of sustainable construction through rating systems that designate appropriate buildings as superior users of energy. Other measures undertaken by the federal government include various Memoranda of Understanding and Executive Orders directed at continuing the momentum of the green building movement. Of note among these is Executive Order 13,123, which seeks to “green the government” through various environmental requirements such as the mandate that “each agency shall reduce energy consumption per gross square foot of its facilities . . . by 35 percent by 2010 relative to 1985.” Much like the philosophy in Chicago, the federal government is taking the approach of setting a public example through which the private sector may be influenced by requiring improvements of its own facilities.

Regulation of federal buildings leans heavily on LEED standards, with seven major federal agencies and the Armed Forces incorporating LEED into their policies and practices. As of 2003, federal buildings comprised

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112 See, e.g., MD. CODE ANN., PUB. SAFETY § 12-502 (state involvement requiring green certification for state buildings and buildings receiving state funding); Exec. Order No. 13,123, 64 Fed. Reg. 30,851 (federal involvement mandating sustainability in federal buildings); Grey to Green Accomplishments, supra note 86 (local involvement setting goals for green construction and green roofing).

113 See infra notes 114–134 and accompanying text.

114 Bennett et al., supra note 8, § 1.05(2) at 11.

115 Id. at 11–12.


118 Compare id., with Richardson, supra note 87.

119 The major federal agencies adopting LEED standards are the General Services Administration, National Aeronautics and Space Administration, National Park Service, Department of the Interior, Department of Energy, Department of Health and Human Services, Department of State, and EPA. U.S. GREEN BLDG. COUNCIL, supra note 7, at 20–22.

120 Id.
roughly ten percent of LEED registered projects. A typical requirement for these agencies is that each obtain some level of LEED certification on all or a portion of the buildings they own or operate. Most often, the level of certification demanded is LEED Silver.

2. State Legislative Initiatives

Of critical importance to the success of this movement is the involvement of state governments because of the lack of comprehensive federal green building laws requiring action from the states. Washington State provides an example of such state-sponsored endorsement of the green building movement with its 2005 green building legislation, the first stated-enacted legislation of its kind. This law requires that any public agency intending to construct or renovate a major facility first conduct a life cycle analysis to ensure the energy efficiency of the building. More recently, in 2011, Maryland passed a bill adopting the International Green Construction Code statewide. These are merely two examples of the now-widespread state legislation requiring or incentivizing green construction. As of 2010, forty-five states had endorsed in some fashion, either through legislation, executive order, or incentives, a LEED-based initiative.

3. Local Initiatives

Finally, the green building movement’s continued momentum can also be traced to the support of local governments. More than twenty-five cities have established LEED-based requirements for new public buildings and many have also passed incentive programs for privately funded buildings that

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121 Id. at 20.
122 See id. at 20–22. For example, the EPA requires a LEED Silver rating on all significant building projects and encourages them to obtain even higher Gold or Platinum ratings. Id. at 21.
123 See id. at 20–22. Silver is LEED’s second-tier rating. Bennett et al., supra note 8, § 1.03 at 5.
124 See Bennett et al., supra note 8, § 1.06(1) at 15.
125 WASH. REV. CODE § 39.35 (2013); Bennett et al., supra note 8, § 1.06(2)(b) at 15.
126 WASH. REV. CODE § 39.35.040.
128 This trend has continued with other states, such as Connecticut and New Jersey, enacting similar legislation. Bennett et al., supra note 8, § 1.06(2)(b) at 17; see N.J. STAT. ANN. § 52:32-5.3 (West 2013); CONN. GEN. STAT. § 12-217mm (2013).
130 See Bennett et al., supra note 8, § 1.07(1) at 18.
achieve some form of nationally recognized green certification. An example of such a local initiative is Atlanta, Georgia’s requirement that all city buildings above a certain size and cost obtain at least a LEED Silver rating. Additionally, Seattle, Washington incentivizes commercial and residential buildings to achieve a LEED Silver rating by authorizing greater heights and/or floor areas to those that meet the requirements. These local programs can be powerful because of their ability to adapt quickly and organize to create incentives and requirements that will work best for their specific circumstances.

III. ANTITRUST LAW

Although the green building movement is still in its infancy in many respects, the movement has gained steam during the past several years and is on a path of continued growth. This potential to persist in offering substantial environmental benefits, however, is not without the capacity for legal pitfalls. One possible and significant pitfall exists regarding antitrust law. This Part outlines the body of law that could have major effects on the United States Green Buildings Council’s (USGBC) Leadership in Energy and Environmental Design (LEED) certification system. Although this issue has yet to be brought to court, existing precedent could expose such a widely adopted standard as LEED to significant problems.

A. The Sherman Act

Passed in 1890, the Sherman Antitrust Act is the binding authority protecting consumers from commercial combinations or conspiracies to restrain free trade. The intention of this Act, as articulated by the Supreme Court, is

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131 Id.; U.S. GREEN BLDG. COUNCIL, supra note 7, at 22.
135 See Bennett et al., supra note 8, § 1.01(1) at 1; Howe, supra note 33, at 3; 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, 239 (2009).
136 Bennett et al., supra note 8, § 1.09(1) at 24; Del Percio, supra note 135, at 239.
137 Del Percio, supra note 135, at 239.
138 See infra notes 140–171 and accompanying text.
139 See infra notes 140–171 and accompanying text.
“in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce or attempts to monopolize the same.”141 This Act seeks to maintain the equality of opportunity in trade by forbidding actions or combinations that suppress competition.142 To make a claim under the Sherman Act that trade has been unreasonably restrained, a plaintiff must show an agreement to restrain trade that resulted in injury to the plaintiff’s business or property.143 Because agreements to conspire are extremely rare, proof of an explicit agreement is not essential to prove a claim under the Sherman Act.144

All contracts between potential competitors are not necessarily in violation of the Sherman Act, even those that might have some anticompetitive effects.145 Rather, a “rule of reason” analysis is typically employed when a court examines a contract against which claims of Sherman Act violations have been made.146 This analysis involves “consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects and the history of the restraint and the reasons for its adoption.”147 Courts have interpreted this to be a fact-based analysis focused on three variables, namely, economic effects, the power of the parties in their markets, and the underlying motives.148

B. The Noerr Doctrine

In the 1961 case Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., the Supreme Court articulated an exception to antitrust liability under the Sherman Act.149 This case involved railroad companies in Pennsyl-

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144 Id. at 1141. In Frey & Son, Inc. v. Cudahy Packing Co. the Supreme Court held that “the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances.” 256 U.S. 208, 210 (1921).
146 Id. at 606–07. For some arrangements, such as price fixing agreements or output limitations, a court will find a per se antitrust violation rather than conducting a rule-of-reason analysis. United States v. Trenton Potteries, 273 U.S. 392, 398 (1927) (creating a per se violation for price-fixing arrangements regardless of the reasonableness of the price set); National Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 100 (1984) (stating that “output limitation[s] are ordinarily condemned as a matter of law under an ‘illegal per se’ approach because the probability that these practices are anticompetitive is so high”).
147 Topco, 405 U.S. at 607.
vania engaging in a publicity campaign to block the passage of a law that would benefit trucking companies with whom they were in direct competition. The trucking companies alleged violation of the Sherman Act through this combined effort, but the Supreme Court declined to find such violation, stating, “[n]o violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws.” This is true even if the conduct has a tendency to create anticompetitive effects. This ruling created an exception to antitrust liability wherein restraint stemming from action petitioning the government is immune. Subsequent decisions have applied this doctrine, recognizing that the Sherman Act regulates business and not politics. Although many courts have declined to extend the reach of this doctrine, it remains a frequent defense against antitrust allegations.

C. Allied Tube and Its Implications on Qualifying for Noerr Immunity

In the 1988 Supreme Court case Allied Tube & Conduit Corp. v. Indian Head Inc., the plaintiffs alleged antitrust violations based on what they believed were efforts by their competitors, steel conduit producers, to keep their product, a plastic conduit, out of the National Fire Protection Association’s (NFPA) National Electric Code (NEC). During a vote on whether to permit use of plastic conduits under the NEC, the steel conduit producers recruited additional members to vote against the proposal and were successful in blocking its passage. This vote-rigging conduct was not in violation of any of the NFPA’s rules.

The Supreme Court recognized the NEC as “the most influential electric code in the nation” which many governments had adopted into law. Despite this fact, the Court held that a private association responsible for standard-

\[\text{ RAW TEXT END }\]
setting which could have broad legislative impact is still not quasi-legislative and therefore not qualified for Noerr immunity. Applying a rule-of-reason analysis, the Court concluded that Noerr immunity depends not just on the potential legislative impact of the conduct but on its context and nature. Because the standard-setting decision took place in a purely private arena involving economically interested parties, the Court declined to view it as a legitimate effort to influence government action, making Noerr immunity inapplicable. The Court felt this conduct could “more aptly be characterized as commercial activity with political impact” than a bona fide attempt to petition the government.

Two dissenting justices disagreed, however, and would have ruled the NFPA’s standard-setting role to be quasi-legislative and therefore eligible for Noerr immunity. Because of the near automatic nature in which these standards were being widely adopted into law, and the dependence of state and local governments on delegation of this work to experts, the dissenting justices powerfully yet unsuccessfully urged immunity for the steel conduit producers.

D. Radiant Burners and Claims of Industry Bias

The issues of standard-setting and antitrust liability were also before the Supreme Court in the 1961 case Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. In that case, plaintiffs alleged that industry bias produced non-objective standard-setting and resulted in their burners not being approved by the American Gas Association. This allegedly damaged the plaintiffs because utility members refused to supply gas to plaintiffs based on their lack of approval. The plaintiffs contended that defendant’s unreasonable refusal to approve their product was a part of a conspiracy to restrain interstate commerce by excluding them from the market. The Supreme Court held that this adequately stated a claim upon which relief could be granted and reversed the lower court, which had dismissed the claim.

161 Id. at 493.
162 Id. at 504.
163 Id. at 494.
164 Id. at 507.
165 See id. at 513–14 (White, J., dissenting).
166 See id.
167 Radiant, 364 U.S. at 657–58.
168 Id. at 658.
169 Id.
170 Id.
171 Id. at 660.
IV. LEED’S CONTINUED SUCCESS MIGHT DEPEND UPON ITS ABILITY TO AVOID ANTITRUST LIABILITY

Thus far, the United States Green Building Council (USGBC) and its Leadership in Energy and Environmental Design (LEED) standard have gone largely unchallenged as they help to push the green building movement forward.172 This will not necessarily continue, as current antitrust case law has a clear application to LEED.173 This Part first examines how Allied Tube & Conduit Corp. v. Indian Head Inc. and Radiant Burners Inc. v. Peoples Gas Light & Coke Co. create the possibility of antitrust liability against LEED.174 Next, this Part explores possible paths that the USGBC can take to avoid having its work undone.175

A. Analogizing Allied and Radiant to LEED

At their cores, Allied and Radiant are both cases about private standard-setting bodies.176 This makes their application to the green building movement and the USGBC’s private standard-setting through LEED certification readily apparent.177 There is a possibility for antitrust actions to arise based on the near ubiquitous use of LEED certification as the standard in green building regulations written into law.178 LEED has risen to popularity very quickly, and in the fewer than fifteen years since its launch, it has all but cornered the market on green building certification.179 The antitrust issue arises from the exclusive adoption in many jurisdictions of this privately developed certification system as the legally binding standard for green building regulation.180

Much like the standards set by the National Electric Code in Allied and the American Gas Association in Radiant, standards chosen by LEED can have

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172 Sarah Fox, Note, A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards, 28 VA. ENVTL. L.J. 299, 309–10, 323; see Bennett et al., supra note 8, § 1.09(1) at 23; Del Percio, supra note 135, at 239.
173 Del Percio, supra note 135, at 247; see infra notes 175–195 and accompanying text.
174 See infra notes 175–195 and accompanying text.
175 See infra 196–255 and accompanying text.
177 Del Percio, supra note 135, at 247, 253; see Allied, 486 U.S. 492; Radiant, 364 U.S. 656; About USGBC, supra note 17.
178 Fox, supra note 172, at 321; see, e.g., WASH. REV. CODE § 39.35 (2013); ATLANTA, GA., CODE OF ORDINANCES ch. 75 (2013) (effective Dec. 9, 2003); U.S. GREEN BLDG. COUNCIL, supra note 7, at 20–22.
179 U.S. GREEN BLDG. COUNCIL, supra note 7, at 6; Fox, supra note 172, at 321–22.
180 Fox, supra note 172, at 321; see, e.g., WASH. REV. CODE § 39.35; ATLANTA, GA., CODE OF ORDINANCES ch. 75; U.S. GREEN BLDG. COUNCIL, supra note 7 at 20–22.
serious impacts for industry. The continued selection of LEED standards by governments passing green building legislation will make that system’s dominance inescapable and might create an incentive for members of industry to influence standard-setting decisions. This possibility of a government-created monopoly of green building certification might spur action from the other private-party verification systems that have developed and from members of industry who may feel that they have been snubbed by LEED’s standard.

The court in *Allied* refused to apply the immunity articulated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.* to a standard-setting organization wielding power similar to that now possessed by the USGBC through LEED. Although in *Allied* there was clearly biased conduct meant to exclude the plastic conduit makers from the market, *Radiant* shows that such flagrant anticompetitive spirit is not necessary for a court to find merit in an antitrust claim against a standard-setting body. The *Radiant* court recognized nonobjective standards alone as sufficient to state an antitrust claim. Indeed, the *Allied* court recognized that “private standard-setting associations have traditionally been objects of antitrust scrutiny.” Therefore, even without malicious intent, the power that the USGBC wields in deciding what products, techniques, and innovations are recognized for LEED certification and the regulatory compliance that ensues might open it to real issues of antitrust liability.

Furthermore, there are already accusations stirring that the LEED standard-setting and certification system is not free of bias. One USA Today article describes the people at the helm of LEED as professionals who “specialize in—and profit from—the type of design the council certifies and promotes.” The article goes on to claim that an effect of promoting LEED certification to public officials is a boost for the businesses owned by USGBC members.
Aside from allegations of bias, LEED also faces criticism regarding its system for awarding points, delay in issuing certifications, and lack of follow up to ensure that buildings meet the performance standards under which certification was awarded.\(^\text{192}\) Despite success stories relying on LEED certification in cities such as Chicago and Portland, Oregon, examples such as New York City’s PlaNYC prove that the USGBC/LEED framework is not the only viable option for organized efforts for sustainability.\(^\text{193}\) LEED’s shortcomings, especially those reflecting bias in decision-making, combined with the strong Supreme Court precedent found in \textit{Allied} and \textit{Radiant}, create true potential for antitrust liability, which LEED would not be able to escape via a defense of \textit{Noerr} immunity.\(^\text{194}\)

The USGBC has not come under antitrust attack yet, but possible explanations for the current lack of lawsuits alleging antitrust violations are the mere infancy of the green building movement and obstacles to bringing such suits.\(^\text{195}\) Given the significant stakes for various industries in obtaining LEED approval, litigation seems nearly inevitable should some litigious party get snubbed.\(^\text{196}\)

\begin{center}
\textbf{B. Recommendations for LEED to Avoid Antitrust Liability}
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In a world with a booming population and ever-increasing consumption needs, the efforts toward sustainable solutions are of paramount importance.\(^\text{197}\) Among such solutions is the green building movement, which, in the short time since its inception, has already begun to show its enormous capacity to bring about positive environmental change.\(^\text{198}\) Despite garnering nationwide support, this movement’s foremost standard-setting body, the USGBC, could

\begin{footnotes}
\item[192] Bennett et al., \textit{supra} note 8, § 1.04(4) at 9; see Frank, \textit{supra} note 189.
\item[193] \textit{See} \textit{CITY OF CHICAGO, supra} note 86; \textit{CITY OF NEW YORK, supra} note 86; \textit{Case Studies, supra} note 97; \textit{supra} notes 88–110 and accompanying text.
\item[194] \textit{See Allied}, 486 U.S. 492; \textit{Radiant}, 364 U.S. 656; Bennett et al., \textit{supra} note 8, § 1.04(4) at 9; Del Percio, \textit{supra} note 135, at 252–53; Fox, \textit{supra} note 172, at 321–23.
\item[196] Del Percio, \textit{supra} note 135, at 253.
\item[198] \textit{MARBLE INST. OF AM., supra} note 9, at 3; Fox, \textit{supra} note 172, at 339.
\end{footnotes}
face potentially crippling liability. Because the goals that the USGBC seeks to achieve through its LEED certification system have been successful, useful, and worth fostering, it is important that this organization understands how to prevent its initiative from being derailed. This section examines several recommendations for how the USGBC can hope to foreclose antitrust liability stemming from the proliferation of the LEED certification standard. Specifically, this section recommends that the USGBC ensure a neutral decisionmaking process, encourage public involvement in the standard-setting process, seek recognition as a quasi-legislative body, and argue for a court to adopt the dissent from Allied.

1. Neutral Decision-Making Process

True legitimacy and inability to manipulate the standard-setting process is an important and necessary step in avoiding antitrust liability. In Allied, antitrust liability was found after the voting members of the National Fire Protection Association (NFPA) recruited new members to vote in a proceeding for the express and admitted purpose of blocking a proposal to approve plastic conduits. Although this conduct was not in violation of any of the NFPA’s rules, the Court held that “antitrust validity of these efforts is not established, without more, by petitioner’s literal compliance with the rules of the [NFPA], for the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition.”

Furthermore, in Radiant, the Supreme Court upheld the validity of an antitrust claim that alleged anticompetitive effects stemming from tests that were not based on objective standards. In that case, the plaintiffs made no allegations of conduct as obviously manipulative as that found in Allied, yet the Court still held that they stated a claim upon which relief could be granted.

199 Del Percio, supra note 135, at 252–54. Sherman Act violations are considered felonies, and penalties include fines of up to $100 million for corporations and $1 million for individuals, or up to ten years imprisonment. 15 U.S.C. § 1 (2006).
200 See Fox, supra note 172, at 339; Case Studies, supra note 97; supra notes 55–72 and accompanying text.
201 See infra notes 203–256 and accompanying text.
202 See infra notes 203–256 and accompanying text.
203 See Allied, 486 U.S. at 504–05; Radiant, 364 U.S. at 659–60.
204 Allied, 486 U.S. at 493.
205 Id. at 509.
206 Radiant, 364 U.S. at 660.
207 Id.; see Allied, 486 U.S. 496–97.
Together, these two cases demonstrate the necessity of establishing unbiased and objective procedures for standard-setting, especially for bodies whose standards have been as widely adopted into law as the NFPA’s National Electric Code (NEC) and the USGBC’s LEED standard have been.\(^{208}\) Neutral, disinterested decision-makers would be ideal, but because those who know the field best most often are those who work or invest in it, that ambition is unlikely to be achieved.\(^{209}\) What is possible, however, is that the USGBC take steps at all times to base its standard-setting decisions on objective tests and set standards through a process free from manipulation.\(^{210}\) Unfortunately, exactly what would satisfy this recommendation is unclear because the \textit{Allied} court declined to articulate the rules of antitrust liability governing private standard-setting processes.\(^{211}\)

Should any antitrust suits be filed against the USGBC, the court would examine the validity of the LEED standards under a rule–of–reason analysis, as is customary in such suits.\(^{212}\) As previously stated, this analysis would involve consideration of the economic effects of the standard, the power of the parties in their markets, and their underlying motives.\(^{213}\) Objective tests and processes that cannot be manipulated into sham proceedings would likely reflect favorably on the USGBC and encourage a finding that any anticompetitive effects were not the underlying motive of the standard.\(^{214}\) Antitrust liability is predicated on a context-specific analysis wherein the LEED standard might seek refuge in the objectivity behind its endorsement.\(^{215}\)

2. Public Involvement

Another avenue through which the USGBC might avoid antitrust liability is through public involvement in its standard-setting process.\(^{216}\) This stems from the acknowledgement that LEED standards have been so widely adopted by federal, state, and local governments, or have influenced the standards that these governments have crafted themselves.\(^{217}\) Therefore, the USGBC could be afforded \textit{Noerr} immunity if, when setting or changing standards, it did so in a

\(^{208}\) Del Percio, \textit{supra} note 135, at 254; Fox, \textit{supra} note 172, at 340; \textit{see Allied}, 486 U.S. at 504; \textit{Radiant}, 364 U.S. at 660.

\(^{209}\) \textit{See Del Percio}, \textit{supra} note 135, at 252; \textit{Frank}, \textit{supra} note 189.

\(^{210}\) \textit{See Allied}, 486 U.S. at 501; Del Percio, \textit{supra} note 135, at 252.

\(^{211}\) \textit{Allied}, 486 U.S. at 509.

\(^{212}\) \textit{See id.} at 501; \textit{United States v. Topco Assoc., Inc.}, 405 U.S. 596, 606–07 (1972).


\(^{214}\) \textit{See Allied}, 486 U.S. at 500.

\(^{215}\) \textit{See Radiant}, 364 U.S. at 660.

\(^{216}\) \textit{See Allied}, 486 U.S. at 510.

\(^{217}\) Del Percio, \textit{supra} note 135, at 252; \textit{see supra} notes 111–134 and accompanying text.
manner that a court could characterize as an effort to influence legislation.\textsuperscript{218} \textit{Noerr} articulated the exception to antitrust liability that public petitioning for legislative action would be immune despite the tendency of such action to produce anticompetitive effects.\textsuperscript{219} In circumstances where the USGBC might anticipate antitrust backlash from a certain standard, public involvement in the passage of that standard might result in immunity under \textit{Noerr}.\textsuperscript{220}

It is important to note that this public petitioning cannot be a sham proceeding because, as the \textit{Allied} court stated, “[w]e cannot agree . . . that the \textit{Noerr} doctrine immunizes every concerted effort that is genuinely intended to influence governmental action.”\textsuperscript{221} Just as a sham proceeding was unsuccessful at gaining \textit{Noerr} immunity in \textit{Allied}, a publicity campaign and forum for the passage of a LEED standard would not be valid in the eyes of the court if it appeared to have been rigged.\textsuperscript{222} Public involvement and scrutiny would provide the needed objectivity in the process of deciding on standards and soundness of the procedures through which standards are set.\textsuperscript{223}

Although this kind of precaution might only be necessary in those situations where a LEED standard risks creating a monopoly, it still involves some degree of sacrifice of the private nature of the USGBC by transforming an independent organization into a lobbying body at times.\textsuperscript{224} Furthermore, given that LEED is currently developed exclusively by experts, the feasibility and administrability of incorporating public involvement is questionable.\textsuperscript{225} Therefore, this recommendation should be confined to only those situations where an antitrust suit would seem inevitable without some safeguard against liability.\textsuperscript{226}

3. Recognition as a Quasi-Legislative Body

A second and perhaps more achievable possibility for the USGBC to gain \textit{Noerr} immunity is to obtain authority as a quasi-legislative body, making the

\begin{itemize}
  \item \textsuperscript{218} See \textit{Noerr}, 365 U.S. at 127.
  \item \textsuperscript{219} Id.
  \item \textsuperscript{220} Del Percio, \textit{supra} note 135, at 254–55.
  \item \textsuperscript{221} \textit{Allied}, 486 U.S. at 503.
  \item \textsuperscript{222} See id.; \textit{Noerr}, 365 U.S. at 127; Clipper Exxpress v. Rocky Mountain Tariff Bureau, Inc., 690 F.2d 1240, 1253 (9th Cir. 1987).
  \item \textsuperscript{223} Del Percio, \textit{supra} note 135, at 254–55.
  \item \textsuperscript{224} See id.
  \item \textsuperscript{225} Id. at 252.
  \item \textsuperscript{226} See generally \textit{Allied}, 486 U.S. 510 (finding antitrust liability for a sham standard-setting voting procedure by industry experts); \textit{Noerr}, 365 U.S. 127 (finding antitrust immunity for members of the industry and the public genuinely attempting to influence standard-setting); Del Percio, \textit{supra} note 135.
\end{itemize}
standards it sets akin to those set by the government and free from antitrust liability.227 Currently, LEED enjoys the frequent adoption of its standards into law at all levels of government, but this alone is not sufficient, under Allied, to confer on the USGBC sufficient authority to avoid liability.228 The Allied decision emphasized a distinction between private, self-interested activity and political activity aimed at furthering the public interest.229 Due primarily to the unaccountability to the public of the people in charge of the NFPA, the court found that their authority fell short of the latter category and could not be granted immunity.230

The parallels between the NFPA’s NEC and the USGBC’s LEED standard are numerous.231 Although governments routinely endorse both standards, the NFPA and the USGBC remain private organizations without true mechanisms for accountability to the public.232 Furthermore, both are susceptible to the influence of industry.233 Therefore, given the current state of the law, the USGBC cannot reasonably expect to fare any better in an antitrust action than the NFPA did.234

Should the USGBC not protect itself, it would face a rule-of-reason analysis for each individual action, with the hopes of success based on less flagrantly anticompetitive motives than those engaged in by Allied’s steel conduit producers.235 Instead of that cumbersome route, the USGBC should seek a delegation of power from the governments that adopt its LEED standards.236 As a result of such delegation, the USGBC would enjoy the same immunity from federal antitrust prosecution as an agency of the federal government.237 This delegation would have to be made explicit, however, because whether the immunity applies to a private party “depends on the extent to which the Government is acting pursuant to a clearly articulated policy or program.”238 Nonethe-

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227 See Allied, 486 U.S. at 502.
228 Id. at 501; see supra notes 119–134 and accompanying text.
229 Allied, 486 U.S. at 501.
230 Id.
231 Compare Allied, 486 U.S. at 501 (addressing the issue of unaccountability) and 492 (describing the NEC generally), with LEED, supra note 19 (describing LEED); LEED Committees, supra note 43 (listing LEED voting members).
232 Allied, 486 U.S. at 502; Bennett et al., supra note 8, § 1.04 at 6; About USGBC, supra note 17.
233 Allied, 486 U.S. at 500; Del Percio, supra note 135, at 253; Frank, supra note 189.
234 Del Percio, supra note 135, at 253.
235 Topco, 405 U.S. at 606–07; see Allied, 486 U.S. at 504.
237 Id. at 401.
238 Id. at 401–02.
less, this could be a simpler method for resolving the vulnerability in LEED than repeated case–by–case, context–specific analysis.239

4. Reliance Upon the Dissent in Allied

The fourth and final recommendation pertains only to how to avoid liability, not how to avoid antitrust suits entirely.240 Although only two Supreme Court justices241 dissented, the dissent in Allied made several strong points that would be easily applicable to the USGBC and LEED in the context of an antitrust suit.242 The dissent opined that the NFPA should be accorded the status of a quasi-legislative body and therefore granted the immunity to antitrust suits which it sought.243 In advancing this argument, the dissenting justices supported themselves with recognition of the reliance that state and local governments placed on the NFPA to produce the NEC.244 They determined that it was “untenable to consider the code-writing process by such organizations as the NFPA too far removed from the legislative process to warrant application of the doctrine announced in Noerr . . . .”245 Further, they lamented what they contended was a “misapplication” of the Noerr doctrine to these facts and the liability against organizations like the NFPA that the decision created.246

If antitrust claims become an issue for the USGBC, along with any of the other defenses outlined above, the organization should resurrect the arguments articulated in this dissent, as they are certainly applicable to LEED.247 In creating the LEED standards, the USGBC employs dozens of people whose job it is to steer, edit, direct, refine, and implement the LEED certification system.248 This organization has developed and continues to improve rating systems for nine different types of projects or buildings.249 This is a complicated and involved endeavor on which governments have come to depend.250 This is evidenced by LEED repeatedly being chosen as the standard for green regulation

239 See Allied, 486 U.S. at 504; Topco, 405 U.S. at 606–07.
240 See infra notes 241–256 and accompanying text.
241 The dissenting justices were Justice White and Justice O’Connor. Allied, 486 U.S. at 511 (White, J., dissenting).
242 See id. at 511–16; Bennett et al., supra note 8, § 1.04(1) at 6.
243 Allied, 496 U.S. at 511.
244 Id. at 514.
245 Id. at 513–14.
246 Id. at 511.
247 See id. at 513–14.
248 LEED, supra note 19.
250 See Bennett et al., supra note 8, § 1.04(1) at 6; Del Percio, supra note 135, at 253–54; LEED Committees, supra note 43.
rather than governments creating their own standards.251 Furthermore, because the USGBC perpetually reevaluates its LEED standards to remain at the forefront of the field, it requires standing committees to review new data.252 These committees are comprised of experts in the many disciplines necessary to set standards for water efficiency, air quality, materials sustainability, siting consciousness, and all other areas covered by LEED.253 The government conducting work of this scale is neither feasible nor advisable, as the cost to the taxpayer would likely be enormous.254

The Allied dissent found that large-scale, full-time work like that of the USGBC and the NFPA, as well as more than 400 other private standard-setting organizations, “contributes enormously to the public interest and . . . participation . . . by those who have technical competence and experience to do so should not be discouraged.”255 Although perhaps the weakest of the recommendations because the arguments did not win the Allied court, this approach still has merit in an era of increasing delegation in this area of highly specified duties to private parties such as the USGBC.256

CONCLUSION

The green building movement has shown great potential for significant environmental benefits. A leader in this movement has been the United States Green Building Council (USGBC) through its Leadership in Energy and Efficient Design (LEED) standard. Although confidence in this standard remains high and many levels of government have chosen to adopt it as their standard for certifying a green building, antitrust case law presents a potential problem. For the USGBC to protect itself from liability as well as for the public to trust and rely on the USGBC’s standard-setting procedures, steps must be taken to avoid committing antitrust violations. In this way LEED can remain the legitimate force for good it was created to be and the public can continue to benefit from increasingly efficient and sustainable buildings.

251 See U.S. GREEN BLDG. COUNCIL, supra note 7, at 20–22 (listing the federal agencies that incorporate LEED standards into their green building initiatives); Bennett et al., supra note 8, § 1.06(2)(b) at 16–17 (providing an overview of state green building laws, many of which rely upon LEED certification).

252 LEED Committees, supra note 43; LEED Green Building Rating Systems, supra note 21.

253 LEED Committees, supra note 43; LEED Green Building Rating Systems, supra note 21.

254 See Allied, 485 U.S. at 514 (White, J., dissenting).

255 Id.

256 See id.; LEED Committees, supra note 43; supra notes 119–123, 131–134, 166 and accompanying text.