

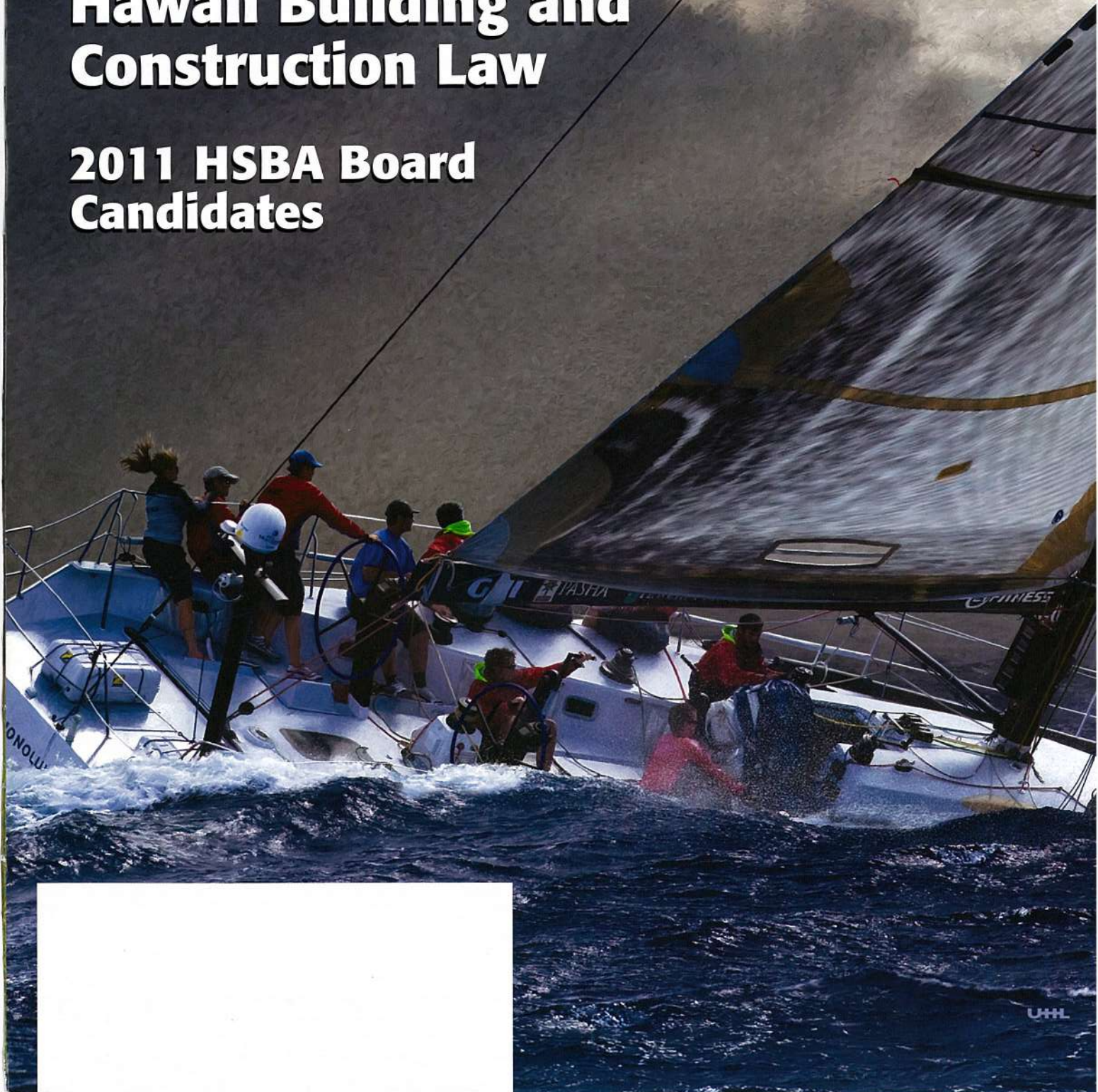
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The Greening of Hawaii Building and Construction Law

2011 HSBA Board Candidates



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One the cover: *Morning Light* (detail) by Phil Uhl. *Morning Light* is a TransPac 52 that was the subject of the recent Disney feature film of the same name most of which was shot in Hawaii. Uhl, who has been involved with the art side of sailing for four decades, was the coordinating producer for the film. To see more work by Phil Uhl go to www.uhllart.com

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The built environment is emerging as a major focus of current efforts to achieve climate change and clean energy policy objectives by requiring energy efficiency and sustainability measures, or “green building,” for new construction and major renovations of existing buildings in Hawaii. Although the term “green building” is not defined by

more than double from \$36-49 billion in 2009 to \$96-140 billion by 2013.² The green market was two percent of non-residential construction starts in 2005, ten to twelve percent in 2008, and is expected to grow to twenty to twenty five percent by 2013.³ Referred to as the “sustainability dividend,” on a national basis LEED buildings sell for an average of \$171

Uncertain and increasing energy costs, coupled with acceptable construction costs, are making green building economically attractive. Buildings account for 72 percent of electricity consumption in the United States.⁶ Hawaii pays the highest electricity prices in the United States;⁷ consumers spent an estimated \$6.21 billion for energy in 2007, or

THE GREENING OF

HAWAII

Hawaii statute, the United States Office of the Federal Environmental Executive has defined green building as “the practice of (1) increasing the efficiency with which buildings and their sites use energy, water, and materials, and (2)

reducing building impacts on human health and the environment, through better siting, design, construction, operation, maintenance, and removal – the complete building life cycle.”¹ Green building practices are increasingly required by law and promoted through prominent voluntary rating systems such as Leadership in Energy and Environmental Design, or LEED, established in 1993 by the United States Green Building Council.

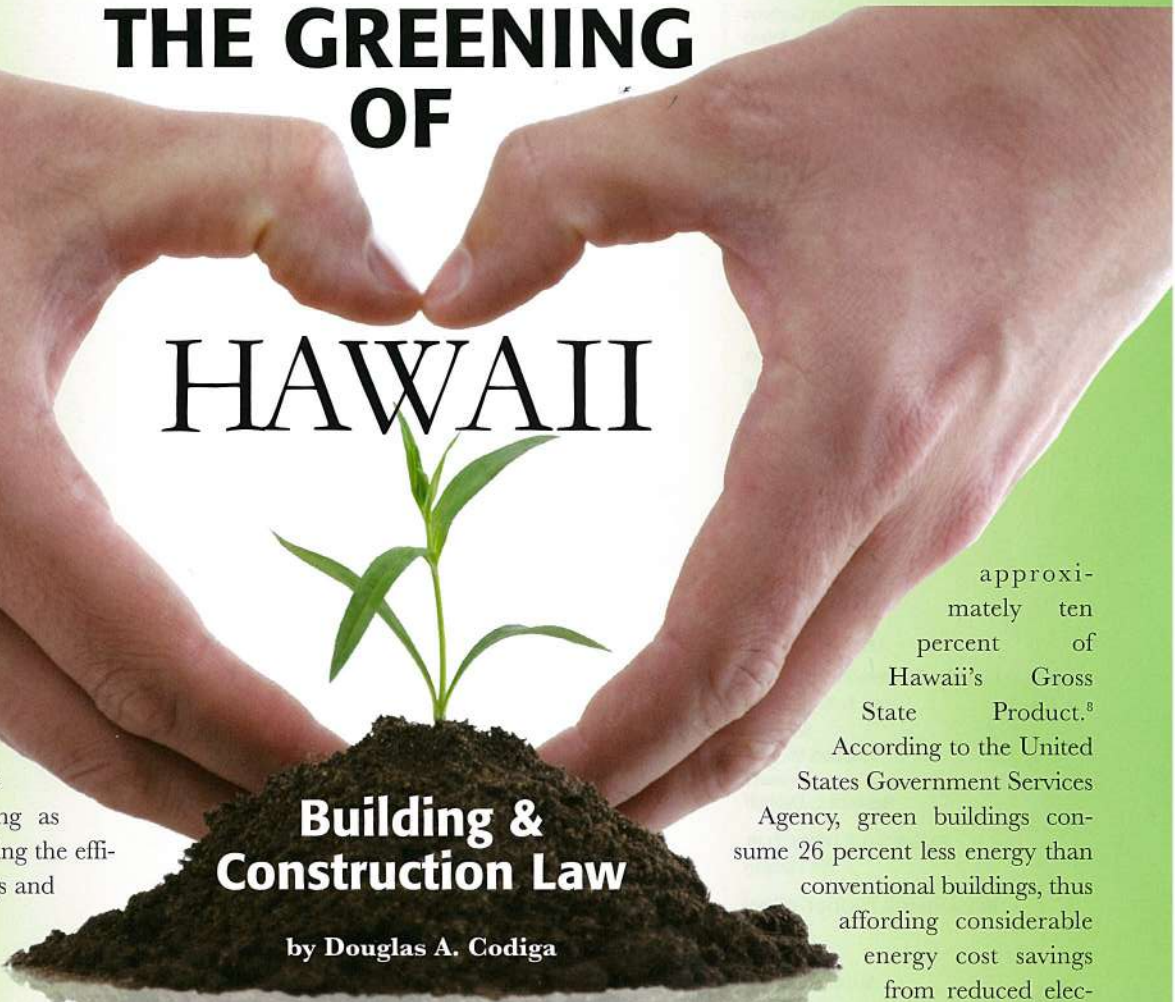
Once seemingly a fad, green building has entered the mainstream. The overall green building market (both non-residential and residential) is likely to

more per square foot than non-LEED buildings, command rental rate premiums of \$11.33 per square foot over non-LEED buildings, and have 4.1 percent higher occupancy than non-LEED buildings.⁴ A building must be green to be Class A in many major property markets today; the current shift to green buildings has been compared to the shift to commercial buildings with central air conditioning in the 1960s.⁵

Economic and Environmental Drivers and Hawaii Clean Energy Law

approximately ten percent of Hawaii’s Gross State Product.⁸ According to the United States Government Services Agency, green buildings consume 26 percent less energy than conventional buildings, thus affording considerable energy cost savings from reduced electricity consumption.⁹ At

the same time, a 2007 study found the cost per square foot of buildings seeking LEED certification falls within the existing range of costs for buildings not seeking LEED certification.¹⁰ A subsequent national study found the median cost increase for building green was 1.4 percent, or a cost premium of approximately \$3 per square foot.¹¹ Although greater construction cost increases for green building have been experienced in Hawaii, due in part to consulting fees and high shipping costs for green materials, green building cost premiums are typically recovered many times over



Building & Construction Law

by Douglas A. Codiga

through energy cost savings.

Green buildings also reduce carbon dioxide emissions that contribute to climate change. In the United States, buildings account for 38 percent of all carbon dioxide emissions,¹² which exceeds the 33 percent of carbon dioxide emissions from the transportation sector.¹³ In Hawaii, just over one half of the state's energy-related greenhouse gas emissions are attributable to the commercial and residential sectors.¹⁴ A green building emits 33 percent less greenhouse gas emissions than the average commercial building.¹⁵ Hawaii law requires statewide reduction of greenhouse gas emissions to 1990 levels by the year 2020,¹⁶ and the Hawaii Legislature has concluded that increasing energy efficiency can contribute to greenhouse gas reduction.¹⁷ Green building therefore has a role to play in Hawaii's efforts to address climate change.

The environmental and economic factors driving green building are in accord with emerging Hawaii clean energy law and policy, especially regarding energy efficiency. On October 20, 2008, less than nine months after the Hawaii Clean Energy Initiative was launched by the State and United States Department of Energy, a landmark agreement (commonly referred to as the Energy Agreement) was signed by the Hawaiian Electric Company, Inc. and the State of Hawaii. The Energy Agreement sets forth the goal of "70 percent clean, renewable energy for electricity and transportation by 2030."¹⁸

On June 25, 2009, Governor Lingle signed Act 155, which mandates that by 2030 forty percent of net electricity sales by electric utility companies in Hawaii shall be from renewable electrical energy, and energy efficiency measures shall cause the equivalent of a thirty percent reduction in energy use¹⁹ – thus requiring seventy percent clean energy (i.e., renewable energy and energy efficiency) by 2030 as a matter of law. This state law mandate is codified in Part V of Chapter 269, Hawaii Revised Statutes, in the corresponding Renewable Portfolio Standards and Energy Efficiency Portfolio Standards ("EEPS") provi-

sions.²⁰ In furtherance of the EEPS statutory requirement, on March 8, 2010 the State of Hawaii Public Utilities Commission issued an order opening a formal proceeding to investigate EEPS, which are to be designed to achieve 4,300 gigawatt hours of electricity use reductions statewide by 2030, with interim goals for 2015, 2020, and 2025, and incentives and penalties.²¹ The EEPS regulatory proceeding and Hawaii clean energy law, which mandate a thirty percent reduction in energy use by 2030, are broadly supportive of green building in Hawaii.

Given the anticipated future growth of green building in Hawaii, the purpose of this article is to provide an introductory overview of key areas of green building law and policy in Hawaii and nationally. The field of green building law encompasses a wide range of complex and interrelated federal, state and local laws, codes, policies, programs and initiatives which are beyond the scope of this article. This article therefore briefly surveys selected major developments in green building law to provide an overview and to suggest how it may influence building, construction, and real estate development in Hawaii in the years to come.

Act 96: Hawaii's Green Building Law

On May 12, 2006, Governor Lingle signed into law Act 96 which includes sections comprising Hawaii's current green building law ("Act 96").²² As described by the Legislature, the purpose of Act 96 is to provide "one segment of a larger comprehensive approach" to achieving energy self sufficiency.²³ In addition to requiring photovoltaic systems at public schools, solar water heating, fuel-efficient vehicles, and energy-savings contracts, Act 96 contains green building-related requirements. These requirements concern LEED building standards for state facilities and priority permit processing: Act 96 calls for "[e]stablishing new planning and budgeting preparation goals for state agencies that incorporate green building practices" and "[p]romoting the use of green

building practices by requiring each county agency that issues building, construction or development-related permits to establish a procedure for priority processing of permit applications for construction projects incorporating energy and environmental design building standards."²⁴

The energy and environmental standards for state facilities required by Act 96 are codified in section 196-9, Hawaii Revised Statutes, "Energy efficiency and environmental standards for state facilities, motor vehicles, and transportation fuel."²⁵ Under section 196-9(a), each agency is directed to implement, to the extent possible, certain goals during planning and budget preparation and program implementation.²⁶ Under section 196-9(b), with regard to buildings and facilities, each agency shall "(1) Design and construct buildings meeting the Leadership in Energy and Environmental Design silver or two green globes rating system or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, except when the guideline, standard, or system interferes or conflicts with the use of the building or facility as an emergency shelter[.]"²⁷ Thus, Hawaii green building law requires state buildings and facilities to be designed and constructed to achieve LEED Silver or comparable rating.

The priority permit processing procedures called for by Act 96, which extend to private entities, are codified in section 46-19.6, Hawaii Revised Statutes, "County building permits; incorporation of energy and environmental design building standards in project design; priority processing."²⁸ Under subsection (a), each county agency that issues building, construction, or development-related permits "shall establish a procedure for the priority processing of a permit application submitted by a private entity for a construction project that incorporates energy and environmental design building standards into its project design."²⁹ The procedures shall give priority to private sector permit applicants at no additional cost to the applicant, and the procedures shall not imply or provide that

any permit application filed under the priority processing procedure shall be automatically approved.³⁰ Like section 196-9(b)(1), which requires design and construction to meet LEED Silver or equivalent rating for state facilities, section 46-19.6 defines “Energy and environmental design building standards” to mean “LEED silver or two green globes rating system or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system.”³¹ Also in 2006, the City and County of Honolulu passed Ordinance 06-06, which added to the Revised Ordinances of Honolulu section 2-9.3, “Green building standards for city facilities,” pursuant to which beginning in 2008 facilities with a floor area greater than 5,000 square feet “shall comply with LEED™ Silver, in the version most recently adopted by the United States Green Building Council (the “USGBC”), as a minimum design standard.”³²

These LEED green building laws in Hawaii are part of a nationwide trend. According to the USGBC, various LEED initiatives, including legislation, executive orders, resolutions, ordinances and policies, are found in 34 state governments, 14 federal agencies or departments, and 178 counties and cities.³³ Given the widespread use of LEED, familiarity with this important green building certification program is necessary to understand Hawaii green building law.

Leadership in Energy and Environmental Design (LEED)

With over 18,000 member companies and organizations and over 136,000 LEED professional credential holders, the USGBC’s LEED program is by far the most widely accepted not-for-profit green building certification program in the United States and the nationally accepted benchmark for the design, construction, and operation of high performance green buildings.³⁴ LEED is a point-based system in which buildings earn credits for satisfying specific green building criteria. The number of points determines the level of certification. Under the most recent LEED rating sys-

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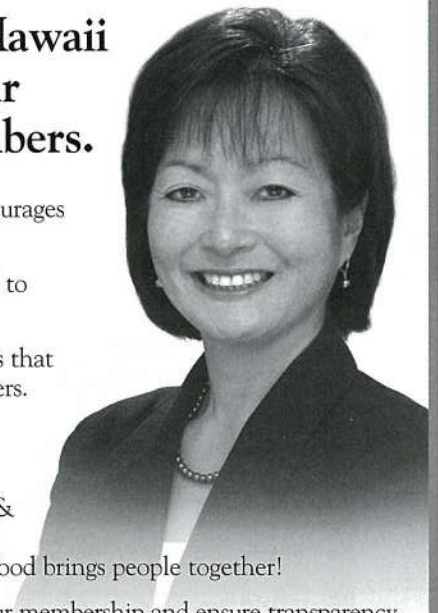
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tem (referred to as LEED v3 or LEED 2009), points are available in four progressive levels: “Certified” for 40 to 49 points, “Silver” for 50 to 59 points, “Gold” for 60 to 79 points, and “Platinum” for 80 points and above.

LEED rating systems exist in specific categories. The pre-eminent LEED for New Construction (“LEED NC”) rating system sets standards for high performance commercial and institutional new construction and major renovation projects, including office, high-rise residential, and government buildings. The LEED for Existing Buildings: Operations & Maintenance (“LEED EB: O&M”) rating system measures operations and maintenance

to maximize efficiency and minimize environmental impacts, and unlike LEED NC, does not necessarily involve new construction. LEED for Commercial Interiors (“LEED CI”) certifies high performance tenant spaces seeking reduced operating costs and increased environmental benefits, and can be earned in non-LEED buildings.

LEED for Core & Shell (“LEED CS”), which complements LEED CI, covers the structure, envelope, and HVAC system of a rental property. LEED for Retail and LEED for Healthcare address the specific needs of schools, retail spaces and healthcare facilities, respectively, and further recent additions to the LEED

program include LEED for Homes and LEED Neighborhood Development (“LEED ND”).³⁵

Projects are certified not by USGBC but by the Green Building Certification Institute (“GBCI”), an independent, third-party organization established in 2008 to administer project certifications and professional credentials within the LEED framework. Projects must register to seek LEED certification. USGBC databases show 19,599 registered projects and 4,991 certified projects.³⁶ In Hawaii, 159 projects are registered for LEED certification and 21 commercial and residential buildings have been certified since the first such certification in 2004.³⁷ Hawaii projects seeking LEED certification include school campuses, housing complexes, restaurants, hotels, and resort facilities.³⁸

GBCI also provides third party administration and verification of LEED professional certificates, which certify the skills and knowledge of implementation required to provide verification services on LEED projects. LEED professional



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certificate designations include LEED Accredited Professional ("AP"), LEED AP Building Design & Construction, LEED AP Homes, LEED AP Interior Design & Construction, LEED AP Operations and Maintenance, LEED AP Neighborhood Development, and LEED Green Associate.³⁹ Architecture is by far the largest area of practice for LEED professional credential holders. According to GBCI, as of March 31, 2010, there were a total of 936 LEED-accredited professionals in Hawaii, including five Hawaii attorneys.⁴⁰ The USGBC is a membership organization with national chapters throughout the United States; the Hawaii USGBC Chapter was founded in 2007.

**Emerging Legal Issues:
"LEEDigation" and
Decertification**

As green building becomes more commonplace, green building-related legal issues have been identified and the first few high-profile lawsuits and disputes have emerged. Broadly speaking,

the potential legal risks of green building arise from unrealized expectations, misunderstandings, physical or economic failure, and litigation.⁴¹ These risks apply to owners, architects, and contractors.

Owner risk centers on the potential failure to achieve the certification, which creates economic risk including the loss of a tenant or sale, loss of government incentives and tax credits, increased design and construction costs, penalties on public projects with green mandates, and increased energy and water costs over the life of the building. Although a mutual waiver of consequential damages clause is commonly included within design and construction contracts, such clauses carry additional risk in green building contracts insofar as case law has yet to define the losses that would be reasonably contemplated by the parties to a green project. This is especially true given challenges in interpreting regulations with certainty, unsettled insurance coverage for claims arising out of green design, and insufficient data to assess whether green buildings are performing

at the desired higher level of efficiency.

Architects and contractors face related risks. Design professionals typically protect themselves from claims of negligence by maintaining errors and omissions ("E&O") insurance. By agreeing to "warrant" or "guarantee" LEED certification, however, E&O coverage may be compromised insofar as such policies exclude contractually assumed liability. Architects may therefore seek to avoid guaranteeing LEED certification. This potential risk may possibly extend to the signing of LEED submittal templates, which are completed by project participants attesting that the information in support of a specific LEED point or credit is accurate to the best of the signer's knowledge. Contractor risk stems primarily from confusion between design and performance specifications. Although it is well established that a contractor is not liable for project defects arising from faulty design standards, green building projects may also include performance standards (for example, that the contractor use green adhesive and

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sealants to achieve LEED indoor air quality credits). Failure to achieve LEED credits specified in performance standards may expose the contractor to potential liability.

The first significant LEED-related lawsuit (dubbed "LEEDigation" by one commentator⁴²) involved over \$600,000 in tax credits lost allegedly due to failure to obtain LEED certification. In *Southern Builders v. Shaw Development*, the general contractor agreed to build a \$7.5 million, 23-unit luxury condominium project in Maryland designed to obtain LEED Silver certification.⁴³ The owner applied and qualified for a state income tax credit equal to eight percent of the project cost. When the contractor failed to deliver a LEED Silver building and a certificate of occupancy within the time required under Maryland's green building tax credit program, the owner forfeited \$635,000 in tax credits.⁴⁴ The owner alleged claims of negligence and breach of contract against the builder.⁴⁵ The project manual stated that the project was designed to comply with LEED Silver certification, but did not expressly obligate the contractor to secure formal certification.⁴⁶ Although the lawsuit apparently settled, it illustrates the potential for parties to fail to recognize the risks inherent in the applicable green building regulatory scheme and to enter into imprecise contracts.

In addition to so-called LEEDigation, challenges to LEED certification, sometimes referred to as "de-certification," have arisen. LEED certification decisions are made by review teams. GBCI procedures allow a green building project team to appeal a LEED review team's final decision.⁴⁷ In addition to appeals by project teams, the GBCI "Certification Challenge Policy" allows appeals of LEED certification by third parties.⁴⁸ The leading example of a third-party appeal involves LEED NC Gold certification of the Northland Pines High School in Eagle River, Wisconsin. The 125-page appeal, filed in December 2008 by concerned taxpayers, alleges the project design and construction did not meet LEED prerequisites and credits concerning project documentation, ener-

gy performance and compliance with energy codes, and indoor air quality, and sought to revoke LEED Gold certification. USGBC retained two technical experts to review the technical merits of the appeal. In April 2010, USGBC's general counsel issued a statement denying the appeal, affirming that the Northland Pines High School project complied with all requirements necessary to achieve LEED Gold certification and no adverse action would be taken regarding certification. In response to the USGBC's official statement, the appellants made available detailed technical reports concerning the project's alleged failure to comply with energy code provisions, and published a three-page reply, titled "LEED Credibility Destroyed," which invited interested members of the public to review the materials and draw their own conclusions.⁴⁹

Legal Challenges to Green Building Laws and Ordinances

In addition to decertification and LEEDigation, adoption and enforcement of green building laws and ordinances may be legally challenged on several grounds, including non-delegation, incorporation by reference, antitrust, preemption, and intergovernmental immunity.⁵⁰ A prominent example of this type of legal challenge is *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque* ("AHRP"), in which the United States District Court in New Mexico granted a preliminary injunction to plaintiffs challenging the City of Albuquerque's green building ordinance on the basis of federal preemption.⁵¹

The challenged green building ordinance in *AHRI* mandated greater energy efficiency, among other goals, for new construction and renovations. Although regulated entities could choose among several prescriptive and performance-based paths to compliance, including the LEED Silver approach, plaintiff appliance manufacturers successfully argued that Albuquerque's ordinance was preempted by the Energy Policy and Conservation Act,⁵² as amended by the National Appliance Conservation Act and the Energy Policy Act of 1992.⁵³

The court specifically dismissed the contention that performance-based standards, such as LEED Silver, do not require the use of any particular product. Rather, the court found the ordinance in effect imposed a penalty for the use of products that meet but do not exceed federal energy efficiency standards.⁵⁴

Hawaii State Energy Code

Although design and construction to meet LEED Silver or equivalent rating is required by Hawaii green building statutes (i.e., Hawaii Revised Statutes §§ 196-9 and 46-19.6), LEED is a points-based voluntary rating system and not a mandatory code written in code language. State and local governments, however, may desire a green building standard written in code language that can be adopted and enforced accordingly. The development and adoption of green building and energy efficiency-related codes suggest government mandates may play an increasingly important role in promoting and requiring green building in Hawaii. Such codes may also be subject to legal challenges.

In response to the desire for uniformity and enforceability, several major green building codes have recently been developed. In January 2010, the American Society of Heating, Refrigerating, and Air Conditioning Engineers ("ASHRAE"), in conjunction with USGBC and the Illuminating Engineering Society ("IES"), published ASHRAE 189.1, "Standard for the Design of High-Performance, Green Buildings Except Low-Rise Residential Buildings" ("Standard 189.1"). Standard 189.1 provides criteria by which a building can be judged as green and is written in model code language that jurisdictions can use to develop a green building construction code. According to ASHRAE, Standard 189.1 provides a "total building sustainability package" for the design, construction and operation of green buildings, including requirements concerning site sustainability, water use efficiency, energy efficiency, indoor environmental quality, and the building's impact on the atmosphere, materials and resources.⁵⁵

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More recently, the International Code Council (“ICC”), in cooperation with the American Institute of Architects and ASTM International, has announced development of the International Green Construction Code (“IGCC”). According to ICC, the IGCC is intended to use the model code approach, to identify both minimum and advanced levels of performance for green and high-performance buildings, to work as an “overlay” to the ICC family of codes, and to be written in mandatory language that provides a new regulatory framework.⁵⁶ ASHRAE, USGBC, and IES participated in developing the IGCC; to avoid conflicts between Standard 189.1 and the IGCC, Standard 189.1 is included as an alternative jurisdictional compliance option within the IGCC. In a press release, USGBC characterizes development of the IGCC as “perhaps the most significant development in the building industry in the past ten years.”⁵⁷

Consistent with Standard 189.1 and the IGCC, on January 12, 2010

California announced adoption by the California Building Standards Commission of that state’s mandatory Green Building Standards Code, known as CALGREEN, to take effect January 1, 2011. CALGREEN will require that every new building constructed in California reduce water consumption by twenty percent, divert fifty percent of construction waste from landfills, and install low pollutant-emitting materials. It will also require mandatory inspections of energy systems for nonresidential buildings over 10,000 square feet. Although CALGREEN will offer more stringent voluntary measures, upon passing state building inspection, California’s property owners will have the ability to label their facilities as CALGREEN compliant without additional third-party certification.

On May 13, 2010 Governor Lingle signed the “State Energy Conservation Code,” Chapter 3-181, Hawaii Administrative Rules (“Hawaii Energy Code”). Although Hawaii has not adopted a green building code, energy codes

are integral features of green building codes, such as Standard 189.1 and the IGCC, and figured prominently in the Northland Pines High School LEED certification dispute. The Hawaii Energy Code adopts the 2006 International Energy Conservation Code (“IECC 2006”), subject to certain specific amendments by the state and counties. Adoption of the Hawaii Energy Code arose from Act 82 signed by Governor Lingle on May 21, 2007 (“Act 82”). Act 82 amended Chapter 107, Hawaii Revised Statutes, to establish a state building code “applicable to all construction in the State of Hawaii,” which shall include energy conservation standards for building design and construction.⁵⁸

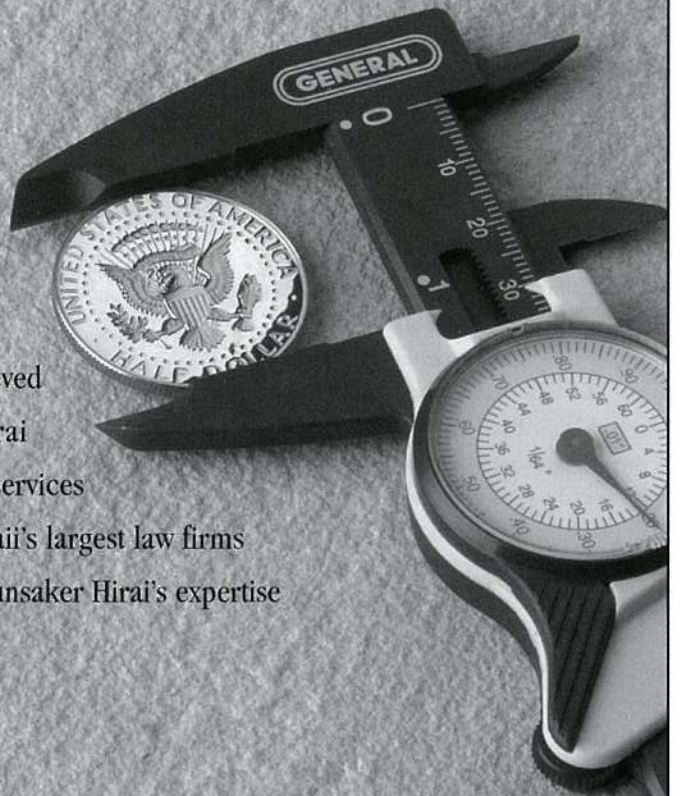
In adopting a statewide code, the Legislature noted that the State has traditionally allowed individual counties to establish their own building codes (including energy conservation codes) but the “status of fragmented building requirements in Hawaii is of serious concern to those involved in building ownership, design, construction, and insurance

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[and] [o]ver forty states have adopted some form of a statewide building code.⁵⁹ Although the Hawaii Energy Code is statewide, it is subject to amendment by each county. The IECC 2006 has been adopted and amended by the City and County of Honolulu and County of Maui.⁶⁰ The 2009 IECC, which generally requires greater energy conservation than IECC 2006, has been adopted and amended by the County of Kauai and is under consideration by the County of Hawaii.⁶¹

Like green building laws, state energy codes are not immune from legal challenges. On May 25, 2010, the Building Industry Association of Washington filed suit in the United States District Court for the Western District of Washington.⁶² The suit seeks to enjoin the pending enactment of certain amendments to Washington's state energy code effective July 1, 2010. Like the *AHRI* litigation concerning Albuquerque's green building ordinance, plaintiffs have alleged the requirements of the state's energy code are preempted by federal energy efficien-

cy regulations.

The Hawaii Energy Code and related legal developments, such as Act 96 and LEED, will likely ensure the continued greening of Hawaii building and construction law in the future. These green building laws are consistent with Hawaii's transition from imported fossil fuel to renewable energy and energy efficiency, or clean energy. The underlying economic and environmental drivers of the transition to clean energy, including energy cost savings and reduced carbon dioxide emissions, apply with particular force to the built environment. Emerging legal issues must be carefully understood and addressed for Hawaii to realize the potential economic and environmental benefits of green building.

¹ See John L. Howard, Jr., *The Federal Commitment to Green Building: Experiences and Expectations*, Office of the Federal Environmental Executive at 3 (2003), at http://ofee.gov/Resources/Guidance_reports/Guidance_reports_archives/fgb_report.pdf. See also Darren A. Prum, "Green Buildings, High Performance Buildings, and Sustainable Construction: Does It Really Matter What We

Call Them?," 21 *Vill. Envtl. L.J.* 1, 33 (2010) (surveying various definitions of the terms "green buildings," "high performance buildings," and "sustainable construction buildings" and concluding that although the terms are used interchangeably they are not synonyms).

² United States Green Building Council, *Green Building Facts* (hereafter, "USGBC Fact Sheet"), citing McGraw Hill Construction, *Green Outlook 2009: Trends Driving Change* (2009), at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1718>.

³ *Id.*

⁴ Andrew C. Burr, *CoStar Study Finds Energy Star/LEED Bldgs. Outperform Peers*, CoStar Group (Mar. 26, 2008), at <http://www.costar.com/News/Article.aspx?id=D968F1E0DCF73712B03A099E0E99C679>.

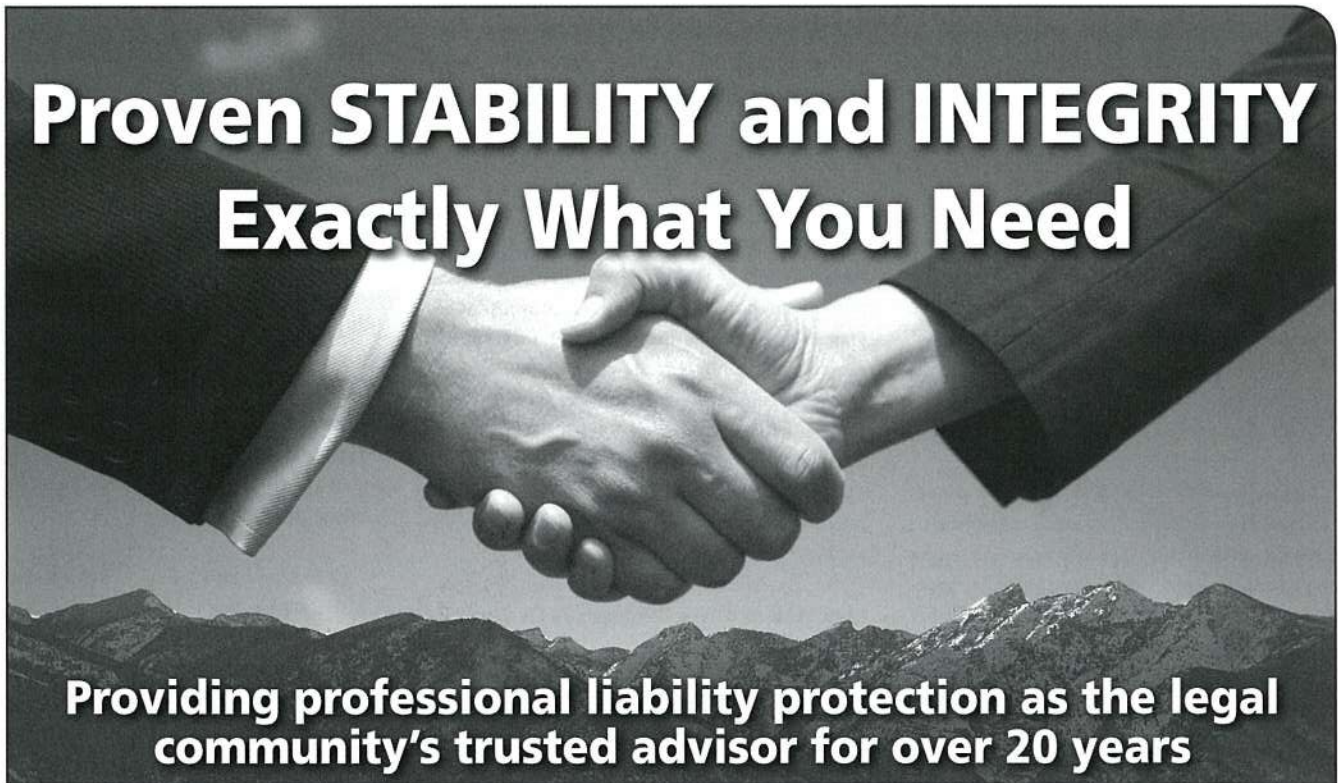
⁵ Stuart D. Kaplow, "Does a Green Building Need a Green Lease?," 38 *U. Balt. L. Rev.* 375, 379-80 (2009).

⁶ USGBC Fact Sheet, citing U.S. Energy Information Administration, *Assumptions to the Annual Energy Outlook* (2008).

⁷ 2009 Haw. Sess. Laws, Act 155 § 1; H.B. 1464, 25th Leg. (Haw. 2009).

⁸ State of Hawaii Energy Resources Coordinator Annual Report (2008) at 2, at <http://hawaii.gov/dbedt/info/energy/publications/erc08.pdf>.

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- 9 USGBC Fact Sheet, *citing* GSA Public Buildings Service, *Assessing Green Building Performance: A Post Occupancy Evaluation of 12 GSA Buildings* (2008).
- 10 USGBC Fact Sheet, *citing* Davis Langdon, *Cost of Green Revisited: Reexamining the Feasibility and Cost Impact of Sustainable Design in the Light of Increased Market Adoption* (2007).
- 11 Greg Kats, *Greening Our Build World: Costs, Benefits and Strategies* at 233 (2010).
- 12 USGBC Fact Sheet, *citing* United States Energy Information Administration, *Assumptions to the Annual Energy Outlook* (2008).
- 13 United States Energy Information Administration, *Emissions of Greenhouse Gases Report (2008)*, at <http://www.eia.doe.gov/oiaf/1605/ggrrpt/index.html#ercde>.
- 14 ICF International, *Proposed GHG Reduction Work Plans for Hawaii* (Nov. 10, 2009) at 68, at <http://hawaii.gov/dbedt/info/energy/greenhouse/GHGWorkPlan12.11.09.pdf>.
- 15 USGBC Fact Sheet, *citing* United States GSA Public Buildings Service, *Assessing Green Building Performance: A Post Occupancy Evaluation of 12 GSA Buildings* (2008).
- 16 Haw. Rev. Stat. § 342B-71 (2010).
- 17 2009 Haw. Sess. Laws, Act 155 § 1.
- 18 Energy Agreement at 18, at <http://hawaii.gov/dbedt/info/energy/agreement/signed2008oct20.pdf>.
- 19 2009 Haw. Sess. Laws, Act 155 §§ 3, 11. *See also* Hawaii Powered: Hawaii Clean Energy Initiative (Energy efficiency measures implemented over the next two decades can save 4,300 gigawatt hours of electricity, equivalent to approximately thirty percent of the demand forecasted for 2030), at http://www.hawaiicleanenergyinitiative.org/wg_efficiency.html.
- 20 *See* Haw. Rev. Stat. ch. 269, Part V, *et seq.* (2010).
- 21 Commission Order Opening Investigation, Docket No. 2010-0037 (March 8, 2010) at 4-5.
- 22 2006 Haw. Sess. Laws, Act 96; H.B. 2175, 23rd Leg. (Haw. 2006).
- 23 2006 Haw. Sess. Laws, Act 96 § 1.
- 24 *Id.*
- 25 Haw. Rev. Stat. § 196-9 (2010). This section contains a number of related requirements involving measures to prevent heat gain, solar water heating, water and energy efficiency practices, recycling and waste minimization, procurement of energy efficient and “environmentally preferable” products, and motor vehicles and transportation fuel. *See id.* at §§ 196-9(b)(2)-(9).
- 26 Haw. Rev. Stat. § 196-9(a).
- 27 Haw. Rev. Stat. § 196-9(b).
- 28 Haw. Rev. Stat. § 46-19.6 (2010).
- 29 Haw. Rev. Stat. § 46-19.6(a).
- 30 *Id.*
- 31 Haw. Rev. Stat. § 46-19.6(b)(1).
- 32 Revised Ordinances of Honolulu § 2-9.3.
- 33 USGBC, “Government Resources,” at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779>.
- 34 USGBC, “About USGBC,” at <https://www.usgbc.org/DisplayPage.aspx?CMSPageID=124>. Although LEED is dominant in the United States, similar and competing green building rating systems exist. Green Globes, of Canadian origin and promoted in the United States by the Portland, Oregon-based nonprofit Green Building Initiative, is an online assessment and rating system. The Energy Star initiative of the United States Environmental Protection Agency and United States Department of Energy is a popular voluntary labeling program that applies to new homes and commercial and industrial buildings. The Hawaii BuiltGreen Program of the Hawaii Building Industry Association utilizes a self-certification checklist to certify residential projects. To avoid antitrust concerns, Act 96, as codified in Haw. Rev. Stat. §§ 196-9(b)(1) and 46-19.6(b), expressly refer to LEED, Green Globes “or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system[.]” *Id.*
- 35 USGBC, “LEED Rating Systems,” at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222>.
- 36 USGBC, “Projects and Case Studies Directory,” at <http://www.usgbc.org/LEED/Project/CertifiedProjectList.aspx?CMSPageID=247>.
- 37 *Id.* *See also* Nanea Kalani, “Economy has slowed pursuit of LEED certification,” *Pacific Business News* (June 11, 2010) at 6.
- 38 *Id.*
- 39 GBCI, “LEED professional credentials,” at <http://www.gbci.org/main-nav/professional-credentials/credentials.aspx>.
- 40 GBCI, “LEED professionals by state/territory,” at <http://www.gbci.org/main-nav/professional-credentials/resources/at-a-glance/state.aspx>; GBCI, “LEED professional directory,” at <https://ssl10.cyzap.net/dzapps/dbzap.bin/apps/assess/webmembers/tool>. Two of the Hawaii attorneys, Michael Vieira and Zachary J. Antalis, publish the blog *Hawaii Green Building Law: Green building and the law in Hawaii*, at <http://www.hawaiigreenbuildinglaw.com/wordpress/>.
- 41 *See, e.g.*, Maura K. Anderson, *et al.*, “Hidden Legal Risks of Green Building,” 84 *Fla. Bar J.* 35 (Mar. 2010).
- 42 Chris Cheatham, “LEEDigation,” *Green Building Law Update* (April 15, 2009), at <http://www.greenbuildinglawupdate.com/2009/04/articles/legal-developments/leedigation/>.
- 43 Shaw Development, LLC’s Counter-Complaint filed Feb. 16, 2007, Case No.: 19-C-07-011405, Circuit Court, Somerset Co., Md. at 2, at http://www.greenbuildinglawupdate.com/uploads/file/Southern%20Builders%20v_%20Shaw%20Devel *opment.pdf*.
- 44 *Id.* at 2.
- 45 *Id.* at 8-11.
- 46 *Id.* at Exhibit B.
- 47 GBCI, *LEED Certification Policy Manual* (April 2009) at § IX, “Certification Challenge Policy,” at http://www.gbci.org/Libraries/Certification_Resources/Policy_Manual.sflb.ashx.
- 48 *Id.*
- 49 *See* Shari Shapiro, “Needing Naysayers or Constructive Critics – The Tough Case Of Northland Pines,” *Green Building Law*, at <http://www.greenbuildinglawblog.com/2010/06/articles/leed/needling-naysayers-or-constructive-critics-the-tough-case-of-northland-pines/>.
- 50 *See* Jason James, “Legal Analysis of Model Municipal Green Building Ordinance” (Draft June 7, 2010), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=527.
- 51 *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque*, 2008 WL 5586316 (D.N.M., 2008). At the time of this writing no final decision or outcome had been reached in the lawsuit.
- 52 42 U.S.C. § 6201, *et seq.*
- 53 Pub.L. No. 100-102 (1987); 89 42 U.S.C. §§ 6311-17.
- 54 *AHRI* at *9.
- 55 ASHRAE, *The Green Building Standard, Standard 189.1, Standard for the Design of High-Performance, Green Buildings Except Low-Rise Residential Buildings*, at <http://www.ashrae.org/publications/page/927>.
- 56 *See* ICC, *International Green Construction Code*, at <http://www.iccsafe.org/cs/IGCC/Pages/default.aspx>.
- 57 USGBC, ICC, ASHRAE, USGBC and IES *Announce Nation’s First Set of Model Codes and Standards for Green Building in the U.S.*, at <http://www.usgbc.org/Docs/News/CodesRelease.pdf>.
- 58 2007 Haw. Sess. Laws, Act 82 § 2; S.B. 795, 24th Leg. (Haw. 2007); Haw. Rev. Stat. § 107-25 (2010).
- 59 2007 Haw. Sess. Laws, Act 82 § 1.
- 60 Personal communication with Howard Wiig, Institutional Energy Analyst, State of Hawaii, Department of Business, Development & Tourism (June 7, 2010).
- 61 *Id.*
- 62 *See Building Industry Association of Washington, et al. v. Washington State Building Council* (Complaint filed May 25, 2010), at <http://www.greenbuildinglawblog.com/uploads/file/Washington%20Complaint.pdf>.

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