ILLINOIS'S FIRST ATTEMPT AT SUSTAINABLE BUILDING IS "GREEN" FOR ALL THE WRONG REASONS*

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I. INTRODUCTION

At one point in time, all Americans were "green" whether they liked it or not. Until sometime around 1885, nearly 100% of all energy consumption resulted from renewable sources.[1] The early settlers and Native Americans had no choice but to use the "original" renewable resource: trees.[2] They also did not carry the burden of finding energy to power supermarkets, cell phones, appliances, and the rest of the modern conveniences that make our lives "comfortable." There is something to be said for splitting, hauling, and stacking an entire tree into a form in which it can provide the heat that it has collected from soaking up day after day of sun.[3] The modern green movement is arguably less "back-to-basics" and more technology driven.

While factories, power plants, and gas guzzling vehicles were easy targets for environmental groups, buildings continue to devour more than 50% of the world's energy.[4] Long before electricity and central air, architects were forced to rely on natural methods for heating, lighting, and

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1. History of Energy in the United States, U.S. ENERGY INFO. ADMIN. (Aug. 19, 2010) http://www.eia.gov/emeu/aer/eh/eh.html.
2. *Id.*
3. ALDO LEOPOLD, A SAND COUNTY ALMANAC 7–19 (1949).

> Only one acorn in a thousand ever grew large enough to fight rabbits; the rest were drowned at birth in the prairie sea. It is a warming thought that this [tree] wasn't, and thus lived to garner eighty years of June sun. It is this sunlight that is now being released, through the intervention of my axe and saw, to warm my shack and my spirit through eighty gusts of blizzard. And with each gust a wisp of smoke from my chimney bears witness, to whomsoever it may concern, that the sun did not shine in vain.

Id. at 7.

4. DAVID GISSEN, BIG & GREEN: TOWARD SUSTAINABLE ARCHITECTURE IN THE 21ST CENTURY 19 (David Gissen, ed., 2002), available at http://books.google.com/books?id=lrnFW_Wv9FsC&printsec=frontcover&dq=big+and+green&cd=1#v=onepage&q=&f=false.

ventilation.[5] This led early 20th century skyscrapers to incorporate some of these old world innovations such as recessed windows, sky gardens, and retractable window awnings and shades.[6] It was not until the 1970s that a group of forward-looking environmentalists suggested movement towards a more self-sufficient style of building.[7] The rest of the United States caught up to this mindset due to the onset of the early 1970s energy crisis.[8] This spurred the American Institute of Architects (AIA) to create a task force with the goal of finding solutions to the problem of building inefficiency.[9] Not to be outdone, the federal government jumped into the game in 1977 and created the Department of Energy and what is now known as the National Renewable Energy Laboratory to research "energy technologies."[10]

It was not until the early 1990s that President Bill Clinton brought the new movement to the forefront by revealing the plans to "Green the White House."[11] The collaborative effort took three years to complete and led to a $300,000 reduction in yearly energy and water expenses.[12] This was the needed push to begin "green" renovations of the countless aging federal buildings.[13] Even decades later, the federal government continues to advocate for "Green Buildings" with the goal of decreasing resource consumption.[14]

During the government's transformation, numerous groups saw an opportunity for a private, industry-based Green Buildings standard.[15] The United States Green Buildings Council (USGBC) was the first to form and is arguably the most widely recognized of these groups.[16] The USGBC refers to its Green Buildings standard as the LEED or Leadership in Energy and Environmental Design rating system.[17] Projects are awarded a LEED

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5. *Id.* at 10–11.
6. BLDG. DESIGN & CONSTR., WHITE PAPER ON SUSTAINABILITY 4 (Nov. 2003) *available at* http://www.usgbc.org/Docs/Resources/BDCWhitePaperR2.pdf.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 5.
12. *Id.*
13. *Id.* at 5–6.
14. *See Green Buildings*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/greenbuilding/ (last updated Nov. 10, 2009).
15. These groups include the Green Buildings Intiative (GBI), the United States Green Buildings Council (USGBC), American National Standards Institute (ANSI), Build It Green, and Living Building Challenge, among others.
16. *See About USGBC*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/About/ (last visited Aug. 27, 2010). Due to the near domination of the USGBC's standards in today's market, this Comment will focus on the impact of the USGBC's standard on the new Illinois legislation.
17. BLDG. DESIGN & CONSTR., *supra* note 6, at 7.

rating depending on their conformance to a detailed checklist of Green Buildings initiatives.[18] The actual success of the LEED rating system, environmental or otherwise, continues to be debated both inside and outside the construction industry.[19]

These developments provide the backdrop for Illinois's recent enactment of the Green Buildings Act.[20] In short, this legislation adopts a generalized standard equivalent to basic LEED certification.[21] This Comment will address the concerns regarding imprecise and non-existent language in the Act and propose solutions using already adopted and working green programs from other states. Section II of this Comment will call attention to other states' and municipalities' attempts at formal regulation of Green Buildings. Section III will further discuss the exact language of Illinois's Green Buildings Act. Section IV will analyze the consequences of adopting such broad and general language. More specifically, the Comment will analyze the problems with the broad waiver language, the lack of language regarding the process and certification of a project, and the apparent cost savings of funding more expensive, yet resource efficient, state buildings. Section V of this Comment will offer possible solutions to the perceived problems associated with the legislation.

II. BACKGROUND

The first movements toward mandatory green building regulations arrived not through state legislation, but from local county and city governments. This is not unusual because most site and building permits and applications are issued at this local level of government. The early success in the local programs led to further interest in higher forms of government. Numerous states, now including Illinois, have adopted mandatory language regarding implementation of green building practices in both state and privately funded projects. This section will provide a breakdown of some of the earlier forms of green building regulations and their apparent success or failure.

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18. *How to Achieve Certification*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1991 (last visited Aug. 27, 2010).
19. Jennie Rothenberg Gritz, *The Green Façade*, THE ATLANTIC, Nov. 25, 2009, *available at* http://www.theatlantic.com/doc/200911u/green-building.
20. 20 ILL. COMP. STAT. 3130 / 1–99 (2010).
21. 20 ILL. COMP. STAT. 3130 / 15.

A. Local Governments Take the Lead in Initiating Green Buildings Standards

In 1992, Austin, Texas, became the first local government to adopt a Green Buildings program.[22] The city council solidified its commitment to Green Buildings when it adopted a resolution in 2000 that requires all new municipal buildings to obtain the LEED silver rating. Through numerous iterations, Austin has come up with its own localized rating system[23] in addition to LEED.[24] With the exception of specific locations and project types, participation in the program is entirely voluntary.[25] Even where required, developers are allowed the choice of LEED certification or the Austin rating system.[26] The Austin Green Buildings program also includes free green home improvement services for those with low to average incomes.[27] To supplement an already extensive website, Austin has numerous lists of energy saving tips and also holds a quarterly workshop designed to show homeowners how to improve their home's efficiency.[28] Not only does Austin take pride in being a green city, the program continues to add to its ever-growing list of awards.[29]

In 1999, Arlington County, Virginia approved a "Pilot Green Buildings Incentive Program" to help in the evaluation of permit exceptions for building height and density.[30] After the program's inception in 2000,

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22. Basic Information about Green Buildings, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/greenbuilding/pubs/about.htm#4 (last updated Apr. 2, 2010).
23. The rating system is very detail orientated with excellent explanations. The pamphlet on the rating system for single family residential is sixty-five pages long. AUSTIN ENERGY GREEN BLDG., GUIDE TO THE SINGLE FAMILY HOME RATING (2008), *available at* http://www.austinenergy.com/Energy%20Efficiency/Programs/Green%20Building/Participation/singleFamilyHomeRatingGuide.pdf.
24. *Participate in Green Buildings*, AUSTIN ENERGY, http://www.austinenergy.com/Energy%20Efficiency/Programs/Green%20Building/Participation/index.htm (last visited Aug. 27. 2010).
25. *Id.*
26. *Projects Requiring an Austin Energy Green Buildings Rating*, AUSTIN ENERGY, http://www.austinenergy.com/Energy%20Efficiency/Programs/Green%20Building/Participation/requirements.htm (last visited Aug. 27, 2010).
27. *Free Home Energy Improvements*, AUSTIN ENERGY, http://www.austinenergy.com/Energy%20Efficiency/Programs/Free%20Home%20Energy%20Improvements/index.htm (last visited Aug. 27, 2010).
28. *Green by Design Workshop*, AUSTIN ENERGY, http://www.austinenergy.com/Energy%20Efficiency/Programs/Green%20Building/Resources/GreenByDesign/index.htm (last visited Aug. 27, 2010).
29. *Awards*, AUSTIN ENERGY, http://www.austinenergy.com/Energy%20Efficiency/Programs/Green%20Building/About%20Us/awards.htm (last visited Aug. 27, 2010).
30. *Green Buildings Incentive Program*, ARLINGTON COUNTY VA., http://www.arlingtonva.us/Departments/EnvironmentalServices/epo/EnvironmentalServicesEpoIncentiveProgram.aspx (last modified Jun. 24, 2010). By agreeing to meet the county's green incentives, builders are allowed to apply for three additional stories above the current building code in addition to a higher building density. The density of a building is calculated by dividing the gross floor area of a

only one project applied for a LEED rating in exchange for bonus density.[31] After seeking feedback on the initial program, the county board updated the program in 2003.[32] Between December of 2003 and 2008, developer participation in the Incentive Program began to take off.[33]

The success of the program is even more evident when considering the requirements of the voluntary participation. Developers are required to hire a LEED accredited professional (LEED AP),[34] provide a breakdown of expected credits, and continue to report on credit progress with the ensuing building permit applications.[35] In addition, all construction waste will be kept out of landfills, and the developer must create a written plan that "outline[s] specific waste streams and identif[ies] the means by which waste will be managed (reused, reprocessed on site, removed by licensed haulers for reuse/recycling, disposal, etc.)."[36] The developer must also agree to use all Energy Star appliances in any multi-family residential development.[37] Even considering the extra costs of these requirements, the county still enjoys a more than minimal rate of participation in the program due to its appropriate use of bonus density and height incentives.

Similarly, the County of San Diego, California, runs a voluntary, incentive-based, Green Buildings program.[38] This program offers the

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building by the building site area. *Id.* The building code caps the density of a building, but developers may seek to increase the density by agreeing to build green. Developers want more people in their building in order to receive the most value per square foot for their development. Thus, a small building site with a high density could be valued higher than a larger building site with low density.

31. *Id.*

32. *Id. See also* ARLINGTON COUNTY VA., COUNTY BOARD AGENDA ITEM MEETING MINUTES OF MARCH 14, 2009 2 (2009) *available at* http://www.arlingtonva.us/departments/EnvironmentalServices/epo/PDFfiles/file69951.pdf (last visited Aug. 30, 2010).

> In 2003, the County's Green Buildings program for site plans was updated and strengthened. The original program did not apply to multi-family residential projects, rehabilitation of existing buildings or other types of site plan development, even though the LEED rating system can be used to enhance and measure the "greenness" of these types of projects. The 2003 revision encouraged all site plan projects to participate in the incentive program.

Id.

33. *Id.* at 5. During that time period, 36% of site plan buildings, 55% of site plan office space, and 24% of residential units participated in the LEED incentive program. *Id.* at 10.

34. The certification for a LEED AP is managed by the Green Buildings Certification Institute (GBCI). *See* GREEN BLDG. CERTIFICATION INST., http://www.gbci.org/ (last visited August 27, 2010). To become a LEED AP, one must have actual LEED experience through their career or education and pass a proficiency exam. *Id.*

35. *Arlington Green Buildings Site Plan Conditions*, ARLINGTON COUNTY VA., 1 http://www.arlingtonva.us/departments/EnvironmentalServices/epo/PDFfiles/file77177.pdf (last visited Aug. 30, 2010).

36. *Id.*

37. *Id.*

38. CNTY. OF SAN DIEGO, COUNTY OF SAN DIEGO GREEN BUILDINGS INCENTIVE PROGRAM (June 2006), *available at* http://www.sdcounty.ca.gov/dplu/docs/DPLU273.pdf.

benefits of an expedited design/construction plan review, a 7.5% reduction in permit and plan review fees, and a no-fee review of a permit and plan check for residential solar systems.[39] The requirements for participation are minimal to say the least. The project must only comply with one of three conditions.[40] First, a project can qualify if at least 20% recycled materials are used or if at least one "primary building material (such as roofing) is made of more than 50% post-consumer recycled content."[41] Second, the project could include the installation of a gray-water system.[42] The final condition allows compliance if the project uses energy at a level below the California Energy Commission (CEC) standards.[43] While the incentives are not groundbreaking, the requirements are by no means strenuous either. These simple standards make it easy for developers to take the first steps towards building green without concern for breaking the bank.

The jumpstart of Green Buildings at the local level should not be surprising. Most building codes are enforced at the city or county level. The number of steps from regulation to implementation was few, thus making the transition process easier. A regulation promulgated at the local level is more flexible to accommodate the specific needs of different regions. The creation of statewide regulations would have to overcome similar hurdles in order to create a system that works for the many political subdivisions that exist below a state legislature.

B. States Throw Their Hat into the Green Buildings Regulation Arena

In 2005, Washington was the first state to pass a law requiring all state-funded buildings to meet specific Green Buildings requirements.[44] In Washington, the Department of General Administration oversees the certification process.[45] From the General Administration's website, owners, developers, architects, engineers, and contractors have a plethora of material to help guide them through the state's requirements.[46] In addition, Washington's Green Buildings Law sets out detailed guidelines to direct

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39. *Id.* The expedited plan review can save up to ten days compared to the normal timeline for plan review. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* Graywater systems are used to recycle the water from bathtubs, showers, and washing machines in order to supply irrigation systems. *Id.*
43. *Id.* Residential and commercial projects must exceed the CEC standard by 15% and 25% respectively. *Id.*
44. WASH. REV. CODE § 39.35D.010 (2010).
45. *Green Buildings & LEED*, WA. STATE DEP'T OF GEN. ADMIN., http://www.ga.wa.gov/EAS/green/ (last updated May 27, 2010).
46. *Id.*

those in charge of the program.[47] Washington requires its state-funded projects to obtain a minimum LEED silver certification.[48] Along with the state law, the General Administration provides a "LEED Guide" to help explain and comment on the General Administration's understanding of the law.[49]

On the same webpage, a link contains the required submittals, and the corresponding forms are available for download.[50] The LEED Guide provided by the General Administration spells out the entire process from the pre-design phase all the way through post-construction and who is responsible for what documents.[51] The Guide also identifies buildings smaller than 5,000 gross square feet or a renovation that will be less than 50% of the building's value as being exempt from the state's standards.[52] The building's value is determined by the owner of the building and can either be the county's assessed value or the cost to replace the building.[53] The document provides an excellent roadmap for design teams that may be unfamiliar with Washington's Green Buildings laws.

The program saw early success, as fifty-six of the first sixty major projects were on track to achieve the required LEED silver rating.[54] This statistic is even more shocking when held against Washington's no liability rule within the Green Buildings law.[55] Washington also requires that the General Administration put together a "Green Buildings report" that explains the successes and failures of the previous two years.[56] The report becomes a written version of the lessons learned from the previous two years with recommendations on how to avoid past mistakes.[57] This ability

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47. WASH. REV. CODE § 39.35D.010–800.
48. WASH. REV. CODE § 39.35D.030.
49. WA. STATE DEP'T OF GEN. ADMIN., LEED QUALITY ASSURANCE PROCESS GUIDELINES FOR STATE AGENCY/ COLLEGE AND UNIVERSITY FACILITIES (Sept. 2007), *available at* http://www.ga.wa.gov/EAS/green/index.html (follow "Guidelines" hyperlink).
50 Post Construction Submittal Form, WA. STATE DEP'T OF GEN. ADMIN., http://www.ga.wa.gov/EAS/green/index.html (follow "Submittal forms" hyperlink).
51. WA. STATE DEP'T OF GEN. ADMIN., LEED QUALITY ASSURANCE PROCESS GUIDELINES FOR STATE AGENCY/ COLLEGE AND UNIVERSITY FACILITIES (Sept. 2007), *available at* http://www.ga.wa.gov/EAS/green/index.html (follow "Guidelines" hyperlink).
52. *Id.*
53. *Id.*
54. WA. STATE DEP'T OF GEN. ADMIN., IMPLEMENTATION OF ESSB 5509 "GREEN BUILDINGS" REPORT TO THE LEGISLATURE 5 (Nov. 30, 2006), *available at* http://www.ga.wa.gov/EAS/green/StateGreenBuildingReport-2006.pdf.
55. *See* WASH. REV. CODE § 39.35D.070 (2010). "A member of the design or construction teams may not be held liable for the failure of a major facility project to meet the LEED silver standard or other LEED standard established for the project as long as a good faith attempt was made to achieve the LEED standard set for the project." *Id.*
56. WASH. REV. CODE § 39.35D.030(4).
57. *Id.*

to intrinsically look at the General Administration's implementation helps to keep Washington ahead of the ever-changing field of Green Buildings.

Not to be outdone, the state of Minnesota has been officially working on a sustainable building program for over ten years.[58] In 2000, the legislature mandated that the Departments of Administration and Commerce work with other agencies to develop "design guidelines" for new construction paid for with state money.[59] The initial legislation took effect in 2004 and was expanded to include more projects in 2008.[60] In addition to the current laws, the Governor's Climate Change Advisory Group recommended that Minnesota look to emulate a new program referred to as Architecture 2030.[61] The focus of the new program is intended to reduce the amount of fossil fuels used to operate buildings.[62] In 2008, the Minnesota legislature passed a bill that created the Sustainable Building 2030 (SB 2030) program.[63] SB 2030 delegated the authority for promulgating new guidelines to the Center for Sustainable Research at the University of Minnesota.[64]

All of the research, time, and effort expended on creating Minnesota's Green Buildings guidelines led to a comprehensive and detailed program as evidenced by the website.[65] The website provides links and information for any and all questions a prospective architect or contractor may have.[66] The actual guidelines and all necessary documents can be downloaded.[67] The website also provides a helpful chart showing how the Minnesota standards stand up against the more familiar requirements of a LEED project.[68] An

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58. Ctr. for Sustainable Bldg. Research, Univ. of Minn., *Overview: Background*, ST. OF MINN. SUSTAINABLE BUILDING GUIDELINES, http://www.msbg.umn.edu/overview.html (last visited Aug. 27, 2007).
59. *Id.*
60. *Id.*
61. *Id.* Architecture 2030 is an organization founded in 2002 in response to the increasing amount of greenhouse gases produced by buildings. *About Us*, ARCHITECTURE 2030, http://architecture2030.org/about/about_usv (last visited Sept. 12, 2010).
62. Ctr. for Sustainable Bldg. Research, Univ. of Minn., *History of Minnesota Sustainable Building 2030*, MINN. SUSTAINABLE BUILDING 2030, http://www.mn2030.umn.edu/history.html (last modified May 26, 2010).
63. MINN. STAT. ANN. § 16B.325 (2010).
64. *Id.*
65. Ctr. for Sustainable Bldg. Research, Univ. of Minn., ST. OF MINN. SUSTAINABLE BUILDING GUIDELINES, http://www.msbg.umn.edu/index.html (last updated Feb. 3, 2010).
66. *Id.* This includes a link to the process of achieving and documenting all the requirements of the new legislation. *Id.* It also includes an extensive section for definitions. *Id.*
67. *Id.*
68. Ctr. for Sustainable Bldg. Research, Univ. of Minn., *B3-MSBG Support*, ST. OF MINN. SUSTAINABLE BUILDING GUIDELINES, http://www.msbg.umn.edu/support.html (last visited Sept. 6, 2010). The LEED guidelines and Minnesota's requirements are similar but not the same. Ctr. for Sustainable Bldg. Research, Univ. of Minn., Comparison of LEED Checklist with Minnesota Sustainable Building Guidelines, ST. OF MINN. SUSTAINABLE BUILDING GUIDELINES, http://www.msbg.umn.edu/downloads_v2_1/LEEDWorksheet_NCv2.2_MSBG.pdf (last visited

online project tracker helps guide the project team while providing the State with the means to check on a project from any location with an Internet connection.[69] In short, the new system is comprehensive, easy to understand, and procedurally prepared for full implementation in July 2010.[70]

With all of the previous research and legislation regarding the Green Buildings legislation, Illinois was fully prepared to institute an immediately effective system. Given the comprehensive nature of both Washington State's and Minnesota's design guidelines, along with their relative success, the path towards legislation should have been downhill.

III. THE ILLINOIS GREEN BUILDINGSS ACT

The Illinois Green Buildings Act is not complicated. With only five sections, there is not enough room for the Act to be complicated.[71] Surprisingly, the Act has little to no documented legislative history. The bill is mentioned by name and number during each reading, but is never debated on the floor.[72] The only other source of guiding information is available from the website of the Capital Development Board.[73] The website provides a summary of the Act and a list of those on the Illinois Green Buildings Advisory Committee that shall provide support.[74]

Sept. 6, 2010). It hoped that in keeping the guidelines similar to LEED would create an incentive to go the extra step and receive LEED certification as well. Ctr. for Sustainable Bldg. Research, Univ. of Minn., *Overview: Guideline Development*, ST. OF MINN. SUSTAINABLE BUILDING GUIDELINES, http://www.msbg.umn.edu/guideline_dev.html (last visited Sept. 6, 2010).

69. Ctr. for Sustainable Bldg. Research, Univ. of Minn., *Minnesota Sustainable Building Guidelines Tracking Tool*, ST. OF MINN. SUSTAINABLE BUILDING GUIDELINES, http://www.msbgtracking.com/ (last visited Sept. 6, 2010).

70. Ctr. for Sustainable Bldg. Research, Univ. of Minn., *Notification of SB 2030*, ST. OF MINN. SUSTAINABLE BUILDING GUIDELINES, http://www.mn2030.umn.edu/notice.html (last modified on May 26, 2010). The new program was recently implemented on December 21, 2010. In order to facilitate an understanding of the changes, the State has provided a document highlighting changes between the existing and new program. Ctr. for Sustainable Bldg. Research, Univ. of Minn., *B3-MSBG Version 2.1 Summary of Changes*, ST. OF MINN. SUSTAINABLE BUILDING GUIDELINES (Jan. 13, 2010), http://www.msbg.umn.edu/downloads_v2_1/B3MSBGVersion SummaryofChanges.pdf.

71. 20 ILL. COMP. STAT. 3130/1–99 (2010).

72. 96th Ill. Gen. Assem., House Proceedings, Feb. 11, 2009 at 21 (First Reading), Mar. 23, 2009 at 2 (Second Reading), Mar. 24, 2009 at 10 (Third Reading). 96th Ill. Gen. Assem., Senate Proceedings, March 30, 2009 at 8 (First Reading), May 12, 2009 at 26–27 (Second Reading), May 19, 2009 at 247 (Third Reading).

73. *Green Buildings Resources and Energy Efficiency*, ILL. CAP. DEV. BOARD, http://www.cdb.state.il.us/green_initiatives.shtml (last visited Aug. 27, 2010).

74. *Id.*

A. Findings and Definitions

In adopting the legislation, the General Assembly found that an "efficient Green Buildings plan" was "essential" for reasons of energy consumption and human well-being.[75] Specifically, Green Buildings was found to be vital to reducing the state's overall energy usage, helping the environment, minimizing pollution, "assuring the reliability of energy studies," and alleviating energy costs.[76] Green Buildings were also deemed necessary to make state buildings better for the health of those who work in them.[77] The third section of the Act provides definitions for words used in the Act.[78] Within the Act, for example, any use of the word "Board" is in reference to the Capital Development Board of Illinois.[79] Additionally, the Act defines a "major renovation" as "a project with a construction budget that equals 40% or more of the building's current replacement cost."[80]

B. Green Buildings Standards

The Green Buildings standards are found in the fourth section of the Act.[81] The Act mandates that all new buildings or major renovations receiving state funding must "seek" certification through LEED, Green Globes,[82] or an equivalent.[83] These projects "must achieve the highest level of certification practical within the project budget."[84] Buildings under 10,000 square feet must "meet the highest standard" of the LEED rating

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75. 20 ILL. COMP. STAT. 3130/5.

76. *Id.*

> Findings. The General Assembly finds that an efficient Green Buildings plan is essential to: (1) reduce the increasing costs of energy for public buildings and reduce the State's overall energy usage; (2) preserve the environment and make State buildings better for those who work and study in them, as well as the area around them; and (3) cut pollution, moderate peak energy demand, better assure the reliability of energy studies, and stabilized energy costs.

Id.

77. *Id.*

78. 20 ILL. COMP. STAT. 3130/10.

79. *Id.* The Board is in charge of the implementation of the Green Buildings Act. *Id.* The Board is also in charge of reviewing the Act within five years of the effective date or after the completion of ten projects, whichever comes first. 20 ILL. COMP. STAT. 3130/15(g).

80. *Id.* The Act also provides general definitions for the acronyms USGBC, LEED, GBI (Green Buildings Initiative), and Green Globes (the GBI's Green Buildings model). *Id.*

81. 20 ILL. COMP. STAT. 3130/15 (2010).

82. Green Globes is a rating system in competition for market share with the LEED system. *About Green Globes*, GREEN GLOBES, http://www.greenglobes.com/about.asp (last visited Sept. 6, 2010). In the U.S., Green Globes is "owned and operated" by the Green Buildings Initiative (GBI). *Id.* GBI is currently looking to make the Green Globes system an official American National Standards Institute (ANSI) standard. *Id.*

83. 20 ILL. COMP. STAT. 3130/15(a).

84. 20 ILL. COMP. STAT. 3130/15(b).

system or an equivalent rating system.[85] These smaller projects are *not* required, however, to become certified by one of the aforementioned groups.[86]

Any new buildings or major renovations over 10,000 square feet have to achieve LEED's silver rating or the equivalent through another rating system.[87] Certification for the large project group is *required*.[88] The Green Buildings Act also requires that all buildings incorporate one LEED "alternative transportation criterion" for either public transportation or bicycle access.[89] The project team is responsible for providing all documentation that demonstrates the project is or could be certified by LEED or its equivalent.[90] Any building that the Board determines is not "comfort conditioned" can receive an exemption from these standards.[91] Even under the exemption, the project design team still has to record and integrate all applicable "sustainable building methods, strategies, and technologies in the final design."[92]

This section also defines the situations in which an application for a waiver of the standards would be appropriate.[93] Either the Board or another "appropriate agency" can grant waivers when provided with the proper documentation.[94] The statute lists four situations in which the project team may apply for a waiver.[95]

The first situation arises when the project would suffer "an unreasonable financial burden," which includes the lifetime cost of operation, cost of construction, and "the total cost of ownership of the building."[96] The project may also receive a waiver for any "unreasonable impediment to construction."[97] Waiver may also be acceptable if the required standards would "impair the principal function of the building."[98] The last exception to the standards applies to historic buildings in which the

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85. 20 ILL. COMP. STAT. 3130/15(b)(1). Equivalent rating systems include, but are not limited to, the Green Globes design program. *Id.*
86. *Id.*
87. 20 ILL. COMP. STAT. 3130/15(b)(2). Equivalent rating systems include, but are not limited to, a two globe rating through the Green Globes design program. *Id.*
88. *Id.*
89. 20 ILL. COMP. STAT. 3130/15(f).
90. 20 ILL. COMP. STAT. 3130/15(e).
91. 20 ILL. COMP. STAT. 3130/15(c). Neither the Act, nor the Capital Development Board's website, define what "comfort conditioned" means. However, the word is commonly associated with buildings that require energy to heat and cool the interior spaces of the building.
92. *Id.*
93. 20 ILL. COMP. STAT. 3130/15(d).
94. 20 ILL. COMP. STAT. 3130/15(e).
95. 20 ILL. COMP. STAT. 3130/15(e)(1)-(4).
96. 20 ILL. COMP. STAT. 3130/15(e)(1).
97. 20 ILL. COMP. STAT. 3130/15(e)(2).
98. 20 ILL. COMP. STAT. 3130/15(e)(3).

standards would "compromise the historic nature of the structure."[99] The required documentation includes at a minimum the "life cycle cost analysis" and "energy modeling."[100]

The Capital Development Board website lists an additional set of changes, not mentioned within the law, that are to be incorporated into the design of applicable projects.[101] These include a prohibition on the "development of prime farmland," a 20% reduction in water use "through the use of high-efficiency fixtures," and an improvement in energy performance "by set percentages on new and existing buildings."[102] The website also provides a spreadsheet for listing specific information about the project and designates who is required to submit the project documentation.[103]

The Illinois Green Buildings Act is brief, and the agency responsible for implementation provides little additional information. The facts beg the question of exactly what the Act requires and how engineers, architects, and contractors can meet those requirements.

IV. ANALYSIS

The two categories of issues found within the Illinois Green Buildings Act are the ambiguity of terms and phrases and the non-existence of language addressing obvious questions regarding the Act.[104] The first part of the analysis will discuss the actual language of the Act and the information found within the Capital Development Board's website. This will include an analysis of the Act's definitions, Green Buildings standards,

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99. 20 ILL. COMP. STAT. 3130/15(e)(4).

100. 20 ILL. COMP. STAT. 3130/15(e).

101. *Green Buildings Resources and Energy Efficiency*, ILL. CAP. DEV. BOARD, http://www.cdb.state.il.us/green_initiatives.shtml (last visited Aug. 27, 2010).

102. *Id.* In addition to the listed requirements the Board may require other specifics to be determined on a project-by-project basis. *Id.*

103. *Id.*

104. These two general issues come from the face of the Illinois Green Buildings Act. For the sake of keeping this Comment to a manageable length I will not be analyzing other obvious issues regarding Illinois's adoption of a private industry standard. For a discussion of the pitfalls of LEED adoption by state and local governments, *see* Sarah B. Schindler, *Following Industry's LEED®: Municipal Adoption Of Private Green Buildings Standards*, 62 FLA. L. REV. 285 (2010) and Chris Cheatham, *3 Reasons Why Your Green Buildings Regulation is a Problem*, GREEN BUILDINGS L. UPDATE (Jan. 22, 2010), http://www.greenbuildinglawupdate.com/2010/01/articles/codes-and-regulations/3-reasons-why-your-green-building-regulation-is-a-problem/. In addition, there are numerous antitrust and unfair competition lawsuits pending against the USGBC due to the use of materials procured solely from its own members. *See* Chris Cheatham, *USGBC Accused of Anti-competitive Practices*, GREEN BUILDINGS L. UPDATE (Jan. 12, 2010), http://www.greenbuildinglawupdate.com/2010/01/articles/codes-and-regulations/usgbc-accused-of-anticompetitive-practices/.

and waiver provisions. The analysis will also discuss the lack of language regarding liability for not meeting the required LEED standard.

A. The Illinois Legislature and Capital Development Board Fail to Clearly Express the Necessary Requirements of Complying with the Green Buildings Act

The Green Buildings Act is short. In this case, however, short and sweet was not the appropriate remedy. For an issue as complex as Green Buildings requirements for all state funded building construction, more language would not only be helpful but should be required to convey the legislature's intent. As mentioned above, the Act is entirely void of all legislative history. It was read and passed in both the House and the Senate by name and bill number only. This has led to a statute that only raises more questions than it answers.

1. The Act Fails to Clearly Define "Major Renovation"

A major renovation is defined as "a project with a construction budget that equals 40% or more of the building's current replacement cost."[105] The Act fails to define, however, what will comprise the "construction budget." Construction budgets continually change from the inception to the time a contractor and the state put their signatures next to a number. The construction budget is purely conceptual and is, therefore, subject to a high rate of deviation. The design team putting together a conceptual budget could purposefully estimate on the low end to keep the initial cost of construction down. In conjunction, the Act does not define what the "current replacement cost" is or even who should be the person to calculate that cost. If the design team is left to calculate both the construction budget and the replacement cost, the opportunity to manipulate numbers that would circumvent the Act is very high. The language of the Act provides little assurance that this type of number crunching would not or could not occur in the right situations.

2. The Green Buildings Standards Are Too Ambiguous to Be Effectively Applied

The actual Green Buildings standards are encompassed in three subsections and consist of five sentences.[106] The Act requires that all new

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105. 20 ILL. COMP. STAT. 3130/15(g). To put the importance of this definition in context, the Act only requires major renovations to comply with the Act. *Id.*

106. 20 ILL. COMP. STAT. 3130/15(b).

construction or major renovations, "regardless of size, must achieve the highest level of certification practical within the project budget."[107] This statement raises the question of what level of certification is practical. As a guide, the next two subsections of the Act provide the answer for the minimal certification required for small and large projects.[108] Projects with less than 10,000 square feet are required to "meet" the highest LEED standard for new commercial construction and existing renovations.[109] Section (b) requires that projects must "achieve" the highest level of certification, while subsection (b)(1) requires that projects must "meet" the highest LEED standard. This confusion can be explained due to the fact that smaller projects are not required to seek certification from LEED or an equivalent.[110] Therefore, the smaller project must only "meet" the LEED standard; but it does not have to obtain an official LEED rating.

The exact language of subsection (b)(1) states that smaller projects are required to seek the highest standard offered by LEED.[111] The highest LEED standard is platinum.[112] There are currently twelve buildings in Illinois that are LEED platinum certified.[113] These buildings were not small projects. They include McDonald's World Headquarters, Exelon Headquarters, and the University of Illinois Business Instruction Facility.[114] In certain regards, small projects find it more difficult to achieve a high rating. The small floor plan reduces the opportunity to incorporate many of the essential LEED requirements for such a prestigious designation.

As a saving grace, the Act does not require actual certification. The actual cost of LEED certification does not directly correlate with project size. A smaller project will have to push the same amount of paper and require the same expertise as a much larger project. Thus, not requiring actual certification will help keep the smaller projects within a more manageable budget.

This Comment assumes that the language means what it says and that small projects must try to show that they could obtain LEED certification. In the instance, however, that this assumption becomes unrealistic, what certification must designers actually aim for? The Act generally states that

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107. *Id.*
108. *See* 20 ILL. COMP. STAT. 3130/15(b)(1)-(2).
109. 20 ILL. COMP. STAT. 3130/15(b)(1).
110. 20 ILL. COMP. STAT. 3130/15(b)(1)-(2).
111. *Id.*
112. *See, e.g.*, *LEED 2009 for New Construction and Major Renovation Rating System*, U.S. GREEN BLDG. COUNCIL, xiii, http://www.usgbc.org/ShowFile.aspx?DocumentID=7244 (last updated July 2010).
113. *Certified Project Directory*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/LEED/Project/CertifiedProjectList.aspx (narrow the directory to Illinois as the location and Platinum as the certification).
114. *Id.*

the goal is to get the highest level practical for the budget. The language regarding who makes this decision and what principles they must consider is not found within the Act or the Capital Development Board's website. The term "practical" is obviously ambiguous and susceptible to many meanings. Some clarity in what exactly is practical could help design teams working towards a solution that is both easy on the environment and the state's purse. In conclusion, the Act does not clearly define the actual standards that are to be used to guide the certification of new state-funded buildings in Illinois.

3. *The Waiver Language Is So Broad as to Allow Too Many Projects a Free Pass*

All things considered, even if the Green Buildings Act was drafted with more precision, the waiver provision creates a large loophole for non-compliance with the Act. Waivers are determined on a case-by-case basis by the Capital Development Board.[115] A state agency or design team must be able to "demonstrate and document":

> (1) An unreasonable financial burden, taking into account the operating and construction costs over the life of the building and the total cost of ownership of the building.
> (2) An unreasonable impediment to construction.
> (3) The standards would impair the principal function of the building.
> (4) The standards would compromise the historic nature of the structure.[116]

First and foremost, the list is not obvious as to whether it is comprised of elements or factors or treated as individual waivers. Although the language choice is poor, this Comment assumes that the drafters intended for any one of the factors to create a situation in which waiver may be applicable.

The first factor, financial feasibility, casts a wide net. The assumption exists that green projects have a higher initial investment in exchange for lower operating and maintenance costs over the building's lifetime. The Act, as a means of combating this initial higher investment, also looks at financial feasibility in terms of the building's lifetime cost of ownership. The financial analysis runs into issues in two different areas.

First, the overall lifespan of a building may need to be at least ten years for the initial cost of LEED to be recouped.[117] It is unquestioned that

115. 20 ILL. COMP. STAT. 3130/15(d).
116. 20 ILL. COMP. STAT. 3130/15(e)(1)-(4).

Green Buildings cost less to operate over a building's lifespan. Thus, the longer an owner operates a building, the more time it has to recoup a larger initial startup fee. For the state of Illinois, one would hope that the state's buildings would stay within the state's control for their life. Illinois should use this understanding to develop buildings with a flexible functionality to ensure that the buildings shall be in use for many decades to come.

The second issue regarding finances is the difficulty for small projects to absorb the additional costs of building green.[118] Although the estimates of additional cost due to certification range from 1% up to 25%, the fact remains that the project will have some increased cost.[119] In addition, the administrative costs of obtaining a green certification do not decrease with project size. As discussed before, Illinois alleviates some of this problem by not requiring projects less than 10,000 square feet to actually become certified. This relieves some of the cost of paying for registration, certification, and the labor and paper required by LEED's process. However, Illinois still requires that the project prove that it could have been certified. Thus, the paperwork that would have initially ended up with LEED certification experts will now be re-routed to the inboxes of Illinois Capital Development Board members. This process will still cost money.

Given the extra costs described above, how will the Board evaluate petitions for waiver due to financial hardship? The extra costs exist, but at what point will they become a hardship? Illinois is in the midst of a budget crisis[120] and may not be able to afford unreasonably high prices in order to receive long-term savings. Other states have concluded that green building *requirements* are a poor idea in a down economy.[121] The detractors in Utah thought that the "Legislature shouldn't encourage a program that likely would lead school districts to ask the cash-strapped state for construction money."[122] Will the Board take the current economic situation into account in approving waivers based on financial burden, and if so, will the Act have any teeth left if this waiver is enforced as broadly as it is written?

The second factor, whether or not the Act is an impediment to construction, is difficult to understand as to what will actually trigger this waiver. The unreasonable impediment to construction cannot refer to financial difficulties, as that would be encompassed by the first factor. It

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117. *See* Eric Walter, *Is LEED Out of Reach for Smaller Construction Projects?*, DAILY REC. (Rochester, N.Y.), Feb. 4, 2010.

118. *See id.*

119. *Compare id. with* U.S. GREEN BLDG. COUNCIL, www.usgbc.org (last visited Sept. 6, 2010).

120. Ray Long & Michelle Manchir, *Illinois Budget Woes: State's Unpaid Bills Hit a Record $5 Billion, and the Cries of Pain are Getting Louder*, CHI. TRIB., Jan. 11, 2010.

121. Brandon Loomis, *Utah House Kills 'Green' Schools Recommendation*, THE SALT LAKE TRIB., Feb. 22, 2010.

122. *Id.*

could refer to timeline constraints. Smaller projects have smaller timelines, but the smaller projects do not have to seek certification. In addition, state projects are notorious for their slow speed due to all the bureaucratic hurdles already involved.

One reasonable explanation for this subsection may be to describe what would happen for a small project being forced to seek a high certification. In that case, the project may have to add "green elements" not to aid in the design of the building but solely to rack up the required points to meet certification. These added, but unnecessary, elements could reasonably impede the building's construction. However, this situation may still fall more squarely underneath the first factor of unreasonable financial burden.

The third factor creates an exception for buildings in which the project's principal purpose would be inhibited by building green. There are some types of building in which Green Buildings are not feasible due to the complexity or the complete lack of complexity in a building. For example, Washington does not apply its Green Buildings standards to "transmitter buildings, pumping stations, hospitals, research facilities primarily used for sponsored laboratory experimentation, laboratory research, or laboratory training in research methods, or other similar building types as determined by the department."[123] If the drafters had these types of buildings in mind when drafting the waiver, a non-exhaustive list such as the one above would have been helpful in determining which projects would not mesh with the Act.[124]

The last factor is somewhat more straightforward and should only be used in a few limited situations. The exceptions should only arise when a building with some amount of history is being considered for renovation. If keeping the historic elements is desired, this interest should come before the addition of green features. This exception is simple and appropriate.

These Green Buildings Standards are required by statute to be reviewed within five years of the effective date or after completion of the first ten projects.[125] Given the number of projects being started in 2010, the question remains whether ten of them will finish within six months to one

123. WASH. REV. CODE § 39.35D.020 (2010).

124. While the list from Washington provides an appropriate backdrop through which to define the waiver, hospitals may likely find certification much easier under a new LEED rating system. LEED v3, the newest system provides healthcare construction with its own category, and thus its own set of rules aimed at working with hospitals that want to move in the green direction. *LEED for Healthcare*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1765 (last visited Aug. 27, 2010).

125. 20 ILL. COMP. STAT. 3130/15(g) (2010).

year.[126] If so, the new Green Buildings Act should be evaluated sooner than five years. As stated by this Comment, a quick review and revamp would not only be helpful, but also necessary for smooth implementation of regulations governing a complex area such as Green Buildings.

4. The Act Is Silent on the Process for Projects That Fail to Meet the Certification Requirements

The project is complete, the state or private employees have moved in, but there is no LEED certification.[127] What now? The Illinois Green Buildings Act is silent on the potential liability for the design team and the contractor as well as on the process by which the problem may be remedied. Under Washington's law, there is no liability for failing to reach the desired rating if a "good faith effort" was made in achieving the certification.[128] This creates the problem of enforcing the Green Buildings Act with no deterrent for non-compliance. Facially, there is no incentive to comply other than to simply obey state law. Similar to the waiver provision, this silence may render the entire Act worthless.

The Act also fails to spell out a process to correct the failed certification. There are no answers to the question of who decides whether the project team receives a free pass or will be required to submit and resubmit until the Board acquiesces. According to the Capital Development Board's Professional Services Agreement, the design team must agree to Alternative Dispute Resolution and/or mediate where applicable.[129] Thus, it may be up to a mediator to decide what, if any, liability a design team may have for failure to meet the Act's requirements. Due to the Act's silence, the design team has no notice as to the potential liability, and therefore, there is no basis to punish the design team. In effect, the Act relies on the design team's honesty and integrity as a means of assuring compliance.

In conclusion, the Act is a start at creating Green Buildings legislation. Unfortunately, the vague language and the lack of discernable standards triggers doubt with respect to the Act's utility. The Act passed the General Assembly without debate. Few would disagree that creating

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126. *See Project List*, ILL. CAP. DEV. BOARD. (July, 7, 2009), http://www.cdb.state.il.us/forms/download/7-29-2009-FY10CapitalBudgetbyCounty.pdf.

127. Under the Act, smaller projects do not require certification, but must prove the project could be certified. If the design team cannot prove this, they would be in the same situation as described in the sentence above. In either situation, the design team has failed to meet the requirements of the Act.

128. WASH. REV. CODE § 39.35D.070.

129. *Professional Service Agreement*, ILL. CAPITAL DEV. BOARD., http://www.cdb.state.il.us/forms/download/PSA2006.pdf (last modified Jan. 2006).

greener state buildings is a noble goal. The process, however, should be carefully planned so as to be ready for immediate implementation. Solely based on the language of the Act and the Board's website, Illinois is far from full implementation of a well-oiled and enforceable Green Buildings program.

V. SOLUTIONS

The solutions to correct the Illinois Green Buildings Act are numerous. This Comment will focus on three solutions that escalate from very basic to very complex. The first solution should be to adopt language similar to that of Washington and improve the Board's website to include more information and guidance for those looking for help in implementation. The second solution would require Illinois to create and adopt a code similar to that of Minnesota. This solution would create a lot of up front work for the Board, as Minnesota has evolved the current LEED requirements into a code that works specifically for Minnesota. The last solution would require Illinois to adopt a recently created industry standard with the moniker ASHRAE 189.1.[130] Each solution, including its intrinsic negative aspects, would provide the clarity and effectiveness that are necessary for execution of an effective Green Buildings program.

A. The Washington Approach

The actual statutes created by Washington and Illinois, on their face, are not light years apart. Washington's statute has ten sections by which it tries to execute its Green Buildings requirement for public buildings.[131] While the actual statute contains more sections than that of Illinois, the actual Green Buildings requirements are much the same. Illinois and Washington both require their major projects to meet LEED silver certification. Washington does not require projects below 5,000 square feet to submit for certification. Washington also exempts the building of affordable housing projects and specific types of buildings that pose special

130. The ASHRAE 189.1 standard was created by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE) in conjunction with the USGBC. *Standard 189.1*, AM. SOC'Y OF HEATING, REFRIGERATING AND AIR-CONDITIONING ENGINEERS, http://www.ashrae.org/publications/page/927 (last visited Aug. 27, 2010). ASHRAE 189.1 has adopted a lot of the LEED requirements, but in a code style language that requires compliance. *Id.* (click on Standard 189.1 FAQ link).

131. WASH. REV. CODE § 39.35D.

challenges to LEED certification.[132] By creating hard and fast exceptions to the law, Washington has eliminated any waiver provision.[133]

Washington also requires the General Administration to supply a report every two years using a "lessons learned" type of approach.[134] This idea provides the legislature with real information from those who are seeing where the rubber meets the road. This will keep Washington's law flexible enough to deal with change, yet consistent enough to provide those interested with notice of upcoming change. In 2006, for example, the legislature amended the fee schedules for architects and engineers after the realization that the stringent standards would cause the design team to incur more costs.[135]

The Illinois Capital Development Board would do well to incorporate Washington's detailed approach on its website. Washington's website includes information regarding process, submittals, information required to meet certification, and general Green Buildings links. The information is helpful not only to those with little or no background in construction, but also to industry professionals seeking guidance regarding their obligations upon accepting a state funded contract.

Illinois would benefit by making simple additions to its laws and creating a more information-laden website much like Washington's. This would take little work and would benefit those with state contracts by providing a clearer picture of how future state projects will proceed.

B. The Minnesota Approach

Unlike Washington and Illinois, Minnesota has adopted its very own guidelines modeled on the LEED rating system. By keeping its own rating system compatible with LEED, Minnesota has created a comfort zone for architects, engineers, and contractors already comfortable with the USGBC's system. Minnesota's Green Buildings program was developed with four key tenets in mind: (1) reducing the amount of guidelines that are already a part of the state's building code, (2) requiring adherence to all guidelines while continuing to recommend guidelines that have yet to be consistently beneficial to the State, (3) connecting the required guidelines to

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132. Washington has adopted specific requirements for affordable housing projects wholly separate from the projects regulated by the above discussed statute. *Evergreen Sustainable Development Standard*, WASH. ST. DEP'T OF COM., http://www.commerce.wa.gov/site/1027/default.aspx (last updated Aug. 25, 2010).

133. Washington does allow projects to comply with the rating system "to the extent appropriate LEED silver standards exist for that type of building or facility." WASH. REV. CODE § 39.35D.030(2).

134. The General Administration is the state agency slated to administer the Green Buildings laws of Washington much the same as the Capital Development Board is to Illinois.

135. WA. STATE DEP'T OF GEN. ADMIN., *supra* note 54 at 5, 9–10.

"real outcomes," and (4) continuing to recognize the similarities between the State guidelines and LEED.[136]

Illinois should have started with the above strategy before drafting the Green Buildings Act. The first two principles work to simplify the process by which to create an appropriately sustainable building. Minnesota was also smart to create requirements rather than suggestions. By tying the requirements to specific government objectives, everyone involved in the process understands why each component is necessary. The last principle, as suggested above, provides a sense of consistency for those in the industry already familiar with LEED.[137]

Minnesota's guidelines are encompassed in an eighty-six page manual.[138] The actual guidelines are helpfully broken down into five different sections.[139] From there, each section is analyzed point-by-point.[140] As stated before, most if not all guidelines are required. There is no magical "point" total that must be achieved. The State thought that if an idea was important enough to be a guideline, then it was important enough to be strictly complied with.

The first section fittingly discusses the process of designing, building, and achieving compliance within the new guidelines.[141] The section starts by listing the intended goal and the list of objectives found necessary to achieve that goal.[142] From there, each separate requirement is broken down

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136. Ctr. for Sustainable Bldg. Research, Univ. of Minn., *Minnesota Sustainable Building Guidelines for New Buildings and Major Renovations*, ST. OF MINN. SUSTAINABLE BUILDING GUIDELINES 1.3–1.4 (Dec. 21, 2009), http://www.msbg.umn.edu/downloads_v2_1/B3-MSBG_V2-1.pdf.

137. *Id.* at 1.4. In addition, "One benefit of making The State of Minnesota Sustainable Building Guidelines transparent to LEED and other guidelines is that LEED certification serves as one incentive to achieve higher performance than the basic requirements of these guidelines." *Id.*

138. *Id.* at 0.1.

139. *Id.* at 1.7. The sections are titled Performance Management, Site and Water, Energy and Atmosphere, Indoor Environmental Quality, and Materials and Waste. *Id.*

140. *See, e.g.*, *id.* at 2.1.

141. *Id.* This Comment will focus on the process used by Minnesota. The technical guidelines required by the other sections are helpful, though outside the realm of a legal commentary. The fact that Minnesota only promulgates required guidelines is, however, of benefit when analyzing how to improve Illinois's Green Buildings Act.

142. *Id.* The objectives are:

> Define a process for tracking progress towards guideline compliance throughout the project development and operation; Document information that captures design intent and actual performance to track progress towards desired guideline outcomes and to facilitate guideline improvement; Define a planning, control and tracking process to ensure that specific steps take place that are needed to support the operational achievement of performance criteria; Initiate and utilize an integrated team approach to produce integrated solutions; Review needs and resources thoroughly so as to maximize utilization of space; Provide guidance on determining the lowest life cycle cost for project alternatives.

Id. at 2.1–2.2.

into its own subsection.[143] The requirement subsection has an intent, a breakdown of the required criteria, a breakdown of the recommended criteria, a related documents sections, and a guide to supplemental resources.[144]

Using the Minnesota process, a project has to first register for the online project tracking tool.[145] This is accomplished with the help of the Center for Sustainable Building Research at the University of Minnesota.[146] The next requirement guarantees that the project team will provide the appropriate information and input this information into the project tracker.[147] The next step in the process requires the design team to think about possible solutions through renovation or building flexibility.[148] Other requirements of the process include holding an integrated team "kick-off" meeting[149] and double-checking that design requirements are met[150] and carried out.[151] The only suggested criteria for the project management guidelines are determining the lowest building life cycle cost between the design alternatives.[152]

Illinois could take some key points from the plethora of documentation provided by Minnesota. First, there is no such thing as too much information. Every requirement is broken down and described in a specific fashion. Second, providing a roadmap for the project puts the entire team, from start to finish, on notice as to the State's expectations. Finally, Minnesota provides for a "variance" option, but only allows it in very few and very specific instances. Although these are general concepts, Illinois would benefit from working with the concepts to improve the enforceability of the Green Buildings Act.

C. The ASHRAE 189.1 Approach

The ASHRAE 189.1 standard drastically differs from either of the previous two approaches because it is not a guideline or rating based system. ASHRAE 189.1 is an "ANSI standard developed in model code

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143. *See, e.g.*, *id.* at 2.3.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 2.4.
148. *Id.* at 2.5.
149. *Id.* at 2.6.
150. *Id.* at 2.7.
151. *Id.* at 2.9.
152. *Id.* at 2.11.

language" that provides a baseline for Green Buildings requirements.[153] Similar to Minnesota's approach, the standard has three goals: (1) create "mandatory" requirements, (2) simplify the compliance process, and (3) harmonize with the existing Green Buildings programs.[154] In addition to using code language, the standard also allows compliance by two methods. The design team may comply by following the specific directions of the code or they may meet "performance" requirements by whatever method they choose.[155]

ASHRAE 189.1 is a complete codebook for Green Buildings. The resulting buildings, however, will not be at the cutting edge of green design. The standard was designed to be a minimum set of requirements.[156] While the actual guidelines may be similar to LEED, they differ due to their mandatory nature. LEED points are mix and match, which gives the design team the opportunity to pick and choose which areas they will focus on. ASHRAE 189.1 allows some flexibility in compliance, but the guidelines are required and not suggested.

Illinois could benefit from this approach due to the ease of adoption. ASHRAE 189.1 already uses code language. Illinois's current program adopts a LEED rating system that was never intended to be "code." Some theorize that the promulgation of the 189.1 standard was a direct result of USGBC's recognition that LEED rating systems caused too many problems when used as *the* code.[157]

In other words, the ASHRAE 189.1 standard is ready to be implemented out of the gate. On the downside, the new buildings will not be on the cutting edge of green projects. As a by-product of not being on the cutting edge, the projects will not be "testing" new technology and thus be able to save money. For Illinois, any money saved is a bonus. Currently, Illinois has a lofty goal with no guide as to attaining the goal and numerous opportunities for variance from the goal. The ASHRAE standard would provide Illinois with an immediately available solution with set requirements created to increase the sustainability of the building.

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153. Kent W. Peterson, *Standard for the Design of High-Performance Green Buildingss*, ENGINEERING FOR SUSTAINABILITY 2, http://www.engineeringforsustainability.org/docs/189.1/chapterChats 021110.pdf (last visited Sept. 6, 2010).

154. *Id.* at 4.

155. *Id.* at 9.

156. This differs from LEED rating systems due to LEED's goal of continuing to create the "greenest" of the Green Buildings through continuous updating.

157. Cheatham, *supra* note 104.

VI. CONCLUSION

While the intent to create more sustainable state buildings was noble, there are numerous issues with the Illinois Green Buildings Act. There is a lack of teeth to enforce what little guidelines the Act actually provides. In addition, there is confusion as to which projects may be exempt from the guidelines and which projects have to comply or substantially comply. As a means of remedying the issues, Illinois has plenty of excellent examples from fellow states and private industry. From becoming more detailed all the way to adopting an entire Green Buildings code, Illinois has numerous options at its disposal. As evidenced by this Comment, being "green" at building green is not where the State of Illinois wants to be.