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Foreword: Symposium: LEED-ing the Way: Policy and Legal Issues with Green Building and Design

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FOREWORD

Steven G. Davison†

SYMPOSIUM

*LEED-ing the Way: Policy and Legal Issues with
Green Building and Design*

This issue of the *University of Baltimore Law Review* is a symposium issue. The focus is on “Policy and Legal Issues with Green Building and Design,” with articles by Stuart Kaplow, Esq., and Nicole Lacoste, Esq. These articles address various policy and legal issues with respect to “green buildings” and “green design”—terms which are used to refer to the use of new designs, materials and equipment in new, renovated, and retrofitted existing industrial, commercial, and industrial facilities, in order to reduce the amounts of energy consumed and pollution and wastes produced by both the construction and operation of a particular facility.

The promotion of green buildings and green design through legal policies and regulation can be viewed as the “third wave” of the movement to protect the environment and conserve non-renewable natural resources through regulation of the use and development of privately-owned land. The “first wave,” which began in the late 1960s, established programs to protect “critical,” ecologically important areas of the environment through regulation of the use and development of privately-owned land in such areas. Examples of first-wave programs are those established with the purpose to protect wetlands and the habitats of endangered wildlife species and Maryland’s Chesapeake Bay Critical Area Program. The “second wave,” which began in the 1990s, established “smart growth” programs for new industrial, commercial, and residential developments on privately-owned land. Smart growth programs seek to locate as much new development as possible near existing developed areas which contain necessary public infrastructure (such as roads and highways, sewer systems, and public water supply systems) to avoid sprawl into pristine undeveloped areas (which results in additional governmental expenses for new supporting

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infrastructure, increased driving of private automobiles, greater traffic congestion, and increased degradation of land, air, and water).

The third, green building/design wave has shifted the focus of legal regulation of the use and development of privately-owned land to programs to minimize the energy consumed by each individual new, renovated, or existing industrial, commercial, or residential facility and to minimize the pollution and wastes generated by an individual facility's construction and operation.

This symposium issue of the *University of Baltimore Law Review* follows the *Law Review's* symposium, "LEED-ing the Way: Policy and Legal Issues with Green Building and Design," held on March 3, 2009, in the Venable Baetjer Howard Moot Court Room of the John and Frances Angelos Law Center of the University of Baltimore School of Law. The first panel of this symposium addressed "Policy Considerations Surrounding Green Building Mandates." The members of this first panel were Caterina Hatcher (the United States Environmental Protection Agency's Energy Star National Manager for the Public Sector), Peter Doo (Doo Consulting, LLC; member of U.S. Green Building Council Maryland), and James B. Kraft (Baltimore City Council, representing District 1). These panelists discussed green building policy issues, including the need for green building and design regulations (with businesses and private landowners having beneficial economic reasons to follow green building and green design practices); the appropriate level(s) of government (federal, state, local) to establish green design and green building programs and to adopt and enforce green building regulations; and the appropriate types of governmental programs (such as programs providing tax credits and deductions, loans and grants) and regulations to promote green building and design practices in both new facilities, renovated facilities and retrofitted existing facilities (including industrial, commercial, residential, governmental, and school buildings).

The panelists for the symposium's second panel, which focused on "Legal Implications and Liability Aspects of Green Building," were attorney Stuart Kaplow, Esq. (Stuart D. Kaplow, P.A.), attorney Nicole M. Lacoste, Esq. (Ballard Spahr Andrews & Ingersoll, LLP), and attorney John P. Machen (DLA Piper). The topics discussed by these panelists included the Leadership in Energy and Environmental Design (LEED) rating standards and system for certification of green buildings (developed and administered by the U.S. Green Building Council, a private professional organization), and the appropriateness of governmental green building standards being based upon a private organization's standards. The members of the symposium's second panel also discussed issues attorneys need to consider in drafting

contracts for the design and construction of a new green building, and potential liability of architects, contractors, and subcontractors for a new building's failure to meet LEED or other green building standards.

The symposium's keynote speaker was architect Stefan Behnisch of the architecture firm Behnisch Architekten, a leading practitioner of the green design architecture movement in both Europe and the United States. Mr. Behnisch and his architecture firm, in partnership with Ayers/Saint/Gross of Baltimore, are designing the new green design building for the University of Baltimore School of Law which is scheduled to open in 2012. Mr. Behnisch's keynote speech explained the green design concepts which he and his firm have integrated into new green buildings, some of which they plan to incorporate into their design of the University of Baltimore School of Law's new facility.

The *Law Review's* symposium issue begins with Mr. Behnisch's keynote speech.¹ Then the issue provides two articles on the topic of green building and design. As the title indicates, the first article by Stuart Kaplow on "Does a Green Building Need a Green Lease?" principally addresses issues that attorneys for the owner and tenants of a green commercial building should consider when drafting an appropriate "green" lease for a new green building.² His article discusses several model green commercial leases which have been developed, and key provisions which should be contained in a green commercial lease (including provisions with respect to permitted uses by the tenant; allocation between the building's owner (landlord) and the tenant of costs associated with the construction, certification, and operation of the green building; payment of heating and electricity/energy costs; insurance coverage; allocation of property tax reductions for the building's status as green certified; and improvements, alterations, repairs and maintenance by the tenant). In addition, his article provides a broad overview of green buildings and green design through analysis of the energy costs and environmental impacts of existing non-green buildings; the reduced operating costs and lesser adverse environmental impacts of new green buildings; differing definitions and standards for green buildings (including the U.S. government's Energy Star system and the LEED system); and federal, state, and local government green building programs, laws,

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1. See Stefan Behnisch, *An Approach to a More Sustainable Architecture*, 38 U. BALT. L. REV. 365 (2009).
 2. See Stuart D. Kaplow, *Does a Green Building Need a Green Lease?*, 38 U. BALT. L. REV. 375 (2009).

and regulations. Mr. Kaplow's article provides practicing attorneys a broad overview of the issues faced in drafting an appropriate commercial lease for a new green building and guidance as to how to handle appropriately the relevant issues and subjects which should be addressed in a green commercial lease.

Nicole Lacoste's article addresses the "Legal Implications for Green Buildings Within Condominium and Homeowners Association Regimes in Maryland: Striking a Balance Between the Promotion of Green Retrofits to Existing Housing Stock and Maintaining Aesthetics by Homeowners Associations and Condominium Associations."³ Ms. Lacoste illustrates that, in Maryland, homeowners and condominium associations and architectural review boards usually have almost unlimited powers under subdivision and condominium restrictive covenants and rules to prevent, for broad, discretionary aesthetic, or design considerations, even reasonable and prudent green external alterations/retrofits (such as the addition of wind turbines to a roof or yard) on private residences and condominiums governed by the association and board. After discussing a new law enacted by the Maryland General Assembly in 2008 which prevents homeowners and condominium associations and architectural review boards from placing unreasonable limitations on exterior solar energy collection devices on houses and condominiums which they govern, Ms. Lacoste proposes that Maryland expand this new law to prohibit homeowners and condominium associations from preventing reasonable and prudent green retrofits to the exterior of any private residence governed by such associations.

In their two articles, Mr. Kaplow and Ms. Lacoste give the reader of this symposium issue of the *University of Baltimore Law Review* an excellent introduction to the green building and green design issues increasingly being addressed by the federal, state, and local governments in the United States, and to the green building and green design legal issues which practicing attorneys will increasingly face in dealing with both new and existing commercial and residential real estate.

3. See Nicole M. Lacoste, *Legal Implications for Green Buildings Within Condominium and Homeowners Association Regimes in Maryland: Striking a Balance Between the Promotion of Green Retrofits to Existing Housing Stock and Maintaining Aesthetics by Homeowners Associations and Condominium Associations*, 38 U. BALT. L. REV. 411 (2009).