

# Lawsuits Are Bad For Marketing: Green Building LEEDigation and other Liability

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# Building Impacts

- ◆ 39% of GHG Emissions, increasing 2% per year
  - 49% of SO<sub>2</sub>
  - 25% of NO<sub>x</sub>
  - 7% methane (C/D, fireplaces, stoves)
- ◆ 70% of Electricity Consumption
- ◆ 39% of Energy Use
- ◆ 58% building end-use energy from on-site fuels

# Green Building Standards

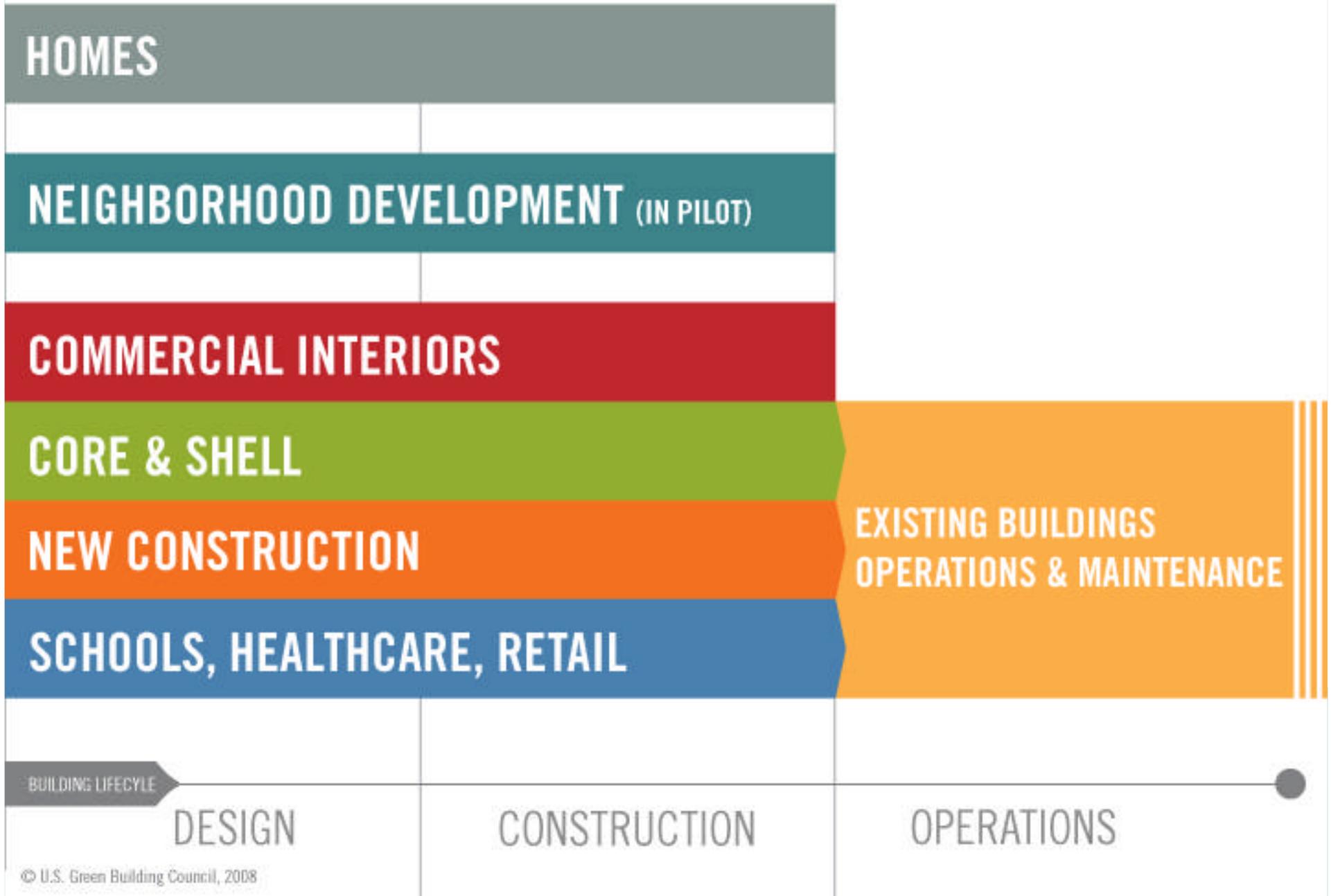
LEED-

- ◆ Energy Star
- ◆ Green Globe

# What Is Green Building?



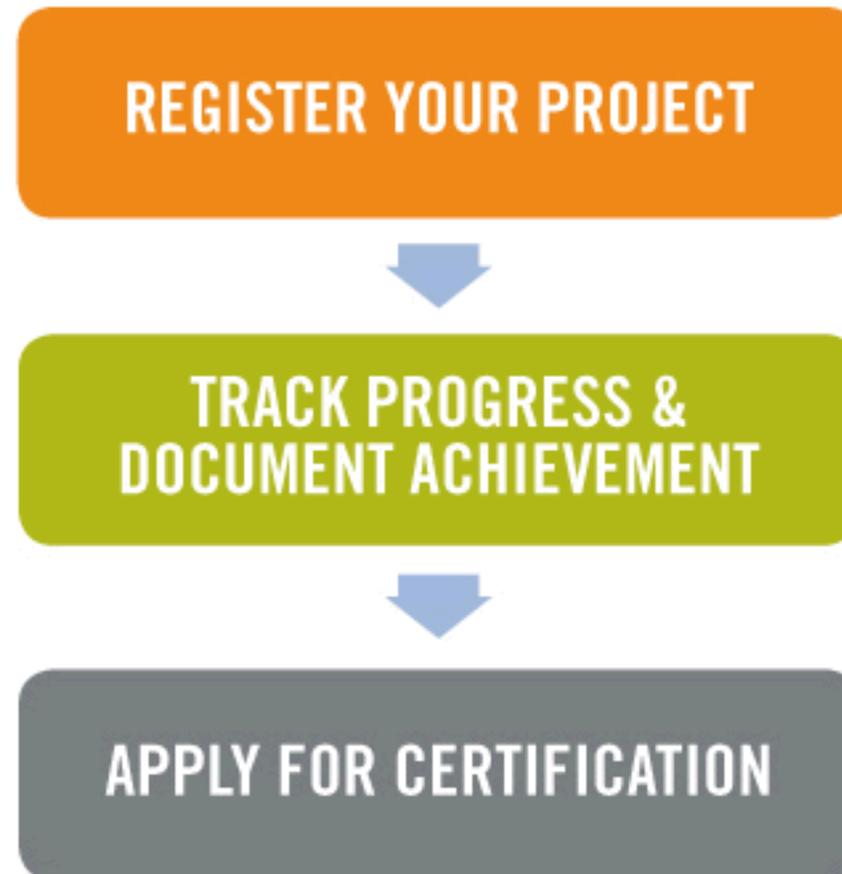
# LEED address the complete lifecycle of buildings:



# USGBC has four levels of LEED:



# Steps to LEED Certification



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Change title to:  
Getting Started: Tools  
technician, 8/8/2008

# Local Green Building Initiatives

- ◆ 115 Cities with Green Building Programs
- ◆ Most Refer to LEED or Green Globes

# Local Initiatives Cont'd

- ◆ Ordinances, Guidance, Regulations
- ◆ Building Code
- ◆ Energy Code
- ◆ Zoning
- ◆ Planned Development Communities (CC&R)

# Local GB Programs: Sticks and Carrots

- ◆ Mandatory or Optional
- ◆ modified LEED rating system
  - minimum points,
  - specific environmental issues
- ◆ Expedited Reviews (Non-Discretionary Entitlements)
- ◆ Bonus Density Incentives
- ◆ Real Estate Disclosure/Transfer
- ◆ Financial

# Local Financial Incentives

- ◆ May Be Tiered based on rating level
- ◆ State or Local Tax Credits or Abatements
  - Income Tax for Owners and Tenants
  - Property Tax Abatement or Exemption
  - Multi-Purpose Tax (Corporate, income, etc)
  - Timing on when to submit exemption
- ◆ Fee Waiver or Rebates
- ◆ Partial or Full Reimburse TP Fees
- ◆ Utility rebates
- ◆ Grants/Loans
- ◆ Leasing Assistance
- ◆ Technical Assistance (no TP certification)
- ◆ Public Recognition

# NYC Green Building Laws

- ◆ **New York City Energy Conservation Code**
  - closed 50% loophole
  - adds new chapter ten to Title 28
- ◆ **Benchmarking**
  - annual assessment of water and energy use performance
- ◆ **Lighting & Submetering**
  - upgrade to code when renovating
  - major tenants to be submetered
  - Renovations <\$50K are exempt
- ◆ **Audits & RetroCx**
  - 50K SF w/i ten years
  - waived if Energy Star, LEED or certain EE measures

# Common Green Building Issues

- ◆ LEED Failure or decertification
- ◆ Green Roof Problems
- ◆ Mold
- ◆ Product Unavailability or Delays
- ◆ Product Substitution
- ◆ Productivity Claims
- ◆ Material Recycling
- ◆ Energy Performance

# Some Legal Issues

- ◆ What Standard (specific, revised?)
- ◆ Who Bears Risk (tenant, owner, professional)?
- ◆ Lease Issues (level, allocation, expense language, other tenants)
- ◆ What is a Failure?
  - loss of funding
  - fail to obtain certification
  - lost tenant
- ◆ Breach of Green Covenant
- ◆ What is Material Breach
- ◆ LEED certification/decertification

# Negligence

- ◆ Negligence
  - duty/breach
  - traceable
  - foreseeable
- ◆ Define Duty of Care (level of performance)
  - LEED experience
  - Inducement to Employ Firm
  - Specify standard to be achieved

# Breach of Contract

- ◆ Contractual Relationship
- ◆ Breach
  - Compliance with Law
  - Indemnity
  - Warranty
- ◆ Measure of Damages
  - Liquidated Damage
  - Damage Limitations (cap and consequential)

# Damages

- ◆ Loss of tax credits/abatements/waivers/rebates
- ◆ Withholding of COO
- ◆ Penalties
- ◆ Forfeiture of Deposits
- ◆ Reputable Risk/Marketing
- ◆ Lawsuits

# Others Causes of Actions

- ◆ Consumer Protection
  - ◆ Fraud
  - ◆ Misrepresentation
  - ◆ Product Liability
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# Green Building Litigation

- ◆ Southern Builders v Shaw Development, No., 19-C-07-011405 (Somerset Cty Cir. Ct, Md 2008)
- ◆ Gifford v USGBC, No. 10-CV-7747 (S.D.N.Y.)
- ◆ Barber v West Chelsea Dev. Partners (NY Sup. Ct.)
- ◆ Gidumal v. Site 16/17 Dev. LLC, No. 105958/10 (NY Sup., 05/5/10 (Riverhouse Battery Park)
- ◆ *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp., 889 N.Y.S.2d 793 (App. Div., 4th Dep't 2009).*

# Local Standards Litigation

- ◆ ACHR Inst. v Albuquerque, No. 08-cv-00633-MV-RLP (D.N.M. 09/30/10)
- ◆ Building Ind. Assoc. of Wash v. Wash. State Bldg. Council (W.D. Wash)
- ◆ Washington-Nile School District (Ohio)

# Property Assessed Clean Energy (PACE) Litigation

- ◆ Town of Babylon v FHA (E.D.N.Y.)
- ◆ California v FHA (C10-03084  
N.D.Cal.)
- ◆ NRDC v. FHA, No. 10-CV-7647  
(S.D.N.Y.)

# Don't Greenwash Building Products

- ◆ Make sure product satisfies at least one green building requirement
  - ◆ Do not claim credits that do not apply to your product or the current building project;
  - ◆ Don't claim product if it's not harvested/extracted or processed locally;
  - ◆ No product is a LEED certified or LEED qualified product
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