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THE IMPOSING SPECTER OF MUNICIPAL LIABILITY FOR EXCLUSIVE PROMOTION OF GREEN BUILDING CERTIFICATION SYSTEMS

Colin W. Maguire

I. INTRODUCTION

“Green buildings” is a catchphrase many Americans hear in their everyday lives. The popular discussion of environmentally sound building practices and their implementation in projects is beyond justified; it is essential. Approximately ninety percent of all raw materials taken from the environment are used for building projects.¹ In addition, the energy it takes to construct and operate buildings far outpaces any other man-made source and contributes to high carbon dioxide emissions.² How municipalities address this growing concern varies by community.³ Concerns about enforcing building codes can put financial stress on local developers.⁴ Similarly, different types of municipalities may have different types of building concerns:

Typically, developers choose locations for specific, economic-driven reasons. A building located in San Francisco will likely be more expensive to permit and erect than a building constructed in Bowling Green, Kentucky. However, the building in San Francisco will also be able to take in higher rents, will likely have a higher occupancy rate, and will be situated in a location that provides access to numerous public parks, transit, and cosmopolitan and business opportunities. This illustrates the importance that locality plays when a developer is making a decision about which market to enter.⁵

It would be a laudable goal for every municipality to create their own, independent green building standard. However, factors such as severe budget cuts, a lack of knowledge, and the very economic factors alluded to above can direct municipalities to the LEED® (Leadership

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1. Sarah B. Schindler, *Following Industry's LEED®: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285, 288 (2010) (citing Charles K. Kibert, *Green Building: An Overview of Progress*, 19 J. LAND USE & ENVTL. L. 491, 493 (2004)).
 2. *Id.* at 288 (citing U.S. Dept. of Energy, ENERGY EFFICIENCY AND RENEWABLE ENERGY, 2008 Buildings Energy Data Book 1-3 (2008), available at http://buildingsdatabook.eren.doe.gov/docs/DataBooks/2008_BEDB.pdf).
 3. *Id.* at 301-02.
 4. *Id.* at 329-30.
 5. Schindler, *supra* note 1, at 302.

in Energy and Environmental Design) standard due to name recognition and other market forces.⁶

The Environmental Protection Agency defines the practice of green building as “the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building’s life-cycle from siting to design, construction, operation, maintenance, renovation, and deconstruction. This practice expands and complements the classical building design concerns of economy, utility, durability, and comfort.”⁷ LEED® is a designation created by the United States Green Building Council (USGBC) which seeks to promote green building practices.⁸ The growth of LEED® and the USGBC has been both a national and international phenomenon, creating an entire marketplace of green building certifications and boasting a network of over 13,000 members in a little over a decade.⁹ A LEED® certified building falls into one of three categories: LEED® Silver, LEED® Gold, and LEED® Platinum.¹⁰ These designations assess a building’s sustainable features as they relate to the categories of “(1) site planning; (2) water management; (3) energy management; (4) material use; (5) indoor environmental air quality; and (6) innovation & design progress.”¹¹

Contrary to the beliefs of some, this is not a governmental organization.¹² Rather, USGBC is a 501(c)(3) non-profit organization with its offices based in Washington, D.C.; they also have a sort of “federal” looking seal as their emblem.¹³ Therefore, the confusion is somewhat understandable. The LEED® designation extends to buildings, as well as organizations and professionals through the LEED® AP program.¹⁴ There is little misunderstanding that LEED® is the pioneering standard in the green building industry.¹⁵ The standard’s name is popular and known, as a friend recently remarked to me, “Isn’t LEED® like the Kleenex® of green building certifications?” This does appear to be the case to many, but those in the green building industry understand that the situation is changing.¹⁶

6. Schindler, *supra* note 1, at 303-04.

7. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/greenbuilding/pubs/about.htm> (last visited Mar. 03, 2012).

8. USGBC, <http://www.usgbc.org/> (last visited Jan. 11, 2012).

9. Les Lo Baugh, *LEED® Green Building Incentives*, 556 PLI/REAL 23, 25 (2008).

10. *Id.*

11. *Id.*

12. USGBC, <http://www.usgbc.org/> (last visited Feb. 15, 2012).

13. *Id.*

14. USGBC, <http://www.usgbc.org/DisplayPage.aspx?CategoryID=19> (last visited Jan. 11, 2012).

15. See Sherry Bonelli, *LEED Isn't the Only Green Building Certification in Town, SUCCEED AT LEED* (Oct. 23, 2011), <http://succeedatleed.com/?p=583> [hereinafter Bonelli].

16. See Bonelli, *supra* note 15.

LEED® faces increasingly stiff competition in the green building certification market.¹⁷ Most notable among their competitors is Green Globes®, a building rating system that prides itself on flexibility and a streamlined administrative process.¹⁸ Though originally operating exclusively in Canada, Green Globes® now has certified buildings throughout North America.¹⁹ Green Homes® America is a green auditing and improvement service specializing in residential properties.²⁰ Even ENERGY STAR, a U.S. Government energy-efficiency assessment process,²¹ will now certify buildings as energy efficient and can boast over 15,000 certified buildings.²² There are other smaller, regional certifications such as the one I have worked with: the Society of Environmentally Responsible Facilities® (SERF).

To fully disclose my position, I have worked for, and continue to contract with, a developing green building certification system based in East Lansing, Michigan. SERF® is a low-cost, customer service-based, marketing-driven certification created by property owners for property owners.²³ While working at this company, my co-workers and I began to question the validity of municipalities exclusively promoting LEED®. As we found out in our communications with others in the green industry, our confusion was shared. Still, this confusion never manifested itself into any kind of research or exploration. Rather, there was a general feeling that this just did not seem right. Fortuitously enough, events transpired that compelled me to dig deeper.

Recently, I had the honor of being appointed to the City of Lansing's Planning Board.²⁴ As part of our duties, we began assessing a proposed draft of the 2011 City Master Plan (Plan), which would ultimately be presented to the public with our suggestions. I was not surprised when several sections of the Plan referenced LEED® or that projects following the LEED® standard would receive beneficial treatment in terms of their zoning and permit processes. However, I was as confused as ever and infinitely more concerned. Why would my own city do this? Were they not aware of alternatives? Was this even legal? This last question was particularly relevant because it meant the City,

17. See Bonelli, *supra* note 15.

18. *Why Green Globes is Better*, GREEN GLOBES, <http://www.greenglobes.com/about-why.asp> (last visited Jan. 11, 2012).

19. *What is Green Globes?*, GREEN GLOBES, <http://www.greenglobes.com/about.asp> (last visited Jan. 11, 2012).

20. *Id.*

21. *About Energy Star*, ENERGY STAR, www.energystar.gov/index.cfm?c=about.ab_index (last visited Mar. 2, 2012).

22. *Id.*

23. SOCIETY OF ENVIRONMENTALLY RESPONSIBLE FACILITIES, www.serfgreen.org/about-us/ (last visited Jan. 11, 2012).

24. Colin W. Maguire, CV (Mar. 3, 2012) (on file with the University of Baltimore School of Law Journal of Land and Development).

already in financial distress, could be opening itself up to costly litigation from other green building certification systems.

This issue was suddenly one of great importance to me personally and professionally. The pressing question was this: Could the City of Lansing be held liable in a state anti-trust lawsuit, and any federal claims, for exclusively promoting and rewarding those green building projects which use the LEED® certification standard? I did an initial report, which I presented to my fellow board members.²⁵ The initial research revealed the topic was broader than I had imagined—there was a significant state antitrust issue and other federal issues. Indeed, this question was not merely one for Lansing but for every municipality in Michigan and municipalities in other states. As a result of my extensive research, I came to the following conclusions.

The purpose of this article is not to propagate backlash against LEED®, but only to propagate backlash against the exclusive promotion of green building certification systems (including Green Globes® or others) by municipalities. The USGBC itself admits that the green building standard industry had a projected value of around \$60 billion in 2010.²⁶ Still, municipalities across the country seem cavalier in their attitudes toward using a private product as a harsh property restriction.²⁷ The purpose of my analysis is not to definitively prove that a potential lawsuit against a municipality would ultimately be successful. Instead, the point is to prove that a plausible case exists.²⁸ Even a lawsuit that is ultimately dismissed or settled can be extremely costly and draining to the defending party. I hope this article will enlighten municipal leaders and save them from avoidable trouble.

II. THERE EXISTS A STRONG POSSIBILITY THAT A STATE LAW ANTI-TRUST SUIT COULD SUCCEED AGAINST A MUNICIPALITY THAT ENDORSES THE LEED® STANDARD OR ANY OTHER GREEN BUILDING STANDARDS, EITHER EXCLUSIVELY OR ON AN EXCLUSIVE LIST.

The first direct challenge to a LEED® requirement in a municipal code appears to have been litigated in *Air Conditioning, Heating, and Refrigeration Inst. v. City of Albuquerque*, a 2008 case from the U.S. District Court in New Mexico.²⁹ In that case, a group representing household appliance makers sued the City of Albuquerque, New Mexico,

25. *Id.*

26. Sarah Fox, *A Climate Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards*, 28 VA. ENVTL. L.J. 299, 301 (2010); USGBC, <http://www.usgbc.org/DisplayPage.aspx?CategoryId=1> (last visited Feb. 19, 2010). [hereinafter Fox].

27. *Id.*

28. To give the analysis focus, only Michigan statutes will be analyzed for their relevance on the issue of state anti-trust suits.

29. *The Air Conditioning, Heating, and Refrigeration Inst. v. City of Albuquerque*, 2008 WL 5586316, at *2 (D. N.M. 2008).

for creating a city-wide requirement that buildings should include appliances that qualified under certain LEED® standards for energy-efficiency.³⁰ The U.S. District Court granted the plaintiff's request for injunction against the City's enforcement of their code, reasoning that the manufacturers would suffer economic injury from having to adjust their stock, would be unable to sell certain products, and would be unable to fully help their customer.³¹ The court also reasoned that the injunction was needed immediately because in the specific case of New Mexico state law, it was unclear that the manufacturers would be able to pierce the doctrine of state immunity.³²

The issue of LEED® exclusivity in a municipal code as being an anti-trust issue has been previously considered an impending threat for municipalities across the country.³³ LEED® has gone so far as to publicize and extol the value of making LEED® the law.³⁴ If unchecked, the propagation of LEED® as law lends itself to a simple, causal conclusion: LEED® will sustain its dominance no matter what competitive measures other companies engage in.³⁵ The problem of LEED® dominance is very real, with LEED®-based state programs in Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawai'i, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, Washington, and Wisconsin, plus innumerable municipal efforts of a similar nature, thus the temptation to cross legal lines is prevalent.³⁶ Still, the question remains (and it is a good one) of whether a state anti-trust claim against a municipality exclusively adopting LEED® could be successful?³⁷ Although state law may differ greatly on this issue,³⁸ let us examine specifically whether such a claim could proceed in the state of Michigan.

A. *Government Immunity Exceptions Can Be Vague in a Broad Sense and May Require Claim Specificity.*

Generally, government entities are immune from tort liability.³⁹ Michigan Compiled Laws Annotated §691.1407 provides notable ex-

30. *Id.*

31. *Id.* at *5.

32. *Id.*

33. Fox, *supra* note 26.

34. *Id.*; see also *Public Policies Adopting or Referencing LEED*, U.S. GREEN BUILDING COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852federal> (last visited Feb. 19, 2010).

35. Fox, *supra* note 26.

36. Les Lo Baugh, *supra* note 9.

37. Les Lo Baugh, *supra* note 9.

38. Les Lo Baugh, *supra* note 9.

39. MICH. COMP. LAWS ANN. §691.1407 (West, 2011 Legis. Sess).

ceptions to this doctrine.⁴⁰ Both sections (1) and (2) offer largely independent standards for exceptions to governmental immunity but share one controlling idea: government function.⁴¹ What a legitimate government function entails is the key, though admittedly broad, issue in government tort liability; as such, it tends to be tort specific.⁴² For instance, if you sued a government for injury sustained in a government-owned building due to a government agency's negligence, then you would have to establish that the building was used for a government function.⁴³ However, that analysis of government function would differ substantially from an analysis of unfair business practices.⁴⁴ In the public building example, you would need to prove the building was used for a government function to move forward with a tort claim.⁴⁵ In terms of anti-trust issues, a tort claim at any state level may only proceed if the action in question was not a government function.⁴⁶

So, would the exclusive promotion of LEED® as a green building certification fall within the scope of the City's authority? This question is best answered by looking at current anti-trust law in Michigan and its standard for government function.

B. State Anti-trust Law Gives Clearer, Contextual Guidance to What a "Government Function" Is.

Michigan Compiled Laws Annotated §445.773 defines monopolizing activity as "[t]he establishment, maintenance, or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices, is unlawful."⁴⁷ The green building market has become a relevant market with various competing interests.⁴⁸ Though LEED® is certainly the pioneer of the market, they face stiff competition from organizations like Green Globes®, ENERGY STAR, Green Homes® America, and other more regional building certification organizations.⁴⁹

40. *Id.*

41. *Id.*

42. *Swartz Ambulance Serv. v. Genesee County*, 666 F. Supp. 2d 721, 728 (E.D. Mich. 2009).

43. MICH. COMP. LAWS ANN. §691.1406 (West 2011).

44. *See, e.g., O'Keefe v. Detroit*, 616 F.Supp. 162 (government function in injury case); *Swartz Ambulance Serv.*, 666 F.Supp. 2d 721 (government function analysis in unfair business practice case).

45. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt Auth.*, 550 U.S. 330 (2007).

46. *Id.*

47. MICH. COMP. LAWS ANN. § 445.773 (West 2011).

48. *Les Lo Baugh*, *supra* note 9.

49. *See Brian Clark Howard*, *10,000 Certified Buildings Later LEED Aim for Market Transformation*, *ECOMAGINATION* (Nov. 30, 2011), <http://www.ecomagina->

Mandating that buildings be LEED® compliant or certified to receive administrative advantages is similar to saying the City will give administrative advantages to those building projects which use Glidden® paint as opposed to Sherwin-Williams® or Behr® brand. In other words, it is a logical case for violation of state anti-trust law. However, the Michigan statute does offer some insulation to government entities even when government activity appears monopolistic in nature and specifically provides a standard for government function.⁵⁰

Michigan Compiled Laws Annotated §445.774 provides exceptions to anti-trust violation liability for government entities in stating: “This act shall not be construed to prohibit, invalidate, or make unlawful any act or conduct of any unit of government, when the unit of government is acting in a subject matter area in which it is authorized by law to act. . . .”⁵¹ This is the important section because it speaks directly to what standard should be used to establish a government function: a state statute that expressly or implicitly authorizes that function.⁵² Therefore, if a state law is in place that requires a government entity to interact with private businesses in a certain way, then monopoly situations may be unavoidable and should be allowed without fear of lawsuits.

C. *Recent Cases on This Subject Strongly Establish That a Legitimate Government Function Exception Requires a State Statute That Explicitly or Implicitly Supports This Activity.*

Similar issues have recently been litigated in Michigan. In *Patriot Ambulance Serv. Inc., v. Genesee County*,⁵³ a 2009 decision, the court reasoned that the state of Michigan gave Genesee County the ability to provide and regulate ambulance services as per Michigan Compiled Laws §§ 333.20902(5), 333.20908(6), which defines ambulance operations to include patient transport, and a patient to include a non-emergency patient,⁵⁴ so it was not a violation of federal or state anti-trust law to pick two companies to provide this service. In *Miranda v. Michigan*,⁵⁵ a 2001 decision, the court reasoned that Michigan Compiled Laws § 791.206(1)(D)⁵⁶ implicitly allowed the Michigan Department of Corrections to have one collect-call service provider for its inmates because the statute gave the Department of Corrections the authority

tion.com/ten-thousand-certified-buildings-later-leed-aims-for-market-transformation.

50. See MICH. COMP. LAWS ANN. § 445.773 (West 2011).

51. *Id.* at §445.774.

52. See *id.*

53. *Patriot Ambulance Serv. Inc., v. Genesee Co.*, 666 F.Supp.2d 712, 718 (E.D. Mich. 2009).

54. See *id.* at 718-19.

55. *Miranda v. Michigan*, 168 F.Supp.2d 685, 692 (E.D. Mich. 2001).

56. *Id.*

“regarding the management and control of state penal institutions.”⁵⁷ This appears to be good news for the Michigan municipalities that exclusively promote green building certifications, but further research reveals a major flaw in that conclusion: Michigan has no green building statute.⁵⁸

D. Michigan Has No Controlling Statute of Green Building Promotion but Illinois Has a Model Example.

Michigan has no state statutes that govern the promotion, planning, or construction of certified green buildings.⁵⁹ This makes a great deal of sense as the sale of many luxury products and services are not somehow regulated by the state.⁶⁰ If a green building certification is not a luxury item, which may be a prevailing opinion since more and more municipal codes are referencing them, then obtaining such certifications must be an open and non-exclusive process. There is a strong reason to believe that promoting and rewarding a single green building certification is not acting within the scope of government authority because it is completely unsupported by statute.

The one state statute that may lend support to the promotion of green building certifications is Michigan Compiled Laws Annotated §125.1504,⁶¹ which is part of the Stille-Derossett-Hale Single State Construction Code Act.⁶² This act deals with the promulgation, contents, and updates of a state construction code.⁶³ Particularly relevant is §125.1504(3), which promotes the recognition of national standards for construction materials, the creation of optimal standards, the use of modern technologies for the general welfare, the standards for energy-efficiency, and the continual review of energy-efficiency standards.⁶⁴ Read together, these goals could be seen as the implicit promotion of a green building code. The statute has direct references to modern building materials and energy efficiency; it references the same components that help make up a green building standard.⁶⁵ That does not necessarily mean that the statute expressly promotes private standards, though the implication could be made that the state statute should look to building material standards “consistent with nationally recognized standards.”⁶⁶ This is an implicit indi-

57. *Miranda*, 168 F.Supp.2d at 691.

58. MICH. COMP. LAWS ANN. § 125.1504 (West 2006); 20 ILL. COMP. STAT. ANN. 3125 (West 2008).

59. See MICH. COMP. LAWS ANN. §125.1504 (West 2006).

60. *Barto v. United States*, 823 F.Supp. 1369, 1369 (E.D. Mich. 1993).

61. MICH. COMP. LAWS ANN. § 125.1504 (West 2006).

62. *Id.* § 125.1501.

63. *Id.*

64. *Id.* at §125.1504(3).

65. *Id.*

66. *Id.*

cation that private green building standards may be considered.⁶⁷ However, in no way would this state statute explicitly or implicitly indicate that one private standard could be exclusively promoted. Conversely, the standard is broad and looks to affect positive changes in building practices that affect the general welfare.⁶⁸ Still, why should Michigan municipalities be forced to enter into this type of analysis when a model state statute exists in Illinois that also addresses the growing nature of the green building market?⁶⁹

In July of 2009, Illinois passed the Green Buildings Act.⁷⁰ This statute stated that “[a]ll new State-funded building construction and major renovations of existing State-owned facilities are required to seek LEED, Green Globes, or equivalent certification.”⁷¹ This non-exclusive statutory requirement allows a variety of green building certifications to be considered by publicly funded construction projects.⁷² The implication could be made, if Michigan had the same statute, that promoting green building certifications is a government function. There could be an implicit, logical progression to a municipality’s promoting of a non-exclusive list of certification for use in private building projects. Illinois’ Green Building Statute also seeks to keep pace with the market by stating that “[t]he green building standards contained in this Act shall be analyzed and evaluated by the [b]oard 5 years after the effective date of this Act. . . .”⁷³

North Carolina has also enacted a green building statute similar to Illinois’ that explicitly allows counties to reduce building permit fees or provide different subsidies to buildings that comply with LEED® , Green Globes®, or “[a] certification or rating by another nationally recognized certification or rating system that is equivalent or greater than [LEED® or Green Globes®].”⁷⁴ The possibility of anti-trust violations as a result of municipal involvement with green building certifications has also been recently addressed in New York.⁷⁵

In the Empire State, the potential anti-competitive consequences of adopting the LEED® standard as law have been explored in addition to the possibility that such action would establish a clear preference shown to LEED® while delegating code compliance authority to a private third party.⁷⁶ After all, a LEED® AP would have to establish LEED® certification and then submit such findings to municipal offi-

67. MICH. COMP. LAWS ANN. § 125.1504(3) (West 2011).

68. *Id.*

69. *Id.*

70. 20 ILL. COMP. STAT. ANN. 3130/1 (West 2011).

71. *Id.* at 3130/15(a).

72. *See id.* at 3130/15(b).

73. *Id.* at 3130/15(g).

74. N.C. GEN. STAT. ANN. §153A-340(h)(i) (West 2011).

75. PATRICIA E. SALKIN, N.Y. ZONING LAW & PRACTICE §32A:28 (3d ed. 2011).

76. *Id.*

cial.⁷⁷ Similar to Michigan law, New York law would not likely immunize a municipality from a state anti-trust lawsuit.⁷⁸ The suggested solution is also simple: provide a non-exclusive list of acceptable certifications.⁷⁹

As it stands, even if the Illinois or North Carolina statutes existed in Michigan, Michigan municipalities exclusively using the LEED® standard would not be viable as acting within a government function because such a statute would show Michigan municipalities that they may: (1) expressly authorize a non-exclusive promotion of a green building certifications for funding purposes; (2) impliedly authorize a non-exclusive promotion of green building certifications for other purposes, like zoning fast-tracking; and (3) not even implicate an exclusive promotion of a green building certification. Furthermore, a similar statute to Illinois' would compel authorities at the state level to reconsider the green building certification market on a regular schedule.

E. Federal Law Supports a State Claim by Looking More to a Marketplace Analysis and Has a Similar Standard for Government Function; Though a Federal Anti-trust Suit Would Not Be Possible.

The U.S. Supreme Court reasoned that local governments may create anti-competitive requirements if they have a supporting state statute and there exists a "clear articulation of a state policy" with a "foreseeable result."⁸⁰ In the case of an exclusive green building certification system, the municipality would likely know that the foreseeable result of exclusively promoting a certification system like LEED® would be that other certification systems would be at a competitive disadvantage.⁸¹

Michigan Compiled Laws Annotated §445.784 considers how Michigan antitrust law should be viewed in a broader sense.⁸² It cites the importance of outside sources that may be more developed in anti-trust law; specifically, it cites federal anti-trust analysis.⁸³ Not all anti-trust issues involve government promotion of a product.⁸⁴ Still, many

77. *Id.*

78. *Id.*; Elec. Inspectors, Inc. v. Vill. of Lynbrook, 293 A.D.2d 537, 538 (N.Y. 2002) (no municipal immunity under the Donnelly Act); Atl.-Inland, Inc. v. Town of Union, 483 N.Y.S.2d 612 (N.Y. Sup. Ct. 1984) (striking ordinance where third party had sole right to conduct inspections).

79. SALKIN, *supra* note 75.

80. BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE DISCRETION §8:80 (2011); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 372 (1991); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42 (1985).

81. BLAESSER, *supra* note 80; *Omni Outdoor Adver.*, 499 U.S. at 373.

82. MICH. COMP. LAWS ANN. §445.784 (West 2012).

83. *Id.* at MICH. §445.773.

84. *See generally* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (showing anti-trust lawsuit brought by American manufacturing

of the market concerns one might consider when two large cable providers wish to merge are similarly present when governments become proactive in a marketplace. As Federal Trade Commissioner William E. Kovacic noted as recently as December 2010, “[m]onopolies that owe their power to government regulation provide none of the dynamic benefits that flow from business rivalry and impose significant costs in the form of higher prices and lower quality.”⁸⁵ Perhaps not surprisingly given the cases reviewed above, federal courts are required to let state-level monopolistic activity stand if the activity is truly a state action; this is also called “state action doctrine.”⁸⁶ This should sound strikingly familiar to the state anti-trust/monopoly analysis.

However, it would not be possible to initiate a federal anti-trust suit against a Michigan municipality as hypothesized here. This is because the Sherman Anti-Trust Act specifically states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with a foreign nation, is declared to be illegal.”⁸⁷ The operative barrier here is that Michigan municipalities would only be trying to control commerce within the state, not between states.⁸⁸ Still, it would be important for the plaintiffs in a case like this to get the case to federal court and possibly succeed on federal claims.

III. WHETHER A STATE ANTI-TRUST CLAIM IS SUCCESSFUL, CLAIMANTS COULD GAIN AN ADVANTAGE BY SUING IN FEDERAL COURT BY JOINING THEIR STATE ANTI-TRUST CLAIM WITH AN EQUAL PROTECTION CLAUSE CLAIM AND A DORMANT COMMERCE CLAUSE CLAIM, BOTH OF WHICH HAVE A PLAUSIBLE BASIS FOR SUCCEEDING.

In drafting a pleading under Federal Rules of Civil Procedure (FRCP) 8(a), we would expect to see the same or similar fact in a pleading for a state claim or a federal claim arising from the same cause of action⁸⁹ (which would inherently require a pleading to be

companies against Japanese electronics manufacturers for alleged conspiracy to drive out American companies from the television manufacturing market); *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966) (showing the United States brought civil action against automobile dealers alleging that automobile dealers were engaged in a conspiracy to restrain trade).

85. WILLIAM E. KOVACIC, FEDERAL TRADE COMMISSION STAFF ADVISORY OPINION/COMMENT LETTER, 2010 WL 5158210 at 2 (Dec. 7, 2010).

86. James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Anti-Trust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1568 (2010).

87. 15 U.S.C.A. §1 (West 2004).

88. See *infra* Sub. Sec. B.

89. See FED. R. CIV. P. 8(a), 10(b). Cf. *Fed. Deposit Ins. Corp. v. Miller*, 781 F. Supp. 1271, 1278 (N.D. Ill. 1991) (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1324 (3d ed. 2011)) (deny-

filed against an individual municipal official). Also, in following FRCP 18(a), it makes sense to join the state and federal claims.⁹⁰ The combined claims will then necessarily have “federal question” subject matter jurisdiction pursuant to 28 U.S.C.A. §1331.⁹¹ The claims would probably be brought in federal court in the state where the municipality is located.⁹²

The claimant would have the tactical advantage of bringing suit in federal court, where the judge would likely be more open to the claims than a local state judge.⁹³ Admittedly, the challenge for the claimant would be proving causation and damages. As such, municipalities should anticipate filing a FRCP 12(b)(6) motion for failure to state a claim upon which relief can be granted.⁹⁴ They should also anticipate filing a FRCP 12(b)(7)⁹⁵ motion for failing to join USGBC pursuant to FRCP 19(a).⁹⁶ The result of this last motion would be difficult to predict. Jurisdiction would not be an issue, but there is an argument that you would need to join USGBC (despite not having a direct claim against them in this scenario) because their interest could be impaired or impeded if they were not joined.⁹⁷ This would require a decision on the part of the judge as to whether defending their possibly illegal exclusivity, which USGBC may or may not have specifically sought, is critical to USGBC’s interest.⁹⁸ In any event, this is not the

ing defendant’s contention that the plaintiff may not plead a combined federal and state cause of action).

90. See Fed. R. Civ. P. 18(a) cmt. 1966 amendment (the 1966 amendments promote the joinder of claims).
91. 28 U.S.C.A. §§1331, 1367(a) (West 1980) (Showing that the court will have original jurisdiction pursuant to the former section for the federal question claim, and thus supplemental jurisdiction under the latter for the non-federal question claim). This type of supplemental jurisdiction would specifically be pendant jurisdiction. *Victors v. Kronmiller*, 553 F. Supp. 2d 533, 553-54 (D. Md. 2008) (quoting *Osborn v. Haley*, 549 U.S. 225 (2007) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966))) (“Pendant jurisdiction may be exercised when federal and state claims have a ‘common nucleus of operative fact’ and would ‘ordinarily be expected to be tried all in one judicial proceeding.’”) (internal quotation marks in original).
92. The federal court in the state would have in personam jurisdiction over the municipality in the state in which it is located, unless the municipality had minimum contacts elsewhere. Cf. *WRIGHT & MILLER*, supra note 89, at §1067 (citing *Int’l Shoe Co. v. Washington State*, 326 U.S. 310 (1945)) (describing the modern notions of in personam jurisdiction after the pre-eminent *International Shoe* case and its descendents). Venue would therefore be proper in the state of the municipality. 28 U.S.C.A. §1391 (West 2011).
93. Cf. Peter E. Halle, *The Elements of a Federal Antitrust Violation* §67:44 (3d ed. 2011) (stating that there are some legal and tactical reasons for the plaintiff to seek pendant (supplemental) jurisdiction in antitrust cases).
94. Fed. R. Civ. P. 12(b)(6).
95. See *id.* at 12(b)(7).
96. See *id.* at 19(a).
97. See *id.* at 19(a)(1)(B)(i).
98. See *id.*

type of position Michigan municipalities would want to find themselves in. However, the claimant would have to come up with a remotely viable federal claim to even get the case to federal court under 28 U.S.C.A. §1331.⁹⁹ The claimant could look to the Equal Protection Clause and Dormant Commerce Clause for injunctive and, possibly, monetary relief.¹⁰⁰

A. *The Standard for Equal Protection Claims Is Broad but Possibly Dangerous for Municipalities and Would Allow Claimants Access to Federal Court.*

The plaintiffs in such a case will likely want a federal law violation as one of their claims. Regardless of whether these anti-trust claims are successful, this claim could suffice for injunctive damages¹⁰¹ and the procedural effect would be critical. The codified promotion of a premium product, where other economical and similar products exist, could be a violation of the Equal Protection Clause.¹⁰² Michigan courts have stated that “[e]very reasonable presumption or intent must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.”¹⁰³ However, if an act of government is called into question as not providing equal protection to its citizens, that act may be submitted to a rational basis review.¹⁰⁴ This test requires a court only to uphold legislation if “that legislation is rationally related to a legitimate government purpose.”¹⁰⁵

This standard appears similar to the anti-trust standard stated above, but the standard is more stringent.¹⁰⁶ The challenger of legislation for equal protection claims must show that the government’s codified action is “arbitrary and wholly unrelated in a rational way to the objective of the statute.”¹⁰⁷ This standard is, generally, inline with the federal standard.¹⁰⁸ Such a claim would probably require a market analysis of the costs of implementing LEED® standards as compared to the available economic data of a Michigan community and viable alternative certifications.

99. 28 U.S.C.A. §1331 (West 1980).

100. *See generally* Mich. Const. art. I, §2 (West, Westlaw through Nov. 2010 amendments); *see generally* U.S. Const. art. I, §8, cl. 3.

101. *See* Rochelle Bobroff, *Ex Parte Young as a Tool to Enforce Safety Net and Civil Rights Statutes*, 40 U. TOL. L. REV. 819 (2009).

102. *See* *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

103. *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 179 (Mich. 2004) (quoting *Cady v. City of Detroit*, 286 N.W. 805, 807 (Mich. 1939)).

104. *Id.* at 184-86.

105. *Id.*; *see* *Crego v. Coleman*, 615 N.W.2d 218, 224 (Mich. 2000).

106. *See* *Cooper*, *supra* note 86,, at 1568.

107. *Phillips*, 685 N.W.2d at 185 (quoting *Smith v. Emp’t Sec. Comm.*, 301 N.W.2d 285, 297 (Mich. 1981)).

108. *See* *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

As a hypothetical example, let's say LEED® certification is exclusively promoted by a Michigan municipality. Also, let's assume the final cost of that certification is \$100,000.00 (with all fees and LEED® AP costs included). Additionally, let's assume that following the LEED® standard would add an additional \$50,000.00 to the cost of a building project, regardless of whether the certification was actually purchased. Let us also assume that the fictitious ACME Green Systems offered a substantially similar certification package and standard, only the final cost of the certification was \$20,000.00 and the additional cost to the building project by following their criteria was \$10,000.00.

Private citizens may choose to go for the LEED® certification and standard no matter what the price, but what about the relation between the two companies' price discrepancy to property values? Michigan (and the country as a whole) has seen a significant drop in property values over the past few years.¹⁰⁹ If the average value of a property in a municipality is only \$500,000.00 (again, a totally assumed value), then the cost of buying that hypothetical LEED® certification plus added project costs would be thirty percent of the overall property value, which is a completely unconscionable figure from an economic standpoint for a business or private individual. Conversely, the ability to buy ACME's certification with additional project costs would be six percent of the building cost. If we were to accept six percent of property value as an acceptable number for a green building certification cost and LEED® was the only environmental certification promoted by the government, then only properties at or exceeding a value of \$2.5 million would benefit from the government's actions.

Could there be a standard more arbitrary standard? Such a standard would only offer benefits and protection to bigger building projects while: 1) completely ignoring a similar product that could be made available to a diverse group of property developers and 2) completely ignoring market forces because property values may rise or fall and less expensive residential development may be more prevalent at a given time than expensive retail and commercial development. In essence, if the service is substantially similar, denying customers of ACME the same advantages as a LEED® customer would be unreasonable, unproductive, and oppressive to a large economic class. In practice, a certain segment of society that could broker large-scale, expensive building projects would be given more benefit from the laws and coffers of that municipality than any other project manager

109. Harry Cassidy, *Declining House Values*, NEWS-HERALD (Apr. 7, 2011), http://www.thenewsherald.com/articles/2011/04/07/business/home_improvement/doc4d9dc7bc9d737518573289.txt.

or property owner. This is precisely the type of action the Equal Protection Clause sets out to prevent.¹¹⁰

B. Currently-out-of-State Green Building Certifications Systems Could Bring a Claim in Federal Court on a Dormant Commerce Clause Theory If Their Path to Doing Business in a Community Is Blocked by Another Private Certification System.

The other troubling scenario for Michigan municipalities is the possibility that an out-of-state green building certifications system may try to expand their business into a community that is exclusively promoting one or two green building certifications systems. There are no major cases directly on point on this issue, but the fairly recent Supreme Court cases on municipal waste disposal of *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994),¹¹¹ and *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007),¹¹² give a degree of guidance on the issue.

In the early 1990s, petitioner C&A Carbone, Inc. began operating a waste management business in Clarkstown, New York, with the intent of sending some of the waste to their established waste disposal sites in other states.¹¹³ Unfortunately for C&A Carbone, respondent Town of Clarkstown previously made guarantees to another waste disposal company who was allowed to build a facility that functioned as the only authorized waste disposal distribution center in the town; anyone else wishing to collect and distribute waste had to pay the town a fee which subsidized the other company's distribution center.¹¹⁴ The Supreme Court reasoned that requiring waste to go through the other company's distribution center drove up the cost of doing business for C&A Carbone, and any other out-of-state provider trying to enter the market, because they would have to pay their competitor in order to do business, and, therefore, discriminated against interstate commerce.¹¹⁵ Justice Kennedy, writing for the majority, found the practice unconstitutional, and specifically noted that the main problem lay not with the physical product being regulated but with the fact that services offered by both in-state and out-of-state providers were being regulated.¹¹⁶

In 2007, the Supreme Court was faced with a similar situation. The Counties of Oneida and Herkimer in New York had established a simi-

110. See Javed Heydari, *E-Commerce Protectionism and U.S. Appellate Courts*, E-COMMERCE TIMES (Sept. 9, 2004), <http://www.ecommercetimes.com/story/36472.html>.

111. *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994).

112. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

113. *C&A Carbone*, 511 U.S. at 387-88.

114. *Id.* at 386-87.

115. *Id.* at 389.

116. *Id.* at 390-91.

lar waste distribution center and required all waste to go through it; however this center was operated by a public entity.¹¹⁷ This time, a group of waste collection companies sued the government entity that ran the waste distribution center under substantially similar claims to those laid out in *Carbone*.¹¹⁸ Though the local government's activity clearly had an effect on interstate commerce, the Court used *United Haulers* to reason that this type of practice was presumptively valid because the facility and its operating body treated all in-state and out-of-state businesses even-handedly.¹¹⁹ The sharpest distinction between *Carbone* and *United Haulers*, the Court reasoned, was that the facility in *United Haulers* was a public facility, making Oneida County and Herkimer County participants in the trash collection market.¹²⁰ A vigorous three-Justice dissent, lead by Justice Alito, saw no material distinction between this case and *Carbone*, and made a cogent argument for the assertion that any direct regulation of interstate commerce will generally be a Dormant Commerce Clause violation.¹²¹

Broadly speaking, concerns have been voiced about state environmental regulations abridging interstate commerce, which could include a green building code.¹²² A city's or a municipality's inability to make laws that disrupt the flow of interstate commerce has never been an absolute, but rather, a balancing approach between national economic interests and local interests is considered under our jurisprudence.¹²³ Generally, a local government's actions are not in violation of the Commerce Clause if their actions are of a proprietary or participatory nature; this is known as the "Market Participant Exception."¹²⁴ These cases, along with the current law on Dormant Commerce Clause analysis, when it comes to the interaction between local government and private service providers, should be instructive to Michigan municipalities and others.

Suppose the fictitious Shamrock Green Buildings, Inc. (Shamrock) operates a green building certifications business out of South Bend, Indiana. Shamrock has interested customers in the city of Battle Creek, Michigan, a stone's throw over the Michigan-Indiana border. However, let us assume that Battle Creek has required all building projects that will be receiving city funding to obtain a LEED® building certification. Smith Development Co. (Smith) wants to renovate a

117. *United Haulers Ass'n*, 550 U.S. at 334.

118. *Id.* at 337.

119. *Id.* at 342.

120. *See id.* at 339-40; *see C&A Carbone*, 511 U.S. at 394.

121. *United Haulers Ass'n*, 550 U.S. at 356-57. *See C&A Carbone*, 511 U.S. at 390-92.

122. Michael Burger, "It's Not Easy Being Green": *Local Initiatives, Preemption Problems, and the Market Participant*, 78 U. CIN. L. REV. 835, 838-40 (2010).

123. *See id.* at 839. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

124. Burger, *supra* note 124, at 839. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 449 (1980) (Powell, J., dissenting).

historic building in downtown Battle Creek. Smith also wants to build in compliance with Shamrock's building standards and receive their certification, which comes with various marketing flyers, internet ads, and even a television spot extolling how environmentally friendly the Smith's project is. Smith would also really like \$1 million in assistance from the city because a great deal of asbestos and contaminated soil will need to be removed for their project to move forward.

The city of Battle Creek has never heard of Shamrock and is insistent that Smith obtain a LEED® certification to receive its \$1 million in assistance. Let us also assume that the total cost of Shamrock and LEED®'s certifications is an identical \$100,000.00. Smith will be left with a few choices: (1) Smith could not get the LEED® certification and pay the \$1 million, and then hope that the extra marketing push of Shamrock's certification has a fantastic return on investment; (2) Smith could pay for both LEED® and Shamrock and spend an extra \$100,000.00, but still get \$1 million from the city; or (3) Smith could drop Shamrock, pay for LEED®, and receive an extra \$1 million for the project. Smith will probably take option 2) or 3) because Smith needs the \$1 million. If Smith does take option 2), it is likely that Shamrock would have to lower their price in order to be competitive, but LEED® would not.

This is the very problem dealt with in *Carbone* and *Untied Haulers*.¹²⁵ It will be untenable for Shamrock, or any other out-of-state provider, to do business in Battle Creek because they will not be used as a certifications system since a customer will likely have to pay more to use their services. Such action by a local government actor would directly regulate and discriminate interstate commerce because it would pick a service provider in the stream of commerce that would receive a benefit and it would impose a market-handicap on all other service providers. The municipality's options to avoid this mess are simple enough: (1) create a non-exclusive standard or (2) create a municipal specific standard that may be influenced by private service providers, which would fall under the Market Participant Exception.

IV. CONCLUSION

Municipalities across the country would be wise to steer clear of exclusively using LEED®, or any other standard, in their assessment and classification of green buildings. One alternative is not to reference "Green Buildings" in any municipal code, but this seems unnecessarily harsh and against popular sustainability attitudes. Another idea would be to establish a non-exclusive list of green building certifications for the municipality to rely upon when making decisions surrounding

125. See *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994); see *United Haulers Ass'n v. Oneida-Hermiker Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

green buildings. This may require a state statute, but any statute should be equipped to deal with inevitable changes in the marketplace.

The ideal solution would be to have every municipality adopt their own green building standard and let the consumer make a private choice as to which certification(s) works for their building. This is not to say that certification systems like LEED®, Green Globes®, or even SERF® would not be used in considering these standards. Rather, the merits of these private standards could be considered in the creation of a public standard, with a maximum amount of community transparency and specific tailoring to the community's needs.¹²⁶ The city of Detroit is in the process of approving such a system for their municipal buildings.¹²⁷ Though their plan would reference known green building criteria, they would also employ a Chief Sustainability Officer to constantly assess their standard's applicability to their community.¹²⁸ It is this kind of forward-thinking, inclusive, and market-aware approach that offers great promise from a legal and logical standpoint. Still, the market should dictate need. With lowering property values and a lot of older housing, cities like Lansing, Michigan, may want to strongly embrace adaptive reuse criteria while putting less of a premium on using other materials in new construction.¹²⁹ Also, the sheer cost of certain certifications may be untenable for most of the population, especially when compared to the actual value of those properties.¹³⁰

Whatever the solution, no municipal official should be unaware as to the possible liability their municipality may face by endorsing a private green building certification exclusively. As the well-known legal maxim states: ignorance of the law is no excuse. Municipalities

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126. See Schindler, *supra* note 1, at 341-42 ("Encouraging local governments to design their own green building regimes, which take into account their own localities' concerns and desires, will help to achieve the regime goal of legitimate process, resulting in greater public notice, incentive to participate, and voice.").
127. See *Detroit Green Task Force Meeting Minutes*, GREENINGDETROIT.COM (Nov. 30, 2011) (explaining that the Green Building Subcommittee is in the process of reviewing the resolution), available at <http://www.greeningdetroit.com/wp-content/uploads/2011/12/Detroit-Green-Task-Force-Meeting-minutes-November-30-2011.pdf>.
128. *Proposed Resolution to Establish a High-Performance Green Building Policy of City of Detroit Municipal Buildings*, DETROIT GREEN TASK FORCE. (on file with author).
129. CITY OF LANSING, DESIGN LANSING: 2011 MASTER PLAN DRAFT 70 (May 16, 2011) (proposing the encouragement of adaptive reuse of smaller vacant industrial buildings as part of its master plan).
130. See *Building Design & Construction Fees*, GREEN BUILDING CERTIFICATION INSTITUTE, <http://www.gbci.org/main-nav/building-certification/fees/bdc.aspx> (listing fees for LEED Certification for non-members at \$1,200 for registration and \$4,250 for precertification, plus an added review fee) (last visited Feb. 22, 2012).

should not subject themselves and their citizens to costly litigation for acting in a way that should have immediately struck them as monopolistic. The green building market, and related green technology fields, represents a burgeoning new area that we do not yet fully grasp, but it may be of critical importance to the country's economic future.¹³¹ Still, we must uniformly understand and accept that this new field is a marketplace: a realm that should be free from government favoritism and exclusivity.

131. See Press Release, U.S. Green Building Council, Square Footage of LEED-Certified Existing Builds Surpasses New Construction (Dec. 7, 2011) ("A newly issued report . . . found that efficiency financing has the potential to soar from \$20 to \$150 billion annually, creating over one million jobs, making the American economy more competitive, enhancing national security, and helping slow the impacts of climate change.") available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=10712>.