

REVISITING *ALLIED TUBE* AND *NOERR*: THE ANTITRUST IMPLICATIONS OF GREEN BUILDING LEGISLATION & CASE LAW CONSIDERATIONS FOR POLICYMAKERS

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INTRODUCTION

Over the past five years, green building legislation has been enacted across the country at the state and local levels with heightened frequency¹ to combat what many legislators and their constituents believe to be an imminent threat resulting from global climate change.² While few would argue against the threat that global warming poses to society's long-term viability,³ crafting policy without considering its broader legal ramifications will do much more harm than good for the green building movement. Of particular concern for purposes of this Article are the potential antitrust implications implicated by the United States Green Building Council's ("USGBC") Leadership in Energy & Environmental Design ("LEED") green building rating system.

The USGBC is a Washington, D.C.-based non profit organization, comprised of "78 local affiliates, more than 20,000 member companies and organizations, and more than 100,000 LEED Accredited Professionals,"

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¹ Between 2003 and 2007, the number of U.S. cities with a green building program increased by nearly 400 percent. AMERICAN INSTITUTE OF ARCHITECTS, Local Leaders in Sustainability, <http://www.aia.org/advocacy/local/programs/AIAS075254>.

² Mark Valentine & Desiree Vargas, *Green Design and Practice in the Development of Buildings and Neighborhoods*, in ARABELLA ANALYTICAL REPORT 7-9 (Oct. 2007), available at [http://www.arabellaadvisors.com/images/Green Design and Practice 2007 Update_Arabella Advisors.pdf](http://www.arabellaadvisors.com/images/Green%20Design%20and%20Practice%202007%20Update_Arabella%20Advisors.pdf).

³ UNIV. OF COPENHAGEN, SYNTHESIS REPORT CLIMATE CHANGE: GLOBAL RISKS, CHALLENGES, & DECISIONS 6 (2009), <http://climatecongress.ku.dk/pdf/synthesisreport/>.

with the goal of transforming “the way buildings and communities are designed, built and operated, enabling an environmentally and socially responsible, healthy, and prosperous environment that improves the quality of life.”⁴ In 1998, the USGBC created the first iteration of LEED, a voluntary, consensus-based system that purports to rate the environmental impact of buildings. Most legislatures, in devising a green building scheme, have incorporated the LEED system into the text of their legislation, whether in the form of an incentive or mandate.⁵ While the LEED system has, in that respect, been the most successful of the green building rating systems promulgated by private, third-party organizations such as USGBC, other systems exist and are vying for market share.⁶ Green Globes, for instance, is such a system; promulgated by the Portland, Oregon-based Green Building Initiative (“GBI”), it has been adopted by at least 18 state legislatures, though its market share is unquestionably much smaller than LEED’s.⁷ Green Globes and LEED have been in direct and, at times, adversarial competition ever since the GBI was founded in 2004 by North American timber interests.⁸ Those interests include the Wood Promotion Network, a consortium of timber industry entities that includes the American Forest and Paper Association, an organization that promulgates a forest certification program called the Sustainable Forestry Initiative (“SFI”).⁹ However, the LEED system’s more extensive pervasion through the market carries potential antitrust implications.

⁴ U.S. Green Building Council, USGBC: About USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=124> (last visited Sept. 15, 2009). For purposes of this Article, references to the LEED refer to the LEED for New Construction Rating System under the LEED 2009 program. *See infra* notes 45–47 and accompanying text.

⁵ 126 cities, 36 counties, 28 towns, and 36 states have incorporated the LEED rating system into legislation, executive orders, ordinances, policies, and initiatives. U.S. Green Building Council, Government Resources, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779> (last visited Sept. 15, 2009).

⁶ *See* Alex Frangos, *Industry Seeks New Green-Building Standard; Timber Business Backs ‘Wood Friendly’ Approach; Critics Call It Self-Serving*, WALL ST. J., Mar. 29, 2006, at B6.

⁷ *See, e.g.*, Mark Rossolo, *Green Globes Included in President-Elect’s Environmental Plan* (Green Bldg. Initiative, Or.), Dec. 8, 2008, http://www.thegbi.org/news/news/2008/news_20081208_obama_green-globes-environmental_plan.asp (stating that “[a]side from its inclusion in the new administration’s environmental plan, the [Green Globes] system has been officially recognized by legislation or executive order in 18 states, including Arkansas, Connecticut, Hawaii, Illinois, Kentucky, Maryland, Minnesota, North Carolina, Oklahoma, Pennsylvania, South Carolina, New Jersey, South Dakota, Tennessee, Virginia and Wisconsin.”).

⁸ *See* Frangos, *supra* note 6.

⁹ *Id.*; *see also* Chris Barneycastle, *The Sustainable Forestry Initiative of the American Forest & Paper Association*, in PROCEEDINGS OF THE SYMPOSIUM ON ARKANSAS FORESTS: A CONFERENCE ON THE RESULTS OF THE RECENT FOREST SURVEY OF ARKANSAS 110–12

An aspect about the LEED system which has raised concern in the industry is the limitation on the types of wood it certifies. Since its inception in 2000, the LEED system's certified wood credit under its Materials and Resources credit category has only recognized wood products certified by the Forest Stewardship Council ("FSC") forest certification program.¹⁰ Unlike LEED, Green Globes does not discriminate between preferred wood product rating systems; rather, it awards credits for wood products that are certified by FSC, SFI, or the Canadian Standards Association ("CSA").¹¹ Consequently, as of 2007, only twenty percent of the total amount of certified wood products in North America was certified by FSC, totaling roughly seventy-three million acres of North American forests compared to SFI, which has certified roughly 135 million acres.¹²

Many proponents of USGBC and the LEED system feel that Green Globes was founded by timber industry stakeholders who believed the smaller total amount of FSC-certified forests in North America, compared with those certified by SFI, would be detrimental to the business interests of their constituents as green building programs across the country continued to increase.¹³ They have also vilified Green Globes in the past by questioning its roots as a timber industry-funded system designed to boost green building market share for timber products that are not recognized under the LEED program.¹⁴

Forest certification programs are designed to manage logging practices in forests by ensuring that, among other things, a sufficient balance exists between old and young trees in order to preserve a healthy timber stock.¹⁵ The Germany-based FSC was founded in 1993 and was aimed specifically at tropical rainforests.¹⁶ In response to FSC's limited focus, SFI

(James M. Guldin, 1997), available at http://www.srs.fs.usda.gov/pubs/gtr/gtr_srs041/gtr_srs041--barneycastle01.pdf.

¹⁰ See McGraw-Hill Construction, *The Case for Certified Wood* (Oct. 2008), http://mcgraw-new.buildingmedia.com/article_print.php?L=6&C=453&P=4 (stating that the "FSC is currently the only certified wood system accepted by LEED. Although considered the touchstone of all certification programs with the most stringent requirements, there is growing support for the sentiment that FSC should not be the only LEED-approved system.").

¹¹ See SUSTAINABLE FORESTRY INITIATIVE, *SFI WEBINAR SERIES—GREEN BUILDING 24*, 31 (2009), <http://www.sfi-program.org/sfi-webinars/pdfs/webinar-green-building-june09.pdf>.

¹² See Tom Wright & Jim Carlton, *FSC's 'Green' Label for Wood Products Gets Growing Pains*, *WALL ST. J.*, Oct. 20, 2007, at B1, available at <http://online.wsj.com/article/SB119368082115675124.html>.

¹³ See Frangos, *supra* note 6.

¹⁴ See *id.*

¹⁵ SUSTAINABLE FORESTRY INITIATIVE, *supra* note 11, at 5.

¹⁶ Wright & Carlton, *supra* note 12; SUSTAINABLE FORESTRY INITIATIVE, *supra* note 11, at 5.

was founded in 1994 to focus on North American forests, but FSC has since spread its reach out of the tropics to forests across the globe.¹⁷ In addition to FSC and SFI, more than fifty forest certification standards exist, with the four major players in North America including FSC, the Sustainable Forestry Initiative, the Certified Family Forest, and the American Tree Farm System.¹⁸ Each system aims to ensure that forests are replenished after logging takes place, local and federal laws with respect to logging are followed, and that timber stocks are not forested or otherwise harvested illegally.¹⁹

The battle over which types of wood products qualify for certain credits under LEED is taking place in the shadows, but at stake is a significant piece of market share for North America's billion dollar timber industry. This battle is becoming more acute as an increasing number of state and local governments choose to exclusively adopt the LEED rating system into legislation and effectively exclude non-FSC-certified wood products from the marketplace.²⁰ This battle between LEED and other rating systems, thus, has given rise to the subject matter of this Article—the potential antitrust implications of adopting the LEED rating system into state and local level legislation.

The first part of this Article provided a brief introduction to USGBC's implicit acknowledgment of LEED's antitrust implications. The second part of the Article discusses USGBC's response to the criticism it has received from the LEED system's focus on FSC certification. Next, the Article provides an overview of the case law that parallels LEED's exclusive approach to qualifying certified wood products. It does not argue that such an analysis would be the only line of antitrust attack against either LEED or USGBC. It does suggest, however, a more narrow antitrust analysis for either GBI or non-FSC forest certification systems to consider based on well-settled Supreme Court case law that calls third-party standard-setting organizations such as USGBC "traditional[] . . . objects of antitrust scrutiny,"²¹ particularly when creating consensus-based environmental standards that are consequently adopted into state and local-level legislation.²²

¹⁷ See Wright & Carlton, *supra* note 12; SUSTAINABLE FORESTRY INITIATIVE, *supra* note 11, at 5.

¹⁸ SUSTAINABLE FORESTRY INITIATIVE, *supra* note 11, at 24.

¹⁹ *Id.* at 5.

²⁰ In *Allied Tube*, the Supreme Court pointed out market effect in upholding an antitrust claim against the defendants. See *infra* notes 59–63 and accompanying text.

²¹ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1987).

²² See *infra* Part IV.

It concludes by recommending that policymakers carefully review the possibility that third-party green building rating systems such as LEED may—either intentionally or unintentionally, by incorporating other third-party certification standards, whether in the context of certified wood products or other products—run afoul of the following line of case law.²³ In order to do so, it suggests that policymakers incorporate flexibility into legislation by allowing projects to choose from a menu of green building certification systems, whether LEED, Green Globes, or other location-specific programs.

I. USGBC'S RESPONSE TO INDUSTRY CONCERNS OVER LEED'S EXCLUSIVE APPROACH

As noted above, USGBC has received criticism for exclusively incorporating FSC certification within LEED.²⁴ In response to the timber industry's concerns about this approach, in 2006 USGBC asked its Technical Steering Committee to assist it in reexamining its wood credits and “propose revised credit language, if appropriate.”²⁵ The Steering Committee received input from “diverse stakeholders, and the support of experts from the Yale Program of Forest Policy and Governance and Life Cycle Assessment experts at Sylvatica. [sic]”²⁶ The Committee proposed establishing a set of criteria for evaluating wood certification systems based on governance, technical standards, accreditation and auditing, and chain of custody and labeling.²⁷ LEED would, therefore, recognize qualifying wood certification programs, while affording the non-compliant systems with the modifications necessary to receive LEED recognition.²⁸

Most instructive of USGBC's attempt to include other wood certification systems are the amendments being proposed to LEED. More specifically, the current language in Credit Number 7 under the Materials and Resources credit category, Certified Wood, states that only certified wood based materials “certified in accordance with the Forestry Stewardship

²³ See *infra* Part V.

²⁴ See Craig Webb, *USGBC Opens Door to Ending FSC's Green Wood Monopoly*, BUILDER, Aug. 11, 2008, available at <http://www.builderonline.com/green-building/usgbc-opens-door-to-ending-fscs-green-wood-monopoly.aspx>.

²⁵ McGraw-Hill Construction, *supra* note 10.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *id.*

Council's (FSC) Principles and Criteria, for wood building components" receive credit.²⁹ The proposed amendments to this section, however, would be more inclusive, certifying wood based materials that "use[d] a minimum of 50 percent (based on cost) of wood-based materials and products that are certified in accordance with a forest certification scheme that is recognized after evaluation against the USGBC Forest Certification System Benchmark, for wood building components."³⁰ The second public comment period critiquing this new language is still taking place, which should invariably bring out revisions to make the amendment language more clear.³¹ Once complete, USGBC's membership will vote on the proposed revisions to the credit, and USGBC will select consultants who will conduct an assessment of existing wood certification standards against the Committee's criteria.³² At an undetermined point in time after that, USGBC will announce which forest certification standards have satisfied the Committee's criteria and will earn points under LEED's MR Credit 7.³³ It remains unclear which, if any, forest certification systems will be recognized by USGBC, though it is likely safe to assume that FSC will conform to this new Forest Certification System Benchmark. The antitrust implications lie, however, in the possibility of LEED continuing to recognize FSC only.

It appears that USGBC's decision to revisit LEED's certified wood credits was an implicit acknowledgment of the potential for alleged antitrust violations. Moreover, controlling antitrust law suggests that a claim could be brought against USGBC or FSC. These antitrust claims would be based on LEED's exclusion of products approved by other forest certification systems from qualifying for credits under Materials and Resources Credit Number 7, Certified Wood.³⁴ USGBC's concerns may have originated from remarks made by a GBI representative in January of 2007, where concerns that "policymakers shouldn't mandate a certain [green building

²⁹ U.S. GREEN BLDG. COUNCIL, LEED 2009 FOR NEW CONSTRUCTION AND MAJOR RENOVATIONS 55 (2009), *available at* <http://www.usgbc.org/ShowFile.aspx?DocumentID=5546>.

³⁰ U.S. GREEN BLDG. COUNCIL, LEED FOR NEW CONSTRUCTION 2009, DRAFT CHANGES TO MRC7 (2009), *available at* <https://www.usgbc.org/ShowFile.aspx?DocumentID=6231>. This is the language that currently exists in MR Credit 7 across the suite of LEED rating systems.

³¹ See U.S. Green Building Council, LEED Draft Ballot and Comments, <http://www.usgbc.org/LEED/LEEDDrafts/RatingSystemVersions.aspx?CMSPageID=1458>. The second public comment period is slated to end October 14, 2009, after this article is sent to publication. *Id.*

³² SUSTAINABLE FORESTRY INITIATIVE, *supra* note 11, at 35.

³³ *Id.*

³⁴ See *infra* notes 45–46 and accompanying text.

rating] system, [but] should mandate results” were expressed.³⁵ The GBI representative’s comment was made amidst pending green building legislation in Boston, Massachusetts.³⁶ Additionally, the GBI representative commented that “there [was] clear legal precedent that prohibit[ed] the government from crafting a law to mandate one business or organization over another.”³⁷ While this remark was likely leveled directly at USGBC and LEED, the controlling case law and applicable facts suggest a slightly different—but no less problematic—posture for the purposes of this Article.³⁸ Important to understanding the applicable case law, however, is a general understanding of the mechanics of the Sherman Act, which would provide the basis for an antitrust cause of action.

II. SHERMAN ACT OVERVIEW

The Sherman Act is the federal statute that permits a cause of action in federal court for anti-competitive business practices.³⁹ In order

³⁵ *Boston Green Building Law Designed to Avoid Potential Lawsuits*, INSIDE GREEN BUS., Jan. 10, 2007. It should be noted that the same GBI representative suggested it would not pursue legal recourse presently or in the future. *Id.* Boston, however, was seeking to ease the standard so that projects only had to be certifiable instead of having to receive LEED certification. *Id.*

³⁶ *See id.*; see also Stephen Del Percio, *Back to Boston: Revisiting Beantown’s Green Building Legislation*, GBNYC, Feb. 12, 2007. <http://www.greenbuildingsnyc.com/2007/02/12/back-to-boston-revisiting-beantowns-green-building-legislation>.

³⁷ *Boston Green Building Laws Designed to Avoid Potential Lawsuit*, *supra* note 35
 . . . [s]ome observers have questioned the logic of requiring a single, private certification system for commercial use. A source with the . . . GBI . . . says the group has long-questioned the trend of mandating LEED, saying that policymakers “shouldn’t mandate a certain system, [but] should mandate results.” The GBI source says that while there is clear legal precedent that prohibits the government from crafting a law to mandate one business or organization over another, the group doesn’t plan legal action against the D.C. law or other laws now or in the future. “We don’t want to bring negative attention to the market,” the source says, noting that GBI “doesn’t disagree at the core” with laws mandating LEED, but the group “just feels it’s not the right way to go.”

³⁸ *See infra* Part III.

³⁹ Sherman Act, 15 U.S.C. §§ 1–7 (2006). The statute provides that:

[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. *Id.*

to successfully allege a Sherman violation, a plaintiff must prove anti-competitive conduct and injury resulting from that conduct.⁴⁰ Case law suggests that in order to bring a successful suit against an organization such as USGBC, a plaintiff must either demonstrate that a standard-setting organization such as the USGBC discriminated against its product in order to restrict competition,⁴¹ or that the conduct of the third-party organization was unduly restrictive.⁴² Case law also suggests that a claim could be asserted against a member of the organization, or the organization itself.⁴³ However, the lynchpin of this line of antitrust analysis is the adoption of the LEED system into state- and local-level legislation and whether it is sufficient proof of market effect.⁴⁴

At the outset, however, it is important to note that USGBC makes it clear on its website that it:

does not certify, endorse or promote products, services or companies, nor do we track, list or report data related to products and their environmental qualities. LEED is a certification system that deals with the environmental performance of buildings based on overall characteristics of the project. We do not award credits based on the use of particular products but rather upon meeting the performance standards set forth in our rating systems. It is up to project teams to determine which products are most appropriate for credit achievement and program requirements.⁴⁵

Consistent with this seeming impartiality, Materials and Resources Credit Category, Credit 4 (Recycled Content), Credit 5 (Regional Materials), and Credit 6 (Rapidly Renewable Materials) do not mandate specific types of products that will qualify; rather, they set forth percentages of recycled, regional, and renewable materials that will qualify for these credits.⁴⁶ Still,

Thus, as noted by the Supreme Court, "Congress has made illegal: 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.'" *Radiant Burners, Inc., v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961) (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 49 (1911)).

⁴⁰ 15 U.S.C. § 15 (stating that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . .").

⁴¹ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 492, 510–11 (1988).

⁴² See *Radiant Burners*, 364 U.S. at 659–60.

⁴³ See *Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572–73 (1982).

⁴⁴ See *Allied Tube*, 492 U.S. at 502–03.

⁴⁵ U.S. Green Building Council, LEED Frequently Asked Questions, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1819#Product> (last visited Aug. 29, 2009).

⁴⁶ U.S. GREEN BLDG. COUNCIL, *supra* note 30, at 52–54.

the current language under the Certified Wood section strictly favors the Forest Stewardship Council. For example, the LEED 2009 New Construction rating system's Materials and Resources Credit Category still reads, under Credit 7, that in order to earn the credit, projects must "[u]se a minimum of 50% (based on cost) of wood-based materials and products that are certified in accordance with the Forest Stewardship Council's principles and criteria, for wood building components."⁴⁷ Although project teams have the discretion to choose which wood products will be incorporated into the project in order to satisfy the MR-7 Certified Wood credit, that product must be certified under the FSC system.⁴⁸ If the product has not been certified under the FSC system, it is effectively excluded from earning credits for a project under LEED. Thus, in a jurisdiction that has adopted the LEED certification system, the product that is not certified by the FSC would effectively be excluded from the marketplace.⁴⁹ Whether this exclusive approach to conferring LEED certification amounts to antitrust violations is contingent on case law established by the Supreme Court.

III. CONTROLLING CASE LAW: ANALOGIZING USGBC'S ORGANIZATIONAL STRUCTURE TO *ALLIED TUBE*, *NOERR*, AND *RADIANT BURNERS*

First, it is important to note that the Supreme Court has held in a line of well-settled case law that "private standard-setting associations have traditionally been objects of antitrust scrutiny."⁵⁰ The USGBC, as a consequence of this principle and the composition of the organization, would be the type of association susceptible to antitrust scrutiny. Three cases, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, *E. R.R. Presidents*

⁴⁷ *Id.* at 55. *Cf.* U.S. GREEN BLDG. COUNCIL, LEED 2009 FOR CORE AND SHELL DEVELOPMENT 55 (2009), <http://www.usgbc.org/ShowFile.aspx?DocumentID=5544>; U.S. GREEN BLDG. COUNCIL, LEED 2009 FOR COMMERCIAL INTERIORS 36 (2009), <http://www.usgbc.org/ShowFile.aspx?DocumentID=5543>; U.S. GREEN BLDG. COUNCIL, LEED 2009 FOR SCHOOLS NEW CONSTRUCTION AND MAJOR RENOVATIONS 57 (2009), <http://www.usgbc.org/ShowFile.aspx?DocumentID=5547> (under LEED 2009, Certified Wood credits are worth the same point value across the New Construction, Core and Shell, Commercial Interiors, and Schools rating systems).

⁴⁸ *See* U.S. GREEN BLDG. COUNCIL, *supra* note 29, at 55.

⁴⁹ *See* U.S. GREEN BLDG. COUNCIL, GREEN BUILDING, USGBC AND LEED (2009), <http://www.usgbc.org/ShowFile.aspx?DocumentID=1991> [hereinafter GREEN BUILDING, USGBC AND LEED] (claiming that 36 states and 190 local governments have adopted the LEED certification system).

⁵⁰ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509–11 (1988).

Conference v. Noerr Motor Freight, Inc., and *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.* further illuminate the applicability of controlling case law to USGBC and, particularly its LEED system.

The seminal case in this arena is *Allied Tube & Conduit Corp. v. Indian Head, Inc.* The *Allied Tube* Court found that a member of the National Fire Protection Association violated the Sherman Act and that *Noerr* immunity did not apply.⁵¹ The plaintiff-respondent in the case was a manufacturer of plastic electrical conduit who claimed that the petitioner, a rival Association member who manufactured steel conduit, violated the Sherman Act by packing the Association's annual meeting with new members for the sole purpose of voting to exclude plastic conduit from the Association's National Electric Code.⁵² At the time, almost all of the electrical conduit sold and used across the country was made of steel.⁵³ The plaintiff claimed that its plastic conduit was more pliable, cost less to install, and was less susceptible to short-circuiting.⁵⁴ Nevertheless, the rival manufacturer recruited 230 steel-related interests to attend the Association's annual meeting and vote against the plaintiff's proposal to include plastic conduit in the Code.⁵⁵ Plaintiff's proposal was rejected and it sued the rival Association member, claiming unlawful restraint of trade under the Sherman Act.⁵⁶ The Second Circuit reversed the district court's directed verdict granting *Noerr* immunity to the steel manufacturer's actions, and the steel manufacturer appealed.⁵⁷

Upon granting certiorari, the Court called the Code "the most influential electrical code in the nation," and noted that many governments had adopted it into law by reference.⁵⁸ Further, the Court observed that "members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm."⁵⁹ A significant factor for

⁵¹ *Id.* at 495. See *infra* notes 64–69.

⁵² *Id.* at 496.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 496–97.

⁵⁶ *Allied Tube*, 486 U.S. at 497.

⁵⁷ *Id.* at 499.

⁵⁸ *Id.* at 495.

⁵⁹ *Allied Tube*, 486 U.S. at 500; see also *id.* at n5 (quoting 7 P. Areeda, *Antitrust Law* ¶ 1503, p. 373 (1986)) ("Product standardization might impair competition in several ways. . . . [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices.").

the Court in finding anticompetitive effect, however, was the “predictable adoption of the Code into law by a large number of state and local governments.”⁶⁰ This is particularly relevant for purposes of this Article because of the continued state and local adoptions of the LEED rating system.⁶¹ The Court held that the defendant could not “bias the [standard-setting] process” by “stacking the Association with decision-makers sharing the entity’s economic interest in restraining competition” and not expect antitrust liability.⁶²

In order to shield itself from antitrust liability, the defendant in *Allied Tube* sought *Noerr* immunity, which the Supreme Court rejected.⁶³ The *Noerr* doctrine, which the Supreme Court first articulated in *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*,⁶⁴ provides that a party who petitions the government for some type of redress is generally immune from antitrust liability, even if there is an improper purpose or motive behind the petition.⁶⁵ For example, in *Noerr*, the defendant railroad companies, employing a variety of deceptive and unethical measures, campaigned for legislation that they believed would destroy the nascent trucking industry.⁶⁶ Nevertheless, the Court, found that the railroad company’s actions were political and held that its conduct was immune from antitrust liability because the Sherman Act was designed to regulate “business activity” and not “political activity.”⁶⁷ Framing the discussion in this manner, the Court held that because “the right of petition is one of the freedoms protected by the Bill of Rights . . . we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”⁶⁸ Accordingly, “[w]here a restraint upon

⁶⁰ *Id.* at 502–03.

⁶¹ See GREEN BUILDING, USGBC AND LEED, *supra* note 50 (claiming that 36 states and 190 local governments have adopted the LEED certification system); see also Stephen T. Del Percio, *Legal Issues Arising out of Green Building Legislation*, ENTREPRENEUR, Fall 2008, <http://www.entrepreneur.com/tradejournals/article/192452490.html>.

⁶² *Id.* at 511.

⁶³ *Id.* at 495.

⁶⁴ *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1960).

⁶⁵ See *id.* at 139–40, 142–44.

⁶⁶ See *id.* at 129–30. The twenty-four railroads conspired by retaining a public relations firm to

. . . to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. *Id.* at 129.

⁶⁷ *Id.* at 137.

⁶⁸ *Id.* at 138.

trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint."⁶⁹

The petitioner in *Allied Tube* unsuccessfully argued for *Noerr* immunity.⁷⁰ Relying on its arguments at trial, the petitioner suggested that *Noerr* immunity applied because the Association was "akin to a legislature" and that it used "methods consistent with acceptable standards of political action, genuinely intended to influence the [Association] with respect to the National Electrical Code, and to thereby influence the various state and legislative bodies which adopt the [Code]."⁷¹ The *Allied Tube* Court, however, refused to extend such protections to the Association.⁷² The Court, acknowledging some validity in the petitioner's argument, held that although *Noerr* immunity was not limited to 'direct' petitioning of government officials, "the *Noerr* doctrine [did] not immunize every concerted effort that [was] genuinely intended to influence governmental action."⁷³ The Association thus could not "be treated as a quasi-legislative body simply because legislatures routinely adopt[ed] the Code the Association publishe[d]" because no government conferred official authority onto it and the Association was composed of "persons with economic incentives to restrain trade."⁷⁴ Therefore, the "context and nature of [the P]etitioner's efforts to influence the Code persuade[d the Court] that the validity of those efforts must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process."⁷⁵

A subsequent case to *Allied Tube*, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, suggests a slightly alternative antitrust argument.⁷⁶ In *Radiant Burners*, the lower courts dismissed an antitrust claim brought by a manufacturer of a ceramic gas burner against the American Gas Association ("AGA") and ten of its member constituents.⁷⁷ The plaintiff alleged that the AGA and Utility members "refuse[d] to provide gas for

⁶⁹ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (quoting *Noerr Motor Freight*, 365 U.S. at 136).

⁷⁰ *See id.* at 509–10.

⁷¹ *Id.* at 498–99.

⁷² *Id.* at 495, 509–10.

⁷³ *Id.* at 503.

⁷⁴ *Id.* at 501.

⁷⁵ *Allied Tube*, 486 U.S. at 509.

⁷⁶ *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

⁷⁷ *Id.* at 657.

use in the plaintiff's Radiant Burner[s]" because its burner was not approved by AGA.⁷⁸ Included in AGA's "seal of approval" process were tests "influenced by respondents, some of whom [were] in competition with petitioner, and thus its determinations [could] be made 'arbitrarily and capriciously.'"⁷⁹ To further support its position, the petitioner posited that although its Ceramic Burner was "safer and more efficient than, and just as durable as, gas burners" approved by AGA, its gas burner was not approved.⁸⁰ Therefore, AGA would not provide gas for use in the plaintiff's burner thus excluding it from the marketplace.⁸¹

The Seventh Circuit, finding plaintiff's argument unpersuasive, affirmed defendant's motion to dismiss. The court held that "[in] the absence of a *per se* violation," an injured competitor, such as the plaintiff, is afforded protection under the Sherman Act when "the public at large suffers economic harm."⁸² Furthermore, the plaintiff had failed to demonstrate public harm or fewer sales of conversion gas burners.⁸³ The Supreme Court reversed, holding that "the conspiratorial refusal 'to provide gas for use in the plaintiff's Radiant Burner[s] [because they] are not approved by AGA' . . . falls within one of the 'classes of restraints which from their 'nature or character' are unduly restrictive, and hence forbidden by'" the Sherman Act.⁸⁴ Additionally, the courts should not attempt to determine whether public harm occurred because Congress has its own criteria.⁸⁵ Lastly, any alleged conspiracy to "interfere with the natural flow of interstate commerce . . . is not to be tolerated . . . because the victim . . . is so small that his destruction makes little difference to the economy."⁸⁶

IV. DISCUSSION: APPLICATION OF *ALLIED TUBE*, *NOERR*, AND *RADIANT BURNERS* TO USGBC'S LEED RATING SYSTEM

In assessing whether the *Allied Tube* standard is potentially applicable to USGBC and its LEED rating system, thus attaching antitrust liability, it is important to consider the structure of USGBC. USGBC is

⁷⁸ *Id.* at 658.

⁷⁹ *Id.*

⁸⁰ *Id.* at 656.

⁸¹ *See id.*

⁸² *Radiant Burners*, 364 U.S. at 659 (quoting *Radiant Burners, Inc., v. Peoples Gas Light & Coke Co.*, 273 F.2d 196, 200 (7th Cir. 1960)).

⁸³ *Id.*

⁸⁴ *Id.* at 659–60.

⁸⁵ *Id.* at 660.

⁸⁶ *Id.*

composed of members who are companies having the same “horizontal and vertical business relations” as the Association in *Allied Tube*, which the Court looked at with suspicion.⁸⁷ Further, the USGBC and its constituent members participate in annual meetings, educational seminars, and actively champion the development process for the suite of LEED rating systems.⁸⁸ These facts suggest that USGBC could exert the same negative influence present in *Allied Tube* if its constituents use the educational opportunities in such a manner. Additionally, because many state and local governments incorporate the LEED rating system into legislation, this potential is exacerbated.

USGBC's Antitrust Compliance Policy also seems to implicitly acknowledge that its organizational structure subjects it to antitrust scrutiny. The Policy states that “from an antitrust standpoint, [USGBC] will be commonly referred to as a trade association. [Moreover, t]rade organizations are subject to antitrust scrutiny because they involve meetings of competitors, but they frequently engage in a number of legitimate, pro-competitive and lawful activities.”⁸⁹ Implicit in recognizing that these types of organizations engage in legitimate and procompetitive activities is an understanding that they can potentially engage in illegitimate activities designed to constrain interstate trade. The Antitrust Compliance Policy thus warns constituents that:

[i]n order to avoid allegations of illegal price signaling, there should be no communications or discussions between any USGBC members either at USGBC meetings or at any other time about (a) current or future prices, pricing plans or production plans, or (b) announcements of price changes or output changes. . . . As a general matter, each member should be extremely careful and seek legal advice before engaging in any conduct that could possibly provide evidence to support allegations of collusion.⁹⁰

⁸⁷ See U.S. GREEN BLDG. COUNCIL, *supra* note 29, at I; U.S. Green Building Council, About Membership, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1716> (last visited Sept. 15, 2009).

⁸⁸ See U.S. Green Building Council, Events Conference Calendar, <http://www.usgbc.org/Events/EventsConferenceCalendar.aspx?PageID=17948&CMSPageID=1722> (last visited Sept. 15, 2009) (for types of activities available to USGBC members); see also U.S. Green Building Council, About Committees, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1742> (last visited Sept. 15, 2009).

⁸⁹ U.S. GREEN BLDG. COUNCIL, U.S. GREEN BUILDING ANTITRUST COMPLIANCE POLICY 10 (2005), <http://www.usgbc.org/ShowFile.aspx?DocumentID>.

⁹⁰ *Id.* at 7.

The potential therefore exists that the activities in which USGBC and its constituents engage could present the same type of antitrust problems as alleged in *Allied Tube*.

However, as is suggested in *Radiant Burners*, the gross violations of the Sherman Act discussed in the *Allied Tube* case are not necessary to establish a viable antitrust claim. First, USGBC itself includes a large number of industry stakeholders who actively participate in the organization's standard-setting process.⁹¹ It is in these meetings that USGBC decides which types of woods qualify for the Certified Wood credit, which could be a capricious or unreasonable process. Thus, a manufacturer of non-FSC certified wood products, relying on *Radiant Burners*, might allege that LEED's standard-setting process is not based on objective standards, but is instead influenced by USGBC's stakeholders, whose FSC-certified wood products are in direct competition with the manufacturer.

An additional point of concern is LEED's exclusive adoption of FSC certification. Other certification systems that certify woods other than those certified by the FSC and promote similar goals could raise antitrust concerns rooted in the *Radiant Burners* logic. Both USGBC stakeholders and policymakers should thus carefully consider whether any similar certification regimes, which might raise similar antitrust questions at some point in the future, are being incorporated by reference into LEED.⁹²

USGBC and its constituents might try to avail themselves of *Noerr* immunity in the event that a party were to allege misconduct in connection with the LEED standard-setting process. Applying the *Noerr* standards discussed in *Allied Tube* suggests that the USGBC and its constituents would not enjoy *Noerr* immunity for noxious conduct during the LEED standard setting process, regardless of how pervasive the LEED rating system becomes in state- and local-level legislation.⁹³ This is because such activities would be taking place within a private standard setting process instead of the political arena.⁹⁴ Additionally, many governments are adopting the

⁹¹ U.S. GREEN BLDG. COUNCIL, *supra* note 29, at I.

⁹² U.S. GREEN BLDG. COUNCIL, FOUNDATIONS OF THE LEADERSHIP IN ENERGY AND ENVIRONMENTAL DESIGN ENVIRONMENTAL RATING SYSTEM A TOOL MARKET TRANSFORMATION 6 (2006), <http://www.usgbc.org/ShowFile.aspx?DocumentID=2039>.

⁹³ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509–10 (1988) (stating that where “an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.”).

⁹⁴ See *id.* at 506–10 (1988).

LEED rating system relying on USGBC's expertise. Thus, USGBC's suggestion on its Antitrust Compliance Policy that "[t]he antitrust laws provide no immunity for trade organization or association activities," is in accordance with established case law.⁹⁵ Naturally, however, *Noerr* immunity would apply to organizations such as USGBC if any noxious conduct was strictly aimed at influencing legislation.⁹⁶

V. CONCLUSIONS AND RECOMMENDATIONS FOR POLICYMAKERS

This Article is not suggesting that the USGBC or any of its members are engaging or have engaged in the type of conduct that was problematic for the Supreme Court in *Allied Tube*. Rather, it has presented a green building paradigm where antitrust case law may be applicable. Thus, although the foregoing antitrust analysis is theoretical, it does suggest some important practical considerations in terms of how state and local governments create green building legislation. It also underscores the point that there should be flexibility in how such legislation is implemented. The Court in *Allied Tube*, for example, specifically pointed to legislation as the basis of proof for market effect—once the Code was adopted into law by a sufficient number of state and local governments, the plaintiff manufacturer was effectively excluded from the marketplace.⁹⁷ While it may remain too early for a plaintiff to prove the market effect prong of a Sherman analysis based upon the number of state and local governments that have incorporated LEED into legislation to date,⁹⁸ it is prudent for legislation to allow for flexibility, particularly while uncertainty remains over what additional forest certification standards, if any, will be incorporated into the revised MR-7 Certified Wood credit.

USGBC's local chapters must also remain mindful of the foregoing antitrust concerns. In early 2009, the Cascadia chapter of the USGBC e-mailed its members and asked them to call state legislators to lobby for them to exclude Green Globes from state-level legislation.⁹⁹ While this

⁹⁵ *Id.*

⁹⁶ See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 142–45 (1960).

⁹⁷ See *id.* at 495–96.

⁹⁸ See U.S. GREEN BLDG. COUNCIL, GUIDANCE TO LOCAL AND STATE GOVERNMENTS 2 (2009), available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=6131>.

⁹⁹ See *LEED v. Green Globes, State Legislature Dukes It Out*, SEATTLE DAILY J. OF COMMERCE, Feb. 19, 2009, <http://www.djc.com/blogs/BuildingGreen/2009/02/19/leed-vs-green-globes-state-legislature-dukes-it-out>. The email stated that “Green Globes was created by the timber and chemical lobbies as a much weaker alternative to LEED,” and

might be the type of political activity protected under *Noerr*, it should sound alarm bells for the type of conduct that “does not take place in the open political arena, where partisanship is the hallmark of decision-making and, but within the confines of a private standard-setting process.”¹⁰⁰

Finally, state and local governments should consider green building legislation that would not exclude other types of rating systems, such as Green Globes or other types of location-specific programs. For example, both Boston, Massachusetts and Dallas, Texas allow projects to satisfy applicable legislation through being deemed “LEED Certifiable” or compliant with the Green Built North Texas standard, respectively.¹⁰¹ As green building legislation continues to proliferate, it will be interesting to observe whether any of the theoretical antitrust concerns raised in this Article mature into a more concrete body of green building law that rests on the underpinnings of *Allied Tube*, *Radiant Burners*, or *Noerr*.

claimed that the Green Globes system is “untested, funded by industry and requires no third party verification.” *Id.*

¹⁰⁰ *Allied Tube*, 486 U.S. at 506.

¹⁰¹ *Green is the New Building Standard in Dallas*, ENVTL. NEWSWIRE SERV., Apr. 15, 2008, <http://www.ens-newswire.com/ens/apr2008/2008-04-15-092.asp>.

