

CREATING STATE INCENTIVES FOR COMMERCIAL GREEN BUILDINGS: DID THE NEVADA EXPERIENCE SET AN EXAMPLE OR ALTER THE APPROACH OF OTHER JURISDICTIONS?

DARREN A. PRUM*

INTRODUCTION

Can a state tax incentive with noble intentions become too lucrative to those receiving it and cause an unintended fiscal crisis upon the government? In Nevada, this situation became a reality when the 2005 state legislature decided to offer green building incentives for commercial structures through an incentive program that included property tax abatements and a sales tax reduction.¹ Two years later in the next regular session of the Nevada legislature, the governor, assembly, and senate faced a major financial crisis because the original legislation did not receive a thorough financial impact analysis and left too much to the state's agencies to interpret.²

* Visiting Lecturer in Business Law and Finance, University of Nevada, Las Vegas. Juris Doctor (JD), May 2002, William S. Boyd School of Law, University of Nevada, Las Vegas; Master of Business Administration (MBA), December 1997, College of Business and Economics, University of Nevada, Las Vegas; Intensive Accounting Principles and Practices (Graduate Certificate), August 1992, School of Business Administration, School of Accounting, University of Southern California—Los Angeles, CA; Bachelor of Science (Business Administration), March 1992, College of Humanities and Social Sciences, University of California—Riverside, CA.

¹ *Nevada Law Promotes Green Building, Alters RE Mandate*, RENEWABLEENERGYWORLD.COM, June 30, 2005, <http://www.renewableenergyworld.com/real/news/article/2005/06/nevada-law-promotes-green-building-alters-re-mandate-33952>.

² See Geoff Dornan, *Senate Puts 'Green' Building Tax Breaks on Hold*, NEV. APPEAL, May 3, 2007, <http://www.nevadaappeal.com/article/20070503/ELECTIONS/105030099> (discussing the Nevada Senate's passage of an emergency measure to halt tax breaks on green building projects). George Knapp, Editorial, *Where Real Tax Breaks Happen*, LAS VEGAS CITYLIFE, May 10, 2007, http://www.lasvegascitylife.com/articles/2007/05/10/opinion/knappster/iq_14252459.txt. Nevada's Legislature is part-time, meeting only in odd-numbered years and for 120-day sessions. Nevada Legislature, Facts about the Nevada Legislature, http://www.leg.state.nv.us/General/General_Short.cfm (last visited Sept. 20, 2009). Otherwise, the governor must summon the legislature into a special session. *Id.* For a discussion of the influence of agency interpretations, see *infra* notes 53–68 and accompanying text.

While Nevada did not pioneer the use of tax incentives to entice commercial developers into turning their projects green,³ the state did become the first jurisdiction without a state income tax to provide abatements through other revenue sources.⁴ In the following two years after Nevada began its program, more than ninety-seven different jurisdictions, including states, cities, and counties, developed and implemented LEED-based⁵ tax incentives to create green building initiatives.⁶ Some individuals later testified before the Nevada legislature that other jurisdictions based their approaches on a more limited version of the Nevada model.⁷

Other states, like New York, Oregon, and Maryland, preceded Nevada by passing their own legislation to allow credits against income tax already owed the state.⁸ Taking these different programs into account,

³ CRAIG KNEELAND, N.Y. ST. ENERGY RES. & DEV. AUTHORITY, NEW YORK STATE'S GREEN BUILDING TAX CREDIT 1, available at http://www.epa.gov/RDEE/documents/stateforum/04_20_06/4_20_06_Austin_GBTC_paper_Kneeland.pdf (last visited Sept. 20, 2009) (noting that New York was the first state to pass legislation authorizing a green building tax credit); see generally Stephen T. Del Percio, *The Skyscraper, Green Design, & the LEED Green Building Rating System: The Creation of Uniform Sustainable Standards for the 21st Century or the Perpetuation of an Architectural Fiction?*, 28 ENVIRONS ENVTL. L. & POL'Y J. 117 (2004) (discussing the LEED building standard and state and local programs of incentives for green building); Nancy J. King & Brian J. King, *Creating Incentives for Sustainable Buildings: A Comparative Law Approach Featuring the United States and The European Union*, 23 VA. ENVTL. L.J. 397 (2005) (discussing developer incentives and motivations in green building design and construction).

⁴ J. Mijin Cha, *Green Building: Energy Conservation from the Ground Up*, PROGRESSIVE STATES NETWORK, Apr. 9, 2007, <http://progressivestates.org/content/593/green-building-energy-conservation-from-the-ground-up>; Internal Revenue Service, *States Without a State Income Tax*, <http://www.irs.gov/efile/article/0,,id=130684,00.html> (last visited Aug. 30, 2009); A. Ridgeway Miller, *Tax Incentives Aren't the Only Value to Going Green*, AREA DEV. ONLINE, <http://www.areadevelopment.com/AssetManagement/oct08/green-construction-tax-credits-incentives.shtml> (last visited Sept. 30, 2009).

⁵ The private, nonprofit U.S. Green Building Council ("USGBC") developed its LEED (Leadership in Energy and Environmental Design) standards in 1998, which have become widely recognized guidelines for sustainable design in the United States. See Charles J. Kibert, *Policy Instruments for a Sustainable Built Environment*, 17 J. LAND USE & ENVTL. L. 379, 384 (2002). The program places buildings into four categories based on their performance with respect to energy and environmental issues. *Id.*

⁶ *Minutes of Assemb. Comm. on Commerce & Labor: Hearing on A.B. 621 Before the Assemb. Comm. on Commerce & Labor*, 2007 Leg., 74th Sess. 10 (Nev. 2007) [hereinafter *Minutes of Assemb. Comm. on Commerce & Labor of May 22*] (statement of Pamela Vilkin, President, Las Vegas Regional Chapter, United States Green Building Council).

⁷ See *id.* ("They looked to Nevada, made some changes, and capped their number.")

⁸ Mark J. Bennett, J. Cullen Howe & James L. Newman, *Green Buildings and Sustainable Development*, CURRENT CRITICAL ISSUES IN ENVTL. L., June 2008, at 36.

still other states, like New Mexico, Virginia, and Hawaii, enacted their own versions.⁹ Virginia followed the Nevada model by allowing property tax abatements at a local level;¹⁰ New Mexico used the income tax credit approach;¹¹ and Hawaii tried a new method by offering a green building priority processing during governmental reviews for project approvals,¹² which should not impact the state's revenue stream at all.

With these different systems in mind, the first part of this article traces Nevada's experience encouraging commercial developers to embrace green building through tax incentives. It begins by explaining how the good intentions of the legislators were undermined by a lack of direction or limitations placed on the state agencies, coupled with an overly generous program that did not consider the government's revenue sources or the potential aftermath. Then, it examines the emergency efforts by the legislature to protect the state and local governments' revenue streams, balancing protection with the desire to continue incentivizing green commercial building within Nevada. Finally, this part provides an explanation of the current program of incentives for those wishing to build green in Nevada and the methods used for their implementation.

The second part of this article looks to the examples that have been set by other states in stimulating green building. It evaluates the approaches that have been taken by Virginia, New York, Oregon, Maryland, New Mexico, and Hawaii to encourage green commercial building while limiting each state's fiscal risk.

The last part of this article considers a proposal for how Nevada could spur commercial development of green buildings, given the state's limitation of having no income tax from which to derive revenue.

I. THE NEVADA EXPERIENCE

On June 17, 2005, Governor Kenny Guinn signed Assembly Bill 3 into law, which made Nevada the premier jurisdiction in the country for the promotion of green buildings.¹³ The new law promoted green building for both public and private projects.¹⁴ Nevada followed Washington in

⁹ See *infra* notes 11–13 and accompanying text.

¹⁰ 2008 Va. Acts 431 (codified as amended at VA. CODE ANN. § 58.1-3221.2 (2009)).

¹¹ 2007 N.M. Laws 2714 (codified as amended at N.M. STAT. § 7-2A-19 (2007)).

¹² 2006 Haw. Sess. Laws 269 (codified as amended at HAW. REV. STAT. § 196-1.5 (2006)).

¹³ Ryan Slattery, *Going Green*, LAS VEGAS CITYLIFE, June 30, 2005, http://www.lasvegascitylife.com/articles/2005/06/30/local_news/news03.txt.

¹⁴ See A.B. 3, 2005 Leg., 22d Spec. Sess. (Nev. 2005) (enacted at 2005 22d Spec. Sess.).

becoming the second state to require governmental buildings to meet green standards.¹⁵ Furthermore, Nevada's model was filled with various tax incentives to help developers of nonpublic structures during construction and afterwards, so long as they met the state's green building standard.¹⁶ Proponents of the green building movement celebrated this monumental legislation, recognizing that many developers did not follow a green path but could now strongly consider the option because of the government's assistance.¹⁷

On the receiving end of the assistance, however, some developers of extremely large projects calculated that they could receive one to three dollars in tax rebates for each dollar spent meeting the LEED standard.¹⁸ Others interpreted the law to also include sales tax breaks on construction equipment.¹⁹ Even the ire of anti-smoking advocates became an issue when the state regulations interpreting the original act created an exception to the non-smoking requirement contained in the LEED standards.²⁰ Many developers, especially casino operators who noticed the smoking exception, quickly calculated the benefits and fast tracked their projects to rapidly qualify for all of the state incentives before the legislature reconvened in 2007 to correct these and other lingering issues.²¹

A. *The Genesis of the Nevada Approach*

The idea that Nevada could lead the nation by providing incentives to developers in the form of generous tax breaks originated with Assemblywoman Chris Giunchigliani and Senator Randolph Townsend.²² In a

Nev. Stat. 68).

¹⁵ Slattery, *supra* note 13.

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ Joe Schoenmann, *Lobbyists Fended Off on 'Green' Tax Breaks*, LAS VEGAS SUN, July 28, 2007, at 1.

¹⁹ *See* Sean Whaley, *Tax Break Further Narrowed: Only Buildings to Be Included in Windfall*, LAS VEGAS REV. J., July 25, 2007, <http://www.lvrj.com/news/8698227.html> [hereinafter Whaley, *Tax Break*].

²⁰ Sean Whaley, *Smoking Foes Questioning Tax Breaks*, LAS VEGAS REV. J., July 21, 2007, <http://www.lvrj.com/news/8639442.html> [hereinafter Whaley, *Smoking Foes*].

²¹ *See All Things Considered: Vegas' Green 'Flash' Could Cost Nevada Millions* (NPR radio broadcast July 10, 2007), transcript available at <http://www.npr.org/templates/story/story.php?storyId=11854239> (follow "Listen" hyperlink) [hereinafter NPR]; Whaley, *Smoking Foes*, *supra* note 20.

²² *See* Slattery, *supra* note 13.

prior legislative session, Senator Townsend played a prominent role in passing a law mandating that public utilities in Nevada obtain a larger portion of their energy supplies from renewable sources.²³ Meanwhile, Assemblywoman Giunchigliani sponsored Assembly Bill 3's predecessor, Assembly Bill 385,²⁴ during the regular session of the 2005 Legislature "to set the standard for environmental building and construction, as has been done in several other states."²⁵ In passing Assembly Bill 3, she worked arduously for several days with numerous stakeholders to develop a cohesive bill that all parties could support.²⁶

Perhaps naïvely, Assemblywoman Giunchigliani estimated the incentives would cost the state only \$250,000.²⁷ In a similar manner, the State Public Works Board estimated a maximum cost of only \$20 million,²⁸ and the University and Community College System predicted an impact of just \$4.7 million.²⁹ Some government agencies submitted reports that did not anticipate any fiscal impact at all.³⁰

During the testimony presented to the Assembly Committee on Government Affairs regarding Assembly Bill 385, numerous individuals,

²³ *Id.*

²⁴ A.B. 385, 2005 Leg., 73d Sess. (Nev. 2005).

²⁵ *Minutes of S. Comm. on Commerce & Labor for May 31, 2005: Hearing on A.B. 385 Before S. Comm. on Commerce & Labor, 2005 Leg., 73d Sess. 2 (Nev. 2005)* [hereinafter *Minutes of S. Comm. on Commerce & Labor for May 31*] (statement of Assemblywoman Chris Giunchigliani, Assembly District 9).

²⁶ Jane Ann Morrison, 'Green' Construction Bill Put Local Government Tax Collections in the Red, *LAS VEGAS REV. J.*, Oct. 13, 2007, <http://www.lvrj.com/news/10521332.html>. Nevada's Legislature only meets for 120 days, and only during odd numbered years. Facts about the Nevada Legislature, *supra* note 2.

²⁷ Erin Neff, Editorial, *Carson City's Own Green Monster*, *LAS VEGAS REV. J.*, May 20, 2007, <http://www.lvrj.com/opinion/7598327.html>.

²⁸ State Public Works Board, Executive Agency Fiscal Note on A.B. 385, 2005 Leg., 73d Sess. (Nev. 2005), *available at* <http://www.leg.state.nv.us/73rd/FiscalNotes/3692.pdf>.

²⁹ University and Community College System of Nevada, Executive Agency Fiscal Note on A.B. 385, 2005 Leg., 73d Sess. (Nev. 2005), *available at* <http://www.leg.state.nv.us/73rd/FiscalNotes/3659.pdf>.

³⁰ *See, e.g.*, Economic Development, Executive Agency Fiscal Note on A.B. 385, 2005 Leg., 73d Sess. (Nev. 2005), *available at* <http://www.leg.state.nv.us/73rd/FiscalNotes/3658.pdf>; Nevada Housing Division, Executive Agency Fiscal Note on A.B. 385, 2005 Leg., 73d Sess. (2005), *available at* <http://www.leg.state.nv.us/73rd/FiscalNotes/3691.pdf>; Public Utilities Commission, Executive Agency Fiscal Note on A.B. 385, 2005 Leg., 73d Sess. (Nev. 2005), *available at* <http://www.leg.state.nv.us/73rd/FiscalNotes/3660.pdf>. The Nevada Local Government agency also submitted a Fiscal Note, but projected impact varied greatly according to local jurisdiction. Local Government Fiscal Note on A.B. 385, 2005 Leg., 73d Sess. (Nev. 2005), *available at* <http://www.leg.state.nv.us/73rd/FiscalNotes/5245.pdf>.

organizations, and governmental entities voiced their general support.³¹ Meanwhile, the Clark County School District voiced concern by noting the fiscal issues and costs associated with achieving LEED standards on rehabilitation work, but it felt the issue could be resolved through amendments during the remaining portion of the legislative process.³²

Hearings in the Senate Committee on Commerce and Labor reiterated the uniform support for the bill.³³ The State Public Works Board voiced concern that publicly funded projects would have difficulty achieving Silver LEED Status on new construction but, like the Clark County School District, trusted that amendments could resolve their issues.³⁴ Supporting Assembly Bill 385, MGM Mirage representative Jon B. Wellinghoff stated that MGM Mirage was interested in incorporating LEED standards into the design and construction aspects of its upcoming twenty-seven million square foot project, but made no mention of just how beneficial the tax benefits would be for his client.³⁵ Foreshadowing events to come, however, Senator Townsend pointed out his discomfort with entrusting the executive branch of government to fill in major policy issues through the regulatory process.³⁶

Ultimately, Assembly Bill 385 passed each chamber of the legislature with different amendments added to the base legislation, so it was sent to a committee to resolve the differences.³⁷ Assembly Bill 385, however, expired when the Senate and Assembly versions could not reconcile their differences prior to the end of the 120-day legislative session in June 2005.³⁸ But like a phoenix, Assembly Bill 385 arose anew as Assembly Bill 3 when the legislature was called into a special session immediately after the conclusion of the seventy-third session in June 2005, and it

³¹ See *Minutes of Assemb. Comm. on Gov't Affairs for April 4, 2005: Hearing on A.B. 385 before Assemb. Comm. on Gov't Affairs*, 2005 Leg., 73d Sess. 21–34 (Nev. 2005) [hereinafter *Minutes of Assemb. Comm. on Gov't Affairs for April 4*].

³² *Id.* at 33–34 (statement of J.P. Gerner, Assistant Superintendent, Facilities Division, Clark County School District, Las Vegas, Nevada).

³³ See *Minutes of S. Comm. on Commerce & Labor for May 31*, *supra* note 25, at 1–9.

³⁴ *Id.* at 4–5 (statement of Ivan R. Ashleman, Vice Chairman, State Public Works Board).

³⁵ *Id.* at 7–8 (statement of John B. Wellinghoff, MGM Mirage).

³⁶ See *Minutes of S. Comm. on Commerce & Labor for June 1, 2005: Hearing on A.B. 385 Before S. Comm. on Commerce & Labor*, 2005 Leg., 73d Sess. 20–22 (Nev. 2005) [hereinafter *Minutes of S. Comm. on Commerce & Labor for June 1*] (statement of Senator Randolph Townsend, Chair).

³⁷ A.B. 385, 2005 Leg., 73d Sess. (Nev. 2005), available at <http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=2028> (last visited Sept. 21, 2009).

³⁸ *Id.*

passed unanimously with almost no discussion.³⁹ It received bipartisan support amidst a national global warming scare, with elected officials eager to show their environmentally friendly sides to constituents.⁴⁰

The groundbreaking legislation required that state-funded programs meet basic LEED criteria.⁴¹ More specifically, each year a minimum of two public buildings that are occupied and financed with state construction monies were required to reach a LEED Silver certification level or higher every two years.⁴² This action made Nevada the second state in the nation, after Washington, to require projects using state funds to adhere to green building standards.⁴³

The new law also provided private developers a huge financial incentive to follow green building practices.⁴⁴ To receive the tax breaks, a project needed to meet or exceed the LEED Silver rating.⁴⁵ The tax breaks began with reducing the sales taxes levied on all materials and fittings used in constructing green buildings.⁴⁶ After completion of construction, the legislation provided a property tax break on the project of up to fifty percent for a ten-year period to the owners of the building.⁴⁷ When asked how such a large percentage was chosen, Assemblywoman Giunchigliani explained that she was looking for a middle ground and felt that one hundred percent gave too much away.⁴⁸ Elated about this breakthrough legislation, some proponents of green building praised this approach as “all or nothing” and as setting an example for other jurisdictions to follow.⁴⁹

B. When the Legislation Turned Sour

With a rudimentary framework set to place Nevada at the forefront of the green building movement, the regulation phase turned to the Nevada Tax Commission and the Office of Energy for implementation.⁵⁰

³⁹ See NPR, *supra* note 21; Morrison, *supra* note 26.

⁴⁰ See Morrison, *supra* note 26.

⁴¹ 2005 22d Spec. Sess. Nev. Stat. 68, 69.

⁴² *Id.*

⁴³ Slattery, *supra* note 13.

⁴⁴ See Schoenmann, *supra* note 18.

⁴⁵ 2005 22d Spec. Sess. Nev. Stat. 68, 71.

⁴⁶ *Id.*

⁴⁷ Slattery, *supra* note 13.

⁴⁸ See NPR, *supra* note 21.

⁴⁹ Slattery, *supra* note 13.

⁵⁰ See *infra* notes 53–68 and accompanying text.

The original legislation only allowed the generous tax benefits for private projects that broke ground on or before December 31, 2005.⁵¹ Due to the lack of specifics contained in the legislation, however, each agency received great latitude in determining their regulations.⁵²

On December 23, 2005, the Nevada Tax Commission began a process that extended the life of the act despite the specific date for the benefits to end.⁵³ It issued a letter that qualified projects before breaking ground so long as a contract for their future construction existed before the December 31, 2005 deadline.⁵⁴ This changed the requirements from actually breaking ground on a project to a standard far less. Then, in July 2006, the Tax Commission widened the benefit further, to include any project in existence prior to the sunset clause.⁵⁵

In parallel, the Office of Energy issued its own regulations defining the qualifications of a green building so the Tax Commission would know who qualified.⁵⁶ The Director of the Office of Energy adopted the U.S. Green Building Council's LEED program as the standard for non-public buildings.⁵⁷ Specifically, the regulation allowed: Version 2 for existing buildings ("EB"), operations, and maintenance; and Version 2.1 and 2.2 for any new construction ("NC").⁵⁸ Moreover, it created a mechanism that automatically updated the state's version to the current one adopted by the U.S. Green Building Council, as long as the Director did not determine otherwise.⁵⁹

The Office of Energy regulations required each project seeking the tax abatements to register the project prior to construction.⁶⁰ The registration required customary items of information concerning the applicant and the project.⁶¹ It also required documentation of registration with the

⁵¹ 2005 22d Spec. Sess. Nev. Stat. 68, 87.

⁵² See Dan Musgrove, *Encouraging Sustainable Development*, N. NEV. BUS. WKLY., May 19, 2008, <http://www.nnbw.biz/ArticleRead.aspx?storyID=11110>.

⁵³ Letter from Charles E. Chinnock, Executive Director of the Nevada Department of Taxation, to Construction Contractors and Real Estate Developers (Dec. 23, 2005), *available at* http://tax.state.nv.us/documents/AB_3.pdf.

⁵⁴ *Id.*

⁵⁵ See Neff, *supra* note 27.

⁵⁶ See Nev. Office of Energy, Adopted Regulation R025-06 (June 28, 2006), *available at* <http://www.leg.state.nv.us/register/2006Register/R025-06A.pdf>.

⁵⁷ *Id.* § 8.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* § 10.

⁶¹ *Id.*

U.S. Green Building Council, the names of LEED-accredited individuals assigned to the design team, the applicable LEED standard, and the level and points expected to be achieved for the LEED certification as a whole.⁶² Once a project achieved LEED certification, the applicant needed to notify the Director of the Office of Energy in order to receive a Letter of Verification.⁶³ This Letter was to be forwarded to the proper agencies for implementation and tax abatements.⁶⁴

In 2007, an advisor on energy matters to the newly elected governor changed the regulatory system to allow the Office of Energy to utilize a one-size-fits-all approach, whereby credits for one building in a larger development could be utilized by others included in the same project.⁶⁵ The Office of Energy's decision to qualify entire developments gave gaming developers the ability to allow smoking in the casino buildings while receiving tax incentives for LEED compliance, despite violating one of the primary tenets of green building.⁶⁶ One of the five key areas of the LEED program is "Indoor Air Quality," which focuses on the health effects of poor air quality and discourages tobacco smoke.⁶⁷ This situation resulted in an amendment to the Office of Energy's regulations that excepted to any building that would otherwise qualify for LEED certification but for its failure to control environmental tobacco smoke.⁶⁸

The pre-amendment interpretation of Assembly Bill 3 opened an opportunity for major hotel-casinos in Clark County to reap significant financial rewards at the taxpayers' expense while keeping their business models intact.

⁶² R025-06 § 10.

⁶³ *Id.* § 11.

⁶⁴ *Id.*

⁶⁵ See Neff, *supra* note 27 ("[T]he commission apparently decided to honor any project on the drawing board.")

⁶⁶ *Id.* The LEED program "seeks to maximize energy efficiency, minimize resource use and waste production, reduce or eliminate toxic materials in building components, and reduce the overall impact of the building on the environment." Christopher P. Perzan, *Environmental Protection: What You Should Know About Green Building*, CBA REC., Nov. 2006, at 39. The program seeks to accomplish this goal through the following five key areas: Site Selection, Water Efficiency, Energy and Atmosphere, Waste and Material Use Reduction, and Indoor Environmental Air Quality. *Id.* at 39–41.

⁶⁷ Perzan, *supra* note 66, at 40–41. The LEED standard specifically addresses ventilation and air-flow along with contaminant sources within the building like tobacco smoke control and occupant-controllable thermal comfort. *Id.*

⁶⁸ Nev. Office of Energy, Adopted Regulation R170-06 § 1(6) (Mar. 23, 2007).

C. *The Aftermath*

As the 2007 Nevada Legislature convened, the effects of Assembly Bill 3 became extremely pronounced. The number of LEED registered projects in the state of Nevada leaped from fourteen prior to the law's passage to ninety-two in July of 2007.⁶⁹ When state economists began to forecast the next biennium budget, they soon realized that the Assembly Bill 3 incentives, as implemented by the administrative agencies, were too lucrative and were causing serious detriment to state and local governments' revenue streams.⁷⁰

Just basing the estimate on seven projects that were expected to achieve the green building requirements, the state of Nevada was expected to lose approximately \$940 million in revenue over the next ten to fifteen years.⁷¹ Clark County, home to Las Vegas, alone predicted losses up to \$50 million per year in revenue, which is nearly ten percent of its tax base, due to the state's generosity.⁷² Furthermore, the Clark County School District feared losses between \$700 million to \$900 million in revenue over the next ten years, and those losses would require additional monies from the state's general fund to cover any shortfall.⁷³ In Clark County alone, MGM Mirage, through its \$8 billion development of the CityCenter project (currently the largest private development project in the United States),⁷⁴ already had applied and received \$80 million in tax credits and was expected to receive another \$900 million in sales and property tax savings over the extended period.⁷⁵ A spokesman for MGM Mirage explained that his company would take advantage of opportunities to reduce its construction costs.⁷⁶

With these dire predictions for state and local coffers, the 2007 Nevada Legislature tackled the financial and social problems created by

⁶⁹ NPR, *supra* note 21.

⁷⁰ See Musgrove, *supra* note 52.

⁷¹ *Id.*

⁷² NPR, *supra* note 21.

⁷³ Sean Whaley & Ed Vogel, *Governor Considers Vetoing 'Green' Tax Break Suspension*, LAS VEGAS REV. J., May 4, 2007, <http://www.lvrj.com/news/7331366.html>. The Nevada Constitution guarantees funding for the state's public schools. NEV. CONST. art. XI § 3.

⁷⁴ Condo Hotel Center, Vdara and MGM Mirage CityCenter, <http://www.condohotelcenter.com/condo-hotels/featured-properties/mgm-city-center.htm> (last visited Sep. 11, 2009).

⁷⁵ Neff, *supra* note 27.

⁷⁶ See NPR, *supra* note 21.

Assembly Bill 3 by quickly trying to place a temporary suspension of the tax breaks.⁷⁷ A plethora of issues, however, made this more difficult than first imagined. As pointed out by Assemblyman James Settelmeyer, the doctrine of “detrimental reference” could grant relief to those project owners who had already qualified for and applied for the tax incentives under Assembly Bill 3.⁷⁸ The Speaker of the Assembly, Barbara Buckley, acknowledged that some financial losses would occur, but explained that the legislature could take swift action before the state lost even more revenue to projects about to apply for the tax abatements.⁷⁹

In a bizarre twist of events, Governor Jim Gibbons vetoed the bill approved by both chambers as a stopgap measure and issued an executive order suspending the sales and property tax breaks on all future projects, with the exception of the four already approved by the Tax Commission.⁸⁰ He explained his veto on the grounds that the state might have subjected itself to lawsuits by the already approved projects and that the legislature did not fully explore the ramifications of its latest action, so his approach made the most sense.⁸¹

In response to the Governor’s actions, the legality of the Executive Order became an issue, too. The legal counsel for the legislature concluded that the Governor overstepped his constitutional authority, which made his order unenforceable and invalid.⁸² The Governor countered that he determined his course of action based on a letter opinion from the Attorney General, discussions with outside attorneys, and research of his own.⁸³ He furthermore pointed out that “a rush by the Legislature to correct a rush by the Legislature in a special session in 2005” needed further analysis

⁷⁷ S.B. 567, 2007 Leg., 74th Sess. (Nev. 2007), available at http://www.leg.state.nv.us/74th/Bills/SB/SB567_EN.pdf.

⁷⁸ See Whaley & Vogel, *supra* note 73.

⁷⁹ *Id.*

⁸⁰ Sean Whaley & Ed Vogel, *Executive Order Issued: Gibbons Delivers First Veto*, LAS VEGAS REV. J., May 15, 2007, <http://www.lvrj.com/news/7509692.html>. These projects were the CityCenter project being built by MGM/Mirage, Fontainebleau, the Venetian’s Lido/Palazzo Resort projects, and a service center for the Patagonia Company in Reno. *Id.*

⁸¹ *Id.*

⁸² Brendan Riley, *Gibbons Defends Executive Order Amid Finger-Pointing*, KOLOTV.COM, May 16, 2007, <http://www.kolotv.com/news/headlines/7542552.html> [hereinafter Riley, *Gibbons Defends Executive Order*].

⁸³ Brendan Riley, *Nevada Lawmakers Question Governor’s Executive Order*, ELKO DAILY FREEPRESS, May 15, 2007, available at http://www.elkodaily.com/articles/2007/05/15/news/breaking_news/breaking2.txt [hereinafter Riley, *Nevada Lawmakers Question*].

by the Attorney General's office due to the tax implications and potential lawsuits.⁸⁴

D. The Solution

In order to avoid a constitutional crisis and a prolonged battle with the Governor, legislators drafted new legislation to create a permanent solution. On May 21, 2007, Assembly Bill 621 was introduced as the next solution to the financial crisis created by Assembly Bill 3.⁸⁵ This time lawmakers promised to reexamine everything, debate the issues, and hold hearings.⁸⁶

The solution called again for the Director of the Office of Energy to adopt a green building rating system for use in Nevada.⁸⁷ It also lowered the property tax breaks and eliminated the sales tax reductions contained in Assembly Bill 3.⁸⁸ The new rates created a tiered system of abatements whereby a Silver level received a twenty-five percent reduction, a Gold level received a thirty percent reduction, and a Platinum level received a thirty-five percent reduction.⁸⁹ Moreover, the duration of the property tax abatement could not exceed ten years and did not apply to those taxes levied specifically for public education.⁹⁰ In addition, to eliminate the discrepancy between the LEED standard on indoor air quality and Office of Energy's decision to grant exceptions for smoking, the law included a provision requiring conformance with LEED standards and ratings with the exception of energy conservation where specific tiers were outlined.⁹¹

The bill also allowed developers that received a letter from the Department of Taxation before February 1, 2007, stating that the project

⁸⁴ *Id.*

⁸⁵ See A.B. 621, 2007 Leg., 74th Sess. (Nev. 2007), available at http://www.leg.state.nv.us/74th/Bills/AB/AB621_EN.pdf.

⁸⁶ Riley, *Nevada Lawmakers Question*, *supra* note 83.

⁸⁷ Nev. A.B. 621 § 2.

⁸⁸ *Id.* §§ 6, 16. Members of the Assembly discussed the possibility of bring the tax breaks to significantly lower rates, like from 2 to 8 percent. Joe Mullin, *Panel Oks Slicing Tax Break*, LAS VEGAS REV. J., May 30, 2007, <http://www.lvrj.com/news/7742327.html>. Opponents of the twenty-five to thirty-five percent breaks, however, argued those levels still give too much away to businesses. *Id.*

⁸⁹ Nev. A.B. 621 § 3.

⁹⁰ *Id.*

⁹¹ See *id.* §§ 3, 4.

qualified under Assembly Bill 3, to receive the full benefit of the 2005 legislation.⁹² In reality, this allowed six projects to continue with the tax benefits as promised, but it also left some noteworthy others on the outside.⁹³ Most notably, Wynn Resorts objected that it stood to pay \$30 million more to build its Encore project and would reconsider its green initiatives if the cut-off date became effective.⁹⁴ In response, legislators pointed out that the date was not set to play favorites; rather, the legislature needed to move forward with good policy decisions.⁹⁵

In order to fully remedy the situation and avoid future issues like those of Assembly Bill 3, the bill required the Department of Taxation and the Chief of the Budget Division to publish fiscal reports for each project applying to receive approval as a green building.⁹⁶ These reports needed to contain the effects of the green building tax breaks in relation to the state and local governments.⁹⁷

On June 15, 2007, Governor Jim Gibbons brought stability back to the state and local governments' revenue streams by signing Assembly Bill 621 into law.⁹⁸ The new legislation reduced the estimated tax effect on Nevada governments to about \$493 million in lost property and sales taxes, based on the agreements already in place with applicants by December 2005.⁹⁹

E. The Second Implementation by Nevada's Agencies

Learning from the debacle in the prior two years, many legislators understood the need to require precise regulations that followed legislative intent during implementation of Assembly Bill 621.¹⁰⁰ Interestingly, the

⁹² *Id.* § 15.

⁹³ Whaley, *Smoking Foes*, *supra* note 20. The six projects that are grandfathered include "the CityCenter project being built by MGM/Mirage; Fontainebleau; the Venetian's Lido/Palazzo Resort projects; the Molasky Corporate Center; the Echelon Place project by Boyd Gaming; and the Panorama Towers project. All are in Las Vegas." *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Nev. A.B. 621, at 3–4.

⁹⁷ *Id.*

⁹⁸ 2007 Nev. Stat. 3374.

⁹⁹ Joe Mullin, *Panel OKs Slicing Tax Break: Measure Would Cut Advantages Approved in 2005 for 'Green' Projects*, LAS VEGAS REV. J., May 30, 2007, <http://www.lvrj.com/news/7742327>.

¹⁰⁰ Musgrove, *supra* note 52.

Legislative Commission received broader authority from the 2007 Nevada Legislature to oversee regulations created by administrative agencies.¹⁰¹ Ironically, the first law to proceed through the more exhaustive and rigorous review was Assembly Bill 621.¹⁰² This time around, the Legislative Commission met routinely with the directors of the Department of Taxation and the Office of Energy to avoid the mistakes of the past.¹⁰³

Disagreements continued regarding the regulations pertaining to the applicants covered under Assembly Bill 3.¹⁰⁴ The Office of Energy held hearings to receive public comment.¹⁰⁵ Again, anti-smoking representatives, conservationists, and others noted the special tax treatment given to some of Nevada's largest and most profitable casinos that do not conform to the true LEED standards.¹⁰⁶ To assuage concerns from the non-smoking groups, the Director of the Office of Energy pledged to allow no exceptions to the LEED requirements going forward but made no promises for those already permitted.¹⁰⁷

Similarly, the Department of Taxation held hearings to determine which construction items received the two percent sales tax treatment for the grandfathered projects.¹⁰⁸ The concerns centered on whether construction equipment used on a green building would receive the lower rate and whether items such as doors and ceiling tiles would be considered removable items that could be excluded as well.¹⁰⁹ Representatives from the Las Vegas Sands Corporation pointed out that very little is not separable from a building.¹¹⁰ The Executive Director of the Tax Department responded that his agency took the position that items like doors would be considered integral to a building.¹¹¹ In the end, he expressed the difficulty in narrowly crafting the regulation's language to provide a balance that ensured legitimate items received the abatement while making clear that a financial

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See Whaley, Smoking Foes, supra note 20.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See Whaley, Tax Break, supra note 19. See also Dornan, supra note 2 (discussing the two percent sales tax base).*

¹⁰⁹ *Whaley, Tax Break, supra note 19.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

windfall did not occur at the same time for items not intended to receive such treatment.¹¹²

Ultimately, the Legislative Commission finally approved a set of regulations for both agencies that followed the vision of Assembly Bill 3 (2005) in conjunction with the updates contained in Assembly Bill 621 (2007).¹¹³

F. Green Building, Nevada Style

Through the adoption of Regulation R116-07,¹¹⁴ the Office of Energy again selected the LEED system as developed by the United States Green Building Council for Nevada as the backbone of its sustainable building initiatives.¹¹⁵ This time, all versions of the LEED standards apply to any new construction (“NC”), existing buildings, operations, maintenance (“EB”), and core and shell development (“CS”).¹¹⁶ Furthermore, it requires the Director of the Office of Energy to review any new LEED standards at least once a year and determine their applicability and eligibility in Nevada.¹¹⁷ To be relevant, however, the new LEED version must have been in existence for more than two years and not be a standard for homes.¹¹⁸

In addition, the new regulations set a floor for specific energy conservation. In order to qualify for the tax abatement, LEED Silver buildings must earn at least three points for energy conservation, LEED Gold must garner at least five points for energy conservation, and LEED Platinum buildings must receive eight energy conservation points.¹¹⁹ To further satisfy this requirement, the project owner must also follow the LEED Green Building Rating System Energy and Atmosphere Prerequisite 1, which requires the use of an independent party to facilitate commissioning of the fundamental building systems.¹²⁰

Moreover, anyone seeking the tax incentives must apply to the Office of Energy within 120 days of receiving approval from the local

¹¹² *See id.*

¹¹³ *See* Musgrove, *supra* note 52.

¹¹⁴ Adopted Regulation R116-07 (2007) (codified as amended at NEV. ADMIN. CODE § 701A.010–§ 701A.290 (2008)).

¹¹⁵ NEV. ADMIN. CODE § 701A.200 (2008).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 701A.210.

¹¹⁹ *Id.*

¹²⁰ *Id.*

government to commence.¹²¹ The application encompasses normally expected items concerning the applicant and the project, but also contains many green building components.¹²² These include documentation of registration with the U.S. Green Building Council, the name(s) of LEED accredited individuals assigned to the design team, the applicable LEED standard, a checklist of the level and points expected to be achieved for each LEED category, whether the project is considered a campus or multi-building setting, and the schedule for construction.¹²³

The applicant is required to submit proof that the structure complies with the category requested in the application and the unique Nevada LEED requirements within forty-eight months of starting the process.¹²⁴ The deadline may be extended when good cause is shown.¹²⁵ Proof that a project achieved the Silver or higher certificate encompasses a letter from the U.S. Green Building Council informing the project owner of meeting the required status, official documents from the U.S. Green Building Council breaking out the points achieved by category and in total, or anything else the Director of the Office of Energy determines is enough evidence of compliance with the Nevada Regulations.¹²⁶ Furthermore, the applicant must also include a project narrative, copies of the documents submitted to the U.S. Green Building Council in its LEED application, specific documents submitted to the U.S. Green Building Council regarding the LEED Green Building Rating System for water efficiency, and statements explaining the eligibility for use of government funds and other property tax rebates.¹²⁷

Once a project receives its Certificate of Eligibility from the Director of the Office of Energy indicating that the building has earned Silver or higher level certification, various state and local agencies will receive notification.¹²⁸ The certificate will explain each building's applicable property tax abatement as well as its length in a given project.¹²⁹ See Figure 1.

¹²¹ NEV. ADMIN. CODE § 701A.220 (2008).

¹²² *See id.*

¹²³ *Id.*

¹²⁴ *Id.* § 701A.240.

¹²⁵ *Id.*

¹²⁶ *Id.* § 701A.250.

¹²⁷ NEV. ADMIN. CODE § 701A.250 (2008).

¹²⁸ *Id.* § 701A.240.

¹²⁹ *Id.*

Figure 1
 Nevada Office of Energy's Regulation R116-07 § 29 table for determining property tax abatements on LEED
 Certified buildings

LEED Certification Level	1-2 Points for Energy Conservation from U.S.G.B.C	3 Points for Energy Conservation from U.S.G.B.C	4 Points for Energy Conservation from U.S.G.B.C	5 Points for Energy Conservation from U.S.G.B.C	6 Points for Energy Conservation from U.S.G.B.C	7 Points for Energy Conservation from U.S.G.B.C	8-10 Points for Energy Conservation from U.S.G.B.C
Silver	NO Abatement	25 percent abatement for 5 years	25 percent abatement for 6 years	25 percent abatement for 7 years	25 percent abatement for 8 years	25 percent abatement for 9 years	25 percent abatement for 10 years
Gold	NO Abatement	25 percent abatement for 5 years	25 percent abatement for 6 years	30 percent abatement for 7 years	30 percent abatement for 8 years	30 percent abatement for 9 years	30 percent abatement for 10 years
Platinum	NO Abatement	25 percent abatement for 5 years	25 percent abatement for 6 years	30 percent abatement for 7 years	30 percent abatement for 8 years	30 percent abatement for 9 years	35 percent abatement for 10 years

Interestingly, if the certificate is issued between July 1 and March 31 of the government fiscal year, then the abatement becomes effective the next July 1.¹³⁰ If the certificate is issued between April 1 and June 30, however, the tax reduction occurs on July 1 of the year following the upcoming fiscal year.¹³¹

On a parallel track, the Taxation Commission turned to those projects permitted the sales tax reduction grandfathered under Assembly Bill 3. In those cases, a discrepancy existed regarding which items qualified for the limited two percent sales tax base.¹³² In Regulation R084-07,¹³³ the Tax Commission narrowed the definition of "Used in the Construction of a building." The new definition allows only those items that would attach or become incorporated into the structure during the course of construction.¹³⁴ These items need to become either inseparable to the structure or a fixture.¹³⁵ Through this action, the commission removed the interpretation, held by many, that included construction equipment in the reduced sales tax category.¹³⁶

Hence, the new procedures developed an easy to follow and understandable process whereby developers and others recognize the steps necessary to receive the property tax abatements.¹³⁷

II. APPROACHES IN OTHER STATES

Some people tout the Nevada program as the only state-sponsored property tax abatement program in the nation developed as a green building incentive for non-governmental structures.¹³⁸ While the vast majority of these types of programs occur at the local government level,¹³⁹ other

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Whaley, *Tax Break*, *supra* note 19. See also Dornan, *supra* note 2 (discussing the two percent sales tax base).

¹³³ Nev. Tax Comm'n, Adopted Regulation R084-07 (2007) (codified as amended at NEV. ADMIN. CODE § 360.479 (2008)).

¹³⁴ NEV. ADMIN. CODE § 360.479 (2008).

¹³⁵ *Id.*

¹³⁶ See Whaley, *Tax Break*, *supra* note 19.

¹³⁷ See Musgrove, *supra* note 52.

¹³⁸ See, e.g., PR Newswire, *Nevada Only State to Offer Green Building Incentives: Patagonia's Reno Service Center Awarded for Its LEED Gold Certification*, <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/04-18-2007/0004568805&EDATE=> (last visited Sep. 23, 2009).

¹³⁹ See Carl J. Circo, *Using Mandates and Incentives to Promote Sustainable Construction and Green Building Projects in the Private Sector: A Call for More State Land Use Policy*

states trace their incentives through executive orders.¹⁴⁰ In addition, many local governments may wish to provide incentives to developers of green building, but the doctrine of preemption may prevent these actions.¹⁴¹ With energy concerns placing pressures on lawmakers, however, many states recently passed legislation to encourage commercial green building projects within their jurisdictions.¹⁴²

For example, Oregon, Maryland, New Mexico, and New York provide tax credits for commercial green buildings.¹⁴³ Some programs specifically utilize the LEED system while others put forward their own “green” standards for buildings.¹⁴⁴ In contrast, Hawaii looked to use other types of incentives to motivate green building without causing a significant financial impact. See Figure 4.

A. *Virginia*

One of the approaches most similar to Nevada’s for providing green building incentives very recently took effect in Virginia. On March 4, 2008, Governor Tim Kaine signed House Bill 239 into law, which amended the Code of Virginia to create a separate class of real property for energy efficient buildings.¹⁴⁵ Through this Act, any building that exceeds the Virginia Uniform Statewide Building Code by over thirty percent through use of LEED or other listed energy performance standards receives a classification

Initiatives, 112 PENN ST. L. REV. 731, 732 (2008) (“[B]uilding codes and most other land use control devices are normally adopted, implemented, and enforced at the local level, where they are subject to local political debates and variations.”).

¹⁴⁰ See U.S. GREEN BUILDING COUNCIL, LEED INITIATIVES IN GOVERNMENTS AND SCHOOLS (2009), available at <https://www.usgbc.org/ShowFile.aspx?DocumentID=691> [hereinafter USGBC STATE INITIATIVES] (describing various LEED incentives in different states and localities).

¹⁴¹ Under the doctrine of preemption, or commonly called “Dillon’s Rule,” lower tiered governments only possess enough authority for situations where exercising it becomes indispensable to governing or in situations where the state provides express authority. See generally Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1122–1124 (2007) (describing Dillon’s Rule).

¹⁴² See U.S. GREEN BUILDING COUNCIL, SUMMARY OF GOVERNMENT LEED INCENTIVES—MARCH, 2009, available at <https://www.usgbc.org/ShowFile.aspx?DocumentID=2021> [hereinafter USGBC SUMMARY].

¹⁴³ See USGBC STATE INITIATIVES, *supra* note 140, at 11–15.

¹⁴⁴ State Environmental Resource Center, Issue: Green Building, <http://www.serconline.org/grBldg/stateactivity.html> (last visited Sep. 23, 2009).

¹⁴⁵ H.B. 239, 2008 Gen. Assemb., Reg. Sess. (Va. 2008) (codified as amended at VA. CODE ANN. § 58.1-3221.2 (2009)); USGBC SUMMARY, *supra* note 142, at 9.

as an energy efficient building.¹⁴⁶ Moreover, each local government then receives permission to levy equal or lesser property taxes for buildings meeting the special classification, as a separate class of real property.¹⁴⁷ Thus, the Virginia approach uses property taxes to promote energy efficient buildings, which are not necessarily green in other respects, while allowing the local governments the decision making authority to determine how much of a financial incentive they wish to provide.

B. New York

Many people credit New York with pioneering the use of government incentives to entice developers into sustainable buildings; it included such provisions in the 2000 state budget.¹⁴⁸ New York's program initially allocated twenty-five million dollars in tax credits to qualifying green buildings over a nine year period and set forth specifics for eligibility.¹⁴⁹ The person or organization seeking the credit may proceed in one of three ways: a green base building, a green tenant space, or both a green base building and tenant space.¹⁵⁰

¹⁴⁶ VA. CODE ANN. § 58.1-3221.2 (2009). The other standards include: Energy Star Program from the US Environmental Protection Agency, Green Globes Green Building Rating System of the Green Building Initiative, or EarthCraft House Program. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See, e.g., CRAIG KNEELAND, NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, NEW YORK STATE'S GREEN BUILDING TAX CREDIT 1 (2006), http://www.epa.gov/RDEE/documents/stateforum/04_20_06/4_20_06_Austin_GBTC_paper_Kneeland.pdf ("In May of 2000, New York State passed the country's first Green Building Tax Credit (GBTC)."); King & King, *supra* note 3, at 420 ("New York became the first state to enact a 'green building tax credit.'"). See generally Del Percio, *supra* note 3 (discussing the development and benefits of green building). Mr. Kneeland explains that the genesis of New York's tax credit program actually began in 1995 when a group of private sector individuals met regularly to develop and propose legislation. KNEELAND, *supra*, at 1. The first draft reached the New York Legislature in June 1998, but it took several years for everyone to agree on the language and become law. KNEELAND, *supra*, at 1–2.

¹⁴⁹ N.Y. TAX LAW § 19 (McKinney 2009). New York State law prohibits the adoption of third party standards that may alter over time. KNEELAND, *supra* note 148, at 5. Moreover, the original legislation did not include the twenty-five million dollar limitation but was added due to concerns by lawmakers that the program would expose the state to too much liability. KNEELAND, *supra* note 148, at 2. It also included a provision to allow the credits to become tradable. KNEELAND, *supra* note 148, at 2. Legislators eliminated that provision as well because they believed the implementation aspects would become too difficult. KNEELAND, *supra* note 148, at 2.

¹⁵⁰ KNEELAND, *supra* note 148, at 2–3. The tax credit targets buildings with a minimum size of 20,000 square feet or tenant space over 10,000 square feet. *Id.* at 2.

Under a green base building, the legislation was crafted to cover situations where the developer wanted to receive the credit but could not control the tenant's use of the space.¹⁵¹ In this instance, the developer may recover a maximum of five percent of allowable costs with a limit of \$150 per square foot.¹⁵² Accordingly, the maximum tax credit for a green building base tops off at \$7.50 per square foot.¹⁵³

In a green tenant space scenario, the legislature addressed the situation where the tenant lacks control over the building's base or other leaseholder's space.¹⁵⁴ Here, a single building may contain multiple green tenant spaces, but the law requires that any owner-occupied area in a green base building also conform to a green tenant space.¹⁵⁵ Similarly, the tax credit only permits five percent of allowable costs but receives a cap of seventy-five dollars per square foot.¹⁵⁶ Nevertheless, this type of situation reaches its maximum tax credit at \$3.75 per square foot.¹⁵⁷

Finally, the green whole building tax credit applies to situations where both the base building and the entire tenant space qualifies as green.¹⁵⁸ When this situation applies, the tax credit takes a hybrid approach and allows seven percent of allowable costs with the higher limit of \$150 per square foot on the base building and \$75 per square foot on the tenant space.¹⁵⁹ This works out to a maximum tax credit of \$15.75 per square foot when the entire building qualifies.¹⁶⁰

Therefore, a developer may receive up to a maximum of \$7.50, \$3.75, or \$15.75 per square foot respectively from the incentive based on the chosen method.¹⁶¹ Furthermore, should the building or tenant space be located within an economic development zone, then all of the percentages applied to the allowable costs will increase by two-tenths of one

¹⁵¹ *Id.* at 2.

¹⁵² N.Y. TAX LAW § 19(a) (3) (McKinney 2009); KNEELAND, *supra* note 148, at 2. This reflects the total credit over a five year period. KNEELAND, *supra* note 148, at 2 n.1. Those receiving credits receive 20% of the total credit, or one percent, per year over this period. KNEELAND, *supra* note 148, at 2 n.1.

¹⁵³ KNEELAND, *supra* note 148, at 2.

¹⁵⁴ *Id.* at 2–3.

¹⁵⁵ *Id.* at 3.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ KNEELAND, *supra* note 148, at 3.

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *See id.* 2–3.

percent annually.¹⁶² Finally, the law requires that the credit's use by a taxpayer be applied over a consecutive five year period.¹⁶³

The New York system strictly dictates to a developer how to obtain the tax credit, whereas the LEED approach sets compliance floors but allows for alternatives so long as the entire project attains a certain level of sustainability.¹⁶⁴ This program's successes led the legislature in New York to add an additional twenty-five million dollars because seven projects qualified for the entire allotment of the initial tax credits.¹⁶⁵

Thus, New York developed its own green building standards while providing incentives through a capped tax credit approach that is spread over a five-year period.

C. Oregon

Other commentators hold Oregon out as a prime illustration of state regulation that promotes the use of sustainable business practices in commercial development.¹⁶⁶ The Oregon approach begins with a sustainability board that is charged with proposing and recommending legislation while developing policies and programs to achieve its sustainability mandate, in addition to its administrative reporting requirements.¹⁶⁷

The main financial incentive for sustainable building practices focuses on a Business Energy Tax Credit administered by the state's Office of Energy.¹⁶⁸ To qualify, the building must minimally qualify as LEED Silver but may receive proportionately more credits for Gold and Platinum status.¹⁶⁹ This starts with a preapproval process and requires the LEED Silver building to earn at least two points from energy efficiency and one point under the additional commissioning category.¹⁷⁰

Furthermore, the income tax credit is only available up to a maximum of thirty-five percent of the eligible costs used in the qualifying

¹⁶² N.Y. TAX LAW § 19(a) (2)–(4) (McKinney 2009).

¹⁶³ *Id.*; see also KNEELAND, *supra* note 148, at 3 n.2–7.

¹⁶⁴ See KNEELAND, *supra* note 148, at 5.

¹⁶⁵ See York State Department of Environmental Conservation, Green Buildings, <http://www.dec.ny.gov/energy/218.html> (last visited Sep. 12, 2009) [hereinafter NYSDEC].

¹⁶⁶ See, e.g., King & King, *supra* note 3, at 413.

¹⁶⁷ Oregon Sustainability Act, 2001 Or. Laws 2560 § 3.

¹⁶⁸ See USGBC STATE INITIATIVES, *supra* note 140, at 15.

¹⁶⁹ OR. ADMIN. R. 330-090-0135(1) (2008).

¹⁷⁰ Or. Dep't of Energy, Business Energy Tax Credits Technical Requirements 6 (2008), available at http://egov.oregon.gov/ENERGY/CONS/BUS/docs/Tech_Req.pdf.

buildings and is based on the total square footage of the building.¹⁷¹ The successful applicant, however, may also take advantage of a unique opportunity called the “pass-through option.”¹⁷² This alternative allows the developer, whether commercial or non-profit, to transfer the credit to a qualified third party in return for a cash payment equivalent to the net present value of the tax credit.¹⁷³

Ultimately, the State of Oregon’s approach really promotes energy efficiency and utilizes the LEED standards to accomplish green buildings as a secondary goal.

D. *Maryland*

About the same time as Oregon, the 2001 Maryland Legislature passed House Bill 8 to allow state income tax credits for specified costs of construction or rehabilitation of green buildings.¹⁷⁴ The Maryland Energy Administration manages the program and the agency determines the amount of the credit based on the documentation submitted.¹⁷⁵ Similar to New York, Maryland limits the total amount of credits issued to twenty-five million dollars.¹⁷⁶ This amount is allocated between 2003 and 2011 and sets annual aggregated limits available for application against corporate or personal state income taxes each year.¹⁷⁷ If the taxpayer’s credit is more than the tax liability, the unused credit may be carried forward for the next ten tax years.¹⁷⁸

In addition, limitations exist on the allowable costs. The credit may not exceed “\$120 per square foot for that portion of the building that comprises the building; and \$60 per square foot for that portion of the building that comprises the tenant space.”¹⁷⁹ The credit includes a calculation of

¹⁷¹ OR. ADMIN. R. 330-090-0105 (2008); OR. ADMIN. R. 330-090-0110(25) (2008).

¹⁷² See OR. ADMIN. R. 330-090-0130(8) (2008); OR. ADMIN. R. 330-090-0140 (2008).

¹⁷³ OR. ADMIN. R. 330-090-0110(48)–(49) (2008). Oregon recognized that not all development occurs by project owners who have tax liabilities, so their method allows those project owners without those legal responsibilities to also benefit by finding willing partners who can utilize the credit against their Oregon income taxes.

¹⁷⁴ 2001 Md. Laws 3334.

¹⁷⁵ MD. CODE REGS. 14.26.02.00–14.26.02.10 (2009).

¹⁷⁶ MD. CODE ANN., TAX-GEN., § 10-722(k) (2009).

¹⁷⁷ *Id.* The Code specifically allows unused amounts in a given calendar year to be rolled over to the next year. *Id.*

¹⁷⁸ *Id.* § 10-722(b).

¹⁷⁹ Comptroller of Maryland, Green Building Tax Credit, <http://business.marylandtaxes.com/taxinfo/taxcredit/greenbldg/default.asp> (last visited Sep. 23, 2009).

four different components: the building, fuel cell, photovoltaic, and wind turbine.¹⁸⁰ On the building portion, the credit is calculated differently between a qualifying whole building and one that only partially obtains eligibility.¹⁸¹ If the entire building qualifies, then the credit becomes worth up to eight percent of the allowable costs.¹⁸² In the alternative, when the whole building does not qualify, the base building can receive a six percent credit, up to a maximum of \$7.20 per square foot.¹⁸³ Likewise, the tenant space also can get the six percent credit, with a \$3.60 per square foot maximum.¹⁸⁴ However, neither the owner nor the tenant may claim the tenant space credit if the owner occupies less than ten thousand square feet of the building or the tenant occupies less than five thousand square feet.¹⁸⁵

Also like Oregon's decision to use an outside benchmark, Maryland incorporates the LEED Silver standard into its requirements, but the state makes no provision for projects that attain higher levels of certification.¹⁸⁶ Maryland only requires that the project meet the LEED standards, so the applicant need not be "certified" by the U.S. Green Building Council.¹⁸⁷ Buildings, however must be at least 20,000 square feet or, if a certificate of occupancy was issued after July 1, 2001, be located in a priority funding area or on a qualified brownfields site.¹⁸⁸

Accordingly, the Maryland approach provides a middle ground that incorporates aspects of both New York and Oregon to promote green buildings within the state.

E. New Mexico

More recently, New Mexico joined the group of states offering a tax credit to promote commercial development of high performance, green design and construction projects.¹⁸⁹ Governor Richardson signed Senate

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Comptroller of Maryland, *supra* note 179.

¹⁸⁶ MD. CODE REGS. 14.26.02.04 (2009).

¹⁸⁷ Maryland Energy Administration, Green Building Tax Credit: Overview, *available at* <http://www.energy.state.md.us/incentives/business/greenbuilding/documents/GBTCTFAQ04-04-08.pdf> (last visited Sept. 23, 2009).

¹⁸⁸ MD. CODE ANN., TAX-GEN., § 10-722(k) (2009).

¹⁸⁹ *See* USGBC STATE INITIATIVES, *supra* note 140, at 13 (discussing recent New Mexico

Bill 543 into law in April 2007 to induce the private sector to design and construct buildings with similarly high sustainability requirements to his executive order for state owned structures.¹⁹⁰ The legislation placed the Energy, Minerals, and Natural Resources Department in charge of the administration of eligibility.¹⁹¹ The agency requires a preregistration followed by a submission of the “Sustainable Building Tax Credit” form when the project is complete and certified by the U.S. Green Building Council.¹⁹²

In a very similar approach to Maryland and Oregon, New Mexico decided to also use the LEED standard for determining eligibility in its “Sustainable Building Tax Credit.”¹⁹³ It further uses the LEED rating systems of Silver and higher with respect to new construction (“NC”), existing buildings (“EB”), core and shell (“CS”), commercial interiors (“CI”), and homes (“H”).¹⁹⁴ As determined by LEED rating and the amount of qualified square footage on a graduated scale, the law stipulates how much of a credit the developer will be eligible by the square foot.¹⁹⁵ See Figures 2 and 3.

Furthermore, the legislature made the tax credits available through 2013 with an annual aggregated cap of five million dollars for commercial buildings and an aggregated cap of five million dollars for residential buildings.¹⁹⁶ The law also requires the use of the tax credit in the year of its issue if it is under \$25,000 and at a rate of twenty-five percent per year over four years if it is over that amount.¹⁹⁷ New Mexico also gave the holder of the tax credit the right to sell, exchange, or transfer the credit so long as the Taxation and Revenue Department was notified of the transaction.¹⁹⁸

green building legislation).

¹⁹⁰ See *id.*; New Mexico Energy, Minerals and Natural Resources Department Energy Conservation and Management Division, *What Is Green Building?*, <http://www.emnrd.state.nm.us/ECMD/cleanenergytaxincentives/GreenBuilding.htm> (last visited Sept. 23, 2009).

¹⁹¹ 2007 N.M. Laws 2714, 2737 (codified as amended at N.M. STAT. § 7-2-18.9 (2009)).

¹⁹² New Mexico Energy, Minerals and Natural Resources Department Energy Conservation and Management Division, Sustainable Building Tax Credit, <http://www.emnrd.state.nm.us/ecmd/cleanenergytaxincentives/sustainablebuildingtaxcredit.htm> (last visited Sep. 12, 2009).

¹⁹³ 2007 N.M. Laws 2714, 2734–35.

¹⁹⁴ *Id.* at 2735–37.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 2738.

¹⁹⁷ *Id.*

¹⁹⁸ 2007 N.M. Laws 2714, 2739–40.

Hence, Governor Richardson's decision to put together task forces in 2004 to study and introduce sustainable building legislation that captures the experience of other jurisdictions, while crafting it to New Mexico's unique environment, demonstrates a well developed, measured, and comprehensive approach to encouraging green development in the state.¹⁹⁹

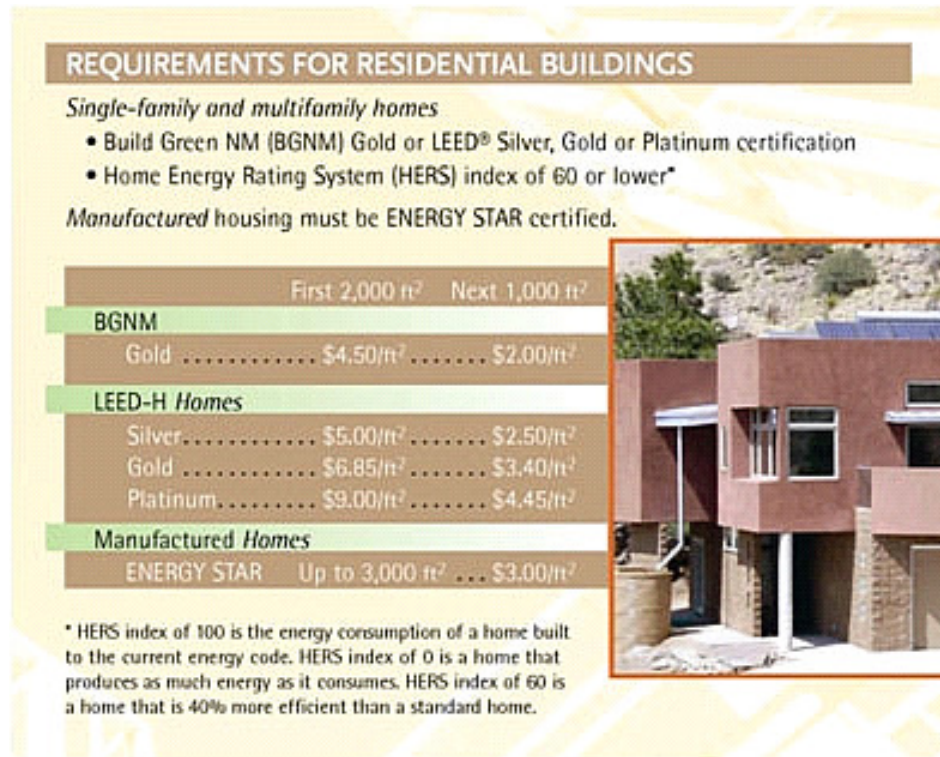
Figure 2. Requirements for Commercial Buildings in New Mexico²⁰⁰

REQUIREMENTS FOR COMMERCIAL BUILDINGS			
<ul style="list-style-type: none"> • LEED® Silver, Gold or Platinum certification • Energy reduction, based on national average for similar building type: 50% through 2010, 60% from 2011 through 2013 • Enhanced commissioning, where applicable • Applies to new construction and renovation of existing buildings 			
	First 10,000 ft ²	Next 40,000 ft ²	Next 450,000 ft ²
LEED-NC New construction			
Silver	\$3.50/ft ²	\$1.75/ft ²	\$0.70/ft ²
Gold	\$4.75/ft ²	\$2.00/ft ²	\$1.00/ft ²
Platinum	\$6.25/ft ²	\$3.25/ft ²	\$2.00/ft ²
LEED-EB/CS Existing building/Core and shell			
Silver	\$2.50/ft ²	\$1.25/ft ²	\$0.50/ft ²
Gold	\$3.35/ft ²	\$1.40/ft ²	\$0.70/ft ²
Platinum	\$4.40/ft ²	\$2.30/ft ²	\$1.40/ft ²
LEED-CI Commercial interiors			
Silver	\$1.40/ft ²	\$0.70/ft ²	\$0.30/ft ²
Gold	\$1.90/ft ²	\$0.80/ft ²	\$0.40/ft ²
Platinum	\$2.50/ft ²	\$1.30/ft ²	\$0.80/ft ²

¹⁹⁹ Noreen Richards & Elena Augustin, *Making Green on Green Buildings: New Mexico's Sustainable Building Tax Credit Adds a Monetary Incentive to Building Green in the Land of Enchantment*, SU CASA SOUTHWESTERN HOMES, http://www.sucasamagazine.com/contents/green_section/making_green.html (last visited Oct. 12, 2009).

²⁰⁰ Energy Conservation and Management Division, *supra* note 192.

Figure 3. Requirements for Residential Buildings in New Mexico²⁰¹



F. *Hawaii*

In contrast to other states that offered credits or abatements on taxes, some jurisdictions wanted to encourage sustainable building practices without giving direct financial incentives to developers of green buildings.²⁰² On May 12, 2006, Hawaii Governor Linda Lingle signed House Bill 2175,²⁰³ which requires all counties that issue building, construction, or development-related permits to provide priority processing

²⁰¹ *Id.*

²⁰² See BROOKS RAINWATER, AMERICAN INSTITUTE OF ARCHITECTS, LOCAL LEADERS IN SUSTAINABILITY: A STUDY OF GREEN BUILDING PROGRAMS IN OUR NATION'S COMMUNITIES 10–11 (2008), available at <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aia075288.pdf> (last visited Sept. 23, 2009) [hereinafter AIA GREEN INCENTIVES].

²⁰³ Hawaii State Legislature: 2006 Legislative Session, HB2175, available at <http://www.capitol.hawaii.gov/session2006/status/HB2175.asp> (last visited Sep. 12, 2009).

on projects that achieve LEED Silver or equivalent preconstruction certification without a cost to developer.²⁰⁴

According to one architect in Hawaii, this approach is a way to provide incentives that do not cost taxpayers financially.²⁰⁵ While endorsing this approach, The American Institute of Architects points out that the government agency responsible for approving and expediting the plans needs to have staff well trained in sustainable building design for it to work as intended.²⁰⁶ Further, it points out that a well designed priority system can help the government increase fees and taxes while providing the developer value through knowledgeable staff and shorter wait times between conception and the certificate of occupancy.²⁰⁷ Likewise, this incentive may also convince developers who would not otherwise consider a green building approach to consider one as a way to keep their projects on schedule and avoid costly delays due to governmental reviews.²⁰⁸

Thus, the Hawaiian Legislature recognized the economic and environmental gains of an expedited review process while protecting the fiscal integrity of the state and the local government's budgets. It is too soon, however, to tell the effects of this approach.

²⁰⁴ H.B. 2175 23d. Leg., Reg. Sess. (Haw. 2006).

²⁰⁵ Cathy S. Cruz, *Talk Story: David Bylund of Architects Hawaii Is All for Sustainability*, HAW. BUS., June 2007, available at <http://www.hawaiiibusiness.com/Hawaii-Business/June-2007/Talk-Story/>.

²⁰⁶ See AIA GREEN INCENTIVES, *supra* note 202, at 9–10.

²⁰⁷ *Id.* at 9.

²⁰⁸ G. WILLIAM QUATMAN & RYAN M MANIES, AIA TRUST, WHITE PAPER: MANAGING THE RISKS AND EMBRACING THE BENEFITS OF GOING GREEN 18 (2008), available at http://www.theaiatrust.com/goinggreen/2008WhitePaper_GreenBenefits.pdf.

Figure 4

Comparison Chart of Commercial Green Building Incentives
by State and Type of Incentive

State	Green Incentive Type	Green Standard	State Financial Incentive	Financial Limitations	Preapproval Required
Nevada	Property Tax Reduction	LEED	Variable, 25% over 5 years to 35% over 10 years	None	Yes
Virginia	Property Tax Reduction	LEED or other listed Energy Preferred Standard	Left to the local government to decide	None	Unknown
New York	Income Tax Credit	New York's own standard	Maximum of \$7.50, \$3.75, or \$15.75 per square foot spread over 5 years	\$50M over a 9 year period	Yes
Oregon	Income Tax Credit	LEED	35% of eligible costs based on total square footage	None	Yes
Maryland	Income Tax Credit	LEED	8% or 6% of total cost in a priority funding area with more than 20,000 square feet	\$25M over a 5 year period	Yes
New Mexico	Income Tax Credit	LEED	Variable based on the building's square footage	\$5M for commercial, \$5M for residential up to 2013	Yes
Hawaii	Expedited Permit Processing	LEED or Green Globes	Not Applicable	Not Applicable	Not Applicable

III. A PROPOSAL FOR WHAT THE NEVADA LEGISLATURE SHOULD HAVE DONE

In crafting legislation that aspires to incentivize developers into building green, policymakers need to take their time and complete their due diligence prior to sponsoring a bill that may become law. These types of programs should take the form of a multifaceted approach encompassing proven methods that provide benefits to all parties involved while targeting a wide spectrum of individuals or organizations that may wish to take advantage of them.²⁰⁹

In Nevada, that means looking at the main sources of revenue for funding the government before offering a financial solution. As one of the few states that does not impose an income tax on its residents or corporations, the legislature needs to make sure its sources remain uninterrupted because it may not have alternatives available to generate revenue if any are siphoned off for special programs. Nevada's governments rely heavily on the three main sources of income: gaming taxes, sales taxes, and property taxes.²¹⁰ Thus, a non-financial incentive should be considered first, due to the model used to generate revenue for the state.

Before placing taxpayer money at risk in the form of an abatement to developers, lawmakers must evaluate alternatives that create incentives that do not readily expose the precious financial resources of the state. In this realm, the Hawaii legislature found an excellent solution by giving priority reviews to those developers moving forward with green buildings.²¹¹ In Las Vegas, where projects move at a tremendous speed in order for contractors to avoid harsh penalties and gain tremendous rewards for early completion,²¹² this type of expedited service could provide the developer something of value without a cost to the government.²¹³

²⁰⁹ See AIA GREEN INCENTIVES, *supra* note 202, at 17.

²¹⁰ See GOVERNOR'S TASK FORCE ON TAX POLICY IN NEVADA, FINAL REPORT OF THE GOVERNOR'S TASK FORCE ON TAX POLICY IN NEVADA: SECTION 4: GENERAL FUND OUTLOOK (2002), available at <http://www.leg.state.nv.us/71st/Interim/Studies/TaxPolicy/FinalReport/TaxTaskForcehomepage.cfm> (follow hyperlink to "Section 4—General Fund Outlook"). Under the Nevada model, the state received 71.0% of its funding from gaming and sales taxes in 2001. See *id.* at 4. The county and cities mostly receive the property taxes. See ROBERT SCHMIDT & CHARLES F. BARR, NEVADA POLICY RESEARCH INSTITUTE, NEVADA'S 2003 TAX INCREASES: UNDERLYING ASSUMPTIONS AND RESULTING IMPACT 15 (2005), available at http://www.npri.org/docLib/20071126_NV_2003_Tax_Increases.pdf.

²¹¹ HAW. REV. STAT. § 196-1 (2006).

²¹² Alexandra Berzon, *Construction Worker Deaths on the Strip: Pace Is the New Peril*, LAS VEGAS SUN, Mar. 30, 2008, <http://www.lasvegassun.com/news/2008/mar/30/construction-deaths/>.

²¹³ See AIA GREEN INCENTIVES, *supra* note 202, at 9–10.

Likewise, the state could mandate that the local governments provide a reduction in permit fees for green buildings.²¹⁴ While this method is usually left to local governments, the American Institute of Architects (“AIA”) points out that it motivates developers, who view a project with a short-term perspective and would normally eschew incorporating green building aspects.²¹⁵ These types of developers generally do not plan to own the building after construction, so they will probably not see the operational efficiencies gained by any added costs.²¹⁶ In Nevada, many of the most recognizable projects are developer owned, but numerous other commercial buildings occur under other turnkey type situations, which might take advantage of such an opportunity. Hence, the state could mandate that the local governments apply a percentage reduction or rebate towards a project’s application and permit fees for those developers seeking and achieving a green building.

From a financial incentive perspective, legislators could consider either property abatements or sales tax rebates. Each creates its own unique dilemma. In considering a property tax approach, it allows the government to stagger the incentive over a defined period of time. This causes very little up-front impact to the taxpayers while getting the environmental benefit immediately and over a long period of time. These revenues, however, mostly provide funding for the counties and cities in Nevada.²¹⁷ The public education system relies heavily on these sources both for operations and capital improvements.²¹⁸ Accordingly, any shortfall due to an incentive program for green buildings will require the other sources of state revenue to compensate for the diversions of these funds.

Alternatively, a sales tax rebate may provide a more targeted opportunity to create an incentive for green buildings with less unintended consequences. Like the two nonfinancial incentives, a sales tax rebate may catch the attention of owners who do not intend to hold the property for a long time and will provide an immediate relief for building green. In the Nevada economic model, a rebate of the sales tax would allow legislators more control over the impact of the incentive with respect to the overall state budget. Since the revenues collected by the sales taxes go

²¹⁴ *See id.* at 15.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ SCHMIDT & BARR, *supra* note 210, at 15.

²¹⁸ *Id.* The authors explain that about thirty-four percent of the money collected goes to the State of Nevada for primarily educational programs, and about fifty percent of the remainder contains specific earmarks for school construction. *Id.*

primarily into the state's general fund, any shortfall due to an incentive program will allow the legislature to budget in an aggregate sum whereas a property tax approach will specifically affect local governments, and possibly the education system, in an inconsistent manner.

Moreover, unlike a property tax abatement, a sales tax rebate may create a perception of more buying power in the developer and generate different tax revenues by the actions of others. When the state rebates the sales tax to a developer the funds provide an opportunity to buy more or better quality materials which could help offset the incentive or could create a trickle down effect. Thus, a sales tax rebate provides a better solution with more control than a property tax reduction.

In addition, limitations on the maximum amount of tax reductions require attention. As contemplated in the original legislation in New York, several huge projects could seriously harm the government's revenue flow,²¹⁹ so no incentive should occur without an upper limitation. The legislature may always raise the limits, but as noted by the Nevada governor, a reduction in an incentive might create lawsuits.²²⁰

In looking at some of the various caps already employed by other states, they range from an allocation of one to five million dollars per year.²²¹ Depending on how aggressive or conservative the legislature wishes to proceed in its incentive to build green, this tool will allow such policy decisions while providing a mechanism for later changes. Nonetheless, a sales tax rebate needs to include government oversight in doling out the program returns while setting a ceiling for all projects.

Finally, a green building standard, as well as the effects of special interests, need consideration. Many states choose to follow a third party's system like LEED or Green Globes,²²² while New York decided to develop its own program.²²³ Because the LEED system was under development at the genesis of New York's Green Building Tax Credit initiative, the state chose to prevent the adoption of a third party system since it could change

²¹⁹ See KNEELAND, *supra* note 148, at 2.

²²⁰ Whaley & Vogel, *supra* note 73.

²²¹ MD. CODE ANN., TAX-GEN., § 10-722(k) (2009) (one million dollar cap in 2003 and 2011) NYSDEC, *supra* note 165 (two million dollar cap in New York); 2007 N.M. Laws 2714, 2737 (five million dollar cap in New Mexico).

²²² See, e.g., 2008 Va. Acts. 431 (allowing LEED or Green Globes Green Building Rating Systems); OR. ADMIN. R. 330-090-0135(1) (2008) (following LEED standard); 2007 N.M. Laws 2714 (following LEED standard).

²²³ See KNEELAND, *supra* note 148, at 1, 5.

over time.²²⁴ While some may view the ability to transform as a detractor, these types of developments may actually provide a modern standard without the difficulties of changing a state law or administrative rules.

Additionally, the Nevada experience showed how special interests may steer a government agency to reinterpret its own rules to provide them exceptions to the standard.²²⁵ By permitting a state agency to select an outside standard, the legislature must carefully select a program that allows flexibility as to changes in society and region as well as providing a generally accepted method. With these competing approaches in mind, the LEED or Green Globes system could very well satisfy the noble goals of providing incentives for green buildings without the added burden of maintaining an independent system, so long as the standard receives acceptance in its entirety.

Therefore, a good incentive plan in Nevada should begin with non-financial incentives like expedited permit processing, and then turn to areas with minimal fiscal consequences to the governments but that provide something of value for those developers choosing to pursue a green building. If these do not achieve the intended goals and a financial incentive becomes necessary, then a sales tax rebate on those materials used in the construction of the green building should occur, since it provides a timely benefit to the developer while allowing the state government the ability to set policy without unintended side effects. The program must also, however, include annual and per project maximum limitations to avoid unbridled abuses and to protect the state's financial interests. In conclusion, the adoption of a system like LEED should also provide a good framework that modernizes over time for those looking to qualify for the incentives, provided that the agency administering the program does not receive leeway to cater to special interests.

CONCLUSION

As a result of the eco-friendly and well-intentioned near financial disaster in Nevada, commentators around the state believe this is old fashion politics at work once again. One called the situation another "time the big boys caught a break,"²²⁶ while another, referring to the legislature's

²²⁴ *Id.* at 5.

²²⁵ See Neff, *supra* note 27 (discussing how the governor's energy advisor allowed casinos that permitted smoking to qualify as green buildings).

²²⁶ Morrison, *supra* note 26.

and governor's attempts to undo the damage, wanted to know how they would "stab the beast the third time."²²⁷ Still others realize that in the end, the financial aspects were a learning experience, and the state and developers will be better off in the end when the dust settles.²²⁸

In Nevada, however, Assemblywoman Debbie Smith characterized the situation as "a good example of good intentions without enough vetting of the details."²²⁹ In the 2005 Legislature's haste to conclude business during the special session and the irrational exuberance for green building amongst politicians, due care for the state's welfare and that of the taxpayers was completely dismissed at the notion of creating feel good legislation that could be required without the financial inducements.²³⁰

Eerily, the Nevada green building debacle appears too reminiscent of the Alternative Fuel Tax Credit fiasco offered by the neighboring State of Arizona in 2000.²³¹ Its proponents pitched the move as both a clean air program and progress toward lessening the country's dependence on foreign oil.²³² Similar to Assembly Bill 3's passage in Nevada, the Arizona legislature passed the Alternative Fuel Credit on the last day of a protracted legislative session just after Arizona's House Leader added language to a bill that already proceeded through committee hearings.²³³ Just like in Nevada, the Arizona program's cost initially estimated at \$10 million ballooned to an estimated \$600 million and required an emergency session of the legislature to limit the state's losses to \$200 million.²³⁴

Furthermore, the Nevada Legislature did not even consider incentives with little or no fiscal impacts to the state or local governments'

²²⁷ Neff, *supra* note 27.

²²⁸ See Musgrove, *supra* note 52.

²²⁹ *Id.*

²³⁰ See NPR, *supra* note 21; Morrison, *supra* note 26.

²³¹ See generally Robbie Sherwood, *Anatomy of a Debacle: Arizona's Alt-Fuels Program*, STATELINE.ORG, Dec. 19, 2000, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=14196> (reporting on Arizona's poorly executed alternative fuel incentive program).

²³² *Id.*

²³³ *Id.* It was alleged that the language was "written with direct input from alternative fuel entrepreneurs" and launched a self-dealing investigation by Arizona's Attorney General. *Id.*

²³⁴ See *id.* Arizona Representative Steve May pointed out that this debacle created one of the largest crises in the state and explained, "Put it this way: \$600 million is 10 percent of our state budget. We were potentially going to spend 10 percent of our budget on a program that has not reduced air pollution by even 1 percent." Melissa Morrison, *Arizona's Alternative Fuel Incentives Backfire: After \$200 Million Mistake, State Reneges on Promise of Tax Credits to Buyers of Altered Vehicles*, WASH. POST, Dec. 11, 2000, at A3.

budgets, but the Hawaiian legislature showed the possibility of providing developers something of value while not financially costing the taxpayer.²³⁵ Interestingly, the Hawaiian legislation was passed ten months before Nevada began searching for a solution to Assembly Bill 3.²³⁶

At the time Assembly Bill 385 was introduced, the green building tax incentive programs in New York, Oregon, and Maryland were well under way.²³⁷ A little research by the bill's sponsors, their staff, or the committees holding the hearings could have uncovered how just seven projects in New York easily accounted for twenty-five million dollars in tax credits.²³⁸ Coincidentally, just seven projects in Nevada under the original incentive program were estimated to cost the state over \$940 million.²³⁹

Moreover, none of the states' programs that preceded Nevada's plan took the reckless fiscal approach of allowing state agencies to create unlimited financial impacts to the state and local government. Both New York and Maryland restricted their initial programs to twenty-five million dollars,²⁴⁰ while Oregon only gave a thirty-five percent credit on the eligible costs used in the qualifying buildings.²⁴¹ Most recently, New Mexico's legislation, which was passed while the Nevada Legislature was trying to solve the ramifications of Assembly Bill 3, imposed a limit of five million dollars on commercial green buildings as well.²⁴²

While Nevada does not impose a state income tax,²⁴³ the four other states only used tax credits as the mechanism for rebating those developers who qualified for the green building program.²⁴⁴ By following the tax credit approach, those governments at least required the person or entity exercising the credits to already have a taxable income and chose a system that did not place a burden on any property taxes levied at the local level.²⁴⁵ Not one of these states used a sales tax reduction on green building materials

²³⁵ See *supra* Part II.F.

²³⁶ Hawaii's House Bill 2175 went into effect on July 1, 2006. 2006 Haw. Sess. Laws 269. The Nevada legislature began working on Assembly Bill 621 in earnest in late May 2007. See Musgrove, *supra* note 52.

²³⁷ See Bennet, Howe & Newman, *supra* note 8, at 36.

²³⁸ See NYSDEC, *supra* note 165.

²³⁹ See Musgrove, *supra* note 52.

²⁴⁰ See *supra* note 176 and accompanying text.

²⁴¹ See *supra* note 171 and accompanying text.

²⁴² See USGBC SUMMARY, *supra* note 142, at 8.

²⁴³ See Internal Revenue Service, States Without a State Income Tax, <http://www.irs.gov/efile/article/0,,id=130684,00.html> (last visited Aug. 30, 2009).

²⁴⁴ See *id.*

²⁴⁵ See *supra* Part II.

or fittings used in the construction to provide further incentives to developers. Nevada's state and local budgets, however, rely heavily on both property taxes and sales taxes to generate revenue,²⁴⁶ which was greatly harmed by the dual incentive approach.

During the testimony given for Assembly Bill 385, the legislators seemed entranced by the romantic notion of making Nevada the leader in green building, but nobody inquired further into the financial effects that may occur when an enormous project takes advantage of the program.²⁴⁷ The committee members were told about MGM Mirage's tremendous plans,²⁴⁸ but never thought about what impact those abatements would cause to the counties and school districts that depended on those current and future tax monies. Former Assemblywoman Giunchigliani, now a Clark County Commissioner,²⁴⁹ is having to figure out where the county will make ends meet based on her generosity with tax abatements as an assemblywoman.

In addition, Senator Townsend acknowledged during the testimony of Assembly Bill 385 that much of the important implementation and interpretation of how the green building program would apply fell to the administrative agencies.²⁵⁰ He could not have expected the Tax Commission to ignore the Nevada Revised Statutes in favor of its own rules, nor an Office of Energy determined to allow the largest and most profitable gaming companies in Nevada to receive the most generous tax breaks while categorically ignoring the LEED standards. As a very experienced legislator, he should not have let a piece of legislation through the system without a thorough analysis of the impacts and the provision of detailed directions to the agencies charged with implementing it.

Finally, the approach between the 2007 Nevada Legislature and Governor Gibbons to temporarily resolve and permanently repair the

²⁴⁶ See GOVERNOR'S TASK FORCE ON TAX POLICY IN NEVADA, FINAL REPORT OF THE GOVERNOR'S TASK FORCE ON TAX POLICY IN NEVADA: SECTION 2: FISCAL SYSTEM OVERVIEW (2002), available at <http://www.leg.state.nv.us/71st/Interim/Studies/TaxPolicy/FinalReport/TaxTaskForcehomepage.cfm> (follow hyperlink to "Section 2—Fiscal System Overview"); SCHMIDT & BARR, *supra* note 210, at 15.

²⁴⁷ See generally *Minutes of Assemb. Comm. on Commerce & Labor of May 22*, *supra* note 6; *Minutes of S. Comm. on Commerce & Labor for May 31*, *supra* note 25; *Minutes of Assemb. Comm. on Gov't Affairs for April 4*, *supra* note 31; *Minutes of S. Comm. on Commerce & Labor for June 1*, *supra* note 36. See also Morrison, *supra* note 26.

²⁴⁸ See *Minutes of S. Comm. on Commerce & Labor for May 31*, *supra* note 25, at 7–8 (statement of John B. Wellinghoff, MGM Mirage).

²⁴⁹ AccessClarkCounty.com, Biography of Chris Giunchigliani, http://www.accessclarkcounty.com/depts/Commission/pages/Chris_g.aspx (last visited Sep. 13, 2009).

²⁵⁰ See *Minutes of S. Comm. on Commerce & Labor for June 1*, *supra* note 36, at 20–22.

problems of Assembly Bill 3 leaves questions regarding prudent approaches to governing and legislating. On one side, the legislature is passing laws that it knows will trigger lawsuits against the state for detrimental reliance. This is being done to protect larger sums of future revenue from being returned to developers who suddenly found the green building movement via unprecedented, and possibly illegal, regulations by state agencies charged with protecting the public.²⁵¹ Meanwhile, the governor is vetoing the legislation and issuing questionable executive orders that try to accomplish the same goal in the interest of prudence.²⁵²

Thus, Nevada may still be at the forefront of promoting government supported green building in the country, but the painful experiences could have been easily avoided with a little bit of forethought, patience, and common sense at the beginning of the process in order to evaluate the concerns, successes, and debates occurring in other states prior to taking action.

²⁵¹ See Whaley & Vogel, *supra* note 73.

²⁵² See Riley, *Gibbons Defends Executive Order*, *supra* note 82.

