

Keep Moving Forward

OTTEN JOHNSON
ROBINSON NEFF + RAGONETTI, PC

>> ottenjohnson.com



OTTEN JOHNSON ALERT

The New Kid on the Block: An Introduction to the WELL Building Standard

January 2019 • [Brittany Wisler](#)

The real estate industry is constantly challenged to meet the ever-changing demands of society. Over the past several years, real estate professionals have become familiar with green building rating systems, such as Leadership in Energy and Environmental Design (“LEED”), which evolved in response to society’s focus on protecting the environment. Now, in response to society’s focus on personal health and well-being, a new building rating system has emerged – The WELL Building Standard (“WELL”).

WELL is the first building rating system to set standards regarding the effect a building has on the health and well-being of its occupants. It is certified by Green Business Certification Inc., the same group that certifies LEED. This alignment with LEED is likely to provide significant credibility. In fact, WELL already appears to be making inroads in the real estate community. The first WELL-certified office building was the CBRE corporate headquarters in Los Angeles, California. And, according to the WELL website, “1,272 projects encompassing over 265 million square feet are applying [for WELL certification] . . . across 43 countries.” Here in Colorado, NAVA Real Estate Developers is pursuing WELL certification for Lakehouse, their new residential project at Sloan’s Lake. Further, state and local governments provide incentives, such as tax credits and higher floor-area ratios, for compliance with environmentally friendly standards like LEED. It is not unreasonable to think that state and local governments will offer similar incentives for WELL in the future, which would also provide significant credibility to the standard.

WELL is built around seven core “Concepts” of health that can be applied to new and existing commercial projects: (1) air, (2) water, (3) nourishment, (4) light, (5) fitness, (6) comfort and (7) mind. These Concepts are composed of various features, some of which are required “Preconditions” and others of which are optional “Optimizations.” Not all WELL features apply to all buildings. Therefore, the features that are considered Preconditions or Optimizations vary based on the type of building and stage of construction. Once achieved, WELL certification is valid for three years. The following section provides a high-level overview of the seven WELL Concepts and some of their related features in order to illustrate the impact WELL can have on the health and well-being of building occupants.

The Seven Core Concepts

Air

Clean air is critical to our health and well-being. In addition to contributing to asthma, allergies and upper respiratory illness, WELL research shows that “air quality issues can diminish work productivity and lead to sick building syndrome (SBS), where no disease or cause can be identified, yet acute health effects [such as eye, skin and airway irritation, as well as headache and fatigue] are linked to time spent in a building.” Features related to this Concept aim to improve indoor air quality by, among other things, (i) setting standards for the amount of volatile organic compounds that can be in a building’s air supply; (ii) instituting indoor and outdoor smoking bans; (iii) setting standards for construction pollution management to clear the building of dust, chemical vapors and other construction-related debris; (iv) using non-toxic, hypo-allergenic cleaning supplies; and (v) preventing outdoor air and pollutants from entering the building.

Water

Access to clean drinking water is essential to optimal health. Unfortunately, more and more people are being exposed to drinking water that contains potentially harmful levels of biological, chemical and mineral contaminants. In fact, in 2009, the U.S. Environmental Protection Agency issued a warning that “we can no longer take our drinking water for granted.” The features related to this Concept address the quality of and access to water by, among other things, (i) establishing minimum standards for the amounts of various inorganic, organic, and agricultural contaminants that can be in the building’s source of drinking water; (ii) implementing and maintaining water treatment systems, including carbon filters, sediment filters and UV sanitation; (iii) providing guidelines for the number of water dispensers that should be located in indoor and outdoor areas of the building; and (iv) implementing a plan for quarterly water quality testing.

Nourishment

Proper nutrition is a hallmark of good health and well-being. As society gets busier and busier, workdays get longer and longer. As a result, many people eat “on the go,”

which often leads to a diet that is high in fat and sugar and low in fruits and vegetables. Features related to this Concept encourage healthy eating in buildings where food is sold on a daily basis by, among other things, (i) promoting consumption of fruits and vegetables by making them easily accessible; (ii) banning the sale of foods that contain trans-fat; (iii) requiring labeling of foods that contain potential food allergens; (iv) requiring labeling of foods to provide detailed nutritional information; and (v) providing access to peanut-free, gluten-free, lactose-free, egg-free and vegan main-course options.

Light

Adequate lighting positively impacts our mood and productivity. Additionally, appropriate lighting plays a significant role in the body's circadian system, encouraging alertness during the day and sleepiness at night. The features related to this Concept aim to accomplish these things by, among other things, (i) establishing guidelines for workstation lighting that support visual acuity; (ii) reducing visual fatigue by limiting electronic and solar glare; and (iii) promoting exposure to daylight by limiting the distance workstations can be from a window or atrium.

Fitness

An active lifestyle is a healthy lifestyle. The American College of Sports Medicine recommends that adults engage in "at least 30 minutes of moderate-intensity aerobic activity five days per week." However, WELL research shows that "[a]n average adult obtains only 6-10 minutes of moderate to vigorous intensity physical activity a day." This inactive lifestyle is partially due to sedentary work environments. Features related to this Concept aim to reduce sedentary behaviors and integrate fitness into everyday life by, among other things, (i) promoting the use of stairs by making them visible and aesthetically pleasing through the use of adequate lighting, music and art; (ii) encouraging employers to provide a certain number of active workstations (i.e., treadmill desks, bicycle desks etc.) that employees can reserve for periodic use; (iii) encouraging employers to provide a certain number of adjustable height standing desks that employees can use on a daily basis; (iv) promoting active commuting by providing bicycle storage, showers and lockers; and (v) providing access to on-site fitness facilities free of charge.

Comfort

A comfortable environment decreases stress and increases productivity. WELL focuses on creating a distraction-free, comfortable and productive built environment through measures that incorporate key components of acoustic, ergonomic and thermal comfort. The features related to this Concept aim to accomplish this goal by, among other things, (i) reducing disruptions from internal noise through the use of sound masking systems, sound barriers and surfaces that dampen sound; (ii) reducing physical strain and increasing comfort through the use of furnishings that allow occupants to adjust the height of screens, desks and seating; and (iii) allowing occupants to control the temperature of their workspaces.

Mind

Although often overlooked, mental health plays a significant role in our overall health and well-being. The features related to this Concept aim to optimize cognitive and emotional health by, among other things, (i) promoting health literacy through an informational guidebook that describes the benefits of the WELL features that are used in the building, as well as through a digital or physical library of mental and physical health resources; (ii) providing access to stress management programs; (iii) recognizing the importance of human-nature connection through development of a biophilia plan that describes how the project facilitates human-nature interactions both inside and outside of the building; (iv) encouraging employers to provide paid paternity and maternity leave, family medical leave, and either on-site child care or vouchers for child care; and (v) implementing policies that encourage volunteering and charitable giving.

Please note that this Section has provided only a high-level overview of the seven WELL Concepts and some of their related features. These Concepts are made up of a great number of additional features, so please see the official WELL manuals and materials for more detailed, comprehensive and nuanced information.

Practical Considerations

Third Parties

When deciding to apply for WELL certification, it is important to recognize the effect that third parties may have on (i) whether a project can achieve WELL certification in the first place, and (ii) whether a project can achieve WELL recertification every three years thereafter.

Considerations for Initial WELL Certification

WELL requirements must be thoroughly analyzed during the planning and design process of constructing a new building or acquiring or renovating an existing one. This analysis will help identify governmental and other third party consents or approvals that may be required early during the permitting process.

Considerations for WELL Recertification

To ensure compliance with the requirements necessary to achieve WELL recertification every three years, WELL requirements should be incorporated into tenant leases and any other contracts that govern the use or operation of the building. For example:

- WELL sets standards for clearing buildings of dust, chemical vapors and other debris after construction. These standards should be incorporated into construction contracts for the building.
- WELL provides guidelines for using non-toxic, hypo-allergenic cleaning supplies. These guidelines should be incorporated into the rules and regulations of tenant

leases, as well as into contracts for janitorial services.

- WELL sets standards for the type of food that can be sold, and the information that must be provided about the food that is sold, in buildings where food is sold on a daily basis. These standards should be incorporated into leases with restaurant tenants and contracts with food vendors servicing the building.
- WELL compliance should be monitored by someone “on the ground”; therefore, property management contracts should obligate the building’s property management company to work towards compliance with WELL.

Contract Provisions

In addition to considering the effect that third parties may have on WELL certification and recertification, when negotiating tenant leases and other contracts that govern the use and operation of the building, real estate professionals should consider the impact that standard contractual language may have on compliance with WELL.

Reasonableness

Many contracts contain a reasonableness standard that applies when one party seeks consent or approval from the other (i.e., “Tenant will not assign this Lease or sublet the Premises without obtaining Landlord’s prior written consent, which consent will not be unreasonably withheld, conditioned or delayed.”). Although this reasonableness standard may seem boilerplate, it is important to note that what is considered reasonable for a building that is not WELL-certified may not be considered reasonable for a building that is WELL-certified. For example, in a building that is not WELL-certified, it may be reasonable for a landlord to give its consent to a tenant that wants to assign its lease to a company that engages in an unhealthy use, so long as the company meets certain financial thresholds. However, in a building that is WELL-certified, this could significantly impact efforts to achieve WELL recertification. Therefore, when negotiating and drafting contracts for a building that is WELL-certified, real estate professionals should clarify the reasonableness standard so that it will not be unreasonable to withhold consent for something that may jeopardize WELL certification or recertification.

Confidentiality

Some contracts contain confidentiality language that limits the information one party is obligated to share with the other. While confidentiality provisions are commonplace, it is important to note that, in order to obtain WELL certification and recertification, tenants, vendors and other users of the building must share certain information with the building owner, such as identifying information and design, construction and operation-related information, that may be of a proprietary nature. Therefore, when negotiating and drafting contracts for a building that is WELL-certified, real estate professionals should carve out from these confidentiality provisions any information that is required for the building owner to seek WELL certification or recertification.

Default and Remedies

Many contracts outline specific acts or omissions that are considered to be events of default, as well as remedies that are available to the non-defaulting party. Failure to meet the WELL requirements that are imposed through tenant leases and other contracts that govern the use of the building should be explicitly listed as an event of default in the applicable agreements. Further, while damages are a customary contractual remedy, it is important to consider whether damages could adequately compensate a building owner for a breach that results in a loss of WELL certification. Therefore, when negotiating and drafting contracts for a building that is WELL-certified, real estate professionals should consider whether self-help and injunctive remedies would provide a more appropriate remedy.

While this alert has discussed some implications of WELL, it does not attempt to address all the nuances that may impact a decision to pursue WELL certification for your project. In addition, WELL also has a WELL v2 pilot program and a WELL Community Standard that have slightly different requirements and applications than the WELL standard addressed in this alert. For more information on all of these standards, please visit <https://www.wellcertified.com/>.

Otten Johnson attorneys in our [Real Estate](#) practice group have substantial experience with development and governmental agreements. For more information on this Otten Johnson Alert or for help evaluating your current situation, contact any of the attorneys in the Real Estate practice group. For a listing, [click here](#).

More Great Reads

Rocky Mountain Real Estate Blog

The latest real estate and land use news and updates. [Read More](#)

Rocky Mountain Sign Law Blog

Regulatory, best practices, and other First Amendment news. [Read More](#)

Our lawyers are pleased to present timely, topical issue alerts on the latest legal developments, trends and other subjects of interest to our clients and colleagues. Otten Johnson publishes Otten Johnson Alerts on a monthly basis. If you do not wish to receive future Otten Johnson Alerts, you may unsubscribe by clicking the "opt out" link below. This Otten Johnson Alert has been prepared for informational purposes only and does not constitute legal advice or the opinion of Otten Johnson. Receipt of this summary does not create an attorney-client relationship between you and Otten Johnson. You should not act or rely on any information in this article without seeking the advice of an attorney. Otten Johnson provides legal advice only after being engaged to do so by a client with respect to particular facts and circumstances.

Read our full disclaimer