

GREEN APPEAL: LEED CERTIFICATION APPEAL PROCESS AND SUGGESTIONS FOR IMPROVEMENT

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INTRODUCTION

In today's real estate and construction environment, "Green is Good".¹ By "Green", I am of course referring to referring to the construction of buildings utilizing renewable resources and energy efficient design.² Currently, the Leadership in Energy and Environmental Design ("LEED"®) rating system developed in 2000 by the U.S. Green Building Council ("USGBC") is one of the most popular and utilized green building standards.³ As LEED ratings have more market value and increasing financial significance, the procedures for obtaining certainty of USGBC/Green Building Certification Institute ("GBCI") interpretations, and for appealing GBCI decisions, become extremely important. This article discusses questions raised by the existing USGBC/GBCI procedures.

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¹ No pun intended. Though, the author struggled with avoiding using the phrase "It ain't easy being Green" in the title.

² Due to the relative infancy of green building law, the actual definition and scope of what is "Green" is still in flux.

³ Green Buildings concepts are also required by the General Services Administration ("GSA") which is the agency responsible for the design, construction, operation and maintenance of more than 8,600 federally-owned facilities. As a result of a 2006 evaluation by GSA of sustainable building rating systems, GSA's Administrator concluded that LEED remains the most credible rating system available to meet GSA's needs. The GSA was also required, pursuant to the Energy Independence and Security Act of 2007 ("EISA"), to re-evaluate the rating systems every five years. In addition to reaffirming LEED as GSA's rating system, the GSA has recently increased its minimum requirement for new construction and substantial renovation of Federally-owned facilities from LEED® Silver to LEED® Gold, the next highest level of certification.

THE BASICS - APPLICATION SUBMISSION AND REVIEW⁴

The LEED rating systems were developed in 2000 by the USGBC and include rating systems for new construction, existing buildings operations & maintenance, commercial interiors, core & shell, schools, retail, healthcare, homes and neighborhood development.⁵ The GBCI administers LEED certification for all commercial and institutional projects registered under any LEED rating system, while the USGBC administers the development and ongoing improvement of the LEED rating systems.

Owners and developers seeking certification of their project(s) pursuant to a LEED rating system must seek certification from the GBCI. The GBCI certification program is a comprehensive third party review process designed to allow owners of eligible projects to apply for and potentially achieve LEED certification. LEED certification is an official recognition that a project complies with the requirements prescribed within the LEED Green Building Rating Systems and the LEED Minimum Program Requirements (“MPRs”) as created and maintained by USGBC. LEED certification provides independent, third-party verification that a building, home or community was designed and built using strategies aimed at achieving high performance in key areas of human and environmental health, sustainable site development, water savings, energy efficiency, materials selection and indoor environmental quality. The certification program is based upon LEED points as awarded on a 100-point scale, with credits weighted to reflect their potential environmental impacts. In addition to the initial points available, 10 bonus credits are available, four of which address regionally specific environmental issues.⁶ In order to achieve LEED certification, a project must satisfy all prerequisites and earn a minimum number of points to be certified. The total

⁴ This Section draws significantly from GBCI, *LEED Certification Policy Manual*, § 1.1. (June, 2011), https://www.leedonline.com/irj/go/km/docs/documents/usgbc/leed/config/terms/Legal_Documents_Download/rating_system_doc_june_20_2011/June2011_Cert_Policy_Manual.pdf (“*LEED Policy Manual*”). As a result, consider this footnote a general citation to the entire section.

⁵ LEED 2012 is the next version of the LEED program and will include the next step in the continuous improvement process and the on-going development cycle of the LEED program, including the Building Design + Construction, Interior Design + Construction, Operations + Maintenance, Neighborhood Development, and LEED for Homes rating systems. LEED 2012 will be balloted from June 1-30, 2012. For more information visit: <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2360> (last visited Mar. 13, 2013).

⁶ Regional credits are another feature of LEED. Regional credits acknowledge the importance of local conditions in determining best environmental design and construction practices. LEED projects will be able to earn “bonus points” for implementing green building strategies that address the important environmental issues facing their region. A project can be awarded as many as four extra points, one point each for achieving up to four of the six priority credits. *Regional Priority Credits*, U.S. Green Building Council, <https://www.usgbc.org/RPC/RegionalPriorityCredits.aspx?CMSPageID=2435> (last visited Mar. 13, 2013) (providing a region-by-region list of priority credits).

number of points awarded to a project allows for recognition at the following levels: 40–49 points, the project is recognized as LEED Certified; 50-59 points, the project is recognized as LEED Silver; 60-79 points, the project is recognized as LEED Gold; and 80 points and above entitles a project for recognition as LEED Platinum.

In order to participate in the LEED certification process, the developer's project team must first register the project with the GBCI.⁷ Registration is the process whereby project teams establish contact with GBCI and are provided access to software tools, rating system errata, critical communications, and other essential information.⁸

During the construction and design process, a LEED project team may encounter challenges when interpreting the requirements of a prerequisite, credit, or MPR. In such a case, the LEED project team may request a Credit Interpretation Request (“CIR”).⁹ The CIR ruling process is designed to allow project teams to obtain technical and administrative guidance on how rating system requirements and MPRs pertain to their projects.¹⁰ Absent guidance from a CIR, the developer of a project must make judgment calls based upon the recommendations of his project team.

Upon receipt of a completed application for certification, a formal application review will be initiated. The application review process differs slightly for each LEED rating system and review path.¹¹ Generally, GBCI's application review process includes a technical review of the information and documentation submitted to determine if a project complies with all applicable MPRs, prerequisites, and attempted credits. As with the application review process, the requirements, schedule, and policies for a LEED review will vary across the different rating systems and certification programs. GBCI indicates that it will “strive to meet the timelines stipulated within our application review policies as they are set forth in

⁷ Registration is the process whereby project teams establish contact with GBCI and are provided access to software tools, rating system errata, critical communications, and other essential information. *LEED Policy Manual*, *supra* note 5, § 9.1.

⁸ *Id.* §§ 9.1-9.4.

⁹ *Id.* § 10.2.

¹⁰ CIR rulings do not in any way guarantee that a prerequisite, credit or MPR will be satisfied or has been achieved. Rather, a CIR ruling provides an interpretation of a LEED program requirement that shall serve as criteria by which, in conjunction with the program requirement itself, GBCI will evaluate a project application. The project applicant must still demonstrate and document satisfaction of the criteria articulated in the CIR ruling upon the subsequent submission of the LEED certification application for the project. In addition, the CIR ruling will not be precedent setting and will not automatically carry forth and apply to other projects submitted by the same or another project team. For more information visit: <http://www.gbci.org/CIRs.aspx> (last visited April 4, 2012).

¹¹ For more information as to the specific review process for each rating system, see *Choose a Rating System*, GBCI, <http://www.gbci.org/main-nav/building-certification/certification-guide.aspx> (last visited April 4, 2012).

the rating system-specific and program-specific appendices of this manual.”¹² Additionally, “[t]o the extent that GBCI is unable to meet the timelines stipulated within these review policies, the applicable submission deadlines shall be extended by one day for each day that GBCI is late in returning the review.”¹³

Upon the conclusion of a final review, GBCI will give an opportunity to accept or appeal GBCI’s determination regarding the certification or denial of the project (the “Project Closeout”). To the extent the GBCI’s final review is accepted, the owner thereby relinquishes the right to appeal such results. If the owner does not accept or request an appeal of the results of the final review within twenty-five days, such results shall be deemed conclusive. Following the Project Closeout, the project team may not revise the forms, reattempt any denied credits or prerequisites, submit Project CIR requests, or attempt to achieve additional credits. This preclusion further applies even if addenda are released by USGBC that would support the acceptance of a denied credit, prerequisite, or MPR. Following the Project Closeout, the final step in the LEED review process is certification. And, once the final application review is complete, the project team can either accept or appeal the final decision. To the extent the GBCI’s final review is accepted, the owner thereby relinquishes the right to appeal such results. If the owner does not accept or request an appeal of the results of the final review within twenty-five days, such results shall be deemed conclusive.

PROJECT OWNER APPEALS POLICY¹⁴

¹² GBCI LEED Certification Policy Manual (the “LEED Policy Manual”), Section 13.3. Available for download at: https://www.leedonline.com/irj/go/km/docs/documents/usgbc/leed/config/terms/Legal_Documents_Download/rating_system_doc_june_20_2011/June2011_Cert_Policy_Manual.pdf (last visited April 4, 2012).

¹³ *Id.*

¹⁴ In addition to the Appeal process by a Project Owner, the LEED Policy Manual also includes other processes by which the award of LEED Certification can be reviewed. Specifically, third parties may submit information to GBCI concerning a LEED Certification. This Certification Challenge Policy’s stated purpose is to “protect the integrity of the LEED certification program as a credible, accurate, and industry-recognized system for evaluating the design and construction of sustainable buildings.” *Id.* § 16.2. Additionally, GBCI also provides that it reserves the right to institute investigations and review documentation for any reason or for no reason at all. *Id.* GBCI also encourages third parties who wish to make a complaint, or bring to light information affecting the grant of LEED certification for a project by submitting a complaint to GBCI within eighteen months of the award of LEED certification for a project. *Id.* Finally, the GBCI President may initiate a formal investigation into the appropriateness of an award of certification to a particular project if the veracity or accuracy of the documentation supporting such award is called into question, or if GBCI’s evaluation of such documentation is suspected to have been incomplete or flawed. *Id.* Such review by GBCI is limited to the period of up to two years after the date the project is awarded LEED certification. *Id.*

To the extent a project owner wishes to challenge GBCI's determination as to the satisfaction of a particular MPR, prerequisite, or credit, the project team or owner may initiate an appeal.

One benefit of the appeals process is that it can be used as a mechanism by which the project owner can submit clarifications or requests for new credits as well as a challenge to a GBCI determination.

First Level Appeal¹⁵

The above appeal is an example of a "First Level Appeal." To initiate the First Level Appeal process, the project team must initiate a First Level Appeal to GBCI prior to formal acceptance of and within twenty-five business days after the results of the final review or appeal are published.¹⁶ All first level appeals must be provided to GBCI via the same platform through which the project application was submitted for review (usually LEED Online). The project team¹⁷ must remit the appeal fee as well as identify the basis of the appeal.¹⁸ GBCI provides that it will endeavor to deliver a decision on the First Level Appeal within twenty-five business days from the initial filing of the appeal. When issued, GBCI's appeal decision shall include identification of the technical basis underlying such decision. GBCI will provide acknowledgement to the project team of the filing of the First Level Appeal.

Starting with the January 1, 2012 Policy Manual, GBCI has split the First Level Appeal into two formats. In the first format, the project team may choose to amend or supplement its LEED certification application with regards to any particular MPR, prerequisite, or credit. In the second format, the project team may challenge the accuracy of the GBCI reviewer's decision regarding the sufficiency of the submitted materials. Each First Level Appeal filed by a project team can only appeal a single MPR, prerequisite, or credit. However, a project team can submit multiple appeals simultaneously.

¹⁵ This section draws significantly from *id.* §§ 14.2-14.3.

¹⁶ *Id.* Formal acceptance of a GBCI determination occurs within LEED Online. LEED Online is a web-based program operated by GBCI through which project teams can manage project details, complete documentation requirements for LEED credits and prerequisites, upload supporting files, submit applications for review, receive reviewer feedback, and ultimately earn LEED certification. *LEED Online, GBCI*, <http://www.gbci.org/main-nav/building-certification/leed-online/about-leed-online.aspx> (last visited April 4, 2012).

¹⁷ The GBCI defines "project team" with respect to § 14 of the Policy Manual as meaning both the "project team and/or owner."

¹⁸ The "Appeal Fee" is a flat fee per each appeal. In that each appeal can only address one MPR, prerequisite, or credit, appeal fees can become quite substantial for a project. See Section 14.5 of the LEED Policy Manual.

First Level Appeals which seek to amend or supplement a LEED certification application may also be used to seek new credits. In fact, GBCI states in Section 14.2.1 of its LEED Certification Policy Manual (the “Manual”) that:

The appeals process may be used as a mechanism for submitting clarifications and/or new documentation to support the application materials related to any particular MPR, prerequisite or credit. In addition, project teams can elect to pursue additional credits and/or compliance paths that were not previously submitted for review. Utilizing the appeals process in this way is common, and is functionally similar to the process of submitting clarifications following a preliminary review. In this type of appeal, the project team is not challenging the accuracy of a GBCI decision but instead is providing supplemental information (often in response to the technical advice identified in comments by a reviewer) necessary to properly demonstrate compliance with the rating system requirement.

To submit a First Level Appeal seeking clarification and/or the submission of new credits, the project team must provide GBCI with (i) an explanation addressing the issues in the technical comments provided with the denial of the MPR, prerequisite, credit, and supplemental documentation as necessary; or (ii) the form related to the new credit or compliance path that the project team is pursuing including all necessary documentation to substantiate the same.

An appeal of GBCI’s decision that seeks clarification or the submission of new credits is only available via the First Level Appeals process. However, a project team may file a First Level Appeal seeking clarification or the submission of new credits as many times as necessary with further appeals. This is subject to the requirement that with each new appeal, the project team must remit the appropriate fees and provide the required documentation. Additionally, unlike instances where the project team is filing a First Level Appeal as a challenge to a GBCI decision, an appeal seeking clarification or the submission of new credits is likely to be reviewed by GBCI representatives involved with the review of prior phases.

The second format for the First Level Appeals may be used as a mechanism to challenge a ruling rendered by GBCI. In order to commence a First Level Appeal with the intent to challenge GBCI’s final determination with regard to a particular MPR, prerequisite or credit, the project team is required to provide a written explanation identifying the basis for the challenge including the identification of the suspected error in the reviewer’s determination which resulted in an incorrect denial. However, the submission of new MPR, credit, or prerequisite documentation (such as calculation, drawings, plans, etc.) by the project team is not permitted. In fact, the project team must clearly indicate in its appeal

documentation that the First Level Appeal is challenging a GBCI ruling and not providing additional clarifications or documentation.

One difference between a First Level Appeal challenging GBCI's determination and that of a First Level Appeal seeking clarification or submission of new credits, is that for a First Level Appeal challenging a GBCI ruling, the First Level Appeals process may be utilized only once per credit, prerequisite or MPR. Another difference between a First Level Appeal challenging a GBCI ruling and that of a First Level Appeal seeking clarification and/or submission of new credits, is that for a First Level Appeal challenging a GBCI ruling, GBCI will assign representatives not previously involved in evaluating the relevant requirement for the project. These "new" representatives will then review the documentation and explanation(s) provided by the project team. If the project team does not prevail with respect to its First Level Appeal challenging the GBCI ruling, the project team must appeal the decision using the Final Level Appeals process discussed below.

Final Level Appeal¹⁹

A project owner or project team may initiate a final level appeal ("Final Level Appeal") in order to challenge a First Level Appeal decision. Final Level Appeals are restricted to appeals only in order to challenge a First Level Appeal decision. Additional clarifications, documentation or alternative compliance paths may not be provided in a Final Level Appeal. The project owner or project team must submit the Final Level Appeal, using LEED Online, within twenty-five business days after receiving notice from GBCI as to the determination of the First Level Appeal.

Whenever a Final Level Appeal is lodged, the GBCI Chair in consultation with the GBCI President shall appoint three persons to serve on the Appeals Board, each of whom shall be qualified by virtue of training and experience to have the appropriate technical knowledge in the relevant LEED rating system. The Appeals Board shall make a final determination on all questions pertaining to MPRs, credits, or prerequisites. No member of the Appeals Board may: (a) review any matter in which his or her impartiality might reasonably be questioned or (b) review any matter which presents an actual or apparent conflict of interest relating to the project.

After appointment of the Appeals Board, GBCI will notify the project team of the names of those persons serving on the Appeals Board. Upon receipt of the names of those persons serving on the Appeals Board, the project team shall notify GBCI within ten business days of the name(s) of any person as to whom the project team questions such person(s) impartiality. The Chair of GBCI shall then determine whether to disqualify any

¹⁹ See *LEED Policy Manual*, *supra* note 5, § 14.3 (covering Final Level Appeals).

such member from serving on the Appeals Board. In the event of disqualification, the Chair of GBCI will designate another individual to serve as an interim member. The GBCI Chair in consultation with the GBCI President shall designate the Chair of the Appeals Board.

All Final Level Appeals must be submitted in writing and sent to GBCI by traceable email, mail, or delivery service. The appeal must specify a valid basis for the appeal, but may not offer documentation other than that previously proffered to GBCI. In turn, GBCI may file a written response to the appeal request. Written briefings may be submitted by the project team and by GBCI within twenty-five business days following submission of the appeal request.

After receipt of the previous information, the Appeals Board will endeavor to meet within sixty calendar days. After its meeting, the Appeals Board shall render a decision, including a brief description of its reasons, based on the record below and written briefs (if any) without an oral hearing. GBCI states that it will endeavor to, but does not guarantee to deliver, the decision on the appeal within ten business days of the meeting of the Appeals Board. Decisions issued by the Appeals Board shall be by majority vote and shall be final.

SUGGESTIONS FOR IMPROVEMENT

No matter the ratings system utilized by the project owner, an expanded and updated appeal process should be implemented by GBCI with respect to the denial of initial certification or the review of points and certification levels from GBCI.²⁰ The current appeal process is missing the “due process” that is a hallmark of the American legal system and which, if implemented as part of the GBCI appeal process could lead to increased validity and standing with respect to the award of GBCI certification. As such, the current appeal process could benefit from modifications to its existing procedures.

Evidentiary Standards

Specifically troubling with respect to the current GBCI appeal process is that project owners are denied (i) the ability to present evidence (outside of the documentary briefs allowed as part of the Final Level Appeal), (ii) the ability to examine and cross-examine witnesses under oath, and (iii) the ability to present opening and closing arguments. Additionally, while legal counsel is most assuredly involved in the appeal process, the ability to have legal counsel present (and actively involved) during each stage of an expanded appeal process would allow a more comprehensive review to be conducted.

Based upon the foregoing, a recommendation for improvement as to the current LEED certification appeal process is that GBCI could adopt standards allowing for the

²⁰ A review of the current changes present in LEED 2012 currently up for adoption does not review any changes to the appeal process.

presentation of evidence, the ability to subpoena witnesses and documents, the ability to examine and cross-examine witnesses under oath, the ability of the project owner (or its representatives) to present opening and closing arguments, and for the project owners legal counsel to be more fully engaged.

As a guideline for the appeal process improvements recommended above, GBCI could adopt a standard similar to that contained in Rule R-33 of the Construction Industry Arbitration Rules and Mediation Procedures promulgated by the American Arbitration Association (the “AAA”).²¹ Rule R-33 provides that:

- (a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.
- (b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered. The arbitrator may request offers of proof and may reject evidence deemed by the arbitrator to be cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where 1) any of the parties is absent, in default, or has waived the right to be present, or 2) the parties and the arbitrators agree otherwise.
- (c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
- (d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently. Parties who request that an arbitrator sign a subpoena shall provide a copy of the request and proposed subpoena to the other parties to the arbitration simultaneously upon making the request to the arbitrator.

²¹ AAA, *Construction Arbitration Rules and Mediation Procedures*, (2012), <http://www.foreclosuremediationfl.adr.org/si.asp?id=6448> (last visited April 4, 2012) (“*Arbitration Rules*”).

The adoption by GBCI of identifiable evidentiary standards will allow project owners and other individuals involved with the LEED certification process to have a clearer understanding of the nature of evidence and issues which can be presented during the appeals process. Additionally, by allowing the presentation of evidence and the ability to subpoena witnesses, project owners and GBCI can help to reduce current criticisms which assert that the GBCI appeal process is open to subjective interpretation and potentially arbitrary enforcement.²²

As a final note to GBCI adopting more expansive evidentiary standards, it is interesting to note that GBCI already incorporates the presentation of evidence, the making of opening statements, the presentation of documents and testimony, the examination and cross-examination of witnesses under oath, the making of closing statements, and presentation of written briefs in Certification Challenge proceedings brought by GBCI, based upon third-party complaints or upon the initiation of a proceeding by the GBCI President.²³ Thus, it is only logical that at a minimum, the same rights should be extended to appeals of LEED certification decisions by project owners.

Establishment of a Clear Burden of Proof

Another recommendation for improvement with respect to the project owner appeal process is that GBCI should clearly identify the burden of proof required by the parties and who bears the burden of overcoming that evidentiary standard. The Certification Challenge proceedings initiated by GBCI states:

GBCI will meet its burden of proof if it is able to demonstrate by a preponderance of the evidence, and the project owner is unable to refute either that the project owner failed to submit truthful, and accurate documentation when applying for certification, or that insufficient evidence exists to demonstrate that (i) all prerequisites and MPRs were properly completed at the time certification was conferred and (ii) that the minimum number of credits were properly completed at the time certification was conferred such that the project obtained the requisite number of points necessary to achieve LEED certification at the level awarded.

Upon the conclusion of a review or hearing, if the Review Panel determines that GBCI has not met this burden of proof no adverse action will be advised and the matter shall be closed. If the Review Panel determines that

²² Gina Vitello, *Appeal Raises Questions About LEED Certification*, HPAC ENGINEERING (Aug. 1, 2010), <http://hpac.com/columns/liability-litigation/appeal-questions-leed-certification-0810/> (last visited April 4, 2012).

²³ *LEED Policy Manual*, *supra* note 5, § 16.

GBCI has met this burden of proof it shall identify the appropriate sanctions to be carried out by GBCI.²⁴

GBCI should clearly identify an evidentiary standard (and upon which party, the project owner, or GBCI the burden shall be placed) that will be required to be met during a LEED certification appeal. In this manner, project owners can more fully evaluate their chances of prevailing on appeal and will help to create a more developed level of certainty as to how an appeal panel may view the evidence the project owner may present.

Revised Qualifications for Appeal Panel Members

Another area of improvement for the appeal process would be in the area of the selection of appeal panel members. Currently, the GBCI Chair in consultation with the GBCI President appoints the persons to serve on a Review Panel, “each of whom shall be qualified by virtue of training and experience to have the appropriate technical knowledge in the relevant LEED program requirements.”²⁵ The LEED certification appeals process would benefit from a program designed to identify qualified professionals willing to serve as panel members. A process similar to the qualification system currently used by the AAA with respect to Neutrals serving on the AAA Panel of Construction Arbitrators would be beneficial.²⁶ Additionally, the guidelines set forth by the AAA regarding the Qualification Criteria for members of the AAA Large, Complex Construction Panel require, in addition to the qualifications required for membership on the AAA Panel of Construction Arbitrators that each member have:

- **Construction Industry Experience:** The business experience qualification varies depending upon the current background of the individual:

Construction Industry Professional: Minimum of 15 years of professional experience as a construction professional demonstrating progressive project responsibilities and performance.

Construction Industry Business Executive: Minimum of 15 years of construction experience with at least 10 years in one or more senior-level positions of a construction industry company, firm or organization.

²⁴ *Id.*

²⁵ *Id.* § 14.3

²⁶ AAA, *Qualification Criteria and Responsibilities for Members of the AAA Panel of Construction Arbitrators*, (2009), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003872 (last visited March 13, 2013) (“*Arbitration Qualifications*”).

Legal Professional: Attorney with a minimum of 15 years in legal practice with at least 75% of practice for the past 15 years devoted to the practice of Construction Law.

- Extensive experience in conflict management.
- Leadership role(s) in construction industry business, trade, or professional association(s)
- Faculty or contributor to dispute resolution education and programs.

Additionally, AAA Neutrals serving on the AAA Panel of Construction Arbitrators are required to complete ongoing training in the field of ADR to supplement their existing industry and legal experience. Such a requirement would also be beneficial for LEED appeal panel members.

GBCI could still retain control of the ultimate decision-making process as to which individuals are eligible to be LEED appeal panel members, but individuals with the requisite qualifications would also be free to apply to be listed as a LEED appeal panel member. As such, GBCI would be able to draw from a broader pool of talented and qualified individuals.

In summary, by setting identifiable standards and qualifications for LEED appeal panel members, GBCI can set a level of transparency as to the expertise and experience of the individuals who may hear LEED certification appeals.

Revised Process for Selection of Panel Members

Another recommended step for LEED certification appeals is that rather than the GBCI Chair in consultation with the GBCI President unilaterally selecting the members of the appeals panel, GBCI could adopt procedures similar to those set forth in Rule R-14 of the Construction Industry Arbitration Rules and Mediation Procedures promulgated by the AAA.²⁷ In particular, Rule R-14, *Arbitrator Appointment from National Construction Panel*, provides that:

Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is

²⁷ See *Arbitration Rules*, *supra* note 22, R-14. The American Arbitration Association is also developing materials to educate construction industry members about Green/Sustainable building issues. See AAA, NCDRC *Green/Sustainable Frequently Asked Questions*, http://www.adr.org/cs/idcplg?IdcService=GET_FILE&DocName=ADRSTG_010809&RevisionSelectionMethod=LatestReleased (last visited March 13, 2013).

appropriate) names of persons chosen from the National Construction Panel. The parties are encouraged to agree on an arbitrator from the submitted list and to advise the AAA of their agreement.²⁸

GBCI could adopt a similar process to allow project owners to select their preferences for panel members. GBCI could also utilize a hybrid system whereby the project owner selects one panel member, GBCI selects one panel member, and the two panel members selected by GBCI and the project owner select the third. Allowing project owners to have input into the selection of appeal panel members will help to ensure the “neutrality” which should exist with respect to appeal panel members.

CONCLUSION

As the number of green buildings continues to increase, demand will increase for LEED Certified attorneys, architects, and contractors. These Green Professionals will benefit from an improved appeals process which incorporates a greater level of certainty as to the “due process” of any appeal and which helps to reduce the chance of subjective interpretation and, potentially, arbitrary enforcement with respect to the LEED Certification process.

²⁸ *Arbitration Rules*, *supra* note 22, R-14. .