

**LEED Online Version 3**  
Be Wary of its Agreements

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**LEED Online Version 3**  
Be Wary of its Agreements

- LEED Online Version 3 (LOL3) requires three agreements to be executed as part of the certifications process. In order they are:
- Terms and Conditions for use of LOL3
- Project Registration Agreement
- Project Certification Agreement

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**LEED Online Version 3**  
Be Wary of its Agreements

- GBCI only permits registration using LOL3
- BY using LOL3, user thereby agrees to GBCI's terms and conditions
- Terms and conditions also purport to be binding upon an LOL3 user's employees and agents
  - Potential consequences for agents and employees
  - Is this enforceable?

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**LEED Online Version 3**  
Be Wary of its Agreements

- User provided information for purposes of submitting, registering and applying for Project certification is all displayed in LOL3.
- If confidentiality desired, then the “confidentiality option” within the registration forms should be selected.

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**LEED Online Version 3**  
Be Wary of its Agreements

- If user not Project Owner, user should determine if they are subject to any confidentiality obligations to Project Owner and possibly be in breach of those obligations
- User may need to address this issue in its agreement with the Project Owner

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**LEED Online Version 3**  
Be Wary of its Agreements

- GBCI reserves right to unilaterally update, change and/or remove content and availability of features and programs
- If user does not agree with changes, sole remedy is to terminate agreement, and certification process, and forfeit all fees paid

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**LEED Online Version 3**  
Be Wary of its Agreements

- User waives all claims against USGBC and GBCI except for willful misconduct, gross negligence, or wanton or reckless behavior (i.e., a waiver of all likely claims)

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**LEED Online Version 3**  
Be Wary of its Agreements

- Each user of LOL3 (and their agents and employees) agree to indemnify GBCI and USGBC against third party claims, losses, damages, etc., related to the use of LOL3 (except for GBCI's or USGBC's willful misconduct, gross negligence, or wanton or reckless behavior)
- Agents and employees should find this objectionable and frightening

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**LEED Online Version 3**  
Be Wary of its Agreements

- Claims not waived by users must follow strict timelines and notice procedures or they, too, become waived
- Venue lies exclusively in DC courts
- Parties waive a jury trial
- DC law governs
- GBCI alone has option to first require mediation in DC
- No rules for selecting mediator or mediation process

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### LEED Online Version 3

Be Wary of its Agreements

#### Project Registration Agreement

- Purpose is to ensure that the person registering the Project (the “registrant”) has reviewed all aspects of the LEED Certification process and is fully aware of and agrees to all of the terms, conditions and provisions contained in the following documents, in order of precedence

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### LEED Online Version 3

Be Wary of its Agreements

- The Agreement itself
- The LEED Certification Policy Manual
- The LEED Certification Application that the registrant submits and GBCI accepts
- The applicable LEED Green Building rating System, and
- The LEED Green Building Rating System Reference Guide

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### LEED Online Version 3

Be Wary of its Agreements

- The Agreement expressly indicates that it supersedes any and all prior agreements between the registrant and GBCI concerning the LEED Certification process
- Therefore, it supersedes the terms and conditions of LOL3 if the user in LOL3 is the registrant under the Project Registration Agreement

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### LEED Online Version 3

#### Be Wary of its Agreements

- The registrant is defined as a person, not an entity, and includes all persons who participate in Project submittals. Thus, the individual employee of, say, an architectural firm, who submits the Project Registration material, and not that employee's employer, is party to the Project Registration Agreement
- (Note, the "Owner," however, can be either and entity or person" <sup>13</sup>

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### LEED Online Version 3

#### Be Wary of its Agreements

- If registrant does not agree with the terms of the Project Registration Agreement, registrant's sole remedy is to terminate agreement, and certification process, and forfeit all fees paid

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### LEED Online Version 3

#### Be Wary of its Agreements

- Initial registrant will be deemed the "Project Administrator" for administration of the LEED Certification Application
- Role of "Project Administrator" may be changed at any time
- The Project Administrator is the sole individual to submit the LEED Certification Application after Owner has executed the LEED Certification Agreement <sup>15</sup>

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**LEED Online Version 3**

**Be Wary of its Agreements**

- Once registration complete, Project will be included in Registered Projects List within the online LEED Project Directory
- If Project information is to be kept confidential, then the “confidentiality option” within the registration forms should be selected
- Registrant may need to address this issue in its agreement with the Project Owner

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**LEED Online Version 3**

**Be Wary of its Agreements**

- Registrant represents that it will endeavor in good faith to use reasonable commercial efforts to
  - (i) design the Project to achieve LEED Certification at the LEED Certified Level, or higher
  - (ii) construct such Project so as achieve LEED Certification at the LEED Certified Level, or higher, and
  - (iii) pursue LEED Certification for such Project

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**LEED Online Version 3**

**Be Wary of its Agreements**

- Further, by registering Project, registrant represents that it has not been told by the Owner of the Project, and it has no other reason to believe, that
  - (i) Project will not be designed so as to achieve LEED Certification at the LEED Certified Level, or higher
  - (ii) Project will not be constructed so as to achieve LEED Certification at the LEED Certified Level, or higher, and
  - (iii) LEED Certification will not be pursued

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**LEED Online Version 3**  
Be Wary of its Agreements

- Presumably, these representations are meant to mitigate against owners using the LEED registration process for the owners' PR or marketing purposes and thereby somehow diluting the LEED brand should owners not later pursue such certification
- GBCI obviously feels that GBCI will somehow be harmed by such practices

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**LEED Online Version 3**  
Be Wary of its Agreements

- Does this place registrants in a risky position of possibly being liable to the GBCI for the actions of owners in not later pursuing LEED certification?
- And what does "have not been told" and "have no other reason to believe" mean? Different registrants could conclude differently on the same set of facts. Who decides?

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**LEED Online Version 3**  
Be Wary of its Agreements

- What happens if registrant obtains knowledge later that would change the registrant's initial representations?
- Might registrant be placed in a Catch 22 position of being contractually obligated to pursue LEED certification through its agreement with Owner yet unable in good faith to make these GBCI required certifications?

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**LEED Online Version 3**  
Be Wary of its Agreements

- Perhaps artful contract drafting could avoid a breach of contract action by Owner, but it certainly wouldn't improve the working relationship between Owner and registrant

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**LEED Online Version 3**  
Be Wary of its Agreements

- Registrant must pay all registration fees by credit card
- Registrant's contract with Owner should either treat such payment of fees as (a) a reimbursable cost item, (b) be paid in advance by Owner, or (c) use Owner's credit card for such purposes

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**LEED Online Version 3**  
Be Wary of its Agreements

- Agreement requires all documents and information submitted in connection with completing a LEED Certification Application to be kept at the Project site for seven (7) years from the date of award of LEED certification
- obviously can only be enforced by the Project Owner, and not the registrant who itself is not the Project Owner

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**LEED Online Version 3**  
Be Wary of its Agreements

- Non-owner registrants must, at a minimum, have a contractual agreement with the Owner to maintain such documents at the site for the requisite period of time and that such Owner will require through enforceable agreements any future owners to also adhere to these requirements.

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**LEED Online Version 3**  
Be Wary of its Agreements

- Registrant acknowledges “that the Project Owner will be required to confirm that each Licensed Professional on the Project team who has registered as such with [GBCI] meets each of the Licensed Professional Exemption requirements, ... and that [the registrant] shall notify [GBCI] immediately of any adverse change in the status, or good standing, of any Licensed Professional(s) who has provided information through the Licensed Professional exemption process.”

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**LEED Online Version 3**  
Be Wary of its Agreements

- How the registrant is supposed to (i) enforce the Owner’s obligation to confirm the exemption status of each design professional, and (ii) be kept informed of the continuing good standing status of each such design professional for reporting purposes, is not spelled out in the text of the Agreement
- It is also unclear how, as a practical matter, the registrant can assure itself of compliance with these obligations

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### LEED Online Version 3

#### Be Wary of its Agreements

- [Note: In accordance with the Policy Manual, by participating in the Licensed Professional Exemption program, the licensee agrees that in the event that incomplete, inaccurate, or untruthful information is discovered [by GBCI in the LEED Certification Application process], information regarding the same will be forwarded to the appropriate licensing board or authority for further investigation and appropriate disciplinary action]

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### LEED Online Version 3

#### Be Wary of its Agreements

- [There doesn't have to first be a finding of intentional, wanton or reckless conduct on the part of the licensee (i.e., the same standards against which GBCI requires itself to be judged). This is too low a threshold to commence a process that could tarnish a design professional's reputation. It's hard to imagine why a design professional would want to subject themselves to this potential risk by participation as a team member or team administrator.]

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### LEED Online Version 3

#### Be Wary of its Agreements

- GBCI takes no responsibility to timely review a LEED Certification Application, nor will any deadlines or Rating System Sunset dates be extended due to GBCI's failure to meet any timelines set forth in the Application Review Policies (except for GBCI willful misconduct, gross negligence or wanton or reckless behavior), nor will any fees associated with the LEED Certification process be refunded. What incentive does GBCI have for timely performing their reviews and evaluations?

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### LEED Online Version 3

#### Be Wary of its Agreements

- GBCI reserves to itself the right to monitor certain project performance metrics (i.e., energy and water use) for a period of five (5) years following the date the project receives LEED certification. While it is the owner's obligation to notify all subsequent owners of the project of these requirements, it is the registrant's obligation to require the owner to use reasonable efforts to require subsequent project owners of these requirements.

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### LEED Online Version 3

#### Be Wary of its Agreements

- The Agreement does not indicate how the registrant is to implement this obligation
- Non-owner registrants who are bound by these terms must, at a minimum, have a contractual agreement with the Project Owner to adhere to these Project monitoring requirements and to inform future owners of same, otherwise, how is the registrant to enforce these Owner obligations?

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### LEED Online Version 3

#### Be Wary of its Agreements

- Registrant agrees, if it is submitting a LEED Certification Application under the LEED 2009 for Existing Buildings: Operations and Maintenance Rating System, registrant shall be required to achieve LEED Certification at least once every five (5) years from the date of the most recent award of LEED Certification, and to grant GBCI access to the Project's water and utility service provider

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**LEED Online Version 3**  
Be Wary of its Agreements

- Since the registrant, and not the Project's Owner, has this duty
- (i) how is the registrant supposed to fulfill this obligation in each of the five subsequent years, and
- (ii) how is the registrant going to be compensated for its time, cost and effort in trying to maintain such LEED Certification?

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**LEED Online Version 3**  
Be Wary of its Agreements

- If the registrant can't fulfill these obligations, and another registrant doesn't assume them, then the Project will lose its LEED Certification status
- This could have significant ramifications for the Project Owner
- Registrant would have to address these issues in its contract with the Project's Owner, assuming there is such a contract.

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**LEED Online Version 3**  
Be Wary of its Agreements

- Registrant agrees to grant GBCI a very broad license to use, reproduce, distribute, display, publish and to make derivative works from (i.e., to edit and modify) any documents provided by registrant in the LEED Certification Application for any purpose in connection with green building research, related educational purposes, and promotion of the goods and services related to LEED or the LEED Green Building Rating System

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**LEED Online Version 3**  
Be Wary of its Agreements

- This is very problematic
- Requires registrant to first have sufficient rights in such documents in order to grant such licenses
- Registrant, if itself doesn't have sufficient rights in the documents, may first be required to obtain an appropriate license from the owner or license holder of such documents in order to grant such license to GBCI

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**LEED Online Version 3**  
Be Wary of its Agreements

- Many times a registrant who is a design professional may have contractually assigned their rights to the documents to the Owner
- If a registrant retained the services of others, such as design professionals, that registrant may have to contractually or otherwise secure appropriate rights from those design professionals' to grant the required licenses to GBCI

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**LEED Online Version 3**  
Be Wary of its Agreements

- Will selection of the "confidentiality option" in the registration forms be sufficient to preclude GBCI from disclosing such documents to others?
- If registrant's contract with Owner requires the registrant to maintain the confidentiality of these documents, registrant will be required to negotiate with Owner a carve out to permit disclosure to GBCI for purposes of LEED Certification Application processes

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### LEED Online Version 3

#### Be Wary of its Agreements

- As with the LEED Online Agreement, registrant releases GBCI from all claims related to the LEED Certification process other than GBCI's or USGBC's willful misconduct, gross negligence, or wanton or reckless behavior (i.e., all claims that are likely to occur)
- Under such circumstances, registrant's maximum amount of recovery is limited to fees paid to GBCI to register the Project and to apply for LEED Certification. The Agreement also contains a mutual waiver of all consequential damages.

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### LEED Online Version 3

#### Be Wary of its Agreements

- Registrant agrees that with respect to each project it registers for LEED Certification and/or for which the registrant submits a LEED Certification Application, that the registrant will indemnify GBCI and USGBC for, and to hold them harmless against, all third-party claims arising from or in any way related to registration and/or the LEED Certification process not caused by GBCI's or USGBC's negligence, gross negligence, willful misconduct, or wanton or reckless behavior.

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### LEED Online Version 3

#### Be Wary of its Agreements

- Will a registrant be required to indemnify USGBC and/or GBCI when a Project Owner, disappointed that it did not receive LEED certification, or the level of LEED certification that it desired, sues USGBC and/or GBCI for what the Project Owner claims to be the wrongful failure of GBCI to grant such certification. What registrant wants that financial obligation? What if the Project was, say, a condominium with many disappointed unit owners all of whom may have claims against USGBC and/or GBCI?

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### LEED Online Version 3

#### Be Wary of its Agreements

- Remember, the registrant is an individual, not an entity. Even if the registrant is nominally the Project Owner, it is actually an individual within the Owner organization who bears this personal liability and the possibility that the Owner entity will have insufficient funds, or unreachable funds, with which to compensate the individual registrant for its losses

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### LEED Online Version 3

#### Be Wary of its Agreements

- As with the LOL3 Agreement, claims not waived by the registrant must follow strict timelines and notice procedures or those claims become waived
- Venue lies exclusively in DC courts
- Parties waive a jury trial
- DC law governs
- GBCI alone has option to first require mediation in DC
- No rules for selecting mediator or mediation process

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### LEED Online Version 3

#### Be Wary of its Agreements

##### Project Certification Agreement

- Purpose is to ensure that Owner has examined all aspects of the application for completeness, truth and accuracy, and is fully aware of and agrees to all of the terms, conditions, and provisions set forth in the following documents prior to submitting the LEED Certification Application for review
- If more than one Owner of the Project, all must consent to the terms of the Agreement by accepting this Agreement within LEED Online

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### LEED Online Version 3

#### Be Wary of its Agreements

Project Certification Agreement consists of the following prioritized documents:

- The Agreement itself
- The LEED Certification Policy Manual
- The LEED Certification Application that the registrant submits and GBCI accepts
- The applicable LEED Green Building rating System, and
- The LEED Green Building Rating System Reference Guide

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### LEED Online Version 3

#### Be Wary of its Agreements

- Unlike the Project Registration Agreement, in which the registrant party to that Agreement may, but is unlikely to be the Owner, the Project Certification Agreement is to be entered into by the Owner or its authorized agent
- If the Owner is an entity, there would be Owner/entity liability under the Project Certification Agreement but no personal liability on behalf of the individual acting as the Owner's agent who enters into the Registration Agreement in its capacity as agent.

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### LEED Online Version 3

#### Be Wary of its Agreements

- The Agreement expressly indicates that with the exception of the LEED Project Registration Agreement [it] supersedes any and all prior agreements between Owner and GBCI concerning the LEED Certification process as it applies to the Owner's Project
- Therefore, it supersedes the terms and conditions for use of LEED Online Version 3 if the Owner was the user who entered into the LOL3 Agreement

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**LEED Online Version 3**  
Be Wary of its Agreements

- Note that the registrant under the LEED Registration Agreement is still bound to GBCI by the latter agreement since the LEED Certification Agreement doesn't supersede it

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**LEED Online Version 3**  
Be Wary of its Agreements

- If it is later determined that the individual entering into the Project Certification Agreement with GBCI is not the Owner or the Owner's authorized agent, then the Agreement states that such individual "shall be held personally liable for the entire liability of the person(s) or entity for which you lack the authority to bind."

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**LEED Online Version 3**  
Be Wary of its Agreements

- If the Owner is unable or unwilling to accept this Agreement its sole choice is to withhold its LEED Certification Application and/or terminate the registration for the Project, and GBCI will not refund any fees paid by the Owner to GBCI
- If the Owner sells or transfers the Project to another Owner, than the successor Owner must execute this Agreement or, again, its sole choice is to withhold its LEED Certification Application and/or terminate the registration for the Project.

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### LEED Online Version 3

#### Be Wary of its Agreements

- The Project Administrator is the sole individual who may submit the LEED Certification Application after the Owner has executed the LEED Certification Agreement
- The Agreement requires that all documents and information submitted in connection with completing a LEED Certification Application must be kept at the Project site for seven (7) years from the date of award of LEED certification, which could be anywhere from 8-10 years after substantial completion of the Project.

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### LEED Online Version 3

#### Be Wary of its Agreements

- Owner agrees that "it will confirm that each Licensed Professional on the Project team who has registered as such with [GBCI] meets each of the Licensed Professional Exemption requirements, ... and that [the Owner] shall notify [GBCI] immediately of any adverse change in the status, or good standing, of any Licensed Professional(s) who has provided information through the Licensed Professional exemption process, and that such obligation shall continue throughout the LEED Certification process up and until final award or denial of LEED Certification occurs."

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### LEED Online Version 3

#### Be Wary of its Agreements

- How can the Owner comply with this obligation?
- Perhaps the Owner should have all design professionals certify at appropriate times the currency of their professional license, perhaps with copies thereof?
- Or maybe the Owner should independently check with each of the relevant licensing boards?
- Will the Owner require its prime design professional to take care of this on behalf of the Owner, and to incur risk in connection therewith?

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### LEED Online Version 3

#### Be Wary of its Agreements

- As with the LEED Registration Agreement, GBCI takes no responsibility to timely review a LEED Certification Application, nor will any deadlines or Rating System Sunset dates be extended due to GBCI's failure to meet any timelines set forth in the Application Review Policies (except for GBCI willful misconduct, gross negligence or wanton or reckless behavior), nor will any fees associated with the LEED Certification process be refunded. What incentive does GBCI have for timely performing their reviews and evaluations?

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### LEED Online Version 3

#### Be Wary of its Agreements

- GBCI reserves to itself the right to monitor certain project performance metrics (i.e., energy and water use) for a period of five (5) years following the date the project receives LEED certification
- The Owner has the burden of advising subsequent owners of these monitoring requirements and exercising reasonable efforts to require subsequent owner and/or occupants of the Project to comply with these Project monitoring requirements
- What would these reasonable efforts look like? Obligations in purchase and sale agreements?

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### LEED Online Version 3

#### Be Wary of its Agreements

- Owner agrees to grant GBCI a very broad license to use, reproduce, distribute, display, publish and to make derivative works from (i.e., to edit and modify) any documents provided by registrant in the LEED Certification Application for any purpose in connection with green building research, related educational purposes, and promotion of the goods and services related to LEED or the LEED Green Building Rating System

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**LEED Online Version 3**  
Be Wary of its Agreements

- This is very problematic
- Requires Owner to first have sufficient rights in such documents in order to grant such licenses
- Owner, if itself doesn't have sufficient rights in the documents, may first be required to obtain an appropriate license from the owner or license holder of such documents in order to grant such license to GBCI
- Absent an agreement to the contrary, copyright law vests copyright in the design professional

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**LEED Online Version 3**  
Be Wary of its Agreements

- Owner will also have to contractually ensure that it obtains the requisite licenses from the prime design professional's consultants whose documents may also have been submitted to GBCI as part of the LEED Certification Application process
- Sometimes design professionals' documents may be protected by confidentiality agreements

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**LEED Online Version 3**  
Be Wary of its Agreements

- As with the LEED Online Agreement and the Project Registration Agreement, the Owner releases GBCI from all claims related to the LEED Certification process other than GBCI's or USGBC's willful misconduct, gross negligence, or wanton or reckless behavior (i.e., all claims that are likely to occur). Under such circumstances, the registrant's maximum amount of recovery is limited to fees paid to GBCI to register the Project and to apply for LEED Certification. The Agreement also contains a mutual waiver of all consequential damages.

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### LEED Online Version 3

#### Be Wary of its Agreements

- Owner agrees that it will indemnify GBCI and USGBC for, and to hold them harmless against, all third-party claims arising from or in any way related to registration and/or the LEED Certification process not caused by GBCI's or USGBC's negligence, gross negligence, willful misconduct, or wanton or reckless behavior
- So, for example, a disappointed condominium unit owner's claims against GBCI will trigger this indemnity obligation

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### LEED Online Version 3

#### Be Wary of its Agreements

- As with the LOL3 Agreement and the Project Registration Agreement, claims not waived by the Owner must follow strict timelines and notice procedures or those claims become waived
- Venue lies exclusively in DC courts
- Parties waive a jury trial
- DC law governs
- GBCI alone has option to first require mediation in DC
- No rules for selecting mediator or mediation process

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