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## GREEN Building in N.J. roundtable



L TO R: ROBERT GERARD, CHRISTOPHER ACKERMAN, JAMES KOSCH, VINCENT MANGINI

**G**reen building is a hot topic, but while interest in sustainable, healthy building has grown rapidly, it remains a complex, evolving field that requires hard-to-come-by expertise. Our panelists understand the issues, and have agreed to share their insights. They are: Christopher D. Ackerman, associate at Dilworth Paxson in Neptune; Robert M. Gerard, chief marketing officer at Birdsall Services Group in Sea Girt; James A. Kosch, shareholder at LeClairRyan in Newark; and Vincent J. Mangini, shareholder at Stark & Stark in Princeton.

This roundtable was moderated by freelance reporter Anne Dorfman and reported by Robert M. Levine of Rosenberg & Associates.

**MODERATOR:** What is green building?

**MANGINI:** Green building is defined in a number of ways, depending on the context. The Environmental Protection Agency defines it as “creating structures and using processes that are

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## GREEN BUILDING IN NEW JERSEY • A ROUNDTABLE DISCUSSION



*I recommend that the buyer negotiate to choose the commissioning agent and also insist on having a LEED AP on the design team to represent its interests.*

— Christopher Ackerman



*After an investment-grade energy-efficiency audit and the upgrading of a building and its mechanical systems — boilers, chillers and HVAC — the occupants are going to use less energy.*

— Robert Gerard

environmentally responsible and resource-efficient throughout a building's life cycle, from siting to design, construction, operation, maintenance, renovation, and deconstruction."

**KOSCH:** The EPA definition covers it in the broadest sense, but there is no cookbook on green building, and in many ways — from a legal standpoint, an engineering standpoint, and a public policy standpoint — we're starting fresh. Green building is really part of a larger concern about sustainability, and it is also about some of the technological innovations that are improving the efficiency and affordability of energy and water use, and enhancing indoor air quality. Climate change is driving some folks, and some public companies are shareholder-driven with regard to sustainability. Companies that do a lot of work in Europe have to comply with EU directives or elect to follow UN sustainability guidelines. Energy is the immediate driver; water, especially on the West Coast, is going to be a long-term driver.

**GERARD:** When we talk about green buildings, we're talking about environmentally friendly buildings. We need to take a holistic look at green building and sustainability, and include both the materials in these buildings and the sites where they are located.

**ACKERMAN:** The United States Green Building Council's definition is also a good starting point. The USGBC defines green building as an approach that uses "building techniques that minimize environmental impacts and reduce energy consumption ... while contributing

to the health and productivity of its occupants." The aim is not only to build with minimal impact on the environment, but also to create a building that will be more efficient and produce long-term savings from reductions in operational costs.

**MODERATOR:** Who determines which standards are used to define the "green" in green building?

**GERARD:** From a voluntary standpoint, you have the USGBC's Leadership in Energy and Environmental Design Green Building Rating System, known as LEED, at program levels of Certifiable, Silver, Gold, and Platinum. This has received the largest amount of publicity and the greatest support from the sustainable community. LEED provides the building industry with choices to ensure that its projects are healthier, more environmentally responsible, and more profitable. The LEED rating system should be viewed by owners and operators as establishing a framework for sustainable projects.

**MODERATOR:** The USGBC is a private, nonprofit organization, and the LEED standard is not government mandated.

**GERARD:** While the LEED rating system has not been fully adopted by all government entities, we are beginning to see mandated green building for publicly funded projects. In New Jersey, new schools built with public funds must now satisfy minimum LEED point levels and will soon be required to meet LEED Silver. Some New Jersey municipalities have passed ordinances

requiring all town-funded projects to be LEED Silver. New York City requires that its larger publicly funded projects meet the equivalent of LEED Silver. Connecticut requires two Green Globes — the equivalent of LEED Silver — based on a rating system licensed by the Green Building Initiative. We are using LEED as a guideline for private sector clients, unless an owner absolutely demands that its project be certified at one of the LEED levels.

**KOSCH:** Numerous standards are being developed internally at the federal level. The Department of Energy has a standard for its buildings, EPA has its standards, the Department of Defense has its standards. They're often geared toward LEED, but you also have Green Globes and Energy Star, which is a government rating for the energy efficiency of both appliances and buildings. When we sit down with a client, we want to know what its goals are, and our conversation is not driven up front by the law. It's driven by the design professionals and the client's needs and whether they want to be certified under a voluntary program. They need to know what they want, and if they're going to have tenants, what the tenant is going to expect. The issue that's hanging out there is that some state legislatures want to jump on the green movement bandwagon and legislate some of these voluntary, evolving and consensual programs into law — which creates a whole bunch of problems. As it stands now, you can sit down with the client, find out what they want, and maybe even develop their own standards. What's important, though, is what's going to

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happen two or three years down the line. You have to keep an eye on the legislation in your state, and sometimes in your county and your locality. In a private development, you have to ask what the rules of the association are going to be.

**MODERATOR:** How do you deal with the fact that there are many standards, and sometimes they may conflict?

**KOSCH:** I quibble with the word *standards*. They're *guidelines*. We are talking about making choices to get to a certification, so *standards* might not be the right word.

**MANGINI:** Some of the guidelines out there are more rigorous than others, so the time and costs required for compliance differ. LEED tends to be more rigorous than, say, the National Association of Home Builders' Model Green Home Building Guidelines. There's a time and a place for these various standards; a less rigorous one may allow a building to become a little bit green more cost effectively, whereas if you have the extra resources, or you want to go the extra mile, it may be better to go with a more rigorous set of guidelines. Irrespective of the guidelines selected for a building, the up-front costs and the overall benefits over time are still very hard to quantify.

**GERARD:** Unless an entity requires building to meet a certain standard, or an owner wants a certified building, our advice is to use LEED or a comparable system as a guide to building a sustainable project.

**MODERATOR:** What is New Jersey doing to promote green

building?

**MANGINI:** A bill that defines the zoning concept of "inherently beneficial use" in the Municipal Land Use Law to include "a wind, solar, or photovoltaic energy facility" was passed by the state Senate in February. A bill in the Assembly would broaden this to include other structures. If enacted, it would mean that the Legislature had determined that these facilities and structures fundamentally serve the public good and therefore satisfy the positive criteria required for a variance; they would still have to meet the so-called negative criteria. If, say, an applicant wanted to put a 50-story structure in the middle of a residential neighborhood, just because it would be generating power through wind technologies doesn't mean the municipal board would have to approve it. A recent state law allows a municipality to amend its master plan to create a "green buildings and environmental sustainability element." And even some municipalities have taken steps to promote green building. Cranford Township, for example, adopted an ordinance allowing for density enhancements if a project constructed in a redevelopment zone meets certain green building criteria. You're going to see a lot more of that.

**GERARD:** Several counties have programs that address county-owned buildings. Ocean and Union counties have developed energy master plans that will serve as a basis for future sustainable projects for years to come. Somerset County has initiated a program to help its municipalities fund energy-efficiency

audits that will lead to sustainable building improvements. The Board of Public Utilities' Clean Energy Program provides financial incentives through its SmartStart Building Program to offset the cost of energy-efficient equipment, and has been the driving force for renewable energy, especially with its solar PV (photovoltaic) program. The BPU's new Local Government Energy Audit Program will provide rebates following the completion of energy-efficiency audits for all public entities in the state. The projects that follow the audit recommendations will certainly be more energy efficient and produce fewer greenhouse gases.

**ACKERMAN:** There is a fair amount of concern regarding how the inherently beneficial use legislation will affect municipal land use powers. If it becomes law, it will limit the discretion of the local authorities in evaluating variances for alternative energy use. Its passage could push some municipalities to amend their master plans to retain or recapture some of their discretion. The new law permitting a municipality to amend its master plan to incorporate a "green buildings and the environmental sustainability element" would allow for additional oversight concerning what, where, and how green buildings and renewable energy systems will be built. This is critical to municipalities that want to protect the character of their neighborhoods and to ensure that growth will occur in the manner prescribed by their master plans. To an extent, this can be done by ordinance, but there are issues with that as well. For instance, if an ordinance allows for density bonus-

es or floor-area bonuses for green buildings, it may still be necessary to obtain a variance. However, if the master plan is amended, conflicts with existing zoning requiring variances would be significantly reduced, providing certainty for planners and developers. Unfortunately the cost of amending a master plan can be prohibitive. If this is the case, the prudent approach may be to wait until mandatory review of the master plan, which occurs every six years.

**GERARD:** New Jersey has a relatively new law called the Energy Savings Improvement Program that allows a public entity to engage an energy services company, or ESCO, to finance capital improvements geared towards energy efficiency and sustainability through a 15-year lease-purchase agreement with the ESCO.

**MANGINI:** Last year the state Legislature passed a law creating a real-property tax exemption for renewable energy systems. The owner of a residential or commercial facility is eligible to have the portion of a property that contains a renewable energy system subtracted from the overall assessed value.

**GERARD:** Also on the commercial/industrial side, the Board of Public Utilities just began a program called Pay For Performance, which provides financial incentives for conducting an energy-efficiency audit and then to take the results of that audit and upgrade the physical plant to be more energy efficient.

**MODERATOR:** What are the

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benefits, and drawbacks, of building green?

**GERARD:** While green buildings may cost more to build, the integrated design process promoted by LEED and other rating systems leads to direct and indirect environmental benefits. Green buildings and interiors are considered to be healthier and have lower operating and maintenance costs. Statistics are beginning to demonstrate increased occupant productivity, employee retention and reduced absenteeism. Clearly, a building that is built according to sustainable principles is more marketable in today's competitive commercial and industrial marketplace. Short term, the cost savings from increased energy efficiency are driving a lot of what we see today. After an investment-grade energy-efficiency audit and the upgrading of a building and its mechanical systems — boilers, chillers and HVAC (heating, ventilation and air-conditioning) — the occupants are going to use less energy. The building will function much better with these improvements, so there will be lower long-term maintenance costs. This also leads to a longer-term reduction in the production of greenhouse gases, which is a goal of the governor's Energy Master Plan. We are also starting to get clients to recognize the importance of water resources, and the state has begun to recognize it as well. Five years from now, water efficiency and the proper management of water resources will be as important as, or possibly more important than, energy efficiency.

**MODERATOR:** Why will water become the moving force behind green building?

**KOSCH:** The problem is distribution. Our infrastructure is geared toward 1950s America, but our population is now larger and distributed differently; we don't have the infrastructure in our suburbs and exurbs to meet today's needs. We are also using potable water where it doesn't have to be used — for irrigation, watering lawns and washing clothes, for example. Some buildings in New York now use what's called "gray water" for landscaping and hygiene purposes, mostly for cleaning clothes. Once people get over the "ick" factor and realize it's really not going to affect their health or the cleanliness of their clothes, it's actually a very efficient thing to do.

**MODERATOR:** To the layperson, green building means a healthier interior and a healthier workplace.

**GERARD:** One of the intentions of green building is that the people working in the building will be healthier, and improved indoor air quality is certainly one of the benefits of green building. There is also a positive psychological benefit to thinking, "I'm working in a healthier green building."

**ACKERMAN:** These things are almost impossible to quantify, especially when you get into worker health and productivity. At this point, most of these claims are anecdotal. I'm not discounting the benefits that natural light and temperature controls may have on building occupants; there is

certainly something to be said for a comfortable work environment. However, if you cannot quantify the value in any meaningful way, it becomes difficult, if not impossible, to use these benefits to value the building.

**KOSCH:** Until more LEED-registered buildings are certified and you get a body of evidence to work with, many people will continue to be skeptical about LEED claims. We still don't know if we're really saving a third of our energy and a third of our water by building to LEED standards. That can be quantified over time, and it will be soon, but some of these softer things are never going to be quantifiable. Also, one person's enjoyment of more sunlight in a building is somebody else's distraction. In addition, we have to be very careful with the law of unintended consequences. All those great energy-efficiency changes to the building codes we made in the '70s? The next thing we knew, we had sick building syndrome because the buildings were sealed. We thought we'd cut energy costs and have more efficient HVAC, and in many ways we did — but we didn't foresee some of the problems with the buildup of dust and bacteria in HVAC systems that caused Legionnaire's disease and other problems. There were a lot of smart ideas, but as it turned out, some were terrible — which is why I'm concerned about rushing into law with this. When you legislate in a field that's evolving so quickly, you risk freezing things, so it can be hard to move beyond that point or you create unintended conse-

quences. Let's say that town or city or state X says, "All of our buildings over a certain size are going to be LEED Silver." Does that mean LEED Silver when you get your certification? LEED evolves over time. If you build to LEED Silver 1.0 now and 10 years from now LEED Silver 3.0 is very different, do you have to upgrade? Who pays for that? Let's say you're happy with your LEED Silver 2.0 building, and your needs are never going to change. Should you be forced to go to 3.0? What if you come up with your own sustainability standard? Why should there be such detailed, mandatory government involvement?

**MODERATOR:** What approaches are municipalities taking toward green building?

**ACKERMAN:** At this point there is a lot of uncertainty. "Will these standards become mandatory? How do we plan for this?" Nationally, municipalities have provided numerous programs to entice green development, such as streamlined permitting, tax incentives, and grants. Some have adopted ordinances establishing density bonuses, floor-area bonuses, and even property tax abatement for certified green buildings, but it is still too early to evaluate which incentives are most effective. That being said, there is currently an enormous opportunity for municipalities to attract redevelopment and new construction. New Jersey has taken a clear stance that development should occur in areas already served by public infrastructure; this is seen in numerous environmental

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regulations and in the state's Energy Master Plan. While some of these policies make construction on open space more difficult, they may have the intended effect of stimulating construction and redevelopment in urban and suburban areas. This is beneficial to the green building market, as growth in urban and suburban areas is one of LEED's central tenets, and LEED provides numerous credit opportunities for construction in these areas. If municipalities recognize this opportunity, amend their master plans, and implement some of the incentives we have mentioned, urban and suburban municipalities could see tremendous growth, and redevelopment of old and outdated infrastructure. Still, even if local incentives are implemented, green building needs more help from the state and federal governments to get costs on par with traditional building costs.

**GERARD:** I think you're going to see green zones and allowances for greater density in these revised master plans, which is something builders will be looking for. Most plans will reference the LEED rating system as a guideline but not require LEED certification.

**MANGINI:** One of the challenges for municipalities entering the green building arena is to do so in a way that does not contravene construction codes, which will likely continue to be adopted at the state level. That's an area where I think we're going to see some problems. I'm hoping that municipalities will keep everything properly in order

in terms of site design versus construction, and any incentives they may offer through planning and zoning. How municipalities will interpret their newfound power to enact green buildings and environmental sustainability ordinances remains to be seen.

**MODERATOR:** The cost of building green is certainly an issue.

**GERARD:** When we're talking about green materials, we're talking about an increase in first-dollar cost. That needs to be recognized whether we're moving toward a certification or not. It's critically important that a municipality or public entity take a holistic approach to planning, and this means that its master plan should take into consideration the site, water efficiency, energy, building materials and the indoor environment.

**KOSCH:** Most people, and I include most proponents of green building, recognize that the up-front dollar costs are going to be higher. Proponents claim that you'll save money over the lifecycle of your structure. There are about 10,000 LEED-registered buildings in the country and some 2,000 to 3,000 LEED-certified buildings; they've only come online in the last couple of years, so we don't know how these lifecycle claims will play out. As a practical matter, if you're drafting agreements, make sure that your design professionals, your construction manager and the folks down the chain in the construction process are monitoring these up-front costs so that the owner knows the delta between green building and not-

green building. Make sure you take a look at the handful of insurance products that are out there, so that if something goes wrong, your green building will be rebuilt to green standards. (Hopefully, you'll specify the then-current standard.) You're also going to have to deal with your auditors, most of whom do not recognize an increased value for a green building at this point.

**MANGINI:** Certain areas of insurance, such as completed operations insurance for contractors, and professional liability insurance for engineers and architects, aren't covered at all at this point, or are covered very, very minimally. Policies really haven't arrived yet with respect to insurance for green design or performance guarantees. Some products are now offered in the builders' risk and property insurance markets, but there are a lot of unresolved issues for the insurance industry that probably can only be addressed as experience with these types of policies grows. For example, how do you value a green building? Do you value it as a whole or as the sum of its parts? Certain green building technologies are very expensive. How do maintenance and operation fit into the overall insurance scheme? At what point can an insurance company disclaim coverage for an insured's failure to maintain green building components, such as a green roof? What standards or guidelines will be used to measure proper maintenance? Efforts to answer these questions are still in their infancy.

**KOSCH:** A handful of com-

panies are offering premium reductions or premium incentives if you have certain energy efficiencies.

**MANGINI:** Policies offer other types of benefits, too. For example, one covers loss of tax credits for failing to meet the required green building standard, and there's another that pays the cost of hiring a commissioning engineer to make sure that all the systems in the building are synchronized and operating smoothly. Insurance companies are trying to find a niche in terms of green building coverage — and there's a lot out there to cover.

**MODERATOR:** These are complex issues and expertise isn't always easy to come by. How do you make sure that a client's expectations are realistic?

**ACKERMAN:** You need to limit expectations from the beginning. It is critical to understand what is feasible before determining what level of certification you should aim for. If you decide to move forward, avoid guarantees with regard to both the anticipated level of certification and actual building performance. The approach should be to educate your client on the process and keep everyone grounded with regard to what can be done technically and, especially, financially. For example, a lot of people want to put solar panels on their homes. This is a trendy choice and it may make sense to incorporate solar power into certain projects. However, solar may not always be the prudent choice. Depending on the size and scope of the project, your client could possibly take half a dozen other energy-efficient

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measures that would result in more credits toward certification and a building that operates at a higher level, thus saving money.

**KOSCH:** At this point, we should be *asking* what the client wants, not *telling* the client. The expertise isn't there yet for a cookie-cutter approach. There's knowledge, and people are gaining expertise, but what you really need is a qualified team — somebody like a Birdsall Services Group.

**GERARD:** Independence is an extremely important part of the holistic team approach. You need to make sure that the commissioning agent is independent from the mechanical and electrical design professionals. The LEED consultant who is advising the team and the owner on the overall approach should also be independent from the other professionals on the team.

**ACKERMAN:** The commissioning agent and the LEED AP (an accredited professional who manages the certification process) should be truly independent from the contractor. The LEED criteria allow for a commissioning agent to be appointed through the contractor, and there may be an issue regarding his or her independence. The buyer should choose the commissioning agent and a LEED AP for the project. Although the LEED criteria provide a credit opportunity when any LEED AP is a principal participant on the design team, it would be wise for the buyer to have its interests represented by the LEED AP of its choice. Considering that the design team will be composed primarily of the builder's representatives and subcontractors,

this is not an unreasonable request.

**KOSCH:** That gets into the additional cost for LEED. This is an immediate first-dollar cost.

**GERARD:** I absolutely agree with Chris. However, the owner needs to go one step further and make sure that he or she engages an independent LEED professional who has participated in projects of a similar size.

**MODERATOR:** How has the current financial crisis affected the push toward green building?

**KOSCH:** I'm seeing a lot of toe-dippers, most of whom are pulling back because of the cost. A year ago, when oil was \$110 a barrel, everybody wanted to build green. The market crashed, energy crashed, and now everybody's stepping back. Once the economy heals, we're probably going to be back to \$80 a barrel oil, so energy incentives will make more economic sense than they do right now.

**GERARD:** While the cost of energy is the initial driver, owners who recognize that there are long-term drivers will continue to pursue sustainable building projects.

**KOSCH:** There are things that people can do now that are arguably green without being LEED. You can change your light fixtures, your toilets, your sinks, your HVAC. You can change insulation and roofing. You don't have to go full-bore LEED when renovating existing buildings or with new construction.

**MANGINI:** I talk to my clients about what they might want

to do with their buildings long term. If I am representing a landlord, I may ask whether they are interested in including the cost of high-efficiency, energy-saving capital improvements in operating expenses, or in requiring incoming tenants to allow the landlord to go into tenant spaces to make the improvements necessary to convert the building into a green building. If they are interested, I might then talk about passing through certain costs to tenants in the context of the lease agreement. The same holds true on the tenant side. I might ask a tenant that is moving into an existing building whether it wants to be able to make its operations more environmentally friendly, even if they're not going to do it as part of the initial fit-out because of the upfront costs. If a tenant is looking to secure a five- or 10-year lease with options, how can it write the lease to enable it to retrofit the space with green building components? Will the landlord agree to the tenant's plans? How does this all fit together? Even if developers, landlords, or tenants aren't doing green now, I find that some are at least willing to think about what they can do to clear the way for it in the future.

**ACKERMAN:** Municipalities can take a long-term, conservative approach, laying the groundwork for green growth by implementing incentives, and planning and zoning accordingly. However, even with the proper incentives, costs may still be prohibitive for builders and building owners. The additional up-front cost can only be justified to those investors who take a long view. Green building, and sustainability in general, is not an investment



*If you're doing new construction or major renovation of an existing building, don't look at your market now. Look at your market five and 10 years down the line.*

— James Kosch



*If you have the extra resources, or you want to go the extra mile, it may be better to go with a more rigorous set of guidelines.*

— Vincent Mangini

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for anyone who is looking for a quick profit; it is for those who want to build wealth conservatively over the long term through the savings associated with lower operational costs.

**GERARD:** Certain owners and developers recognize the value of sustainable buildings as a long-term play. Even if they're only going to own a building for eight or 10 years and then flip it, having built sustainable, they should have a product with more value. Public entities are considering solar PV and other renewable energy options, such as combined heat and power or cogeneration, because of the incentives provided through the BPU.

**KOSCH:** It's not a question of "Can you afford to build green?" but of "Can you afford not to build green?" If you're doing new construction or major renovation of an existing building, don't look at your market now. Look at your market five and 10 years down the line. The question, though, is, "What's your best guess, and how much are you willing to bet that you're guessing right?" There's only so much we can be right about.

**MODERATOR:** The federal stimulus packages include a lot of direct and indirect money and tax incentives for green energy, green development, jobs, and infrastructure improvements. Have you started to see the benefits?

**MANGINI:** There is a lot of stimulus money out there. One of the things that the American Recovery and Reinvestment Act of 2009 did was to upgrade the federal tax credit for certain energy-efficient home improve-

ments. It isn't a huge amount of money for homeowners, but it is something. A home-owner may receive a tax credit equal to 30 percent of the cost of improvements, such as windows, doors, insulation and HVAC, up to a maximum of \$1,500. There was also an upgrade in the tax credit for investments such as geothermal heat pumps, solar energy systems and other equipment. A homeowner may now receive a credit equal to 30 percent of costs without a maximum monetary cap.

**GERARD:** We have clients, both public and private, that are waiting for stimulus money. The U.S. Department of Energy is now providing Energy Efficiency and Conservation Block Grants to select public entities for energy-efficiency audits, retrofits, new energy distribution systems and the reduction of greenhouse gases, to name a few things. We fully expect that more money will roll through the state; we're still not sure through which agencies, but we do know that it will go to promote energy efficiency and reduction of greenhouse gases. The increase in federal tax credits and tax deductions for commercial buildings mentioned earlier will be a significant driver for sustainable building in the commercial sector.

**KOSCH:** The current bill includes tax credits for production of wind, solar and geothermal. We have clients in the production end of this who also make equipment for wind and solar, and they're actively pursuing the 30 percent manufacturing tax credit on top of the production credits. There's a lot of R&D money out there right now for those who are looking into photovoltaic cell development and biofuels, and

we have clients looking into both technologies.

**MANGINI:** One of the requirements for the DOE's State Energy Program — and \$3.1 billion in stimulus money will go through that program — is that the states interested in receiving these monies commit to upgrading their building codes to meet or exceed the 2009 International Energy Conservation Code. They also have to meet or exceed the American Society of Refrigeration and Air-Conditioning Engineers' minimum standards for the design and construction of energy-efficient buildings (except for low-rise residential structures), and their systems. It's bittersweet in the sense that there's money out there, but they're going to have to do more to get it.

**MODERATOR:** Let's move on to drafting contracts.

**KOSCH:** In many ways it's like doing a turnkey contract for an energy facility. You want to make sure there's a clear line of responsibility between the owner, the architect, the construction professionals and the subcontracting parties. For example, how do you deal with change orders? Build into your construction contract the requirement that any substitutions comply with LEED or other guidelines being used, and that the approving authority — whether it be the architect, engineer or construction manager — must take that into consideration. If you don't, it could be costly on many fronts.

**MANGINI:** Whether it's a new building or a fit-out of existing space pursuant to a lease, you need to assemble a team that knows what it's doing.

Preferably, everyone on the team should have some experience or the ability to get up to speed very quickly. You should have a construction manager or an architect who's a LEED Accredited Professional, or accredited or certified under another standard or guideline you're using if such accreditation or certification exists. To analogize from the product-substitution example, what happens when your lease gives the landlord the right to relocate you? A tenant who's concerned about energy-efficient operations might want something in its lease requiring the landlord to deliver a new location that can be retrofitted to the tenant's current green standard. The same holds true on the landlord's side. If a tenant has the right to assign or sublease, the landlord might want to restrict this to a prospective assignee or subtenant who has the same mindset as the tenant, and the same ability to operate a green facility out of that space. Whatever the issues or concerns, the lawyer must address them adequately in the lease documents.

**KOSCH:** All of these drafting exercises are going to be original until this becomes more routine. Depending on who you're representing, avoid describing how green your building is going to be in "soft" terms, and be specific about what deliverables you're going to include. Be clear about who will pursue rating certifications and who will pay if the ratings are not achieved. Be clear about future undertakings; that is, if the rating criteria change over time, will you agree to upgrade?

**GERARD:** We find that a num-

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ber of our clients review their natural gas and electric bills, but really don't know what their costs are for energy per square foot. There's not a great deal of data that allow for a comparison of energy costs per square foot between industries. The benchmarking exists, but it's not as good as it needs to be. This is critically important because it goes along with making sure the clients' expectations are clear. You need to provide the client with an understanding of what their energy profile is today, as you begin to try to move it to another level. Birdsall Services Group has the advantage of being on both sides; that is, as design professionals as well as energy consultants and LEED consultants (although we can't be the LEED consultant and the design professional on the same project). This is a new field that is expanding rapidly, with new challenges occurring on every project. Having that communication between the design professional, the energy consultant and the LEED consultant is a great benefit.

**KOSCH:** Make sure there's a provision for cost monitoring, particularly when representing the owner. The phrase "LEED creep" has already worked its way into the language. I've heard stories in which an owner agreed to go the green route and thought they were going to get an X-million dollar building with all these wonderful green improvements. Instead, it was three or four times X, and there was incredible sticker shock. Again, no litigation in these anecdotal cases, but I suspect there were some very serious negotiations afterwards.

**GERARD:** Most owners are will-

ing to spend \$20,000 to \$25,000 on an initial LEED evaluation in order to fully understand the additional costs involved in going through the LEED certification process. That's an appropriate way for a smart owner to evaluate the situation. That initial evaluation and cost can give an owner the proper expectation: "Okay, the additional cost for certification is another 1.5 percent, so I'm going to move forward with certification," or "I am going to have to add 3 or 4 or 5 percent to my project cost, so I'm only going to follow certain aspects of LEED."

**ACKERMAN:** This raises the question of whether or not the state should offer incentives for building that does not lead to certification but does contain LEED or LEED-equivalent aspects.

**KOSCH:** "LEED-equivalent": what does that really mean? We're dealing with very vague language here. Scary.

**MODERATOR:** What are you telling clients about building or retrofitting to "certifiable, but not necessarily certified" levels?

**ACKERMAN:** Certifying a building can be expensive, and some builders or owners may explore building to certifiable levels without paying for the oversight of a third party such as USGBC. The danger in this approach is that the building loses some credibility as a green building because certification is one of the biggest values in marketing these buildings. The downside of losing the stamp of approval from a third party is something clients should be aware of when making decisions about how to spend their money. That being

said, not everyone can afford certification or needs to have their entire building meet every LEED standard, so for these situations perhaps it would make sense to have more incentives for certifiable buildings. There are some — the New Jersey SmartStart incentives, for example — but generally incentives are aimed at buildings that achieve certification by a third party such as USGBC. If the ultimate goal is to make buildings and infrastructure more efficient and reduce consumption of natural resources, does a building need to be certified to achieve this? I am not saying these incentives should be the equivalent of those for buildings that achieve certification, but perhaps there should be incentives for buildings that, for example, achieve the water and energy elements of LEED.

**KOSCH:** What really has to happen is that thinking green on the key components becomes part of the standard. Some day, either in conjunction with USGBC, the federal government, or somebody else, the American National Standards Institute or the Uniform Commercial Code will come up with broader-themed standards. Evolutionarily, that's where I think we're going.

**GERARD:** I do as well, certainly on the health care side. Health care and sustainability was being driven by something called the Green Guide to Health Care. The folks from GGHC got together with USGBC LEED and came up with the LEED for Health Care rating system for the design of health care facilities. USGBC was smart enough to say, "We can't force LEED down health care's throats. We'll go to this organization that's done a real good job on sustain-

ability and work together."

**KOSCH:** Health care operations are repeatable because they are the same. It's a little different with office complexes, where there's more variability in uses and operations, but you can still get there.

**MODERATOR:** What are the takeaways for readers who may want to enter the challenging world of building green?

**KOSCH:** Know the standards or certifications that are available, and know what the current law is and what it's likely to be within a short period of time. Know that at this point most of your drafting is going to be original. You should be *asking* your clients, not *telling* them. Hopefully we will move toward green development in a broad-minded, evolutionary way, and not in a dictatorial, revolutionary way.

**GERARD:** It has to be a team approach. You need counsel. You need people who are experienced in energy and the environment. You need LEED consultants and independent building commissioning agents. You need grants professionals and auditing professionals to help you take advantage of the available energy grants, tax credits and deductions. This team approach should be incorporated into an energy master plan that provides a roadmap to proper management of energy costs.

**ACKERMAN:** The buyer must do everything possible to ensure that the design team has as balanced a perspective as possible. I recommend that the buyer negotiate to choose the commissioning agent and also insist on having a LEED AP on the

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design team to represent its interests, because the team will likely include many professionals appointed by and through the builder. The builder's and buyer's visions may not always be in sync, and it is critical that the buyer be represented by its own professionals to ensure that the project is carried out in the best interests of both parties.

**MANGINI:** Clients need to think comprehensively and holistically, because when they evalu-

ate all of the possibilities, they may find that financially they can't do it all, and that some approaches to, or incentives for, green building will conflict. For example, a tax credit may be based on meeting a certain protocol that is contrary to what the client had intended to use for the project. In light of these potential difficulties, you need to have Plan A, Plan B and maybe even a Plan C — a whole host of alternatives. Clients also are well advised to incorporate

the impact of government policy into their evaluation of development plans, because policy in this arena is moving quickly, and because different levels of government may be involved, and not always moving in the same direction. For example, site selection may become a tremendously important consideration if New Jersey's inherently beneficial use legislation becomes law. How that's going to be interpreted is way up in the air, and clients need to be

prepared for opposition from municipalities and boards for one reason or another. Just because it's green doesn't mean it's going to be welcomed in every context.

**KOSCH:** At the end of the day, the tax incentives, the drivers, and the PR possibilities are all extraneous to the fact that your building or your operations have to make sense. You don't want to end up with an environmental Edsel. ■

## BIOGRAPHIES



Christopher D. Ackerman is an associate in Dilworth Paxson's Government Affairs Group. His interest in sustainable practices in business led him to become the first New Jersey attorney to obtain accreditation as a Leadership in Energy and Environmental Design, Accredited Professional (LEED AP). Those designated a LEED AP demonstrate a comprehensive understanding of green building practices and principles. Chris focuses his practice on municipal law and land use, as well as environmental law, and green building and sustainability. He is a member of the United States Green Building Council and The Justice Stewart G. Pollock Environmental Inn of Court.

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Robert M. Gerard currently serves as Chief Marketing Officer at Birdsall Services Group. In this capacity, Mr. Gerard is directly responsible for the development and implementation of corporate marketing and business development. He is also responsible for the firm's strategic planning activities and future acquisitions. Since 1999, Mr. Gerard has spearheaded the firm's involvement with energy management, and the aggregated procurement of electric and natural gas. Additionally, he has assisted in the development of client-wide sustainable energy master plans that include energy efficiency, sustainable (green) building standards, greenhouse gas emissions, renewable energy, and energy procurement.

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Vincent J. Mangini focuses his practice in the area of green development law, land use, redevelopment, historic preservation, and commercial transactions such as purchase and sale agreements, office and retail leases, construction contracts and architectural services agreements. He litigates disputes over land use approvals and redevelopment area designations. He is a member of the U.S. Green Building Council as well as the American Institute of Architects. Mangini is a frequent contributor to the New Jersey Law Blog ([www.njlawblog.com](http://www.njlawblog.com)), on topics of green building, redevelopment and land use. He received a J.D. from the U. of Richmond School of Law, and an M.U.R.P. from Virginia Commonwealth University.

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