

GERMAN MARKET TOOLKIT

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KATEGORIE
Nachhaltigkeit



GEWINNER

GREEN PROPERTY MANAGEMENT AGREEMENTS

Recommended clauses and actions for
sustainable building management

CONTENTS

I. GREEN PROPERTY MANAGEMENT – BETWEEN CONTRACT, CERTIFICATION AND SERVICE PROVISION.....	04
<hr/>	
2. BACKGROUND AND OBJECTIVES.....	06
2.1 Significance of building certificates.....	06
2.2 Second generation certificates.....	07
2.3 Sustainable property management closes the gap	07
2.4 Certification systems for sustainable property management.....	08
2.5 Recommended clauses and action.....	09
<hr/>	
3. RECOMMENDED CLAUSES	11
3.1 Preliminary remark on the Green Property Management Agreement.....	12
3.2 Sustainable property management.....	13
3.3 Recognition for property management services	14
3.4 Provision, processing and deletion of data.....	19
3.5 Sustainable use by tenants.....	22
3.6 Sustainability manual.....	29
3.7 Sustainability committee.....	30

3.8	Indemnities and penalties	31
3.9	Alignment of the agreement with future certification systems	32
3.9.1	Future certification of property management services	33
3.9.2	Future certification of lease agreements	35
<hr/>		
4.	RECOMMENDED ACTION.....	37
4.1	Maintenance	38
4.2	Measurement and verification	40
4.3	Environmental protection and security	41
4.4	Procurement and structural measures	42
4.5	Tenant relations	43
<hr/>		
5.	OUTLOOK.....	47





I. GREEN PROPERTY MANAGEMENT – BETWEEN CONTRACT, CERTIFICATION AND SERVICE PROVISION

Building certificates are an important factor when assessing the sustainability of new buildings. In recent years certification systems have been further developed so that existing properties can now also be assessed. The second generation of certification systems examines criteria such as the sustainability of property management. However, this examination falls short on two counts. Firstly, the systems do not provide any suggestions as to how to draft the contractual clauses on which sustainable management is based. Secondly, there are no recommendations on which services are to be provided and in which form.

To fill these gaps:

- the international property consultant **Cushman & Wakefield**,
- the German certifying body of the BREEAM Certification System (Deutsches Privates Institut für Nachhaltige Immobilienwirtschaft; **DIFNI** for short) and
- the international law firm **DLA Piper**

set up an interdisciplinary working group on sustainable property management (the “**Working Group**”) at the end of 2012.

The objective of this **Working Group** was to prepare comprehensive recommendations on sustainability in the area of property management. In this connection, the terms “sustainable property management” and “green property management” are used synonymously and are understood in accordance with the currently applicable sustainability guidelines of the



Zentraler Immobilien Ausschuss e.V. (status March 2013) which are in their 3rd edition. Aspects of environmental friendliness, economic efficiency and social compatibility are given equal consideration where possible. The result is a catalogue of recommended clauses and actions that has been available since mid-2013 and is presented in excerpts in this guide.

The recommendations cover the basic building blocks of sustainable property management:

- **LAW:** legally examined Green Property Management Agreement templates,
- **METHOD:** a concept oriented to certification; and
- **CONTENT:** differentiated and clearly formulated specifications of services.

This guide summarises the working results of the **Working Group** for the German market. In addition to a general introduction to the background and objectives, it offers recommended clauses and action by way of example using which sustainable property management can be implemented and maintained in the long term.



2. BACKGROUND AND OBJECTIVES

2.1 SIGNIFICANCE OF BUILDING CERTIFICATES

The real estate industry is faced with enormous challenges when it comes to sustainability. In view of the resource intensity and direct social impacts, the sector is called upon to develop sustainable solutions. Sustainability, understood as described on the previous pages, is a complex concept which must be attuned to the special features of the industry, its products and participants.

The activities of the real estate industry are based on individual analyses (location, financing, contractual terms, equipment, etc.) which make it difficult to establish industry-wide standards. However, without such, much of the potential offered by sustainability will go unused.

The industry has reacted to this shortcoming by developing building certificates. They have been used for some years to assess the sustainability performance of new buildings in a standardised process. Certified buildings are awarded a quality seal. Several thousands of quality seals have now been awarded throughout Europe so that the certification, at least in central locations, could become established as a market standard in the area of new commercial properties. Sustainability criteria are today a part of the value creation of buildings.

A certain degree of scepticism can currently be observed on the market when it comes to certification. In some cases, the added value is the subject of criticism due to the numerous costly systems with their very different requirements in some cases. However, systems of this nature are the only reliable means of guaranteeing transparency, comparability and quality assurance in complex circumstances and in the absence of compelling statutory requirements or other suitable systems. Without examination and recognition by an independent third party, for example by the certifying body of a certification system, this would not be possible in the extensive areas of building construction and management.



2.2 SECOND GENERATION CERTIFICATES

Although the certification of planning and construction services for new, extension and conversion work is an important step, it is in itself inadequate because it only covers new buildings. Only once the existing stock has been incorporated in certification, will it be possible to further tap the sustainability potential of the real estate industry. This is taken into consideration by the second generation certificates which have been awarded in Germany since around the middle of 2012.

In addition to the individual assessment of the sustainability performance of floor space, the assessment of sustainable management qualities has been of focal importance in the certification of existing properties. Certification is usually conducted in accordance with internationally recognised methods so that the facility management concepts and the quality of property management can be compared internationally.

2.3 SUSTAINABLE PROPERTY MANAGEMENT CLOSSES THE GAP

Property management companies assume a central position in the area of sustainable property management because they have a key position derived from the coordinating function between owner, facility management and tenants.

To enhance the sustainability performance of buildings, property management companies assume structured quality assurance responsibilities in a technical and commercial respect. In view of the continued development of the international standards in building certificates which are reflected in the area of property management, these responsibilities should extend beyond the traditional controlling function assumed by property management companies. Internationally recognised sustainability requirements should also be incorporated.

Three aspects of sustainability, namely environmental friendliness, economic efficiency and social compatibility should be equally considered where possible. Only in this way can cost efficient and long term property management be achieved which is independent of the sustainability standard of the actual building.

2.4 CERTIFICATION SYSTEMS FOR SUSTAINABLE PROPERTY MANAGEMENT

As in the area of building certificates, the services used to achieve sustainable property management are to be tested by an independent certifying body. Only in this way can transparency, comparability and quality assurance be ensured. This is especially applicable if it is considered that the quality of property management services varies considerably between individual providers.

The examination of property management services is subject to different criteria than the inspection of building properties after erection or renovation. The requirements placed on the services to be provided must in particular be defined differently and different evidence of regular and qualitative provision of services is necessary.

A certification system does not so far exist on the German market which assesses the property management services themselves and awards a certificate to the respective provider of the services and not to the building on satisfaction of certain requirements. However, the possibility does exist for providers of property management services to have their services assessed as part of an existing building certification system and to receive recognition for this. The certifying body of the respective certification system checks whether the services offered by the property management company satisfy the requirements of the building certification system. If this is the case, the provider of these services and not the building for which the services were provided receives the recognition. This can considerably facilitate the later granting of a building certificate.

WORKING GROUP ON SUSTAINABLE PROPERTY MANAGEMENT

Since end of 2012

1. Development of "Badge of Recognition"
2. Preparation of recommended clauses and action

PILOT PHASE

Oct 2013 to Oct 2014

Testing of the "Badge of Recognition"

OBJECTIVE

Spring 2015

Introduction of a certification system for property management services



One example of recognition of this type is the so-called *Badge of Recognition* which is awarded by DIFNI in accordance with the BREEAM DE certificate to providers of sustainable property management services irrespective of the sustainability status of the respective building. This recognition system is a further outcome of the **Working Group** and was developed by adapting the requirements placed by the BREEAM DE certificate in Part 2 on property management. Following the pilot phase of this system, the **Working Group** plans a further development of this recognition system in the form of a dedicated certification system for property management services in accordance with the BREEAM Certification System. This system will also be independent of other sustainability properties of a building, i.e. in particular of the structure and behaviour of the users, and will only assess property management services themselves.

For reasons of completeness, it is also mentioned here that the **Working Group** also believes a parallel certification for the behaviour of users, in particular of tenants, to be probable. Even if all systems are interconnected, it is particularly important that they are designed independently of each other as far as possible and can be used without the other respective system. Only in this way can the sustainability performance in the real estate industry as a whole be gradually increased and not be restricted to a few premium properties.

2.5 RECOMMENDED CLAUSES AND ACTION

The area of sustainability is very complex and subject to constant change in the real estate industry. This also applies to the sector of sustainable property management which is faced with great challenges due to the constant pressure of cost and high fluctuations. This brochure addresses the currently relevant points in the view of the **Working Group** which are necessary to achieve environmentally friendly and cost-efficient property management which also takes social aspects into consideration.



Even if these recommendations have been developed in accordance with Part 2 of the BREEAM Certification System for existing buildings, they have been deliberately formulated openly. They are also conceivable in connection with other certification systems or without a current or aspired to certification. Ultimately, the recommendations are by no means restricted to premium properties but are intended to achieve property management which is as sustainable as possible irrespective of the condition of a building.

This brochure particularly addresses owners, asset and property managers and the providers of so-called facility management services. It provides guidelines on the drafting of contracts (**LAW**), with the possibility of a current or future certification (**METHOD**) as well as recommendations for the development and implementation of specifications of services (**CONTENT**).



3. RECOMMENDED CLAUSES

The Green Property Management Agreement is usually a standard contract which has been extended by individual provisions to achieve sustainable property management (“**Green Property Management Agreement**”). The following recommended clauses are individual contractual clauses which should not be understood as a catalogue set in stone which must be implemented in its entirety. Rather, the intention is to provide an overview of individual exemplary clauses aimed at achieving sustainability. The parties are at liberty to decide which individual clauses they wish to agree to what extent and in which form. Adjustments may be necessary to align the **Green Property Management Agreement** with the characteristics of the property and the interests of the parties.

Building certificates and certification systems for property management services constitute a considerable added value. The recommended clauses in Chapters 3.1, 3.3 and 3.9 are geared to this in part. However, the other recommended clauses can also be agreed if the parties aspire to sustainable property management irrespective of the current or future certificates.

Further details on property management services are regulated in a specification of services which is attached to the **Green Property Management Agreement**. The preceding contractual provisions set out the framework within which the specification of services is to be used. Whilst the recommended clauses presented in this Chapter 3 refer to the contractual wording of the **Green Property Management Agreement**, the recommended action presented in the following Chapter 4 is oriented to the shaping of the specification of services with the objective of achieving sustainable property management.

As is always the case when contractual clauses are used which are intended for several contracting parties and which have not been individually agreed with the other party, it must be considered that these are subject to a more stringent efficacy control in accordance with the law concerning the General Terms and Conditions of Business pursuant to Section 305 et seq. German Civil Code (BGB). Also when drafting property management agreements aimed at sustainable property management, it should be ensured that clearly formulated provisions are used which do not lead to an inappropriate disadvantaging of the contracting partner of the user of the clauses.

3.1 PRELIMINARY REMARK ON THE GREEN PROPERTY MANAGEMENT AGREEMENT

The following recommended clauses use the definitions usual in the drafting of agreements as derived from the following recommended clause I. In addition to the definitions of the contracting parties and the property to be managed, information on the state of repair, type of use and any certificates and other recognitions such as the “Badge of Recognition” presented in Chapter I can be included here:

RECOMMENDED CLAUSE I: “PRELIMINARY REMARK

The [name of the party commissioning the Property Management Services] (“Principal”) is owner of the property with the address [♦] (“Property”). On [♦] a [designation of the pertinent certificate] with [name of the pertinent certificate class (e.g. three points)] was issued for the Property erected in the year [♦]. The Property is in a [♦] state of repair and is used as [♦]. The [name of the provider of the Property Management Services] (“Property Manager”) is commissioned with the management of the property.

(Optional for recognition of the property management company)

The Property Manager has received recognition from [name of the respective certifying body] for the services offered. These recognised services form part of the catalogue of services to be provided in accordance with this Agreement.

Now, THEREFORE, the Parties agree the following:”

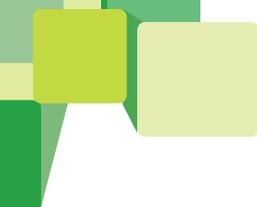
3.2 SUSTAINABLE PROPERTY MANAGEMENT

It is advisable to directly follow the preliminary remark in the agreement by an introductory programme clause. A clause of this type is a declaration of intent of the parties. It is therefore significant because it defines the overall understanding of the parties of the term "sustainable property management" and stipulates the criterion according to which the following provisions of the **Green Property Management Agreement** including the specifications are to be interpreted.

RECOMMENDED CLAUSE 2:

*"The Parties intend to orient this contractual relationship to criteria of sustainable management as far as possible. In this context, ecological, economic and socio-cultural aspects shall be taken into consideration equally ("**Sustainable Property Management**"). In particular, the Parties shall use resources and energy in an environmentally compatible and economical manner, regularly cooperate in a constructive way and also consider innovative paths to achieve higher standards of sustainability. In this context, they shall observe the principle of economic efficiency and shall also strive to involve the users of the Property to the greatest possible extent."*

A legal definition of the term 'sustainability' has not so far been developed. In the view of this **Working Group**, the sustainability guidelines of the Zentraler Immobilien Ausschuss e.V., which are currently in their 3rd edition, status March 2013, are characteristic of the prevailing understanding of sustainability. Accordingly, aspects of environmental friendliness, economic efficiency and social compatibility are to be considered. The recommended clauses presented here with the objective of sustainable property management are also aimed at this.



3.3 RECOGNITION FOR PROPERTY MANAGEMENT SERVICES

In the absence of a certification system for property management services, the possibility exists – as explained in Chapter 2.4 – to have property management services recognised in accordance with building certification systems. If the property management company has had its services recognised accordingly, this should be reflected in the **Green Property Management Agreement**.

The following recommended clauses concern the incorporation of these recognised services and the resultant rights and duties of the parties.

Although these recommended clauses are applicable to all popular recognition models on the German market, the term “Badge of Recognition” is used here in accordance with the BREEAM system. In other certification systems, recognitions of property management services are conceivable in principle but not yet established so far on the German market.

RECOMMENDED CLAUSE 3:

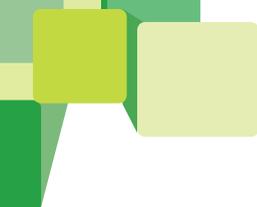
*“The Property Manager shall provide the services defined in the specification of services (“**Sustainable Property Management Services**”) attached hereto as **Annex [♦]**.”*



In addition to incorporating the recognised service catalogue, the parties should clarify the rights of use existing by virtue of the recognition and in particular with respect to associated logos, brands and protected titles:

RECOMMENDED CLAUSE 4a):

*“The Property Manager has had the Sustainable Property Management Services assessed by [] (“**Certifying Body**”) and has obtained the recognition (“**Badge of Recognition**”) in [possibly naming the recognition class] for these services. This recognition entitles the Property Manager to use the word mark “[♦]” (“**Word Mark**”) and the seal (“**Seal**”) shown in **Annex** [♦] in connection with the provision of its Sustainable Property Management Services.”*



In addition to the property management company, the owner of the property for whom the recognised services are provided will usually be interested in marketing the recognition. It should therefore be ensured in the agreement between the property management company and the respective certifying body that the owner can be granted appropriate powers by the property management company. This is dealt with by the following recommended clause:

RECOMMENDED CLAUSE 4b):

“The Badge of Recognition also includes the right of the Property Manager to permit the parties to contracts which agree Sustainable Property Management Services in a binding manner, to use the Word Mark and the Seal in connection with the reference to the Property Manager.

The Property Manager shall permit the Principal to use the Word Mark and Seal in such a way that is clear to third parties that the Principal has received the Badge of Recognition by the Property Manager, who shall also be named, and this shall be recognisable in either a literal manner or shall be implied by the circumstances in which it is used.

*A corresponding declaration of the Certifying Body is attached for reasons of clarity as **Annex [♦]**.”*

The following recommended clause furthermore regulates the duties of the contracting parties with respect to the recognised services:

RECOMMENDED CLAUSE 5:

“As part of their respective obligations under this Property Management Agreement, the Parties must at all times take any necessary action to ensure that the Sustainable Property Management Services can be provided entirely in order to ensure that all requirements for the awarding of the Badge of Recognition are satisfied during the term of this Property Management Agreement.”



The area of building certificates and therefore also of other recognitions which follow building certification systems are subject to constant change, in particular as a result of technical processes and tighter statutory provisions. It can therefore be expected that in future stricter requirements will need to be satisfied for the repeated awarding of recognition for property management services. It is therefore recommended that it be regulated in the Agreement whether the contractual relationship is to be adjusted to the stricter requirements of the certifying body. The following alternatives are conceivable:

RECOMMENDED CLAUSE 5a):

(Static alternative – adjustment of the contractual arrangements to future stricter requirements not desired)

“However, the Parties are not obliged to take measures to comply with any future (in particular stricter) requirements which may be necessary in the future for the awarding of the Badge of Recognition by the Certifying Body”.

RECOMMENDED CLAUSE 5b):

(Dynamic alternative – adjustment of the contractual arrangements to future stricter requirements desired)

“The Parties are obliged to take measures to satisfy any future (in particular stricter) requirements which may be necessary in future for the awarding of the Badge of Recognition in [possibly naming the recognition class] by the Certifying Body. This obligation shall apply unless this is not financially acceptable to the respective party. Furthermore, this duty shall apply only to a period of [♦] years after conclusion of the Property Management Agreement. After expiry of this period, the Parties shall renegotiate this clause”



The parties can furthermore agree that any culpable action of one party which leads to the frustration of the recognition conditions and therefore to the withdrawal of the recognition of the property management company substantiates an extraordinary right of termination for the other party:

RECOMMENDED CLAUSE 6:

“The Parties agree that a good reason to terminate this Property Management Agreement without notice by way of exception shall in particular also exist if culpable actions or failures to act of the other Party mean that the Sustainable Property Management Services are no longer provided and can no longer be provided by the Property Manager in whole or in part and the Badge of Recognition is withdrawn by the Certifying Body or is not awarded anew. A right of termination shall only exist in this case, however, if the terminating Party has set the other Party an appropriate period to desist or take action with respect to the actions substantiating termination and this period has passed fruitlessly.”



The certifying body usually reserves a right to information against any confidentiality clause in the agreement stipulating the recognition requirements. Accordingly, the property management company is obliged to notify the certifying body about the conclusion of property management agreements which agree the recognised services in a binding manner. This duty to provide information should be reflected in the **Green Property Management Agreement** to avoid breaches of the confidentiality duties:

RECOMMENDED CLAUSE 7:

“The Principal shall release the Property Manager from the duty to maintain confidentiality towards the Certifying Body insofar as the Property Manager is authorised to disclose to the Certifying Body the conclusion of this Property Management Agreement, name and address of the Principal and of the Property as well as the provisions of this Agreement in which the Sustainable Property Management Services are agreed. Insofar as no corresponding duty of the Certifying Body exists in accordance with the underlying contractual relationship, the Property Manager shall obligate the Certifying Body in writing in advance to keep these data confidential.”

3.4 PROVISION, PROCESSING AND DELETION OF DATA

The collection, storage and analysis of data play a large role in the management of property. The property management company is the central organisation for the collection and analysis of all information and for developing strategies of sustainable property management on this foundation. In an ideal case, the property management company has access to all building data including data existing with the earlier property management company, facility management company and other providers of services in connection with property management and with users.

Sustainable property management within the jointly defined understanding of the parties in accordance with recommended clause 2 can only be provided by the property management company if extensive access to these data is guaranteed.



Even if such cooperation duties on the part of the owner (in particular duties to provide existing data) usually exist also without explicit contractual clauses, the incorporation of the following recommended clause is expedient for reasons of clarification:

RECOMMENDED CLAUSE 8:

*“The Principal shall support the Property Manager to the necessary extent in the provision of the services under this Agreement during the term of this Property Management Agreement. In particular, the Principal shall provide the Property Manager with all information, documents, contracts (in particular lease, maintenance and supply agreements) (“Data”) which are required for the provision of the services set out in the specification of services contained in **Annex** [♦] in a suitable form (electronically if available) within [♦] months of signing this Property Management Agreement. Data obtained by the Principal after signing this Property Management Agreement shall be passed on to the Property Manager immediately.*

These Data shall include, in particular, consumption data, energy certificates and other property data which have been collected by the providers of services or works in connection with Sustainable Property Management in the past or which will be obtained in the future. The same shall apply to Data which is relevant to Sustainable Property Management and which is available for past or current users of the Property, provided that the Principal has access to this Data under the terms of the respective lease agreements.”



It is furthermore recommended to regulate which legal succession is to apply if the data necessary for the provision of services are not provided to the property management company:

RECOMMENDED CLAUSE 9:

“If the Principal fails to provide the Data also within a period of grace set by the Property Manager or not in the form required for the provision of services, the Property Manager shall make the Principal suggestions including offers for the re-creation of the Data and shall commission such after approval in the name of and for the account of the Principal.”

The owner is interested in the property management company handing over all data in a suitable form near to the end of contract and deleting such at the property management company:

RECOMMENDED CLAUSE 10:

“The Property Manager shall only store and analyse the Data provided and the Data collected in the context of the management of the property. On expiry of this Property Management Agreement, the Property Manager is obliged to return the Data to the Principal in suitable form and shall irrevocably delete the Data from its own system.”



If the property management company is interested not only in analysing the data of individual properties but also in preparing cross-property analyses, the following recommended clause can be agreed:

RECOMMENDED CLAUSE II:

“The Property Manager is entitled to use the Data obtained in connection with this Property Management Agreement for the purpose of comparative analysis of various data sets related to various properties. In such cases, the Property Manager shall render the Data anonymous prior to use which shall include the irrevocable deletion of any personal data. The Data rendered anonymous shall be used by the Property Manager exclusively for the purpose of optimising the management of properties. The Property Manager undertakes to refrain from combining the Data rendered anonymous with other personal data regarding the Principal. In such cases, the obligation to delete upon expiry of this Property Management Agreement pursuant to the above paragraph [reference to the last sentence of the recommended clause 10] shall not apply.”

3.5 SUSTAINABLE USE BY TENANTS

In addition to the property management company, users, in particular tenants, have a decisive influence on the sustainability performance of buildings. Therefore, the leases should also incorporate the tenants in the process of sustainable property management and urge them to use the property in a sustainable manner. This can happen by entering into leases which, in addition to the usual standard clauses, contain clauses which are intended to achieve sustainable equipment, management and use of the property (so-called Green Leases).

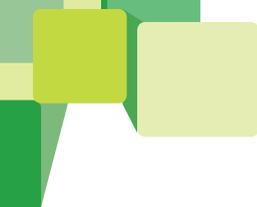


Even if the tenants' duties with respect to sustainability are to be set out in the respective leases, the framework for the conclusion of green leases can be stipulated in the **Green Property Management Agreement**. A number of alternatives are conceivable here which are shown by way of example in the following recommended clauses:

RECOMMENDED CLAUSE 12:

*“In addition to a Sustainable Property Management, the Parties aim at achieving the greatest possible sustainable use of the property by the tenants in accordance with the understanding of sustainability set out in paragraph [reference to recommended clause 2] (“**Sustainable Use**”).”*

Different grades of the sustainability standards to be agreed with the tenants as minimum are conceivable. There are currently no statutory requirements using which a lease can be described as “green” in Germany so that the respective “green” content will be a matter of the will of the contracting parties of the lease.



The following recommended clause leaves the sustainability standard to be agreed open and requires that the party to **Green Property Management Agreement** concerned with letting essentially endeavours to agree “green” clauses. For reasons of clarification it is advisable to attach a catalogue of “green” specimen clauses to the **Green Property Management Agreement**:

RECOMMENDED CLAUSE 12a):

(“Soft” alternative – Endeavour to conclude essentially green leases is necessary and also adequate)

*“The Parties shall seek to conclude lease agreements which contain provisions serving the sustainable equipment, management and use of the Property (“**Green Lease Agreements**”). With respect to lease relationships which already exist on conclusion of this Property Management Agreement, the Parties shall seek to conclude amendments to the lease agreements (“**Green Lease Amendments**”). In the agreement of Green Leases or Green Lease Amendments, they will be guided by the specimen clauses attached here as **Annex [♦]** which must similarly be adjusted to the respective individual case, in particular under consideration of the interests of the tenant and the characteristics of the rental Property.”*



By contrast, the following clause contains the obligation to enter into green leases. The parties can stipulate the minimum number of “green” clauses to be agreed or the sustainability standard which must at least be satisfied in a binding manner. However, the parties currently run the risk that individual areas cannot be let or only at poorer conditions if tenants refuse to accept “green” clauses. Therefore, a duty should only be agreed within certain limits, for example only if this is financially acceptable and only within a specific period, to avoid ineffective terms and conditions of business. The following recommended clause takes these aspects into consideration:

RECOMMENDED CLAUSE 12b):

(“Strict” alternative – Conclusion of green leases is prescribed within a specific period unless this is not financially acceptable for one party)

*“The Parties undertake to enter into leases which stipulate sustainable equipment, management and use of the property in a binding manner (“Green Leases”). When entering into new leases, they should only agree agreements which have [minimum number of clauses to be agreed] of the specimen clauses attached as **Annex [♦]** or in which a comparable sustainability standard is guaranteed in another way. With respect to rental relationships which already exist at the time this Agreement is concluded, the Parties aspire to the conclusion of corresponding written lease amendments (“Green Lease Amendments”). This duty shall not apply if it is financially unacceptable to a party to this Property Management Agreement. Furthermore, this duty shall only apply to a period of [♦] years after conclusion of the Property Management Agreement. After expiry of this period, the Parties shall renegotiate this clause.”*

By way of supplement to the above recommended clause 12b), it is conceivable that the parties stipulate in the **Green Property Management Agreement** that a space is not to be let to certain tenants, for example with a high energy consumption or if they contradict the social aspect of sustainability, or only if corresponding countermeasures are taken. This is regulated by the following alternative:

RECOMMENDED CLAUSE 12c):

(“Strict” alternative – Exclusion of letting if the sustainability concept is contradicted)

“The Parties are agreed that within the meaning of best possible Sustainable Property Management and Sustainable Use, space shall not be let to [specification of individual industries, for example industries with a high energy consumption] or potential tenants which would contradict the understanding of sustainability set out in paragraph [reference to recommended clause 2]. The Parties may deviate from this by mutual consent in an individual case if suitable sustainability measures are taken on the part of the potential tenant and if he is obligated to provide corresponding evidence of such. Such sustainability measures are, for example, specific energy saving measures which reduce the energy consumption to be expected for the respective rental area in the Property under consideration of the former energy consumption of the tenant by [♦] %, or the acquisition of regulated emission certificates to compensate CO₂ emissions.

If letting to the potential tenant would contradict the social aspect of sustainability, letting shall only come into consideration if the potential tenant credibly submits that he has converted his operations such that a contradiction with the sustainability concept is no longer to be feared in the future.

If there is a contradiction with this clause in existing leases, this clause shall apply with respect to any extensions or new leases.

The duties set out in this clause shall not apply if this is financially unacceptable for one of the parties to this Property Management Agreement. The duties set out in this clause shall furthermore only apply to a period of [♦] years after conclusion of the Property Management Agreement. After expiry of this period, the parties shall renegotiate this clause.”



Action taken by the tenants (for example conversion to LED lighting) can substantially increase the sustainability performance of a property. The property management company has the requisite expertise to develop measures of this nature under consideration of the specific user behaviour and the special features of the respective rental property. This potential should be used by the following recommended clause:

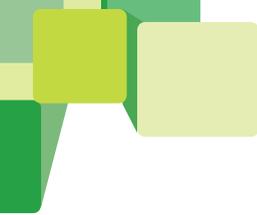
RECOMMENDED CLAUSE 13:

*“The Property Manager shall at the wish of the Principal regularly prepare reports on the rental situation of the Property under consideration of green leases already concluded and further optimisation potential in accordance with the specimen attached here as **Annex** [♦].”*

For the further promotion of sustainable property management and use, the parties are permitted to agree financial incentives, for example in the form of a budget for concessions to tenants. These may be expedient, particularly in the case of existing property for the subsequent incorporation of “green” clauses into existing leases:

RECOMMENDED CLAUSE 14:

“In order to promote Sustainable Property Management and Sustainable Use of the Property, the Principal shall provide the Property Manager with an annual budget to create financial incentives for the tenants in an amount of EUR [♦]. The Property Manager shall inform the Principal about the appropriation of the budget every year by providing a cost benefit analysis”.



Furthermore, a bonus payable to the property management company may be agreed on proven higher tenant satisfaction:

RECOMMENDED CLAUSE 15a):

*“The Property Manager shall conduct tenants’ surveys on user satisfaction in accordance with the questionnaire attached hereto as **Annex** [♦]. If this increases user satisfaction by [♦]% compared with the previous year, the Property Manager is entitled to a bonus of EUR [♦]. The bonus must be paid by the Principal within 30 days of receiving an invoice from the Property Manager.”*

Finally, a higher motivation of the employees at the property management company has a decisive influence on the satisfaction of the tenants. The agreement in the following recommended clause creates further incentives:

RECOMMENDED CLAUSE 15b):

“The Property Manager is obliged to pay [♦]% of the bonus to his employees on a pro rata basis at his own discretion.”

3.6 SUSTAINABILITY MANUAL

The specifications to be attached in the Annex usually provide for the preparation of a Sustainability manual to promote sustainable property management on the part of the property management company (see in particular the recommended clauses set out in Chapter 4.1 of this brochure). The following recommended clause further specifies this duty. In addition to attaching a corresponding template, the recommended clause aspires to the greatest possible involvement of tenants. However, as already presented in Chapter 3.5, binding tenant duties are reserved for the respective leases.

RECOMMENDED CLAUSE 16:

*“In order to permit Sustainable Property Management and the Sustainable Use of the Property, the Property Manager shall provide a manual in accordance with the sample attached hereto as **Annex [♦] (“Sustainability Manual”)**. The Manual shall at least be provided to the tenants. If possible, the Manual shall be agreed in a binding manner as an integral part of the lease agreements pursuant to the above paragraphs [reference to recommended clauses 12, 12a) and 12b)].”*

Furthermore, the property management company can be given the power to change the sustainability manual, whereby it may not exceed certain limits:

RECOMMENDED CLAUSE 17:

“The Property Manager is entitled to amend the content of the Sustainability Manual at appropriate intervals at his reasonable discretion (Section 315 German Civil Code – BGB). The Property Manager shall inform the Principal and the tenants of the Property in good time if he intends to amend the Manual and receive the Principal's and/or tenants' suggestions with respect to the nature and extent of the amendments in the Sustainability Manual. In the case of any inconsistencies between this Property Management Agreement and the Sustainability Manual, the provisions of this Property Management Agreement shall prevail.”

3.7 SUSTAINABILITY COMMITTEE

Only through regular communication between owner, property management company, providers of so-called facility services and ideally the tenants can the entire potential of a property be exploited to achieve a sustainability standard. The creation of a sustainability committee meeting at regular intervals may be expedient, particularly in the case of larger properties with several tenants:

RECOMMENDED CLAUSE 18:

*"The Parties shall set up a sustainability committee which consists of proxies of the Principal, of the Property Manager, third parties involved in property management and, if possible, every tenant of the Property ("**Sustainability Committee**"). Meetings of the Sustainability Committee shall take place quarterly/semi-annually/as required, but at least [♦].*

Responsibilities of the Sustainability Committee shall be:

- a) *to observe the compliance of all duties of the Parties under this Property Management Agreement with respect to the Sustainable Property Management and to the Sustainable Use of the Property (including compliance with the duties under the Sustainability Manual) and to observe the enforcement of possibly agreed penalties for violations;*
- b) *to record complaints in minutes at tenants' request, to analyse and to discuss appropriate measures;*
- c) *to consult about possibilities to optimise Sustainable Property Management and Sustainable Use of the entire Property;*
- d) *to negotiate possibilities of joint marketing of achieved sustainability standards including aspects of Sustainable Property Management and Sustainable Use;*
- e) *to create a yearly sustainability report ("**Sustainability Report**") which, in particular, contains a summary and assessment of the Sustainable Property Management and the Sustainable Use of the entire Property for the previous year and a forecast for the following year.*

The Parties are obliged to implement the recommendations of the Sustainability Committee set out in the Sustainability Report within a reasonable period of time in accordance with this Property Management Agreement."

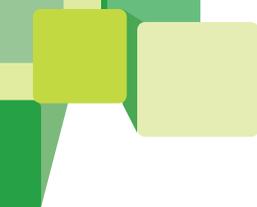
3.8 INDEMNITIES AND PENALTIES

The amount of damage arising from the breach of a duty in a contractual provision which is aimed at sustainable property management is frequently difficult to quantify. Therefore, it may be advisable to supplement the damage claim existing by virtue of the law by a sanction clause, for example in the form of a contractual penalty clause.

It is then up to the parties to decide for which breaches of contractual duty and to which degree of fault (only in the case of wilful intent or gross negligence for example) a contractual penalty is to be paid. The following recommended clause provides for a restriction to individual provisions but leaves the degree of fault open. As required, it can be extended to all duties of the **Green Property Management Agreement** and/or restricted to a specific degree of fault:

RECOMMENDED CLAUSE 19:

“For all breaches of the Property Manager or of the Principal of one of the provisions set out in this Property Management Agreement in paragraph [reference to provisions dealing with sustainable management], the Party complying with the Agreement is entitled to demand from the other Party the payment of a contractual penalty in an amount of up to EUR [♦] in addition to the replacement of any damage in accordance with the general rules and regulations. The amount of the contractual penalty shall be determined by the party complying with the Agreement at its discretion (Section 315 German Civil Code – BGB). The claim to performance and Section 343 BGB shall not be affected.”



The parties can particularly express the aspects of environmental friendliness and social compatibility of sustainability by the following clause:

RECOMMENDED CLAUSE 20:

“The Party complying with the Agreement must donate the amount collected as contractual penalty to a charitable organisation and/or use it for environmental protection measures (for example to purchase regulated emission certificates to compensate the CO₂ emissions.”

3.9 ALIGNMENT OF THE AGREEMENT WITH FUTURE CERTIFICATION SYSTEMS

As presented in Chapter 2.4, there is only the possibility in Germany at the current time to have the building itself certified and to have property management services recognised in accordance with an existing building certificate. This section deals with future certification systems which in the view of the **Working Group** will exist in the foreseeable future in the real estate industry to supplement the building certificates. Only an examination by an independent third party, such as the certifying body of the respective certification system, can reliably ensure transparency, comparability and quality assurance.

The **Working Group** expects that the certification trend will continue and is planning an independent certification system for sustainable property management services in accordance with the BREEAM certification system. Furthermore, the **Working Group** attributes great importance to the involvement of the users in the increase of sustainability performance of properties and expects that there will also be an independent certification system for the behaviour of the tenants.

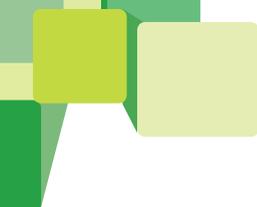
3.9.1 Future certification of property management services

In this clause, the Property Manager reserves the right to have the property management services assessed on introduction of a certification system after conclusion of agreement by certification organisations and possibly to have further service duties incorporated in the agreement.

Relevant duties of the Principal in this context are, in particular, the agreement of new specifications, the adjustment of contractual relationships with any third parties in connection with the management and/or use of the property, for example with further providers of property and/or facility management services, operator services, utility companies and tenants:

RECOMMENDED CLAUSE 21:

“The Parties agree that the services provided under this Property Management Agreement shall be assessed under a certification system for Property Management Services or any other similar certification system that will be introduced after the conclusion of this Property Management Agreement. In such an event, the Parties shall in accordance with their responsibilities do whatever is necessary to comply with any criteria which have to be met in order to obtain the aspired to certificate. This obligation shall not apply insofar as its compliance would be economically unreasonable for the respective Party. Furthermore, this duty shall only apply to a period of [◆] years after conclusion of the Property Management Agreement. After expiry of this period, the Parties shall renegotiate this clause.”



Any such certification may lead to the extension of the contractual service catalogue:

RECOMMENDED CLAUSE 22:

“As far as a certification requires the incorporation of new obligations in this Property Management Agreement and the Parties are obliged to incorporate these in this Agreement in accordance with paragraph [reference to recommended clause 21] above, the Parties shall agree on the new catalogue of services in a further amendment to this Property Management Agreement that is legally binding and against reasonable remuneration of the Property Manager considering the cost incurred for the granting of a certificate.”

A certification of the property management services also has an added value for the owner of the managed property. The inspection of the services by independent certification organisations creates comparability, transparency and quality assurance in the area of property management. Therefore, it is also important for the owner to be able to market the certificate of the property management company it has commissioned. The following recommended clause takes this interest into account:

RECOMMENDED CLAUSE 23:

“In the case that a certificate is granted, the provision in the above paragraph [reference to recommended clauses 4a) and 4b)] shall apply accordingly. In particular, the Property Manager shall make every effort to grant the Principal similar user rights with respect to any Word Marks and Seals of the certificate.”

3.9.2 Future certification of lease agreements

The users have a decisive influence on which sustainability standard can be reached in a property on the whole. Some building certificates for existing properties therefore have a further category in addition to a category for property management in which the use is assessed by tenants. Therefore, this **Working Group** also believes the introduction of an independent lease certificate to be probable.

The management of tenants, i.e. the conclusion, termination or extension of leases and correspondence with tenants is usually the responsibility of the property management company as part of commercial property management. The property management company has the best overview of the sustainability potential of the buildings including the individual rental areas. The property management company can provide support both for the landlord and for the tenants in the process of obtaining a lease certificate. This should be provided for in the **Green Property Management Agreement**:

RECOMMENDED CLAUSE 24:

"In the case where a certification system that certifies the use of properties by the tenants is introduced after the conclusion of the Agreement, the Property Manager shall in accordance with its duties under this Property Management Agreement assist the Principal in the certification process. In addition, he shall provide documentation, determine potential for optimisation and coordinate the process with the tenant and the Certifying Body. These obligations shall not apply insofar as their compliance would be economically unreasonable for the Property Manager. Furthermore, this duty shall only apply to a period of [♦] years after conclusion of the Property Management Agreement. After expiry of this period, the Parties shall renegotiate this clause."



A certification of this type can similarly lead to the extension of the contractual catalogue of services. This should already be considered in the **Green Property Management Agreement**.

RECOMMENDED CLAUSE 25:

“Insofar as paragraph [reference to recommended clause 24] above requires the incorporation of new duties in this Property Management Agreement and this is economically reasonable for the Property Manager, the Parties shall agree on the revised catalogue of services in a further amendment to this Property Management Agreement that is legally binding and against reasonable remuneration of the Property Manager.”



4. RECOMMENDED ACTION

This chapter provides recommendations on contents and implementation of suitable specifications of services with the objective of sustainable property management. The specification of services forms the core element of sustainable property management services to be provided by the property management company. It is an integral part of the **Green Property Management Agreement** and is attached to it.

Both in preparing the recommended clauses and developing this recommended action, the **Working Group** places particular importance on the equal emphasis of aspects of sustainability. Only if aspects of economic efficiency are considered in the specification of services alongside environmental friendliness and social compatibility will the product 'sustainable property management' achieve success on a long term basis.

The following action recommended by the **Working Group** is divided into the following five categories which currently provide the framework for sustainable property management:

- Maintenance
- Measurement and verification
- Environmental protection and security
- Procurement and structural measures
- Tenant relations.



All five categories contain a number of individual requirements which are introduced in the following:

4.1 MAINTENANCE

One of the duties of a property management company is to preserve the value of the property by maintenance of the building. The parties should therefore agree precise quality standards in all spatial, technical and temporal aspects in the specification of services. In order to do this, the property management company will usually rely on access to property documents. It is therefore recommended to supplement this duty of the property management company to include an explicit duty on the part of the owner to provide all necessary documents set out in the contractual text of the **Green Property Management Agreement** in good time (see recommended clauses in Chapter 3.4). Only in this way will the property management company be able to meet the quality standards stipulated out in the specification of services on the set dates and without any unnecessary costs.

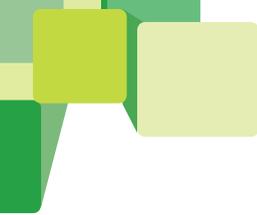
The maintenance of a property is subject to constant changes (for example changes in tenants). The specification of services should therefore contain corresponding provisions for this. Requirements are conceivable, for example, which stipulate that the maintenance strategies and building condition assessments are revised at regular intervals and on certain occasions.

Maintenance in the sense of sustainable property management also requires the following services to be provided by the property management company, in particular:

- Preparation of technical data and information concerning the property;
- Storage and updating of operating manuals, lists of materials, installation diagrams, product data sheets etc.;

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- The complete drafting and regular updating of service and operation plans;
 - On-going budgeting of service, maintenance, procurement and disposal costs (so-called *operational expenditures*) and
 - Execution of alternative cost benefit calculations with larger scale purchases and structural measures (so-called *capital expenditures*).

Incorporation of tenants in the processes of sustainable property management is not essential but may make a substantial contribution. This has already been discussed in Chapter 3.5 and also plays an important role in the drafting of the specification of services. A structured exchange of information between tenants and the property management company will guarantee that the property can be sustainably maintained. Incorporating tenants in maintenance has several advantages: environmentally friendly, health promoting and cost efficient operations are secured, maintenance processes are constantly improved and costs can be saved. To ensure that tenants also benefit directly from these advantages, the property management company undertakes to draw up sustainability manuals in cooperation with tenants, to implement and improve these (see also recommended clauses 16 and 17 in Chapter 3).



4.2 MEASUREMENT AND VERIFICATION

Another of the responsibilities of the property management company is to measure and verify the consumption of energy and water in the building. The property management company is responsible for ensuring that the building is clean, that the lights work and that air, temperature and noise levels agree with the statutory and any contractually agreed requirements. In a nutshell, this means that the property management company is required to measure the operational costs and consumption and should be at effort to verify such in the sense of sustainable property management. The following should, in particular, be taken into consideration when drafting any such catalogue of duties in the specification of services:

- Factors such as multiple letting, sub-letting, tenant retrofits, complex technical installations, special uses and decentralised operational accounting make measurement and verification difficult and must therefore be given careful consideration.
- Sustainable property management requires that the property management company regularly has at its disposal consumption indicators and costs in full, transparently, in a structured manner. It should therefore be clarified that the property management company must provide expenses per consumption (in kWh, m³, etc.) on the basis of meter readings and showing the respective costs for all accessible areas of the property.

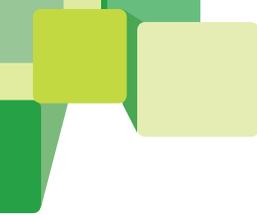
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- In addition, the parties should agree, making reference to the existing contractual arrangements with third parties (in particular with tenants and utility companies), who is responsible for the collection, checking, analysis and communication of consumption data, to which extent and towards whom. The parties should also name third parties who are authorised to analyse individual data and use it for specific purposes.
 - Finally, the specification of services should cover provisions on how technical services are to be controlled and monitored. It must in particular be regulated how heat, cold, ambient air quality is controlled and secured. In the same way as for maintenance, the property management company should make settings, calibrations and adjustments to supply in collaboration with the tenants as far as possible, and document such accordingly.

4.3 ENVIRONMENTAL PROTECTION AND SECURITY

Management concepts concerning environmental protection and security may contain different measures. The **Working Group** considers two measures in particular to be expedient:

Firstly, in addition to requirements on the awarding of contracts and commissioning of third parties, it should also be set out in the specification of services how structural and technical precautions on fire, water and atmosphere protection are to be set up, monitored and maintained with the aim of complying with environmental and social standards.

Furthermore, provisions of operational environmental protection are a good idea to reduce detrimental environmental influences. This will mean, for example, the stipulation in the management concept that atmospheric greenhouse gas emissions are systematically recorded and then reduced. It should also be agreed that outdoor facilities and building shell are to be managed in an environmentally neutral manner.



4.4 PROCUREMENT AND STRUCTURAL MEASURES

Sustainable property management requires the selective control and monitoring of materials. Both the material itself and the procurement and the use of corresponding services have a direct or indirect impact on environment and health. To control these and keep them as small as possible, the parties should define strategies and guiding principles for the sustainable procurement and handling during extension and refurbishment measures in the specification of services.

Examples for such strategies and guidelines are, in particular:

- Provision of a transparent and comprehensively documented disposal concept;
- Conversion from conventional to energy saving lighting fixtures graded according to zones and time;
- Use of low emission floor coverings;
- Use of water-based paints and varnishes; and
- Sealing and air distribution systems to protect against airborne contaminants and odours during construction work.

The parties should also set out clear quality requirements in the specification of services, precisely also for cases in which orders are tendered and awarded to third parties and finally executed by them.

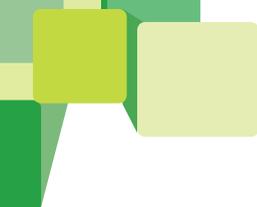


4.5 TENANT RELATIONS

Regular, transparent and direct communication between tenants and the property management company is a decisive factor for sustainable property management. It enables any points of criticism to be addressed, approaches identified and further sustainability concepts to be prepared. This is because according to the understanding of sustainability as promulgated by this **Working Group**, higher sustainability performance of buildings will ultimately lead to enhanced wellbeing of users and tenants.

This communication can be promoted considerably by the establishment of:

- Tenant surveys;
- Complaint management systems;
- Incorporation of tenants in the preparation of Sustainability Manuals (see recommended clause 17, Chapter 3); and
- Sustainability Committees (see recommended clause 18, Chapter 3)
- to be regulated in the specification of services.



The parties should therefore agree in the specification of services that the tenants are regularly surveyed to guarantee sustainable property management. Specifically it should be regulated in the specification of services who is to conduct the surveys, on the basis of which method(s) and content and how frequently. The parties should also agree how the results of the surveys are to be used. It is furthermore to be stipulated in the specification of services which measures may be derived from the survey for sustainable property management, who is responsible for budgeting, implementing and monitoring such and in which time frame.

Furthermore, the parties can stipulate that the tenant surveys are extended by one or several complaint management systems, whereby the sustainability committee presented in recommended clause 18 in Chapter 3 is a conceivable possibility. The specification of services should then contain clear provisions on who has the competence for the complaint management system, who is responsible for its implementation and which methodical content and time requirements must be satisfied.

The parties can also agree on a revision or updating of the property-specific sustainability manual. By way of further specification of the recommended clauses 16 and 17 in Chapter 3, the following points can be regulated in the specification services:

- Changes to operations, possibilities of intervening and controlling;
- Presentation of results of complaint management;
- Offers for training and educational measures;

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- Offers for alternative transport use;
 - Presentation of staffing changes and/or altered responsibilities of the parties who are directly responsible for building operations.

Finally, the parties can set up a sustainability committee – as provided in recommended clause 18 in Chapter 3 – as an institutionalised communication platform for landlords, tenants, facility management, property management and any other third parties. This committee can function as a platform for complaint management. If the tenant structure is complex, value should be placed on incorporating as many tenants and sub-tenants in the committee's activities as possible. The sustainability committee should facilitate and promote the formal and informal exchange of all parties involved and concerned with the operation of the building. Regular and documented committee meetings would be one example of formal exchange; individual meetings, further training measures, functions and other events are an example of informal exchange. Central issues of sustainable property management should be at the focus of the formal and informal exchange. The following provisions in the specification of services are conceivable by way of further detailing recommended clause 18 in Chapter 3:

- To ensure an effective exchange of operative building data;
- To develop and to implement and revise plans for property-specific environmental management;

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- To receive feedback, criticism, suggested improvements for cleaning, hygiene, pest control, waste disposal, etc. (general and exclusive rented areas);
 - To identify, plan, resolve, report on existing, considered or planned service, maintenance, construction/refurbishment work; and
 - To create transparency in the quality of retrofitting or extensions, for example of heating, ventilation, sanitary installations or lighting.

Further measures are, of course, conceivable for the long term bonding of the tenants. However, if the aspects set out here are implemented, the first important step will have been taken to achieve a high degree of tenant satisfaction and to establish such on a long-term basis.

Long-term tenant relations are one of the elementary objectives in a holistic approach to all services concerning the property, which is why the active incorporation of the tenants in the subject of sustainability is of such great importance.

5. OUTLOOK

This brochure contains basic building blocks using which sustainable property management may be realised. It is primarily aimed at owners, asset managers and the providers of facility management services with the objective that they align their cooperation with the requirements of **LAW, METHOD** and **CONTENT** using the services of a property management company.

The **Working Group** selected this format in the knowledge that the dynamism of the market and the perception of the subject of sustainability is constantly changing. It is therefore to be expected that some of the recommended clauses and action will become less important whilst others will assume a greater impact or significance. The results presented in this brochure are by no means to be understood as an unalterable set of regulations but as a contribution in the search for sustainable property management. This **Working Group** is planning to adjust the current building blocks or to supplement with further building blocks whenever the market calls for new contractual clauses and/or service content.

The members of the **Working Group** would like to encourage you, the readers of these recommendations, to become actively involved in sustainable property management which is one of the central tasks for the real estate industry. We would be delighted to receive your suggestions and comments. Please write to GreenPM@dlapiper.com.

The following contact partners are available to discuss any aspect of this guide in greater detail.



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