Spanish Real Estate Legal Update

Review

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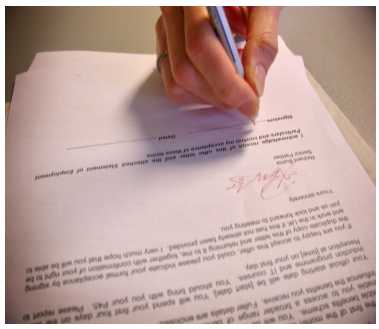

In this issue:

- The new Commerce Act of the Autonomous Region of Valencia and the large retail establishments.
- The Preliminary Draft Regulation of the Land Act.
- The European Court of Justice questions the licenses of large retail establishments.
- Unilateral abandonment of non-dwelling lease agreements by the lessee.
- Recent Case Law.

The new Commerce Act of the Autonomous Region of Valencia and the large retail establishments.

The new Commerce Act of the Autonomous Region of Valencia has been approved as of 23 March 2011, and has been published in the BOE (Official State Bulletin of Spain) as of 16 April 2011 (Commerce Act 3/2011, 23 March, of the Autonomous Region of Valencia). This new law replaces Act 8/1986, 29 December, of the Autonomous Region of Valencia on the Organization of Commerce and Retail Outlets and Act 8/1997, 9 December, of the Autonomous Region of Valencia on Retail Hours.

The purpose of this new legislation is to encourage the freedom of establishment and exercise of the retail activity, adapting the legislation of Valencia to the provisions contained in Directives 2005/29/EC and 2006/123/EC of the European Parliament and of the Council on 11 May 2005 and 12 December 2006, respectively, eliminating those barriers that impede the exercise of the retail activity and that are unjustified on the basis of general interest.

Among the modifications made by virtue of such legislation, the following are worthy of mention:

In the first place, it is necessary to record the start of any activity in the Retail Activities Register, which should occur within the maximum period of three (3) months of the start of the activity, and the main purpose of which is to allow a statistical control and ongoing update of retail activities in the Autonomous Region of Valencia in order to contribute toward the definition of policies for promotion of the retail sector.

With regard to general opening hours, retail establishments should perform their activity on weekdays and Saturdays, up to a maximum of ninety (90) hours per week. It is established that they may also open on nine (9) Sundays and/or holidays per year. City councils are empowered to substitute up to two Sundays or holidays of classified working days with two local holidays. The decision adopted will be obligatory for all establishments that do not meet the requirements for unrestricted opening hours.

The law recognizes the freedom of price for the sale of products and rendering of services, with the exceptions of legislation regulating sales at a loss and as established in special laws. The obligation to provide information is likewise maintained and, except in the case of promotional offers, restrictions are introduced, such as the prohibition of limiting the quantity of articles that may be acquired by each purchaser.

With respect to the installation of retail establishments, the requirements have been eliminated that made the granting of a retail permit subject to an evaluation of the impact on the retail supply already in existence. Current requirements are based on reasons of general interest relative to the organization of the territory, urban development, environment, and protection of artistic and cultural heritage.

Currently, the general rule is based on the fact that the installation of retail establishments is not subject to the system of retail authorization, except in the case of those establishments that could have a supra-municipal impact and could impact the environment, territory, and/or artistic historical heritage, which require authorization from the autonomous region once the corresponding municipal permits have been granted. For the purposes of this law, an individual or collective retail establishment is deemed as generating a supra-municipal impact when its area is equal to or greater than 2,500 m2.

Additionally, it is predicted that the Autonomous Region of Valencia will undertake a Territorial Retail Action Plan by Sector, which must be initiated by the regional ministry with authority on retail matters. Such a plan will specify criteria, guidelines, and territorial approaches so that the retail policy may be developed coherently with territorial planning, ensuring its coordination and its most effective contribution toward the objectives of sustainable development of the Autonomous Region of Valencia.

Likewise, in classifying the land, urban planning documents should contemplate retail use as unique within the overall classification of tertiary land, including a classification of retail activities and formats.

For the first time in Valencian legislation, the concept of urban shopping malls is recognized, and is defined as those urban environments where a representative group of retail companies exists that, within a specific urban area and associated by a legally recognized entity, professionally develop a joint strategy for the socio-economic improvement of their environment, particularly by means of promotional activity, service management, and economic stimulation.

Lastly, we indicate that this law also regulates sales outside the retail establishment and promotional sales.

Sandra Paoletti

The Preliminary Draft Regulation of the Land Act.

Final Provision Two of Royal Legislative Decree 2/2008, 20 June, which approves the Revised Text of the Land Act (hereinafter, “the Act”) authorized the Government, within the scope of its powers, to proceed with the development of the aforementioned Act.

In compliance with the aforementioned mandate, pursuant to the procedure envisaged in Government Act 50/1997, 27 November, in September 2010 the Directorate General of Land and Urban Policies of the former Ministry of Housing (currently a part of the Ministry of Development), prepared the proposal for the Preliminary Draft of the Regulation of the Act that is being analyzed by the Council of State.

The proposed Preliminary Draft Regulation comprising the subject of this article, endeavors to provide a response to the desire expressed by the State legislator to establish a new system of appraisals for the land and reinforce public notarial and registration duties, by means of the active collaboration of notaries and registrars in significant aspects of urban planning management.

From this perspective, the Preliminary Draft Regulation is structured under three titles that develop the following aspects of the Act:

(i) The preliminary title contains those aspects requiring a regulatory supplement, such as the basic situations of urbanized and rural land, real estate complexes, actions for endowment and the evaluation and monitoring of the economic and environmental sustainability of zoning instruments, annulment of given provisos in urban development agreements, etc.

(ii) The first title is devoted to real estate appraisals that, as expressly established in the Preliminary Draft Regulation, constitute the core of the Act, for the purpose of combating speculation and reappraisal expectations that are not consistent with the reality of the land.

(iii) The third title develops those aspects that tie the Land Register to urban development actions, which in some cases entail the partial amendment of Royal Decree 1003/1997, 4 July, which approved the Supplementary Rules to the Regulation for the execution of the Mortgage Act on registration in the Land Register of urban planning records.

Nevertheless, in its administrative approval process, the Preliminary Draft is undergoing some substantial modifications, aimed at the repeal of a large part (if not all) of the provisions relative to registration aspects contained in the third title of the Regulation.

Without prejudice to the foregoing, by focusing solely on real estate appraisals, the Preliminary Draft Regulation develops the corresponding evaluation methods following the guidelines established by the Act. Such methods are aimed at the need to quantitatively estimate the real value of the property, by means of the establishment of a replacement value in the market for another, similar one in the same situation, without any consideration whatsoever for possible expectations that do not derive from the owner's investment effort.

In terms of the properties located on rural soil, the Preliminary Draft Regulation establishes that these will be appraised by capitalization of the real or potential annuity of the business use at capitalization rates that are expressly envisaged in the Preliminary Draft, whose value may be adjusted upwards on the basis of objective factors of location.

Likewise, in terms of the properties located on urbanized land, their value will be determined in accordance with normal market conditions in line with the reality of the property pursuant to the terms envisaged in the Preliminary Draft.

In those cases envisaged in the Act and in the Preliminary Draft Regulation itself, the general criteria for appraisal will be applied to all land, including any devoted to infrastructures and public services of general municipal or supra-municipal interest, whether envisaged by territorial and urban organization or those of new creation.

Likewise in accordance with the aforementioned, the Preliminary Draft Regulation establishes that the appraisal of the land must be performed in accordance with its basic status, without considering expectations generated by the urban development plan, and therefore any urban development capital

gains resulting from the planning authority of the public authorities that have not been re-capitalized as a result of the urban development action will in no case be subject to appraisal.

In consideration of the amendments being made to the Preliminary Draft, it will be necessary to wait for the final version of the Regulation before we make a more specific evaluation of its implications for the sector.

To this respect, it is logically worthy of mention that in view of the current situation of political and economic uncertainty in Spain, it is difficult to establish a specific period in which we may expect to see a published version of the anticipated Regulation for development of the Act, which requires the corresponding opinion of the Council of State that is expected within the next few months.

Alfonso López

The European Court of Justice questions the licenses of large retail establishments.

As a result of the so-called Bolkestein Directive, Spain has reformed, among others, Act 7/96 on the Organization of Retail Trade, establishing as a general principle that the implementation of retail establishments will not be subject to a system of trading authorization, while this situation may be restricted and/or limited by pressing reasons of general interest, providing they are not based on financial reasons.

As a result of the reform of State legislation, the respective Autonomous Regions have also adapted their respective legislation to EU requirements. Nevertheless, these autonomous reforms have not been undertaken on the basis of a single and consensual position that facilitates the EU principle of freedom of establishment and rendering of services, but instead each Autonomous Region has different requirements and procedures for the implementation of large retail establishments, leaving us with a spectrum of diverse requirements and procedures that hinder and limit the implementation and development of new retail establishments.

As an example of the foregoing, we have the deregulating autonomous legislation approved by the Autonomous Region of Madrid that allows the installation, enlargement or change of ownership of a large retail establishment (whose sales area exceeds 2,500 m2) without the need for a prior trading authorization. On the other hand, legislation approved by the Autonomous Region of Catalonia restricts the installation of large retail establishments on the basis of the type of retail establishment and its territorial location.

As a result of the restrictions and limitations on the implementation and development of retail outlets that existed in the legislation of several autonomous regions and, in particular, in the repealed Catalonian Act 18/2005, the European Commission presented an appeal before the Luxembourg Court, which at the end of the past month of March 2011 pronounced a ruling which, among other questions, stated the incompatibility with EU law of the existing limitations of the aforementioned Catalonian legislation in terms of the location and size of large retail establishments, and in terms of the analysis of the prior implementation of other retail establishments located in the same area, since these are protected by financial criteria, which are rejected by EU case law and legislation and in no case constitute a pressing reason of general interest on the basis of which it is possible to avoid the application of basic EU principles.

While this recent ruling analyzes legislation that is no longer in force, the case law principles that it contains are applicable to legislation currently in force in the respective autonomous regions, and wetherefore believe that the restrictions and requirements contemplated in applicable legislation in the various autonomous regions could be questioned, which serve only to limit the implementation and opening of new large retail establishments.

Ramón Castilla

Unilateral abandonment of non-dwelling lease agreements by the lessee.

As a result of the current economic situation, it is customary for lessors to receive requirements from lessees regarding improvements to their contractual conditions and, in the worst-case scenario, regarding the unilateral termination of the lease agreement.

In this article we analyze the various options contained in doctrine and case law to protect the lessor in light of the aforementioned unilateral termination by the lessee with respect to non-dwelling lease agreements.

In view of the unilateral termination by the lessee, two cases are worthy of note:

i) That the lease agreement does not envisage the power of unilateral termination, and

ii) to the contrary, that the lease agreement envisages such power of unilateral termination and, therefore, regulates its consequences.

In the first case, the lessor may choose between demanding fulfillment by the lessee of the contractual obligations arisen for such lessee from the lease agreement or seeking the termination of the agreement. In both cases, the lessor is empowered to demand compensation from the lessee for any damages that may correspond.

In the second case, it is common in non-dwelling lease agreements for the parties to envisage an obligatory period of duration and, in the event of the early unilateral termination by the lessee, a penalty clause is applied that usually consists of the entirety of the rent corresponding to the period pending completion.

However in terms of any potential compensation that could correspond to the lessor, it is important to state that Urban Leasing Act 29/1994 (hereinafter, "LAU") does not expressly regulate such matter, which has given rise to diverse considerations of the Courts and, therefore, controversial case law to this respect, with the following movements, among others, being worthy of mention:

- If the parties have not envisaged the consequences of early termination, given that there is no legal provision to this respect and the termination is free, there is no need for the lessee to compensate the lessor if it early terminates the agreement;

- The lessee that early terminates the agreement that does not envisage consequences for such early termination must compensate the lessor in accordance with the provisions of Section 11 LAU, applicable by analogy, with one monthly payment of rent for each year of the agreement pending fulfillment, if the agreement has a term greater than five years and these have elapsed (Ruling of the Supreme Court, 20 May 2004);

- Although the parties may have stipulated the consequences of the early termination of the lessee, the judge may reduce the pact by applying the provisions of Section 11 LAU by analogy (Ruling of the Provincial Court of the Balearic Islands, 17 June 2002);

- The Courts are empowered to reduce the agreement on the consequences of the early termination in accordance with the provisions of Section 1103 of the Spanish Civil Code (Ruling of the Provincial Court of Burgos, 13 November 2000).

In spite of the diverse case law cited above, a doctrinal and case law line of thought exists whose application is probably the most common, pursuant to which:

1. In accordance with Section 4.3 LAU, in terms of the system applicable to non-dwelling leases, there is no application by analogy of Section 11 LAU (defended by a certain sector of case law – as commented above – according to which and as in the case of dwelling lease agreements, in the event of the early termination of the lease, the lessee should compensate the lessor with one monthly payment of rent for each year of the agreement pending fulfillment). Otherwise the will of the parties and, suppletorily, the provisions of the Civil Code, will be applicable.

2. On the basis of the foregoing, if the lease agreement regulates the liability of the lessee in the event of unilateral early termination, such penalty clause may be reduced by the courts in accordance with the provisions of Sections 1103 and 1154 of the Civil Code, although such reduction power of the Courts is discretionary (rulings of the Supreme Court dated 17 September 1998, 15 December 1999, 10 October 2007).

3. The aforementioned reduction by the Courts of the penalty clause is usually performed based on the fact that "the compensation in question is deemed as limited to the time in which the premise, following its abandonment by the lessee, remains unoccupied and free, since otherwise the unjust enrichment of the lessor would take place" (rulings of the Supreme Court dated 23 May 2001 and 15 July 2002). Another circumstance that may be taken into consideration by the Courts when reducing the penalty clause is whether the lessee was unable to continue with the lease or if this was too costly as a result of a business crisis.

4. Without prejudice to the foregoing and since, in keeping with the contents of paragraph 2 above, the aforementioned reduction power is discretionary, the Courts may likewise declare the inadmissibility of such power to reduce the corresponding compensation. Thus the Supreme Court ruling dated 10 October 2007 establishes that "while the amount of compensation granted for loss of profit may be reduced by the Courts in keeping with the provisions of Section 1103 of the Civil Code, no legal circumstance takes place in the case in question that advises the use of that power, considering that the lessor complied scrupulously with all of its obligations, while the lack of foresight and the breach of its obligations by the lessee are clear and lacking in all legal grounds."

Eva Sánchez

Recent Case Law.

Contentious-Administrative Court no. 7 of Pamplona, Ruling dated 25 February 2011, Appeal 119/2005

The purpose of this contentious-administrative appeal is the dismissal by failure of the Administration to respond to the claim for asset liability of the Government Administrations filed by a developer for cancellation of the activity and works permits granted by municipal resolutions for the construction and operation of an apart-hotel, and for refusing at the same time to declare the invalidity of the detail studies on which such permits were based.

Although the activity and works permits for a classified activity (apart-hotel) were granted by the local authority, just a few months later the corresponding autonomous body sent the City Council a notice informing on the strict use of the plot in question for a school, which was answered by the City Council stating that residential use of the aforementioned plot was permitted in accordance with the urban development legislation in force at that time. In view of this situation, the autonomous body requested the City Council to cancel the aforementioned permits with the understanding that the use for an apart-hotel was manifestly contrary to the Zoning Plan.

The City Council, in view of this second autonomous region notice, sought the invalidity of the detail studies affecting the plot covered by the permits, commencing an ex-officio review of such urban development instruments.

Along with this, worthy of mention is the fact that the company that purchased the plot where the aforementioned apart-hotel would be built had filed an urban development inquiry before the City Council prior to the purchase in order to determine whether an apart-hotel could be built on such plot. As of the moment of its reception of the affirmative response from the City Council, the purchaser began making substantial investments for the purchase and initial development thereof.

As indicated by the Judge, in evaluating the situation and possible liability of the City Council, we should make reference to a general principle consecrated in our legislation which states that, while not every legal resolution for annulment entails the obligation to compensate per se, neither should the possibility of such remedy be deemed as excluded when the rest of the necessary requirements exist, in accordance with the provisions that regulate the matter, for which a causal connection should be established between the action of the Administration and the damaging result and unlawful injury, in the sense of the non-obligation of the citizen to withstand such damaging results.

By virtue of the foregoing, the Judge declared that the Local Administration should have denied the concession of the permits for construction of an apart-hotel because the plot in question was classified for use exclusively by a school, thereby applying urban development legislation (which should not include the perception of indeterminate legal concepts). In other words, the Administration cannot be recognized any margin for interpretation in our case, since it should have denied the aforementioned permits as soon as they were requested and, likewise, the plaintiff/developer has neither the obligation nor the legal duty to withstand the damage produced. By virtue of the foregoing, the Court convicted the City Council to pay the apart-hotel developer and plaintiff the amount of EUR 6,963,251 in damages deriving from the cancellation of the works and activity permits that were granted by the City Council.

Ignacio Domínguez

Commercial Court no. 1 of Málaga / 1 Bis. Ruling 203/11, 26 May 2011

This ruling is highly innovative in the bankruptcy sector, since the court has denied a banking institution the collection of loans granted to a real estate developer in bankruptcy, declaring such loans subordinate instead of privileged and thereby giving them a lesser collection status for the aforementioned institution.

The conflict began when the banking institution decided to unilaterally suspend and breach the agreement reached with the developer recipient of the loans to finance the works that were being undertaken in one of its developments, which led to a series of damages that were difficult to remedy for the developer itself, the buyers of the dwellings that could not be completed, the suppliers and workers of the developer, and consequently to bankruptcy.

Likewise, and what entailed an action classified by the Court as “de facto management”, the credit institution on the one hand advanced subrogation tranches of the developer’s loan for the purpose of

paying interest on the same loan, and likewise utilized quantities of capital provided by the construction certificates executed to "pay itself" other loans and, in both cases, dispose of capital whose purpose was the optimum execution and conclusion of the works of the aforementioned development.

The Developer alleged that substantial quantities were pending payment to suppliers and construction services among others, essential for delivery of the dwellings to the buyers under the necessary conditions, citing the electric infrastructure or decennial insurance which, due to the negligence of the banking institution, could not be paid until much later.

Therefore, the Court deemed that the aforementioned banking institution, in breach of the conditions stipulated in the developer's loan, acted as de facto manager of the mortgage loans granted to the real estate developer, obstructing the availability of the corresponding tranche for the construction, causing financial damages and extensive harm to the interests of the clients of the developer and the bankruptcy itself, by means of the exercise of decision-making powers for its own benefit, precisely what the bankruptcy reform of March 2009 seeks to avoid.

In short, this ruling is a case of a party who "in practice, and in day-to-day corporate affairs, makes decisions or imposes itself – or is in a situation of imposing its will over the party that holds the post and representation before third parties".

The Court convicted the banking institution, ordering the loans it held to be classified as subordinate, stripping them of their preferential status and with it their priority for collection in the bankruptcy proceeding.

Ignacio Domínguez

Directorate General of Registers and Notary (Property). Resolution dated 11 November 2010.

In this appeal, the Land Registrar denies the registration of a deed of purchase, on which the declaration of new construction had previously been made, on the grounds that the aforementioned deed had not complied with the requirement established in additional provision 2.1 of Act 38/1999, in other words, that within the period of 10 years of the construction of the dwelling, the self-developer must accredit the utilization thereof, in addition to having been expressly released by the purchaser from the establishment of decennial insurance.

In short, this is a case of clarifying whether, once a deed for the new construction of a dwelling has been registered without decennial insurance, because it is a self-development of just one dwelling for personal use, the documental accreditation of such use by the developer/seller may be required at the time of its transfer, or if the declaration made in its day in the deed of new construction suffices for the purpose of registering the sale in the Land Register.

In accordance with the provisions of the Building Standards Act ("LOE"), the case of the individual self-developer of a sole single-family dwelling for personal use is exempt from the obligation of the aforementioned insurance.

The LOE likewise establishes that in the event of the "inter-vivos" transfer of the property within the ten-year period, the self-developer, barring provisions to the contrary, will be obligated to underwrite the aforementioned insurance for the time pending completion of the ten-year period.

With regard to the foregoing, we see that the LOE contains two requirements for the aforementioned exemption: the first refers to the "individual self-developer", whose definition should not be the subject of restrictive interpretations, but should instead be broadly interpreted to include individuals as well as bodies corporate, and, in terms of the second legal requirement for exemption from decennial insurance upon the declaration of new construction, applicable legislation and case law require the concurrence of the following;

1) that it not be just any dwelling, but rather a “single-family” dwelling;

2) that the dwelling be devoted to “personal use”; and

3) that it be one “sole dwelling”.

In the case at hand, the Directorate General confirmed the possibility of the Land Register to require documental accreditation of the use of the dwelling at the moment of its transfer.

To this regard, and although in this case the purchaser had granted the self-developer/seller exemption from the establishment of decennial insurance, contrary to the moment of the declaration of new construction, here the mere statement that the dwelling was devoted to the personal use of the latter (in order to thus comply with the requirement of the use of the dwelling by the aforementioned self-developer/seller) is not sufficient, “and must be accredited by sufficient documental proof, whether by notarial deed, municipal registration certificate or any other equivalent means of proof admitted by Law”.

Ignacio Domínguez

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