EXPO Real 2014

Dear readers,

We would be delighted to welcome you this year again at the EXPO Real in Munich. Visit us from October 6-8, at our stand in hall C1, #230 and meet our international Real Estate team.

We will be happy to exchange interesting thoughts with you.

We are looking forward to seeing you!

Stefan Kirchmann
Head of Real Estate

SAVE THE DATE!

5th MAZARS Real Estate Breakfast

This year, we again are pleased to invite you to join us in Frankfurt and Berlin. During a rich breakfast our experts will inform you about the current developments in the real estate tax law.

Frankfurt: 27.11.2014
Berlin: 04.12.2014

You are welcome to register for the breakfast at the following address:

jade.ebelt@mazars.de.

We are looking forward to your registration!

Real Estate News

Municipal Urban Renewal Areas Within Real Property Transactions

In a legal due diligence process, municipal urban renewal areas often fall within the context of public law. Within renewal areas, the approval requirements such as the liability for equalisation levies have to be taken into account.

Rental Restrictions And Changes In Real Estate Agents Law

The parliamentary groups agreed on changes to residential tenancies and Real Estate Agents Law which will probably take effect in the first half of 2015.

Current VAT Jurisdiction

The Federal Financial Court (Bundesfinanzhof) confirmed in its judgment of 24.04.2014 (VR 27/13) the admissibility, under certain conditions, of the division of a lease into two leases.

An Agreement On Real Property Tax Reform Is In Sight

The discussion of whether it is necessary to reform the real property tax has long passed. The focus has now shifted to figuring out what exactly this reform will look like in the future.

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Municipal Urban Renewal Areas Within Real Property Transactions

The Relevance Of Municipal Urban Renewal Areas In Real Property Transactions

In a legal due diligence process, municipal urban renewal areas (Sanierungsgebiete) often fall within the context of public law. The relevance of these renewal areas is significant and is often underestimated by the parties or their legal advisors.

Within renewal areas, municipalities are entitled to remedy urban development problems by taking renewal measures. Areas affected by these renewal measures are as a rule, determined within the framework of a by-law (Satzung) which must be disclosed to the public. In addition to these measures, the renewal area is then registered in the Land Register for informational purposes.

In renewal areas, the approval requirements that must be granted by the competent municipality have to be taken into account in all real estate related agreements. Furthermore, in sale and purchase agreements, the liability for equalisation levies (Ausgleichsbeiträge) between the parties will require a thorough drafting.

This being said, the relevance of the aforementioned topics with regard to the legal due diligence process and the drafting of the sale and purchase agreement will be covered in the next sections.

Municipal Approval Requirements In Urban Renewal Areas

The relevant municipality’s approval is required in all of the legal procedures pertaining to the selling of a real property situated within a municipal urban renewal area (sec. 144 para. 2 no. 1 of the Federal Building Act, BauGB). It is not unusual to find that the maturity of the purchase price may be impeded or at least delayed due to the approval requirement being overlooked by the parties or their legal advisors. In this case, the sale of company shares (share deal) would also in purely practical terms, no longer be possible if the parties have already invested their money and effort over a period of time in an asset deal. The prevailing legal opinion is that if the real property is acquired via a share deal then the authorization requirement does not apply.

Other situations which will automatically trigger an approval requirement are the creation of a public easement (sec. 144 para. 2 no. 4 BauGB) or the parceling of a plot of land into sections, irrespective of the parties’ choice to acquire a real property by way of an asset or share deal. (sec. 144 para. 2 no. 5 BauGB).

If the parties involved have not considered the consequences of a municipal urban renewal area with regard to tenancy law, this may result in having quite a considerable impact upon the real estate transaction. For example, according to sec. 182 para. 1, in a real property being rented out, the municipality is entitled to cancel the tenant’s lease agreement with 6 months’ notice if the renewal measures being conducted require such a termination. Any tenant which is affected by this measure, will have to tolerate the renewal (sec. 173 para. 3 BauGB).
BauGB). What is of particular importance here is that long-term leases with a duration of more than one year require the approval of the community and, without this are provisionally invalid (sec. 144 para. 1 no. 2 BauGB). One of the effects of the municipality rejecting the approval requirements would be that there is no long-term lease agreement in place or, it would have to be cancelled. Therefore, parties of a real estate transaction should be advised to conduct a thorough legal due diligence so as to avoid unpleasant surprises and to carry out an appropriate yield calculation.

**Liability For Equalisation Levies (Ausgleichsbeiträge)**

Special attention should be paid to the liability for equalisation levies. Upon the completion of the renewal measures, the redevelopment by-law is then repealed and the remediation notice in the land register is deleted. The equalisation levy will then be determined together with the owner of the real property.

The urban renewal work usually increases the value of the land which results in the property owner paying an amount of money to the local municipality for this increase.

According to sec. 154 para. 1, sentence 1, para. 3, sentence 1 BauGB, the land owner at the time the urban renewal is cancelled is liable for payment of the equalization levy. This means that if the urban renewal area is cancelled shortly after the notarization of the sale and purchase agreement, or the equalisation levy is collected after the notarization but prior to the registration of the purchaser as new owner, the seller is only liable for the equalisation levy against the municipality.

It is doubtful as to whether the purchaser can release the seller from paying the equalisation levy without it being clearly specified in the sale and purchase agreement.

The seller’s obligation to pay the equalisation levy quite often does not correspond with their intention of exiting themselves completely from all liability to third parties. Therefore, a contractual provision is set into the property purchase agreement that is in the interest of the seller because ultimately, it can neither be predicted when legal ownership is actually transferred nor is it possible to say when an urban renewal area will be, or already has been cancelled.

The ‘golden bullet’ which would resolve this issue would be to insert a claim within the sale and purchase agreement which expressly releases the seller from their obligations. However, there exists the opinion that a mere reference to public burdens may suffice instead.

In order to avoid the possible objection of the purchaser to release the seller from the equalisation levy by claiming that he had had no previous knowledge of an already deleted entry in the land register, it would be advisable to provide the purchaser with the land register excerpt in which the renewal area was still registered or, to simply inform the purchaser about a renewal area which was formerly in place.
LEGAL

Rental Restrictions And Changes In Real Estate Agents Law

On September 23, 2014, the heads of the CDU, CSU and SPD’s parliamentary groups agreed on changes to residential tenancies and Real Estate Agents Law which will presumably take effect in the first half of 2015.

According to these changes in the law, the current rent of a residential tenancy that is re-let may only be increased by an additional 10% calculated on the basis of the rent customary in place (ortsübliche Vergleichsmiete).

The federal states (Länder) are authorized to define those areas with a strained housing market in which the rental restriction will apply for a maximum period of five years. This rental restriction does not apply to the first rental contract of a newly built or renovated residential unit.

The Real Estate Agents Law ensures that the party commissioning the services of real estate agents will be obligated to bear their costs. According to the new changes, the landlord is obliged to pay the real estate agent to find a new tenant whereas past practice was that the tenant had to bear these costs. Contractual provisions deviating from this principle are legally invalid.

TAX

Current VAT Jurisdiction

During our Business Breakfast in November of last year, we discussed in detail Lower Saxony Financial Court’s decision below from 04/11/2013. (5 K 393/11)

The Court had just dealt with the question of whether the competent tax office had the right to deny the Input VAT deduction claimed by the property owner X-KG. The court’s determination was based on the following information. After X-KG renovated their property, they rented it to a bistro and a construction company at a price that included VAT. Because of this, X-KG claimed the 100 % Input VAT deduction.

However, because the building contractors used a part of their office which amounted to 20% of their output transaction revenue to manage their own residential property, the tax office argued that X-KG would no longer be able to deduct any VAT on the property rented by the construction company. Because the building contractors exceeded the de minimis threshold of 5% (section 9.2, para. 3 UStAE), the tax office refused X-KG’s VAT deduction.

The other reason was the fact that the contractors did not use the entire property for generating revenue.

As you may remember, in order to avoid the loss of the entire deduction, we recommended drafting two separate lease agreements. By taking this action, we avoid ‘infecting’ the other part of the tenancy agreement.

The Federal Financial Court
(Bundesfinanzhof) confirmed in its judgment of 24.04.2014 (VR 27/13) the admissibility, under certain conditions, of the division of a lease into two leases. It also specifies that the waiver of the sales tax exemption under § 9 para. 2 p 1 UStG (Option zur Umsatzsteuer), can also apply to individual areas of a rental property, if this sub-area can be clearly demarcated. The financial management’s idea of dividing the surface area into separate rooms was approved by the Federal Fiscal Court (cf. § 9.2, para. 1 p 2 UStAE). However, according to the Court, a sub-area within a room does not present a clear enough demarcation. The allocation of public land must be assessed on a case-by-case basis. To avoid any potential disputes from arising, the Federal Financial Office has declared that the leased area would be taxable, since only a part of the office was used for tax-harmful purposes.

As a landlord, you should make sure that you always include a compensation clause in the rental agreement in the event of harmful use or subletting by the tenant.

If you should have any questions, we are here to assist you!

Anja Bähner  
Senior Manager Tax  
☎ 069 96765—1159

TAX

An Agreement On Real Property Tax Reform Is In Sight!

The discussion of whether it is necessary to reform the real property tax has long passed. The focus has now shifted to figuring out what exactly this reform will look like in the future.

Under the current law, the assessment of real property tax takes place in different stages:

The tax office determines (dependent on the usage of the land) the taxable amount for real property tax (Steuermessbetrag) starting with the taxable value of the tax object (Einheitswert). The municipality then determines a certain percentage (Hebesatz) on the taxable amount for real property tax. The real concerns about the constitutionality of property tax do not lie in the determination of real property tax per se, but rather on how the tax base is assessed. It is still currently based on the use of the outdated unit values (valuation at January 1, 1964 and January 1, 1935).

Of the numerous real property tax reform proposals which have been put forward, two models prevail, the ‘Southern Model’ and the ‘Northern Model’.

The calculation of the property tax in the ‘Southern Model’ is based on the building area and the number of floors rather than the location and amenities of the building. Whereas in the ‘Northern Model’, the market value which is based on the purchase price, location, size of property, the living / usable area and year of construction, provides the basis for its real property tax calculation.

Current information shows that the rules for Real Property Tax A for Agricultural and Forestry have remained unchanged within the framework of the basic tax reform. The changes will come with the calculation of Real Property Tax B which covers all other types of developed and undeveloped properties, such as buildings and apartments. The new Real Property Tax B will be a combination of both the Northern and Southern models. It is planned to calculate the real property tax on the basis of the current market value of the land and the
area of the building. Depending on the type of use, a lump sum will be added. Real Property Tax C, initially planned for commercial real estate, will be abolished. Thus, each federal state will be given more leeway in determining their tax rates (Steuermesszahl).

The decision of the Federal Constitutional Court on the constitutionality of this real property tax is expected later this fall. It still remains relatively uncertain where exactly the dice will fall regarding the direction this property tax reform will actually take. It is expected however, that the properties which are currently undervalued will be rated higher in the future. Current speculation would indicate that the municipalities will use the ambiguity resulting from this reform to adjust their real property tax assessment rates accordingly.

Please stay tuned to this channel for future news updates!

Editors (V.i.S.d.P.)

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Stefan Kirchmann (stefan.kirchmann@mazars.de)
Andrej Latinović (andrej.latinovic@mazars.de)

For more information:
www.mazars.de - www.mazars.com