Contents

Dear reader,

This year's third newsletter for our clients focuses on new legislation and recent rulings pertaining to property law.

We report extensively on new and controversial attempts by the government to force property owners to join the fight against climate change.

In the hope that this letter will provide you with new insights, I remain

Yours faithfully,

Johannes Grooterhorst, LL. D.
Attorney at Law

A. Current news

Environmentally-friendly properties – New legal obligations mandating the use of renewable energy

The Act on the Promotion of Renewable Energies in the Heat Sector (EEWärmeG) came into force on 01.01.2009. It is intended to promote the use of renewable sources of energy and § 3 EEWärmeG specifically creates an obligation to use renewable energies in "newly constructed buildings." The German federal states are allowed to introduce similar obligations for existing buildings.

The Act on the Promotion of Renewable Energies in the Heat Sector (EEWärmeG)

In the interest of protecting the climate, conserving fossil fuel resources and reducing the country's dependence on energy imports, the act seeks to facilitate a sustainable development of the energy supply. According to § 1 Section 2 EEWärmeG it "aims to contribute to increasing the renewable energy's share in final energy consumption for heat (space heat, cooling and process heat and hot water) to 14 per cent by 2020."

Obligation extends to all buildings with more than 50 m² of usable floor space

According to § 4 EEWärmeG the obligation to use renewable sources of energy extends to all buildings with a usable floor space of more than 50 m² in which energy is used for heating and cooling. The law exempts only such entities as subterranean buildings, buildings built for religious purposes and residential buildings "intended to have an operating life of less than four months per year."

Required percentage of coverage varies according to type of renewable energy chosen

The obligation to use renewable energy spelled out in § 3 Section 1 of the act can be met by having the renewable energy chosen cover the following shares of thermal energy demand: If solar radiation energy is used it must contribute at least 15 % to meeting the heat energy needs of a building; if energy derived from gaseous biomass is used the figure is at least 30 %; and if energy derived from solid or liquid biomass is used it must contribute at least 50 % (the same applies to geothermal and environmental heat energy). § 10 of the act obligates the owner of a building to furnish proof that the renewable energy's contribution to the building's thermal energy needs meets the requirements laid down by the act.

According to § 13 EEWärmeG the Federal Government "shall provide needs-based funding for the utilisation of renewable energies for heat generation of up to € 500 million per year between 2009 and 2012". Measures (merely) intended to meet the obligation to use renewable energies laid down in § 3 Section 1 EEWärmeG will not receive funding, however. Until the German federal states impose an obligation to use renewable energy in existing buildings, funding for measures that appropriately upgrade energy use in existing buildings or for such measures that exceed the requirements laid down by the EEWärmeG might be a possibility.

Measures for existing buildings are likely to be regular measures designed to cut energy consumption. According to § 554 of the German Civil Code (BGB) lessees must tolerate such measures, while § 559 Section 1 1st Alternative states that the costs of such modernisation measures can be passed on to the lessee(s).

The Energy Saving Ordinance 2009 (EnEV 2009)

On 18.03.2009, the Federal Government moreover passed the Energy Saving Ordinance (EnEV 2009), which will come into force on 01.10.2009. In an attempt to activate the energy-saving potential of existing buildings, the EnEV increases the demands made on their energy balance. In view of the new Act on the Promotion

of Renewable Energies in the Heat Sector (EEWärmeG), the EnEV 2009 also provides stimuli aimed at increasing the utilisation of renewable sources of energy. The ordinance thus, for example, allows the electricity from renewable sources to be subtracted from a building's power requirements. What all this means is that clients, project developers and holders of real estate portfolios will in future have to keep an even closer eye on measures designed to save energy and/or make use of energy from renewables.

Isabel Gundlach

B. Building and property law

Seller's duties to disclose information in the case of property purchase agreements involving health hazards

I. With its rulings the Federal Supreme Court (BGH) has made the sellers' duties to disclose information when concluding a property purchase agreement very far-reaching. In a recent ruling of 27.03.2009 (V ZR 30/08) the BGH came out in favour of a duty on the part of sellers to disclose information about building materials used (asbestos) that at the time the building was erected were in common use, but were later discovered to constitute a health hazard.

Liability cannot be excluded in the event of hazardous defects

In the case reviewed by the court the sellers had sold a residential building to the buyers while explicitly excluding any "liability for faults and defects". The building in question had been erected in the 1980s using the prefabricated construction method and its facade contained asbestos cement tiles. That such tiles had been used was known to the sellers before the purchase agreement was signed. The sellers had failed to provide this item of information to the buyers, however. The buyers had sued for damages incurred as a result of having to decontaminate the facade.

Compensation in the event of a serious threat to human health

The BGH started off by making it clear that any serious threat of a release – within the context of the normal use made of an object of sale – of substances with a great potential to harm human health would already constitute a material defect that provided a basis for a claim for damages and which sellers would be obligated to inform buyers about. With a residential building this state of affairs is the case if no common renovation, remodelling or reconstruction work can be done without incurring substantial risks to human health.

Defect-based rights and claims for damages resulting from culpa in contrahendo

The BGH also noted that in addition to the rights arising from purchase-agreement-based defects, culpa in contrahendo liability (§ 280 in conjunction with § 311 Section 2 No. 1 BGB) might also arise. Whether this was the case would depend on whether the sellers had maliciously deceived the buyers with regard to the presence of asbestos. In this regard the BGH also pointed out that sellers are both obligated to answer the questions of buyers truthfully and comprehensively and point out human health hazards even without being asked about them. If sellers failed to fulfil their disclosure obligations, it would not be possible to invoke a contractual liability exclusion clause at a later date, the court declared.

Dr Rainer Burbulla

Permissibility of time-based fees for architects

II. In its judgement of 17.04.2009 (File No.: VII ZR 169/07) the Federal Supreme Court (BGH) ruled on a fee-related lawsuit filed by an architect. For the various "subservices: contract alignment, identification and documentation of defects, defect management, assessment of depreciation values, post-acceptance work" the architect's contract specified hourly rates of € 205.00 for expert work, € 130.00 for collaborative work and € 50.00 for secretarial work.

Time-based fees and the Fee Regulations for Architects and Engineers (HOAI)

The Federal Supreme Court dismissed the objections of the client to the effect that it was only legal to charge for those types of work listed in the Fee Regulations for Architects and Engineers (HOAI) at hourly rates for which the HOAI specified or allowed such a procedure. Tasks given to an architect involving the determination, documentation, evaluation and removal of defects were types of work, the court declared, that had to be assessed within the context of work contract law. Even though major parts of the work had been of the kind covered by the regulatory framework of the HOAI, there had been no obstacles to the parties effectively agreeing on time-based fees, the court went on to say.

According to the BGH, § 4 Section 1 HOAI made it possible for the parties to the contract to apply the principle of private autonomy when agreeing to fees for types of work covered by the HOAI. It was only the minimum and maximum rates laid down in the HOAI that limited the parties' freedom of contract, the BGH observed.

Ralf-Thomas Wittmann

C. Commercial tenancy law

Termination for cause on account of persistently late payment of rent

I. In its ruling of 08.07.2008 (File No.: I-24 U 177/07) the Higher Regional Court (OLG) Dusseldorf found that persistently late payment of rent following a written warning provided grounds for the termination of a lease without notice; regardless of whether the rent was ultimately paid or payments at no time were two months in arrears.

Thus according to the justified ruling by the Higher Regional Court irregular payment of the rent permits the termination of a lease for cause if the persistently late payment of the rent makes it unreasonable to require the landlord to continue the lease. In the opinion of the OLG Dusseldorf it was of no consequence that the rental claims of the landlord were ultimately – if belatedly – satisfied.

A question of reasonableness

In the case in question a tenant had for a period of more than six months paid the monthly rent with a delay of in numerous cases one month and in one case three months. The OLG Dusseldorf considered this state of affairs unacceptable for the landlord, in particular because it deprived him of the necessary ability to rely on payments being punctual.

Tobias Törnig

Termination for cause without notice because of a delay in payment

II. According to § 543 Section 2 No. 3a BGB a landlord has the right to terminate a lease for cause without notice if a lessee " is in default, on two successive dates, of payment of the rent or of a portion of the rent that is not insignificant".

A portion of the rent that is not insignificant

A recent ruling by the Federal Supreme Court (BGH) of 23.07.2008 (File No.: XII ZR 134/06) defines "a portion of the rent that is not insignificant" in the case of rent for business premises as any amount in excess of a month's rent. However, in the opinion of the BGH such arrears only provide the grounds for a termination for cause without notice, if they result from two successive dates.

Two successive dates

Arrears that do not meet the above conditions, because they, for example, (also) result from other dates, do not provide grounds for a termination for cause without notice unless they amount to two months' rent.

Tobias Törnig

Discontinuance of services otherwise provided by the landlord to a delinquent lessee after the termination of the lease

III. In its ruling of 06.05.2009 (File No.: XII ZR 137/07) the BGH concluded that a landlord had a right to discontinue services otherwise provided by him to a lessee who despite the lease having being terminated had failed to vacate the leased property.

No unlawful interference with possession

The Federal Supreme Court has thus come out against the opinion voiced to date by the majority of higher courts and propagated by the greater part of specialist literature on tenancy law according to which such an act would constitute a so-called unlawful interference with possession, comparable to a changing of the locks on a property. The principle of unlawful interference with possession gives rise to a special protection of possession that is intended to give the possessor protection against interference and which in principle remains in effect even after the lease has been terminated and the lessee is obligated to vacate the leased property. Thus even after having given notice the landlord cannot simply take the leased property away from the lessee.

No external interference

The BGH has now, however, pointed out that possession of a leased property by itself only entails the right to a defence against external interference not the right to a particular kind of use. Thus the mere discontinuance of services by the landlord did not amount to an interference with the right of possession, the court declared. The possession was only protected against acts of interference and did not confer a right to the continuance of supply services. The landlord was thus entitled to discontinue heating, electricity and water supply services, the moment the lessee was legally obligated to vacate the leased property, the court observed.

Tobias Törnig

D. Public law

Zoning law: strengthening town and city centres

I. In its ruling of 26.03.2009 (File No.: 4 C 21.07) the Federal Administrative Court declared that the urban development goal of strengthening centres by concentrating retail sector business in the centres of districts and of other parts of towns and cities can justify the exclusion – in the context of legally binding land-use plans – of retail operations from non-central areas.

Exclusion from non-central areas

In the case in question the City of Dortmund had taken the opportunity provided by an outline planning application for a new self-service grocery retail market in a mixed area to change the land-use plan in such a manner that retail business sector use was thereafter more or less excluded. The exclusion of retail business sector use from this planning area was done with an eye to the retail business concept covering the whole of the City of Dortmund and – in the interest of strengthening areas designated as centres by the concept – aimed to reserve so-called "centre-forming" types of use for these same areas.

Making distinctions between types of use

The Federal Administrative Court considered such conduct permissible. On the basis of a sound retail business concept a municipality had a right, the court stated, to exclude at regular intervals types of use not found in centres, or found to only a very limited extent, from other municipal areas with the intention of shifting any possible establishment of new business premises towards the centres in an attempt to boost or preserve their appeal.

Isabel Gundlach

The zoning law principle of taking account of neighbours' interests as a limit to rights under building law

II. A building project that is permissible in principle according to the building laws that apply to the particular plot of land may nonetheless be inadmissible if it contravenes the zoning law principle of taking account of neighbours' interests. It was on this principle that the Higher Administrative Court Munster based its recently published ruling of 04.09.2008 (File No.: 10 A 1678/07).

Permissibility under zoning law vs. principle of taking account of neighbours' interests

In its decision the Higher Administrative Court made it clear that regardless of any permissibility under zoning law the question of whether a building project violated the general principle of taking account of neighbours' interests had to be answered individually for each project. In the case in question the Higher Administrative Court held the principal of taking account of neighbours' interests to be violated because a garage extended far into the rear of a property whilst being on a level with the garden and patio area of the neighbouring property.

The limits of building law

The general principle of taking account of neighbours' interests can thus on the one hand be used by a neighbour to challenge a building permit, if the reasons that might be given for regarding a building project as unreasonable are of a concrete nature only. On the other, the ruling points out to clients the general limits of building law: Thus a client cannot simply ascertain from the legally binding land-use plan or other building law provisions what is permissible. He or she must always also keep an eye on the actual on-site building conditions.

Niklas Langguth

Procedural law: No restriction of requests for judicial review to objections raised in the context of public participation

III. With the act of 21.12.2006 the legislator has via § 47 Section 2a of the Administrative Court Act (VwGO) restricted the right to request judicial review. According to § 47 Section 2a VwGO a request for judicial review relating to a legally binding land-use plan is henceforth inadmissible unless it is based on objections that have already been raised within the context of a land-use planning process.

With its decision of 29.08.2008 (File No.: 7 B 915/08.NE) the Higher Administrative Court Munster has now for the first time answered the question of whether this implies that in future it will only be possible in the course of a judicial review of acts to raise objections that have already been raised within the context of a land-use planning process.

The Higher Administrative Court gave a narrow interpretation to § 47 Section 2a VwGO and made it clear that the provisions of the paragraph do not imply preclusion with regard to objections to a land-use plan that would be examined in a judicial review. Regarding objections the party making the request for judicial review is hence not limited to those objections he or she has made during the public consultation or laying open for public inspection phase of the land-use planning process. Rather, he or she is entitled to raise any objections in the judicial review proceedings – provided that he or she has raised at least one of them during the land-use planning process.

Niklas Langguth

Public procurement law: claim to additional payment arising from a delay in the contract awarding process

IV. With its judgement (establishing a principle) of 11.05.2009 (VII ZR 11/08) the Federal Supreme Court (BGH) addressed the question as to whether a contractor might be entitled to additional payment because of a delay in construction time arising from a delay in the contract awarding process.

Acceptance of tender after a contract awarding process lasting twelve months

In the contract awarding process on which the lawsuit was based the contractor's unadjusted tender was accepted following a delay in the process of twelve months caused by a re-examination procedure. In his lawsuit the contractor had filed a claim for additional payment against the public client on the grounds that the costs of materials had risen in the meantime. The BGH upheld the complaint.

Delay caused by re-examination procedure

The fact that §§ 107ff of the Act against Restraints on Competition (GWB) gives unsuccessful bidders the chance to have the intended acceptance of a tender re-examined regularly leads to delays in the awarding of contracts – with a consequence being that construction dates specified in public invitations to tender cannot be met and binding periods of tenders expire. The bidders are then asked to extend the binding periods of their tenders, which were made in response to the original public invitation to tender. In the event that the bidder extends the binding period of his tender, it can be accepted in its unadjusted form even at a point in time at which construction dates can no longer be met.

Price increases due to a delay in construction time

If a tender is accepted and a delay in construction time has created additional costs for the bidder (through higher purchase prices, say), the bidder can demand that the client reimburse these costs, if the tender is accepted in its unadjusted form. In this case due to the strict observance of form of the contract awarding process and the fundamental principle according to which the acceptance of a tender cannot change the invitation to tender, a contract with the dates specified in the invitation to tender comes into existence. As these dates can no longer be met, a supplementary interpretation is required. Within the framework of this supplementary interpretation new construction dates and the additional costs arising from an adjustment of payment in accordance with § 2 No. 5 VOB/B have to be taken into account. If the parties to the contract cannot agree on the adjustments, the court(s) will adjust the payment.

Dr Rainer Burbulla

Events – Current news

Should you be interested in taking part in an event, please do not hesitate to contact the speaker(s) in question at: www.grooterhorst.de

1. **Union Internationale des Avocats** – 53rd Congress 27 October to 31 October 2009
   "Der Anwaltsberuf und die globale Wirtschaftskrise: Möglichkeiten und Fallstricke"
   ["Being a lawyer at a time of global economic crisis: opportunities and pitfalls"]
   Speaker: Dr Johannes Grooterhorst
   28 October 2009 in Seville

2. **German Council Forum Recht und Beratung**
   "Einzelhandel und Einzelhandelsimmobilien in der Krise"
   ["The retail sector and retail sector properties at a time of crisis"]
   05 November 2009 in Dusseldorf
   Speakers: Dr Johannes Grooterhorst
   Tobias Törnig

3. **New Book Announcement**
   Towards the end of October 2009 the following book will be published:
   Rechtshandbuch
   Immobilien-Asset-Management
   Potenziale und Strategien für Investoren und Eigentümer
   [Legal Handbook – Real Estate Asset Management – Opportunities and Strategies for Investors and Owners]
   Edited by Dr Johannes Grooterhorst, Udo Becker, Rolf-Ulrich Dreyer and Tobias Törnig
   The authors are: Dr Johannes Grooterhorst
   Dr Ursula Grooterhorst
   Tobias Törnig
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