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BUILT ENVIRONMENT insights

THE BUILT ENVIRONMENT:
THE FUTURE IS NOW

IN THIS ISSUE:

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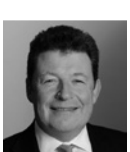
We are delighted to introduce our first issue of Built Environment Insights, our biannual publication in which we cover topical issues for the Built Environment from around the globe. Cities are changing to meet technological advances, growing populations, evolving hotel and leisure patterns and the renewal of social infrastructure. In an environment of low returns, these cities present huge opportunities with a wide range of new players from around the world.

As cities respond to these factors, the way we think about the built environment is changing. By looking at the built environment or real assets as a whole, rather than two separate areas – public and private – we can exploit connected opportunities and apply a broad base of knowledge and experience which helps both our clients maximise their return on investment and optimise the benefits for the communities within that space.

We hope that you find Built Environment Insights useful and enjoy reading this issue. If you have any feedback or if there are any topics that you would like us to cover in future editions, please email **builtenvironmentinsights@ashurst.com**



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UK

Proptech: Benefits and challenges of the digitalisation of real estate

by Amanda Hale, Nick Elverston and Darren Rogers

Digitalisation knows no boundaries, it is impacting businesses in all industries. The real estate sector is no exception and is embracing some of the most significant technological changes. This provides tremendous opportunities for efficiency, growth and transformation.

These opportunities come from a powerful combination of technology, data and ubiquitous communications. Hardware, such as sensors, has been increasingly miniaturised. There is now nearly unlimited, scalable, cheap, data storage provided by the Cloud. The adoption of new technologies by business such as shared platforms; virtual reality; data analytics; artificial intelligence and machine learning; robotics and blockchain are transforming operations and creating new revenue streams in all real estate sub-sectors.

This article covers some of the key trends for 2017, as well as the legal implications that need to be considered when introducing new technologies to internal operations, changing business models or entering into partnership arrangements.

Implications of new technologies

Virtual Reality

Perhaps the most obvious development in proptech has been the rise in online brokerage (in particular in the residential sector). Virtual reality (VR) is growing in popularity as a way of marketing property – the benefits to clients, possibly located overseas, of being able to experience space remotely are compelling. The use of VR in property is already a global US$1 billion industry , Goldman Sachs estimates that this is set to treble by 2020. We expect to see real estate companies partnering with tech companies to develop tailored use of VR.

As with other novel tech, the use of VR raises a number of IP issues, including ownership of the underlying code (and whether or not the code is patentable), rights in databases of material and a possible need to clear content appearing in virtual walkthroughs (for example on billboards or logos), use of which may not qualify as "fair use" – all of which is complicated by the international accessibility. As ever with new media, clarification of the position will come with decisions of the courts and, possibly, new laws. Pending this clarification, sensible clearance and editing strategies are recommended.

Smart buildings/Internet of Things (IoT)/Automation

Smart buildings are already changing the way in which real estate is managed, in particular IoT will infiltrate our buildings and homes, taking care of routine maintenance tasks, detecting malfunctions and defects before they become an inconvenience. We will see more automated control of properties. There are, however, associated risks, such as increased vulnerability to cyber-attacks, loss of data and loss of access to confidential information. As an integrated, digitalised system, the smart building poses a heightened security risk.

Operators and tenants should ensure that suitable systems are in place. These should include firewalls, anti-virus and anti-spam software. Proper due diligence is required to ensure that counterparties have appropriate measures in place (with the correct certification). Ultimately, for most businesses, it is not a question of "if" but "when" cyber-attacks will occur and all businesses are encouraged to have their cyber-incident response teams and processes in place. These processes should be thoroughly tested, through wargaming, in advance of needing to rely on them in the heat of an attack. Cyber risk insurance may be appropriate and tenants should consider requiring landlords to take out suitable cover.

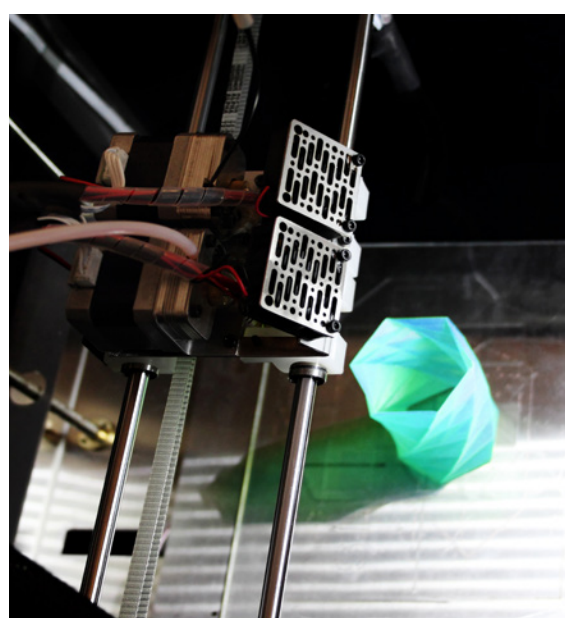
Sometimes overlooked is the increased use of open source software. Open source software is often published under a warranty-free licence, sometimes requiring any program that incorporates the open source code to be made freely available, curtailing the ability to exploit proprietary software – careful due diligence and rights management is recommended (particularly where development is outsourced). Contractual issues also arise between operators and tenants, with both keen to ensure that they have sufficient access to data, but potentially vying for "ownership" and the rights to exploit that data.

Digitalisation by its nature gives rise to unintended consequences. Increased reliance on technology and automation can render many tasks, formerly undertaken with human intervention, redundant. This can lead to redundancies and industrial unrest which , in turn, may lead to an increased need for people with expertise in industrial relations and employment law to resolve matters. Any business which relies on a significant workforce would do well to prepare for this.

3D Printing

Last year, a firm in China achieved what many thought was the stuff of fiction, the building of ten houses in 24 hours using a proprietary 3D printer. It won't be long before others follow suit and begin fabricating buildings (or at least components of buildings) on site. Digitalisation enables an element of personalisation and it may become possible to order a custom-built house over the internet for next day delivery!

As with other new technologies, 3D printing is pushing the boundaries of copyright law. We are already seeing a proliferation of online file-sharing platforms, many of which are very unclear as to ownership of shared work product, in particular in the form of Computer Aided Design (CAD) files. Once again, we are in the early days of commercial use and immediate intervention from lawmakers seems unlikely. In the meantime, clarity as to the licence types under which files are shared is recommended. As are security arrangements around the sharing of those files. 3D printing also raises liabilty issues between the producer and user of the code; for example, in the event of failure of a component deployed in the fit-out of a building which has been designed by computer, by one party, and then transmitted for production, via 3D printing, by another.



Media provision

Digitalised spaces can offer enhanced opportunities for providing media content. Operators of public spaces should be aware that screening protected material is likely to constitute a "communication to the public" under copyright law and doing so without the necessary licence could put them in breach. A regular domestic licence will not be appropriate for screening in public spaces. Operators will, therefore, need to consider any licence requirements and attached costs prior to rolling-out such displays.

Connectivity

Proving the appropriate connectivity infrastructure is obviously a key consideration when developing commercial property (be it broadband, mobile or WiFi). As businesses become increasingly reliant on access to data, agreements for the provision of connectivity, whether with telecoms suppliers or tenants have grown in importance, in particular around the negotiation of KPIs, cybersecurity and liability provisions. Telecoms regulation also comes into play in this context, since developers offering connectivity services are likely to be regulated (under European law as "electronic communications providers", bringing with it a host of compliance obligations).

Smart contracts/blockchain

Carrying out property transactions over the internet will increasingly become reality. However, an inherent problem is ensuring the integrity of data and fraud prevention. The use of blockchain technology, (which is a type of distributed database that facilitates secure interactions between multiple parties) could, eventually, make real estate transactions safer, more efficient and cheaper. Moreover, it could aid data transparency and, eventually, enable the use of smart contracts for real estate transactions.

However, while blockchain is likely to be one of the most talked about technologies of 2017, we believe the practical applications will take a little longer to gain market acceptance. This is partly because it will take time for any of what are likely to be numerous competing applications to reach critical mass, but also because of legal uncertainty. In particular, there is currently little regulatory framework (which is an issue receiving much attention from law and policymakers; however, formal structures are likely to take some time to put into place). This means that participation agreements will need to be detailed to govern access, promulgate rules of conduct and apportion liability. In addition, legal enforceability needs to be carefully considered, alongside other important issues such as tax liabilities.

Implications for new business models

Data-driven business models

Data is the currency of the digital economy. Technological advances in the built environment offer new opportunities to deploy that currency. For instance, sensors and location-based services make it possible to monitor operations and maintenance, thereby increasing efficiencies, enhancing customer experience (for example, in terms of car parking and targeted information services), as well as improving the value of tenancies by gathering data in relation to both historic and forecast footfall, delivery and warehousing information and customer profiles. Consumer data can be collected for use in behavioural advertising, whether provided by individuals themselves or by the sale of data to third parties.

Here, it is key that the anticipated collection, storage and processing of data is permitted under data protection legislation. Stricter rules on data profiling will come into force under the new General Data Protection Regulation (also known as the GDPR), compliance with which will be mandatory from 25 May 2018 and unprecedented fines, of up to four per cent of an organisation's annual worldwide turnover (or, if greater, €20,000,000), may be awarded for serious breaches. In the UK, online behavioural advertising is also regulated by the Advertising Standards Authority, which requires businesses to be clear about their data collection and to provide tools so that consumers can choose to unsubscribe.

Where businesses rely on the exploitation of data, key considerations run beyond compliance. In many cases large data sets are created with data input from business partners. Businesses will need to work out the provenance of their data (does it come from other businesses? The State?). It is important to establish the facts to ensure that there will be continued access to data on a known-cost basis and whether there is freedom to commercialise compiled data.

Data-reliant businesses are well advised to make sure they have (or put in place) the right data access arrangements (for example escrow arrangements guaranteeing access should the supplier ever fail) and the right contractual framework in order to ensure guaranteed supply, as well as comfort that the data will be clean and accurate and has been collected, stored and processed lawfully.

Flexible workspaces and flexible stores

With many workspaces becoming virtual, the concept of a "fixed office" as we know it is changing. However, where office space is required, co-working can be more flexible, as well as offering opportunities for networking, collaborative sharing and innovation. The idea of purchasing a membership to shared work space is very different from entering into a lease for office premises. Co-working spaces normally operate on short-term membership contracts that offer more flexibility than fixed-term leases and, to avoid security of tenure, co-working licences should ensure that members do not have exclusive possession.

Shifts in consumer behaviour also mean that some retail tenants also want to move away from rigid, long-term arrangements. Landlords are increasingly focusing on creating compelling destinations to lure retailers, which could involve creating areas for events or leisure activities in retail centres. While tenants will be focused on flexibility, landlords should ensure they have the necessary levers in leases to influence the layout of stores, including the number of concessions, or to terminate tenancy, if they need to react to fast-changing events. They also need to be able to support existing tenants while any changes to layout are carried out. Security is also important here since tenants will want to be reassured that IT and communications infrastructure is secure.

Implications for partnerships and M&A

The move to increased tech-centricity of business is changing corporates' profiles, their third party dependencies, as well as their credit ratings and the availability of finance. As a result, digitalisation is driving deals. We are seeing rises in joint ventures and partnerships; spin-offs and exits; corporate venturing (as a way for established businesses to harness the innovation of start-ups); tech fund formations; and M&A (sometimes as a replacement for R&D).

Digitalised businesses are different – inherently more complex and more connected – that requires a wider view in undertaking due diligence in order to properly assess the values and risks associated with a transaction. These can take the form of market risks (will a blockchain based real estate operation ever gain sufficient market adoption?), technology risks (are virtual reality and enhanced reality just the latest fads?) and legal risks (such as those identified in this article in relation to IP, data and cybersecurity). All of this affects our legal analysis and advice when advising on transactions in the digital economy.

Compliance can be a particular headache when looking at acquiring early stage companies. This can be related to the application of law, whether existing (are Uber drivers really employees rather than self-employed? Is letting a property on Airbnb an unlawful sublet?), or the new (will the use of drones for aerial photography be restricted?). Assessing whether compliance issues will affect the sustainability of a new business model is further complicated because of the tendency of the business models of early stage companies to flip faster than their compliance analysis. Nevertheless, it is worth doing proper, targeted, due diligence in order to assess what is being acquired, in order to secure appropriate warranties, put in place structural separation and assemble a plan to resolve issues.

Conclusion

As with any new development, digitalisation gives rise to uncertainties and complications. However, success has always meant thinking ahead – and right now that means thinking about digital. Quite simply, if a company doesn't have a digital strategy, it doesn't have a strategy and without a strategy, it may not have a business.

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BELGIUM

The Belgian "Specialised Real Estate Investment Fund"

by David Du Pont and Arnaud Wtterwulghe

Belgium recently introduced a new type of real investment vehicle, the Specialised Real Estate Investment Fund ("SREIF") which benefits from both a flexible regulatory framework and an attractive tax treatment.

SREIFs in short

A SREIF is an alternative investment fund with a fixed number of participation rights for collective investments reserved for eligible (institutional and professional) investors. It is aimed at investing exclusively in certain real estate assets, including but not limited to:

- Belgian real estate assets held directly by the SREIF (exceptionally, the SREIF may indirectly hold Belgian real estate provided that: (i) such Belgian real estate is held through a 100 per cent directly or indirectly owned subsidiary; and (ii) a subsequent restructuring process occurs within 24 months following which the SREIF will directly hold such assets)
- foreign real estate assets held directly or indirectly by the SREIF
- shares in foreign real estate companies holding real estate abroad
- shares in regulated institutional or public real estate companies

The main characteristics are set out below.

Easy to set up

SREIFs are only available to professional and institutional investors, so the procedure to set up a SREIF is fairly straightforward and does not require any regulatory approval or licence other than having it registered in the SREIF list maintained by the Belgian Ministry of Finance. The latter will merely verify whether the formal requirements are met and will not verify the investment policy, the valuation of the assets or the creditworthiness.

It is expected that the whole procedure will take no more than 30 business days from the date on which the complete file is submitted.

Belgian or foreign investors can also restructure an existing real estate portfolio by way of contribution, merger or demerger with a newly set up SREIF.

A SREIF must be incorporated as a closed-end investment company and may take the form of:

- a limited liability company;
- a partnership limited by shares; or
- a limited partnership.

Attractive regulatory framework

A SREIF offers more regulatory flexibility compared with the regulatory burden impeding existing Belgian real estate investment trusts (REITs):

- it can be created by a single investor
- there is no risk diversification requirement (which means that a SREIF may invest in a single asset or in a single class of real estate assets)
- it may invest in Belgium and also abroad
- there is no maximum debt leverage
- no listing on a stock exchange is required
- IFRS accounting standards apply: asset values can reflect market value which may avoid cash traps

Eligible investors

Eligible investors include certain professional and institutional investors. Given that only eligible investors may invest, the information documentation to be prepared by a SREIF can be relatively short and straightforward.

If certain financial instruments issued by a SREIF are held by investors who are not eligible investors, the SREIF will not lose its institutional character as long as it can demonstrate that it has taken appropriate measures to guarantee that the financial instruments are held by eligible investors and provided that it does not promote or contribute to these financial instruments being held by non-eligible investors. A SREIF is deemed to have taken such appropriate measures if certain conditions are met, e.g. explicitly stating in the information document and in its articles of association that only eligible investors are entitled to hold financial instruments issued by the SREIF.

Attractive tax treatment

An attractive tax regime applies:

- **Corporate Income Tax:** SREIFs will only be taxed on a limited notional corporate tax base consisting of (i) received "abnormal or benevolent advantages" and (ii) certain disallowed expenses. As such, this excludes rental income, capital gains on real estate assets, dividends or interest received in relation to Belgian and non-Belgian real estate.

- **Withholding Tax:** Income distributed by the SREIF to foreign shareholder(s) will be exempt from Belgian withholding tax provided that the income stems from foreign source income, i.e. non-Belgian dividends or non-Belgian real estate income.

- **Double Tax Treaties:** A SREIF may in principle benefit from any double tax treaty to which Belgium is a party.

- **VAT:** Management fees for services provided to a SREIF are exempt from Belgian VAT.

- **Annual tax on collective investment institutions:** An annual "subscription tax" applies to SREIFs at a rate of 0.0925 per cent, calculated on the basis of the total net amounts invested in Belgium (as such geographical scope is defined in the relevant legislation).

- **No stock exchange tax:** No such tax is due on disposals or acquisitions of participations in a SREIF.

- **Other:** A tax of 16.995 per cent is triggered when a company is registered as a SREIF (calculated by reference to the sum of all latent capital gains and tax-free reserves of the SREIF at the time of registration) instead of the standard 33.99 per cent rate. The same tax applies in the event of contributions of a branch of activity/universality to a SREIF, (de)mergers and any other similar transaction to which a SREIF is a party. Contributions in kind of real estate assets in exchange for new shares in the SREIF will also be subject to such tax rate.

Term

A SREIF must be incorporated for a maximum term of ten years in order to compensate for the risk of a lack of liquidity of its investments given that it is a closed-end fund and for it not being listed. As an exception to this general rule, the SREIF's articles of association may provide that its term be extended for successive periods, each of which is for a maximum of five years only, provided that certain conditions are met, including obtaining the unanimous approval at a shareholders' meeting of the SREIF.

Restraints

Certain restrictions do apply to SREIFs:

- a SREIF cannot act as a real estate developer/promoter
- at least 80 per cent of a SREIF's net result must be distributed annually to its shareholder(s)
- the minimum total value of the assets held by a SREIF must amount to at least EUR 10 million at the end of the second financial year following its registration as a SREIF
- a SREIF's annual report must include a breakdown of its net results in order to determine the source (i.e. foreign or Belgian) of the allocated dividend
- the investment policy must be disclosed to investors
- a SREIF may only acquire or dispose of hedging products if such acquisition or disposal is not speculative and provided that this is in line with the SREIF's global policy of hedging financial risks
- investors may not request the redemption of their shares and may only exit the fund: (i) upon expiry of the SREIF's term (initially ten years – extension possible, see above); (ii) upon transferring their shares to other professional and/or institutional investors; and (iii) if the shareholders decide on early liquidation

Impact of AIMFD

To the extent that a SREIF qualifies as an alternative investment fund within the meaning of the AIMF law, i.e. the law of 19 April 2014 implementing the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD) in Belgian law, the SREIF manager will in principle be subject to the AIMF law unless it qualifies for an exemption.

In such case, the SREIF's manager will have to comply with the AIFM law requirements (e.g. obtaining a licence, liquidity requirements, etc.) although a lighter version of the AIFM law requirements may apply to so-called "small" managers of alternative investment funds (i.e. the assets of the funds under its management remain below EUR 100 million or such assets amount to less than EUR 500 million provided that certain additional conditions are met).

One advantage of the AIFM law being applicable is that the manager of the SREIF will have a so-called European passport and thus will have the opportunity to market the shares of the SREIF across the EU.

Limited regulatory monitoring

Only limited regulatory monitoring applies: the Belgian Financial Services and Markets Authority (FSMA) will merely monitor whether a SREIF only targets institutional and/or professional investors and whether its manager complies with the AIMF law requirements to the extent that it is relevant.

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GERMANY

Impact of public law on real estate investment

by Hendrik Theismann

German public building law

Public building law provides the legal framework for development and use of buildings and so is a crucial part of every real estate investment. This applies not only to development projects but also to any other use of a property, whether for commercial or residential purposes.

Ownership is guaranteed and protected under German Constitutional Law (*Grundgesetz*). The right to build a property and make use of it in a particular way is governed and restricted mainly by the provisions of urban development and building law (*Städtebau- und Bauordnungsrecht*) of which public construction and planning law (*Bauplanungsrecht*) forms part. The Federal Building Code (*Baugesetzbuch*) stipulates the framework for land use plans (*Flächennutzungspläne*) and zoning plans (*Bebauungspläne*), which are put into effect by the local municipalities.

A land use plan reflects the urban development/land use of an entire municipal territory (or beyond) and is binding only on the authorities, not on a citizen. A zoning plan has the quality of a local ordinance (*Satzung*) and is binding in relation to any property within the area covered by the plan. A zoning plan not only sets rules for permitted use (e.g. commercial areas, industrial areas, residential areas, etc.), but also for the construction of buildings (e.g. roof forms, number of floors, etc.) as well as infrastructure (location of roads, parks, public buildings, etc.). A zoning plan is therefore the most effective way for a municipality to govern and control the use of, and building, of real property. Where no zoning plan applies for a particular area, the permissibility of a building depends on surrounding properties in the adjacent area and is therefore a factual question.

The building laws (*Bauordnungen*) of the German states regulate the construction of buildings and the process of granting a building permit. They are in essence laws to prevent danger. There are exceptions that do not require a building permit, but the general rule is that a building permit is required for a new construction, reconstruction or demolition of a building and/or a change of use. The application process depends on the type and size of the construction and – of course – on the resources of the local building authority.

Experience shows that it takes three to 12 months to process the application; however, it is possible to apply for a partial building permit (*Teilbaugenehmigung*) for particular works (e.g. demolition, excavation works, etc.) which can be obtained much faster and enables a developer to commence the construction phase earlier. A building permit grants a right to build on a property and to use the building, and stipulates any conditions and other requirements for its construction and use. A building permit may only be granted if a development complies with the provisions of all applicable public planning and construction law.

An infringement of public building law and/or non-compliance with a building permit may result in an imposition of a penalty and an order by the building authority to alter a building, change its use or even prohibit the use of a building. In less material cases it might be sufficient to simply apply for a new building permit that would legitimise the current condition/use, if it is generally permitted under planning law.

During the due diligence phase of an acquisition process, public building law is always a material issue to be addressed by technical and legal advisers. In addition to the applicable zoning plan and building permits, edificial charges (*Baulasten*) cover the most important legal aspects. Edificial charges are voluntary public-law duties of the owner to the building authorities. Such charges are, in most German states, registered in an edificial charges register kept at the local building authority; in other states the charges are registered in the form of an easement for the benefit of the municipality in the land register. However, once an edificial charge has been assumed , it is binding on any owner or subsequent owner. Building permits should be obtained from the seller or the building authority.

In addition, local statutes/ordinances can constitute a special urban development zone that may have specific procedural law and substantive restrictions for a property. Examples are reallocation, urban development and prevention areas. A qualified redevelopment area is probably most serious as written permission is required from the municipality for the disposal of land and the establishing and disposal of a heritable building right (Erbbaurecht), the establishment of any right encumbering the land, such as rights of first refusal, mortgages and land charges, and a lease for a fixed term of more than one year. Development projects which commenced without the requisite permission are illegal. They can be stopped using construction control measures, for example, by way of a suspension of construction or even removal of buildings. The municipality also has the option of terminating leases to realise the aims and purposes of a redevelopment.

Upon completion of the redevelopment, owners of property within the redevelopment area can be subject to a financial settlement in favour of the municipality. The basis for the calculation of the financial settlement is the increase in the value of the property as a consequence of redevelopment measures.

Monument protection (*Denkmalschutz*) also falls within the wider scope of building law. If a building is listed as a monument, the owner may be obliged to carry out certain preservation measures and may only make alterations to the building to the extent permitted by the authorities. However, the question of whether a building is subject to monument protection is usually considered as part of the permission procedure before the issue of a building permit and requested measures will be part of the building permit. However, any measures carried out on site or on a new building, even if a building permit is not requested, may be subject to conditions, restrictions or measures requested by the public authorities. Similar rules apply if a historic site is located or excavated or a property is located close to a building subject to monument protection or of historical importance.

Finally, we would like to highlight public development charges (*Erschließungsbeiträge*). A municipality may charge owners of properties benefiting from certain public infrastructure such as roads, sewage works, canals, etc. Once the relevant infrastructure is completed, the municipality may charge the adjoining owners for the related costs; an owner's share of the costs depends on the use and size of a property as well as its location. There is often a considerable length of time between the commencement of a public development and the request for payment of charges, often several years. Development charges are considered to be public charges encumbering a property that can be enforced against the current owner of a property. There is no register for such charges but the local authorities keep the relevant information.

German environmental law

German environmental law consists of various (federal and state) acts, ordinances and even local statutes of which the Federal Soil Protection Act (*Bundesbodenschutzgesetz*), the Federal Water Resources Act (*Wasserhaushaltsgesetz*) and the Federal Environment Damages Act (*Umweltschadensgesetz*) are probably the most important. The Soil Protection Act deals with contamination of soil, the Water Resources Act applies to water and ground water pollution and the Environment Damages Act governs all kinds of damage and harm to the environment. However, all of them are based on the principles of (i) protection, prevention and precaution, (ii) co-operation and (iii) causation, and provide for fines and penalties in case of an infringement.

For an investor in real estate, limitation of liability for contaminated soil or ground water is usually a key concern. And this is certainly an obvious objective: the investor has not caused any harm to the environment nor caused any pollution on the site and would therefore not expect to incur liability. So, one should be aware that the Soil Protection Act not only establishes liability for contamination for the polluter but also for the current owner and any current user of a property (including tenants) regardless of whether they (owner and user) caused the pollution or not. Even former owners can be held liable, if they knew or should have known about the contamination. This might come as a surprise, but it is in line with the concept of prevention and co-operation: the environmental authorities may

impose an order on each of these persons to investigate, clean and/ or decontaminate. The authority exercises its "administrative discretion" to protect and prevent, and the authority therefore has to hold liable the person who it reasonably believes is able to introduce the most effective measures to avoid further damage to the site and to clean and decontaminate it. This is usually the current owner of a property as they have access to the site, power to carry out the administrative orders and have an asset of material value (i.e. the property). In other words, even if the polluter is identified, the authority will therefore likely hold liable the current owner. This is statutory law that cannot be excluded by way of an agreement. However, the person held liable for investigation or decontamination may claim compensation from the polluter. This often imposes a burden of proof on the current owner who also faces the risk of bankruptcy of the polluter. In a sale and purchase contract, the parties may exclude any such compensation claims even if they are aware of the contamination.

In Germany's current bull market conditions, where sellers of properties have strong negotiating power, any liability of sellers (including compensation claims) is often excluded. Even worse from a buyer's perspective is that sometimes buyers are asked to hold sellers harmless in case a seller is held liable by the environmental authority. As a result, an environmental due diligence at phase 1 level at least or – in case of indicators of pollution – at phase 2 level is crucial for a proper risk assessment and consideration of potential decontamination costs. A good starting point is usually the register of potentially contaminated sites (*Altlastenkataster*), which is kept at the district level by the authorities. The register lists all indicators – to the extent known by the authorities – for contamination, including any former uses of a site that have an immanent risk of contamination. An environmental due diligence might not be as important in a more buyer-friendly market when buyers can achieve better contractual protection from sellers, but then again the buyer's liability against the authority remains and the question of creditworthiness of a seller and sufficient security remains. Environmental due diligence seems to be the best protection for an investor.

In some areas of Germany that are or were used by the mining industry, damage caused by mining (*Bergschäden*) is another risk for real estate investments. This particularly applies to the Ruhr area in North-Rhine Westphalia, the Saar area, the brown coal mines in east Germany and the salt mines in Lower Saxony. Compensation claims against the mining companies are subject to the Mining Damages Act (*Bergschädengesetz*); however, often, such claims are excluded either because a former owner has waived such claims against a lump-sum compensation payment or the land was formerly owned by the mining company, which was sold with a compensation waiver. A waiver is only binding on an owner, if assumed by contract or registered in the land register.

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UK

The future is now: Embracing technology in the construction sector

by Sadia McEvoy and Chris Whitehouse

There is a broad consensus that the construction industry is playing catch-up when it comes to embracing technological advances and innovations. The industry is criticised as one which prioritises avoiding the cost and disruption of embracing new technologies over the potential benefits. Will the recent surge in technological developments mean that construction firms finally turn to machines and inventions to boost business?

Don't go changing

In its 2016 Global Construction Survey, KPMG found that the construction industry is struggling to reap the full benefits of technologies such as advanced data and analytics, mobility, automation and robotics. KPMG surveyed 218 senior executives drawn from major project owners and engineering and construction companies and found that just 8 per cent of firms are rated as "cutting-edge visionary" when it comes to technological innovation. More shockingly, 69 per cent fall into the category of "followers" or "behind the curve".

The Farmer Review 2016: Modernise or Die, an independent study commissioned by the Construction Leadership Council, claims that the construction industry will miss its greatest single opportunity to improve productivity and offset workforce shrinkage if it fails to embrace technological innovation. The review warns that, at the current rate of change, the industry will be marginalised as it becomes less attractive to the new, digital-world generation. Furthermore, there will be a tipping point in the next ten years when the construction industry's current failures – which include low productivity – poor predictability and financial fragility, decline so significantly that they may be irreversible.

The drone zone

One technological development attracting attention far beyond the construction sector is the use of unmanned aerial vehicles (UAVs), commonly called drones. In the commercial sector, for example, Amazon has made no secret of its plans to develop drones capable of delivering packages to homes within 30 minutes. Meanwhile, Facebook's ten-year plan includes using its solar-powered, unmanned Aquila drone to bring internet access to remote parts of the world.

Within the construction sector, drones are used for site surveys in the initial stages of a project and for monitoring throughout the construction phase. They are already quite a common sight on construction projects, with 42 per cent of firms using them according to KPMG. The most advanced drones are fitted with radio frequency identification (RFID) which allows them to accurately track the location of pipes, plates and other metal products on site. As drones become increasingly affordable, the time-consuming use of a clipboard and checklist to keep track of such materials will surely become a thing of the past.

The evolving nature of building design is another driving force behind the rise in drone usage. In the quest to be unique, buildings are becoming taller and more complex. Using a drone to take measurements and carry out surveys on these challenging projects has the potential to reduce the risk of accidents and save considerable time.

Japan is one country to embrace the use of drones and integrate them with another technology – autonomous machines. Komatsu, one of the world's largest construction companies, has developed "Smart Construction" in partnership with the American company, Skycatch. Smart Construction is a one-stop service for excavation and earthmoving operations. It uses drones to map sites in three dimensions and guide robotic vehicles by providing real-time data on the amount of earth being moved around. Komatsu estimates that using drones can eliminate the 20-30 per cent margin of error in soil volumes associated with human-conducted surveys. This may be an indicator of how Japan will manage its massive labour shortage (especially with the 2020 Tokyo Olympics looming), but such technology is unlikely to be welcomed in the UK without substantial legal and regulatory changes. The same might be said of driverless cars.

Of course, technology has its limitations. For example, conventional drones can only carry about 20 kg of material, so cranes are unlikely to be abandoned any time soon. However, it is not beyond imagination that drones will at some point become the primary means of transporting smaller loads to tricky locations on site.

Print it your way

Another technological development which is ripe for exploitation by the construction sector is 3D printing. If used effectively, it can save construction and labour costs and also reduce waste. KPMG highlights the fact that 3D printing also enables the creation of a vast array of complex designs that can shorten supply chain times and facilitate modular assembly.

The 3D printing process begins with a virtual design of the object to be printed. Using software, this design is then "sliced" into hundreds or thousands of thin layers, which are then sent to an industrial "printer" for manufacture. The process is similar to normal desktop printing; but imagine printing hundreds of layers of the same text onto paper to create a pop-up book.

Recognising the rapidly changing technological landscape, the UAE has demonstrated its commitment to innovation by adopting the use of 3D printing. The world's first 3D-printed office building was completed in Dubai in May 2016, a city which has stated that one of the keys goals of its "Dubai 3D Printing Strategy" is to ensure that 25 per cent of buildings are based on 3D printing technology by 2030.

Since 2013, the European Space Agency has been working with London architects Foster + Partners on the potential for using 3D printing for lunar habitations. Back on Earth, Beijing-based HuaShang Tengda claimed in June 2016 to have completed the world's first 3D-printed house in just 45 days. The two-storey, 400m^2 home is purportedly the first to be printed whole rather than as an assembly of separately printed components.

3D printing can also be used for other purposes, as demonstrated on the Crossrail project. Crossrail has actively sought to drive innovation in the construction sector, by establishing its own programme, Innovate18, in conjunction with Imperial College London, to provide a focal point for collaboration and ideas-sharing among the various contractors and consultants working on the project. Crossrail has used 3D printing to generate models of items to be lifted, which are then used in team briefings to demonstrate how to move the items safely.[1]

Nevertheless, the adoption of 3D printing will bring challenges. The easy means of replicating others' designs could lead to increased copyright infringement and it will be interesting to see how copyright law evolves to ensure there

1 "Crossrail's game-changing innovation targets legacy", Construction News, 12 January 2017.

is still sufficient incentive to produce innovative designs. In addition, the choice of materials, colours and finishes available with 3D printing still falls a long way short of traditional methods, although this gap is likely to narrow with time.

A significant distinction between 3D printing and drones is that equipment costs for the former are still very high. In reality, the adoption of 3D printing will be evolutionary rather than revolutionary, and is unlikely to be embraced on a large scale until the potential savings are seen to outweigh the initial outlay. We may not yet be close to printing nuclear power stations, but those who do not consider using this technology to produce complicated parts of a project are arguably behind the curve.

Better information management

To many observers, the most immediate means of achieving technological advancement in the sector is not via new gadgets but by endorsing Building Information Modelling (BIM).

A true implementation of BIM is the equivalent of each member of the project team writing a chapter of a perfectly flowing novel. It is effective collaboration producing a resource which benefits all. Or, as defined by the Construction Project Information Committee:

"Building Information Modelling is digital representation of physical and functional characteristics of a facility creating a shared knowledge resource for information about it and forming a reliable basis for decisions during its life cycle, from earliest conception to demolition."[2]

BIM is categorised on a spectrum of four levels, from level 0 increasing in maturity up to level 3. The UK Government mandated that all centrally procured projects from 4 April 2016 should achieve BIM level 2, requiring the design team to generate building information (including cost or programming data) which is created in separate discipline models. Only in level 3 is this information then stored on an integrated, web-based system.

Uptake has been slower in the private sector, with key concerns relating to intellectual property rights in the model and the potential difficulties of establishing liability when faults arise if multiple parties have input into the model. And yet, developing techniques for the efficient management of information is a perennial concern. Casey Rutland, architect, and prominent BIM advocate, cast doubt in a recent blog on those who think BIM is "just a fad". For him, BIM is for the forward-lookers among us and is fast becoming the norm, rather than the exception.[3] BIM's growing significance has recently been recognised by the JCT, one of the UK construction industry's leading producers of standard form construction contracts, which has catered for projects that are using BIM in their 2016 suite of contracts.

Meanwhile, those in the "proptech" sector are calling for closer collaboration with home builders in relation to BIM as their two respective areas of expertise increasingly collide. Chimni, the London-based makers of an online accounting tool for home owners, recently released a White Paper outlining the potential benefits of home builders and those in the proptech industry working together in relation to innovation in housing data and property technology. In the words of Nigel Walley, CEO of Chimni, *"both industries will need to develop a shared vision for how people will expect to manage their homes in the future and the data they will require to do that"*.[4] BIM has the potential to be more than a data tool by becoming an enabling platform for the integration of other technologies.

2 "Drawing is Dead – Long Live Modelling", CPIC.

3 "BIM – Its own Economic Bubble?", The Case for BIM, 3 January 2017.

Closing thoughts

This article has touched on just a few of the technological advances which have the potential to radically improve the quality and delivery costs of construction projects. Construction firms may choose to focus on other technologies such as smart sensors to track people on site, or virtual reality, which is already being used to train employees in dealing with hazardous environments. And construction companies are not the only ones who can instigate change, as Crossrail demonstrates. Its Innovate18 programme will not be coming to an end with the completion of the project. Instead, it has evolved into the Infrastructure Industry Innovation Platform (i3P), which aims to ensure that the ethos and the lessons learned live on and develop in infrastructure projects such as Tideway and Hinkley.

Post-EU referendum, the UK Government is under ever-increasing pressure to stimulate home-grown British industry, and supporting technological innovation is an integral part of this. The media coverage given to the relative lack of British presence at CES (the Consumer Electronics Show – one of the world's biggest technology trade shows), where there were allegedly nearly five times more French companies than British, is indicative of this kind of pressure. The organiser of CES was widely quoted as labelling the UK Government's lack of support for tech firms a "source of embarrassment".

Commentators can be quick to criticise construction firms for being generally slow to adopt these technologies but, in the post-recession era of increasingly tight margins, it is easy to understand why not everybody is rushing out to buy a new 3D printer. Those who have embraced the possibilities (or who are at least starting to) are, however, beginning to see the benefits and it may not be long before some competitors are left behind.

4 "BIM for Proptech & Smart Home People", The Chimni Blog, 30 December 2016.

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AUSTRALIA

Deconstructing Australia's foreign investment regime

by Pauline Tan

The most significant reform of the Australian foreign investment legislative framework commenced on 1 December 2015 (the Framework).

The Framework introduced:

- new thresholds for notifiable actions based on both the type of acquisition and the nature of the foreign person seeking to invest; and
- record keeping and reporting obligations, application fees and penalties for non-compliance.

The structure of the Foreign Investment Review Board (FIRB) also changed. The Australian Taxation Office (ATO) is now responsible for the administration of the agricultural land register and applications made in relation to residential land. Applications for foreign investment in commercial land, agricultural land and Australian business are made to the FIRB.

Who does the Framework apply to?

The Framework applies to foreign persons seeking to invest in Australian land or entities. Individuals and entities defined as foreign persons include:

- an individual not ordinarily resident in Australia (this includes Australian citizens living abroad);
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest;
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;
- the trustee of a trust, where an individual not ordinarily resident in Australia, a foreign corporation or a foreign

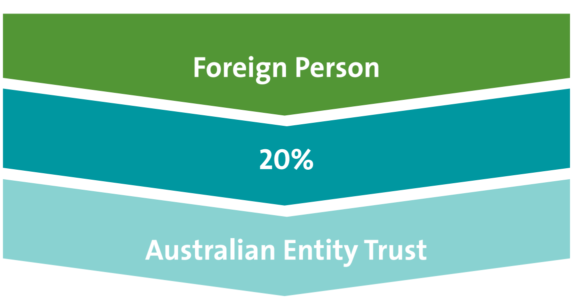
government holds a substantial interest in the trust;
- the trustee of a trust, where two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest in the trust;
- a foreign government;
- a foreign government investor;
- a person who is a general partner of a limited partnership in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; and
- a person who is a general partner of a limited partnership in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest.

What is a "substantial interest" for the purposes of a foreign person?

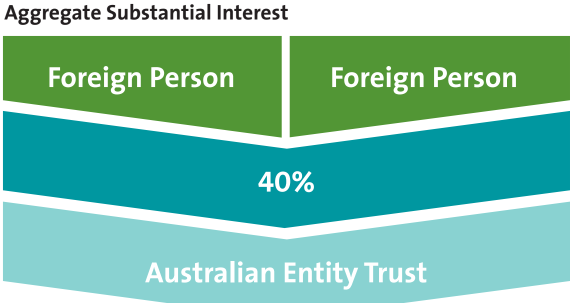
The changes saw an increase in the "substantial interest" threshold. A person is now taken to hold a substantial interest in a trust or entity if they control 20 per cent or more of voting power or shares in a company (up from 15 per cent).

A person will also have an "aggregate substantial interest" in an entity if two or more persons (with any one or more associates) hold an aggregate of at least 40 per cent of the entity. For a trust, two or more persons will hold an aggregate substantial interest if the persons hold (with any one or more of its associates) a beneficial interest of at least 40 per cent of the income or property of the trust.

Substantial Interest



Aggregate Substantial Interest



When does a foreign person have to notify FIRB of an investment?

The Framework introduced the concept of classifying certain actions as either significant actions or notifiable actions. Actions that are notifiable must be notified and significant actions may be, but are not required to be, notified to FIRB. Significant actions and notifiable actions include acquisitions of the types of interests, where the relevant threshold test is met.

A foreign person may (but is not required to) give notice of a significant action to the Treasurer unless it is also a notifiable action (in which case notice must be given). Foreign persons should be aware that although notice is not required for a significant action, the Treasurer may make an order prohibiting the significant action or requiring that the significant action be undone if the significant action is or would be contrary to the national interest. The Treasurer may also make an interim order pending making a decision as to whether or not to make an order prohibiting significant action. A no objection notification, which may impose conditions, may also be given by the Treasurer in respect of significant action.

Foreign persons must provide information to notify the Treasurer of all notifiable actions in relation to acquisitions in Australian land and entities, unless an exemption applies. (Tracing rules apply in most circumstances where a corporation or trust in which a foreign person holds a substantial interest or aggregate substantial interest proposes to take certain actions.) Exemptions to significant actions and notifiable actions are provided in the form of no objection notifications or exemption certificates (which are discussed in greater detail below).

Once an application is submitted, the Treasurer has 30 days to make an order or decision and a further ten days to give notice of the decision to the applicant or publish an order but the Treasurer may seek the applicant's agreement to extend this period.

Thresholds

In order for an action to be a significant or notifiable action, it must meet the relevant threshold test.

The thresholds for significant and notifiable actions vary according to both the type of interest and the nature of the foreign person. If the interest is greater than the thresholds and a notifiable action, the action must be notified. FIRB thresholds are available at https://firb.gov.au/exemption-thresholds/monetary-thresholds/

Thresholds are indexed annually on 1 January.

Fees

Fees are now imposed on all applications for approval of acquisitions made to the Treasurer. As with the thresholds for significant and notifiable actions, the application fees vary according to the type of interest being acquired. The current fees are available at http://firb.gov.au/applications/fees-2016-17/

Fees will also be payable where:

- a foreign person has voluntarily given the Treasurer notice of a significant action which is not notifiable; or
- the Treasurer gives a foreign person one of the following:
  - an order prohibiting proposed significant actions;
  - an interim order;
  - a disposal order; or
  - a no objection notification,

and the foreign person had not sought approval from the Treasurer in respect of the action specified in the order or notification.

An application for approval is not considered to have been submitted until the fee is paid. FIRB will send applicants an e-mail notifying them of the estimated fee payable to the ATO.

What types of interests does the Framework cover?

While the Framework covers various types of investments, we focus here on investments in land that may require notification to FIRB.

Thresholds for notifiable actions (and the fees) vary depending on the classification of the type of land.

The Framework refers to Australian land which is defined as commercial land, residential land or agricultural land. Australian land also includes mining or production tenements.

Interests in Australian land may be significant or notifiable. An interest in Australian land includes:

- a legal or equitable interest in Australian land;
- an interest in a security in an entity that owns Australian land, being a security that entitles the holder to a right to occupy a flat or home unit situated on the land;
- an interest as lessee or licensee in a lease or licence giving rights to occupy Australian land if the term (including extension or renewal) is reasonably likely to exceed five years;
- an interest in an agreement involving the sharing of profits or income from the use of, or dealings in, Australian land if the term of the agreement (including extension or renewal) is reasonably likely to exceed five years;
- an interest in a share in an Australian land corporation or agricultural land corporation;
- an interest in a unit in an Australian land trust or agricultural land trust; and
- if the trustee of an Australian land trust or agricultural land trust is a corporation, an interest in a share in that corporation.

We will now explore what each of the three categories of Australian land includes.

Commercial land

Commercial land is defined as land in Australia:

- which is not used wholly and exclusively for a primary production business;
- on which ten or fewer dwellings could not reasonably be built; or
- which does not have one or more dwellings (except "commercial residential premises").

Commercial residential premises

Land can still be classified as commercial land even if it has one or more dwellings if those dwellings are considered to be "commercial residential premises" as this term is defined in A New Tax System (Goods and Services Tax) Act 1999 (Cth). Commercial residential premises include:

- a hotel, motel, inn, hostel or boarding house;
- premises providing accommodation in connection with a school;
- marine berths occupied by ships used as residences; caravan parks or camping grounds; or

- other premises similar to those outlined in A New Tax System (Goods and Services Tax) Act 1999 (Cth), other than those providing accommodation to students in connection with an educational institution which is not a school.

Commercial residential premises are commercial land for the purposes of the Framework.

Types of commercial land

Under the Framework, there are two types of commercial land:
- commercial land that is vacant, being land which has no substantive permanent building which can be lawfully occupied by persons, goods or livestock; or
- commercial land that is not vacant, being land which has a substantive permanent building which can be lawfully occupied by persons, goods or livestock.

Commercial vacant land will have a lower notifiable threshold than commercial land that is not vacant.

Foreign investors should also be aware that lower thresholds apply for acquisitions of developed commercial land which is sensitive in nature. Developed commercial land will be considered sensitive if, among other things:
- critical state-owned infrastructure assets relevant to national security are located on the land;
- failure of a telecommunications unit on the land would result in telephone or internet services not being provided on other land; or
- public infrastructure is located on the land.

Under the Framework, there is no different treatment of land that has heritage-listed property.

Residential land

Residential land is defined as land in Australia on which:
- there is at least one dwelling; and
- the number of dwellings which could be reasonably built is less than ten.

However, it does not include land which is wholly and exclusively used for a primary production business or on which the only dwellings are commercial residential premises.

Foreign persons must apply for approval before purchasing new dwellings or vacant land. Generally approval for the purchase of a new dwelling will be unconditional. Acquisitions of vacant land for residential development purposes if approved are usually subject to a requirement that construction commences within a specified time frame and/or a requirement that the land cannot be transferred without construction having commenced.

Approval to purchase established dwellings will generally not be given to non-resident foreign persons. If approval is given to temporary residents, approval will generally be subject to the condition that the land be sold when the foreign person leaves Australia.

Other types of interests in residential land

An interest in residential land is not limited to what one might ordinarily consider a residential land contract (i.e. the purchase of dwellings or vacant land). It can also include:
- a contract to purchase a share of a dwelling;
- security interests in a real property mortgage;
- an option to purchase the property at an agreed price at some future time (e.g. a put and call option);
- a leasehold interest of five years or more;
- an increased share ownership in a dwelling in which the foreign person already has an interest;
- acquisition of shares or units in an entity in which more than 50 per cent of its assets are interest in residential real estate; and
- other acquisitions of Australian land.

Exempt persons – not everyone needs to notify

Acquisitions of certain residential real estate are exempt from the requirement to apply for and receive foreign investment approval. These include acquisitions by:
- non-resident Australian citizens;
- holders of Australian permanent visas;
- New Zealand citizens;
- a foreign person purchasing real estate as a joint tenant (but not as tenant in common) with their Australian or New Zealand citizen spouse, or Australian permanent resident spouse;
- an Australian corporation which would not be considered a foreign person if interests held in it by New Zealand citizens and non-resident Australian citizens were disregarded;
- the trustee of a trust which would not be considered a foreign person if interests held in it by New Zealand citizens and non-resident Australian citizens were disregarded; and
- charities operating in Australia for the primary benefit of persons ordinarily resident in Australia.

Agricultural land

Agricultural land is defined as land in Australia that is used, or could reasonably be used, for a "primary production business" as defined under the Income Tax Assessment Act 1997 (Cth). This definition includes land which is partially used, or where only part of the land could reasonably be used, for a primary production business. However, if the land includes a building or part of a building not directly connected with the land or which is not used and could not reasonably be used for a primary production business, the building or part of the building will not be considered "agricultural land".

While the definition of agricultural land is broad, there are a number of factors that FIRB will consider in determining whether land could reasonably be used for a primary production business. These include the primary use permitted on the land by its zoning; the land use history; the land characteristics; and the lease or licence conditions.

Whether land could reasonably be used for a primary production business will depend on the facts and circumstances of the particular land. It is unclear whether some of the relevant factors will be given more weight than others. If in doubt as to whether the land is agricultural land, investors should seek foreign investment approval if the value of the acquisition exceeds the threshold in order to avoid the significant penalties for failing to notify.

Excluded land

The Framework expressly excludes from the definition of agricultural land a number of different types of land which may "reasonably be used" for a primary production business. They are:

- land whose zoning requires government approval for a primary production business;
- land for which rezoning approval has been sought to:
  - prohibit the use of the land for primary production business; or
  - approve the use of the land for a mine, oil or gas well, quarry or similar; or
  - approve the use of the land to locate infrastructure relating to a mining operation; or
  - approve the use of the land for mining waste storage;
- land used wholly and predominately for a mining operation;
- land where a government approval for use of the land for a mining operation is in force;
- land used under a government law or agreement, wholly or predominately for the purpose of environmental conservation;
- land used wholly or predominately as a wildlife sanctuary or for rehabilitation of animals;
- land which is approved as an industrial estate;
- land of one hectare or less; and
- land which has government authority approval to provide facilities to the public for tourism, outdoor education or outdoor recreation.

Mixed use land

Unless the land is being acquired for a continuing purpose, the land may not be neatly classified in just one category under the Framework.

Acquisitions of interests in land are considered on a title-by-title basis. This means that, although a monetary threshold may not be triggered in respect of one parcel of land, the threshold may be triggered by other parcels of land either forming part of the same title or proposed to be acquired under the one contract for sale.

Where an application is made to acquire land that is mixed use, all uses should be notified and the highest application fee will apply.

Australian entities and trusts

In addition to real estate investments, a foreign person looking to invest in an Australian corporation or unit trust or in an Australian business may need to notify FIRB of that investment.

Actions in relation to Australian entities and trusts

It is a significant action if a person takes certain actions in relation to entities and business that have a connection with Australia, such as acquiring or issuing securities (being shares in corporations or units in unit trusts), entering into agreements with Australian businesses, and altering constituent documents.

For such an action to be significant, the relevant threshold test must be met and the action must result in a change in control of the entity so that a foreign person begins to control the entity or business or there is a change in foreign persons who control the entity or business.

It is a notifiable action to acquire a substantial interest in an Australian entity, where the Australian entity is:

- an Australian corporation that carries on an Australian business, whether alone or together with one or more other persons; or
- an Australian unit trust; or
- an Australian entity that is the holding entity of either of the above.

Investors should be aware that different thresholds apply in respect of entities which are considered to be land entities (i.e. corporations or trusts whose interest in agricultural land or Australian land exceeds 50 per cent of its total assets).The thresholds which apply to a land entity will depend on the types of land assets held by the entity (as set out above).

It is important to note that an interest in a security, asset, trust or Australian land includes not only the acquisition or disposal itself, but also entering into an agreement to acquire the interest under an option or otherwise having a right to have the interest transferred to the foreign person or their associate. However, the action to acquire or dispose of the interest will only be taken once the provisions of the agreement become binding (i.e. after satisfaction of any conditions precedent). This means that entry into an agreement for the acquisition of an interest which is a notifiable action will not be contrary to the Framework where FIRB approval is, among other things, a condition precedent to a binding agreement.

Agribusiness

Under the Framework, an agribusiness is one in which the business or entity derives earnings from carrying on a business falling within certain classes of the Australian and New Zealand Standard Industrial Classification Codes.

Foreign investors, other than those from Chile, New Zealand and the USA (which have the benefit of a higher threshold), will be required to apply for foreign investment approval before acquiring a direct interest in agribusiness where that interest exceeds A$55 million.

Direct interest in an agribusiness

Interests that amount to a direct interest are specified as:

- an interest of at least 10 per cent in the entity or business;
- an interest of at least 5 per cent if the foreign person who acquires the interest has entered a legal arrangement relating to the businesses of the foreign person and the entity or business; or
- an interest in the entity or business of any percentage if the foreign person is in a position to influence or participate in the central management and control of the business or to influence, participate or determine the policy of the entity or business.

Exemption certificates

Under the Framework, if foreign persons are likely to acquire a substantial number of real estate interests during a year, developers or foreign persons (as the case may be) can apply for an exemption certificate. There are four types of exemption certificates available:

- exemption certificates for one established dwelling;
- exemption certificates for acquisitions of Australian land;
- exemption certificates to sell new dwellings in a development to foreign persons; and
- exemption certificates to acquire securities through underwriting.

Developers obtaining exemption certificates to sell new dwellings to foreign persons must pay a fee in respect of each dwelling sold to a foreign person where the dwelling is sold for less than A$3 million.

Investors applying for an exemption certificate may need to provide detailed information regarding the proposed acquisition (e.g. details of the suburbs in which proposed property acquisitions are intended to be made or details of the specific land (if known)).

Agricultural land register (and proposed water register)

Also introduced from 1 December 2015 were reporting obligations for foreign persons who have an interest in agricultural land (as referred to above).

All foreign persons who held an interest in agricultural land as at 1 July 2015 must have given notice of their interest to the Commissioner of Taxation.

Foreign persons acquiring an interest in agricultural land or ceasing to hold an interest in agricultural land must give the ATO notice of the event in the approved form within 30 days of the occurrence of the event. Failure to comply with reporting obligations may result in an administrative penalty of up to A$4,500.

New legislation introduced late in 2016 seeks to create a register of foreign ownership of water entitlements, which will operate from 1 December 2017. The ATO will maintain the register, which will operate in a similar way to the agricultural land register.

Record-keeping obligations

Under the Framework, there are new record-keeping obligations in relation to:

- any significant or notifiable action taken by a foreign person in response to an order or decision by the Treasurer;
- any action taken by a foreign person that is specified in an exemption certificate;

- whether a foreign person is complying with a condition in the no objection notification or exemption certificate; and
- a disposal of an interest in residential land that was a significant or notifiable action, or would have been a significant or notifiable action if it had not been the subject of an exemption certificate.

It is important to remember that, while significant actions may not be notifiable, information regarding the significant action must be kept. The period of time for which records must be kept varies depending upon the nature of the record required to be kept.

Records must be kept in English, or must be readily convertible into English, in hard copy or electronic format. Records must also be sufficiently clear so that the act, transaction, event or circumstance they refer to can be easily ascertained. Failure to keep records is an offence and fines may be imposed for non-compliance.

Standard conditions

In February 2016, the Australian Government announced that standard conditions would be imposed on all foreign investment applications. While these standard conditions require investors to comply with Australian taxation laws, including paying taxation debt, in relation to the action and any transaction, operations or assets acquired as a result of the action, they may also impose a higher level of engagement with the ATO by requiring tax rulings before the FIRB application is processed. The standard conditions also require investors to provide documents and information in accordance with Australia's tax laws and to provide an annual compliance report. A FIRB Guidance Note released in November 2016 provides some guidance on how the tax conditions may be applied to FIRB approvals. The tax conditions are separated into two categories:

- Item A conditions: these may be imposed where the Treasurer considers that the investment involves a risk to Australian tax revenues.
- Item B conditions: these may be imposed where the Treasurer considers that there is a significant or particular risk to Australian tax revenues.

Penalties for non-compliance

The Framework imposes strict civil and criminal penalties for breach, including fines and imprisonment. They include, for example, criminal penalties including fines of A$135,000 for individuals or A$675,000 for corporations, three years' imprisonment and civil penalties of up to 10 per cent of the consideration or market value of residential property and A$45,000 for individuals or A$225,000 for corporations in other circumstances, where a foreign person:

- fails to notify of notifiable action;
- takes significant action before the earliest of:
  - ten days after the expiration of the decision-making period;
  - before the end of the period specified in an interim order (if made); or
  - before the day a no objection notification is given to the foreign person;
- contravenes an order made by the Treasurer; or
- contravenes conditions imposed in an exemption certificate or a no objection notification.

Infringement notices may also be issued for less serious breaches of the Framework.

Conclusion

Given the considerable application fees, penalties and the Treasurer's powers to take action in relation to both significant and notifiable actions, foreign investors should carefully consider, in consultation with their advisers, the notifications to be made under the Framework.

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SPAIN

SOCIMIs: A great success story that began with a failure

by Ismael Fernández Antón

The Spanish REIT was founded in October 2009 under the name of Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario ("SOCIMI"), but its flawed legal regime meant that no SOCIMI was created until the reforms in 27 December 2012, which relaxed the legal requirements for their incorporation, removed regulatory barriers and enhanced the tax treatment applicable from 2009, providing the key feature for a REIT to succeed: zero taxation.

As a result of the improved regime, the Spanish real estate market has seen an intense flowering of SOCIMIs (with 32 SOCIMIs currently listed), which have become the stars of the recovery of the whole sector. As an example, in 2015, the four biggest SOCIMIs alone invested almost EUR 4,200 million in the market and the largest Spanish real estate company – Merlin Properties – is a SOCIMI.

SOCIMIs, what are they?

SOCIMIs are public limited companies (sociedad anónima) whose corporate purpose is the holding of either (i) leased urban assets (by means of acquisition or development) or (ii) a stake in the share capital of other SOCIMIs or foreign entities of analogous or similar activity (the vehicles known as real estate investment trusts or REITs). Since the amendments in 2012, SOCIMIs have been subject to zero taxation under Corporate Income Tax, putting them on equal footing with the existing regimes for REITs abroad.

Basic requirements of SOCIMIs

The basic requirements of the SOCIMI special tax regime are as follows:

a. The minimum share capital for SOCIMI is EUR 5 million. The share capital can be subscribed for using non-monetary contributions (i.e. by contributing properties to the SOCIMI), which means it is not necessary to make a monetary disbursement.
b. A minimum of only one property is required to incorporate a SOCIMI, thus they can be created in real estate projects where the existence of a company per project (and one asset per company) is essential for the purposes of liability, management, risks and licences. It is not necessary for the property to be located in Spain.
c. Mandatory trading on regulated markets (such as the four Spanish stock exchanges) or multilateral trading systems (such as the Mercado Alternativo Bursátil or MAB) either in Spain or another jurisdiction within the European Union or the European Economic Area.
d. At least 80 per cent of the assets must be lettable urban properties, land for development of lettable urban properties or shares in other SOCIMIs or REITs.
e. At least 80 per cent of the earnings (excluding any income arising from the sale of qualifying assets) must come from lease or dividends distributed by any subsidiary SOCIMI.
f. A mandatory distribution of dividends in a given proportion depending on the origin of the profits obtained:
   - 80 per cent of overall earnings, including the earnings derived from the lease of properties;
   - 50 per cent of the capital gains obtained from the transfer of assets (properties and shares) eligible for the application of the special tax regime (properties used for lease and shares in entities whose corporate objective is the foregoing activities). The remaining 50 per cent will be reinvested in eligible assets within three years of the transfer. Failing that, said benefit must be distributed in its entirety together with the rest of the benefits; and
   - 100 per cent of the profits of the entities in which the SOCIMI holds a stake.
g. Property assets must be leased for a minimum three-year term (one-year availability for a lease will be calculated for this purpose). Regarding the interpretation of this requirement, the tax authorities consider that, in those cases where we find complex property (such as a shopping centre in which the horizontal division has not been declared), it is not necessary that the lease term condition is fulfilled for all the individual premises, but the overall degree of compliance will be analysed, without prejudice to any premises not let.
h. No debt restrictions will apply.

Two further points are relevant to the above requirements:

- A SOCIMI need not comply with all these requirements if the listed company is not the SOCIMI itself but its parent company; and
- not all of the above requirements must be satisfied at the time of opting for the applicable regime. Some of the requirements, and in particular the one related to the listing, may be met within the two years following electing for the SOCIMI regime, without prejudice to the application of the SOCIMI special tax regime.

Zero taxation of SOCIMIs: the big attraction

SOCIMI are subject to Corporate Income Tax (CIT) at a zero per cent rate, which makes them very attractive to any kind of investor, whether resident or non-resident in Spain, and places them on a level with other well-organised REITs in western countries.

As a general introduction to taxation for investors, we encounter three different scenarios:

- Spanish CIT taxpayers (or non-residents with a permanent establishment in Spain) will include the dividend in their CIT base (the amount to which you apply the percentage to determine the tax to be paid) without entitlement to the exemption to avoid double taxation, although these investors may still take advantage of the SOCIMI regime;
- Spanish individuals will include the dividend in their taxable base subject to flat rates up to a maximum of 23 per cent (24 per cent in 2015); and
- non-residents without a permanent establishment in Spain who receive dividends from a SOCIMI will be subject to a withholding tax of 19 per cent (20 per cent in 2015), unless an exemption (parent-subsidiary) or reduced treaty rate is applicable.

Investors who are not resident in Spain (e.g. funds investing in shopping centres, hotel buildings or any other property to be leased), in particular residents within the European Union, can maximise the efficiency of their investments in Spanish real estate for leases down to zero per cent on the Spanish CIT, and also to zero per cent on Spanish withholding taxes under the parent-subsidiary directive, thereby receiving a return on their investment without tax leakage.

However, all that glitters is not gold and where dividends are distributed to a shareholder holding 5 per cent or more of the share capital of the SOCIMI, and such dividends, in the hands of such shareholder, are either exempt or subject to a tax rate below 10 per cent, the application of a special levy to the SOCIMI will be applied because the latter is required to pay tax at a rate of 19 per cent on the dividends paid to such shareholders (whose participation equal to or greater than 5 per cent of the share capital and taxation is below ten per cent).

This special levy will typically be triggered in case of non-resident investors who are resident in either a tax haven territory or in a jurisdiction (even within the European Union) where the dividends collected by the relevant investor are eligible for a participation exemption regime. Most investment in Spanish real estate by non-resident investors has been through Luxembourg or Dutch entities. Therefore a review of the structures currently in place may be needed

in order to determine whether the SOCIMI tax regime (as amended in 2012) provides additional efficiencies and how to adapt the existing investment structures in order to apply the new regime.

Last but not least, SOCIMIs are entitled to a 95 per cent reduction in the transfer tax triggered on the acquisition of residential properties to be let or land for the promotion of residential properties to be let, to the extent that the holding period requirement of three years is met.

More flexible listing: the opportunity for the Spanish MAB (Alternative Market)

SOCIMI can opt to trade on regulated markets, which are generally subject to tighter regulatory demands, or on multilateral trading systems (such as the MAB), which are more flexible and less regulated, located not only in Spain but also in any other European Union or European Economic Area jurisdiction.

Creation of a specific MAB segment for SOCIMI

Since 2012 the MAB has been a suitable market for SOCIMIs, provided they can comply with the listing requirements of that market.

The MAB created an "ad hoc" segment for them, alongside its other three segments (SICAVs, Venture Capital Companies and Growth Companies). SOCIMIs are subject to specific regulations contained in several MAB circulars, so Spanish SOCIMI and foreign companies whose corporate purpose and investment regime are comparable to those established for SOCIMI are able to join this segment of the MAB. Both the Spanish SOCIMI and the foreign company: (i) must have their share capital fully paid up; (ii) their articles of association must not have restrictions blocking future negotiations on the transfer of their shares; and (iii) their shares must be registered in book-entries.

This segment of the MAB was released in late 2013 with two SOCIMI, Promorent and Entrecampos, Ashurst was instructed to provide legal advice on the listing process of Promorent.

What agents are necessary for the admission of a SOCIMI to the MAB?

Admission to the MAB requires the SOCIMI to designate a registered adviser to liaise with the supervisory authorities both at the time of inclusion and once it is listed. Its main task is to assess the suitability of SOCIMIs interested in joining the MAB segment and to advise them regarding the regime applicable to the trading of their securities, as well as in relation to preparing and submitting financial and corporate information required for operating in that segment.

In order to boost the liquidity and trading of shares in SOCIMIs the MAB requires SOCIMIs or their core shareholders to sign a liquidity agreement with a liquidity provider, which may be an investment services company or a credit institution. This agreement aims to boost liquidity in transactions affecting SOCIMI shares, to achieve adequate trading frequency and to reduce price fluctuations not caused by an overall market trend.

The MAB requires that, at the time of admission, the SOCIMI submits a valuation report of the company prepared by an independent expert in accordance with international valuation standards (a copy of the report to be attached to the relevant document for admission to trading). The valuation is not necessary if, in the six months prior to the application for admission, the SOCIMI has conducted a share placement or financial operation to determine the initial listing price of its shares.

Free float

In order to ensure the adequate operation of this segment and to facilitate share liquidity, the MAB requires a minimum free float at the time of inclusion on the MAB: the SOCIMI is required to have shareholders with shareholdings of less than 5 per cent of share capital, and these minority shareholders must hold a number of shares representing the lower of the following two amounts: (i) an estimated market value of EUR 2 million, or (ii) 25 per cent of the shares issued by the company.

SOCIMIs must duly comply with the free-float requirements, such that any SOCIMI wishing to list its shares on the MAB must effectively have minority shareholders controlling the above-mentioned participation in the SOCIMI share capital within a period of one year after becoming a listed company on the MAB.

What documents are necessary and how long does it take to list a SOCIMI on the MAB?

To be listed on the MAB, a SOCIMI must present an application for admission to trading, along with a prospectus entitled "information document for inclusion on the MAB", which must contain information regarding the real estate assets and their management, as well as financial and corporate information. For illustration purposes, the aforesaid "information document for inclusion on the MAB" shall include, among other things, a description of the real estate assets, their depreciation

periods, the situation and condition of the same, as well as the policy for investment and replacement of said assets and the potential cost of the same being put into use due to a change in lessee. The SOCIMI's board of directors will be obliged to produce two reports that will form part of the information document for inclusion on the MAB: (i) one confirming that the SOCIMI's working capital is sufficient to conduct its activity during the first 12 months after admission, and (ii) the second confirming that the SOCIMI benefits from a stable organisational structure that enables it to comply with the applicable reporting obligations.

The directors of the SOCIMI and the SOCIMI itself are responsible for disclosing the information to the market at the time of incorporation. In this regard, they will be liable for damages caused to the holders of securities if the disclosed information does not represent a true picture of the SOCIMI.

The financial information provided to the MAB must be prepared in accordance with International Financial Reporting Standards (IFRS) or national accounting standards, unless the issuing company was incorporated outside the European Economic Area, in which case it may choose to apply Generally Accepted Accounting Principles used in the United States (US GAAP).

The procedure for admission to trading on the MAB takes between two and four months. In any event, it all depends on various factors, such as whether or not it is necessary to restructure the company or its group beforehand, the type of financial information to be included in the "information document for inclusion on the MAB" or the conducting of a public offering for the sale or subscription of shares.

Once the SOCIMI's shares have been listed on the MAB, the core shareholders and key executives are not allowed to sell shares or perform transactions equivalent to selling shares during the first year following the listing on the MAB, except those that are placed at the disposal of the liquidity provider.

What disclosure and transparency requirements will SOCIMIs listed on the MAB have to fulfil?

Once its shares have been listed on the MAB, a SOCIMI must provide the MAB with information on a regular basis. In its regulations (Circular 7/2016), the MAB has sought to strike a balance between two principles: the principle of sufficient information, as investors must have a reasonable amount of information available to them to enable them to make trading decisions; and the principle of, inherent on the MAB, which, as a multilateral trading system, is subject to more flexible requirements than those required for trading on a regulated market.

Within the four months following the end of the first six months of each financial year, SOCIMIs must send to the MAB, for dissemination, a financial report including all the key financial data relating to the first six months of that year, and annually, as soon as possible and no later than four months after the accounting close of each financial year, the audited annual financial statements.

SOCIMIs, as issuers, must disclose to the MAB, for dissemination, all relevant information that may affect those of their shares which have been admitted to trading on the MAB.

As regards significant shareholdings, the acquirer shall report to the SOCIMI the acquisition or sale of a significant shareholding which reaches, exceeds or falls below 5 per cent and successive multiples of share capital. Communications shall be made within a period of four trading days commencing the day after the acquisition is executed. Once the communication from the acquirer has been received, the SOCIMI must communicate the transaction to MAB. In its Circular 7/2016, the MAB also requires the SOCIMI, on a half-yearly basis, to report to it a list of those shareholders with shareholdings equal to or higher than 5 per cent of share capital.

Other information which SOCIMIs must disclose to the MAB, for dissemination, includes information relating to transactions performed by their directors and executives, and, to the extent SOCIMIs are aware of them, the signing, extension or termination of shareholders' agreements affecting the transfer of shares or shareholders' voting rights.

Finally, it should be noted that a SOCIMI must have a website that includes all the public information relating to the process of inclusion of its shares on the MAB, as well as any further information that it submits to the MAB from time to time.

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UK

Homes for Londoners: key planning challenges to delivering housing to meet the capital's needs

by Trevor Goode and Charlie Reid

"London is open. We are a leading global city with a strong economy, with businesses that trade internationally, and with people drawn from all over the world".

So writes Sadiq Khan, the current Mayor of London. The new Mayor's positive message is consistent with the commonly held view that London, as Europe's largest city by both population and output, is in the top tier of global cities (together with New York, Singapore, Tokyo and Paris). However, it is perhaps ironic that the Mayor's ringing endorsement of his city should be found in the foreword to the recently published draft supplementary planning guidance on affordable housing and viability entitled "Homes for Londoners" (the Mayor's SPG). If London is so large and doing so well, why is it apparently unable to provide something as basic as homes for its citizens?

The provision of "Homes for Londoners" was a key manifesto pledge of Khan because, behind London's pole position as a global talent hub lies an acute housing shortage coupled with an ever-widening affordability gap. It is in this context that the Mayor's aspirations to boost the supply of new affordable homes within London needs to be understood and, as the Mayor seeks to use the planning system and his planning powers to help achieve his objectives, affordable housing is the flashpoint which brings into focus the complex political and social dilemmas that dog the planning process.

In this article we look at the key challenges presented in delivering Homes for Londoners and consider some of the solutions.

Planning in London

London has been developing as a global hub for centuries, and for most of its history, it has done so without a planning system. Before the formal existence of any public control over the use and development of land in the form of the Town and Country Planning Act 1947, landowners were, broadly speaking, free to use land in any way they wished provided that they committed no nuisance or trespass against their neighbours' property. Today, society requires that this freedom be restricted for the public good and that the use of land be determined by the long-term interests of the community as a whole. Therefore, the UK planning system exists to control development in the public interest.

Strategic planning in London is the shared responsibility of the Mayor of London, the 32 London Boroughs and the City of London Corporation. The Mayor is responsible for producing and keeping under review the London Plan (the spatial development strategy for the city) and Boroughs must ensure that their own local development documents are "in general conformity" with the London Plan.

One of the strategic objectives of the London Plan is to boost the supply of housing across the city. Despite the plan setting out housing targets for each Borough, London continues to face a supply crisis, which is described by the London Plan itself as pressing and desperate. At the public examination of recent alterations to the Plan, the Examining Inspector noted that policies seeking to achieve a step change in housing delivery were not working and that the revised housing targets set for the London Boroughs were "woefully short of what is needed". Against this backdrop, London Boroughs are required as a matter of strategic importance to meet and exceed their housing targets.

Under Khan, the London Plan is due for a full review and a new draft Plan is due to be consulted upon in autumn 2017. However, its adoption is not expected before autumn 2019 at the earliest, some two and a half years into Khan's four year tenure. This perhaps helps to explain the role of the draft SPG, which is seen by some to foreshadow future affordable housing policy that will be contained within the new London Plan.

Overcoming the challenges

London needs to provide homes to meet the diverse needs of its residents and therein lies the problem. The divergence between the poorest and the richest is most acutely felt in the capital so finding a solution which, to use Theresa May's strapline, 'works for everyone' is challenging, to say the least.

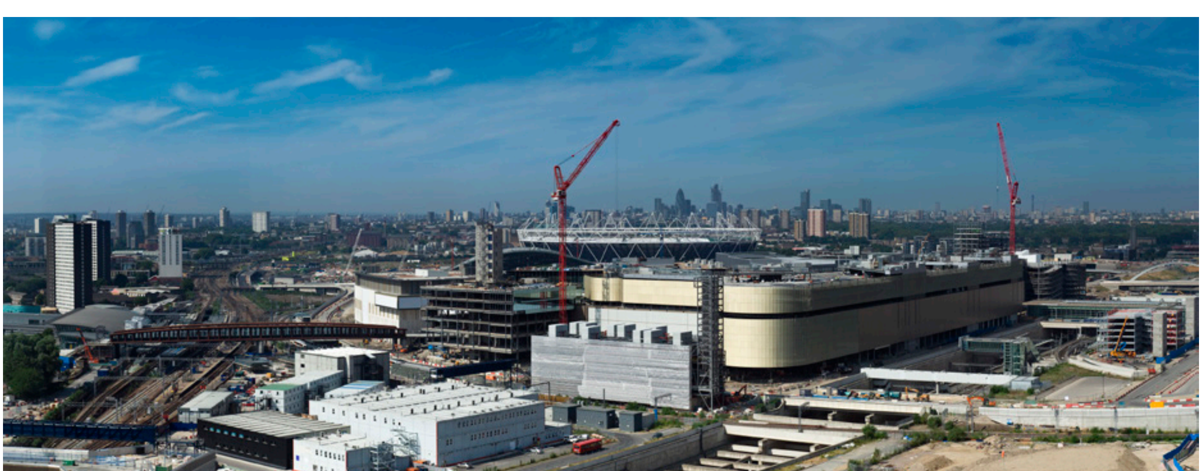
Land supply, viability and competing priorities and needs all play their part in the mix and all need to be overcome if a solution is to be found.

Land supply

Providing housing requires land, which is, by its nature, a finite resource. The problem is particularly severe in a historic city such as London. The fact that London is already well-developed means that prime sites where people want to live are few and far between and those which do exist are often subject to a number of physical constraints in addition to any policy impediments.

There is also a clear political reluctance to build upon London's precious Green Belt - many observers say that the release of some of this Green Belt would make a material difference in land supply and enable more sustainable development to come forward.

The pressure to deliver more housing and other infrastructure means that we are seeing the promotion of schemes of increasing densities and intensification, which



are changing the urban fabric of this once low-rise city. Schemes are becoming taller as developers seek to provide higher numbers of units on smaller and more constrained plots. Good examples of this are Spire London and Landmark Pinnacle, the first and second tallest proposed residential towers in Western Europe promoted by Greenland Group and Chalegrove Properties respectively and which, advised by Ashurst, recently obtained planning permission.

These two schemes also serve as examples of how areas of London that have not historically been seen as residential are increasingly being promoted as new neighbourhoods. Both of these schemes are located immediately adjacent to Canary Wharf, usually thought of as one of London's key financial centres and the antithesis of the once favoured suburban idyll.

They also illustrate how the quest for density often results in a more complicated and consequently more expensive building, which has knock-on effects in terms of design and build costs. In both cases, design constraints and build costs impacted overall scheme viability which in turn affected the ability to deliver on-site affordable housing; the solution in both cases was to provide off-site affordable housing on donor sites specifically acquired for this purpose. This in itself was a challenge given the limited availability of land suitable for such purposes that was both affordable to the developer and considered suitable by the local authority. So while the use of donor sites can help values it is not necessarily straightforward, given the inevitable competition for sites and the fact that the starting point for authorities is provision onsite.

Increasingly, different categories of brownfield land are being brought into play to help in the delivery of housing. Perhaps the most celebrated example of this is the redevelopment of Battersea Power Station as part of a residential-led scheme. Central government has brought forward a register of brownfield land in an effort to fast-track development of these sites and, within London, the Mayor has produced a register of public land in an effort to identify surplus land that could be used to boost housing supply.

Upward extension is also going to become increasingly important and in a response to last year's consultation on this topic, published alongside the Housing White Paper, the Government has indicated that the National Planning Policy Framework will be used to support the delivery of additional homes by building up.

Viability

One of the consequences of the lack of land is that the subsequent competition for sites is driving land values up to an all-time high. This has obvious impacts on planning gain with affordable housing usually being the first casualty. However, local authorities are increasingly refusing to allow land values to dictate the levels of affordable housing offered. Strongly contrasting approaches to valuing land have emerged between the public and private sectors which are dividing the development market. On the one hand, there is a market-based approach which looks at comparable land transactions and, on the other hand, there is a more policy-led approach which seeks to ensure that planning policy requirements are properly accounted for.

The Mayor's SPG advocates the latter approach and also provides that, as a general rule, any viability assessments used to support a departure from affordable housing policy will be made publically available. Local authorities, such as the Boroughs of Southwark and Islington, have already adopted very similar policies at a local level.

Should the Mayor's SPG be adopted, we are likely to see this approach becoming even more firmly entrenched in the planning policies of all London Boroughs. One possible outcome is that the production, review and scrutiny of viability assessments will increasingly become standardised and transparent – any reduction to levels of affordable housing and other planning gain will have to be robustly justified, it no longer being satisfactory to hide behind the phrase "subject to viability". Developers may be expected in future to have demonstrated that all possible routes to improve viability, e.g. through securing grant funding, have been exhausted before any reduction in affordable housing levels is accepted.

Increased use of review mechanisms in planning agreements is also likely to become the norm, with the Mayor suggesting that this tool could be used to encourage an early start on site. His proposal is that all schemes would be susceptible to an early review where an agreed level of progress has not been made within two years of the grant of planning permission. Those schemes that are not policy compliant would be subject to a further review towards the end of the development.

All of this may well bring into play a tension between what landowners are willing to sell their land for and what developers are willing to pay. If local authorities attempt to skew land values too much, there may come a time when landowners are no longer prepared to sell and will sit on their landholdings until such time as this latest political intervention passes. Rather than easing the housing crisis, it could well have the opposite effect.

Competing priorities and needs

The tension not only plays out between public and private, but also between different functions at local authorities, all wanting a slice of the planning gain pie.

Despite near universal acknowledgement of the housing crisis facing Londoners, there remains a conflict between strategic city-wide policies and local priorities.

Prime examples of this are two housing schemes recently recovered by the new Mayor for determination, his first call-ins since taking office. In both cases, the projects were relatively modest in scope (505 homes including a 21 storey tower in Haringey and 186 homes across up to 17 storeys in Harrow) but the local authorities recommended refusal over concerns about the height and density of the proposals in addition to affordable housing levels and, in the Haringey case, the impact on the Green Belt. The proposals will be considered by the Mayor at future representation hearings . These will be closely scrutinised for signals as to the direction of travel at City Hall. Given the suite of measures being provided by the GLA and the government to boost housing supply, the conflict between London-wide objectives and the immediate concerns of local electorates seems only set to increase with many wondering whether Khan (Labour) will take a more interventionist approach than his predecessor Boris Johnson (Conservative). If he does, he will arguably be at odds with the current Conservative government's localism agenda, which through the promotion of neighbourhood planning is seeking to create a more positive relationship between the public and the planning process.

Alternative tenures

A city as diverse as London needs to provide diverse housing products to cater for its residents and we are starting to see a shift in this regard.

Build to Rent is finally being recognised as a sector in its own right and the Mayor's SPG has, for the first time, provided a definition. Schemes of 50 units or more in single ownership, held under a build to rent covenant of at least 15 years, offering on-site management and longer tenancies will meet the criteria and benefit from being able to meet affordable requirements such as discounted market rent, flexibility in space standards and a mix focussed on one and two bed units.

Co-living is also starting to take off, bridging the gap between student halls of residence and private rented accommodation, offering living space and shared community facilities under one roof. The Collective's scheme at Old Oak is a good example of this and its popularity will no doubt see more schemes of this nature come forward.

Providing an alternative to conventional forms of affordable housing, London Living Rent is now being encouraged by the Mayor. This is a form of intermediate housing where households with a maximum income of £60,000 are encouraged to save for their own home through low rents (based on one-third of median household incomes for the relevant borough) on time-limited tenancies.

The Starter Homes concept (the provision of discounted housing to the under 40s) is yet another product proposed by Government, albeit a controversial one. The recently published Housing White Paper has allayed fears that this alternative tenure would simply provide cheaper homes for would-be voters rather than genuinely affordable housing. As now proposed, eligibility will be means tested and local authorities will have the ability to determine the number of affordable homes that should be provided, based on local housing need.

Ever-evolving political demands

Planning has been in a state of flux for a significant period of time and, just as overworked planning authorities get to grips with one set of legislative changes, another is forced upon them. Many of the latter day changes seem to be knee-jerk tinkerings by central government to deal with immediate problems and to win votes. They lack the joined-up thinking and long term vision required to really make a difference.

However, that might be about to change following the publication of the Government's Housing White Paper, which seeks to take the long term view rather than relying on headline grabbing, short-term measures.

Whilst the detail will be worked up following consultation with stakeholders, various carrots and sticks will be wielded to get Britain building at an accelerated pace and burdensome red-tape will finally be slashed, to some degree at least.

And whilst the proposals are not as radical as some may have wished, it is refreshing to see that this administration has taken the bold step of attempting to resolve the housing crisis at the risk of upsetting their mainstay of voters.

Use it or lose it planning permissions, more funding for planning departments, a CIL overhaul, clarity on Starter Homes, proposals to increase density and proposals to speed up plan-making are all in the offing and it is hoped that this time, the Housing White Paper will deliver on its promise and pave the way for holistic and carefully thought out changes that put an end to the piecemeal approach to reform that we have, for so long, had to endure.

Concluding thoughts

London is witnessing a growing population and economy colliding with an acute housing and infrastructure shortfall.

Solving the problem is not going to be a quick fix. Long-term decisions need to be taken which are detached from the political cycle and strategies need to be put in place which are driven by a desire to make things better rather than protecting votes and popularity.

The Housing White Paper is a step towards this solution but formulation and implementation of these proposals will take time.

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Workplaces of the future: The built environment meets safety and wellbeing

by Eleanor Reeves, Vince Rogers, Ruth Buchanan and Hannah Martin

As cities, jobs and technology have evolved over the decades, so too have our workplaces. Some of the most recognisable features of this evolution include open plan designs, collaborative spaces, hot desks and facilities for recreation. These workplace changes are an inevitable consequence of changes in our working lives.

In spite of this, office occupier requirements have barely changed in decades. Cost and location remain the two key factors. In recent years, however, another factor has inched its way up into third place: connectivity. The ability to communicate seamlessly with colleagues and clients around the globe is vital, as is the need to access information held in computer systems or in the cloud. It is becoming increasingly important to have a well-connected building because the workplace is more diffuse due to the rise of flexible and remote working. Organisations with mobile and flexible workers may require a central hub or meeting point rather than a constant and static work location.

It is also clear that the built environment can have a material impact on health and wellbeing and, if optimised, can reduce absence rates and liability exposure as well as increase productivity.[1] In this article, we look at why organisations are placing increasing value on well-designed workplaces.

The built environment and health, safety and welfare

The House of Lords Select Committee on National Policy for the Built Environment commented in 2016, *"It is widely acknowledged that the quality of life, prosperity, health and wellbeing of an individual is heavily influenced by the 'place' in which they live or work"*.[2]

Similarly, in 2015, Public Health England released a report in which it stated that the physical environment that organisations provide for employees to carry out their work activities has a powerful role in shaping a range of psychological and behavioural outcomes for employees.[3]

1 Health, Wellbeing & Productivity in Offices, World Green Building Council

2 "Building Better Places", House of Lords Select Committee on National Policy for the Built Environment, 19 February 2016

3 "The impact of physical environments on employee wellbeing – topic overview", Public Health England, 2015

The link between health and the built environment is now so well accepted that many building accreditation schemes include a component concerning the health and wellbeing of occupants. For example, the Building Research Establishment's Environmental Assessment Method, the first sustainability rating scheme for the built environment, addresses the health and wellbeing of occupants and other stakeholders by rating buildings in terms of indoor environment (health and wellbeing), active/healthy lifestyle, and safety and security.[4]

An important reason to take the design and use of workplaces seriously is compliance with health and safety law. In the UK, employers have a duty of care under common law and the Health and Safety at Work etc Act 1974 for the health and safety of their employees. Furthermore, the Workplace (Health, Safety and Welfare) Regulations 1992 place a specific duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their employees and other people who may be affected by the workplace. The Management of Health and Safety at Work Regulations 1999 also require employers to assess and control risks to protect their employees. Similarly, in Australia, a person conducting a business or undertaking has a primary duty to manage risks associated with exposure to hazards arising from work that could result in physical or psychological harm to workers and other persons. Psychological hazards are required to be addressed the same way as physical hazards, through a hierarchy of control mechanisms starting with elimination of the risk and, if that is not possible, mechanisms which minimise or reduce exposure to it.

Different components of the built environment can have different effects on employee safety and their mental health and wellbeing. While the connection between the built environment and physical health is obvious, well-studied and well-regulated, recent studies have increasingly shown that building design and the environment can operate as a positive or a negative factor in workers' stress levels and mental health.[5] For example, it has long been clear that poor lighting in an office environment can expose employees to trip hazards and can cause physical injuries such as eye strain, headaches, fatigue and musculoskeletal injuries.[6] It is also becoming increasingly clear that poor lighting, particularly a lack of access to natural light, also has consequences for stress and mental health. A 2013 study found that workers in workspaces with windows slept an average of 46 minutes more per night than workers in offices without windows, and that the latter group reported lower scores than their counterparts on quality of life measures related to physical problems and vitality, as well as poorer outcomes on measures of overall sleep quality, sleep efficiency, sleep disturbances and daytime dysfunction.[7]

4 See further www.breeam.com

5 "Health Wellbeing & Productivity in Offices", World Green Building Council, pages 7-9

6 "Lighting at work", Health and Safety Executive, 1997

7 Chueng I. (2013) Impact of workplace daylight exposure on sleep, physical activity, and quality of life, American Academy of Sleep Medicine 36

Checklist – Building for health, safety and wellbeing[8]

- **Air quality**
  Productivity improvements of between eight and 11 per cent are not uncommon as a result of better air quality.
- **Windows**
  Several studies in the last decade have estimated productivity gains as a result of proximity to windows. Experts now believe that it is the view through the window that is likely to be the most significant factor, particularly where that view offers a connection to nature.
- **Thermal comfort**
  Studies have consistently shown that personal control for employees over thermal comfort returns improvements in productivity.
- **Noise and layout**
  Being productive is practically impossible when noise provides an unwarranted distraction. Noise distraction relates closely to interior layout. There are a whole range of fit-out issues which can have an effect on wellbeing and productivity including workstation density and having breakout and social spaces.

Hidden costs

If health and safety issues in the workplace are not managed properly, as well as giving rise to compensation claims, they can have an economic impact on productivity and overheads. In more serious cases, breaching health and safety legislation can give rise to enforcement action. Such action can lead to adverse consequences which may include criminal penalties, unplanned expenditure and reputational damage. A breach of health and safety law can support compensation claims by helping to establish a breach of a common law duty by the employer, and whether harm or injury suffered as a result of that breach was reasonably foreseeable. Health and safety should not only be a priority for HR and occupational health specialists, but also senior management as part of discharging their corporate governance responsibilities, and managing potential personal liability exposure. A workplace designed to optimise the health and safety of its occupants is therefore likely to be attractive to organisations which proactively manage health and safety.

Health and safety regulators have also been giving increasing attention to workers' mental, as well as their physical, health. In the UK, poor mental health cost employers £30 billion in 2014 through lost production, recruitment

8 Drawn from "Health Wellbeing & Productivity in Offices", World Green Building Council, page 8

and absence.[9] The UK Health and Safety Executive (HSE) has recently published statistics which show that workplace stress accounts for almost half of all working days lost to ill health (11.7 million working days in 2015/16).[10] In the majority of these cases of workplace stress, the precipitating event for workplace stress involved factors "intrinsic to the job". The HSE's strategy "Helping Great Britain work well" places an emphasis on managing workplace stress, and the HSE's Management Standards for work-related stress recognise that the work environment falls within one of its six primary categories of stressors at work.[11]

One of the principal Australian safety regulators, Safe Work Australia (SWA), is also paying close attention to workplace stress. SWA reported in 2016 that the total cost to Australian employers of workplaces with a poor physiological safety environment is estimated to be approximately A$6 billion per annum, and that workplaces with poor physiological safety environments have significantly higher levels of "absenteeism" and "presenteeism" than others, equating to an annual cost to employers of A$1,887 per employee. SWA also recognises that psychological hazards can have environmental causes, and encourages duty holders to address the hazards at an organisational level.[12]

There are also other justifications for workplaces to be designed in a manner that protects employees' physical and mental health. A person who has a sufficiently long-term and serious condition affecting their physical and/or mental health may have a disability for the purpose of anti-discrimination and equal opportunity law. Discrimination law imposes obligations on employers to make reasonable accommodations for a person's disability. What is a reasonable accommodation will depend on the circumstances; however, it can often include modifications to the built and physical environment. A workspace which is designed with accessibility and safety in mind can not only assist in preventing harm to health, which may develop into disabilities, but also assist employers and occupiers in meeting their obligations to accommodate.

Furthermore, while attention is often given to the ways in which workspaces are designed to attract and retain younger generations of employees, employers must also consider older workers. As the workforce ages (as is the case for the workforces of many industrialised countries), businesses will need to look for workspaces which accommodate a mature workforce, that may have a higher rate of disability and different susceptibilities to physical and mental harm.

One of the defining characteristics of office environments today is the fostering of a sedentary lifestyle. Three-quarters of UK GDP is generated by the largely office-based service industries, and most office-based employees conduct their work at desks.[13] Physical inactivity, particularly excessive sitting, is now recognised to be a health hazard in itself and an emergent health and safety issue. During 2016, SWA released a report which reviewed the literature on sedentary behaviours, and characterised "excessive occupational sedentary behaviour" – or too much sitting – as a potential workplace health and safety concern. A UK study has also suggested that an inactive lifestyle is, in itself, a risk factor for early death, as well as a risk factor for conditions such as obesity, heart disease and cancer.[14] All of this has direct, and indirect, economic costs to employers. A research team which extensively studied office buildings found four "killer" variables of productivity (personal control, facility management, building depth, workgroup size) which are directly influenced by building design.[15] Each of these "killer" variables represents not only a risk of harm and cost to individuals and the organisation, but also a lost opportunity for greater efficiency and productivity.

Conclusion

While office occupier requirements have barely changed in decades, it is becoming ever more apparent that the quality of workspaces can have a significant impact on health and wellbeing. The spotlight on workplace health and safety continues to shine, bringing with it an increased risk of liability exposure for employers. A workplace that is designed to optimise the health, safety and wellbeing of its occupants is therefore more likely to attract organisations who proactively manage health and safety, and who want to take advantage of the productivity and cost savings that a well-designed workplace can offer.

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9 "Promoting Positive Mental Health at Work", ACAS 2014

10 "Workplace related Stress, Anxiety and Depression Statistics in Great Britain 2016", Health and Safety Executive

11 "Helping Britain Work Well", HSE, 2016; "Management Standards for work-related stress", HSW, 2007

12 "Preventing psychological injury under work health and safety laws", Safe Work Australia, 2014

13 RIBA "Good design – it all adds up" page 16

14 "Physical inactivity kills twice as many as obesity, new study claims", The Independent, 14 January 2015

15 Leaman A and Bordass B "Productivity in buildings: the "killer" variables; Clements-Croome D (2000), Creating the productive workplace, E& FN Spoon, London


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UPCOMING EVENTS

Meet Ashurst at the International Hotel Investment Forum (IHIF) 2017

Representatives from the Ashurst Hotels, Leisure and Gaming team are attending the International Hotel Investment Forum from 6-8 March 2017 in Berlin.

The three day event, attended by over 2,000 hospitality and tourism decision-makers from over 70 countries is the place where deals are done and important industry decisions are made.

If you would like to arrange a meeting at the conference please contact one of the attendees.

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Meet Ashurst at MIPIM 2017

Ashurst is attending MIPIM 2017 from 14-17 March at the Palais des Festivals, Cannes. If you would like to arrange a meeting with one of our Partners to discuss a future prospect, please contact us at mipim2017@ashurst.com

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