

- (iv) to require each villa lot owner, as a precondition of ownership, to be a member of the HOA, the bylaws of which will require compliance with all the covenants, including positive ones.

Note

- 1 It's important to distinguish between a restriction and a restrictive covenant. Restrictive covenants limit how an owner can use their villa. Restrictions limit how he can deal with their villa.

UKRAINE

Nota bene: amendments to land transactions in Ukraine

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The Ukrainian land law is undergoing significant changes due to the constant development of land transactions in Ukraine. In autumn 2008 one could observe an unprecedented number of amendments to the laws covering real estate issues in Ukraine.

The Law of Ukraine 'On Amendments to Certain Laws of Ukraine on Promoting Construction Activity' # 509-VI (the Law) came into force on 14 October 2008. This Law has been hailed by real estate specialists as a construction revolution in Ukraine.

The Law introduced amendments to the Land and Civil Codes of Ukraine, the Law 'On Land Lease' and a number of development and construction laws. In general, the Law is intended to secure the investments in the construction area and includes the amendments in order to simplify and shorten the construction procedures. The Law also introduced significant changes in the land transactions concerning the land auctions, more detailed procedure of land allocation and other issues intending to simplify the procedures in this area as well.

In particular, one of the innovations became the possibility of *disposal of land lease right*. Now, the right of land lease can be sold (including on land auctions), mortgaged and inherited. The owner of a land plot can also contribute the right of land lease to the capital of a company for the term of up to 50 years.

Certain changes were made in the Land Code of Ukraine with regard to such rights to land as '*superficies*' (the right to construct on the land plot owned by another person) and '*emphyteusis*' (the right to use the land plot owned by another person for agricultural purposes). From this moment, these rights to land of state and municipal ownership can be sold only by auctions. Previously, the Ukrainian law stipulated the obligatory auction procedure only for sale and lease of state and municipal land. As we see, one of the

main principles in land transactions in Ukraine is the competitive basis of state land purchase and use.

Thus, the Land Code now establishes the right of a person to alienate (sell, inherit, contribute to the charter capital of a legal entity) and to pledge the rights of lease, *superficies* and *emphyteusis* regarding land plots.

At the same time, the Law contains certain restrictions with regard to state and municipal land. The rights to land of state and municipal ownership (lease, *superficies* and *emphyteusis*) cannot be alienated by land users, mortgaged and contributed to the capital of a company.

With adoption of the new amendments to the Land Code, the Ukrainian legislator finally specified what types of land do not need auctions for the purchase or lease, namely:

- land occupied by buildings owned by individuals or legal entities without state shares, unless the owner of the building located on the land plot refuses to buy or to lease the respective land plot;
- land used for usage of natural resources and special water usage according to the special permits (licences);
- land used by religious organisations legalised in Ukraine for the location of religious buildings;
- land or buildings located on such land operated by state or municipal enterprises, institutions or organisations, or an enterprise or public organisation in the sphere of culture and the arts, including by national artistic unions;
- land used for location of diplomatic and similar representative offices of foreign states and international organisations in accordance with the international treaties of Ukraine;
- land used for construction and maintenance of line transportation or energy infrastructure (ie roads, railways, petroleum and water pipelines, power transmission lines, airports, petroleum terminals, power stations, etc);
- land used for the complex reconstruction of a residential quarters of an old residential fund in accordance with the law; and
- land used for construction of social and affordable housing in case there was a relevant construction tender.

The above-mentioned amendment saved the players of the real estate market from lots of confusion, as before that it was not clear what procedure had to be used for such categories of land.

The Law establishes general requirements for carrying out auctions of state land and the rights to state land purchase, defining in more detail the procedure of their purchase, and the procedure of plot preparation for auctions. In this respect it is necessary to note that the Law provides for payment in advance when buying state land that was not provided before. The rejection of an advance payment is one of the grounds for denial of land purchase.

In general, the Law presents a number of positive

innovations that will let the players of the land market avoid different deadlocks and conflicts caused by the earlier contradictions and discrepancies in Ukrainian legislation. With the adoption of this Law, the Ukrainian legislator has made a significant step towards making the procedures in construction and land transactions more transparent and increasing foreign investment into the Ukrainian market.

UNITED KINGDOM

Tenant's right of first refusal – up in the air!

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Part 1 of the Landlord and Tenant Act 1987 (the Act) enables tenants to have a right of first refusal at the time a landlord proposes to sell the reversion of its lease. The intention behind the legislation was to provide tenants with the opportunity to become their own landlord, in certain circumstances. The drafting of the 1987 Act was regarded as unclear and the Housing Act 1996 introduced amendments to the 1987 Act. The amendments strengthened the force of the Act providing that:

- Non-compliance by the landlord is a criminal offence; and
- the date of exchange of contracts is treated as the date of 'relevant disposal'.

In the main, there are four conditions which require to be satisfied, namely:

- (1) the premises must be one to which the 1987 Act applies;
- (2) the landlord must not be an 'exempt' landlord;
- (3) the tenant must be a 'qualifying' tenant; and
- (4) there must exist a proposed 'relevant disposal'.

Premises

The premises affected by the 1987 Act include the whole or part of a building if they contain (i) two or more flats held by qualifying tenants and (ii) the number of flats held by such tenants exceeds 50 per cent of the total number of flats in the whole of the premises. Where a building is a combination of flats and for example, shops, the 1987 Act will apply where the floor area of the flats exceeds the floor area of the shops.

Landlord

The landlord will be the person who is the tenant's

immediate landlord. If that landlord does not own freehold or the reversion of at least seven years, then the superior landlord is also regarded as a landlord for the purposes of the 1987 Act. Those landlords who are exempt include local authorities, housing corporations, certain housing associations and private sector residential landlords where the premises are their only or principal residence and have been for a period in excess of the 12 previous months.

Tenant

Any tenant qualifies under the 1987 Act unless his tenancy is:

- a protected short hold tenancy,
- a business tenancy under the 1954 Act,
- a tenancy terminable on cessation of employment; or
- an assured tenancy under the Housing Act 1988.

In the main therefore most qualifying tenants will be long leaseholders at low rents or where the tenancy is regulated.

Relevant disposal

A relevant disposal for the purposes of the Act will be a transfer of a freehold or leasehold reversion. The difficulty for landlords is that there is no actual definition of 'building' in the 1987 Act and accordingly the matter of what is included in a 'building' has been left to be determined by the courts.

Case law

The recent case of *Dartmouth Court Blackheath Limited v Beresworth Limited* [2008] EWHC 350 (Ch) is an example of a case where the lack of a definition of the building led to a dispute between, on the one part, a landlord who was disposing of part of his property to a developer and, on the other, the tenants of the flats which formed part of the landlord's property. In this case, the whole premises consisted of a block of 72 flats, a caretaker's office, common landscape, garages and an electricity sub-station. The disposal was first of all of the garages, the office space and the electricity sub-station and secondly, a grant of a long lease of the roof and air space above the building to the developer for the purposes of building additional flats.

In terms of the 1987 Act, when a landlord proposes to make a disposal, he is required to serve a notice on the tenants. The notice should set out the main terms of the offer of sale and the deadline and the procedure for acceptance. In this case the landlord had elected not to serve notices on the tenants since none of the flats themselves were being disposed of. The landlord was of the opinion that the disposals were not caught by the terms of the 1987 Act.

The courts decided that the first disposal, ie of the garages, office and electricity sub-station was not a relevant disposal in terms of the 1987 Act. Accordingly, in that instance the tenants were not entitled to be