GROOTERHORST
& PARTNER
RECHTSANWÄLTE

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Dear Reader,

an important topic of our second Newsletter 2012 is developments in planning law:

In the current issue we report about new legal initiatives of the federal state legislator in North-Rhine Westphalia: a municipality represented by Grooterhorst & Partner Rechtsanwälte had forced the legislator to act on the basis of two widely noticed lawsuits. Furthermore, the federal government plans additions to the German Building Code. We also comment on a variety of court rulings made recently dealing with questions under private and public law respectively as well as with activities in the real estate industry ("from retail trade to the ban on night flights").

Finally it will be demonstrated how the modern topic "Equal Treatment" has an impact even on company law (the managing director's contract of employment).

I wish you some enjoyable reading.

Yours
Dr. Johannes Grooterhorst
Rechtsanwalt

Content

A. Current News

I. Planning Law: New legislation relating to the regional planning at federal state level of the large-scale retail trade in North-Rhine Westphalia: cabinet decision of April 17, 2012 on an objective segment plan for controlling the large-scale retail

Initial situation: no legally binding objectives of regional planning for the retail trade in NRW

As of September 30, 2009 it has (once more) been clear that legally binding objectives of regional planning for controlling the retail trade were missing in North-Rhine Westphalia (NRW). The OVG Münster stated in its much-noticed ruling of September 30, 2009 concerning the establishment of the FOC Ochtrup that the regulations included in § 24 a of the Federal State Development Programme (LEPro) for controlling the retail trade do not present legally binding objectives for regional planning. Just over a month earlier, the Constitutional Court for the federal state North-Rhine Westphalia had already declared void the regional planning regulations at federal state level for controlling an FOC included so far in § 24 a Sec. 1 Sent. 4 Regional Development Programme (LEPro).

Grooterhorst & Partner Rechtsanwälte won the two rulings recognized nationwide for the municipality.

From that moment only principles of regional planning for the large-scale retail trade have existed which have to be taken into account, yet not strictly observed, by considering them following the regional planning law of the federal government within the scope of the urban land-use planning of the municipalities.

By December 31, 2011 the Federal State Development Programme (LEPro) and, therefore, the regional planning regulations for controlling the large-scale retail trade had expired completely. Thus, as of January 1, 2012, North-Rhine Westphalia has with respect to the large-scale retail trade a legal vacuum in favour of an establishment.

Preparation for a new comprehensive Federal State Development Plan

North-Rhine Westphalia is planning to develop a draft version for a new comprehensive Federal State Development Plan that is also to include regulations for the large-scale retail trade. However, the federal state government has interrupted the elaboration of this draft version of a comprehensive Federal State Development Plan because of the upcoming re-election of May 13, 2012.

Approval of an objective segment plan regarding the large-scale retail trade by a cabinet decision of April 17, 2012

In order to eliminate the complete vacuum existing since January 1, 2012, the state government has now ruled to give priority to working out federal state planning regulations as to the large-scale retail trade in an objective segment plan concerning the Federal State Development Plan North-Rhine Westphalia. The state cabinet approved the draft version of such an objective segment plan regarding the large-scale retail trade on April 17, 2012.

Objectives and principles

The following regulations entitled “Objectives and Principles” are included in the draft version of April 17, 2012 (www.nrw.de/landesregierung/landesplanung/, tab “Retail Trade”, quoted verbatim from it below):

General settlement areas

1 Objective, Locations only in General Areas of Settlement
Core areas and special areas for projects such as defined in § 11 Sec. 3 Federal Land Utilisation Ordinance are only to be constituted and assigned in General Areas of Settlement as stipulated according to regional planning.

Locations for centre-relevant core product ranges in central supply areas

2 Objective, Centre-relevant core product ranges: Locations only in central supply areas
Thus, core areas and special areas for projects as defined in § 11 Sec. 3 Federal Land Utilisation Ordinance with a centre-relevant core product range are only to be constituted and assigned in central supply areas. By way of exception, core and special areas for projects as defined in § 11 Sec. 3 Federal Land Utilisation Ordinance with a core product range relevant for local supply are also allowed to be constituted and assigned outside central supply areas, if by way of evidence:

- an integrated location in the central supply areas is not possible and
- the guarantee of the supply of goods for everyday needs requires this urban land-use planning and
- central supply areas of municipalities are not essentially impaired.

3 Objective, Centre-relevant core product ranges: Prohibition of impairment
By constituting and appointing core and special areas for projects as defined in § 11 Sec. 3 Federal Land Utilisation Ordinance with a centre-relevant core product range, central supply areas of municipalities do not have to be essentially impaired.

Prohibition of impairment by centre-relevant core product ranges

4 Principle, Non-centre-relevant core product ranges: Sales area
When constituting and assigning special areas for projects as defined in § 11 Sec. 3 Federal Land Utilisation Ordinance with a non-centre-relevant core product range located outside central supply areas, the expected overall turnover of the retail trade use enabled by the respective assignment shall not exceed the purchasing power of the respective municipality for the planned groups of assortment.

Sales areas for projects with non-centre-relevant core product ranges

5 Objective, Non-centre-relevant core product ranges: Location, prohibition of impairment, relative share of centre-relevant peripheral product ranges
Special areas for projects as defined in § 11 Sec. 3 Federal Land Utilisation Ordinance with a non-centre-relevant core product range are also allowed to be constituted and assigned outside central supply areas, if the scope of centre-relevant peripheral product ranges amounts to a maximum of 10% of the sales area. In doing so, central supply areas of municipalities are not to be essentially impaired by the absolute volume of centre-relevant peripheral product ranges.

Location, prohibition of impairment and relative share of non-centre-relevant peripheral product ranges

6 Principle, Non-centre-relevant core product ranges: Sales area of centre-relevant pe-ripheral product ranges
The scope of centre-relevant peripheral assortments of a special area for projects as specified in § 11 Sec. 3 Federal Land Utilisation Ordinance with a non-centre-relevant core assortment shall not exceed a sales area of 2.500 m².

Sales area of centre-relevant pe-ripheral product ranges

7 Objective, Setting up a land-use plan for existing locations
Existing locations for projects as specified in § 11 Sec. 3 Federal Land Utilisation Ordinance outside central supply areas can be constituted and assigned as special areas pursuant to § 11 Sec. 3 Federal Land Utilisation Ordinance. In the course of this, the sales areas are normally to be limited to the approved portfolio.

In exceptional cases minor expansions can be taken into consideration if these are necessary for a functional extended use of the portfolio and if the assignment does not result in a considerable impairment of central supply areas of the municipality.

Setting up a land-use plan for existing locations

8 Objective, Agglomerations of retail trade
The municipalities have to counteract the emergence of new as well as the stabilization and expansion of existing centre-impairing agglomerations of retail trade located outside General Areas of Settlement. Furthermore, they have to thwart the creation of new as well as the stabilization and expansion of existing centre-impairing agglomerations of retail trade with centre-relevant core product ranges located outside the central supply areas. They have to ensure that an essential impairment of central supply areas of municipalities by centre-impairing agglomerations of retail trade is avoided.

Agglomerations of retail trade

9 Principle, Regional retail trade concepts
Regional retail trade concepts have to be taken into the consideration when creating and amending regional plans.

Regional retail trade concepts

Practical Considerations: „Objectives of regional planning in the preparation phase since April 17, 2012“

Thus, according to the classification by the federal state of North-Rhine Westphalia, regional planning “objectives currently in the preparation phase” have been available since April 17, 2012. These have now to be considered as miscellaneous requirements of regional planning during deliberations in the context of urban land-use planning and in case of discretionary decisions in planning and measures relevant to regional planning (§ 4 Sec. 1 Sent. 1 Regional Development Act (ROG) of the federal government). This classification could be questioned if the quality of “objectives currently in the preparation phase” as “miscellaneous requirements of regional planning” necessitates a state of planning that allows one to forecast that the statements relating to planning also find their way into the final version of the regional development plan. Such a state might possibly only be achieved if the weighing-up process has already come to an end, thus already consolidating a weighing-up decision. However, the State Planning Act (LPlG) of North-Rhine Westphalia provides that an “objective of regional planning currently in the preparation phase” can be assumed as soon as the procedure of regional development planning has started with the decision on development.

Procedures of participation as of June 2012

As of June 2012, it is intended to implement a comprehensive procedure of participation concerning this draft version. This implies that municipalities, public-sector institutions as well as the general public have the chance to deliver an opinion within a period of four months.

Security instrument of the regional planning authorities

As soon as regional planning “objectives currently in the preparation phase” are available, there is room for the security instrument of temporarily prohibiting any planning relevant to regional development (§ 14 Sec. 2 Regional Development Act (ROG), § 36 Sec. 1 No. 2 State Planning Act (LPlG) of North-Rhine Westphalia). The regional planning authority can – pursuant to these – (temporarily) interdict plans and measures relevant to regional development, if there is reason for thinking that the plan or measure render the implementation of the intend-

ed objective of regional planning impossible or make it substantially more difficult. Hereby, an interdiction must be aligned to an objective that can be achieved with the means of regional planning. An interdiction should, therefore, be inadmissible, if such planning secured by it has – from the start – evident defects that cannot be remedied in the further course of the planning procedure.

It remains to be seen whether the planned objectives to control the large-scale retail trade can be measured against the clear and unambiguous ruling of the OVG Münster.

Dr. Johannes Grooterhorst
Isabel Gundlach

II. Planning Law: Second part of the Building Code amendment – Drafting a law for strengthening inner city development in cities and municipalities

In the coalition agreement of the Federal Government it is agreed to strengthen both climate protection and inner city development in planning law. Already on July 30, 2011 the first part of this Building Code (BauGB) amendment came into force with the law on promoting climate protection in the development of cities and municipalities. Now the draft bill of the law on strengthening the inner development of cities and municipalities and the further development of urban planning legislation is available as second part of the Building Code amendment.

Draft bill for the law strengthing the inner development of cities and municipalities

With this amendment especially inner city development shall be strengthened further. In essence the currently available draft bill of the Federal Ministry for Transport, Building and Urban Affairs includes the following significant regulations:

Urban development mainly by measures of inner city development

- Urban development shall mainly take place by measures of inner city development (§ 1 Sec. 5 Sent. 3 Building Code (BauGB)). Therefore, in future, the necessity to convert areas used for agricultural purposes or as forest shall be justified by forwarding specific reasons (§ 1 a Sec. 2 Sent. 4 Building Code (BauGB)).

Central supply areas in the preparatory land-use plan

- It shall now be possible to also depict central supply areas in the preparatory land-use plan (§ 5 Sec. 2 Sent. 2 Building Code (Bau GB)). This has been designed to further strengthen the maintenance and development of central supply areas.

Admissibility of entertainment facilities in the non-qualified binding land-use plan

- The municipalities shall receive the possibility to control with a non-qualified binding land-use plan the admissibility of entertainment facilities or special types of entertainment facilities in the inner area that is not part of a land-use plan (§ 9 Sec. 2 b Building Code (BauGB)).

Conversion of handicraft und trade businesses

- In the inner area the conversion of handicraft und trade businesses in residential areas shall be possible under simplified conditions (§ 34 Sec. 3 a Sent. 1 No. 1 Building Code (BauGB)).

Commercial facilities for keeping animals as well as the construction of new agricultural buildings

- Commercial facilities for keeping animals shall only be privileged in the outer area if they are not subject to any duty for implementing an Environmental Impact Assessment according to the Environmental Impact Assesment Act (UVPG) (§ 35 Sec. 1 No. 4 Building Code (BauGB)). Furthermore the construction of a new agricultural building, which is to be allocated a new type of use, shall be facilitated in justified individual cases (§ 35 Sec. 4 Building Code (Bau GB)).

- Moreover, the Federal Land Utilisation Ordinance shall be amended to such an extent, that facilities for child care are generally permitted in purely residential areas if such care-places do not considerably exceed the demand typically to be expected for this purely residential area (§ 3 Sec. 2 No. 2 Federal Land Utilisation Ordinance (BauNVO)). This regulation shall also apply to already applicable land-use plans (§ 245 a Building Code (BauGB)).

Admissibility of facilities for child care in purely residential areas

- Furthermore, solar systems shall also be considered as secondary structures if the energy generated is entirely or mainly fed into the national grid (§ 14 Sec. 3 Federal Land Utilisation Ordinance (BauNVO)). This regulation, too, shall be extended to already applicable land-use plans (§ 245 Sec. 1 Building Code (BauGB)).

Solar systems as secondary structures

- The Federal Land Utilisation Ordinance shall include an independent definition of full storeys (§ 20 Sec. 1 Federal Land Use Ordinance (BauNVO)). Accordingly, full storeys are all those storeys whose upper edge of the ceiling exceeds the terrain surface by more than 1,4 m and which have a clearance of at least 2,3 m at more than 2/3 of their floor area.

Independent definition of full storeys

- Additionally, it is planned that also the upper limit for defining the scope of structural use can be exceeded under simplified conditions in order to enable a higher concentration of structural development (§ 17 Sec. 2 Federal Land Utilisation Ordinance (BauNVO)).

Simplification of concentration

- The planned Building Code (BauGB) amendment furthermore intends to extend the scope of action of municipalities about the contracts of development. Therefore, contracts regulating the development, i.e. land improvement contracts, contracts regulating follow-up costs or other forms of contracts shall in future generally apply as contracts as defined in § 11 Sec. 1 Sent. 2 No. 1 and 3 Building Code (BauGB).

Extending scope of action for contracts concerning the development

- Pursuant to § 179 Sec. 1 Sent 1 Building Code (BauGB) it shall in future no longer be a prerequisite for imposing a demolition order that a land-use plan exists. This is intended to enable a demolition order also to be applied in the inner area that is not part of a land-use plan.

Prerequisite for demolition order

Furthermore, exercising the legal right of first refusal of the municipality shall be reasonably extended in favour of a third party (§ 27 a Building Code (BauGB)).

A further aspect disappeared in the context of drafting the law. It was actually planned that the guideline to principally verify the protection of species in case of development and building plans of the inner city, had only to be verified in exceptional cases when pursuing important objectives relating to urban planning such as the creation of living space.

Practical considerations

It is planned that this law comes into force within this very year. It remains to be seen whether further amendments will occur in the course of the legislative process or whether this draft can come into force largely unaltered and in the afore-mentionend manner.

Dr. Steffen Schleiden

B. Commercial and Company Law

Private Limited Company (GmbH) managing director's contract of employment and General Equal Treatment Act

Age discrimination when extending a private limited company (GmbH) managing director's contract of employment

In its judgement of April 23, 2012 – II ZR 163/10 – the BGH ruled that the General Equal Treatment Act (AGG) also applies when extending the contract of employment of a managing director of a private limited company (GmbH). Age discrimination can, therefore, result in claims for damages and for compensation of the managing director.

In that case the plaintiff was employed as managing director of a hospital that was operated as a private limited company (GmbH). The contract of employment was concluded for a period of five years. One year prior to its expiry the supervisory board of the private limited company (GmbH) decided not to renew the contract of service with the plaintiff – who at the time of the expiry of the contract was 62 years old. Instead the position was occupied with a 41-year old competitor. In a newspaper interview the chairman of the supervisory board justified the decision that due to the "rebuilding phase of the health market" they had opted for an applicant who was able to "put the company in the wind in the long run". By means of the non-extension of the contract of employment, the plaintiff considered himself to have been discriminated against for reasons of age and brought an action seeking damages and compensation.

Application of § 6 Sec. 3 Equal Treatment Act (AGG) to contracts of managing directors at first-time appointment and when extending the contract of employment

While the regional court still had dismissed the case, the plaintiff won his case at the OLG and the BGH. For this the interpretation of § 6 Sec. 3 Equal Treatment Act (AGG) was decisive. Pursuant to the wording of § 6 Sec 3 Equal Treatment Act (AGG) the Equal Treatment Act (AGG) is applicable to the managing director when "access to employment" is concerned. The BGH has now ruled that "access to employment" does not only cover the first-time appointment to managing director, but also the decision to extend the contract. The statements in the media made by the chairman of the supervisory board provided sufficient evidence for age discrimination so that the reversal of the burden of proof of § 22 Equal Treatment Act (AGG) applied. The hospital was not able to provide any counterevidence.

Practical Considerations

The ruling provides legal certainty in that § 6 Sec. 3 Equal Treatment Act (AGG) also applies to renewals of contract for managing directors.

It should be noted, however, that a company is not necessarily bound to renew every contract of a managing director. Provided that the company can produce objective reasons, it is still free in its decision to renew a contract of a managing director or not. Moreover, the decision has shown that it is better to show restraint in making – particularly thoughtless – statements to a third party in order not to supply involuntarily the counter party with arguments.

Jörg Looman

C. Real Estate Law

Private Building Contract Law: Reimbursement of private expert opinions in a dispute concerning building law

Review of the expert opinion of a court-appointed expert by a private expert

Getting an expert opinion is everyday practice at courts in the course of lawsuits under building law. Subsequent to the provision of an expert opinion provided by a court-appointed expert a non-expert litigant often faces the problem that it can only review the assessment of the court-appointed expert by calling in its own expert ("private expert").

If the litigant wins the lawsuit, the question occurs in how far a right of reimbursement exists regarding the party's costs that accrued for the private expert.

Until recently the ruling of the OLG has been controversial as to whether the ability for reimbursement of the costs for the private expert requires that the private expert opinion has really influenced the court case.

With the ruling announced only recently (December 20, 2011 – VI ZB 17/11) the BGH has put an end to this legal uncertainty.

Assessing the relevancy ex ante – lack of expert knowledge for one's own submission

According to this it is crucial whether the costs were necessary for an adequate prosecution/defense or not, i.e. whether an understanding and economically reasonably thinking party might have considered the cost-triggering measure ex ante (i.e. prior to the date when the expert was commissioned) as relevant to the case. This is, according to the BGH particularly the case if a party due to a lack of expert knowledge is not in a position to make an appropriate submission without getting private expert opinion. This also applies to those cases in which a party is not in a position without getting an expert opinion to challenge a disadvantageous expert opinion of a court-appointed expert.

Practical considerations
No subsequent (ex post) assessment concerning the necessity of a private expert opinion

Even if it turns out ex post (i.e. from the retrospective) that the private expert opinion has not influenced the lawsuit at all, it does not change anything about the reimbursement of costs for a private expert seen necessary from an ex ante perspective.

Ralf-Thomas Wittmann

D. Labour Law

I. No maximum number in case of so-called repeated fixed-term contracts of employment ("Kettenbefristungen")

With its judgement of January 26, 2012 – C-586/10 – the EuGH ruled that several successive limitations of employment contracts (so-called "repeated fixed-term contracts of employment" ("Kettenbefristungen")) are permitted provided that the employer can provide an objective reason for each limitation.

13 fixed-term contracts of employment within 11 years

In the case underlying the ruling the plaintiff was employed by the defendant on the basis of 13 fixed-term contracts of employment from 1996 to 2007. In doing so, she acted in place of different employees respectively who were on parental or special leave. When the plaintiff did not receive a subsequent contract in December 2007 she sued for declaration in that the last limitation was invalid so that the contract of employment continued to be valid without limitation. She referred to the fact that so many limitations could no longer be considered

"a temporary" need, but that in truth there had been a permanent need. Her action was unsuccessful both at the labour court as well as at the regional labour court.

No rigid maximum number of limitations

Upon submission of the BAG the EuGH has now ruled that a rigid maximum number of limitations does not exist regarding § 14 Sec. 1 S. 2 No. 3 Law on Part-Time Work and Fixed-Term Contracts (TzBfG). In the event of repeated fixed-term contracts of employment ("Kettenbefristungen) it is only relevant whether there was a temporary need for representation in each individual fixed-term contract of employment, because, for example, another employee is on parental leave. In principle, the employer is free to conclude a permanent contract of employment because he has a regular need for representations or to arrange a fixed-term contract of employment for each individual case of representation. At the same time, however, the EuGH has also stated that the courts have to consider in their ruling all circumstances of each individual case in order to avoid abuse of the limitation regulations. These circumstances also imply the time period as well as the number of limitations.

Practical Considerations
Case-by-case review concerning abuse of law

Fortunately, the EuGH made it clear that there are no strict specifications for repeated fixed-term contracts of employment ("Kettenbefristungen"). Since, however, each individual case matters, it has to be precisely verified respectively whether there is, in fact, still a temporary need or whether this chain contract of employment is considered an abuse of law. It remains to be seen, how the BAG to which the EuGH has referred the case now rules. The longer and more multiple such a repeated fixed-term contract of employment ("Kettenbefristung") is, the higher the risk that the BAG confirms an abuse of law. In order to avoid an action against fixed-term employment contracts pursuant to § 16 Law on Part-Time Work and Fixed-Term Contracts (TzBfG), it is always recommendable, therefore, to diligently review all circumstances.

Jörg Looman

II. Legally valid formulation in employer's references

"got to know"

In its judgement of November 15, 2011 – 9 AZR 386/10 – the BAG ruled that the formulation "got to know" is a legally valid formulation in employer's references.

Reference with final grade "Good"

In the underlying case, the employer issued a reference for the former employee with the final grade "good" and, in doing so, used the following formulation amongst others: "We got to know Mr. K. as a very interested and highly motivated member of staff who always demonstrated a high degree of commitment. Mr. K. was always prepared to commit himself to matters of the company even beyond the normal working time. At all times, he accomplished his tasks to our full satisfaction."

According to the employee, the formulation "got to know" has the contrary meaning of what has been said, because normally this formulation suggests that an employee does not possess specifically this ability.

After the plaintiff had failed with his action for correcting the employer's reference already at the lower courts, his appeal before the BAG remained unsuccessful, too.

In its judgement the BAG stated that no general shift in meaning has developed according to which "got to know" always includes an encoded – negative – message. The formulation used is, in truth, neutral. A formulation should not be considered in isolation in the employer's reference, but has to be read within the overall context of the entire reference. Due to the all in all very positive formulations in the employer's reference the formulation used has to be deemed positive.

"GOT TO KNOW " NO ENCODED NEGATIVE MESSAGE – THE CONTEXT OF THE ENTIRE REFERENCE IS RELEVANT

Pursuant to § 109 Sec. 1 Trade Regulation Act (GewO) the employer undertakes to issue an employer's reference. Even if he is entitled to a certain freedom of assessment when formulating the employer's reference, he has, however, to pay attention to the principles of reference truth and clarity pursuant to § 109 Sec. 2 Trade Regulation Act (GwO). This case once again clearly reveals that due to the particularities of the language of references frequently denominated as a "secret code", careful formulations should be observed, thus avoiding predominantly unintended devaluations in the employer's reference. In doing so, nuances often matter.

PRACTICAL CONSIDERATIONS

JÖRG LOOMAN

III. CHRISTMAS BONUS – CAVEAT OF THE EXISTENCE OF A CONTINUED CONTRACT OF EMPLOYMENT

In its judgement of January 18, 2012 (10 AZR 667/10) the BAG ruled about a clause in the contract of employment, which made a bonus payment dependent on the continued existence of employment on the date of payment.

The contract of employment provided a Christmas bonus of 1,900.00 EUR for November. Additionally, the contract of employment included the following clause:

"The entitlement to a bonus payment is excluded if the employment is in a state of termination at the time of the payment."

CONDITIONAL BONUS PAYMENT IN THE EVENT OF AN ABSENT CORRELATION TO WORK RENDERED

The BAG ruled that a bonus payment could be made dependent on the continued existence of an employment at the date of payment, if the bonus payment is not intended as remuneration for work rendered. In the specific case the BAG ruled by way of interpretation that the bonus payment provided in the contract of employment ought not to serve the purpose of remunerating work performance rendered. The conditions of payment arising from the contract would not allow an intelligent contracting partner to doubt that the Christmas bonus is deemed a contribution to Christmas and, additionally, honoring company loyalty. The BAG, however, did not see an additional remuneration for work in the bonus payment.

NO INADEQUATE DISCRIMINATION OR VIOLATION AGAINST THE REQUIREMENT OF TRANSPARENCY

In the clause making the claim to a bonus payment dependent on the continuation of employment at the date of the payment, the BGH did not recognize an inadequate discrimination or violation of the requirement of transparency.

PRACTICAL CONSIDERATIONS
FORMULATION IN THE CONTRACT OF EMPLOYMENT DECISIVE

Bonus payments are often part of the contract of employment. To the same extent parties frequently disagree after a termination or dissolution of the employment contract on an existing – possibly even only a proportionate – entitlement to bonus payments. Then the courts are needed to judge about the legal nature of the bonus payment. Such legal disputes can normally be avoided if the contract of employment provides a clear regulation whether the bonus payment is intended to remunerate work rendered or whether the employer wants

to honor other purposes with the bonus payment such as, for example, company loyalty. Explicit regulations facilitate the processing of contracts later on.

Johanna Westermeyer

E. Commercial Landlord and Tenant Law

I. Non-Competition Clause: Optics and hearing aid business versus ear-nose-throat (ENT) surgery

Legally valid shorter supply route between surgery and hearing aid business to patients

In its judgement of January 11, 2012 the BGH (XII ZR 40/10) ruled that an optics and hearing aid business is not entitled to claims against the landlord for a violation of the non-competition clause, if an ENT surgery in the same building directly sells hearing aids to patients within the so-called "shorter supply route".

In the case underlying the judgement the tenant concluded a lease with the landlady about business premises in a "medical centre for doctors". Rental purpose is the operation of an optics und hearing aid business. In the lease the two parties agreed the following non-competition clause: "Protection against competition for the tenant shall be agreed to the following extent: no further optician's and hearing aid business…"

When concluding the lease, the tenant was aware that an ENT-surgery was already based in the "medical centre for doctors". At first the tenant operated an optics business and she then extended her business by a hearing aid department. Shortly after that the ENT-surgery started to provide hearing aids to patients. Consequently, the tenant reduced the rent because of a violation of the non-competition clause and she asserted claims for damages against the landlord for loss of profit.

Protection by non-competition clause not in case of an overlap in the "range of products" of another business

The BGH negates a violation of the landlord against the non-competition clause. According to the BGH the non-competition clause includes that it is prohibited for the landlord to rent out premises to a third party for operating an optics and hearing aid business. This results from the wording of the non-competition clause. This clause protects the tenant (only) against direct competition from a similar type of business, not, however, against some overlap in the "range of products" by a surgery. According the BGH it is decisive that the ENT-surgery does not operate a hearing aid business and does neither practise the professional activity of an hearing aid technician, but has rather – in a legally permissible manner – extended the medical services by a "shorter supply route" to the patients.

Supplementing interpretation of contract only in the event of "unplanned imcompleteness of the regulation in the lease"

In fact, another result would not arise even in the context of a supplementing interpretation of contract. A supplementing interpretation of contract could be taken into account in the event of an unplanned incompleteness of the regulation in the lease, which is missing. An incompleteness in the lease exists in so far as the parties of the lease did not have the possibility to consider the supply of patients with hearing aids by the ENT-surgery located in the same building when concluding the contract, because this possibility only followed the Health Service Reform Law of December 20, 1988 (§ 126 Social Code Book V (SGB V)). This incompleteness of the lease was, however, not unplanned. The tenant was aware when concluding the lease that an ENT-surgery was located in the "medical centre for doctors". She, therefore, had to anticipate that (in future) overlaps between her activity and that of the surgery might occur.

Practical Considerations
Questions of contract-immanent protection against competition – diligent drafting of contract

Duties of protection against competition in the commercial landlord and tenant law are not to be underestimated. Even if the parties do not expressly anchor protection against competition of the tenant in the lease, the tenant is entitled to a so-called contract-immanent protection against competition. Many landlords who believe they only owe protection against competition if expressly agreed in the lease overlook this. In the event that contracting parties of a lease expressly agree protection against competition, diligent formulations are necessary as reflected in the ruling of the BGH. In that case it would have made sense not to concentrate on the operation of a further optics and hearing aid business when formulating the non-competition clause, but the parties should have specifically listed the services for which the tenant should have been granted protection against competition (comp. OLG Brandenburg, judgement of August 10, 2007 – 3 U 133/06).

Dr. Rainer Burbulla

II. Building Permit Law North-Rhine Westphalia (NRW): Consideration of appropriate distances to incident-prone facilities in the proceedings of granting building permit

In its judgement of February 21, 2012 (Az.: 2 B 15/12) the OVG North-Rhine Westphalia ruled that a building permit for a kindergarten cannot be mandatorily denied if the appropriate distances pursuant to the Seveso II-Directive to incident-prone facilities are not complied with.

Building permit for kindergartens close to a chemical company

The case dealt with a building permit for a kindergarten planned to be built in direct proximity to a chemical company that was in the scope of application of the so-called Seveso II-Directive (Directive 82/96/EC). By way of interim legal protection the company affected turned against this building permit and introduced the justification that the building permit had to be necessarily denied because the appropriate distances to the chemical company would be undercut. In doing so, the company invoked a judgement of the EuGH of September 15, 2011 in which the Court ruled that even in proceedings on the granting of building permit the compliance with so-called appropriate distances have to be considered (comp. our Newsletter 4/2011, p. 11).

No mandatory denial in the absence of appropriate distance to incident-prone facilities
"Consideration" of the appropriate distances only in the proceedings on the granting of building permits

The competent Administrative Court (VG) Düsseldorf dismissed this application and justified this by stating that even if the appropriate distances are undercut a building permit cannot be mandatorily denied pursuant to the EuGH.

The OVG North-Rhine Westphalia confirmed this ruling with its decision. The EuGH made it clear that a building permit cannot necessarily be denied if the appropriate distances to incident-prone facilities are not complied with. In fact, compliance with appropriate distances only has to be considered in the context of the decision. Apart from that, the type of the respective hazardous substances, the probability of a serious accident as well as the consequences of a potential accident for human health and the environment, the type of activity of the new establishment or the intensity of its public use and the ease with which emergency services can intervene in case of an accident are to be considered, too.

In this ruling the OVG left it open how attention to appropriate distances has to be paid in legal terms. Thus, consideration of appropriate distances can be given either via the criterion of "ensuring healthy living and working conditions" as defined in § 34 Sec. 1 Sent. 2 Building Code (BauGB) or via the requirement to be considered as defined in § 15 Sec. 1 Federal

Land Utilisation Ordinance (BauNVO) and in the feature of "Insertion" in § 34 Sec. 1 Sent. 1 Building Code (BauGB). Pursuant to § 15 Sec. 1 Sent. 2 Federal Land Utilisation Ordinance (BauNVO) a project that is in principle admissible can, in fact, be inadmissible when exposed to unacceptable nuisance or disturbances.

Practical Considerations

With the ruling of the OVG North-Rhine Westphalia a first decision from a higher court is available concerning the question of how to fulfil the legal requirements of the EuGH for considering appropriate distances in the context of a proceeding on granting building permits. In fact, the EuGH left it to the member states how appropriate distances regulated in the Seveso II-Directive in the context of proceedings on granting building permit are to be considered in legal terms. The decision of the OVG North-Rhine Westphalia reveals two ways for doing this. It remains to be seen which of these two draft versions will prevail in the course of further jurisdiction.

Dr. Steffen Schleiden

F. Public Law

I. Planning Law: No errors of assessment when adopting the winning design of an urban design competition in the urban land-use planning – temporary legal protection

„Richard-Wagner-Museum Bayreuth"

The Bavarian VGH had to rule in a recent decision on the question whether it was an inadmissible preliminary commitment and thus an error of assessment in the land-use plan procedure if the winning design of an urban design competition was integrated into the urban land-use planning (Bauleitplanung) (ruling of January 12, 2012 – 2 NE 11.2623).

The Bavarian VGH denied this question. The subject was proceedings of temporary legal protection concerning the land-use plan (Bebauungsplan) "Richard Wagner Museum" of the city of Bayreuth. The land-use plan specifies an area of communal use "buildings and facilities for cultural use: here Richard Wagner Museum". Neighbours submitted an application for judicial review against this land-use plan and applied for the temporary suspension of the land-use plan, so that no building permit could be granted on the basis of the land-use plan as long as a final decision about the application for judicial review had not been made.

Temporary suspension only in the event of serious and irrefutable doubts about the lawfulness of the land-use plan

Even in the event of urban design competition the municipality's own planning decision is decisive

The summary proceedings remained unsuccessful. In fact, a suspension can only be regularly taken into consideration if serious and irrefutable doubts about the lawfulness of the land-use plan exist. In the present case this does not apply: Following the Bavarian Administrative Court (BayVGH), especially the fact that the land-use plan is based on the winning design of an urban design competition does not imply an inadmissible preliminary commitment and thus an error of assessment resulting in the ineffectiveness of the land-use plan (Bebauungsplan). The fact of the matter is that the city of Bayreuth has made its own planning decision and attributable to it that meets the demands of weighing up the pros and cons concerning urban land-use planning.

Therefore a building permit can be granted on the basis of the land-use plan in spite of the pending judicial review proceedings.

Practical Considerations
Protection for urban design competitions

It would result in lost efforts of many protagonists, let alone the end to the implementation of urban design competitions that frequently trigger prestigious projects, if the winning design selected after a lengthy procedure could not form the basis of a land-use plan. As long as the land-use plan proceeding is conducted properly and fairly in terms of weighing up pros and cons and as long as the planning municipality makes its own decision, there are no concerns, as clarified by the Bavarian VGH.

Isabel Gundlach

II. Planning Law: Binding target quality of the prohibition of agglomeration – Implementation of the duty to adjust urban land-use plans to the objectives of regional planning by means of the municipal supervisory authority

Adjusting a land-use plan to the State Development Plan (LEP)

The Higher Adminstrative (OVG) Koblenz has stated in a recent judgement the obligation of the city of Mendig to adjust its land-use plan "Industrial Park at the A 61/ B 226" to the State Development Plan (LEP) of Rhineland-Palatinate and at the same time the binding target quality of the prohibition of agglomeration included in the State Development Plan (judgement of March 23, 2012, 2 A 11176/11 OVG). The State Development Plan intends in this respect to counteract the agglomerated formation of non-large-scale retail businesses with an assortment relevant to the inner city outside the areas integrated into urban planning by limiting the sales area in urban land-use planning.

Evading retail-trade-related objectives of the State Development Plan by non-adjusting the land-use plan

In August 2010 the Federal State Planning Authority prompted the city of Mendig to pass a resolution for elaborating a third amendment to the land-use plan and, accompanying it, to enforce a development freeze. This was occasioned by eight preliminary building applications for establishing a restaurant business as well as retail trade businesses for textiles, sports articles and shoes with a sales area of altogether 6,249 m². The applicable land-use plan specifying an industrial park without any further limitation of use for retail businesses permitted these establishments. The Federal State Planning Authority deemed these establishments as an unacceptable evasion of the retail-trade-related objectives of the State Development Programme (LEP) und pointed out to the city of Mendig that it was obliged to adjust the applicable land-use plan to the objectives of regional development. At first, the city of Mendig seemed to have followed this with the decision to draw up the land-use plan; however, the city of Mendig annulled the decisions again only two months later. The municipal supervisory authority intervened.

Prohibition of agglomeration as binding objective of regional planning

An action of the city of Mendig filed against this remained unsuccessful before the Administrative Court (VG) as well as before the OVG Koblenz. The concerns of the city of Mendig raised against the binding target quality of the prohibition of agglomeration had no effect; it is about a binding objective of regional planning to be strictly observed in the context of urban land-use planning. The OVG stated further that the limitation of the municipal planning competence brought about by the prohibition of agglomeration would be justified, because it serves the protection of supralocal interests of higher importance. According to the OVG Koblenz, not only retail trade mega-projects in the form of large-scale retail businesses or shopping centres, but also agglomerations of several non-large-scale retail businesses could have an impact on spatial structures and thus endangering the central local arrangement, so that it is justified to subject them to the special legal regime of regional planning. The applicable land-use plan of the city of Mendig contradicts these binding objectives because it

enables the establishment of agglomerations; it has, thus, to be adjusted to the objectives of regional planning. On that basis, the intervention of the municipal supervisory authority against the city of Mendig was lawful, as declared by the OVG Koblenz.

Practical Considerations

Effects of regional planning even in case of non-large-scale retail trade outside integrated supply areas

It becomes apparent that guidelines concerning regional planning take more and more into account the concentration of non-large-scale retail businesses. In this respect, the BVerwG has recently also confirmed that a prohibition of agglomeration can represent a binding objective of regional development (judgement of November 10, 2011 – 4 CN 9.10). The development of retail trade locations outside integrated supply areas becomes even more difficult.

Isabel Gundlach

III. Planning Law: Ban on night flights at Frankfurt Airport – Invalidity of a planning approval decision

In its judgement of April 4, 2012 (Az.: 4 C 8/09) the BVerwG confirmed the ruling of the Hessian Administrative Court concerning the ban on night flights at Frankfurt Airport.

Planning approval procedure subsequent to mediation procedure

In the context of expanding Frankfurt Airport at first a mediation procedure took place in the run-up to the planning approval procedure in which both proponents and opponents of the expansion participated. This mediation came amongst others to the conclusion that no flights are allowed to take place from 11 pm to 5 am (so-called mediation night). This mediation result was also made an integrated part of the State Development Plan (LEP) of the federal state of Hesse. In the context of the subsequent planning approval procedure for the expansion of Frankfurt Airport 17 flights had been permitted within the mediation night. Furthermore, 150 flight movements within the so-called nightly marginal time between 10 pm and 11 pm and between 5 am and 6 am had been permitted.

Requirement to weigh up the pros and cons between the interests of the population (aircraft noise at night) and the airport operators

The VGH Kassel has annulled this planning approval decision with respect to the 17 nighttime flight movements permitted due to actions filed by neighbouring municipalities and local residents affected. The VGH justifies this by stating that the admissibility of night flights has to be decided in the context of weighing up the pros and cons. In doing so, the interest of the population in their protection against nighttime aircraft noise has to be weighed against the interest of the airport operator to implement night flights. Due to the fact that the so-called mediation night was made an integrated part of the State Development Plan (LEP), the interest of the population to be protected against nighttime aircraft noise is given priority in the course of weighing up the pros and cons.
Therefore, the planning approval decision is faulty in terms of the consideration given regarding the admissibility of night flights. The VGH has thus annulled the planning approval decision.

Reducing the scope of discretion to zero upon consideration subsequent to mediation

The BVerwG confirmed this decision with its ruling. In doing so, it has also explained that by integrating the mediation result into the land-use plan the scope for action in terms of permitting night flights has been reduced to “zero”. At the same time, the court reduced the admissibility of flights in the so-called nightly marginal times from 150 flight movements to 133 flight movements.

Practical Considerations
Conflict between mediation and planning freedom

This ruling reveals which far-reaching results a preliminary mediation procedure can have for the subsequent planning approval procedure. On the basis of this judgement it remains questionable whether in the future mediation will be implemented in the event of controversial mega-projects. In fact, mediation can have the effect that conflicts will be already pacified at an early stage thus avoiding lengthy litigation. At the same, mediation can also sustainably restrict the planning freedom of the competent authority.

Dr. Steffen Schleiden

IV. Planning Law: Requirements for a local supply centre / Requirements concerning the planning objective for developing a central supply area

In a recent ruling (judgement of Februrary 15, 2012 – 10 D 32/11.NE) the OVG Münster has negatively delimited the requirements set to the existence of a local supply centre in the sense of a central supply area.

Subject matter of the ruling is a grown supply centre the municipality has specified within the context of its retail concept as a central supply area ("local supply centre"). For the purpose of its protection the municipality had drawn up a land-use plan in an area located 750 m further away with arrangements pursuant to § 9 Sec. 2 a Building Code (BauGB). This regulation which was introduced in 2007 enables the municipalities to implement negative planning by means of a non-qualified binding land-use plan for the protection of its central supply areas and to exclude land-use types (for example, also retail trade with certain product ranges) in the respective land-use plan area in order to maintain or develop central supply areas.

The OVG Münster noted that the supply area identified by the municipality as protection-worthy was no central supply area in the sense of the regulation. Apart from a 440 m² large grocery discounter, there is a flower shop, a kiosk, a travel agency, a post office, a church, the kindergarten of the district, a butcher's shop, several doctors and additional educational supply, a tanning studio, a games arcade, a hairdresser as well as several restaurant businesses with diversified characteristics. According to the OVG Münster this does not meet the demands of a local supply centre which the retail expert opinion of the municipality itself stipulated as a minimum configuration.

Even the alternative justification of being able to develop the respective area to a central supply area did not convince the OVG Münster. A comprehensible conception of planning has to be submitted, i.e. an explanation and examination have to be provided until the resolution adopting the land-use plan pursuant to § 9 Sec. 2 a Building Code (BauGB) which is intended to protect the supply area to be developed.

Practical Considerations

The OVG Münster has considerably raised the prerequisites for accepting a central supply area. This does not make it easier for municipalities to protect their grown, but weakly marked centres with the tools provided by the Building Code (BauGB). If a municipality intends to develop a central supply area, it has to have already taken specific steps in order to be able to make use of this planning alternative of the non-qualified binding land-use plan pursuant to § 9 Sec. 2a Building Code (BauGB).

Isabel Gundlach

G. Conducting Legal Proceedings

I. Rental claims in legal proceedings based on documentary evidence

Non-admissibility of proceedings based on documentary evidence in the event of missing documentary proof when handing over the rented object according to contract
No acceptance of the rented object as fulfilment in the event of specific reservations regarding defects on hand-over

In a recently published judgement of March 30, 2012 – 1 U 77/11 – the OLG Cologne ruled in the case "Exhibition Hall Cologne" that the legal action for rent payment taken by the landlord is non-admissible in a lawsuit based on documentary evidence, if the landlord cannot prove the acceptance of the rented object as fulfilment by means of documents.

In the case underlying the judgement the landlord filed claims against the tenant, the city of Cologne, for unpaid rent as well as for compensation for use in a lawsuit based on documentary evidence. The city of Cologne invoked a right of retention and reduction because of defects at the rented object. The alleged defects have already existed at the moment of handing over the object, however, they only became obvious at a later stage during a subsequently carried out performance measurement of the faulty installations (heating and cooling systems) at full-load operation. At handing over the city of Cologne reserved all claims regarding "all deviations from the performances of the heating and cooling systems owed by the landlord pursuant to the lease and which become obvious in the course of a technical check in full-load operation at a later stage".

The OLG Cologne has dismissed the claim in this lawsuit based on documentary evidence as inadmissible. According to the senate, the city of Cologne did not accept the rental object as fulfilment at any point in time, which would have led to a reversal of the burden of proof. The senate bases non-fulfilment on the fact that the city of Cologne had stated repeated and specific reservations against the fulfilment by the landlord agreed upon by contract with respect to the heating and cooling system. Above all, by means of the stated reservation subject to review the city of Cologne made it sufficiently clear at handing over that it did not accept the cooling system as fulfilment and that it, first of all, intended to carry out further technical checks under full-load operation. Thus, the landlord has not provided the evidence of fulfilment according to contract by means of evidence – documents – admitted for a lawsuit subject to documentary evidence.

Practical Considerations: Concept of acceptance as fulfilment – difference between general reservation and specific reservation based on defects

Jurisdiction has established that the landlord can even assert rental claims in a lawsuit based on documentary evidence if the tenant invokes a rent reduction or a right of retention (comp. BGH, judgement of July 8, 2009 – VIII ZR 200/08). In the event that the tenant asserts initial defects, i.e. those that are already present at handing over, the admissibility of a lawsuit based on documentary evidence requires that the tenant has accepted the rental object assigned for use by the landlord without notifying the defects purported at a lager stage provided that this is indisputable or can be proven by the landlord on the basis of documents. A general reservation of the tenant at handing over does not exclude acceptance as fulfilment. It is rather necessary that the tenant states reservations regarding specific defects at handing over. In this case, handing over is indisputable or can only be proven by the landlord through documents if these specify the subsequent correction of defects.

Dr. Rainer Burbulla

II. Claims of the landlord in the lawsuit subject to documentary evidence – Reversal of the burden of proof for acceptance as fulfilment in case of unconditional rental payment

Burden of proof for handing over according to contract principally with the landlord

In its judgement of November 22, 2011 – 24 U 2/11 – the OLG Düsseldorf ruled that the landlord carries the burden of proof for the handing over (according to contract) of the rental object. A reversal of the burden of interpretation and proof can occur if the tenant has unconditionally payed the rent in full for a longer period of time.

In the case underlying the judgement of the OLG Düsseldorf the landlady rented out commercial halls to a tenant. At first, the tenant payed the rent in full and without reservation. After the tenant stopped the payment, the landlady claimed the payment of rent arrears and service charge advance payments in a lawsuit subject to documentary evidence.

The plaintiff asserted, amongst others, in the lawsuit subject to documentary evidence that the rental object was not handed over to her at any point in time.

Unconditional payment of rent for a longer period as reversal of the burden of proof – consequence for the lawsuit subject to documentary evidence

The OLG Düsseldorf considered the appeal of the tenant essentially to be unfounded. According to the senate the tenant had unconditionally accepted the rental object as fulfilment. In fact, the landlady carries the burden of interpretation and proof for handing over (according to contract) the rental object. It is only subsequent to the handing over that the tenant is subject to the burden of interpretation and proof when claiming defects at the rental object. However, in this case it is decisive that the tenant had unconditionally payed the rent for a longer period proven by the landlady by providing bank account statements as admissible evidence in the lawsuit based on documentary evidence. This resulted in the reversal of burden of interpretation and evidence. The consequence of this is that the tenant should have proven in more detail and with evidence in the lawsuit subject to documentary evidence to have never come into the possession of the rental object. The tenant had failed to do this.

Practical Considerations

Paying the rent in full can suggest that the tenant accepted the performance of the landlady – handing over of the rental object – as fulfilment (comp. BGH, judgement of July 8, 2009 – VIII ZR 200/08). The indicative effect, however, does not apply if the tenant notifies specific defects and makes them the subject of specific reservations (comp. OLG Cologne, in this issue, page 16).

Dr. Rainer Burbulla

Events

August 27 – 30 2012

IIR Intensive Course
in Berg am Starnberger See, Seehotel Leonie
Legal Knowledge Real Estate
Speaker Rechtsanwalt Dr. Rainer Burbulla,
Partner, Grooterhorst & Partner Rechtsanwälte

June 29 2012

ZfIR Journal for Real Estate Law Annual Meeting
in Frankfurt
Current Legal Developments in Commercial Landlord and Tenant Law
Speaker Rechtsanwalt Dr. Rainer Burbulla,
Partner, Grooterhorst & Partner Rechtsanwälte

June 20 2012

Trade Dialogue
in Hannover, Nord/LB Forum, Friedrichswall 10
Favourite Commercial Real Estate: Locations, Assortments
and Concepts in a Competition for Investors and Clients
Talk: Which concepts at which locations?
Especially current news of regional planning
Speaker Dr. Johannes Grooterhorst,
Partner, Grooterhorst& Partner Rechtsanwälte

June 14 2012

IREBS Immobilienakademie GmbH
in Eltville, Kloster Eberbach
Intensive Studies Commercial Real Estate Basics Landlord and Tenant Law for Commercial Real Estate
Speaker Rechtsanwalt Dr. Rainer Burbulla,
Partner, Grooterhorst & Partner Rechtsanwälte

May 09 2012

Crenet Spring Conference 2012
in Bremen
General Legal Conditions when Revitalizing Industrial Areas
Speaker Dr. Johannes Grooterhorst,
Partner, Grooterhorst & Partner Rechtsanwälte

In case you are interested in participating in one of the events, please contact our speakers: www.grooterhorst.de

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