



# Commercial Property Update

## Issue 5

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### VAT on property: new regime

A complete new VAT and property regime comes into force on 1 July 2008 which will impact on all commercial property transactions. The VAT treatment of residential properties broadly remains unchanged in that new homes remain taxable at 13.5% and there is no option to tax residential lettings.

The detail is set out in the Finance Bill 2008 which is due to become law shortly.

The main changes are as follows:

- VAT @ 13.5% will be charged on the sale of “new” properties. New means less than five years old, or less than two years old if the property is being disposed of a second (or more) time since completion. The VAT treatment of undeveloped land is not affected.
- The sales of “old” properties would be exempt from VAT, but an option to tax such supplies @ 13.5% will be permitted.
- Most leases will be exempt from VAT. This is a major change as the distinction between short-term leases and long leases is removed. There will be an option available to the landlord (on a letting by letting basis) to tax rents at 21% and thereby avoid the loss of deductibility of VAT input credits but not where the landlord and tenant are connected and the activities of the tenant are less than 90% taxable.
- A “capital goods scheme” will be introduced to track the use to which a property is put on an annual basis (in terms of taxable or exempt use) over a 20 year period. This will be a complicated procedure which will calculate an adjustment of any initial VAT deduction where there is change in the use of the property.

### Landlord and tenant: renewal rights

**Background.** The Landlord and Tenant (Amendment) Act 1980 as amended by the Landlord and Tenant (Amendment) Act 1994 broadly provides for a statutory right to a new tenancy where a tenant occupies a premises for any term in excess of five years. The 1980 Act provided that any provision contracting out of the Act is void. The 1994 Act amended the position and allowed for the renunciation of statutory renewal rights by office tenants.

**Changes.** The Civil Law (Miscellaneous Provisions) Bill 2006 which has just been passed by the Dail provides that any tenant (regardless of user) can contract out of its renewal rights under the Landlord and Tenant Acts. Therefore this option which was only available to office tenants will now be available to all tenants. This will mean that the standard four year nine month tenancies will fall away in use and parties will enter into terms that reflect commercial realities.

In order to contract out, the tenant must receive independent legal advice in relation to the renunciation and execute a formal renunciation.

The Bill is expected to be enacted shortly but will be brought into force by statutory instrument so it is not yet clear when this opt out provision will be available.



## Energy rating of commercial buildings

Currently all new homes for which planning permission is applied for on or after 1 January 2007 must have a Building Energy Rating (BER) Certificate before they can be offered for sale or for rent. The BER Certificate is an energy label for buildings similar to that used on electrical appliances. The scale runs from red to green with a score in the red zone representing homes that consume the most energy.

From 1 July 2008 the European Communities (Energy Performance of Buildings) Regulations 2006 (which implements the EU Energy Performance of Buildings Directive 2002/91/EC) will also apply to new non-domestic buildings for which planning permission is applied.

The Regulations will apply to all buildings, new or otherwise, when offered for sale or for letting, after 1 January 2009. A limited number of building categories are exempt from the Regulations, for example, protected structures.

## Estoppel and rescission of a contract

**Case: Courtney v McCarthy [2007] IESC 58**

**Background.** Proprietary estoppel can create or affect property rights. It arises from the courts' equitable jurisdiction and occurs when the assertion of strict legal rights is unconscionable. An equity will arise when:

- The plaintiff is induced, encouraged or allowed to believe that it has or will have some benefit over the landowner's land.
- The plaintiff acts to its detriment by relying on this belief, to the knowledge of the landowner.
- The landowner then refuses to allow the plaintiff the benefit expected.

Specific performance is a court remedy that compels one party to comply with the conditions of a contract existing between both parties.

**Facts.** The vendor instituted proceedings to establish that she had lawfully rescinded an agreement to sell development land. After the auction of the land in question there was a delay in paying the deposit and the purchaser sought to vary the terms of the contract and kept delaying completion. The vendor finally wrote to the purchaser to say she was rescinding the agreement and that the deposit was forfeited. Subsequently the vendor agreed to complete the transaction on a particular date which the purchaser was unable to do despite drawing down the necessary funds. The completion date was changed to the following day but due to various miscommunications the vendor then decided to withdraw. The purchaser sought specific performance of the agreement. The purchaser had attempted to avoid paying interest in the interim. The purchaser's specific performance claim arose from an alleged estoppel which arose after purported rescission.

**Decision.** The Supreme Court held the rescission by the vendor appeared to be lawful but an estoppel in favour of the purchaser had arisen. The vendor was bound by the promise she made to extend the sale closing and could not assert rescission against the purchaser if the purchaser was willing to perform the original contract on the agreed date. The purchaser's appeal was allowed and she was granted specific performance of the contract. The negligent behaviour of the purchaser and *mala fides* displayed meant that she had to pay the full contractual interest owing to the vendor.

## Law reform: proposals for the future

The Law Reform Commission's Third Programme of Law Reform 2008 – 2014 was launched on 17 December 2007. It was prepared following consultation with the Attorney General, members of the public and public representatives, Government Departments and non-governmental voluntary and community organisations. 37 areas of law have been identified for review including debt enforcement and securing interests over personal property; trust law and the settled land acts; the eConveyancing road map; further statutory codification of land law; and damages in contract and tort law. For more detail see <http://www.lawreform.ie/3rd%20Prof.pdf>



## Draft guidelines on sustainable residential development

On 10 February 2008 the Government launched new draft planning guidelines on sustainable residential development in urban areas including small towns and villages and an urban design manual for consultation. The guidelines will replace the Residential Development Guidelines 1999 and aim to:

- Set out stronger planning requirements to facilitate the development of sustainable communities through strengthening planning and the provision of necessary supporting services and amenities;
- Help achieve the most efficient use of urban land through housing densities that are appropriate to the location involved and availability of supporting services and infrastructure, particularly transport; and
- Set high standards in terms of space and facilities.

The urban design manual illustrates best practice in implementing sustainable development policies and urban design principles as set out in the draft guidelines. It sets out 12 criteria which should be used both in pre-planning in the application consultations and in assessing individual planning applications.

The draft guidelines and the urban design manual can be accessed on [www.environ.ie](http://www.environ.ie). The closing date for comments is 6 May 2008.

## Building Control Act 2007: Commencement Order

On 3 March 2008 the first phase of the Building Control Act 2007 was commenced. From this date the enforcement powers of local building control authorities were considerably strengthened as follows:

- The maximum penalties for breaches of national Building Regulations were increased from £800 (punts) to €5,000 on summary conviction; with fines for ongoing offences from £150 (punts) to €500 per day after summary conviction; and from £10,000 (punts) to €50,000 on conviction on indictment.
- An option for authorities to bring summary prosecution for all building code offences in the District Court was introduced (this is instead of prosecution on indictment by the Director of Public Prosecutions in the Circuit Court).
- The recoupment of costs incurred by building control authorities in taking enforcement action for breaches of the building code and to obtain the benefit of fines resulting from prosecutions brought by them is now allowed.
- The rights of building control authorities to seek a High Court or Circuit Court order to stop work on buildings where there is non-compliance with the building code were widened.

**If you have any queries on the contents of this update or if you require advice on any aspect of commercial property, please contact Ainsley Heffernan, Head of the Commercial Property Department.**

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