

Real Estate Road Map Austria

Your guide to real estate development in Austria

Introduction

Real estate projects are as diverse as the areas of law that may be involved. The interdisciplinary structure of our Property & Procurement department enables us to offer top-tier consulting services over the entire life cycle of your real estate project.

Whether you are acquiring specific projects or entire real estate portfolios, we are on hand to provide advice every step of the way, from acquisition to construction and development of a project, and its subsequent sale or management. We will also help you optimise your tax burden at each of these stages.

This road map gives you a brief overview of what to consider from a legal perspective to ensure the success of your real estate development project in Austria. We can draw on many years of experience in supporting a wide range of real estate projects, and we would be happy to advise you or your company on any questions that may arise in this context.

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Fundamentals of civil law and tax law



Construction contract law

If a real estate project is developed by the developer itself and appropriate companies are commissioned to build the structure, this raises specific questions regarding construction contracts and management. Once the **basic contract type** has been chosen (general contractor, management contractor, EPC contractor, EPCM contractor, CMA), the specific **pricing** (force account, unit price or lump-sum price) and the **variability of the price** (fixed price, price escalation, indexation) must be clarified in advance of the project launch, among other things. Changes in performance are commonplace in construction projects, making it all the more important that contracts include the possibility of effecting such **performance changes** without then being confronted with unjustified claims for additional costs. Ideally, a construction contract will allow the performance of construction work to be optimised while maintaining quality (**value engineering**).

To avoid conflicts between contracts, the entire set of contracts governing the execution of the work must also be carefully coordinated; for instance, the planner contract must be coordinated with the general contractor agreement and any subcontracts. The basis for effective **claim and anti-claim management** during construction is also defined at the contract drafting stage.



Commonhold (condominium)

Commonhold (condominium) combines tenancy in common of a property with the right in rem to exclusive use and disposition of an individual unit of that property (e.g. a flat). As a rule, commonhold is established by being recorded in the land register on the basis of a commonhold agreement and a utility appraisal (known as “**Parifizierung**” or partitioning, i.e. appraisal and subsequent subdivision of a building into smaller units for sale). Whether or not it makes sense to establish commonhold in a real estate project depends primarily on how it is **intended to be used and sold**. Housing projects are usually sold in individual subdivisions, so establishing commonhold makes sense for such projects. Commercial real estate, on the other hand, is often sold as a whole or retained for lease, so that establishing commonhold is not strictly necessary.

Since subsequent amendments to a commonhold agreement are often thwarted by failure to achieve the necessary consensus, drafting such agreements requires particular care if the project developer wants to remain invested. **Close coordination** between planners, utility appraisers, and contract drafters is very important in this respect.



Leasehold under the Austrian Leasehold Act

A leasehold under the Austrian Leasehold Act (Baurechtsgesetz, BauRG) is the real, transferable and heritable right to a built structure on or below **land owned by another**. It is usually granted for a consideration; a common form is payment of regular ground rent. Leaseholds can be granted for periods of **between 10 and 100 years** and are recorded in the land register, where leasehold subdivisions can also be established. Leaseholds are becoming increasingly popular with investors for tax reasons and with users due to the lower cost of acquisition. However, it should always be clarified what will happen to the built structure when the **leasehold expires**. The Austrian Leasehold Act stipulates that the building reverts to the owner(s) of the land, who must pay compensation in the amount of one quarter of the current construction value. This provision is non-mandatory, however, and often not applicable, which means that there is some contractual leeway in this respect. Reversion to the landowner without compensation is also a possibility.



Developer Contracts Act

The Developer Contracts Act (Bau trägervertragsgesetz, BTVG) is mandatorily applicable whenever buyers are required to pay **a certain amount per square metre of useful area** to the developer or a third party prior to completion of a structure. This covers not only the acquisition of property, but also tenancy/leases, leaseholds, commercial leasing, and other rights of use – both for new construction and in case of “complete renovation”. The BTVG stipulates what a contract must include, as well as security models and rights of withdrawal to protect buyers. Payments to the developer are made according to the **progress of construction work**, which is monitored by trustees. Trustees also have further extensive duties of care under developer contracts. If purchase price instalments are paid early, they must be set aside and interest accrued on them.

The developer is liable for interest on amounts paid ahead of schedule, irrespective of the payee, which is why the provisions of the BTVG **must be observed with particular care** when making payments.



Tenancy law

Austrian tenancy law is characterised by a distinction between the lease of residential or commercial property under the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, **ABGB**) and under the Austrian Tenancy Act (Mietrechtsgesetz, **MRG**). Whereas considerable discretion can be exercised when drafting lease agreements for leases under the ABGB, the MRG is characterized by strict protective rules in favour of lessees, and deviation from these rules to the lessees' detriment is not admissible.

Full exemption from MRG

Short-term leases, buildings with no more than two residential or commercial units, staff residences, second homes, care home leases, etc. (section 1(2) MRG), lease of business premises ("Unternehmenspacht"), ground leases.

Partial application of MRG

Building permit issued after 8 May 1945 (if commonhold was established) or after 30 June 1953 (new construction without public subsidies, "Neubau"), loft conversions (after 31 December 2001), building extensions (after 30 September 2006) (section 1(4) MRG).

Full application of MRG

Essentially any residential lease or lease of commercial space ("Geschäftsraummiete"), unless exceptions apply; in particular, a building permit issued before 8 May 1945 (if commonhold was established) or before 30 June 1953 (non-partitioned old tenement, "Altbau"), publicly subsidised new construction.

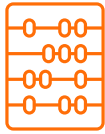
The question of which legal provisions apply to a lease can sometimes be difficult to answer, but it is relevant for a wide range of matters (e.g. requirements of form, calculating rent, rent caps, transferring contractual relationships, maintenance, termination options, etc.).



ESG – Environmental, Social, Governance

It is becoming increasingly important to consider ESG issues, particularly in the real estate business. The **European Green Deal** and the European Commission's Fit for 55 package of concrete measures include numerous aspects that are relevant for real estate developers: energy-efficient building and living, increased use of renewable energy, provision of EV charging infrastructure, recycling, and reduced soil sealing through the re-use of existing infrastructure.

Real estate funds, primarily funds as defined by the EU Taxonomy Regulation, are increasingly entering into **green leases** for the purpose of complying with ESG criteria. In addition to ecologically certified construction practices (e.g. klima:aktiv, DGNB, LEED, BREEAM), agreements often include provisions on **energy monitoring**, the use of ecological cleaning agents, a commitment to resource-conserving user behaviour, and compliance with sustainable quality standards for maintenance work or alterations. Depending on intended use, such provisions must be checked for their compliance with **mandatory statutory provisions**, such as the MRG or the Austrian Consumer Protection Act (Konsumentenschutzgesetz, KSchG).



Tax law

A wide variety of tax law questions arise related to the acquisition, construction and management of real estate (**property income tax, value-added tax, land transfer tax, fee regulations**). In Austria, for example, real estate operators can opt into VAT. If they do so, they can claim input VAT deductions for construction costs, but must also consider specific aspects during operation (**activities of lessees not subject to VAT**). Specific questions also arise with regard to VAT liability for construction work (**reverse charge**). Applicable fees can potentially be optimised by structuring the contractual relationship accordingly. As regards building management, questions regarding the deductibility of expenses, e.g. for maintenance, must be considered.

All these matters make it necessary to have a **customised solution** that takes into account the particularities of the specific real estate project.



Questions of public law

Regional development

Regional development is regulated in the regional development and land-use planning laws of the individual states (**regional planning**). Its goal is the systematic, forward-looking and sustainable development of a region, for which regional development objectives are defined. Land-use planning is the responsibility of the municipalities, which establish development plans, zoning maps, and master plans.

A **zoning map** specifically lays out the planned land use for the entire area of a municipality, i.e. the zoning. These binding determinations can only be revoked by means of amendments to the zoning map. The main categories of land use are building land, reserved areas (serving public purposes), and grassland, as well as special areas (e.g. for shopping centres) in some cases. The types of zoning provided for in the respective regional development laws are defined under the main categories of land use (e.g. residential area, industrial area, commercial area, etc.). The zoning map governs other legal acts of the municipality, including but not limited to master plans, building site permits, and planning permissions.

On the basis of the zoning map, a **master plan** regulates construction in an area, with due regard to land take limitation and community development. Specifically, it stipulates if and what type of construction is permitted on plots of land. The master plan includes zoning designations as well as provisions on frontages, level lines, cross sections, maximum building heights, construction methods, and building setback lines, among other things.

When developing a real estate project, it is therefore essential to verify, first and foremost, if the zoning designation allows the **intended use of the property**, if the buyers' planned building project is compatible with the zoning designation, if any structures already built are consistent with the zoning designation, and if additions and extensions can be built without requirements that would constitute an undue financial burden. If problems are identified in the process, the option of applying for rezoning of the property can be considered.

The legal consequences of **land use in violation of the zoning** designation depend on whether or not a structure has already been built. If no structure has been erected yet, it must be expected that planning permission will not be granted. If a building has already been constructed, an official order to restore the plot to a condition in accordance with its zoning designation may be imposed or, if no other solution is permissible, the planning permission may also be annulled and the building may have to be wholly or partly demolished.

Subsidised housing as a zoning category

Subsidised housing was established as a zoning category in Vienna in 2019. When land is rezoned as residential or mixed-use, **two thirds must be earmarked for social housing**. This also applies to the construction of high-rise buildings and to zoning changes in a residential area, such as an increase in density of development. Pursuant to the planning regulations, application of the restrictions is based on **minimum floor area**.

The **cost of land** zoned in this category is capped per square metre of above-ground gross area in regulations on housing subsidies. This cap on the cost of land is frozen for the duration of the subsidy period, and the flats can neither be leased out nor sold for profit. A **prohibition of transfer** must be recorded in the land register **for the benefit of the City of Vienna**, meaning that the latter's consent is required if a sale is intended. This is to ensure that the buyer of a flat does not make a speculative profit by reselling it. In addition, flats may only be sublet at capped rents pursuant to subsidy law. The prohibition of transfer applies for the duration of the subsidy period.

Selling the property for profit is prevented by application of the provision on purchase price formation under the Non-Profit Housing Act (Wohnungsgemeinnützigkeitsgesetz).

Regional development contracts (urban development contracts)

Regional development has traditionally been regulated by local and regional authorities exercising state authority (issuing master plans, zoning maps, local or regional development plans or strategies).

In principle, regional development is a matter of public law in which the local and regional authorities exercise state authority when they issue zoning maps and development strategies or plans. Recently, however, there has been increasing recourse to **private sector projects**, specifically civil law contracts concluded with applicants for zoning amendments, in order to achieve local regional development objectives (such as affordable housing, creation of public infrastructure, mobility, etc.).

Urban development contracts are generally based on a reciprocal relationship. Applicants for zoning amendments undertake to perform specific actions or **provide specific services**. However, since local and regional authorities are barred from entering into contractual commitments relating to their exercise of state authority, applicants for zoning amendments generally have no **legal claim** to any specific zoning designation.



Building codes

Certain structures require planning permission, i.e. a building permit, before they can be built. In Austria, the different **state laws** of the nine states govern this requirement. A distinction is generally made between construction projects that do not require a permit, those that require notification, and those that require a permit.

Neighbour rights arising from building codes are particularly relevant for quick and efficient real estate project development. Each building code defines which building regulations can give rise to subjective rights of neighbours, and thus give them legal standing in building authority proceedings. Usually, this concerns compliance with minimum distances, building height regulations, or procedural rules in favour of neighbours.

Land transactions

The legal transfer of land is subject to certain **restrictions** in Austria, aimed at compliance with the designated use of the land. Depending on property type and use, the **land transfer laws of the states** distinguish between the transfer of agricultural and forestry land ("**green**" **land transactions**), the transfer of building land ("**grey**" **land transactions**), and land transactions involving foreign nationals. The transfer of agricultural and forestry land entails very severe restrictions for Austrian and foreign nationals with the aim of safeguarding agriculture and forestry. Laws governing the transfer of building land aim at limiting undeveloped building land and second homes. Land transactions involving foreign nationals essentially concern the acquisition of real property by nationals of non-EEA countries or companies that are (indirectly) controlled by such nationals.

The land transfer laws are enforced by means of reservation of approval by **the administrative authorities** for certain land transactions that vary by state (e.g. acquisition of freehold, creation of mortgage liens, leases, etc.). Therefore, if a transaction requires approval by the land transfer authority, this constitutes a condition precedent to the effectiveness of the contract.

Repair and maintenance obligations

The owners of a building must ensure that it is kept in good condition in accordance with the building permit and the building code (**prevention of building defects**). These obligations also extend to ancillary structures (e.g. house sewer, terrace). Specific regulations in this regard can be found in the respective building codes of the states. Official orders refer to the **state of the art** at the time the construction contract was awarded (while other conditions may apply to structures that are subject to conservation under monument protection, for example). The building authority may also order **safeguarding measures** to be implemented.

Moreover, the municipality may issue instructions to carry out maintenance and repair work on buildings falling within the scope of the Tenancy Act (essentially buildings in which flats or commercial spaces are leased out).

Failure to remedy building defects may even lead to criminal prosecution (grossly negligent homicide) and may have consequences under civil law (claims for damages) and administrative law (breach of administrative regulations).

Environmental impact assessment

An environmental impact assessment (EIA) is an instrument by which the impact of certain types of projects listed in the Environmental Impact Assessment Act 2000 (Umweltverträglichkeitsprüfungs-Gesetz, UVP-G 2000) has to be reviewed and assessed prior to their implementation.

A characteristic feature of an environmental impact assessment is what is referred to as **consolidation of proceedings** (Verfahrenskonzentration), i.e. a single authority rules on the approvability of the project in question in a single administrative decision.

As a general rule, an environmental impact assessment must be carried out for projects that are expected to have a significant impact on the environment. Annex 1 of the UVP-G 2000 provides an exhaustive list of these projects.

Projects that are subject to an environmental impact assessment include:

- Infrastructure projects (e.g., expressways, airfields),
- Industrial estates or business parks
- Shopping centres
- Car parks

An environmental impact assessment is only required if a certain **threshold** has been reached or a specific **criterion** applies (e.g. land take, production capacity).

It should be noted that several smaller projects that do not individually meet the threshold or criterion, but may have a significant environmental impact due to their **cumulation** with other projects, may also trigger an EIA requirement. This must be determined by the authority on a case-by-case basis. Consideration must be given to similar, existing or approved projects in the same spatial context, as well as to projects for which complete permit applications have previously been filed with a public authority.

If it is uncertain whether or not an environmental impact assessment is required for a planned project, **declaratory proceedings** can be carried out.

Reform efforts envisage expanding the range of projects subject to an environmental impact assessment, accelerating proceedings for energy transition projects, and increasing procedural efficiency by structuring proceedings better and clarifying specifications regarding depth of assessment, as well as the possibility of online or hybrid hearings.





Implications under State aid law and public procurement law

Real estate development and public procurement law

Neither the direct sale nor acquisition or lease of real estate by public bodies (or private sector contracting entities) is subject to public procurement law. However, if a real estate purchase contract contains elements of a construction, supply or service contract from a functional point of view, public procurement law may very well apply. If such a project is not properly advertised and awarded, the contract concluded is null and void.

CMS also advises on matters of procurement law so that the following constellations in particular can be handled without any legal complications:

Public procurement law does not apply to leases if the contracting authority does not take any measures to determine the features of the construction work and does not exert any decisive influence on the design, in particular on the building structure, overall dimensions, exterior walls, and load-bearing walls. However, the development, construction, expansion or conversion of buildings (including offices, schools, courthouses, etc.) must be put out to tender and awarded in accordance with public procurement law even in the case of advance performance by the developer or construction company, which only then sells or leases the completed structure, built in accordance with a contracting authority's wishes, to that contracting authority.

Public tenders are also required for sales of publicly owned land to private developers or investors who will be obligated to build structures according to the contracting authority's precise specifications (location development). This applies, in particular, if private investors lease such structures to the contracting authority (or its company), but the main purpose of the lease agreement is the construction of a specific structure, not the lease of properties.



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While purchases of land in close proximity to publicly owned buildings are admissible, even if it may be needed for extensions in the future, such land transactions cannot include a waiver of a tender procedure to be expected at a later point in time if the seller is a public authority.

Financial services in connection with real estate transactions involving publicly owned land (in particular project financing) are not exempt from public procurement law either.

Real estate valuation and State aid law

If real estate transactions involve publicly owned properties, the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union must be observed.

In accordance with this Notice, sales of such real estate may be carried out in one of the following two ways in particular:

- By carrying out a competitive, transparent, non-discriminatory and unconditional tender procedure. This procedure must be made known to a wide range of interested parties and must allow potential bidders sufficient time for valuation and submission of bids.
- On the basis of an independent expert evaluation obtained prior to the negotiations that establishes the market value on the basis of generally accepted market indicators and valuation standards (e.g. benchmarking). In any case, the established value of the property should be considered as the minimum sales price.

It should be noted, however, that the European Commission gives preference to tender procedures over expert evaluations.

From a legal perspective, it should also be considered that protection of the legitimate expectations of potential State aid beneficiaries is extremely limited. When acquiring publicly owned properties, it should in particular be verified that the sale is carried out following the above-mentioned procedures. If the transaction is subsequently audited, the purchase price may be judged to have been too low, amounting to State aid granted to the buyer. As a result, the buyer may have to pay a premium on the market price or the sale may have to be reversed.

Administrative organisation law governing sellers

When publicly owned land is sold, approval by the relevant authorities is essential from the buyers' point of view. In this context, administrative organisation law governing the relevant authorities must be carefully considered (e.g. Vienna city constitution, municipal regulations of the states).

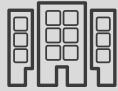
Checklist*

1. Is the intended/current use consistent with the zoning? ☐
2. Is the vision for the planned project compatible with the master plan? ☐
3. Has a final building permit been issued? ☐
4. For existing buildings: Is there a risk of an official repairs and maintenance order and do the costs of this need to be factored in? ☐
5. Is the property being sold on the basis of a compliant tender procedure or on the basis of an independent expert evaluation obtained prior to negotiations that meets the requirements of the Notice on the notion of State aid? ☐
6. Have the necessary approvals been granted by the sellers (e.g. resolution of the municipal council, etc.)? ☐
7. Is a land transfer permit required or can it be obtained by law? ☐
8. Is an environmental impact assessment required? ☐
9. Which building law procedure applies to the project to be developed (building notice under section 62 of the Vienna Building Code, simplified building permit procedure, regular building permit procedure)? ☐
10. Has a full notice of completion, including the required annexes and approvals, been issued? ☐
11. Do any actionable contractual claims arise from the construction of the project (e.g. assignment of warranty claims against contractors, guarantee of essential characteristics of the project property, etc.)? ☐
12. Which tenancy law provisions (full exemption, partial or full application of the Austrian Tenancy Act) apply to the project to be developed? ☐

* This checklist is intended to provide an overview of questions that may arise during a real estate development project and should not be construed as exhaustive.

No liability is assumed for the content or completeness of the roadmap. Individual consultation is recommended on all aspects of this roadmap.

Full-service one-stop shop



Real Estate & Construction

- Contract drafting for purchases and sales of real estate projects
- Tenancy law, lease agreements, operator and management contracts
- Legal issues relating to planning (architectural law) and project structure
- Construction management, warranty and claims management

Infrastructure & Projects

- Infrastructure transactions and projects
- International construction law
- Representation in international construction projects



Public Procurement

Tenders and procurement procedures for:

- Infrastructure & construction
- Energy, environment & waste management
- Transport & traffic

Public Law

- Regional development law
- Public construction law
- Representation before authorities and courts

ESG

- Environmental law
- Waste law, water law, forest law
- Energy-efficient building & living



Tax

- Tax issues relating to real estate projects
- Tax optimisation of real estate investments
- Tax-optimised acquisition structures

Dispute Resolution

- Litigation
- International & national arbitration
- Mediation and court proceedings

Credentials

- Legal advice to a “dark green” Article 9 real estate fund from Germany on market entry in Austria by acquiring two real estate projects in Vienna (share deal/green leases)
- Advice to an American-Polish joint venture on the acquisition and development of a logistics centre as well as on asset and property management issues
- Advice to an international real estate developer on the acquisition and development of a residential tower in Vienna (share deal)
- Legal advice to an industrial company on the acquisition of a plot of land purchased from an Austrian municipality, as well as on the development and construction of new company premises
- Tenancy law advice to an international car manufacturer on the lease of sales locations in Austria
- Advice to an Austrian municipality on the contribution of extensive real estate assets to subsidiaries, in particular from a land transfer law perspective
- Advice to an international real estate fund on the acquisition of a logistics centre leased to an online retailer (share deal)
- Legal advice to a German real estate developer on market entry in Austria by acquiring a housing project in Vienna (share deal)
- Advice to an international real estate developer on the acquisition of serviced apartments for students
- Advice to the owners on the sale of a luxury hotel in Kitzbühel
- Advice to a provider of laboratory diagnostics on the lease of new company premises
- Comprehensive legal and tax planning of a transnational share deal involving an international real estate fund
- Ongoing legal advice to a pan-European real estate manager on asset management issues
- Legal advice to an institutional real estate investor on the acquisition of several office towers as a forward purchase
- Advice to an investment company on the acquisition of capital management companies in Austria
- Advice to an Austrian insurance company on the sale of a luxury hotel in Salzburg
- Advice to an Austrian energy supply company in its bid for the electricity grid of a South-East European country in the context of privatisation
- Advice to a logistics company in connection with the privatisation of a Central European airport

Your key contacts



Nikolaus Weselik

Partner | Property & Procurement
Head of the Expert Group for
Construction and Real Estate Law

E nikolaus.weselik@cms-rrh.com

T 43 1 40443 1750

Nikolaus Weselik is a lawyer specialising in national and international construction contract law and real estate law, construction litigation and other forms of litigation and dispute resolution, as well as legal issues pertaining to project development, and the purchase and sale of real estate projects or individual properties. He is a partner at CMS in Vienna and head of the expert group for construction and real estate law. He speaks German and English.

Nikolaus Weselik has more than 25 years of experience in legal practice, advising national and international clients in the areas of construction, real estate, project development, and hotels, both in non-contentious matters and in arbitration and other adversarial proceedings.

Nikolaus Weselik is recommended by international directories as a leader in the field of construction and real estate law.

The German newspaper Handelsblatt ranks him among the best lawyers in construction law and commercial real estate law (Best Lawyers Ranking 2020).

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Johannes Hysek

Partner | Property & Procurement

E johannes.hysek@cms-rrh.com

T +43 1 40443 3250

Johannes Hysek is an expert in real estate law. He has many years of experience advising numerous Austrian and international clients (including insurance companies and funds) on real estate transactions (including mortgage-backed syndicated loan agreements), privatisation, and corporate restructuring. In addition, he regularly advises international (luxury) brands on market entry and establishing flagship stores in Austria.

He also advises clients in Austria and abroad on a wide range of issues, from financing arrangements to the acquisition, sale, and development of commercial properties and real estate portfolios.

Johannes Hysek was admitted to the Austrian Bar in 2002 and joined CMS in 2008. He has been a member of the Royal Institution of Chartered Surveyors (MRICS) for many years. He speaks German and English.

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Mariella Kapoun

Partner | Property & Procurement

E mariella.kapoun@cms-rrh.com

T +43 1 40443 4100

Mariella Kapoun is a lawyer specialising in real estate and construction law. She advises national and international clients on the full spectrum of real estate transactions, including forward funding and forward purchase deals. Her expertise also covers residential and commercial leases, contracts for work and services, and developer contracts, as well as insolvency law and corporate law, including representation in court and administrative proceedings. Mariella Kapoun also advises clients at the interface of new technologies, digital transformation, and blockchain.

She regularly lectures on real estate and construction law, in particular at the Vienna University of Applied Sciences (FH Wien) and ARS Academy Vienna.





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CMS Austria certainly is highly regarded for construction-related legal advice. Apart from their knowledge of the different contractual standards, they have good expertise across a wide variety of industries and countries.

Legal 500, 2022

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