

THE REAL ESTATE  
LAW REVIEW

TWELFTH EDITION

Editor  
John Nevin

THE LAWREVIEWS

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This article was first published in March 2023  
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John Nevin

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Published in the United Kingdom  
by Law Business Research Ltd  
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK  
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ISBN 978-1-80449-152-2

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AUMENTO LAW FIRM

BINDER GRÖSSWANG RECHTSANWÄLTE GMBH

CHANDLER MHM LIMITED

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CORDATO PARTNERS LAWYERS

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ESTUDIO BECCAR VARELA

GONZALEZ CALVILLO

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URÍA MENÉNDEZ

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# PREFACE

This time last year the world's focus was still on the covid-19 pandemic as the dominant issue affecting us all. Tragically, just as we were starting to see light at the end of the tunnel, the much-hoped-for fresh start was stopped in its tracks by the war in Ukraine. The past 12 months have been dominated by war in Eastern Europe and the ensuing global humanitarian, economic and political fallout. The stability and certainty craved by all currently remains a distant hope.

Following on from COP26 in Glasgow, this year the focus was on Sharm El Sheikh for COP27. Once again, some key world leaders were notable by their absence and there remains the sense that more could and should have been achieved. This year, a further focus was acknowledging the developed world's contribution to the climate problem, and a new loss and damage fund was agreed upon to help meet the climate change costs suffered by the world's poorer nations. It has been accepted that something needs to be done, and that includes in the property industry. The built environment accounts for at least 25 per cent of the UK's greenhouse gas emissions, and significant changes are necessary if net zero targets are to be met. To date, the focus has been on high-profile new developments with eye-catching environmental, social and governance credentials. How to deal with the much larger stock of older, lower-value and underperforming buildings remains a bigger challenge.

A great deal has happened since the first edition of *The Real Estate Law Review* appeared in 2012; Brexit seems but a distant memory, as a pandemic was swiftly followed by war in Europe and a cost of living crisis. These have truly been unprecedented times. This 12th edition of *The Real Estate Law Review* will, perhaps more than ever, continue to prove its worth by giving readers an invaluable overview of how key markets across the globe operate and how they react to major world events. The covid-19 pandemic and the war in Ukraine have both served as stark reminders that it is not possible to look at domestic markets in isolation. Investors and their advisers need to understand real estate assets in the context of global events, and *The Real Estate Law Review* continues to help its readers to do just that.

This edition extends to 25 key jurisdictions around the world, and I am very grateful to all the distinguished practitioners for their insightful contributions. Each chapter has been updated to highlight key developments and their effects on the relevant domestic market. Together, the chapters offer a helpful and accessible overview of the global real estate market. Overseas investors are key influencers in most markets, and it is vital that practitioners are able to advise on a particular deal in the light of an understanding of their client's own jurisdiction.

Covid-19 has not gone away but we have learned to live with it. The pandemic's legacy will be its lasting effect on how we live, work and play, and on each and every aspect of the global real estate market. More immediate headwinds include the very real risk of a long and deep recession, soaring inflation, rising interest rates, the withdrawal of government



lockdown support, failing consumer confidence, increasing costs, a critical shortage of labour and materials as well as ongoing supply chain problems. On a more positive note, the property industry has traditionally proved to be resilient, and covid-19 demonstrated its ability to adapt to difficult and challenging times. The United Kingdom will be anxious to maintain its position at the top of global shopping lists as investors look for relatively safe havens for their investment capital. London and the regions seem certain to remain attractive to overseas investors looking for investment opportunities, both in the traditional real estate investment markets and also the rapidly evolving alternative asset sectors. The next few years will undoubtedly be challenging as we continue on the journey to recovery, but opportunities will arise, and real estate will remain a key part of global investment strategies. Knowledge of the global real estate markets will prove key to identifying and making the most of buying opportunities.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this 12th edition of *The Real Estate Law Review*. I would also like to thank the members of *The Law Review* team for their sterling efforts in coordinating the contributions and compiling this edition. Finally, I wish everyone the very best of health for 2023 and beyond.

**John Nevin**

Slaughter and May

London

February 2023

# SWITZERLAND

*Andreas F Vögeli, Oliver Zbinden, Annina Fey and Jamie Lee Mancini<sup>1</sup>*

## I INTRODUCTION TO THE LEGAL FRAMEWORK

### i Ownership of real estate

Under Swiss law, different types of real estate ownerships exist. The most common forms are sole ownership<sup>2</sup> and co-ownership. A special – and in Switzerland predominant – form of co-ownership is the condominium-principled co-ownership. Its main characteristic is that different persons own separate units in a common property or, as the law puts it, a condominium is a form of co-ownership of immovable property that gives the co-owner the exclusive right to make sole use of specific parts of a building thereon and design the interior of such parts. Condominium owners can manage, use and design the structure of their units as they wish but must not obstruct any other condominium owners in the exercise of their own rights or damage the common parts of the property. Importantly, each unit has its own folio in the land register and may be sold separately without the consent of the other co-owners, who have no statutory right of pre-emption.

Further property rights include:

- a* usufructuary rights: a contractual arrangement where the owner confers complete enjoyment of the object on the usufructuary;
- b* right of residence: the right to live in all or parts of a building; and
- c* building rights:<sup>3</sup> the ownership of the ground is dissociated from the ownership of the constructions.

One major difference between a usufructuary right and the right of residence is that the latter can only be granted to individuals but not to legal entities.

A lease contract, if entered in the land register, provides a similar legal position to the beneficiary as the aforementioned rights *in rem*. The effect of this entry is that every future owner, in principle, must allow the property to be used in accordance with the lease.

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1 Andreas F Vögeli is a partner, Oliver Zbinden and Annina Fey are senior associates and Jamie Lee Mancini is an associate at Niederer Kraft Frey.

2 Often also referred to as freehold or land ownership as the sole owner usually owns the land and its integral parts and everything built on it.

3 Compared to the freehold, the owner of a building right is not the owner of the land but only the holder of a leasehold right encumbering that land. He or she is granted a right to erect and maintain a building on the underlying lot.

## ii System of registration

Every (privately owned) piece of land, including individual condominium units, has its own folio in the land register, where title information (ownership, size and description of the property), easements, usufructs and other servitudes, charges, lien and mortgages, notes (typically public law restrictions) and priority notices (e.g., contractual pre-emption rights and lease agreements) are recorded.

Title to real estate is transferred to the new owner exclusively by way of entry in the land register. The ownership cannot be transferred as long as the purchaser is not entered into the land register. The prerequisite for registration is a notarised purchase contract constituting the legal ground for acquisition of ownership or any other rights *in rem* on real property. Only notarised contracts can be entered into the land register.<sup>4</sup>

There is a legal presumption that federal land register entries (but not entries in cantonal registries in the few locations where the federal land register is not yet fully introduced) are true and correct. Every person who relies on the land register in good faith is therefore fully protected. The content of the land register prevails over the factual circumstances as long as good faith is given. Furthermore, the land register establishes the presumption that the registered rights exist. Therefore, title insurance is neither needed nor known.

## iii Choice of law

Rights *in rem* on real property are exclusively subject to the law of the place where the real property is located. In principle, contracts concerning real property or its use are also governed by the law at situs; however, a choice of law by the parties is permitted. In any case, the form of the contract is governed by Swiss law if real estate in Switzerland is concerned.

Because of the notarisation requirement, Swiss law is generally chosen by the parties to a real estate transaction as the governing law.

## II OVERVIEW OF REAL ESTATE ACTIVITY

The investment environment changed fundamentally for real estate investors in 2022. In mid-June 2022, the policy rate set by the Swiss National Bank was still at -0.75 per cent. After three increases to counter inflation, the policy rate has now been at +1.00 per cent since 16 December 2022, which corresponds to an increase of 1.75 percentage points within a good six months. The seven-and-a-half year negative interest rate phase is thus already history.

Despite these sharp rises in interest rates and geopolitical uncertainties, the market for Swiss investment properties is relatively stable. Neither have market values slid sharply nor have yields moved sharply upwards. Particularly in the rental housing segment, a certain protection against inflation is assumed. Indirect real estate investments, however, have lost ground. According to WUPIX-A, listed real estate companies were trading 10.9 per cent lower at the end of November 2022 than at the beginning of 2022, while real estate funds even suffered a decline of 18.1 per cent in this period according to WUPIX-F.<sup>5</sup>

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4 Notary law is cantonal; therefore, the notarisation process may differ from canton to canton. Generally, only notaries at the place of the property are competent to notarise real estate purchase contracts. An exception to this is the special case of a transfer of assets under the Swiss Federal Act on Mergers. Under this Act, for certain forms of restructuring of legal entities all assets, including real estate, are transferred by entry of the corresponding contract in the Commercial Register.

5 Cf. wüestpartner, Immo-Monitoring 2023|1, pp. 78–79.

### III FOREIGN INVESTMENT

The purchase of real estate by foreign investors, in particular of residential properties, as well as foreign mortgage financing of residential properties, is restricted by the Swiss Federal Act on the Acquisition of Real Estate by Persons Abroad (Lex Koller) and the respective ordinance. The Lex Koller requires that foreign investors – European Union or European Free Trade Association nationals without permanent residence in Switzerland and nationals of other countries without a C permit – must apply for authorisation when acquiring residential properties in Switzerland. In practice, authorisations for residential properties are difficult to obtain. They may be granted, for example, for the purchase of a holiday home based on a yearly defined quota in touristic (alpine) regions.

No authorisation is required if the property is used for commercial purposes (e.g., offices, shopping centres, retail, hotels and restaurants). If this is the case, it is irrelevant whether the property is used for the buyer's business or rented or leased by a third party to pursue a commercial activity. The property may also have land reserves if they – as a rule – do not exceed one-third of the total surface of the land.

The purchase of undeveloped land needs an authorisation even if it is in a commercial or industrial zone except when work on a building that will be used for commercial purposes has already started or will start within a short time.

At the latest after the conclusion of the real estate purchase contract, the foreign investor must request authorisation for the transaction or determination that no authorisation is required for the respective acquisition. The authorisation may be granted with conditions and restrictions to ensure that the property is used in accordance with the purpose stated by the foreign acquirer.

### IV STRUCTURING THE INVESTMENT

Traditionally, investments in real estate were made by acquiring specific properties directly or through a legal entity established for that purpose. Given the recent growth of the market for real estate investment products, a general trend towards indirect investments can be observed. The advantages of indirect investments are low transaction costs, high liquidity, broad diversification and a lower entry level compared to direct investments.

The main types of indirect real estate investment vehicles are real estate funds,<sup>6</sup> non-regulated investment companies limited by shares, which must be either listed or only accessible to qualified investors, Swiss real estate investment foundations and special purpose vehicles (SPVs). Real estate funds may be established in the form of contractual investment funds, SICAVs (investment companies with variable capital), KGKs (limited partnerships for collective capital investments) or SICAFs (investment companies with fixed capital).

Contractual investment funds, SICAVs and standard SPVs are the most common investment vehicles. In addition, real estate investment companies and real estate investment foundations have become quite popular in recent years. Depending on the investor's corporate structure, SPVs may offer a number of advantages. Real estate investment trusts (REITs) and real estate derivatives are typically not set up in Switzerland and may be subject to regulatory requirements and restrictions if distributed in Switzerland.

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<sup>6</sup> See the SXI Real Estate Funds Broad Index for real estate funds listed on the SIX Swiss Exchange.

The contractual investment fund is a contract based on a collective investment agreement under which the fund management company commits itself to investors in accordance with the number and type of units that they have acquired in the investment fund, and to manage the fund's assets in accordance with the provisions of the fund contract at its own discretion and for its own account. The fund management company draws up the fund contract and, with the consent of the custodian bank, submits it to the Swiss Financial Market Supervisory Authority (FINMA) for approval. The fund management company's share capital must be at least 1 million Swiss francs (paid up in cash), and the investment fund must have net assets of a minimum of 5 million Swiss francs.

SICAVs are, in principle, established under the provisions of the Swiss Code of Obligations (CO). A SICAV must be authorised by FINMA prior to beginning its operations. FINMA's approval must also be obtained for its constituting documents. Specific authorisation and approval requirements are as follows:

- a* assets of at least 5 million Swiss francs one year after launch;
- b* the company's name must contain a description of its legal form or the abbreviation SICAV;
- c* the ratio of company shareholder deposits to total assets must be appropriate;
- d* company and investor shares that do not have a nominal value and are freely transferable must be fully paid up in cash;
- e* investment regulations must be defined;
- f* a custodian bank must be designated;
- g* the SICAV must choose to be either self-managed or externally managed;
- h* its sole object must be to manage its funds and sub-funds; and
- i* it must hold a defined quantity of equity capital.

SICAVs are usually listed on the Swiss stock exchange, which alleviates certain Lex Koller burdens.

KGKs are limited partnerships with the sole object of collective investment. They must be authorised as an institution by FINMA and their constitutive documents require approval as well. At least one member (the general partner) bears unlimited liability. The other partners (limited partners) are liable only up to a specified amount. General partners must have paid-in capital of a minimum of 100,000 Swiss francs and limited partners must be qualified investors.

A SICAF is a company limited by shares with the sole object of collective investment. It must be authorised by FINMA and have its constituting documents approved as well. Its shareholders are not required to be qualified investors and it is not listed on a Swiss stock exchange. Essential features of a SICAF are that it only manages its own assets and generates returns or capital gains without engaging in business activities as such. The minimum deposit on foundation must be at least 500,000 Swiss francs in shares, fully paid up.

Swiss real estate investment foundations are used for the joint investment and management of pension assets. The group of investors of an investment foundation is generally limited to pension funds and to persons supervised by FINMA who manage the collective investments of pension funds. The launch of a Swiss real estate investment foundation requires a broad range of documents, such as foundation regulations, articles and a prospectus. It is subject to (pre-)approval and direct supervision by the Occupational Pension Supervisory Commission.

In general, the costs for each type of entity used to invest in real estate vary depending on the volume and the structure of the vehicle. How a foreign investment is structured in a particular case is usually determined by tax considerations.

## **V REAL ESTATE OWNERSHIP**

### **i Planning**

Zoning laws are based on a federal act, but the implementation is on the cantonal and communal level. Building regulations are mainly enacted by the cantons and implemented by the municipal building authorities, which leads to significant regional differences. Change of use, particularly of residential premises into commercial ones and vice versa, is heavily regulated and increasingly restricted.

In general, new buildings or any changes to existing buildings require a permit by the competent local authority. They must be planned and designed in a way that they render a harmonious overall impression, both individually and taking into account the surrounding area. Special building regulations may help to facilitate the planning of major projects. Additionally, dimensions and distances stipulated in the regulations must be observed. Furthermore, a variety of special regulations (e.g., on fire and earthquake safety) need to be complied with.

Once the planning application is submitted to the competent municipal authority, it publishes the project in the local official gazette. All parties affected by the project, primarily owners of neighbouring buildings, have the right to raise objections against it. If the municipal building commission finds that the project is in accordance with all applicable regulations and all objections are settled, a building permit is issued. It is key that the finalisation of the project does not deviate from the specifications set out in the building permit, otherwise the authority may order the removal of the illegal structures of the construction.

Buildings and land under cultural heritage protection as well as nature conservation or agricultural areas underlie strict regulations; new constructions and renovations must therefore be carefully planned.

### **ii Environment**

Swiss environmental law differentiates between the polluter who actually caused the pollution and the owner of the property. Primarily, the person causing the pollution must bear the costs of remediation. If the polluter cannot be called upon to bear the costs, the remediation costs remain with the cantons and partly with the owner of the land. Hence, the buyer of real estate may also be held responsible for environmental issues, particularly soil pollutions.

Polluted real estate is registered in the cadastre of contaminated sites and may only be transferred with the approval of the competent cantonal authority, which may order that potential future costs of remediation be secured.

### **iii Tax**

The transfer of real estate is subject to land registry and notary fees. Additionally, property transfer taxes may apply depending on the canton (e.g., Zurich and Zug do not levy property transfer taxes). The rates range between 1 to 3.3 per cent of the purchase price. It is common practice for the parties to a real estate purchase contract to agree to pay the real estate transfer taxes as well as the land registry and notary fees in equal parts, even though most cantonal regulations provide that these must be borne by the buyer.

Furthermore, any profits made on selling the property are subject to tax, which must be paid by the seller. Taxation of capital gains derived from Swiss real estate varies from canton to canton and even from municipality to municipality. Capital gains tax rates may be progressive and may also depend on the duration of ownership. Different capital gains tax rates may apply to corporate and individual owners. The range of applicable rates is therefore wide and may vary between zero (in the canton of Geneva after a duration of ownership exceeding 25 years) and 60 per cent (for short-term capital gains in the cantons of Zurich, Zug and Basel City). In most cantons, the payment of the tax is secured by a statutory mortgage on the property. Hence, it is in the buyer's interest that the seller pays the capital gains tax and this should be taken into account when drafting a property purchase contract.

Additionally, an individual using a property as his or her own residence is subject to an annual tax on a deemed rental income (known as imputed rental value). However, maintenance and financing costs relating to the property may be deducted, which may even outweigh the imputed rental value.

#### **iv Finance and security**

Swiss real estate is usually financed by a mix of equity and loans. The standards applying to investment property financing by Swiss banks were tightened as of 1 January 2020 and provide a maximum loan-to-value ratio of 75 per cent (owner-occupied residential properties are exempt). Thus, 25 per cent of the property, as valued by the bank, must be covered by equity as well as any difference between the value and the actual (usually substantially higher) purchase price. Borrowers must further amortise their mortgage debt down to two-thirds of the property's lending value within 10 years.

Buyers and owners of real estate in Switzerland are free to raise external financing from lenders abroad. The granting of a security over a mortgage note does not entail problems under the Lex Koller as long as the terms of the security are at arm's length and do not aim to circumvent the provisions of the Lex Koller. In practice, institutional investors often hold significant real estate portfolios that are financed without external funding. However, a mix of equity and debt in the form of a secured term loan and a revolving credit facility is also common.

External real estate financings are almost exclusively secured by mortgage notes. Mortgage notes can be created as register mortgage notes or as mortgage notes in paper form. The creation of a mortgage note provides an independent claim in the mortgage note's amount and is separate from the claim under the credit documentation (i.e., the loan). The mortgage loan claim is secured by the underlying property.

## **VI LEASES OF BUSINESS PREMISES**

Two main types of purely contractual lease arrangements exist: the traditional lease and the usufructuary lease. Both types are governed by the CO. The traditional lease is more common in Switzerland, both for residential and business premises in the retail, hotel, office and industrial sector. Usufructuary lease is typical in the agricultural and gastronomy sectors.

The law only sporadically differentiates between the lease of commercial and residential properties. Notable differences are the minimum notice periods (three months for residential and six months for commercial premises) and the security furnished by the tenant (in a residential lease, the landlord may not ask for more than three months' rent by way of security; in a commercial lease, there is no such restriction). A large number of Swiss tenancy

law provisions are mandatory to protect the tenant, who is per se considered to be the weaker party, which is obviously often not the case with commercial tenants. However, commercial lease contracts may also only be negotiated within the limits of mandatory tenancy law.

Lease contracts may be limited or open-ended. Parties to open-ended lease contracts usually agree that they can terminate the contract subject to a six or 12-month notice period. Yet, typically, commercial leases are concluded for a term of five to 10 years, with the option to extend the lease for one or more similar terms. Landlords usually seek five-year lease terms because it offers the possibility to adapt the rent to the Swiss consumer price index. An agreement to link rent to the Swiss consumer price index is not valid where the lease is contracted for less than five years. In addition, banks financing commercial real estate often require that part of the mortgage or loan is repaid before the lease terminates. At the same time, a long-term lease is particularly attractive for tenants developing the property for their specific needs (at their own expense), as it is common not to claim reimbursement for the investments from the landlord at the end of the lease.

Extension options can be designed in different ways. Usually tenants favour options where the conditions of the rent, in particular the rental price, remain, while landlords prefer options that offer the possibility to adapt the rent at the end of the lease term to the new market price.

In both limited and open-ended leases, the parties are free to choose a certain lease model. Typically, the rent is fixed and will only be revised if the contractually agreed rent calculation basis changes (e.g., the Swiss consumer price index, reference interest rate) or if the landlord provides additional services. The parties may agree on a staggered rent or a turnover or sales-based rent instead – usually combined with a guaranteed minimum rent. The law only forbids clearly excessive rents, which is not the case if the rent falls, for example, within the range of rents customary in the district, if it is justified by increases in costs or by additional services provided by the landlord or if it does not exceed the range of gross pre-tax yield required to cover costs in the case of a recently constructed property. However, in certain circumstances, the rent amount can also be challenged by the tenant after the conclusion of the rental agreement.

While the rent for residential leases is almost always paid monthly in advance, it is not uncommon for parties to commercial leases to agree on quarterly payments. Most commonly, the rent is secured by a security deposit, which is paid by the tenant before the lease starts. The deposit provided in the form of cash or negotiable securities is deposited in a bank account in the tenant's name. The bank can release such security only with the consent of both parties or in compliance with final payment or final court decision. Alternatively, bank guarantees can also serve as a security. If the tenant neglects to pay the rent, the landlord is allowed to terminate the lease contract after having set the tenant a final deadline for payment.

A security of tenure does not exist in Switzerland. Nonetheless, the tenant may request the extension of a fixed-term or open-ended lease where termination of the lease would cause a degree of hardship that cannot be justified by the interests of the landlord. The lease may be extended by up to six years for commercial premises. In practice, extensions of more than two years are rarely granted in the greater Zurich area.

## **VII DEVELOPMENTS IN PRACTICE**

There have been a number of developments to the regulatory framework and in jurisprudence impacting the real estate market.



As far as officially ordered closures of shops to counter the covid-19 pandemic are concerned, the Swiss Federal Supreme Court has not yet decided, and it is still highly controversial among tenancy law specialists and higher cantonal courts, whether such closures constitute a defect in the rental property, which entitles the tenant or leaseholder to an appropriate reduction or a corresponding retention of a part of the rent in accordance with Articles 259d and 288 Paragraph 1(b) of the CO. It is also controversial whether a tenant or leaseholder can enforce an amendment of the lease or usufructuary lease due to the changed circumstances (rent reduction; early termination option) based on the legal institution of the *clausula rebus sic stantibus* created by the Swiss Federal Supreme Court. According to this legal institution, on the basis of Article 2, Paragraph 2 of the Swiss Civil Code, a judge must amend or cancel a contract if, due to subsequent, unforeseeable circumstances, such a manifest imbalance between performance and consideration has occurred that the insistence of a party on its claim appears to be abusive. The Higher Courts of the cantons of Zurich, Geneva and Basel – contrary to the Higher Court of the canton of Ticino – came to the conclusion that in the case of officially ordered closures, subject to corresponding assurances in the lease agreement, there is no defect in the rented property that entitles the tenant to a rent reduction based on Article 259d CO. Moreover, the Higher Courts in the cantons of Zurich and Geneva have emphasised the strict requirements for the applicability of the *clausula rebus sic stantibus*. In particular, the tenant had to explain based on his or her business records how the official measures had specifically affected his or her business operations, which operational measures he or she had taken and with what success, which state aid he or she had taken advantage of and why he or she had waived possible countermeasures.

Following the example of the cantons of Geneva and Vaud, the canton of Basel-Stadt introduced restrictive regulations in May 2022 that make the modernisation of residential investment properties considerably more difficult. In particular, refurbishments after all leases have been terminated can now hardly be realised. In addition, the demolition and subsequent construction of such properties is severely restricted. Apart from exceptions for ongoing maintenance, the new regulation makes renovations and the demolition and subsequent construction of such properties subject to a permit requirement and a time-limited rent control. We consider it rather unlikely that other cantons or even the Federal Parliament will follow this path in the near future, even though corresponding initiatives are to be expected, especially in the larger cities.

The totality of buildings in Switzerland consumes around 45 per cent of the country's energy needs. It is also responsible for around one-third of domestic carbon dioxide emissions. Accordingly, buildings are heavily regulated in these areas. In 2022, a number of important new regulations were passed that will have a significant impact on the real estate sector in the short, medium and long term:

In the short term (i.e., in the winter of 2022/2023), there is a risk of gas or electricity shortages in Switzerland for various reasons, but mainly due to the war in Ukraine and the fact that a large number of nuclear power plants in France are currently undergoing maintenance and are therefore not connected to the electricity grid. Depending on the severity, the Federal Council could order drastic measures based on the Federal Act on National Economic Supply. The possible measures were specified by the Federal Council in numerous ordinances in the autumn and at the beginning of winter 2022 and include, for example, the restriction of heating temperatures, a reduction of shop opening hours, bans on cultural events, gas or

electricity quotas (or both), or even alternating electricity grid disconnections for a few hours in certain areas. Depending on the specific measure ordered, tenants could assert various claims against landlords, including rent reductions.

As far as the short and mid-term impact is concerned, in an urgent amendment of the Federal Energy Act (EnG), a new Article 45a EnG was introduced, which entered into force on 1 October 2022. Article 45a EnG provides that when constructing new buildings with a size of more than 300 square metres, a solar system, for example a photovoltaic or a solar thermal system, must be installed on the roofs or facades. The cantons may also stipulate this obligation for smaller buildings. The new provision includes certain exceptions (e.g., if such systems are in contradiction with other public law regulations or are technically not possible), and will only apply where the cantons have not introduced requirements for generating own electricity in new buildings in accordance with the model cantonal provisions in the buildings sector (MuKEn) 2014 Part E by 1 January 2023.

As for the long-term impact, the Parliament adopted the Federal Law on Goals of Climate Protection, Innovation and Reinforcement of Energy Security (KIG) on 30 September 2022. The aim of the new legislation will be to reach the goal of 'net-zero 2050' as per the Paris International Climate Treaty, which Switzerland ratified in 2017. One political party has announced launching a referendum against the legislation, which is why a popular vote on the subject is likely to be held. If the KIG were to come into force, the result would be the end of fossil fuels in buildings.

Furthermore, on 16 September 2022, the Federal Council issued the Message on the revised Act on the Reduction of Greenhouse Gas Emissions (CO<sub>2</sub> Act), since the popular vote had rejected the prior proposal on 13 June 2021. The Federal Council now seeks a change of approach with targeted promotion to steer investments into climate-friendly solutions. The focus is on measures that enable the population to reduce CO<sub>2</sub> emissions. At the same time, the CO<sub>2</sub> Act is intended to strengthen the Swiss energy supply and reduces Switzerland's dependence on oil and natural gas. The matter will now be discussed in Parliament. Furthermore, the Department of Environment, Transport, Energy and Communication has opened a consultation on four ordinances on environmental matters, inter alia, on 13 December 2022 on amendments to the Ordinance on Protection against Non-Ionizing Radiation, the Noise Abatement Ordinance and the CO<sub>2</sub> Ordinance. The consultation will last until 27 March 2023.

In October 2018, the Federal Council passed the draft for the second stage of the partial revision of the Spatial Planning Act for the attention of Parliament. With the second stage of the partial revision of the Spatial Planning Act, construction outside the building zones was to be newly regulated, although the fundamental principle of separating building areas from non-building areas would be maintained. During the Parliament's consultation, on 8 September 2020, a federal popular initiative against the destruction of the landscape (landscape initiative) was submitted, demanding stricter rules for constructions outside the building zones. The Committee for Environment, Spatial Planning and Energy of the Council of States revised the Federal Council's proposal and integrated elements into it that incorporate core concerns of the landscape initiative. The Council of States unanimously approved the new proposal on 16 June 2022. The matter will now be treated by the National Council.

In parallel to the revision of the Swiss Federal Law on Public Procurement, the Confederation and the cantons intended to coordinate their legal basis in procurement law as far as possible in terms of content in a joint project. On 15 November 2019, the inter-cantonal

Body for Public Procurement (InöB) adopted the revised inter-cantonal Agreement on Public Procurement (IVöB 2019). As per 2022, the cantons of Aargau, Solothurn, Schwyz, Graubünden, Thurgau and Appenzell Innerrhoden have already acceded to the IVöB and the canton of Berne has announced it will autonomously implement the rules as cantonal law. The majority of the other cantons are currently preparing to accede to the IVöB and it is to be expected that most of the cantons will do so in the course of 2023.

As a consequence of the first stage of the partial revision of the Spatial Planning Act, the cantons were obliged to introduce a levy by 30 April 2019, which is imposed on planning advantages gained by landowners through the determination of new building zones and in the case of rezoning or upgrading of zones. The Swiss Federal Supreme Court has had various occasions to rule on the implementation of these regulations, most recently in May 2022. The Federal Supreme Court has stated that it is mandatory that such levies also be implemented in the case of rezoning and zone upgrades and not just in the case of new building zones, as had been the proposed solution in the municipal ordinance in question. Thereafter, the Council of States has stated that in its opinion, this does not correspond to the will of the legislator. In the summer session of 2022, it therefore approved a motion to amend the respective provision in the Spatial Planning Act, in order to clarify that a levy by federal law is only imposed in the case of new building zones and that it is also left to the cantons to decide whether a levy shall be imposed for rezoning and zoning upgrades. The proposal will now be discussed by the National Council.

In October 2022, the Federal Council adopted the draft for a partial revision of the CO for the attention of the Parliament. The draft provides, among other things, that the period for the notification of defects to the seller is 60 days, unless the parties agree otherwise in the property purchase contract. According to current law, the buyer has to notify defects ‘immediately’, namely usually within one week, unless the parties have agreed otherwise in the property purchase contract.

Furthermore, the Parliament aims to introduce regulations with regard to the abolishment of the taxation of the imputed rental value for self-occupied premises. After the proposal was accepted by a narrow majority of the Council of States, the matter was treated by the National Council on 29 September 2022, and while it decided, in principle, to take the matter at hand, it also passed a motion to push the matter back to the Committee for Economic Affairs and Taxes of the National Council and requested the redrafting of the proposal. The aim of this is to push for a change of system while observing the constitutional principle of promoting home ownership and the constitutional requirements to prevent inadmissible disparities between tenants and home owners. To this end, it will also be examined whether a sub-commission should be set up to evaluate the possible solutions.

The Parliament also aims to introduce a nationwide mandatory earthquake insurance by means of a contingent liability system. According to this system, all homeowners would be obliged to pay a premium after a severe earthquake has occurred. If there were no severe earthquakes, the earthquake insurance would not incur any costs. Based on the motion of the Commission on the Environment, Spatial Planning and Energy approved by the National Council, the Federal Council has been tasked with proposing respective solutions.

A consultation conducted by the Committee for the Environment, Spatial Planning and Energy of the National Council on an amendment to the Lex Koller ended in February 2022. The proposed amendment to protect strategic infrastructures of the energy industry, such as hydroelectric power plants, gas pipes, the electricity grid and nuclear power plants,

from acquisition by persons abroad, was rejected by a majority of the participants in the consultation. It is currently unclear whether and, if so, with what content, the amendment of the Lex Koller, which is based on an adopted parliamentary initiative, will be pursued.

As reported, the Swiss Federal Supreme Court changed its practice with regard to exemption permits in the event of noise limits being exceeded in March 2021.<sup>7</sup> The Court clarified that exemption permits are only granted *ultima ratio*; first, all other possible constructional and structural measures must be examined; even then, an exemption permit is only granted if the noise limits are not significantly exceeded. The threshold for obtaining an exemption permit for excessive noise limits is therefore extremely high, which makes compacted building in urban areas prescribed by spatial planning impossible in numerous cases. On 16 December 2022, however, the Federal Council adopted a draft amendment to the relevant provisions in the Environmental Protection Act, which clarifies the noise law criteria for the granting of building permits in areas affected by noise and, if adopted by Parliament, would be a rejection of the current system of exemption permits.

## VIII OUTLOOK AND CONCLUSIONS

As outlined above, real estate investors and developers must deal with a number of laws governing real estate transactions, including civil law, environmental law and tax law. In the area of tenancy law, it is key that the parties negotiate lease contracts only within the limits of the mandatory provisions.

The Swiss real estate market is still stable. However, we assume that in 2023 the increase of the interest rates will be taken into account in valuations and property prices are likely to fall, depending on the location.

Due to the geopolitical situation, the ongoing pandemic and the conflict in Ukraine, there is a shortage of various building materials and the price of building materials is rising massively in some cases, which will have an impact on existing and new construction contracts. Creative solutions to this unprecedented situation between the parties are needed.

The energy shortage is not only affecting the commercial and industrial sectors, but also the housing sector in particular. Tenants – in addition to rents that may be rising due to the increase in interest rates – are particularly confronted with sharply rising ancillary costs. Furthermore, the entire population of Switzerland is being called upon to save energy to avoid temporary power cuts.

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<sup>7</sup> See *The Real Estate Law Review*, 11th edition, p. 270.

## ABOUT THE AUTHORS

### ANDREAS F VÖGELI

*Niederer Kraft Frey*

Andreas F Vögeli heads the real estate team at Niederer Kraft Frey, which deals with a variety of highly complex real estate transactions. He specialises in large and complex domestic real estate transactions, with a particular focus on enterprises that are involved in project development, hotel or leisure projects. His expertise covers the full life cycle of real estate, providing a comprehensive and commercially pragmatic approach for clients.

Mr Vögeli is an expert at the University of Zurich at the MAS real estate programme and regularly holds seminars in real estate matters. He is a council member of the real estate management programme of the Institute of Financial Services Zug IFZ, Lucerne University of Applied Sciences and Arts.

Mr Vögeli is highly reputed among clients throughout Switzerland and abroad. He is distinguished as a leading real estate lawyer by *Chambers Europe* and *The Legal 500*, has been nominated for the 'Real Estate Lawyer of the year 2022' category by *Best Lawyer*, and won the ILO Client Choice Award 2017 and 2018 in the category of real estate for Switzerland.

### OLIVER ZBINDEN

*Niederer Kraft Frey*

Oliver Zbinden is a senior associate in the real estate team at Niederer Kraft Frey. He advises and represents domestic and international investors, financial institutions, companies and private clients on all aspects of real estate and construction law, particularly real estate transactions, tenancy law, private construction law, public construction and zoning law, environmental law and Lex Koller issues. In addition, Oliver Zbinden's practice includes general commercial and contract law. Appreciated as an 'excellent real estate lawyer' (*The Legal 500* 2022), Oliver Zbinden has been recommended by *The Legal 500* for real estate and construction since 2020.

After graduating from the University of Lucerne and working as a junior associate with a major law firm in Zurich, Oliver Zbinden initially worked as a research associate with the Business Law Institute (BLI) at the University of Lucerne, as a research and teaching assistant to Prof Dr iur Jörg Schmid in the fields of contract law, property law and notarisation law at the University of Lucerne and as an extraordinary clerk at the Cantonal Court of Lucerne before being admitted to the Bar in Zurich and joining Niederer Kraft Frey in 2017 as an associate. Oliver Zbinden is a member of the International Bar Association, the Swiss Bar Association, the Zurich Bar Association (ZBA) and the construction law specialist group of the ZBA.

## **ANNINA FEY**

### *Niederer Kraft Frey*

Annina Fey is a senior associate and has been a member of NKF's real estate team since 2020. Her practice has focused on real estate matters since her admission to the Bar in Zurich in 2016. She advises and represents domestic and international investors, financial institutions, companies and private clients in all aspects of public law, construction and zoning law, environmental and energy law, private construction law, tenancy law, real estate transactions and general contract law, including employment law. Her practice includes both advisory and litigation matters, which she handles in German, English and French.

Annina obtained her PhD from the University of Lucerne in 2022 and is a graduate of the University of Fribourg, where she obtained a *summa cum laude* bilingual law degree. During her studies, an internship took her to New York where she gained unique insights into the US common law system. She completed her junior associate year with a major Zurich law firm and worked as junior judicial clerk at the District Court of Horgen prior to her bar admission. She is a lecturer at the Lucerne University of Applied Sciences and Arts in a postgraduate programme. She is a member of the Swiss Bar, the Zurich Bar Association, the construction law specialist group of the Zurich Bar Association, wipswiss and ULI Switzerland.

## **JAMIE LEE MANCINI**

### *Niederer Kraft Frey*

Jamie Lee Mancini is an associate in the real estate team at Niederer Kraft Frey since 2022. She advises and represents domestic and international investors, financial institutions, companies and private clients on all aspects of real estate and corporate law, particularly real estate transactions, tenancy law, private and public construction law, public procurement law and Lex Koller issues.

Jamie studied at the University of Berne and the Utrecht University. During her studies, she worked as a legal intern with an international private bank as well as with law firms in Spain and Berne. After graduating from her studies, Jamie worked as a junior associate with an international law firm in Berne as well as at the Regional Court of Thun as a law clerk. After taking the bar exam, Jamie initially worked as an associate with an international law firm in Zurich in the fields of corporate law and M&A before joining Niederer Kraft Frey in 2022 as an associate. Jamie is a member of the Swiss bar, the Zurich Bar Association (construction law specialist group) and the International Attorneys' Association (AIJA).

**NIEDERER KRAFT FREY**

Bahnhofstrasse 53

8001 Zurich

Switzerland

Tel: +41 58 800 8000

Fax: +41 58 800 8080

[andreas.f.voegeli@nkf.ch](mailto:andreas.f.voegeli@nkf.ch)

[oliver.zbinden@nkf.ch](mailto:oliver.zbinden@nkf.ch)

[annina.fey@nkf.ch](mailto:annina.fey@nkf.ch)

[jamielee.mancini@nkf.ch](mailto:jamielee.mancini@nkf.ch)

[www.nkf.ch](http://www.nkf.ch)

