



Dubai
International
Financial
Centre

CONSULTATION PAPER NO. 2

March 2018

PROPOSED AMENDMENTS TO THE REAL PROPERTY LAW DIFC LAW NO. 4 OF 2007 AND REGULATIONS

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PROPOSALS RELATING TO AMENDMENTS TO THE REAL PROPERTY LAW
AND REGULATIONS

Why are we issuing this paper?

1. The Dubai International Financial Centre Authority (“**DIFCA**”) proposes to enhance the current Real Property Law regime (the “**Current Law**”) and the Real Property Regulations (the “**Current Regulations**”)¹ to bring that regime in line with international best practice and to address certain areas that require further clarification. In doing so, we have taken into account specific factors relating to Real Property within Dubai International Financial Centre (“**DIFC**”) and the need to provide an appropriate regulatory environment for the guarantee of title to real property to all purchasers, whether off plan or in the secondary market, and to facilitate dealings with Real Property generally. This Consultation Paper No. 2 (“**Consultation Paper**”) seeks public comments on the proposed amendments to the Real Property Law (the “**Amendment Law**”) and the Real Property Regulations (the “**Amendment Regulations**”).
2. In an attempt to ensure that the DIFC Real Property market is a highly regulated environment which instils confidence in current and prospective owners, investors, occupiers, developers and mortgagees, we have introduced a host of new or enhanced various provisions of the Current Law which are detailed further below.
3. The current legislative proposal is accompanied by proposed amendments to the Current Regulations that will be issued together with the Amendment Law. DIFCA proposes to seek public comment on the proposed amendments to the Current Regulations as well as the Amendment Law.

Who should read this paper?

4. This Consultation Paper would be of interest to persons owning, occupying, developing, registering rights against or and those planning to own, occupy, develop or register rights against Real Property within the DIFC including their legal advisers.
5. DIFCA invites interested parties to provide their views and comments on the issues outlined in the Consultation Paper, using the table of comments provided in Annex F.

¹ The DIFC enacted its first Real Property Law and Regulations in 2007, which govern the registration and administration of Real Property in the DIFC. The law was amended by the Real Property Law Amendment Law, DIFC Law No. 4 of 2012. The Current Regulations are currently the second consolidated version which came in to force on 1 April 2014.

6. All comments should be provided to the person specified below:

Jacques Visser
Chief Legal Officer
DIFC Authority
Level 14, The Gate, P. O. Box 74777
Dubai, United Arab Emirates
or e-mailed to: consultation@difc.ae

7. You may choose to identify the organisation you represent in your comments.
8. DIFCA reserves the right to publish, on its website or elsewhere, any comments you provide, unless you expressly request otherwise at the time the comments are made.

What happens next?

9. The deadline for providing comments on the proposals in this Consultation Paper is 15 April 2018.
10. Once we receive your comments, we will consider if any further refinements are required to the Amendment Law annexed to this Consultation Paper at Annex A or the Amendment Regulations annexed at Annex D. Once DIFCA considers the Amendment Law and Amendment Regulations to be in a suitable form, they will be enacted as an amendment to the Current Law and Current Regulations to come in to force on a date specified and published.
11. The Amendment Law and Amendment Regulations are in draft form only. You should not act on them until the Amendment Law and Amendment Regulations are formally enacted. We will issue a notice on our website when this happens.

Defined terms

12. Terms identified throughout this paper by the capitalisation of the initial letter of a word not specifically defined in this Consultation Paper are to be interpreted as having the definition provided in the Amendment Law or Amendment Regulations. Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

Background

13. The proposal to replace the Current Law with the Amendment Law stems from a comprehensive review of the Current Law and the identification of certain areas that we felt could do with clarification or enhancement. In undertaking that review, we considered

international best practice and comparable models in other jurisdictions, focusing specifically on the United Kingdom and Australia on which the current regime is substantially premised.

14. We also considered the local property market in the UAE to ensure alignment of certain recognised and accepted practices within the region. The Amendment Law attempts to balance the needs of the DIFC to provide proportionate regulation and stability in the Real Property market, instil confidence in persons seeking to develop and/or own Real Property within the DIFC and follow an established and an accepted common law model of the registration of Real Property Rights and Real Property Interests.

Key changes proposed

15. The Amendment Law and Amendment Regulations contain significant enhancements and refinements to the Current Law and Current Regulations. The key aspects of the proposed changes include:
 - (a) new provisions introducing an off plan sales regime incorporating the registration of off plan sales on a new off plan register, the setting up of escrow accounts by developers and an off plan disclosure regime to buyers – see paragraphs 16-18;
 - (b) a removal of the concept of a final search certificate and a general clarification of who can apply for Official Search Certificates – see paragraphs 19 -20;
 - (c) the carve out of certain provisions relating to landlord and tenant issues in order to deal with this in a separate Leasing Law in due course, the reduction of the minimum term for compulsory registration to a lease exceeding 6 months and basing the registration fee payable for the registration of leases on bands depending on the length of the lease term – see paragraphs 21-24;
 - (d) the imposition of liability on developers for construction defects to new buildings - see paragraph 25;
 - (e) the addition of more detailed and comprehensive provisions regulating the registration of Real Property Rights including Mortgages and Caveats within the DIFC – see paragraphs 26-27;
 - (f) changing the timing of the completion of a legal disposition and/or other dealings with Real Property to the actual registration of the Instrument relating to such disposition being lodged in the form approved by the RORP and removing the requirement for the filing of a separate Freehold Transaction Return in the case of a Transfer of a Real Property Interest – see paragraphs 28-31;

- (g) changing the deadlines for registrations of the Transfers of Real Property Interests and partially mirroring the onshore penalty regime for any delays in such registrations – see paragraphs 32-38;
- (h) clarification of the role of the RORP in respect of Real Property Rights and Real Property Interests and further enhancement and expansion of its powers to ensure effective administration of the Amendment Law – see paragraphs 39-43; and
- (i) clarification of the RORP'S duties and obligations in the circumstances where the beneficial owner of property is a Minor – see paragraph 44.

Off Plan Sales Regime

16. In our view the Current Law could do with improvement in providing protection for off plan purchasers of Real Property in the DIFC in terms of providing a distinct registrable Real Property Interest in the Real Property Register. Currently this is done by way of the registration of a Caveat against the Folio of the Plot in which a Lot is purchased until construction is complete and handover takes place, whereupon titles are issued to off plan purchasers. We do not feel that Caveat registration is sufficient protection as it does not confer an indefeasible ownership right upon a third party purchaser and can essentially be challenged by a Caveatee.
17. Furthermore in our opinion the Current Law could benefit from having regulation over the activities of developers wishing to sell off plan properties in the DIFC.
18. Under the Amendment Law, we propose to:
 - (a) Introduce an Off Plan Registry specifically for the RORP to register Developers of Strata Developments, Off Plan Developments and Off Plan Sales. This should provide comfort to the market and prospective purchasers that developers in the DIFC are appropriately licensed to conduct development activities, that the development has been approved by the DIFC and that they will obtain indefeasible title to their Lots;
 - (b) In addition to the above we are proposing to bring in a scheme similar to onshore Dubai whereby developers must set up an escrow account for the purposes of pooling sums paid by Purchasers in an Off Plan Development for the use of construction of the development with sums withdrawable by a Developer once verified by an Approved Project Assessor.
 - (c) Furthermore we propose that the RORP be provided with wider powers to approve the documents to be used during the conducting of Off Plan Sales such as the Off

Plan Sale Agreements and Disclosure Statements providing details of the Off Plan Development to Purchasers. We intend to increase the powers of the RORP to issue further Directives as and when required to ensure a fair balance in the protection of rights and obligations between Developers and Purchasers.

Q1. Do you have any concerns about the Off Plan Registry regime and the way it is drafted in the Amendment Law?

Q2. Do you have any comments or concerns on the additional regulation in general and the expansion of the monitoring powers of the RORP?

Q3. Are there any issues or concerns relating to Off Plan Sales that you feel are not addressed or require further elaboration?

Final Search Certificate

19. Article 165 of the Current Law envisages a scenario whereby a potential purchaser of Real Property may apply for a final official search of the Folio of the Real Property Register for the Lot being purchased. The purpose appears to have been a replication of the UK regime whereby registrations of Real Property Rights and Interests are effectively suspended for the duration of a period between an exchange of contracts by the buyer and seller until completion of the transaction. However this is not a concept that the local market is familiar with and this application has not been made to date. Therefore we plan to remove this Article altogether and put the onus on the party buying a Lot to carry out an official search of the Registry prior to or on the same day as lodging the Transfer Instrument.
20. Furthermore in Article 154 of the Amendment Law we have specified the categories of persons that may apply for an Official Search Certificate as we feel that the RORP should be satisfied that there is a legitimate reason for such an application to protect the identities of owners of Real Property within the DIFC.

Q4. Are there any concerns in relation to these proposed changes?

Registration of Leases

21. We have removed many of the provisions in Part 8 of the Current Law which relate to leases as it is our intention to enact a new Leasing Law next year which will provide further regulation in landlord and tenant matters in the DIFC, which again we hope will clarify and hence improve confidence in the Real Property sector within the DIFC.

22. At Article 53, the Current Law makes reference to a Lease which exceeds 1 year being subject to compulsory registration. Most residential leases will be for a period of 12 months exactly and this therefore technically provides a loophole against those leases being registrable. We have taken the length of the term of a registrable lease down to a lease exceeding 6 months and furthermore introduced a stepped system of registration fees payable in respect of leases for different term lengths, namely 6 months – 5years, 5years - 10 years and over 10 years. The new applicable registration fees are set out in the Amendment Regulations at Schedule 1.
23. Furthermore we removed the reference in Article 35 of the Current Law to the RORP creating a Folio for a lease registration as this was not accurate or current practice.
24. An additional amendment we felt necessary to make to the provisions relating to leases was to remove the obligation on the RORP to register an option to renew a lease as there should be no duty on the RORP to check the underlying documents to Instruments and construe whether such an option exists.

Q5. Are there any concerns in relation to these proposed changes to capture lease registration?

Construction defects of new buildings

25. The Civil Code (Federal Law No. (5) of 1985 on the Civil Transactions Law of the United Arab Emirates as amended by Federal Law No. (1) of 1987 dated 14/02/1987) is not applicable to the DIFC by virtue of Federal Law No.8 of 2004. The provisions of the Civil Code relating to the decennial liability on developers for construction defects to buildings therefore does not apply in the DIFC. In Article 162 of the Amendment Law we have proposed provisions which mirror the Civil Code and introduced a statutory liability on developers for non-structural defects for 1 year from Building Completion (as defined in the Amendment Law) and structural defects for 10 years. Again the reasoning behind these changes is to give Purchasers of new builds confidence in purchasing DIFC Real Property and legal recourse in the event of a sub- standard build quality.

Q6. Are there any concerns in relation to these proposed changes?

Registration of Real Property Rights

26. The Current Law contains various references to the registering and recording of various rights and interests against Real Property with insufficient clarification on the legal status or

differences between rights and interests and recording and registration and how these concepts take precedence over each other. We aim to clarify and consolidate this to refer to a registrable ownership interest being referred to as a Real Property Interest and any other registrable right or interest against Real Property being referred to as a Real Property Right including Covenants, Easements, Mortgages and Caveats and even the Master Community Declaration which will all appear on an Official Search Certificate of a Folio and rank in order of chronology of registration.

27. We propose to tighten up the provisions for the registration, cancellation and lapsing procedures for a Caveat to ensure that there is an equal balance between the rights of both Caveatee and Caveator. Please see our proposed amendments to the Current Law in Part 17 of the Amendment Law.

Q7. Are there any concerns in relation to these proposed changes and whether the Caveat registration or lapsing regime requires any further clarification?

Instruments and their Registration

28. In the Current Law there is a mention of the registration of Instruments but we felt there was a lack of clarity as to whether these Instruments were intended to be documents entered into between third parties being lodged with RORP for the registration of a Real Property Interest or Right, or documents prescribed by the RORP giving rise to the registrable Real Property Interest or Right.
29. To date the RORP office has formulated prescribed forms which are required for the registration of Real Property Interests or Rights which capture the main essence of what has been agreed between parties but reliance was always on the underlying accompanying documents as to the contractual completion date and actual legal disposition taking place. We feel that this is contrary to the original intention of the Current Law which was that the Instruments should in fact be the prescribed forms and not the underlying documents, similar to the position in the UK and Australia. For example in the UK a sale of a property will not be considered complete in order for title to pass from the seller to a buyer until the form prescribed by the UK Land Registry is completed by the parties to the transaction.
30. Furthermore we do not feel that it is the function of an RORP to interpret documents contractually purporting to grant rights and interests in Real Property and verify whether they do so. The RORP has a duty to register all dispositions that the parties to those dispositions agree have been completed with regards to Real Property and provide the details of on the RORP prescribed forms. The RORP should have the right to request all documents pertaining to such transactions to check any aspect that it wishes to do so (for

example the value of the Real Property stated in an SPA/MOU and evidence of payment of the same), but should have no duty to analyse and reach an opinion on the accuracy or completeness of such documents or the intention of the parties.

31. The Current Regulations envisage the filing of a Freehold Transaction Return which was a form additional to the actual transfer form. We have decided that there is no need for two separate forms as such and we are proposing to amalgamate all the details the RORP requires to register a change in title in one Transfer Instrument pursuant to which the prescribed 5% fee for registration will be payable.

Q8. Are there any concerns in relation to these proposed changes?

Deadlines for the registration of Transfers and Penalties for Non-Filing a Transfer Instrument

32. In the Current Regulations there is a requirement at Article 5.1 of Schedule 2 for a purchaser to file a Freehold Transaction Return within thirty (30) days of the effective date of a freehold transaction. By virtue of Article 5.5 of Schedule 2 of the Current Regulations, the Freehold Transaction Fee was also payable within this timeline but it was not clear whether it was payable on the same day or on the lodging of a further transfer instrument. Article 5.5 of Schedule 2 of the Current Regulations states that the penalty for non-payment of the Freehold Transaction Fee within the timeline is interest of 5 per cent per annum until the fee is actually paid.
33. As mentioned above in paragraph 30 we do not see it as the duty of the RORP to have to review the contractual documents purporting to transfer a Real Property Interest in order to ascertain the effective date. Secondly we feel that this timeline for registration in respect of transfers of Real Property Interests in the secondary property market in particular is arbitrary and unfair in many cases, especially where there are mortgages to be discharged from title and the Purchaser has no influence on the timing of this from the mortgagee's side. Thirdly we feel that the Current Regulations do not make clear what the 5% interest penalty is applied on.
34. We have therefore proposed in Article 1.6.2 of the Amendment Regulations that the timeline for registration in respect of the registration of Off Plan Sales in the Off Plan Sales Register should be thirty (30) days from the date the Off Plan Sales Agreement is entered into and the Freehold Transfer Fee is also payable on this date.
35. In respect of the Transfer of Shares in an entity that owns Real Property the timeline for registration and payment of the Freehold Transfer Fee is proposed as thirty (30) days from

the registration of that Transfer of Shares with the relevant regulatory registration body (being the DIFC Registrar of Companies).

36. In respect of a transfer of Units within a Unit Trust the timeline for registration and payment of the Freehold Transfer Fee is thirty (30) days from the date of Transfer of those Units.
37. In respect of the secondary market Transfers of Real Property Interests, given that we have moved towards the Transfer Instrument being the actual document creating the legal disposition we do not see the need to impose any timeline here as such. This is the same situation as in onshore Dubai. The registration should be payable on the date the Transfer Instrument is lodged with the RORP.
38. If it comes to the attention of the RORP that there has been a prior contractual transfer of a Real Property Interest that has not been registered, the RORP can order for such registration to take place and apply an additional 5% penalty on the value of the Real Property on the effective date of the unregistered transfer or at the date of registration, whichever is the greater. This again broadly mirrors the situation in onshore Dubai and we feel is a sufficient pecuniary deterrent to limit fraud of this nature.

Q9. Are there any concerns relating to these proposed changes and timelines for the registration of Transfers of Real Property Interests?

Enhancement and Expansion of the RORP's Powers

39. The proposed expansion throughout the Amendment Law of the RORP's investigative and enforcement powers and the ability to issue Directives in our view would enable the RORP to carry out its role more effectively and to detect and deter contraventions of the Amendment Law and Amendment Regulations.
40. The power of the RORP to issue Directives has been specifically extended to the following areas: a) the form of Off Plan Sales Agreements, Disclosure Statements and any other Documents to be produced by a Developer, b) the measurement practice of Lots, c) the specification of criteria required before a release of funds can be made from an Escrow Account and d) the time and method of the payment of fees prescribed under the Amendment Law.
41. In addition to the above and as mentioned previously we have removed any onus or liability on the RORP to check or verify the accuracy or completeness of any underlying documents to a transaction involving the registration of a Real Property Interest or Real Property Right.

We felt that this was not an appropriate role for the RORP and it should not have to adjudicate on any contractual disputes which arise between parties to transactions.

42. Further powers of the RORP added to the Amendment law include: a) the ability to approve the Approved Project Assessor for an off plan development, b) the administration of the Off Plan Register, c) the right to issue Orders against parties for non-compliance with the Amendment Law including (i) to a developer to rectify construction defects within a property, (ii) the release of retention monies held by the Escrow Account 12 months following the expiry of the defects liability period and (iii) to enforce the payment of community fees due under the Master Community Declaration by defaulters.
43. We have also enhanced the provisions in the Current Law with respect to the Master Community Declaration to further clarify how the Master Community Declaration is registered on the Folio and its status on the Folio. Although there is already a requirement under the Current Law for the RORP to include the Master Community Declaration in the Folio, along with the benefits and burdens created under such Master Community Declaration, the Amendment Law requires that the Master Community Declaration be Registered by the RORP as a Covenant in Gross on each Folio and further clarifies the position of the Master Community Declaration over other Registered Instruments. Under the Amendment Law the Master Community Declaration shall take priority over all other Registered Instruments notwithstanding it was Registered after the Registration of other Instruments.

Q10. Do you agree with the proposed functions, objectives and powers of the RORP? Are there other powers that need to be added or removed in your opinion? What are your reasons?

Q11. Do you have any concerns relating to any other aspect of RORP's powers? What are they and how should they be addressed?

Minors

44. A new Article 134 ensures that any beneficial ownership interest of a Minor is to be registered by way of a Caveat on title until the Minor reaches the age of 18 and that the appointed guardian of the Minor is registered as the Registered Owner in the meantime. Once the Minor reaches 18 it can lodge a Transfer Instrument with the RORP to transfer the legal interest in the property to him/herself.

Q12. Do you wish to see any further provisions to protect owners of property who are under the age of 18?

Legislative Proposal

45. This legislative proposal contains the following:
- a. the Amendment Law (at Annex A);
 - b. the Current Law (at Annex B);
 - c. a comparison of the Current Law and the Amendment Law (at Annex C);
 - d. a comparison of the Current Regulations and the Amendment Regulations (at Annex D);
 - e. a roadmap of the proposed changes (at Annex E); and
 - f. a table of comments to provide your views and comments on the Consultation Paper (at Annex F).