FRAMEWORK FOR SHOPPING CENTRE BUILDING PERMITS ACROSS EUROPE: SPAIN[1]

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Fortunately or unfortunately, the construction and operation of shopping centres in Spain is subject to various legal requirements. This paper is not intended to be a detailed manual or an exhaustive review of all the legal aspects regarding shopping centre development in Spain, but is rather an attempt to provide the reader with a general overview of the main legal issues affecting such developments. Specifically, this note is an introduction to the Spanish legal framework on (a) the planning and zoning procedures for the implementation of shopping centres; (b) licensing requirements; and (c) environmental procedures for the implementation of such projects.

While outsiders often consider Spain a centralised state, the country is administratively divided into seventeen autonomous regions (*Comunidades Autónomas*), two cities in Northern Africa and more than 8,000 municipalities. Furthermore, there are three different levels of government in the country: municipal government (local entities), the government of each autonomous regions and the central government. These three territorial authorities have their own autonomous political bodies and decision-making powers in various areas including planning, tourism, retail and environmental protection.

As such, the legal framework for the development of shopping centres in Spain is far from being uniform and is governed by different regulations which will depend on the autonomous region and municipality hosting the project.

1. SHOPPING CENTRES AND LAND ZONING

The development of shopping centres entails a specific and relevant use of the territory. Thus, the possibility and terms according to which projects can be developed will closely depend on the urban planning regime of the land on which they are to be developed.

As the reader might suspect, the urban planning regime for land is not homogenous throughout Spain. Autonomous regions are the territorial administrations with subject-matter competency to legislate on planning matters. The urban regime for land within national territory is therefore primarily defined by the different planning laws enacted by the autonomous regions and, on basic aspects, by state regulations on land (Legislative Decree 2/2008 of 20 June approving the consolidated text of the State Land Act - the "**TRLS 2/2008**"-), given that the state has subject matter competences to establish the basic conditions guaranteeing the equal exercise of rights and the fulfilment of constitutional duties regarding land.

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The urban regime of land is linked to its specific urban classification (*clasificación urbanística*). The urban classification of the whole municipal territory is carried out by the relevant local master plan (-*plan general*-) which, although it is drafted and prepared by the relevant city council, is ultimately approved by the autonomous region[2].

In general (differences might exist depending on the autonomous region), the master plan divides land within a municipality into three categories:

a) Rural land (*suelo rústico o suelo no urbanizable*), which can be protected or not depending on the existence of specific environmental characteristics, is excluded from the urbanisation process and its ordinary uses include agricultural, farming, livestock, forest activities, etc.

b) Urban land (*suelo urbano*), which can be either consolidated or non-consolidated is already included in the city structure which enjoys all necessary services and road access, public services, etc. The master plan defines all the planning characteristics and parameters (buildability -*edificabilidad*-, detailed uses, footprint, set-back requirements, etc.) of such land and therefore no further planning or execution instruments are required to start the building process[3].

c) Land suitable for development (*suelo urbanizable*), which can be either divided or not in planned units) is land that, according to the master plan, will be transformed into urban land upon completion of the urban development process in order to satisfy a municipality's growth needs. The master plan establishes its total buildability, uses, general infrastructures providing service to the whole municipality, etc. Construction on such land is not permitted until more detailed planning instruments are approved and the full planning execution process is completed.

1.1 Shopping centres on rural land

A number of shopping centres in Spain have been developed on rural land. Although these projects are inconsistent with the ordinary planning regime for this type of land (*i.e.*, agricultural, farming and forest), they were authorised following a specific procedure established in former state laws (articles 85 of Royal Decree 1346/1976 of 9 April approving the consolidated State Land Act and article 16 of Royal Legislative Decree 1/1992 of 26 June approving the consolidated State Land Act). The authorisations permitted construction of projects of public utility or social interest that needed to be located in rural areas.

This possibility was later removed by the Spanish Supreme Court which held that shopping centres are better intended for urban areas (Supreme Court judgments of 7 June 1989 and 17 July 2001, among others). Nowadays, a number of autonomous regions have enacted regulations expressly prohibiting the possibility of developing shopping centres in rural land.

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2 General plans are definitively approved by the autonomous region. The approval process is nevertheless initiated by the city councils by an initial approval which is followed by a provisional approval after a period of public enquiry and consultation with other administrations.

3 This is applicable to consolidated urban land (*suelo urbano consolidado*). In respect of non-consolidated urban land, the legal regime is very similar to land suitable for development.

1.2 Shopping centres on land suitable for development and urban land

Due to the specific nature and legal purpose of rural land, shopping centres will normally be developed on land classified as urban or suitable for development in the relevant master plan. In these cases, the land will be normally classified in the relevant zoning plan as "*Commercial; Large retail establishment category*".

Due to the significant impact these projects might have on the whole structure of the municipality, some regional laws and municipal planning regulations require that such projects (large retail establishments) be expressly authorised in the municipality's master plan or even through a broader territorial plan. Detailed planning instruments (*i.e.*, those with a narrower scope) will lack competency to zone these projects if not previously authorised by the master plan.

Construction and operation of shopping centres to be built on land suitable for development will require the prior fulfilment of a number of legal obligations inherent to the legal regime of this category of land since the urban development process has not been completed. These requirements include, among others, (i) the approval of specific and detailed zoning plans (Special Plan, Partial Plan, Detail Survey), which are normally approved by the city councils and contain the specific planning parameters governing the plots included on a development unit (footprint, detail uses, set-back requirements, etc.); (ii) the assignment without consideration to the city council of land to be used as public roads, parks, etc.; (iii) the fair distribution among owners of the rights and obligations (*equidistribución*); and (iv) the execution of the public infrastructures of the development unit.

In general, regulations require the completion of public infrastructure works (*e.g.*, roads, sewage, water and electricity supply, etc.) prior to the commencement of the construction of the building. As such, a developer will generally be entitled to directly apply for the relevant licences on urban land. For land suitable for development, the developer will not be entitled to apply and obtain the relevant licences to build the project until the land has been transformed into urban land (*i.e.*, upon completion of the public infrastructure works). As an exception, developers will be allowed to start the construction of the project (even if the urbanisation works have not been concluded) if they undertake not to use the construction until the urbanisation works[4] are fully terminated and to include this undertaking in contracts regarding the transfer the ownership of the plot. Finally, the developer should create and deliver suitable securities or guarantees in order to secure or guarantee full termination of the infrastructure works.

2. MUNICIPAL LICENCES REQUIRED FOR THE DEVELOPMENT OF SHOPPING CENTRES

Once urban development is completed, construction and use of the buildings is subject to the granting of a number of licences and permits by the relevant authorities. These are aimed at enabling authorities to monitor that the construction and activities to be carried out are in compliance with planning and environmental regulations.

[4] Legally speaking, no licences authorising the use (*e.g.*, operation and first occupation licences) should be granted until the urbanisation has been terminated and accepted by the city council.

Detailed rules regarding "licences" are normally established by local regulations and generally vary in each municipality. Nevertheless, the following rules are generally applicable throughout Spain:

a) Licences must be applied for by the developer (article 9.2.*c*) of Law 38/1999 of 5 November on construction).

b) Applications of licences must include technical documentation (projects) allowing local authorities to assess whether the proposed construction complies with planning regulations.

c) Local authorities are obliged to approve licence applications if they comply with the planning regulations (*i.e.*, approval is not discretional).

d) Regulations set forth deadlines within which local authorities must issue the licences (normally, three months from licence application). Failure to issue the licence within the deadline implies the denial of the licence (article 23 of Royal Decree-Law 8/2011, of 1 July), this denial being considered a "legal fiction" to make the applicant entitled to challenge the denial in Court. Whether or not challenged, the municipally will continue to be obliged to grant the licence if the application is in accordance with the relevant regulations.

e) Failure to obtain the licences may be sanctioned with economic fines or even lead to demolition orders (if the works cannot or are not legalised) or closure orders.

The specific permits (and their names) required for the construction and use of buildings depend on local regulations, but mainly include the construction licence and the first occupancy licence (licences related to the construction works) and the activity and opening licences (licences related to the activities to be carried out inside the building).

2.1 Construction licences:

a) Works licence (*licencia de obras*)

Work licence must be obtained prior to starting any construction works. Licences cannot be granted unless the premises are to be built in accordance with planning regulations. Works licences will specify a term to start and to finish construction (both of which depend on regional and local regulations).

It is important to note that this licence cannot generally be granted until the commercial licence has been granted (see section 4).

b) First occupancy licence (*licencia de primera ocupación*)

First occupancy licence is closely linked to the works licence and must be obtained once the building works have been concluded. By granting the first occupancy licence, local authorities authorise the use of the building after ensuring that the works have been carried out in accordance with the works licence and all other applicable regulations, and that the works have been duly completed.

2.2 Activity licences:

a) Activity licence (*licencia de actividad*)

Activity licence must be obtained before any activity is carried out in the shopping centre. This licence must be granted either before or simultaneously with the granting of the works licence. By means of this licence, local authorities ensure that the use of the building (large retail establishment) is in accordance with those permitted by the planning regulations and verifies other matters such as compliance with environmental, health, safety and fire prevention regulations.

b) Operating licence (*licencia de funcionamiento o apertura*)

Operating licence is closely linked to activity licence and is granted once the activities are about to begin after construction has been finalised. The purpose of this licence is to verify that the premises have been carried out in accordance with the activity licences and that the corrective measures included in the activity licences have been properly fulfilled or implemented. Activities cannot begin until the opening licences are granted.

3. ENVIRONMENTAL ASSESSMENT OF SHOPPING CENTRES

Most of the activities have a direct impact on the environment. This is indeed the case of shopping centres. Accordingly, shopping centres are subject to a prior assessment in order to determine the possible environmental impact associated to their construction and operation.

European Union law requires that member states adopt measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment (due to, *inter alia*, their nature, size or location) are subject to a development consent and an assessment with regard to their effects (Article 1 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, amended by Council Directive 97/11/EC of 3 March 1997- the "**Directive 85/337/EEC**"-).

Annex II of Directive 85/337/EEC lists projects, works and activities for which Member States must determine through a case-by-case examination or threshold or criteria set by member states whether the project must be made subject to an environmental assessment. Annex II (Group 10) includes "*Urban development projects, including the construction of shopping centres and car parks*".

The legal regulation for environmental impact assessments (the "**EIA**") was introduced in Spain by virtue of Royal Decree 1302/1986. According to this piece of legislation, "[*u*]*rban development projects, and hotel complex out of urban areas and linked constructions, including the construction of shopping centres and car parks"* were included among the projects that are always subject to an EIA provided that they were located (i) outside "*urban areas*"; and (ii) "*in special sensible areas designated in execution of Directives 79/409/EEC and 92/43/ECC or on wetlands included in the Ramsar List*".

However, the European Court of Justice issued a judgment on 16 March 2006 (Commission *vs* Spain -Case C-332/04-) in which Spain was found to be in breach of Directive 85/337/EEC. The case concerned the construction of a shopping centre in Paterna (Valencia) and addressed whether or not the construction of the shopping centre was subject to EIA. The judgement stated that Spanish legislation for qualification of point 10(b) of Annex II of the Directive (requiring an EIA to be carried out for urban-development projects including the construction of shopping centres and parking facilities) in applying this only to projects outside urban areas reduced the scope of the Directive went beyond the degree of latitude available to member states. The judgement could have used Shakespeare's words to explain it: "*The fault, dear Brutus, is not in our stars, but in ourselves, that we are underlings*" (Cassius to Brutus in *Julius Caesar*, Act 1, Scene 2).

As a consequence, Law 9/2006 of 28 April regarding the evaluation of the effects of some plans and programmes modified previous Spanish regulations and required a case-by-case examination of shopping centres not constructed outside urban areas or on special sensible areas in order to determine whether the project had to undergo an EIA.

The state legal framework in this matter is currently set out in the consolidated text of the Law on Environmental Impact Assessment approved by Royal Legislative Decree 1/2008 of 11 January (the "**EIA Law**") and Royal Decree 1131/1988.

According to these regulations, shopping centres will be required to undergo an EIA whenever the construction will take place outside "*urban areas*" and are carried out in special sensible areas designated in execution of Directives 79/409/EEC and 92/43/ECC or on wet lands included in the Ramsar List (Annex I Group 9.*c)*.3 of EIA Law). If shopping centres are not located in these areas, the EIA will be required only if the environmental authority so decides within the consultation proceedings which are mandatory for the developer of a shopping centre (Annex II Group 7.*b)* of EIA Law) and based on the criteria set forth in Annex III of the EIA Law.

In this respect, it is important to note that most of the autonomous regions have enacted legislation which has increased the number of projects, works and activities which must undergo EIA or similar environment assessment procedures, among which the construction of shopping centres are normally included.

4. COMMERCIAL LICENCE

4.1 New European legal framework: Directive 2006/123/EC

In addition to the municipal licences, and generally prior to the granting of the same, developers of shopping centres in Spain are required to obtain a commercial licence from the relevant autonomous region.

The state and the autonomous regions have deeply reviewed in the past two years the legal framework of these licences in order to adapt the existing regulations on large retail establishments to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (the so-called "**Bolkestein Directive**"). The deadline for member states to implement the Bolkestein Directive elapsed on 28 December 2009.

The Bolkestein Directive is an initiative of the European Commission with the purpose of creating a single market for services within the European Union similar to that for goods. The Bolkestein Directive sets forth general provisions facilitating the exercise of freedom of establishment for service[5] providers and the free movement of services.

In particular, Article 9 of the Bolkestein Directive permits member states to condition the access to a service activity or the exercise thereof to an authorisation subject to certain conditions (there is no discrimination against the provider, it is justified by an overriding reason relating to the public interest and the desired objective cannot be attained by less restrictive means). The authorisation schemes must be based on criteria which are (i) non-discriminatory; (ii) justified by an overriding reason relating to the public interest; (iii) proportionate to the public interest objective; (iv) clear and unambiguous; (v) objective; (vi) made public in advance and (vii) public and accessible.

The Bolkestein Directive expressly prohibits member states from making access to a service activity in their territory subject to a case-by-case application of an economic test or making the granting of the authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the planning objectives set by the competent authority. The prohibition does not address planning requirements that do not pursue economic aims but are instead based on overriding reasons relating to the public interest.

Nevertheless, member states may make access to a service subject to compliance of quantitative or territorial restrictions, specifically with limits with reference to population or a minimum geographic distance between providers.

Many regional commercial regulations in Spain conditioned in the past the granting of commercial licences (and therefore access to a service activity) on the proof of the existence of economic needs or market demand or the potential effects that the development of a particular shopping centre may have on the existing commercial network.

In view of the above, important modifications in connection with the European legislation were made of State Law 7/1996 of 15 January on retail trade (the "**Retail Trade Law**") and the regional regulations.

4.2 Current legal framework in Spain

In trade retail matters, the central government has decision-making powers to establish conditions to guarantee equal rights for all Spanish citizens, civil and commercial law and the general demands of the economy. Regional authorities have decision-making powers (if established in their relevant regional-statutes) over zoning and planning, retail trade, execution of national law for the defence of competition and protection of consumers and users. All regions have assumed

[5] Service is defined as any self-employed economic activity, normally provided for consideration.

legislative powers and authority over domestic trade, without prejudice to the national general regulatory framework.

The national regulation on retail trade is the Retail Trade Law, which defines a "*retail establishment*" as those fixed and permanent premises, constructions or installations devoted to regular retail activities, does not require any longer a specific authorisation for the opening of a large retail establishment although authorises the autonomous regions to establish a specific authorisation regime subject to the conditions set forth by the Bolkestein Directive defined above as they have been transposed to Spanish legislation by Law 17/2009, of 23 November.

The Spanish autonomous regions enacted their own regulations including unique definitions of large retail establishment and setting out the specific procedure for the granting of commercial licences and have recently adapted them to the requirements of the Bolkestein Directive, this adaptation having taken place, however, in very different ways. As such, regulations governing the requirements for the issuance of commercial licences vary significantly amongst the autonomous regions.

In the regulations of the autonomous regions, large retail establishments are normally defined as retail establishments with a retail surface area exceeding some specific figure, whether individual (such as a hypermarket) or collective (such as a retail park or centre).

The operation, extension and, in some cases, the transfer of large retail establishments require the granting of a commercial licence or an authorisation from the regional government. Some regions, such as the autonomous region of Madrid, have openly decided to eliminate the commercial licence as a requirement for the development of large retail establishments. Others, however, still struggle to find the loopholes in the Bolkestein Directive to try and get a similar situation as prior to the Bolkestein Directive, all in all creating a diverse and staggering scenario to the detriment of developers, retailers and, ultimately, consumers. This situation often reminds us of Seneca's words "*if a man knows not to which port he sails, no wind is favourable*".

Normally, the developer of the shopping centre (in the case of collective retail establishments) or the specific operator (in the case of individual retail establishments) must apply for the licence. Prior to the granting of the commercial licence, the following reports will generally be issued: (i) a report from the relevant City Council confirming the planning compatibility of the project; and (ii) a report from a administrative body of the autonomous community with powers on environment, territorial zoning and traffic.

Regional regulations set out a maximum deadline within which the regional authorities must grant the commercial licence. In most cases, failure to carry out the proceeding within this deadline will imply, in general terms, a tacit granting of the licence.

It is important to note that commercial licences are granted on the basis of criteria that are at times vaguely defined, which causes the granting process of these licences to often be considered as discretionary. Generally, regional authorities will

verify the impact of the new shopping centre on road network, parking spaces, traffic, environment, territorial restrictions, etc.

Some regions (*e.g.*, Asturias, Canary Islands, Andalucía) have approved (or are about to approve) zoning plans for their respective territories in different retail areas setting specific limits, restrictions or guidelines to be used by the relevant authorities in determining the possibility of developing a specific project and therefore deciding whether or not to grant the licence.

5. LITIGATION

Administrative resolutions and regulations can be appealed by third parties. If the approval of zoning plans or the granting of licences (*i.e.*, works, activity, commercial licences, etc.) is contested by a third party, they are subject to an administrative or judiciary review, depending on the case at hand.

5.1 Judiciary review of the administrative resolutions and regulations

According to the Spanish Constitution of 1978, the Spanish judicial system is an independent branch within the State and is governed by a separate body.

Judicial system is organised into courts addressing different subject matters (civil, criminal, commercial, labour, contentious-administrative courts). Contentious-administrative courts hear all kinds of matters related to authorisations for building and operating shopping centres, including planning matters and commercial authorisations.

In general, contentious-administrative courts (at the trial level or first instance) and high regional courts (second instance or appeal courts) have jurisdiction on planning resolutions issued by local authorities and high regional courts have jurisdiction (exclusive jurisdiction) to hear matters on zoning plans and trade retail resolutions issued by the autonomous regions.

Planning instruments are considered administrative regulations and, therefore, are normative in nature. The main consequence of their normative nature is that they can be indirectly challenged by filing an appeal against an administrative resolution based on the same (*e.g.*, a works licence). In light of this statement, it is out of question that the challenge of a works licence could ultimately lead to the courts declaring the corresponding general or partial plan null and void.

According to the above, the validity of municipal licences and other planning resolutions (other than planning instruments due to their normative nature) may be challenged before the contentious-administrative courts. Judgments may be appealed before the high regional court. The validity of zoning plans and commercial licences may be challenged before the high regional court. Access to the Supreme Court is significantly restricted given that it will not have subject-matter competences to rule according to regional legislation.

A judiciary appeal must be filed within two months from of the publication of the planning regulation or the notification or publication of the relevant resolution.

5.2 Administrative claims or revisions

5.2.1 Administrative claim (*recurso de reposición*)

Administrative resolutions concluding the procedure can be appealed before the administration that issued the resolution within one month of the notification. The administration must resolve the claim within one month. The claim will be deemed rejected if one month has elapsed without an express resolution. Express and tacit rejections may be appealed before the Contentious-Administrative Courts within two or six months, respectively, depending on whether the rejection is express or tacit.

5.2.2 Review of administrative resolutions

If an administrative resolution (*e.g.*, a works licence) or an administrative regulation (*e.g.*, a zoning plan) is deemed entirely void (the specific causes are strictly regulated), administrative authorities can declare it void *ex oficio* or can do so at the request of an interested party (only in respect of administrative resolutions). This declaration requires the prior favourable report from the consultation body of the relevant autonomous region. This review is available to the administrative authorities until, for timing reasons, its exercise would be contrary to equity, good faith, particular rights or law.

Administrative authorities can also declare administrative resolutions issued in favour of interested persons as harmful to the public interest (even if those resolutions are not entirely void). If so, authorities may challenge them in Court. A declaration of harmfulness can only be made within four years of the resolution.

5.3 *"Legitimatio ad processum"*

In general, in order to file an appeal against an administrative resolution or regulation, the plaintiff must evidence a legitimate interest (*i.e.*, being a neighbour, a competitor, a retail association, etc.).

It is important to note that in planning matters, article 4.*f)* of the TRLS 2/2008 establishes the availability of a "*public action*" (*acción pública*) to any citizen in order to preserve compliance with planning regulations. Accordingly, any third party (not necessarily a neighbour or a competitor with a direct interest) would be entitled to file an action against the validity of an administrative resolution (*e.g.*, a works licence) or regulation (*e.g.*, zoning plan) on the grounds that it does not comply with the relevant regulations. This public action may be exercised at any time within four years since the construction works were terminated unless the plaintiff had full knowledge of the works licence granted, in which case the public action must be filed within the ordinary terms (one month for administrative appeals or two months for contentious-administrative appeals) starting from the date this knowledge took place.

5.4 Effects of the annulment of administrative resolutions or regulations

If an administrative resolution is declared entirely void (*nula*), the general rule is that the nullity of the resolution has *ex tunc* effects, implying that it is as if the

resolution had never existed.

If the resolution is instead made void (*anulable*), such nullity would have, in general, *ex nunc* effects, implying that it would only have effects up and until the date the resolutions were made void.

It is important to note that the annulment of a planning instrument implies the nullity of all administrative acts issued by the public authorities under the "umbrella" of the planning instrument that were not firm and definitive on the publication date of the judgment.

In addition, a direct effect of the annulment of a works licence is the obligation to demolish the works carried out illegally.

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