

Back to the Drawing Board: Healthcare facility planning from the drawing board to fully operational. Legal considerations concerning health regulation, real estate, and construction, for operators, developers and investors

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Introduction

When planning the development of a new health facility, whether greenfield or brownfield site, there are many factors that should be taken into consideration from a very early stage, and well before plans are drawn or the perfect premises are found. It is all too easy to be lured into signing terms on a plot of land or existing building for fear of losing a good site. However, tread carefully, as the rules as to where a health facility can be established, what it should look like, and the activities that it will be permitted to undertake, are becoming more restrictive, with additional procedural steps that should be taken into consideration before important decisions are made.

We have been involved in many health facility development projects, reviewed many business plans, and feasibility studies, undertaken transaction due diligence and supported numerous clients developing facilities from the drawing board to fully operational across the MENA region. In this article, we explain some of the common issues that arise during the development of a new facility. Some of the points made are of general application and apply equally across the MENA region. However, in light of recent legal changes in the Emirate of Abu Dhabi, United Arab Emirates (“**UAE**”), we focus on this jurisdiction to illustrate some of the challenges that a developer may face.

Regulations and Guidelines

Health facilities in Abu Dhabi must comply with regulations concerning the location and building type for a hospital or healthcare centre issued by both the Department of Health – Abu Dhabi (“**DoH**”) and Abu Dhabi Municipality, Al Ain Municipality or Al Dhafra Municipality (“**Municipalities**”).

By way of background, the difference between a hospital and a healthcare centre is determined by the type of services provided. Generally, if inpatient services are provided, the operator must apply for a hospital licence; if not, they must apply for a healthcare centre, medical complex, or polyclinic licence

(collectively “**Healthcare Centre**” licences) in the applicable area of clinical specialty.

Guidelines issued by the DoH (the “**DoH Guidelines**”) provide detailed information as to how these different healthcare facilities are to be licenced. The DoH Guidelines also provide information on how the hospital or Healthcare Centre should be designed and fitted-out. When applying to the DoH for a healthcare licence, the application process involves the DoH examining plans and drawings for the premises across multiple phases of the project. Inspectors from the DoH will assess the building and consider the fit-out design. Finally, the DoH’s inspectors will visit the premises to ensure that they meet all the standards set out in the DoH Guidelines.

In advance of investing in preparing expensive plans for a premises that may not meet with DoH approval, there is now an additional step in the process that involves DoH licensing officials determining on a ‘Master Capacity Plan’ basis, whether a new health facility is needed in the location proposed by the developer, and whether the activities are desirable in supporting local population health needs. This assessment of needs must be given very high priority by the investor or developer at an early stage. We recommend that the developer meets with DoH officials to discuss a project in advance of committing significant capital. This point is also of more general application across the UAE and MENA region, where similar capacity planning is now more common, or facility licences granted on a ‘Certificate of Need’ basis, as in Dubai, where a dialogue with health licensing regulators is desirable to ensure that the projects gets off on the right footing.

Real estate considerations

Hospitals

A hospital in Abu Dhabi must have its premises in an independent building. In the past, a hospital could be located in a mixed-use building. Frequently, such mixed-use buildings contained apartments or commercial offices in addition to hospitals. The DoH has now prohibited this.

Healthcare Centres

Healthcare Centres can operate from a villa, provided the villa has been granted permission to be converted from residential to commercial use. For such conversion to commercial use, it is necessary to obtain approval from the relevant local Municipality. Following the implementation in Abu Dhabi of Administrative Resolution No. 32 of 2011 (which deals with privacy protection in residential areas), the Municipalities generally do not allow conversion of residential villas to commercial uses. However, exceptions are sometimes permitted if the villa is used as a Healthcare Centre, rehabilitation centre for those with special needs, or a care centre for the elderly.

Commercial Hubs

Following the implementation in Abu Dhabi of Administrative Resolution No. 78 of 2020 (regarding permits to practise economic activities in buildings located in commercial hubs) (“**Resolution No. 78**”), the Municipalities may allow residential villas to be used for some specific healthcare uses. Annex 3 to Resolution No. 78 lists various categories of healthcare activities that, with consent from the local Municipality, may in some cases be carried out from villas located in residential neighbourhoods. These villas must generally have a direct frontage onto a major street to enable easy access. If, after a detailed assessment, the Municipalities consider that the villas are suitable, they may be designated as commercial hubs (“**Commercial Hubs**”). Some permitted healthcare activities that may be carried out from Commercial Hubs after consents are obtained include: dental surgeries; paediatric clinics; cardiology clinics; diabetes clinics; physiotherapy centres; ophthalmology clinics; and care homes for the elderly or

disabled. However, it is essential to bear in mind that even if the Municipalities designated a residential villa as a Commercial Hub, approval would still be required from the DoH for the proposed healthcare activity. From our recent experience, the DoH maintains stringent requirements that must be satisfied before approving the use of a Commercial Hub for healthcare purposes. We, therefore, recommend that healthcare providers engage at an early stage with the relevant Municipality and with the DoH if planning to operate from a Commercial Hub.

Key considerations in the construction and management of healthcare facilities

Amongst the construction, engineering, and infrastructure projects that are procured daily all over the world, it is arguable that healthcare projects – whether they be in relation to the design and construction of a new hospital or healthcare facility, the expansion, fit-out, or renovation of an existing clinic or facility (perhaps a new unit or hospital ward) or the management of an existing facility post-handover – are amongst the most important and influential. This is probably true, in terms of the potential benefits derived by the wider community in the days, months, and years that follow handover, where the need for a clear, comprehensive, and robust procurement strategy is made all the more important and where the potential risks and rewards of achieving successful completion, could not be greater.

There are a number of important considerations that, therefore, need to be factored into the procurement strategy, in order to ensure that the design and construction of such projects, in addition to the management of such facilities post-completion, are as trouble-free as possible.

We set out below some of the key considerations to note from the perspective of an employer or developer and how such stakeholders may try and mitigate against the risk of issues arising on such projects:

- One of the key factors to ensure a successful project is extensive planning prior to commencement of the works and good contract administration during the design development and construction phase. Given the phased and intricate nature of what are often heavily engineered healthcare projects and the need to adhere to stringent programme and budget requirements, this planning is required to ensure the works are completed according to the employer's bespoke requirements, to the required standard, within the agreed budget, and without undue disruption or delay. Investing time and resources in the tender process and indeed in choosing a suitable tier-1 project team (whether consultants and/or contractors) with suitable sector-specific knowledge and expertise in projects of this nature is vitally important, with an appreciation also for the fact that the best route to completion of a successful project is not necessarily the quickest or the cheapest;
- There is likely to be an increased level of regulatory scrutiny at all stages of the project lifecycle, in particular prior to handover, in order to ensure the completed works are fit for purpose and satisfy what are often stringent regulatory requirements (whether they be from DoH, the Civil Defence, or other local government authorities), prior to completion being certified. It is therefore important to ensure that the taking-over requirements, as well as any testing and commissioning regime set out within the construction contract, is well drafted and where necessary aligned with the regulatory requirements in mind;
- Employers should ensure that any existing or new facilities management arrangements adequately cater for the ongoing day-to-day operation and maintenance requirements that will arise post-completion. This may entail revisiting an existing facilities management agreement in order to ensure additional services can be provided, for example, to cater for the expanded scope that will come with overseeing a recently renovated site or, alternatively, may involve procuring services from a new provider, to commence upon completion of the works;
- Insurances are a key aspect of any construction project. It is important to ensure the terms of the policies are closely examined so that they align with the contractual requirements and ultimately mitigate

- against any design, construction, and defects risk that might arise, with a view to recompensing the employer for such insurable risks should they crystallise. Care should be taken in particular with respect to examining (and if needed negotiating the removal altogether of) any exclusions in such policies that may cut across the scope of insurance cover being provided and therefore may prejudice the employer's rights or entitlement. In any event it is recommended that an insurance advisor or broker is engaged at an early stage in order to examine the insurance requirements as well as the policies that may subsequently be provided to ensure these provide a robust degree of protection;
- Given the multitude of trade contractors and suppliers that are often engaged in such projects, it is important to ensure that well drafted, collateral, manufacturer, and supplier warranties are procured in favour of the employer and any other stakeholders (such as health service providers and tenants) with an interest in the project. These should be procured from all third parties from whom works, services, or products are being procured or supplied;
 - Where an existing site is being developed or renovated it is imperative that the construction site is kept as clean, safe and as organised as possible, in an environment where there is undoubtedly a heightened need to ensure that a more rigorous level of hygiene and safety is maintained. In part, this will mean the need to ensure the contractor not only cleans the site prior to completion, but moreover adheres to stringent health and safety protocols throughout the construction phase. In part, this will include securing adequate laydown areas for the safe storage of equipment and materials that are to be used on the project.

Conclusion

The processes involved in developing a new health facility from the drawing-board to fully operational are complex. A healthcare operator intending to establish a hospital must ensure that its premises are in an independent building. A Healthcare Centre can be located in either a separate building or a villa; however, if located in a villa, it must be capable of being converted from residential to commercial use according to laws set by land authorities, or designated as a Commercial Hub. Occasionally, a Healthcare Centre can operate from a mixed-use building, but prior approval is usually required, with approval granted on a case-by-case basis. With regard to construction works the developer must comply with all facility design and planning requirements that are applicable within the geographical area designated for their project. There are many aspects of the construction that should be planned well in advance, such as procurement, using licensed contractors, and ensuring that the design plans for the facility are appropriate for the type of licence being granted. All parties in the project should work towards a clear and unified plan to enable regulatory steps to take place in parallel in order to proceed to the final regulatory approvals stage in the shortest possible time.

Al Tamimi & Company's Healthcare team, Real Estate team, and Construction and Infrastructure team regularly advises on all elements of the establishment of a health facility, leasing of premises, construction procurement process, and licensing, through to fully operational.

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