

A New Regime for Mortgaging of Granted Land in Dubai

by Andrew Balfe - a.balfe@tamimi.com - Dubai International Financial Centre
Jody Glenn Waugh - j.waugh@tamimi.com - Dubai, UAE

March 2017

The issuing of Dubai Decree on Mortgaging Granted Lands in the Emirate of Dubai (Decree No. 31 of 2016) ('Decree'), expands upon the existing framework for the registration of mortgages over granted land in Dubai and should provide beneficiaries with greater flexibility to procure development or operational funding in respect of such land.

In particular, the establishment of a clearer mechanism for the enforcement of lenders' rights under registered mortgages over granted land is a key step to creating a more robust and attractive regime for lenders.

Background

Prior to the issuance of the Decree, the ability for beneficiaries of granted land in Dubai to use such land as security to procure development funding was governed by The Order Issued on 14 May 1996 (the 'Order') and The Instructions Issued on 5 June 1996 (the 'Instructions').

The Order and the Instructions permitted the registration of mortgages over land granted for residential or commercial purposes, provided that certain conditions were met. These conditions included, that the lender must be a bank licensed to operate in Dubai, that the purpose of the mortgage must be to fund the construction of a building on the land, and that the method for drawing down on the loan reflect that restriction.

The Order and the Instructions were silent on land granted for industrial purposes. The express exclusion of commercial and residential granted land from the application of the Dubai law concerning Mortgages in the Emirate of Dubai (Law No. 14 of 2008) (the 'Mortgage Law'), also created uncertainty with regard to lenders' ability to enforce security over granted lands. In particular, until recently, the Dubai Courts had been reluctant to allow enforcement of such mortgages.

The Decree, which takes effect from 1 November 2016, repeals the Order and the Instructions, installs a more developed framework going forward, and provides clarity on these and other issues.

Common elements that continue to apply under the Decree

Despite their repeal, a number of the elements applicable under the Order and the Instructions continue to apply under the Decree. Such elements include:

- the lender must be a bank or financial institution licensed to operate in Dubai;
- the Dubai Land Department remains charged with ensuring that the terms of any proposed mortgage satisfy these relevant funding conditions; and
- mortgages which do not satisfy the relevant conditions must not be registered (and are deemed by the Decree to be null and void).

Mortgages registered under the prior framework are also deemed by the Decree to be valid and effective under the operation of the Decree.

Broader application of the Decree

The Decree relates to government land granted to individuals (natural or legal) for residential, commercial, or industrial purposes. The Decree makes a number of important expansions or clarifications, beyond the scope of the prior framework. These include:

- granted industrial land is now expressly included within the scope of the Decree, providing clarity that such land may be mortgaged;
- funds advanced in respect of granted residential land may be utilised for the construction, maintenance, expansion, or replacement of the improvements on the land;
- funds advanced in respect of granted commercial or industrial land may be applied to the use of such land for the purpose for which it was granted;
- the income of commercial and industrial granted land may be separately mortgaged from the land itself (permitting the mortgagee to manage the operation of the land and receive the income from the use of the land until the debt is repaid);
- mortgages are to be registered in accordance with the procedures applicable under the Mortgage Law (noting that the Mortgage Law is otherwise not applicable to land granted for commercial and residential purposes); and
- stipulating an enforcement regime, giving lenders clarity on the process for enforcement of a mortgage over granted lands (discussed below).

To procure registration, the borrower must now submit to the Land Department a copy of the applicable building permit issued by a competent authority. The Land Department also has the discretion to require any other documents or information it deems necessary to assess whether a mortgage meets the criteria for registration. Typically, this would include providing a copy of the loan agreement illustrating the purpose of the loan.

Enforcement

Without detracting from the greater clarity that the Decree provides on various matters, perhaps the most important aspect of the Decree is the inclusion of a clearer regime for the enforcement of mortgages registered over granted land. Not only will that regime address uncertainties with enforcement, giving lenders greater confidence in advancing funds for the development of granted lands, but it also provides clarity that granted lands are a legitimate form of security that may be offered by borrowers or relied upon by lenders.

The default and enforcement procedures applicable under the Decree align closely with the corresponding provisions of the Mortgage Law, requiring the mortgagee to serve notice of default by the notary public and to allow at least thirty days for the mortgagor to cure any breach, prior to seeking an order for sale from the execution department of the Courts. If the mortgagor fails to cure the breach, then the Court may order the sale of the property in accordance with the Land Department's applicable procedures.

One requirement specific to the Decree is that the granted residential lands may not be sold without the prior approval of the Board of the Mohammed Bin Rashid Housing Establishment (‘Establishment’). It is not clear, at this stage, on what basis such approval will or will not be forthcoming.

The Decree also stipulates the priority of entitlements to repayment, following the sale of the

mortgaged property as follows:

- judicial fees and expenses;
- fees arising from the sale of the mortgaged property;
- the fees of ownership of the commercial or industrial lands (due under Law No. 4 of 2010 Concerning the Ownership of Industrial and Commercial Lands) ('Transfer Fee'), unless this was paid at the time of registering the mortgage;
- repayment of the secured debt; and
- in respect of commercial or industrial land, the balance to the mortgagor; or
- in respect of residential land, the balance shall devolve to the purchase of accommodation in the name of the mortgagor or such other housing arrangement as the Establishment deems appropriate. If the balance is not sufficient to procure alternate accommodation, it will be paid to the mortgagor.

The Transfer Fee applicable to any transfer of ownership of granted land by a beneficiary is equal to 30 per cent of the market value at the time of the sale as designated by the Land Department. Where the land holder is not the original beneficiary of the grant (e.g. due to a subsequent transfer), the applicable fee is equal to 50 per cent of that market value.

While the enforcement process and the priority regime (detailed above) will be familiar to lenders, the potential imposition of the Transfer Fee (if applicable) will be a key due diligence issue for lenders. Where the original beneficiary of the grant is the mortgagor, the payment of the Transfer Fee that would be applicable on an enforced sale. It is likely lenders will insist on such fees being paid up front, or reduce the loan accordingly.

Conversely, where a landholder (who is not the original beneficiary of the grant) is the mortgagor, payment of the applicable Transfer Fee may be required in order to procure registration of the mortgage. Again, this will be a due diligence issue for lenders.

Finally, it is timely to reiterate that registration of the mortgage, as a critical pre-requisite to enforcement, should also be a pre-requisite to the advance of funds.

Government agencies and real estate developers

Two additional matters are covered by the Decree:

- first, land granted to government agencies, or to companies in which the government (or government agencies) own at least 50 per cent of the shares, may be mortgaged unconditionally; and
- second, land granted to real estate developers are deemed to be freehold land and may be unconditionally mortgaged and disposed of.

While the application of the first point is clear, the implications of the second point are less so. While the language is broad, we consider that this must be read having regard to the existing law in relation to real property rights in Dubai and, in particular, restrictions on foreign ownership of land (other than in designated areas). Practically speaking, we also anticipate that the grant of any large development sites would be limited to government, or government related real estate developers.

Conclusion

Readers will appreciate that the Decree establishes a much more developed regime for the mortgaging of granted lands and provides clarity on a number of issues. Providing a broader scope

for the permitted application of borrowed funds and, in particular, establishing a clearer mechanism for the enforcement of security over granted lands, should result in increased confidence amongst both borrowers and lenders, and further facilitate the development and use of such granted land.