

# PROPERTY ASSET MANAGEMENT: LEGAL FRAMEWORK

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The Property Asset Manager is a figure of the construction process of recent implantation in Spain, also the Spanish legislation in force does not expressly contemplate it like an agent of the construction. We have analyzed and interpreted the legislation, especially the “Ley de Ordenación de la Edificación - LOE”, to see what could be applied. We have also analyzed the legal nature of the contract, as well as the responsibilities deriving from their works, taking into account the applicable rules to the construction process as well as the contract of the Property Asset Management and its penal responsibility. To conclude, the actions of the Property Asset Management, even if it is a figure that is not expressly regulated in the current Spanish legislation, is subject, directly or indirectly, to the scope of application of the regulations regarding contractual liability of the LOE, the Civil Code and The Penal Code. From our point of view, the Spanish courts will be recognizing the figure of the Property Asset Management as a new active agent of the construction when it comes to performing management functions, that is to say, delegated developer. We believe that an update of the LOE is needed, in the sense that it includes this new figure, Property Asset Management, along with many more agents that fight their way through the Spanish construction process. However, they have a lot of strength in the international field.

*Keywords:* Ley de ordenación de la edificación, L.O.E., Building Ordinance law, Portfolio, Civil code, Penal code, Spain.

## 1 INTRODUCTION

The Property Asset Manager is a recently implemented figure in the construction process. Current Spanish legislation does not expressly contemplate this figure as an agent of the building.

The objective of this article is to analyze the legal status of the Property Asset Manager as a new Agent in the Spanish property sector. This figure is already exercising an internationally recognized activity but which, as we have seen, is without a legal regime in Spain despite its continuous development.

With all this background information, we have asked ourselves:

- Why in an area of building so consolidated in our country, an agent like the Property Asset Manager, does not have any legal legislation to protect or compel him?
- How could an Agent be incorporated like this in the Building Ordinance Law, with its own identity?
- What responsibilities would it have?

## 2 STATE OF THE ART

Initially, we analyze the existing definitions and functions at an international level, since at the Spanish level there is practically no bibliography.

We have then analyzed and interpreted the Spanish legislation to see what may apply to the Property Asset Manager.

Subsequently, we analyze the Building Ordinance Law in Spain, which regulates the building process, through the establishment of obligations and responsibilities of the Agents.

### 2.1 Property Asset Management Definition and Function

#### 2.1.1 Definition

If we take into account the definitions of the Institute for Asset Management (IAM 2006, IAM 2012), we can say:

- **Property Asset Management:** It is a discipline that allows alignment of strategies and objectives of the business thanks to the management of the life cycle of the property assets of the organization.
- **Property Asset Manager:** It is the manager that integrates key operational factors of the organization (people, property assets, product manufacturing or service provision, price, location, etc.). It is proposed as the exclusive delegate of the developer to the rest of the Agents involved during the Life Cycle of a Property Asset, in order to reach the expectations of the Property Asset Manager, the project and the end user.

#### 2.1.2 Functions

According to the Institute for Asset Management (IAM 2006, IAM 2012), the main function of Property Asset Management is the process that aligns the strategies and objectives of the business through the management of the life cycle of the organization's property assets, ensuring the optimization of said Assets, so that they support better the business.

### 2.2 Legal Regime

We have then analyzed and interpreted the legislation to see what can be applied to the Property Asset Manager. We have also analyzed the legal nature of their Contract, as well as the responsibilities derived from your performance, taking into account the applicable rules to the construction process as well as the Property Asset Management contract and your criminal liability.

We analyze below the following points:

- The relationship between the Property Asset Manager and their clients
- The relationship between the Property Asset Manager and other agents and consumers
- Criminal liability

#### 2.2.1 Relationship between the property asset manager and their client

The legal relationship of the Property Asset Manager is determined by the contract with its client, establishing in its clauses all the duties and responsibilities that are assumed by the Property Asset Manager. Therefore, the legal regulation between the Property Asset Manager and its

client is governed by the device principle and the autonomy of the will of the parties. In other words, the contract will define the scope of action of this figure, as well as its sphere of responsibilities.

In the contract, it will be established if the Property Asset Managers obligation is of means or results being the means, the most usual.

These contracts will be governed by the articles of Civil Code: 1101, 1255, 1544 (Civil Code Art. 1101, 1255 and 1544). In addition, the *lex artis* is defined as the set of good practices that are required of all qualified professionals in the development of their activity; which are often collected, at least partially, in the codes that are published by professional colleges.

### **2.2.2 Relationship of the property asset manager with other agents and consumers.**

At this point we analyze the relationship between the Property Asset Manager figure with third parties: joint ventures or a joint execution project, builders, subcontractors, professionals (architects, builders or other agents involved in the construction works) and, of course, the consumers.

The legal regime applicable to the relationship between the Property Asset Manager and third parties is a necessary right and their responsibilities will depend on what the law and its interpretation of the case law indicates, to its effects cannot be avoided or annulled by private contract.

As already mentioned, there is no specific legal regulation in Spain of the responsibilities of the Property Asset Manager vis-à-vis third parties, especially when its activity is similar to that of a delegated developer, and therefore carries out functions as a constructive agent, so that its action has a direct impact on legal traffic vis-à-vis consumers and third parties.

We must, therefore, resort to the figure of analogy, foreseen in our legal system for cases in which there is no specific legal regulation for an assumption, but there is such a forecast for other related figures whose activity is analogous to that being studied, being applicable its legal regime.

In this case, we understand that the Property Asset Manager can carry out the functions of delegated developer.

### **2.2.3 Criminal responsibility**

Spanish criminal law is governed by criminal liability derived from fraud (acting purposefully) or guilt (recklessness); is of individual character and the responsibility cannot be extended jointly to other construction agents unless they have participated in the typical events that give rise to the criminal offense.

The criminal or criminal types most frequently associated with construction work are those related to occupational health and safety. Thus, article 316 of the Penal Code punishes those who, in violation of labor risk prevention regulations and are legally obliged; do not provide the means necessary for workers to carry out their activities with adequate safety and hygiene measures. That is to say, in a manner thus putting in serious danger their life, health or physical integrity, establishing a sentence from six months to three years and a fine of six to twelve months of suspension. What is relevant for a principal or delegate developer, such as the Property Asset Manager, is to avoid criminal liability in ensuring that all the elements listed below are used in the work so that they cannot be charged with malice or guilt in his management.

It is worth mentioning that we have studied the existing jurisprudence in Spain (CENDOJ 2016), about the figure of Property Asset Manager and we have not found any reference to such

activity or agent as such. The existing jurisprudence exclusively speaks of the figure of the Developer.

### 2.3 Building Ordinance Law (“Ley de Ordenación de la Edificación -LOE”)

Next, we analyze the Building Ordinance Law, (LOE 1999) which regulates the building process, by establishing the obligations and responsibilities of the agents involved, as well as establishing guarantees against owners or users, in order to protect them from risks and to assure the quality of the built.

Law 38/1999, on Building Management, which is published in the B.O.E. on 6<sup>th</sup> November, 1999, is a Law to apply to works of new construction and to works in existing buildings, for whose project’s corresponding building license has been requested, as of its entry into force.

The agents existing within the LOE include the following: developer, designer, contractor, director of design (Architect), director for the execution of the work (Aparejador), entities and laboratories of quality control of the building, material suppliers, owners and the users. The performance of any agent is regulated by the LOE.

As you can see, the Property Asset Manager is not found in the LOE. In our opinion, the developer is the agent that responds to the figure of analogy with the Property Asset Manager and this if it is expressly included in the Building Ordinance Law (LOE). According to the article 9 of the LOE, the developer is defined as follows: *"Any natural or legal person, public or private, who, individually or collectively, decides, develop, programs and finances, with own or third parties resources, the building works for themselves or for their subsequent asset disposal, delivery or assignment to third parties under any title."*

The responsibility of the Property Asset Manager, since it is not listed as an Agent in the LOE, will depend on the content of its activity. But, whenever it performs functions that are equivalent to those of developer delegated in a work under construction or rehabilitation, it will be applied by analogy, the responsibility of the developer before third parties.

It is important to bear in mind that the courts and tribunals have determined for the developer almost complete legal responsibility for the finished work, which he shares with the other construction agents, so that, according to case law, other construction agents, the only agent that shares them with others is the developer.

In this context, in our judgment, the Property Asset Manager if it has carried out delegated developer activity will respond to third parties with the main developer.

After studying all this documentation, we discovered that it is necessary to define in detail its content: responsibilities, obligations, guarantees, scope, etc.

## 3 PROPOSAL FOR ACTIONS

Currently, Property Asset Management is not within the Agents that are included in the building process, that it is not listed as such in the Building Ordinance Law, being one of the agents that exists within the building process is not regulated from the legal point of view.

Therefore, our proposal is that; it is necessary to define its obligations, functions, etc. in a detailed way, since there are responsibilities derived from their professional performance that may affect other agents that intervene in a global or partial way in this process of building and property. Property Asset Manager should include:

- Being in possession of a **degree or professional qualification** that enables the fulfillment of the duties and responsibilities required to act as Property Asset Manager, especially as a delegated developer.

- The responsibility of the Property Asset Manager can have a serious economic impact, given the importance of the role; it is advisable to sign a **professional insurance policy** to cover civil liabilities arising from your contract.
- Comply with legal provisions affecting it, including liability arising from existing contracts.

#### 4 CONCLUSIONS

The Property Asset Manager is a figure recently establishment in Spain, derived from the financial crisis. The market demands a new professional profile already existing at international level. The Property Asset Manager aims to align business strategies and objectives by managing the lifecycle of an organization's property assets, ensuring optimization, and improving performance.

Given that it is a figure of the property and construction process recently established in Spain, it is necessary to assess its legal regime of its application: the relationship with its client and in relation to third parties.

Given that, the function of the LOE is to promote quality by focusing on the basic requirements and obligations of the different agents who are responsible for developing the activities of the building process. Furthermore, it sets the responsibilities and the guarantees that protect the user and comply with the constitutional right to decent and adequate housing. We understand the range of agents involved should be expanded, including the Property Asset Manager as well as new professionals who have appeared since 1999.

To conclude the role of the Property Asset Manager, even if it is a figure that is not expressly regulated in the current Spanish legislation, is subject, directly or indirectly, to the regulations regarding contractual liability of the Building Ordinance Law, Civil Code and Criminal Code.

From our point of view, the Spanish courts will consider the Property Asset Manager as a new active agent of the building when performing property asset management functions, that is, as it will be treated in the same manner as a delegated developer.

We believe it is advisable to update the Building Ordinance Law, in the sense that it includes this new figure, the Property Asset Manager, as well as many other agents that are opening up in the Spanish construction process and are already established in the international field.

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