

Dr. Raffael Büchi / Eva Gehrig

## **Extension excluded: The loan for use as an ideal form of contract for the interim use of properties**

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Interim use — temporary use of properties — prevents vacancies, and offers owners active protection of their properties. Costly organisation and administration can be transferred to service providers. The loan of use serves as the contractual basis since it allows interim use to be tailored precisely to the needs of the owner, excluding extension risk.

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## 1. Risks and disadvantages associated with vacancies

### 1.1 Squatting

[Mn 1] Empty properties are risky for proprietors<sup>1</sup>. In Zurich area<sup>2</sup>, squatting is the

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<sup>1</sup> This, of course, always includes male and female proprietors.

<sup>2</sup> However, squatting also occurs again and again in other Swiss cities, including Winterthur (e.g. Sidi), Basel (e.g. Villa Rosenau), Bern (e.g. Reithalle) or Geneva (e.g. Rhino), but also in smaller communities such as Wetzikon (see Jennifer Steiner, Hausbesetzung erhitzt die Gemüter, Zürcher

order of the day<sup>3</sup> — there is much goodwill in the squatter scene<sup>4</sup> and even voices calling for house squats publicly<sup>5</sup>.

[Mn 2] According to the “instructions on squats in the city Zurich”<sup>6</sup>, the police force can only vacate an empty property when persons or landmarked buildings are directly endangered by squatting. Otherwise, a proprietor must prove before the vacating by the police force that

- he is about to demolish, reconstruct, renovate, or rent the occupied property.
- or he has organised a “new use”, respectively interim use

(Rz 3] The Zurich City Police only accepts new or interim use as grounds for eviction if it is “sustainable”, i.e. if it bridges the entire period until demolition, conversion or renting, and if it covers at least 50% of the building area. This, in turn, must be explained by the owner. This pragmatic<sup>7</sup> practice by the police may seem, against the background of the ownership guarantee enshrined in the Federal Constitution<sup>8</sup>, surprising<sup>9</sup>. However, legal theory is of little help to the owner of an occupied property: he must be able to convince the police quickly of the necessity of eviction. It will be difficult for the owner to organise interim use at this point, as most potential interim users will be uncomfortable with the prospect of a showdown with squatters. The owner will be better off if he can preventatively eliminate the risk of squatting by organizing interim use<sup>10</sup>.

## 1.2 Structural damage

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Oberländer of 24 October 2012

<http://www.zol.ch/bezirk-hinwil/wetzikon/Hausbesetzung-erhitzt-die-Gemueter/story/26983622>).

<sup>3</sup> According to the information from the Zurich city police, about 30 properties are currently occupied in the city of Zurich and in the immediate vicinity - from detached houses to industrial areas.

<sup>4</sup> See Adi Kälin /FABIAN BAUMGARTNER, Viel Wohlwollen für die Besetzerszene, NZZ vom 8. Januar 2014, p.13,

<http://www.nzz.ch/aktuell/zuerich/uebersicht/viel-wohlwollen-fuer-die-besetzerszene-1.1821667>

<sup>5</sup> Surprisingly, the website of the JUSO Canton Zurich, <http://www.live-for-free.ch/>, with a “catalogue” of vacant properties and the open call for occupancy.

<sup>6</sup> Accessible at [www.stzh.ch](http://www.stzh.ch).

<sup>7</sup> “The eviction of a squatted property should be successful not only for the moment but in the long run” (Merkblatt Hausbesetzender Stadt Zürich) - in other words: the police do not have the personnel resources to play cat and mouse with squatters. After an eviction, there must be no vacuum that causes the squatters to return. According to Marco Cortesi, media head of the Zurich city police, this is to prevent “Sisyphian work” (see MONIKA ZECH, Hausbesetzungen: Zürich tickt anders), TagesWoche of 29 October 2011, [http://www.tageswoche.ch/de/2011\\_43/basel/97338/hausbesetzungen-zuerich-tickt-anders.htm](http://www.tageswoche.ch/de/2011_43/basel/97338/hausbesetzungen-zuerich-tickt-anders.htm)).

<sup>8</sup> Article 26 of the Swiss Federal Constitution (BV).

<sup>9</sup> Has been confirmed by the Federal Court, however, see BGE 119 1a 30 ff, in particular E.2.

<sup>10</sup> See below “Prevention of vacancies through interim use”.

[Mn 4] Vacancies of longer duration can cause structural damage, for example, if humidity enters as a result of inadequate or decreased heating and ventilation.

### **1.3 Loss of income**

[Mn 5] If the owner leaves a property vacant, he foregoes any income. Costs, on the other hand, continue to be incurred for the most part, even if the property is not heated and no value-preserving investments have to be made.

## **2.Prevention of vacancies through interim use**

### **2.1 Most efficient protection of a property**

[Mn 6] In many cases, owners try to protect a vacant property from occupation or vandalism by having the building guarded by a security service provider, boarding it up or removing the infrastructure<sup>11</sup>. However, none of these - sometimes very expensive<sup>12</sup> - protective measures can eliminate<sup>13</sup> the risk of occupation, and vandalism remains possible anyway.

[Mn 7] The best protection against squatting is the preventive organisation of interim use: Where there is no unused space, nothing can be squatted.

[Mn 8] Interim use also offers safeguards against structural damage: the building remains heated and ventilated.

### **2.2 Contribution to cost coverage**

[Mn 9] The owner can use the income from interim use to, at least, partially compensate the costs associated with the property, even if he arranges the interim use as a loan for use in order to exclude<sup>14</sup> the possibility of extension under tenancy law.

### **2.3 Improving attractiveness and positive image transfer**

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<sup>11</sup> Compare. BEAT METZLER, Mit der Axt gegen Hausbesetzer, Tages-Anzeiger vom 15. Dezember 2011,

<http://www.tagesanzeiger.ch/zuerich/stadt/Mit-der-Axt-gegen-Hausbesetzer/story/2828210>

<sup>12</sup> Round-the-clock surveillance by a security person, for example, costs around CHF 450,000 per year, according to a security services company in the Zurich area.

<sup>13</sup> Premises can be attractive to squatters even if the owner has ripped out the infrastructure - for example as a location for parties. Boarding and guarding are not insurmountable obstacles (for example, the squatters of a villa in Zurich Wollishofen simply pushed a security guard aside).

<sup>14</sup> See below, "The legal structuring of interim uses".

[Mn 10] Interim use does not only have a defensive effect - to protect properties - but also an "offensive potential

- Lively properties and locations are more attractive than "ghost houses"<sup>15</sup> that have been empty for a long time;
- The owner can support start-ups and artists with the interim use, or help alleviate the housing shortage, and - if he wishes - communicate this in a way that promotes his image.

### **3. the challenges and prejudices associated with interim uses**

[Mn 11] Despite these obvious advantages, owners often do not consider interim use for two main reasons:

- They shy away from the effort involved in organising and managing interim use and the risk that interim users could "cause problems"<sup>16</sup>;
- They fear that interim use cannot be terminated on time because the interim users do not vacate the building on the due date.

#### **3.1 Organisation, administration and monitoring of interim use**

[Mn 12] Finding suitable intermediate users, organizing and managing interim use are actually associated with considerable effort. Very few owners are willing to make this effort themselves. Often, they also lack contacts to potential intermediate users. This is where specialized organizations can step in, taking over from the owner everything related to the planning, structuring, organization, support, monitoring and termination of the interim use and acting as an intermediary between the owner and the interim users.

#### **3.2 Risk potential of interim use is overestimated**

[Mn 13] Experience shows that owners tend to overestimate<sup>17</sup> the risk and potential problem associated with interim users. If they visit an intermediate building, they are surprised how "normal" everything is. Interim users may on average be more mobile, more creative and younger than the Swiss average, but they work on their projects in their offices or studios like other professionals. The same is true of residential interim users: apart from their mobility, which is probably above average, they are no different from normal residents.

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<sup>15</sup> It's like in gastronomy: Empty restaurants are a deterrent, well-frequented restaurants are attractive.

<sup>16</sup> Experience shows that owners often associate intermediate users with wild creativity, parties, disorder, noise and annoyance of neighbours.

<sup>17</sup> Compare footnote 17.

[Mn 14] There are factors that have a positive influence on the potential risk for the owner associated with interim users: for example, the prospect of obtaining work or housing opportunities that may be more favourable in the future has a disciplining effect on interim users.

- Only interim users with a faultless track record will be taken into account again by organisers of interim use
- Only owners who judge an interim use to be a success will offer their support for further interim use; negative experiences are quickly circulating in the property market.

[Mn 15] An interim user who attracts negative attention harms not only himself but also all other interim users by jeopardizing their chances of finding favourable spaces in the future. This creates peer pressure to behave in accordance with the rules.

### **3.3 Terminate interim use one schedule**

[Mn 16] From the owner's point of view, an interim use has been successful if, on the agreed final date, all interim users have completely vacated the building and returned the premises used by them in good condition. The idea that interim users will defend themselves against the termination of the interim use, for example by means of extension requests, must be unpleasant for every owner. The delay of a construction project usually comes at a high cost<sup>18</sup>.

[Mn 17] The subsequent section shows how the interim use has to be structured in order to create a legal basis for it to be timely terminated.

## **4. the legal structuring of interim use**

### **4.1 Extension risk when structured as a tenancy**

[Mn 18] If the owner wants to be sure that the interim use is terminated in due time, he may not arrange the interim use as a tenancy. Due to the protective provisions and possibilities of extension<sup>19</sup> under tenancy law, it is dependent on the goodwill of the interim users whether the interim use is terminated as agreed. If a tenant gets in trouble and demands an extension, it will take months, in the best case, until the owner can expel him - in the worst

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<sup>18</sup> See e.g. GEORGE GINDELY, Renitente Zwischennutzer verzögern den Umbau von Alterswohnungen, Tages-Anzeiger of 9 February 2013, p. 15, <http://www.tagesanzeiger.ch/zuerich/stadt/Reni-tente-Zwischenmieter-verzoegern-Umbau-von-Alterswohnungen-/story/15972991>.

<sup>19</sup> Art. 272 et seq. of the Swiss Code of Obligations (OR); the tenant's right to demand extension is indispensable - agreements to the contrary are void (Art. 273 c).

case, years. The extension of the lease looms if the interim use is structured as a chain tenancy, i.e. as a series of a fixed-term rental agreement<sup>20</sup>.

## 4.2 Loan for use - the ideal form of contract for interim use

[Mn 19] The best way to provide security with regard to the timely termination of an interim use is to structure the interim use as a loan for use. Its characteristics are outlined below.

### 4.2.1 Non-remuneration

[Mn 20] The loan, or borrowing, is defined by law as a free transfer of an object for use<sup>21</sup>. The borrower is obliged to return the same item<sup>22</sup> to the lender after use<sup>23</sup>. The object of a loan can be movable, but also immovable objects - properties<sup>24</sup>.

[Mn 21] If the loan for use is subject to payment, it is to be qualified as rent (or lease, at the most). A remunerated loan would be contrary to the legal system. This does not mean that the lender may not charge the borrower anything at all in order to keep the law of tenancy at bay. On the one hand, the right to use<sup>25</sup> means that the borrower himself has to bear the costs arising from the use of the item. On the other hand, according to the law, the borrower also bears the usual maintenance costs.

[Mn 22] For the interim use practice, this means that the owner can pass on to the interim users the (consumption-dependent) incidental costs, the usual maintenance costs<sup>26</sup> and minor expenses that serve to maintain value. Extraordinary expenses<sup>27</sup> as well as charges<sup>28</sup> and taxes, on the other hand, are borne by the owner. The distribution of maintenance obligations and the obligation to bear costs can be changed by contract. However, if the interim user is obliged to take value-enhancing measures, the contract loses its gratuitous character and rent is payable<sup>29</sup>.

[Mn 23] If the owner wants to exclude the risk that an interim use agreement set up as a loan for use is classified as a tenancy, he must be able to demonstrate without further ado

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<sup>20</sup> Zu Kettenmietverträgen siehe BGE 139 III 145 / Pra 102 (2013) Nr. 96.

<sup>21</sup> Art. 305 of the Swiss Code of Obligations.

<sup>22</sup> This person is not the owner of the item, as he does not undertake to transfer ownership, see CHK-b. Schönenberger OR 305 N 4.

<sup>23</sup> Art. 305 of the Swiss Code of Obligations.

<sup>24</sup> CHK-b. Schönenberger OR 305 N 3.

<sup>25</sup> Art. 306 OR para. 1 OR.

<sup>26</sup> For example, minor repairs and technical maintenance. Whether building cleaning and maintenance of the grounds can be passed on without losing the character of a commercial loan and be classified as tenancy must be decided on a case-by-case basis.

<sup>27</sup> Uses, Art. 307 Para. 2 OR.

<sup>28</sup> CHK-b. Schönenberger OR 307 N 2.

<sup>29</sup> cf. on the costs of maintenance CHK-b. Schönenberger OR 307 N 1-4.

that he does not generate a profit with the income arising from the interim use, but only passes on the costs mentioned above. Thus, the contributions to cost that interim users have to pay as borrowers will typically be far below the market rent.

[Mn 24] If the yield is the main concern for the owner during the interim use, the only option left is to structure the property as a rent. However, he should consider carefully whether the higher incomes during an interim use actually outweigh the risks associated with the application of tenancy law.

[Mn 25] Another argument in favour of structuring the property as a loan with correspondingly low cost contributions is that intermediate users can usually only be found if the service package is right: the disadvantages and costs<sup>30</sup> associated with an interim use must be balanced by tangible advantages. These typically consist of the fact that intermediate users can enjoy a lot of space, or space in an excellent location, at very favourable conditions, which they would not or could not afford under normal circumstances.

#### 4.1. 2 Duration

[Mn 26] If no specific duration is agreed for the loan for use, it shall end as soon as the borrower has made use of it in accordance with the contract or with the expiry of the period, within which such use could have taken place<sup>31</sup>. If the lender has left the item for use, which is neither of a certain duration nor for a certain purpose, he may reclaim it at will<sup>32</sup>. According to the interpretation of the Federal Court<sup>33</sup>, this means that the lender can reclaim the item at any time<sup>34</sup> if the duration of the loan is not limited either by the party agreement or by the agreed use.

[Mn 27] The lender can demand the return of the item earlier than agreed if the borrower uses or degrades the item in violation of the contract or gives it to a third party for use, or if he himself urgently needs<sup>35</sup> the item due to an unforeseen case.

[Mn 28] The following shall, therefore, apply by law to interim use even without specific contractual provisions:

- If an intermediate user borrows a room for a specific purpose or for a specific use<sup>36</sup>, he must return the room after it has fulfilled the purpose or could have fulfilled it;

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<sup>30</sup> Costs for relocation and new furnishings and all administrative expenses and work associated with a change of address.

<sup>31</sup> Art. 309 para. 1 OR.

<sup>32</sup> Art. 310 OR.

<sup>33</sup> BGE 125 III 363.

<sup>34</sup> According to article 310 OR.

<sup>35</sup> Art. 309 para. 2 OR.

<sup>36</sup> Example: Loan of a room for a vernissage or for a business dinner.

- If no agreement is reached on the duration and use of a room, the owner can reclaim the room at will;
- Even if the owner has agreed with the interim user on a specific duration of the interim use, he can reclaim the interim used rooms at any time if the interim user violates contractual provisions and integrated rules (e.g. house rules), if he damages the borrowed room, if he gives it to a third party without the owner's permission, or if the owner urgently needs the room himself.

[Mn 29] There is no protection against termination and no extension possibilities in the case of a loan for use; a similar application of the provisions of tenancy law is excluded<sup>37</sup>.

#### **4.1.3 Care and liability of the borrower**

[Mn 30] The rights and obligations of the borrower in the case of a loan for use are based on the principle that he may only make careful use of the object borrowed in person, as described in the contract or as specified by the nature and purpose of the object. In the event of use contrary to the contract or purpose, he is also liable for accidents<sup>38</sup>.

[Mn 31] If the contract does not provide for an agreement regarding the use of the borrowed item, the borrower may use the item as it results from the nature of the item or its purpose<sup>39</sup>. The transfer of the use to a third party is generally not permitted<sup>40</sup> but can be contractually agreed.

[Mn 32] This means that the standard of care for the interim user in the case of a loan for use is considerably stricter than in the case of a rental relationship. Even without an explicit contractual regulation, the following applies to the intermediate user:

- As a matter of principle, he may only use the borrowed room personally, carefully and within the scope of the purpose given by the nature of the building and its division in the zoning plan;
- If he does not do so, he is also liable for coincidence.

#### **4.1.4 Freedom in contractual arrangements**

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<sup>37</sup> This is completely undisputed in case law and doctrine, see instead of all judgment of the Federal Court 4D\_136/2010 of 11 February 2011, I. civil law division, E. 4.3.3., with numerous references.

<sup>38</sup> Art. 306 OR.

<sup>39</sup> Art. 306 para. 1 OR.

<sup>40</sup> Art. 306 Abs. 2 OR.

[Mn 33] In contrast to the rental agreement, whose central formal and protective provisions are of a mandatory nature and cannot be undermined<sup>41</sup> by deviating agreements, a loan for use agreement can be freely formulated<sup>42</sup>:

- No legal formal requirements<sup>43</sup> and thus easier administration (e.g., interim use contracts can be concluded and extended on a web-based basis);
- Any time limit or termination options;
- Linking the loan for use with conditions and obligations for the borrower, as long as the non-remuneration of the loan for use is not called into question<sup>44</sup>.

## 5. Conclusion

[Mn 34] If the owner of an interim use is not interested in maximising profits but in planning and flexibility, the ideal form of contract is not rent but a loan for use. It allows the owner to determine the duration of the interim use at will without exposing himself to the risks of extension under tenancy law and imposes stricter duties of care and liability on the interim user than under tenancy law.

[Mn 35] The loan for use is by definition free of charge. Nevertheless, the owner may pass on incidental expenses, ordinary maintenance costs and smaller, value-preserving expenses to the interim user.

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Dr. iur. Raffael Büchi, Head of Know-how & Business Development at Bär & Karrer, organised the interim use of "Badi 595" for a client of the law firm in June 2011 in order to use and protect his commercial property with over 4000m<sup>2</sup> office space in Zurich Altstetten during the planning phase for conversion into apartments and studios. In Badi 595, 100 people — mostly start-ups, micro-enterprises and creative professionals — found temporary workspace. "Projekt Interim" ([www.projekt-interim.ch](http://www.projekt-interim.ch)), a team from the circle of Badi 595 interim users, took over the management of Badi 595 in January 2012 and returned the building to the new owner Mobimo in June 2013 after a two-year period (which means in time for the start of the conversion), successfully completing the interim use project. Raffael Büchi supports Projekt Interim during his spare time with the legal structuring of interim use. Eva Gehrig is head of the legal department of Mobimo ([www.mobimo.ch](http://www.mobimo.ch)), a leading real

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<sup>41</sup> Deviating agreements are null and void according to Art. 273 c para. 2 OR.

<sup>42</sup> Of course, the general limitations of contractual freedom according to Art. 19 para. 2 and Art. 20 OR as well as Art. 27 of the Civil Code (ZGB) remain reserved.

<sup>43</sup> CHK-b. Schönenberger OR 305 N 1.

<sup>44</sup> For the non-remuneration see above.

estate company in Switzerland with a property portfolio worth over CHF 2.3 billion. She was responsible for the interim use of "Badi 595" on the Mobimo side.

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