

The Instruments for the Implementation of Territorial Plans and Land Management by the Public Administration.

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ABSTRACT

The territorial planning and the management of urban development in Albania was one of the greatest challenges of the administration, both at the central and local level.

The planning, until after the proclamation of independence, has been an important element, in the administration's hands, used in the context of the organisation of the new Albanian state, especially in Tirana.

2009 marks an important reform in the urban legislation with the introduction of the law "For Territorial Planning" and the regulations adopted for its application. The reform sign a change in the notion of territorial planning, passing by the concept of urban planning, as definition of the general rules for the location and architecture of the buildings in all the Albanian territory, in a concept of territorial planning as a whole, organised into four levels clearly defined. The law defines the new instruments to be used by the administration, in the planning and management of the territory, where a particular importance remain the special instruments to monitor the land development. The drafting of planning instruments, and especially of the plans and regulations, is followed by their implementation in a specific territory. This last phase has presented particular issues after the 90s as, regarding the regulatory plans of municipalities.

The expropriation for public interest, as an instrument used for the construction of infrastructure and services in implementation of territorial plans will be subject of analysis, focusing also in other instruments of the legislation for territorial planning.

The study has as objective to analyse the instruments provided by the law for territorial planning, the way in which they can be used by the local administration during the drafting and especially during the implementation of territorial plans.

KEYWORDS: Planning, Control of territory development, Expropriation for public interest, Local administration, Infrastructure, Public services.

1 INTRODUCTION

Urban development of Albanian cities, starting from the declaration of independence of the Albanian state, has been a challenge for local and central administration. The city of Tirana was among the first cities in the country which, particularly in the Kingdom's period underwent a territorial planning, setting out the interventions that will be realised in the territory for the construction of infrastructure and services in the Albanian capital. Private property was guaranteed in the Kingdom's Statute of Albania (art.

198) and can't be affected without proving public interest, without a payment of a reasonable value and without following the procedure defined by the special law on expropriations.

Political developments that followed the fall of the Kingdom of Albania and the end of World War II led to a fundamental change in the manner of drafting and implementation of spatial planning instruments. Private property, guaranteed by that time, was replaced very quickly from public property through nationalisation of agricultural land without any compensation, based on Marxist ideology that was put up by the Albanian socialist state. Private property was guaranteed only in urban areas and only for residential buildings, leaving to the administration an almost complete freedom of action in the drafting and implementation of territorial plans. In this period dates the reorganisation, based on urban plans of many Albanian towns, assisted on one side by the limitation of private property, but also hampered on the other side (especially in the late 80 ') by financial constraints faced by the central and local government.

With the changes in the political and economic system, in the early 90', we have the first law for territorial planning, the beginning of the process of returning the property to the old owners, the division of land to the families of agricultural cooperatives, the privatisation of several state companies etc, which led to a gradual move of the biggest part of the land's ownerships, in private hands. A passage which marked a change of role and approach of the local administration toward the planning and management of the territory. The latter made difficult by the birth of a new phenomenon which will take considerable dimensions in the years that followed, the illegal building. Local and central administration showed significant deficiencies in control of the territory, or in other words in control of territory development, towards a sustainable development of cities.

Infrastructure and public services were not able to follow the development and expansion especially in big cities. The local administration gradually began to play a more active role in planning, based on the instruments offered by a more complete urban legislation, extending gradually in recent years the infrastructure and services in urban areas.

The expropriation for public interest has been the main instrument, not to say the only one, in the realisation of the definitions of territorial planning instruments regarding the implementation of infrastructure and public services. The 2009 reform and the law for planning, provides new instruments on "the hands" of the local administration for the implementation of urban plans. These instruments will be exactly the main object where the study will be focused.

2 THE EXPROPRIATION FOR PUBLIC INTEREST

All the forms of planning and management involve the recognition and at the same moment a special power of public administration that is expressed in the possibility for conditional use of private property, leading up to the acquirement of it from the owner. We can't say that such a situation is a recent development. In any society have always existed rules on restrictions placed on the right of ownership.

In the beginning it is important to specify the reasons of the existence of private property restrictions, that by the end of the nineteenth century was based on the country's defence needs and to ensure the full property rights of each owner.

Starting from the industrial period, the restricting reasons quoted above, become secondary, leaving place for the increasing interest of national production and in a second moment of social development. For these reasons, state control over private property marks a progressive increase, expropriation gradually turns from an instrument used in rare cases, to a widely used instrument¹.

Among the most important interventions and one of the first, in city planning and implementation of its determinations, we can mention the Haussmann's plan of Paris. A widely used instrument for the implementation of this plan was the expropriation for public interest, based on a law of 1841. The implementation of this law allowed Haussmann to make large scale expropriations of private owners, in order to build roads and implement other projects of public interest, as in the case of the interventions in

¹ Cofrancesco, G. 2004. Le figure pianificatorie, Libreria dello stato.

areas with unhealthy apartments with the risk of outbreak of epidemics². A key role in Haussmann's initiative was played by the decree of the Senate of 1852 that created the possibility of simplified procedures of expropriation for the implementation of public works, giving the opportunity to resale the unneeded expropriated lands³. On 27 September 1858 the Council of State ruled that municipalities can maintain only road surfaces, while the surrounding land should be given back to previous owners. The unitary direction of all public works in the capital was not based on endless contributions, but through loans guaranteed by future outputs, the reform of administrative divisions, in the same moment with the settlements reform are the results that Haussmann reached, fighting strongly against other sectors of administration and other political controllers.

In the mid 19th century, also in many European cities, were conducted the first major urban interventions as in: Brussels, Vienna, Barcelona, Florence, London etc.

In Albania after independence and the gradual organisation of local and central administration, we have the beginning of city planning and especially for the newly capital, Tirana.

The plans, as a results of the work of the Albanian and foreign architects and engineers, were implemented by local authorities in the kingdom's period, aided by foreign funds, especially in Tirana. In the period following the conclusion of World War II, urban planning was implemented without regard of guarantees for the private property, replaced by the public property through requisition and expropriation far from market value. The legislation on expropriation for the period 1945-1990, does not guarantee to owners the real value of their property (which actually was hardly determinable because of the in-existence of a real estate market) but guaranteed to them a choice of new state given apartments. The expropriation minimum guarantees, were provided only for buildings for residential use and any other construction (also land) were taken by the state without any compensation.

The democratic developments of 90s, as in all European eastern countries, returned the state administration's attention to the free market and private property, which was guaranteed by the Albanian Constitution. The expropriation for public interest is based on a special law and implemented at a time when public interest prevails over private interests of their owners and towards fair compensation, taking into account the depreciation that can be caused to the remaining part of property. That realised when the protection of public interest, can't be achieved without exercising ownership rights over real estate or movable private property.

Objects of expropriation for public interest are: the real estate (permanent buildings and land) and movable assets (historic, archaeological, cultural, scientific or property at risk for public health and safety). Expropriation can be done for the realisation of investment projects that represent public interest at the national or local level in the field of: transportation, energy, telecommunications, water related works of any kind; the realisation of national or local investment projects for the environmental conservation, health, culture and public education; the realisation of investment programs for the national defence, the protection of monuments and real estate properties with archaeological, historical, cultural and scientific character (when their preservation is not performed by the private owner) etc.

This instrument was widely used in recent years, from the local administration, generally to build infrastructure (as the implementation of Tirana's ring road, for primary and secondary roads of the city, currently used in the extension project of Tirana's main boulevard, for streets of other big municipalities etc.) but also by the central administration in the infrastructure projects at the national level (as the National Road, on the Levan-Vlore highway and other parts of the same road, Tirana-Elbasan highway etc.). One problem faced in these cases, was the compensation given to expropriated owners who, in many cases, have protested or addressed to the court, exercising their right in determining the amount of compensation.

² Benevolo, L. 1991. *Le origini dell'urbanistica moderna*, Laterza.

³ Londei, E. F. 1982. *La Parigi di Haussmann, La trasformazione urbanistica di Parigi durante i II Impero*, Roma.

3 THE SPECIAL INSTRUMENTS OF DEVELOPMENT CONTROL

In 2009 we have an important reform in territorial planning with a new law, which defines the development control instruments divided into general instruments and special instruments.

As general instruments, the law provides the regulations of development control of the territory in the national and local level that regulate the process, according to which local planning authorities will decide if a development application, or the realisation of a development is in conformity with the planning instruments. They determine, among other things, the process and method of application of national and local planning instruments, the implementation of national and local policies for environmental protection, conservation of natural and cultural heritage, health, safety and well-being protection.

The local planning authorities are responsible for the development control of territories under their jurisdiction, as well as for the implementation of obligatory national instruments, national regulations of development control and building regulations for their administrative territory.

The special instruments of territory development control, according to the planning law (art. 63), are: the development suspension, the public servitude, the public reservation, the right of transfer, the right of preference and the right to leave. These instruments (public servitude, public reservation and the right of preference) can be part of a local or national territorial plan, or otherwise they may be approved by the planning authority, based on a study that determines the facts and formulates the objective of public interest to be achieved.

3.1 The development suspension

The planning authority can decide the suspension of development during the approval of the initiative of drafting the planning instrument, or during the process of its development. The decision to suspend the development, determines the reasons for using this instrument, the territory involved or certain parts of it, kinds of permits, issuance of which is suspended, structures that can't be demolished, timing and extent of the suspension according to the type of development. This instrument can be used for a period up to 12 months, which may be extended another six months, for specific reasons provided by law. The suspension can end before the timeframe, if the conditions required for its adoption cease to exist and in any case, when the planning instrument comes into force.

In case that development suspension stays in force for more than 12 months, the parties affected by its adoption, have the right to be compensated to the extent of loss or damage.

The Council of the municipality (except where the mayor decides, if there is a clear and emergency risk to values and certain characteristics or local functions of the building) decides on the proposal of the mayor for the adoption, modification or revocation of the development suspension.

This instrument has the objective to avoid the risk that, in the period between the drafting and adoption of the plan, the plans definition can be affected by the possibility of issuing development permits. Until the adoption of the new plan, the permit applications must still be evaluated under previous planning instrument, or in its absence, on the determinations of the planning regulation model. This will bring the disapproval of the application for permission from the mayor, if in contrast with the previous plan. If the request is in accordance with the instrument of territorial planning still in force, the decision about it may be suspended until the entry into force of the new plan, under which it will be decided whether or not to be approved the development permit. In countries like Italy, suspension of development can take up to 5 years showing that, the restriction of the right to build (*ius aedificandi*) as part of the right of ownership, in our country has a more limited term⁴.

The development suspension "as a protective measure" of the local administration's territory, pending the drafting and approval of territorial planning instruments is an important tool which local authorities can use to ensure a better implementation of instruments in the drafting period.

⁴ Salvia, F., Teresi, F. 2002. Diritto Urbanistico, Cedam.

3.2 The public servitude

According to the Civil Code (art. 261) the servitude, is defined as the obligation in charge of a property that is attributable to the use and usefulness of another owner's property, and in our case it is decided for a public interest, as defined by local or central administration (for example. placement of electrical power lines).

Public servitude in our case, can be defined by local or national planning instruments, or by a development permit. The instrument stays in power indefinitely, if the act that creates it does not specify an ending date. The owner of real property, subject to the servitude, which is established for the implementation of a future public purpose, does not interfere with the intended use of the public servitude.

The owner may claim compensation, if it causes direct material damage, although according to the legal definition, public servitude placed in the public interest is not object of compensation.

Categories of public servitudes and rules for their implementation are determined by local government council and implemented by the mayor, while nationally the competent authorities are the National Council of Territory and the Minister.

3.3 The public reservation

The public reservation is the decision of a planning authority, which provides that in a real estate private propriety or a part of it, the development of land and buildings is limited or excluded for a particular public interest.

Planning authority must inform the owners of real estate, which may be affected by the decision of public reservation of their land for the purpose and reasons of taking such a measure, at least 60 days before the date of adoption of the decision. It is decided without a compensation for a period up to 18 months, when it does not cause damage.

The planning authority can start the expropriation procedure only after trying to negotiate the purchase of the property, determined to be reserved for a public interest. The expropriation can't be greater than its required for the achievement of the public interest.

The decision to exercise the public reservation instrument on a real estate propriety, is carried out after coordination and cooperation between planning authority on national and local level and depending on the case, can be taken by the minister, or by the mayor. The decisions about the public reservation of a land, is published in the register of territorial planning (which is an electronic or written public inventory for the information about the territorial planning) and in the register of real estate propriety.

The public reservation appears immediately as the most important instrument of the special instruments of territorial development control, which can be used as part of the planning instruments during the drafting to determine areas where infrastructure and public service will be built at a second time. The reservation is defined as an instrument that precedes the expropriation and the limited time period, gives the guarantee that the exclusion from the development possibility of a privately owned land does not constitute a permanent restriction of private property, leaving the owner with a land which can't develop. From the other hand, this limited time allows local administration to negotiate for the purchase of real property or to start moving with the procedures of expropriation.

3.4 The right to transfer

The right to transfer is the right to change the ownership of real estate propriety, from the local government to the state, for the realisation at the national level, of public or private investments in infrastructure. The Council of Ministers has the right to decide to transfer a real estate property owned by the local government, in favour of the state for the implementation of national investment in public infrastructure. This transfer can be done with the payment to the owner of the fair value of land or buildings, according to the market price at the time of ownership transfer.

Towards the local government, in recent years, we had a gradual transfer of real estate property by the central government. The transfer of ownership, based on a special law is in two forms: in ownership or in use. The transfer of this properties is carried out, without a payment toward the central government,

taking into consideration limited opportunities of the local government to create revenue. The transfer of property is also important for the decentralisation process and the increase of assets of local government, creating new opportunities to create income. The right of transfer represents the reverse process, under which the property of municipalities passes to the state, but only for national infrastructure projects.

3.5 The right of preference

The right of preference is the right in favour of a planning authority, to be preferred before any private subject in the purchase of a private real estate propriety, which is subject to sale, according to the market value and located in an important area for the fulfilment, or the protection of a public interest.

The owner of a real estate, in which is approved the right of preference, before signing a sale contract, announces to the responsible planning authority, which has approved the preferential area, the purpose of selling the propriety, the price and conditions. The responsible authority should be expressed in relation to the exercise of the right of preference. In case of refusal of its exercise, not reaching an agreement on the price, or the lack of response from the responsible planning authority within 60 days from the date of notification, the owner has the right to sell the real property after this deadline. In these cases, the authority can't exercise the preferential right on the same property for a period of 5 years.

The owner can sell the real estate only at a price equal or more favourable for him than the price offered for the planning authority.

The approval of preferential areas is carried out by the authority that approves the territorial plan, as part of it or even separately from the local government council or the National Council of Territory.

We can find this right, in other cases in the Albanian legislation, but in a different function from that of territorial planning, like is the case of cultural heritage buildings. If the owner decides to sell the propriety, it must submit a request to the ministry responsible for culture, which if interested can begin the process of evaluating and purchase, or otherwise the owner can sell it. The right of preference is occurring also in the cases of joint ownerships (Civil Code, art. 204).

In the case of territorial planning, this instrument can be provided in specific areas of the local government territory, where the local administration decides to build in a second moment, infrastructure and services or to protect an area or building, which although not part of the cultural heritage, remains important for the city.

3.6 Right to leave

The right to leave is the right of a private owner, subject to a public reservation of his real estate propriety, to officially notify the responsible planning authority, in the administrative territory of which the property is located, about the decision to sell the property.

The owner may notify the authority responsible for the exercise of the right to leave, accompanied with the price and conditions. Within 60 days the planning authority must notify the owner the decision about buying the real estate, being obligated to pay the price within 6 months from the date of the decision. In case of refusal, the planning authority must decide within 60 days the revocation of the propriety public reservation, or to use as appropriate the expropriation procedure.

4 THE RIGHT OF OWNERSHIP VS. EXPROPRIATION AND SPECIAL INSTRUMENTS OF DEVELOPMENT CONTROL

The right of ownership is guaranteed by the Constitution in article 41, according to which the right of private property is guaranteed and the law may provide expropriations or limitations on the exercise of this right only through a fair compensation and only for public interests. The Constitution provides, not only in the case of expropriation, but even in the case of restrictions of property rights, equivalent to expropriation, the existence of a public interest and the payment of fair compensation. The criterion of fair compensation, also became part of the law for expropriation and temporary use of property for public

interest. The right of ownership is guaranteed also by the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Albania in 1996, in the first Protocol in article 1.

The expropriation for public interest, is known in the history of the development of European cities as the main instrument used to implement projects in infrastructure and services defined in local urban plans. The expropriation marks the transfer of property from a private owner in favour of the state or another private subject which follows a public interest, recognising to the latter, all the rights enjoyed by the owner. Based on the obligation to guarantee the right of ownership, the expropriation law defines the reasons under which a property can be taken by the administration from the private owner.

Besides the expropriation for public interest, there are other instruments that limit the right of ownership. These are the special instruments of development control of the territory, which limits the right of ownership, without depriving the owner of his property, but by limiting some rights that he enjoys such as the right to build (*ius aedificandi*).

According to the German doctrine (*Grundgesetz*), the law can't affect the essence of fundamental rights. The German doctrine and jurisprudence tried to provide an answer to the question of what is the untouchable essence of the right of ownership. At this point were presented two theories⁵: the first (*einzelaktstheorie*) supports the idea that the specific administrative acts present expropriation characteristics, when the owner is deprived from the right to built. This characteristic does not appear in the case of general administrative acts. (ex preservation of buildings or important cultural heritage areas: Gjirokastra as a protected city or specific buildings as cultural monuments, where the characteristics defined by the law on cultural heritage, are an integral part of the area or the building itself). The second theory (*substanzminderungstheorie*) supports the idea that any act capable to limit fundamental rights, part of right of ownership, has expropriation characteristics.

Even in Italy, the Constitutional Court (Decision no.55 and 56, dated May 29, 1968) ruled that: the limitation of the right of ownership are discretionary acts that precede the expropriation as such, should be compensated, as is the case of expropriation for public interest, because they affect the inviolable core of the rights of ownership. If a reward isn't provided, the act is unconstitutional.

The Albanian legislation for territorial planning provides the public reservation as an act of planning authority which determines the limitation or exclusion of land development for a particular public interest. The law does not define a compensation for the period in which the use of this instrument is placed, but rather a guarantee for the private owner's obligation to negotiate for the purchase of the real estate property prior to expropriation procedure. Compensation is not provided in the case of use of the instrument of the development suspension or public servitude. In these cases the limits of the right of ownership are generally expressed on the prohibition or suspension of development on a land up to restriction of its use. Their term, limited in time (for the public reservation and the development suspension) makes that the restriction of the right of ownership, should not be unlimited and appear as an indirect expropriation of the land.

In the case of public reservation, the planning law establishes the right of leaving, as another instrument, which can be used by the private owner, subject to public reservation. The exercise of this right, by providing to the administration the conditions for sale and the price, propel the planning authority to decide, within 60 days between: buying the property, revoke the public reservation or to start the expropriation procedure. The decision to offer the property, in which a reservation is placed, solves a situation in which the owner finds himself with a property useless for building, which in a second moment may be subject to expropriation. In this way, the restriction of the right of ownership will be shorter and the property will be transferred to the local authority who has imposed the restriction, or it will remain to the owner after the revocation of it.

The expropriation law provides another limitation of the right of ownership of a temporary nature, which is the temporary taking of property for public interest. This instrument, among others, can be used for the purposes of implementation of projects or investments in the public interest, for which an

⁵ Sandulli, A. M. 1971. I limiti della proprietà privata nella giurisprudenza Costituzionale in Giur. Cost.; id. 1972. Profili costituzionali della proprietà privata in Riv. Trim. Dir. Proc. Civ.

expropriation decision has been taken (ex. to provide temporary roads needed for transport, for construction sites, warehouses, installation of engineering networks, opening channels to divert water and other needs necessary for these projects and investments). Private property may be taken for temporary use in any case toward a compensation but not more than 2 years and may not last longer than the end of the cause for which it was required. Other limitations of the right of ownership are the minimum distances provided by the urban and environmental legislation, regarding the minimum distances that the buildings must follow from the road, railway, hydropower, archaeological sites etc.

Another limitation of the right of ownership is provided in the legislation for cultural heritage, which provides important private buildings, which are declared "cultural monument" can't be changed in their internal or external appearance, depending on the protection category of the monument. In some cases entire areas with historical and cultural importance buildings, can have restrictions on the right of ownership based on the public interest to preserve this important areas. Differently from the limitations described above, this category of restrictions are based on the characteristics of the property itself and are recognised even by their owner, unlike the other limitations which are placed in a discretionary way by the planning authority.

Starting from the 90s, public institutions and all Albanian society faced the problem of guaranteeing and recognition of private property, starting from the process of return and compensation of property, legalisation of illegal buildings up to the "uncertainties" of the property right, created by the decisions of state institutions. At this stage of the right of ownership guarantee, researchers of the field and jurisprudence should gradually also focus on ensuring all core rights that constitute this fundamental right.

5 CONCLUSIONS

Public administration has now a variety of instruments, to implement the determinations of planning instruments, in terms of infrastructure and services, in the local and national level. The most important among them remains the expropriation for public interest, which has a relatively long history in Albania that begins from the first years after the independence. This instrument, which has undergone changes over the years, appears today as the most used instrument by the public administration, for the implementation of projects in infrastructure and services. The expropriation is seen, indeed, as an "authoritarian" act of the administration which does not leave space of interaction with the owner, which may appeal only for the measure of compensation that has been fixed.

The "incomplete" tableau of these instruments, will be completed in 2009 with the special instruments of development control, which define new opportunities through a greater interaction between the parties, for the realization of public interests. This instruments can be used as single or as a first step, followed later by expropriation. Their use by the administration responsible for planning, remains in the initial steps, creating the need for a gradual increase in their use for the implementation of territorial plans.

Such as the expropriation, as well as the special instruments of development control, constitute restrictions on the right of ownership and should be subject to compensation by the state, to find in this way, the necessary balance, not easy to be achieved, between public interest and the interest of owners. All instruments that were analyzed above, based on their length, the nature of the restriction and the characteristics or location of the building or land, may in some cases, show characteristics of an indirect expropriation. The latter problem is precisely avoided by the limited time of use, of some of these instruments, which also carries in itself a long experience in this field by other European countries. A challenge for planning authorities will be precisely their implementation, which necessarily requires an increase of their professional capacities.

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