



Acquisition and expropriation of real property for the public benefit in Slovenia

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ABSTRACT

Public acquisition and expropriation are the feasibilities of the state or local governments to acquire real property, where the increased benefit for the society is legally recognized. In spite of the commitment of market economies to the inviolability of private property, both approaches are well known in market economies and are topics of several international discussions. In particular this has been of importance in the former planned economies, where private ownership has become a fundamental issue. The rules concerning compulsory transfers of real property are different among the countries, but similar in concept. The dissimilarities can be found in the conditions on which transfers are carried out and in relation to compensation assigned to the property owner. This paper reviews the possible ways of real property acquisition with the stated purpose of establishing public benefit in Slovenia. The first step in the process of real property acquisition for the public benefit in Slovenia is real property purchase, where an agreement for compensation is to be achieved. Expropriation is used as the last resort where a real property is acquired without the consent of its owner and the compensation is usually based on the economic loss as the direct effect from the real property acquisition.

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Introduction

The development of the modern society requires government provision, at the state, regional or local levels, of public infrastructure and facilities that ensure safety and prosperity of life, economic progress and social welfare, compatible with sustainable development and environmental protection guidelines. An early step in the process is the acquisition of appropriate land or other kinds of real properties, which is the obligation of public institutions (FAO, 2008). For the purpose of public interest, the government cannot rely on real property markets alone to ensure that real property is acquired when and where it is needed for the greater good. It is possible that the owner of the relevant real property is not eager to participate in any kind of transaction. In such cases, when there are no alternative locations available, the legal system empowers the state or local community to exercise the expropriation procedure in order to support and achieve the desired public benefit. In this paper, the term of expropriation is to be understood also as compulsory acquisition, compulsory purchase or eminent domain. However, many countries worldwide assume that the state or local governments should attempt to purchase the required real property in good faith before the power of expropriation is used.

Land right issues and their influence on political and economic reality have made the recognition of the right to land as a human right very complicated. Currently, land rights as a human right are described as components of the right to an adequate standard of living, which entails the right to adequate housing, and the right to adequate food. Land rights are also linked to the right to property, including the right not to be arbitrarily deprived of one's property (Westman, 2008). Recognizing the utmost importance of land, the right to real property needs to be emphasized and treated as a human rights issue. However, the land right is not an absolute right. The land right and all other tenure rights are limited by the rights of others and by the measures taken by states that are necessary for public purposes. Such measures must be determined by law, solely for the purpose of promoting general welfare, including environmental protection and consistent with states' human rights obligations (FAO, 2012). For these reasons, the execution of an expropriation is strongly related to the human rights that are implemented on the constitutional level as the formal security of private property. On the European level, the European Convention on Human Rights introduces three principal provisions that concern private property: protection of private possessions, provision for a fair trial, and protection of a right with respect to a home. Consequently, the topic of expropriation, compulsory purchase, has been the subject of several international discussions and publications in the last decade (see Viitanen and Kakulu, 2008; FAO, 2008; Kalbro et al., 2008; Hopfer et al., 2010). Compulsory dispossession of real property should be well balanced between the public interests and the protection of private property of citizens on the other

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hand. The assurance of such balance must be formally enacted in the legal framework. Such procedures should be, according to FAO (2008), based on the fact that the forced conveyance of real property ought to be implemented only in the cases when the public benefit is evident, congruent with spatial planning acts, and no other solution is available.

The acquisition of title for the public benefit means an official conveyance of real property rights from an individual physical or juridical subject to the public institution in general. In the contemporary context it can also be implemented as the establishment of public easements, or even, in some special cases, as the encumbrances in favour of private companies (Kalbro, 2007). Generally, expropriation is a forced sale of real property in accordance with either an eminent-domain order or an order for a judicial sale arising from non-payment of duties (Garner, 1999). The circumstances for an expropriation, compulsory purchase, or restriction of individual ownership rights through easements in favour of public interest noticeably vary among the legal systems, but some common cases can be outlined (Denyer-Green, 2005; Ferlan et al., 2009):

- An expropriation for the public benefit is carried out when the new usage of the real property will gain increased merit for the community in comparison to the existing private one. Such an expropriation should be executed in accordance with the planning regulations and with reasonable compensation to the owner. The repayment is usually based on the assumed market value of the real property and should also cover some collateral outlay. The expropriation is carried out in the context of important infrastructural projects, for example traffic networks, electricity generation and transmission, water supply, sewage disposal, telecommunication facilities, hospitals, schools, etc.
- An expropriation caused by the insufficient maintenance of a real property, such as: ruination of buildings, destruction of historic, cultural or natural monuments and pollution of the environment.
- An expropriation for the prevention or reparation of damage caused by natural disasters and other common threats.
- A compulsory purchase (at auction) of a real property is caused by insolvent duties of its owner, such as bankruptcy, mortgage redemption, avoiding tax duties, court decision and operation of law.

The main problem of the expropriation procedure for the public benefit is the fact that the legitimate purchaser aiming to realize a certain public benefit usually urgently and rapidly needs to obtain the selected and exactly located real property. The indirect danger involved in such an expropriation provision comes out from the privileged or monopoly offer, which can cause high purchase price that together with the complicated administrative procedures often results in unnecessary high transaction costs (Kalbro, 2007). International studies and discussions about acquisitions of real properties for the public benefit, which were carried out by the United Nations (UN), Food and Agricultural Organization (FAO), World Bank and International Federation of Surveyors (FIG), indicate the need to standardize the expropriation procedures and to unify the principles of fair compensation to the rightful claimant. The transparency and efficiency of such methods, low transaction costs, short time period and fair compensation are especially emphasized (FAO, 2008, 2012; Viitanen and Kakulu, 2008).

Methodology

In market economies the public acquisition of real property, including expropriation, is essential when dealing with certain aspects of market failure. This includes the need to facilitate the provision of public goods such as infrastructure and utility

networks. The formal realization of a transparent expropriation case requires that the basic principle of increased public benefit is justified and published by the public authority. An expropriation or limitation of ownership by easements is acceptable if the necessity of the relevant public interest is evident and justified. The gained public benefit should be transparent and comparable to the loss caused to the private ownership. In different countries, the development of the real property acquisition for the public benefit has been influenced by the tradition and legislation. For these reasons a particular importance of real property acquisition for the public benefit is to be stressed in the case of (former) transitional countries. In spite of the commitment to the inviolability of private property, these countries have had to develop compulsory purchase procedures (see Grover et al., 2008; Hopfer et al., 2010).

Furthermore, the real property acquisition for the public benefit is dependent on the land administration system. Slovenia, as a study case of this discussion, has a similar land administration system and transaction procedures comparing to the other countries formed from the former Austro-Hungarian Empire (dual system of real property registration – the Land Cadastre and the Land Registry). In these countries, an expropriation procedure usually balances the interest between the public, the common good, and the interest of the particular owner of the land. Expropriation means the taking of a right (typically ownership of land) without the consent of the owner in the public interest, and against compensation (see Navratil and Frank, 2008).

In Slovenia, similar to other countries in transition, compulsory purchase of real property for the public benefit has been affected by transition to the market economy in the past two decades. The institutions of real property public acquisition and expropriation, being introduced due to public interest, have been developed according to the new Constitution, which permits and protects private ownership, as stipulated by the requirements of the European Convention of Human Rights. An overview of the existing legal framework is crucial to the understanding and international comparison of real property acquisition for the public benefit. For this reason, the Slovenian legal background in real property registration and expropriation is presented, where the procedures of real property acquisition for the public interest are dissected in more detail and graphically represented. Here, the Unified Modelling Language (UML) has been used, which was developed in the mid-nineties and was adopted by the Object Management Group (OMG) as standard in 1997, and has been already used to describe land related systems and procedures (see Šumrada, 2006; Ferlan et al., 2007; Lisec et al., 2007). The UML was originally designed for modelling software-intensive systems, but nowadays it is a formal general-purpose visual modelling language that is designed to be independent of any development methodology (Eriksson et al., 2004).

Real property ownership in Slovenia

In the traditional concept of the ownership system, a real property is understood as a land unit (a land parcel) and all permanently attached things (fixtures), such as buildings and utilities. During the socialist period this basic principle was neglected in Slovenia partly by the overruling social ownership in urban zones and partly also in rural areas. However, the Slovenian particularity when comparing to the other Eastern European countries was that the prevailing small farms (with approximately 10 ha of arable land) were never fully nationalized. Most of them survived also under the socialist regime, despite the unfavourable regulatory regime and policy measures, such as the constitutional restriction on the maximum farm size (Lisec et al., 2008). As early as in 1980 the role of social ownership was lessened by the Basic Property Law Relations Act (1980). After the declaration of independence in 1991, the Basic

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