

# Legal Certainty and Public Authentication DG pronouncement on the legal nature of a right of superficies over municipal land

In determining applicable legislation and competent jurisdiction, a question arises as to whether the creation and assignment for consideration by a Town Council of a right of superficies to build a car park is a private contract or a special government contract.

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**B**y means of a decision dated 2 January 2025 (Official Journal of Spain of 12 February), the Directorate-General of Legal Certainty and Public Authentication (hereinafter the 'DG') has rejected the appeal lodged by the Puente Genil Town Council against a land registrar's examination, whereby registration of the Town Council's title and beneficial ownership of certain properties as a result of the termination of an assignment for consideration of a right of superficies for the construction of a car park.

The Town Council accompanied its application for registration with a certified transcript of the

minutes of the Plenary Session that unanimously adopted the decision and a favourable opinion from the Andalusian Advisory Council issued in the contract termination procedure.

The registrar refused the registration on the basis of three defects, two of which were remedied by the Town Council on appeal. The third defect is the one that concerns us here, which is that the registrar, as no condition subsequent was recorded, went on to analyse whether, according to the administrative procedure followed, it was appropriate to cancel the prior registration, and his conclusion was that the appropriate

procedure in the civil jurisdiction should have been followed.

The Town Council appealed against the refusal of registration, arguing that the assignment for consideration of the right of superficies had to be classified as a government contract. It argued that - as reported by the Andalusian Advisory Council - the awarding of the contract was for the public interest (providing parking spaces in the town centre), an interest linked to the specific purview of the procurer, because, among the responsibilities that the Local Government Act attributes to the municipality, are those of vehicle traffic, parking and mobility.

The DG's decision, on the other hand, considers that it is a private contract, on the grounds that, according to public procurement legislation, private contracts are "contracts of sale, gift, swap, lease and other similar legal transactions involving real estate..." (Art. 5(2) of the 2000 General Government Contracts (Recast) Act, applicable *ratione temporis*, and current Article 9(2) of the Public Contracts Act 9/2017). Consequently, it states that the so-called *doctrine of separable acts* applies, according to which the drafting and awarding of these contracts is governed by administrative rules and jurisdiction, while their effects and termination are subject to private law (Art. 26(2) of the Public Contracts Act).

The Town Council denied that the contract for the creation and assignment for consideration of a right of superficies could be understood to be included among the "contracts of sale, gift, swap, lease and other similar legal transactions involving real estate" referred to in the laws of contract. However, the DG considers that it is, based on the following legislation:

- Town planning rules and regulations. Updating what the decision says with current legislation, chapter III of the current Royal Legislative Decree 7/2015, approving the

recast version of the Land and Urban Rehabilitation Act, contains a series of provisions on the right of superficies and states that it will be governed by "civil legislation in matters not provided for by it or by the instrument creating the right" (Art. 53(4)).

- The General Government Estate Act 33/2003, Article 110 (completing the provisions of Article 7(3)) whereof lays down that "contracts, agreements and other legal transactions concerning property and property rights shall be governed, as regards their drafting and award, by this act and its implementing provisions and, in matters not provided for therein, by the legislation on general government contracts. Their effects and termination shall be governed by this act and private law", which leads back to civil legislation to regulate the termination of the contract as a way of extinguishing its effects. Additionally, this article confers jurisdiction to civil courts to settle disputes, without prejudice to the fact that the juristic acts related to contract drafting and awarding are considered separable acts, in which case they may be judicially reviewed.

With regard to the Town Council claim that it was a special government contract, in that it was aimed at satisfying a public interest linked to local government business, the DG cites the case law of the Supreme Court and, in particular, its judgment of 21 February 2012 (app. 306/2009). This judgement held that "the characterisation of the contract as a government contract in terms of the public interest pursued depends on the public purpose being expressly included as the reason for the contract", and that Article 8(2) of the General Government Contracts (Recast) Act requires, for special government contracts, that the specific terms state "their nature as special government contracts" and "the jurisdiction of judicial review courts"

## *The Supreme Court (Third Chamber) will soon rule on this issue*

to hear them (note, however, that the current Article 25 of the Public Contracts Act does not contain these formal requirements for a contract to be characterised as a special government contract in nature).

In the case in question, the DG points out that the registry entry does not contain any of these clauses and that the submitted documentation does not show that the specific terms included them or that the public purpose pursued was expressly established as the reason for the contract at the time it was signed.

The DG therefore concludes that the contract for the creation and assignment for consideration of a right of superficies is a private contract and that, therefore, in order to carry out its termination and the consequent cancellation of the registered right, the express consent of the registered right-holders is necessary or, failing

that, the appropriate court decision, which must be, as stated, a civil court. This decision may be appealed by the Town Council by means of a claim in the civil courts.

Finally, it should be noted that the Supreme Court (Third Chamber) will soon rule on this issue, establishing case law on the matter. By means of the Order of 22 November 2023 (app. 7577/2022), a ‘cassation’ appeal has been allowed to proceed in order to resolve the following question of interest for the formation of case law on breaches of the rules governing the determination of disputes: to determine whether the contract for the creation and assignment for consideration of a right of superficies on municipally owned land intended directly for a public purpose — in this case, the provision of social housing for vulnerable groups — should be considered a special government contract or a private contract for the purposes of determining the competent courts (in a matter related, as in this case, to the termination of the contract).