

# ANALYSIS

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Real Estate

Do purchasers of apartments and premises take on, by way of subrogation, planning obligations arising from a land readjustment procedure?

Whether or not the purchasers of residential apartments and commercial premises take on, by way of subrogation, the planning obligations arising from a land readjustment procedure, has always been a conundrum on account of the economic and social impact that an affirmative answer would have on the end recipients of housing. The Supreme Court has yet to rule on this matter.

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## 1. The judgment

The court decision under consideration here is the Madrid High Court of Justice (Judicial Review Division, First Chamber) judgment no. 320/2024 of 22 April 2024 (JUR 2024/157959). The applicant, Éntasis Desarrollos, cites in its favour the Andalusia High Court of Justice judgment no. 1462/2018, affirmed by the Supreme Court on 27 October 2015, both disregarded in the present application.

The Governing Council resolution, ratified at the Ordinary General Assembly of the Land Readjustment Association and subsequently confirmed on administrative review by the Madrid City Council's Director-General of Urban Planning, informed the members of the Land Readjustment Association of the Este-El Cañaveral Development "that not all of the zone's development work has been completed and that, pursuant to the case law of the First Chamber of the Judicial Review Division of the Madrid High Court of Justice, settled in judgments such as those of 23 May 2006 and 26 December 2017, end purchasers of real estate products are not included in land readjustment associations, since the aforementioned principle of subrogation in rem applies to land transfers and not to transfers involving apartments or premises". The consequence was that "the immediate owners of land prior to its transfer to end third parties of real estate products, until the complete completion of the development work in the UZP 2.01 zone, in accordance with the provisions of Article 18(1)(c) of Royal Decree-law 7/2015, of 30 October, approving the revised version of the Land and Urban Rehabilitation Act" remained as members of the Land Readjustment Association of Zone UZP 2.01.

The administrative review decision invoked Article 27(1) of the Land and Urban Rehabilitation (Recast) Act, according to which the new owner (the provision refers to the "conveyance of real property") takes on by way of subrogation the "rights and duties of the previous owner, as well as the obligations taken on by the latter vis-à-vis the competent public authority and which have been registered, provided that such obligations relate to a possible effect of an alteration of a right in rem". It thus disagrees with the view taken by the first instance court by reference to the aforementioned judgment of that Division and Chamber. In contrast to this approach, the respondent and the co-respondent emphasize that the articles of association of the Land Readjustment Association (specifically, Articles 8 and 13(2)(d)) refer in all cases to the "landowners" as members of the Land Readjustment Association, stressing that membership of said association is "inseparable from ownership of the relevant land".

On this basis, the judgment continues, this appellate Chamber and Division can only reiterate the position set forth in the aforementioned Judgment no. 779/2006 of 23 May (app. no. 1111/2003), in which, while acknowledging that the matter "involves particular complexity," it categorically affirmed that the end purchasers of real estate, after the land readjustment plan has been approved and without having taken on any planning obligations, are not members of the Land Readjustment Association. The wording of Article 27 of the Land and Urban Rehabilitation (Recast) Act regarding the principle of subrogation in rem is not unknown, but, as highlighted in the appealed judgment (in relation to the legislation that had preceded it, but which

used the same terminology), that provision refers to transfers of land and not to those of apartments or premises comprising the buildings. As in any subrogation, the public authority's consent, as creditor, is required, pursuant to the provisions of Article 1205 of the Civil Code.

And, finally, if the claim were upheld, the end purchasers of the real estate properties, upon joining the Land Readjustment Association, could see their interests negatively affected. Not surprisingly, this implies (as noted in the aforementioned ruling) "becoming a party to the obligor/obligee relationship entered into with the City Council to jointly and severally fulfil the obligation to develop the land, and it is evident that third-party purchasers of real estate have not taken on that obligation, which rests with the developer".

Another aspect must be highlighted in the present case: we are dealing with a case of "simultaneous construction on land that does not yet have the status of a building lot, with the execution of development work" (Art. 23(1) of the Land (Region of Madrid) Act, a fact that only emphasises the need to rule out the inclusion of the end purchasers of the real estate products in the Land Readjustment Association.

## 2. Commentary

According to Article 5 of Royal Decree 1093/1997 (emphasis added):

1. At the request of the public authority or the acting urban planning entity [...], for each affected property the registrar shall make a note in the margin stating the commencement of the procedure and shall issue [...]

a certificate of title and charges. The application shall list the properties, portions, or rights of use attached to the planned unit development. In the case of units subject to the land readjustment scheme, for the purpose of making the aforementioned annotation, it shall suffice that the deed of formation of the entity has been executed.

2. The marginal note shall be valid for three years and may be extended for an additional three years at the request of the acting public authority or the collaborating urban planning entity.
3. If an entry is made in the registry folio after the annotation, the content of such entry shall be included in the registrar's acknowledgment of entry for the record of title.
4. The annotation *shall, in any case, produce the effects provided for in Articles 14 and following.*

The relevant effects, insofar as they are of interest, are as follows, according to Article 19 (emphasis added):

*All title holders of, and holders of other rights in rem in, the properties resulting from the repartitioning procedure shall be encumbered with the obligation to develop the land and to the other duties arising from the repartitioning plan and urban planning legislation [...].*

1. [...]
2. In the event of non-compliance with the payment obligation resulting

from the settlement of the account, if the public authority chooses to collect through enforcement proceedings, *such shall be directed against the title holder or holders of the property* and shall be notified to the others who *hold other registered or annotated rights subject to the encumbrance*. All of the foregoing is without prejudice to the fact that, in the event of payment of the urban planning obligation by any of the latter parties, the party making the payment shall be subrogated to the claim with the right to recover from the non-compliant owner, as provided by civil law, which shall be recorded in a marginal note.

Pursuant to Article 20 (emphasis added):

... The encumbrance shall expire seven years from its date. However, if during its term the provisional settlement account for the repartitioning or land readjustment plan has been finalized, such expiration shall occur two years after the date of registration of the final balance in the Land Registry, provided that, in no case may the term exceed seven years from the original date of the encumbrance.

It is clear that commonhold (condominium) associations under Article 8(4) of the Land Registry Act are not owners of *properties resulting* from the land readjustment procedure. However, even if they were, in their capacity as third-party purchasers, they would no longer be “encumbered” with the payment upon the expiration of seven years from the date the annotation under Article 5 was made, and this period had surely already elapsed by the date of the judgment in question.

However, Article 27 of the Land (Recast) Act (TRLRS), a provision that has been repeated throughout the history of our urban planning law, goes beyond the encumbrance referred to in the regulations and, in a solemn manner, states that “[t]he conveyance of real property does not alter the status of the holder with respect to the owner’s duties under this Act and those established by applicable land use and urban planning legislation or enforceable through acts of implementation thereof. The new owner takes on by way of subrogation the rights and duties of the previous owner, as well as the obligations taken on by the latter vis-à-vis the competent public authority and which have been registered, provided that such obligations relate to a possible effect of an alteration of a right in rem”. The new owner is subrogated to the “duties and charges” but not to the obligations, unless these have been registered. However, judicial review case law has never held that subrogation entails a release of the former owner, at least vis-à-vis the public authorities. For these purposes, it may be argued that payment obligations already incurred by the developer, even if not yet settled, will not, at the very least, be imposed on third-party purchasers of apartments and premises. It is another matter that the “encumbrance” of new planning obligations (those under Article 18 TRLRS) does not extend to these third parties.

The Directorate-General of Registries and Notaries has held that the “fiduciary powers” of the land readjustment associations over the incorporated plots ends when the land readjustment plan is definitively approved and the new resulting properties are subrogated. That is, the land readjustment association’s authority to bind

parties ends when the resulting property is delivered, thus before the lot has been converted into commonhold.

But when do land readjustment associations “cease to exist”? A municipal act is required, *which almost never takes place*, because land readjustment associations drag on and on, and Article 30 of the Urban Planning Management Regulations confirms their continued existence until the development work has been accepted and the plan accounts have been settled.

By skipping various complex intermediate steps, we can arrive at the conclusion of the argument, which is the basis for the present judgment. *In 1999, I wrote the following on this subject:* “It is clear that these purchasers (of commonhold units) can never be subject to seizure for debts of the land readjustment association. The reason for this is that, from the moment the replacement plots have been delivered, the ‘right in the readjustment’ is definitively crystallized. The seized purchasers could no longer, in our case, retain a

potential ‘right in the readjustment’ that could no longer be realized or materialized in the future, given that the repartitioning process concluded and cannot be repeated.” Consequently, and in agreement with the Madrid High Court of Justice, these purchasers of residential apartments and commercial premises can never be members (or debtors) of the Land Readjustment Association.

And the former owners — those who had a right in the readjustment and received resultant properties (and the subsequent purchasers of these properties) — may remain *liable and encumbered* only by the planning obligations arising during the seven-year period of the encumbrance under Article 19 of Royal Decree 1093/1997. Note that what “expires” is the encumbrance as such, not the marginal note that carries the effect of the encumbrance; thus, if these owners are no longer “liable” with respect to the properties, they will not be so in any other way either. Because the encumbrance under the aforementioned Article 19 is a ‘local land charge’, not a (mere) lien.