SPANISH CONSTITUTIONAL COURT
Cabinet of the President
Press Office

INFORMATION NOTE No. 88/2015

THE TC UPHOLDS THE UNCONSTITUTIONALITY OF THE PRINCIPLE USED TO CALCULATE INDEMNIFICATION FOR THE OWNERS OF INITIALLY DEVELOPED LAND

The Plenary Meeting of the Spanish Constitutional Court (TC) has partly upheld the unconstitutionality issue filed by Section Two of the Contentious-Administrative Chamber of the High Court of Justice of Castilla-La Mancha against several provisions of Legislative Decree 2/2008, of 20 June, approving the Consolidated Version of the Land Act [Texto Refundido de la Ley del Suelo] (TRLS). The Plenary Meeting has declared the unconstitutionality of Art. 25.2.a) because the compensation set for the owners of rural land that is initially developed is not in line with the actual value of the expropriated asset, as foreseen in the Constitution (Art. 33.3). The judgment, in which Santiago Martínez-Vares has acted as Reporting Judge, has three particular dissenting votes (of the Vice President, Adela Asúa, and Fernando Valdés Dal-Ré; Juan José González Rivas; and Juan Antonio Xiol) and the concurrent vote of Pedro González-Trevijano and Andrés Ollero.

In the Order raising the unconstitutionality issue, the High Court of Justice of Castilla-La Mancha has questioned the entire valuation system established by the Consolidated Act for rural land that is initially developed, affecting Art. 12 (distinguishing between land in a basic situation other than rural land and developed land); Art. 23.1.a) and 2 (excluding from the valuation of land any planning expectations, which could affect market value) and Art. 25 (specific indemnification to compensate the exclusion of owners' rights to participate in the initial development steps).

The Plenary Meeting has endorsed the constitutionality of Arts. 12 and 23.1.a) and 2. With respect to Art. 12, the judgment states that "*it is not unconstitutional*" to treat all land not yet incorporated into urban planning as "*basic rural land*", given that this classification is based "*on the physical characteristics actually affecting the land* (…) *without considering the different use given thereto under urban planning or territorial development*". Consequently, further to this different basic situation, "*the same valuation method may be applied to all*", i.e. the one foreseen in Art. 23 TRLS.

Nor is the land valuation method foreseen in Art. 23 unconstitutional, adds the Plenary Meeting, which excludes variables that depend on urban planning "*expectations*", preventing said evaluations being affected by market price fluctuations.

In relation to Art. 25 TRLS, the Order of the High Court of Justice considers that it is unconstitutional because the compensation foreseen (for those owners not allowed to participate in initial land development steps) is far removed from the market value of the expropriated asset.

According to the Plenary Meeting, the TRLS itself (Art. 8.3.c)) allows the owner of rural land that is being initially developed to participate "*in the execution of urban development steps* (…) *in the equitable distribution of benefits and charges amongst all the affected owners in proportion to how they are affected*". However, through expropriation proceedings, the Administration may deprive a landowner of this right.

It is here where the challenged precept (Art. 25) comes into play; it establishes compensation for all expropriated owners that are not allowed to participate in initial development measures. In other words, the law foresees economic compensation even though the owner of rural land has not yet incurred any cost related to initial development measures taken over the land. The reason for this, explains the judgment, is because "*this right to participate in urban development measures further to an equitable distribution of benefits and charges, defined in Art. 8.3.c) TRLS, when defining the right of ownership* (…) *is included in the owner's assets*".

According to Art. 25, the asset's evaluation (used to calculate the economic compensation) is obtained by applying a fixed percentage "*to the difference in value between the land in its original state* (…) *and the one it would have had had the development proceedings been completed*".

i

This percentage, determined in each Autonomous Community by the autonomous legislator amongst the various ones foreseen by law, "*is not at all related to the actual value of the right that the owner is deprived of, a right that would have enabled it to participate in the urban planning measures further to the equitable distribution of benefits and charges*", affirms the judgment, which thereafter recalls that, according to Court case-law, "*the land valuation method* (…) *should guarantee an adequate equilibrium between the compensation obtained and the actual value of the asset, in this case, of the right being expropriated*". "*This adequate equilibrium*", it adds, "*is not guaranteed with the fixed percentage used by the legislator to determine the common share in the capital gains generated by the planning process and financed by the landowners*".

Nor does the preamble of the challenged Act, indicates the Plenary Meeting, "*give any reason, apart from affirming that the process is weighted, why this objective and fixed value imposed further to a percentage established for another purpose, and no other, is able to calculate compensation that is proportionally balanced with the actual value of the expropriated right*".

Furthermore, the judgment states that the valuation method established in Art. 25 does not guarantee "*regulatory uniformity*" either, which the Constitution requires when the public powers are obliged to indemnify any owners whose assets have been expropriated (Art. 33.3). Consequently, "*the compensation payable for a deprivation of this right will depend on where the assets are located within national territory and, to this effect, regulatory uniformity will not be guaranteed which, according to this Court, is inherent to legal expropriations and the guarantees that should be offered in order to safeguard the content of the right of ownership foreseen in Art. 33.3 of the Spanish Constitution (CE)*".

To conclude, the valuation method established in the challenged provision "*does not in any case guarantee a proportional equilibrium that should exist between the legal compensation foreseen and the actual content of the right of which a landowner is deprived*" and, consequently, the compensation foreseen by law is unconstitutional.

In their particular vote, Asúa and Valdés claim that the unconstitutionality issue should have been dismissed because what is being judicially challenged are the very foundations of the valuation system established by law, due to not conforming to the "*market price*" principle, which the Court has already endorsed, expressly excluding the possibility of this market value operating "*as a constitutional guideline for the indemnification guaranteed in Art. 33.3 CE*". Furthermore, they believe that the

judgment "*reformulates*" unconstitutionality issues, demoting them to an examination of whether a "*proportional equilibrium*" has been applied between "*the value of the expropriated asset or right and the compensation offered*", indicating the unconstitutionality of the formula chosen by the legislator to compensate the right of urban planning participation, without giving any explanation whatsoever about why this formula is imbalanced.

In turn, González Rivas considers that, furthermore, Art. 23.1 and 2 TRLS should have been declared unconstitutional because a method is established for the valuation of rural land that does not take into account "*the nature and usefulness of the asset*", forbidding "*urban planning expectations*", in breach of "*the indemnity guaranteed in Art. 33.3 CE*".

In another particular vote, Xiol consider that the unconstitutionality of Art. 25.2 TRLS should not have been declared because the valuation method it contains "*is adequate to define the value*" of the right to participate in initial land development, and because said right "*is not part of the essential content of the right of ownership guaranteed by Art. 33 CE*" but, rather, is an attribution granted by the legislator to the owners. Furthermore, he considers that, when upholding the unconstitutionality and nullity of Art. 25.2.a) TRLS, the judgment should have granted a term to the legislator in which to establish another principle. As it did not do so, "*the parties applying the law*" should be the ones determining the compensation amount whilst the law is being reformed; and in so doing it will be "*difficult* (…) *to avoid*" the effects of market prices, which constitutional case-law has already dismissed.

In their concurrent vote, González-Trevijano and Ollero are in agreement with the ruling, but believe that the judgment should have declared the unconstitutionality of Art. 25.2.a), also due to a breach of the "*indemnity principle*" (Art. 33.3 CE). According to this constitutional principle, "*an owner should be left in the position it would have been in had ownership continued; consequently, the valuation method should guarantee the constitutional content of the right of ownership which, at least, requires compensation at income value*".

Madrid, 13 November 2015.