(Yet) Perpetual usufruct

Work on the amendment of the Real Estate Management Act has recently gained momentum, with the upcoming 'abolition of perpetual usufruct' announced in the media. Reading the draft, however, leads to entirely different conclusions.

The proposed amendments are intended to introduce the possibility for perpetual usufructuaries - including businesses - to acquire ownership of land used for non-residential purposes. According to the draft, proceedings for the sale of land will be initiated (unlike in the case of land developed for residential purposes) at the request of the perpetual usufructuary.

The application must be submitted within 12 months from the date of entry into force of the Act, and the demand for sale will only be granted if the purpose of use indicated in the agreement or decision has been fulfilled. It is also a condition that the property has remained in perpetual usufruct for at least ten years.

Significantly, at an earlier stage of work, it was assumed that this period would be as long as 25 years. Despite the partial favourable change, another draft provision remained unchanged, according to which a request for sale is not entitled if the property was granted in perpetual usufruct after December 31, 1997 (i.e. just about 25 years ago). The good news is that the owner of the land (the State Treasury or a local government unit) will not be able to refuse to sell it to a perpetual usufructuary. Unfortunately, the application of the provisions will be excluded concerning certain land listed in the Act - perpetual usufructuaries of undeveloped real estate, among others, will not be entitled to acquire the ownership right.

The proposed changes do not respond to real property market problems. Potential investment land consists of several separate 'perpetual' properties, some remaining in ownership and some in perpetual usufruct. If the land is undeveloped, trading it will not be a problem. Nor will it be a problem to obtain a decision in the investment process, as the administrative authority will not examine the type of title to the property and will not refuse to issue, among other things, a building permit due to the planned foundation of a building on land with a 'mixed' title.

Complications only arise at a later stage of the development - for example, when such a building is to be disclosed in the land and mortgage register, when the real estate (including the building) is to be sold or when the developer has constructed a multi-unit building and wants to separate the premises therein.

Doctrine and jurisprudence indicate that such action will not be possible due to the difficulty of determining the legal status of such a building, which is partly located on a property in ownership. According to the principle of superficies solo cedit, it should be a part of the land. However, in the part in which it is situated on perpetual usufruct, it should constitute real property separate from the land. In practice, the above problems hinder the development of many potential investments.

The market is trying to deal with these difficulties in several ways - one solution in such a situation is to design the building so that a possible vertical subdivision is possible so that each part can be a technically separate building - one sited on the property remaining in ownership, the other on the one in perpetual usufruct.

PRS or BTS (build-to-suit) developments are also becoming increasingly popular. By definition, they are based on a lease and do not require the sale of the property. They may therefore be an attempt to avoid the complications that the mixed nature of the title to the land may cause for disposal activities.

Solving the real market problems will still be left to the creativity of investors and their lawyers. The announced abolition of perpetual usufruct is still a song of the future.

Do you want to know more? Contact us!

Urszula Krupa, Senior Associate
urszula.krupa@ngllegal.com