

Problems Associated with the Legal Substance of Real Estate Encumbrances

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Abstract

The article is devoted to the problems pertaining to the establishment of encumbrances on real estate. Encumbrances that are created on the basis of law have a different legal substance. As a rule, encumbrances by law are significant and bring benefits to an unlimited number of rightholders. This type of encumbrances includes various protection zones, roads, nature reserves, etc. It is assumed that these encumbrances are for the common good; therefore, the rights of an owner may be restricted. Legislation allows establishing encumbrances without any authorisation from the real estate owner. The objective of the thesis is to analyse the legitimacy of encumbrances based on law in the context of the impairment of owner's property rights. To this end, both descriptive and analytical methods have been employed to analyse the legal grounds for encumbrances and related case-law. The study has relied on both legislation and case-law. The results of the study give strong grounds to conclude that a special procedure could be applied to the establishment of encumbrances in situations when those are intended to meet the needs of the entire society or individual communities of certain regions. Like any other encumbrances, those established by law restrict owner's property rights. A real estate encumbrance should be recognised as a restriction on owner's property rights. Certain remedies should be introduced with a view to balancing the rights and interests of the society and the owner and minimising the adverse effects of encumbrances. Such remedies could comprise an owner's right to claim reasonable compensation, challenge the establishment of encumbrances and initiate their annulment.

Introduction

Real estate has always been an essential element of economic growth. Equally important is the role of real estate in meeting social needs and ensuring public welfare. Real estate allows for the exercise of individual's constitutional rights. For instance, real estate provides housing, healthy and safe environment and a possibility of obtaining material benefits from the property. The Universal Declaration of Human Rights serves as the initial legal base of these principles¹ and, according to this Declaration, everyone has the right to own property and no one shall be arbitrarily deprived of his property, everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. Democratic countries have implemented these principles into their national laws. Chapter VIII of the Latvian Constitution contains provisions safeguarding fundamental human rights.²

The path of public development testifies to the approximation of various social and economic processes. Population growth leads to the decrease in isolation and aloofness. Nowadays, the necessity for cooperation is an objective fact. This also refers to the utilisation of properties, which is most often outside the needs of a single owner and the boundaries of a single property, for instance, ensuring of the construction and maintenance of public roads and technical facilities (gas pipelines, communications and power supply equipment), flora and fauna protection. It is evident that this manner of utilisation concerns the needs of the entire society or at least communities of certain regions rather than individual owners. The socially responsible exercise of own rights is coming to the foreground. The partial restriction on an individual's rights for the common good is reflected in legal doctrine. The author shares the opinion of Martijn W. Hesselink, Professor of the Amsterdam Institute for Private Law, that "private law is no longer based on the principle of autonomy" (Martijn W. Hesselink,

¹ Vispārējā Cilvēktiesību deklarācija. Available on: <http://www.humanrights.lv/doc/vispaar/vispcd.htm>, [viewed on 10.02.2015]

² Latvijas Republikas Satversme, adopted on 15.02.1922, entered into force on 07.11.1922. Published: Latvijas Vēstnesis, No 43, 01.07.1993

2002). This means that legal scholars and society in general face a new challenge, which is to find a balance between the socially responsible policy of property utilisation and the guaranteeing of an owner's rights.

The establishment of encumbrances is a way to safeguard public interests, which would enable the use of real estate owned by another person for the common good.

In this article, the author analyses encumbrances as a legal institution, legal aspects of encumbrances and the need for effective mechanisms to safeguard the rights of owners.

Research

Legislation does not provide for any uniform definition of the term 'encumbrance'. As a result, this term stands for various legal institutions, such as easement, mortgage, rent, operating restrictions, protection zones. More generally, an encumbrance means any third party's rights to real estate. The substance and types of encumbrances as a legal institution may be understood by means of the interpretation of law and the analysis of the legal system.

Encumbrances by their grounds can be categorised as follows:

- 1) arising from private law;
- 2) arising from public law.

In private law, mortgage, rent and easement should be viewed as encumbrances. The common feature of these legal institutions is the grounds for their establishment, which can be either law, or a contract, or a court judgment. As a rule, these encumbrances are defined on an individual basis and created with the consent of the party concerned (real estate owner) or at least with his knowledge. For instance, easements are established for the benefit of a particular person (easement in gross) or for a particular property (appurtenant easement), mortgage is registered for a particular property, and it is a specific property that is rented. On certain occasions, the encumbrance may result not only in the restriction on the rights of the party concerned (real estate owner) but, on the contrary, in material benefits for this party, such as rental.

The grounds for terminating these encumbrances are accurately defined by law.¹ For the most part, encumbrances may be terminated by a relevant agreement between the parties and due to the expiry of their term.

As regards encumbrances arising from private law, obligations are normally established between two parties, i. e. the owner and the party in whose favour the encumbrance is created. The party concerned (real estate owner) is aware of the grounds for terminating encumbrances in advance or is allowed to refer to these grounds by law. Certain kinds of encumbrances bring material benefits to the owner, thereby minimising the adverse effects of the encumbrance, i. e. compensating for the restrictions attached to the exercise of property rights. Considering that obligations arising out of encumbrances are established between rightholders, while legal relationships are associated with real estate, the legal substance of encumbrances may be characterised as a mixed legal relationship. Property law treats encumbrances as *jura in re aliena*, while the law of obligations views them as a duty to comply provided for the party concerned.

These encumbrances have only immaterial significance for public interests.

Encumbrances that are meaningful for society arise from public law. They could be described as a matter of national interests. These encumbrances represent territories and facilities that are necessary for the safeguarding of significant public interests and the protection and sustainable use of natural resources.² Spatial planning is a duty of public authorities, and the owner has only a minor role in introducing encumbrances. According to Section 4 (1) of the Spatial Development Planning Law, spatial development must be planned through public participation, while Section 4 (4) of this Law provides

¹ For instance, see Sections 1237 and 1379 of the Civil Law. Civillikums. Trešā daļa. Lietu tiesības: Latvijas Republikas likums, adopted on 28.01.1937, entered into force on 01.09.1992. Published: Valdības Vēstnesis, No 44, 24.02.1937; Section 2165 of the Civil Law. Civillikums. Ceturtā daļa. Saisību tiesības: Latvijas Republikas likums, adopted on 28.01.1937, entered into force on 01.03.1993. Published: Ziņotājs, No 1, 14.01.1993

² Teritorijas attīstības plānošanas likums: Latvijas Republikas likums, adopted on 13.10.2011, entered into force on 01.12.2011. Published: Latvijas Vēstnesis, No 173, 02.11.2011

that the interests of private individuals and public interests must be balanced with sustainable spatial development.¹ The aforementioned Law contains a declaratory provision. There are grounds for criticism of the fact that owners whose properties are subject to encumbrances are not individually involved in the solution of matters, which is also confirmed by the case-law of the Constitutional Court of the Republic of Latvia showing that applications challenging the detail planning of territories have been lodged nine times.² In all these cases, the encumbrances have been recognised as proportionate and complying with the Basic Law. The case-law treats spatial planning as legislation.³ Therefore, no appeals are allowed because laws may not be appealed through courts of general jurisdiction.

Encumbrances are determined by public authorities (the Cabinet, sectoral ministries, planning regions and local governments) by developing spatial planning. A spatial plan is the initial document providing for encumbrances. The next step is the updating of encumbrances and their registration in a relevant property file of the Land Registry. In accordance with Section 41 (2) of the Land Registry Law⁴, the process takes place online between two public authorities (the State Land Service and the Land Registry), without the consent of the real estate owner. It should be noted that a decision taken by a judge of the Land Registry Department concerning the registration of actual encumbrances is not subject to appeal.

Annex 2 "Unified Classification of Encumbered Territories and Real Estate Encumbrances" to Cabinet Regulation No 61 of 4 February 2014 serves as the legal basis for establishing encumbrances.⁵ According to this Annex, there exist the following encumbrances: the coastal protection zone of the Baltic Sea and the Gulf of Riga, surface water body protection zones, protection zones around marshes, territories of state-protected cultural monuments and their protection zones, protection zones around water-supply points, protection zones along streets and motorways, protection zones along railroads, protection zones along electronic communications networks, protection zones around national meteorological and hydrometric gauging stations, protection zones along power grids, protection zones along heating networks, protection zones around hydrotechnical and amelioration constructions and installations, protection zones along water-supply and sewage networks, protection zones around geodetic points, protection zones around technical means of navigation, gas-supply protection zones, protection zones around state-protected facilities and the state border, protection zones around optical telescopes and radio telescopes, protection zones around facilities subject to enhanced sanitary requirements and territories where pollutants have been or could be detected, protection zones around hydrocarbon extraction sites, as well as pipelines, tanks, storage facilities for oil, oil products, hazardous chemicals and chemical products and related refineries and handling companies, petrol stations, special areas of conservation and their zones, windbreaking forest strips, national subsoil blocks, tow-paths, territories subject to construction restrictions specified in spatial development planning documents and territories designated by local governments for public access to public territories.

The establishment of encumbrances is determined by several laws, including the Protection Zone Law⁶, the Fishery Law⁷, the Law on the Protection of Cultural Monuments⁸, while six other laws deal with certain elements of the creation of encumbrances. The analysis of the applicable legislation has revealed that encumbrances are determined only by public authorities based on law or their decisions (administrative acts) without considering the opinion of real estate owners. Disagreement of the real estate owner may not be an obstacle to encumbrances. The author believes that the absence of a clear procedure for appealing against decisions adopted by public authorities for owners whose properties are thereby encumbered is contrary to the principles of a democratic state.

¹ Ibid.

² Latvijas Republikas Satversmes tiesas dati. Available on: <http://www.satv.tiesa.gov.lv/?lang=1&mid=19> [viewed on 10.02.2015]

³ Latvijas Republikas Augstākās Tiesas Judikatūra. Tiesu prakses apkopojumi Administratīvajās tiesībās. 2013.gads Tiesu prakses apkopojums teritorijas plānošanas, būvniecības un vides lietās 2008 - 2012. Available on: <http://at.gov.lv/lv/judikatura/tiesu-prakses-apkopojumi/administrativajās-tiesībās/> [viewed on 10.02.2015]

⁴ Zemesgrāmatu likums: Latvijas Republikas likums, adopted on 22.12.1937, entered into force on 05.04.1993. Published: Latvijas Vēstnesis, No 11, 08.04.1993

⁵ Latvijas Republikas Ministru kabineta noteikumi Nr. 61, adopted on 04.02.2014, entered into force on 13.02.2014. Published: Latvijas Vēstnesis, No 31, 12.02.2014

⁶ Aizsargjoslu likums: Latvijas Republikas likums, adopted on 05.02.1997, entered into force on 11.03.1997. Published: Latvijas Vēstnesis, No 56/57, 25.02.1997

⁷ Zvejniecības likums: Latvijas Republikas likums, adopted on 12.04.1995, entered into force on 12.05.1995. Published: Latvijas Vēstnesis, No 66, 28.04.1995

⁸ Likums „Par kultūras pieminekļu aizsardzību”: Latvijas Republikas likums, adopted on 12.02.1992, entered into force on 11.03.1992. Published: "Ziņotājs", 10, 05.03.1992

The uncertainty of rightholders in whose favour encumbrances are created is inherent in the encumbrances established by public authorities. Encumbrances are made *a priori* to satisfy the needs of society and for the common good. Society is represented by the government in relations with real estate owners and, therefore, these legal relationships are subject in full to the principles of public law. The Constitutional Court of the Republic of Latvia has held that "both the general principles of law and of public administration and the principles of spatial planning must serve as guidance for the proper and adequate exercise of discretion in the field of spatial planning"¹ and "in the course of the development of spatial (detail) plans, the local government must act as an unbiased and neutral mediator balancing the interests of the developer of a particular territory and the community concerned, hear and make an objective assessment of the opinions of all the parties involved regarding the most appropriate and suitable way of development of the particular territory, as well as comply with the requirements set out in spatial planning laws".²

The above means that whenever public authorities by their decisions cause impairment of property rights, these decisions must be particularly solid, lawful and proportionate. Based on the case-law of the European Court of Human Rights, researchers have concluded that restrictions must always be specific and set within clearly defined limits, with respect for the law (laws must be freely accessible, clearly formulated and understandable), public interests (spatial development, defence of democracy, elimination of consequences, protection of national financial interests, road construction, land reform, etc.) and proportionality (the balance between the interests of society and owners) (Caņģeņa, 2014).

An objective assessment can only be made of the lawfulness of encumbrances, while public interests and the balance between the interests of society and owners can only be viewed on an individual basis. No uniform procedure for defining the scope of public interests and proportionality can be introduced because characteristics (the level of economic and social development of the community (populated location), development priorities and targets to be achieved, the type and extent of encumbrances) will always vary. Consequently, the competence of officials and their understanding of fundamental human rights and the ability of courts to ensure lawfulness and equality in disputes – these are factors that are of primary importance in maintaining social balance and justice.

The author classifies encumbrances depending on their form as follows:

- 1) operating prohibitions (restrictions);
- 2) prohibitions (restrictions) of the use of territories;
- 3) restrictions on the exercise of rights.

Operating prohibitions (restrictions) mean that in an encumbered territory the owner may not carry on certain economic activity or economic activities are allowed only to a limited extent and subject to special licences. For instance, no operations may be authorised in protection zones around water-supply points³, and nature reserves may have areas where natural resources are fully excluded from economic or other activities. Limited economic activities may be allowed in certain areas of nature reserves⁴, and operating restrictions are effective in forests during the breeding season.⁵ It should be concluded that, in order to protect public interests, owners are prohibited from pursuing any profit-making activities which are associated with their properties but have environmental impacts, or are carried out in heritage sites, or involve facilities of public significance, or are performed during a certain period.

Encumbrances associated with the use of territories have similar substance. The only difference is that they are static by nature. A territory should be recognised as encumbered merely due to the existence of an encumbrance. These encumbrances include all kinds of protection zones which may not be used in any manner. In fact, these are territories excluded from civil transactions. Protection zones may have a width ranging from 1m up to 300m. On certain occasions,

¹ Latvijas Republikas Satversmes tiesas 2004. gada 9. marta spriedums lietā Nr. 2003-16-05, paragraph 5. Published: Latvijas Vēstnesis No 38, 10.03.2004

² Latvijas Republikas Satversmes tiesas 2007. gada 28. novembra lēmums par tiesvedības izbeigšanu lietā Nr. 2007-16-03, paragraph 7. Published: Latvijas Vēstnesis No 194, 04.12.2007

³ Aizsargjoslu likums: Latvijas Republikas likums, adopted on 05.02.1997, entered into force on 11.03.1997. Published: Latvijas Vēstnesis No 56/57, 25.02.1997, Section 39(1)(1)

⁴ Par īpaši aizsargājamām dabas teritorijām: Latvijas Republikas likums, adopted on 02.03.1993, entered into force on 07.04.1993. Published: Latvijas Vēstnesis No 5, 25.03.1993, Section 3(2)

⁵ Meža likums: Latvijas Republikas likums, adopted on 24.02.2000, entered into force on 17.03.2000. Published: Latvijas Vēstnesis No 98/99, 16.03.2000, Section 37(4)

considering the relation of the width of protection zones to the size of a property, the encumbered territory may be rather large, taking the major part of the property, thereby leading to a considerable decrease in the cadastral value. According to the State Land Service, the value of land may be down by 20% if the relevant property is located, for instance, in the dune protection zone of the Baltic Sea and the Gulf of Riga or in the territory of a cultural monument. ¹ It should be concluded that encumbrances, which take the form of protection zones, not only prevent the owners from using certain part of their properties but also reduce the possibility of earning maximum benefits therefrom (i. e. sell at a higher price).

The third type of encumbrances provides for a special procedure for transactions. In the cases referred to in law, the owner of encumbered real estate is bound by pre-emptive rights granted to the state. Pursuant to Section 35 (1) of the Law on Special Areas of Conservation, the state has a pre-emption right to land located in nature conservation areas, nature reserves and natural monuments. ² Hence, the owner of the land is not free to exercise his rights when choosing the buyer and he has to take into account the state as a rightholder and potential party to the transaction.

In conclusion, the establishment of encumbrances leads to a considerably narrower scope of an owner's property rights, practically excluding the element of discretion, thereby reducing the possibility of obtaining economic benefits and restricting the freedom of transactions. Mechanisms offered by the state to minimise restrictions are essential to ensure compliance with the principle of proportionality. Legislation provides for certain compensation only for one kind of encumbrances, i. e. operating restrictions, and it should be emphasised that this provision refers only to agriculture and forest management. ³ It should be added that in certain instances a land owner may demand repurchase of the land, and this right is in line with the mechanism intended to minimise the adverse effects to be faced by the owner. In view of the spread of protection zones and their effect on property rights of owners, the author takes a critical view of the law-giver's position whereby no compensation is provided for the establishment of protection zones. It is evident that legislation views only operating restrictions as encumbrances. This approach narrows the interpretation of encumbrances as a legal institution because any encumbrance (not only operating restrictions) may limit property rights of owners. Moreover, any encumbrance should be viewed in the context of proportionality. The author believes that the opinion given in scientific literature that property rights are relative and owners have obligations towards others is still questionable. The relevant obligations are more significant and are not merely limited to the avoidance of harm to others. Within their community, owners must share their property or benefits therefrom to maintain peace and social order (Gregory S. Alexander et Eduardo M. Peñalver, 2012). The author criticises the form and manner of participation and society's contribution in response to encumbrances rather than the sharing requirement.

The owner makes it possible for the public to derive benefits from his property and, therefore, the owner has already fulfilled his obligations towards the public. The author is of the opinion that, without compensating for the restrictions caused by encumbrances, property rights of owners are restricted unreasonably and the balance between the duty to share a property to satisfy public needs and the right to property is destroyed.

Conclusions

An encumbrance should be understood as de facto and legal limitations imposed on real estate owned by private owners in the form of restrictions on the use of property and the special procedure for transactions, as may be necessary for public needs. An encumbrance is a way how private property may be used for public needs. Encumbrances have a legitimate goal and origin. Whenever encumbrances are established and maintained, the protection of property rights of owners by means of the effective legislation is not sufficient, nor is it commensurate with duties and restrictions imposed by encumbrances.

¹ Valsts Zemes dienesta informācija par kadastrālo vērtību ietekmējošiem apgrūtinājumiem. Available on: <http://kadastralavertiba.lv/profesionali/vertibu-ietekmejosie-faktori/apgrutinajumi/> [viewed on 12.02.2015]

² Par īpaši aizsargājamām dabas teritorijām: Latvijas Republikas likums, adopted on 02.03.1993, entered into force on 07.04.1993. Published: Latvijas Vēstnesis No 5, 25.03.1993, Section 35(1)

³ Par kompensāciju par saimnieciskās darbības ierobežojumiem aizsargājamās teritorijās: Latvijas Republikas likums, adopted on 04.04.2013, entered into force on 01.06.2013. Published: Latvijas vēstnesis No 74, 17.04.2013

Recommendations

The improvement of the legislation governing encumbrances should be viewed in the context of the protection of owners' rights because the existing encumbrance regulation focuses on public interests. Property rights and mechanisms to ensure the exercise of these rights are primarily civil institutions to be considered in the development of legislation. For the purposes of proportionality, it is necessary to increase the participation of real estate owners in the creation of encumbrances.

With a view to ensuring the uniform legal treatment and rendering the establishment of encumbrances more transparent, it is desirable to consolidate laws governing encumbrances and introduce regulation whereby owners could initiate alteration or annulment of encumbrances under certain conditions. The legal nature of spatial planning is worthy of debate because limited possibilities of appeals testify to the misunderstanding of democracy.

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