

THE ADMINISTRATION RIGHT AND THE ENTRY IN THE LAND REGISTER OF THE OWNERSHIP OVER THE REAL ESTATE SUBJECT TO PUBLIC PROPRIETY

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Abstract: *Thus, the territorial administrative units exercise all the ownership prerogatives on State's estates without having any rights, in most of the cases. This situation is very prevalent so that an important part of the administration does not make any distinction between the State estate and territorial administrative units' estate. Because of this generalized confusion we confront with a lots of administrative papers through some entities exercise the right to dispose of some estates that aren't in it's propriety. But, the titular of the real rights cannot dispose of this unless it was write down in the land registry while the property right and other real rights would be recorded in the land registry on the constitution paper base, followed by the necessity of recording the real rights of the State or of the territorial administrative units into the land registry.*

Keywords: *public administration, land registry, territorial administrative units, administration right, ownership.*

JEL Classification: K 23

I. The administration right, the judicial way to exercise the right to public property over the state or local administration owned belongings by third parties¹

The public administration understood both as an activity of the state and local administration has been defined² within the doctrine as „*activity consisting of the use of territories and managerial, political and judicial processes in order to fulfill the mandates of the legislative, executive and judicial government in order to provide the regulation and social services as a whole and for its segments*”.

The prerogatives awarded to the public administration involve also the exercise of the attributes of the right to propriety over the real estate owned by state or local

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¹ Dana Apostol Tofan, *Drept administrativ*, Ed. C.H. Beck, București, 2008, pag. 4.

² Ioan Alexandru, *Administrația publică: teorii, realități, perspective*, Ed. Lumina Lex, București, 2007, pag. 67.

administration entities. In some cases the goods administration may be not directly and immediately fulfilled by the holder of the right³, and that is why the law giver by Article 136 paragraph 4 of the Constitution⁴ has foreseen the possibility for the goods publicly owned by the state or local administrative entities to be given under the observance of the organic law for administration to autonomous regies or public institutions, to be granted or rented or to be given for free use to public utility institutions and this possibility is detailed by the stipulation of two others organic laws Article 123-124 of Law no. 215/2001 regarding public administration⁵, respectively Article 12 of Law no. 213/1998, republished, regarding the public propriety and its judicial status⁶. Pursuant to the provisions of paragraph 3, article 12 of the Law regarding the public propriety and its legal status, Law no. 213/1998, republished, „ the holder of the administration right is entitled to use and dispose of the goods pursuant to deeds by which the goods were put under his administration”, wherefrom the presumption that the administration right is in

³ See Liviu Pop, *Dreptul de proprietate și dezmembrămintele sale*, Ed. Lumina Lex, București 1996, p. 78.

⁴ Paragraph 5 of Article 136 of the Constitution: „(4) The public propriety is inalienable. Pursuant to the organic law they may be given for administration to the autonomous regies or public institutions, may be granted or rented they may also be given for free use to the public utility institutions.”

⁵ Published in the Romanian Official Journal no. 204 of 23 April 2001.

Article 123-124 of Law no. 215/2001: "Article 123 (1) The local and county councils decide if the goods belonging to the public or private propriety, of local or county interests, as the case may be, may be put under the administration of the autonomous regies or public institutions, may be granted or rented. They decide on buy of new goods or on the sales of the goods belonging to the private state propriety of local or county interests under the observance of the law provision.

(2) The sale, granting or renting have to be done by tender organized pursuant to the law provision.

(3) By derogation from the provisions of paragraph (2), when the local or county councils decide on the sale of a land privately owned by the local administration entity where the building is erected the good-faith builders enjoy the preemption right for buying the land belonging to the buildings. The sale price is determined based on an assessment report approved by the local or county council, as the case may be.

(4) The owners of the buildings stipulated at paragraph (3) shall be notified within 15 days on the decision of the local or county council and may express their option to buy within 15 days from the date of receiving the notification.

Article 124 The local and county councils may give for free use, for a limited period of time, movable and immovable goods publicly or privately owned by local or county authority, as the case may be, to judicial not for profit entities which perform welfare public utility works or public services. ”

⁶ Published in the Romanian Official Journal no. 448 of 28 November 1998 2

Article 12 of Law no. 213/1998, republished.

(1) The goods belonging to the public propriety may be given for administration, as the case may be, to the autonomous regies, prefectures, local and central public administration authorities, to other public institutions of national, county and local interest.

(2) The putting under the administration is accomplished by the decision of the government or of the county council, respectively of the Council of the City of Bucharest or its local council, as the case may be.

(3) The holder of the administration rights may possess, use and dispose of the goods according to the deed awarding the administration right. The administration right may be revoked only if the right holder does not exercise his rights or does not fulfil his duties arisen from the transfer deed.

(4) In the litigation regarding the administration rights the holder of this right has to appear on his own behalf before the court. In the litigations regarding the right of propriety the holder of the administration rights is committed to show to the court the holder of the right to propriety, according to the stipulation of the Civil Procedure Code. The holder of the administration right is liable pursuant to the law for any damages caused by not fulfilment of its obligations. The not fulfilment of this obligation may lead to the revocation of the administration right.

(5) In the litigations stipulated at paragraph (4) the state is represented by the Ministry of Public Finances and the administrative entities are represented by the county councils, the General Council of the City of Bucharest or by the local councils, which issue a written power of attorney, in each case, to the chairperson of the council or to the mayor. This is entitled to designate another clerk or lawyer to represent him before the court.

(6) The provision of paragraphs (4) and (5) are also applicable to the litigations regarding the grant, renting right or the right to propriety regarding the granted or rented goods.

the field of civil law a way to exercise the public propriety right⁷, and has all its attributes i.e. *jus possidendi* (possession), *jus utendi*, *jus fruendi* (fruition), *jus abutendi* (disposition), with the explanation that the exercise of the administration right is exclusively done within the deed granting administration right. The administration right is one of the ways to exercise public propriety right by other persons than the title holder, i.e. the state or the local administration entity.

The administration acts are not identical with the administration right. The activities performed by the public institutions, irrespective if institution serving the public legislative, jurisdiction or administration services comes into discussion, implies in each stage the existence of administrative acts⁸. The activity of the public institution is generally based on judicial and administrative acts, especially as far as its organization concerns. At the same time, the activity of public institutions has to take into account the content of the normative or individual administrative acts, acts having a jurisdictional character or authority normative or individual acts⁹ or acts having a jurisdictional character¹⁰ or administrative contracts¹¹ and often the result of this activity is even the issue or pass of an administration act¹². Thus, by **administration right**¹³ in the field of civil law we understand the judicial way to exercise the right to property the right to public property over the state or local administration owned belongings by third parties, the holder of the administration right, who is entitled to possess, to use state owned goods and to dispose of them pursuant to the deed awarding administration rights. On the other hand by **administration acts**¹⁴ we understand those acts by which the valorization of goods or patrimony is achieved. Administration acts are income collection, tithing, insurance of goods, maintenance repairs also.

Granting administration is achieved by government or county council decision, respectively the decision of the General Council of the City of Bucharest or of its local council, as the case may be, and thus the birth of administration right is based on the decision of the General Council of the City of Bucharest or of its local council¹⁵.

As far as the judicial status of the administration right concerns, in the specialized literature occurs the opinion that the administration right is a main real right which derives from the public property right, hence the conclusion that the administration right may not grant to its holder more attributes than the public property right¹⁶. The administrative law feature of the administration right makes this to have own judicial

⁷ See Liviu Pop, *Dreptul de proprietate și dezmembrăminte sale*, Ed. Lumina Lex, București 1996, p. 73.

⁸ For a more detailed analysis see Ioan Alexandru, Mihaela Cărăușan, Sorin Bucur, *Drept Administrativ*, Ed. Lumina Lex, București, 2007, pag. 346-361, Verginia Verdinaș, *Drept Administrativ*, Ed. Universul Juridic, București, 2007, pag. 77-83.

⁹ The administrative authority act has been defined by the doctrine as: „*the unilateral manifestation of the judicial will based on and for the application of law of an administrative authority by which a new legal situation is established or is refused the judicial claim regarding a right granted by law, an the judicial will is under administrative judicial control.*” Iulian Nedelcu, Alina Livia Nicu, *Drept Administrativ*, Ed. Themis, Craiova, 2002, pag. 338.

¹⁰ For a comparative analysis of the jurisdictional administration act see Alina Livia Nicu, *Instituția publică în dreptul administrativ*, Ed. Universitaria Craiova, 2003, pag 253-255; Anibal Teodorescu, *Tratat de drept administrativ*, București, 1934, pag. 117.

¹¹ For a more detailed analysis of the administrative contract see A. L. Nicu, *Instituția publică în dreptul administrativ*, Ed. Universitaria Craiova, 2003, pag 255, Verginia Verdinaș, *op. cit.*, pag. 77-83.

¹² Cited from Alina Livia Nicu, *op. cit.*, pag. 241.

¹³ See Liviu Pop, *Dreptul de proprietate și dezmembrăminte sale*, Ed. Lumina Lex, București 1996, pag. 73.

¹⁴ See Gheorghe Beleiu, *Drept civil român – Introducere în dreptul civil*, București 1991, pag. 171.

¹⁵ See article 12 alin 2 Law nr. 213/1998.

¹⁶ See Liviu Pop, *Dreptul de proprietate și dezmembrăminte sale*, Ed. Lumina Lex, București 1996, pag. 78.

particularities, thus, as a derivative of the public property right may be claimed towards other natural or judicial persons but it may not be claimed against the holder of the public propriety right i.e. the local administration entity. The Article 12, paragraph 3 of Law no. 213/1998 regarding the public property and its legal status contains the explanation that the administration right may be cancelled only if the holder does not exercise the rights and does not fulfill the obligations coming out from transfer deed.

The judicial features of the administration right are identical with those of public property right (inalienability, immune from attachment, indefeasibility) because the administration right derives from the public property right.

The diligence of those who administer goods belonging to the public domain of local interest must be the diligence of a proprietor according to the provision of Article 12, paragraph 3 of Law no. 213/1998 regarding the public property and its status which states that "the holder of the administration right may possess the goods and dispose of them according to the deed granting administration rights".

According to the provisions of Article 136, paragraph 4 of the Romanian Constitution, republished in 2003 and to Article 12, paragraph 1 of Law no. 213/1998 regarding to the public property and its legal status, the holders of the administration rights over goods belonging to the public domain are autonomous regies, public institutions of national, county or local interest, the public administration local entities.

The administration right may be claimed against other natural or judicial persons **subject to the limitative condition of prior entry in the land registry**, and may not be claimed against the holder of the property right.

In spite of the fact that the Law no. 215/2001 by Article 122 requires a yearly inventory of all goods belonging to the local administration entities and a yearly presentation to the mayor of a report regarding the state of goods administration, respectively to the chairperson of the county council, we have ascertained that in practice these obligations were and are often neglected by the local public authorities.

We have also ascertained that many local authorities exercise the administration right on goods, and issue even disposition acts, without taking into consideration that those goods do not stand under their propriety and were not put under their administration.

As far as the movable property standing under the real estate publicity obligation concerns, we have ascertained that in fact this is not recorded with the land registry to the benefit of the local administration entities and is needed to foster the mayors of the local administration units to identify the movable property belonging to the local administration units to take an inventory and to require the entry of the real right in the land registry.

An incorrect inventory of all goods owned or under administration leads to the impossibility to use and manage them all in a proper manner.

II. The importance to entry the ownership with the land registry

Irrespective of the way the ownership over real estate has been acquired, the owners, natural or legal persons, local administration, or as the case may be, the state are put under the obligation to entry this right into the land registry.

One can reach this conclusion by the analysis and interpretation of Article 26 of the Decree-Law no. 115 of 27 April 1938¹⁷ for the unification of the provisions regarding the land registers, according to which "**the real rights shall be acquired without an**

¹⁷ Published in the Romanian Official Journal no. 92 of 27 April 1928, abrogated by Law no. 7/1996 Cadastre and Real Estate Publicity Law (According to the provisions of Law no. 7/1996 the abrogation comes into force only after finishing the cadastre for the whole country)

entry in the land registry by death, accession, forced sale and expropriation; the holder is entitled to dispose of them by land registry only after the entry in the land registry". Furthermore, pursuant to the provisions of paragraph 1 and 2 of Article 17 of the above-mentioned law „**the real rights over real estates are acquired only if** between the one who gives and the one who receives the right there is a will agreement regarding the establishment or transfer according to a given cause and the establishment or **transfer has been entered into the land registry**", and „**the real rights disappears only if the cancellation has been entered into the land registry** based on the agreement of the holder; the agreement is not needed if the right disappears by reaching the deadline shown in the record or by the death of the holder ” wherefrom one may conclude the constitutive respectively extinctive character of the entry of real rights in the land registry¹⁸. As opposed to Article 17 of the Decree-Law no. 115/1938, the provisions of Article 26, paragraph 1-3 of the Law no. 7/1996¹⁹ as subsequently amended and republished – Cadastre and Real Estate Publicity Law sets forth only the opposability effect towards third parties of the entries in the land registry and not the rights constituent effect²⁰ but it stipulates that such rights have to be previously recorded if the holder understands to use them.

Taking into consideration the above mentioned legal texts we may draw the conclusion that **a first condition** to exercise any disposition act over real estate propriety owned by local administration or the state is the requirement to entry the ownership of the real estate²¹ in the real estate registry²². In this respect the holder of the registered right must be the local administration entity – **the commune, the city or town or county** -, respective **the state**.

We have to notice that the above-cited legal texts do not draw the conclusion that the fulfillment of this condition is needed for fulfillment of the administration acts of the real estate or *ubi lex non distinguit, nec nos distinguere debemus*. From this arise the need to define and delimitate the disposition acts from the administration acts.

¹⁸ As far as the constitutive effect of the record of the ownership with the land registry concerns see: Cristina Cucu, *Legislația cadastrului și a publicității imobiliare – Comentarii și explicații*, Ed. All Beck, București 2005, pag. 71, 98; Liviu Pop, *Dreptul de proprietate și dezmembrămintele sale*, Ed. Lumina Lex, București 1996, pag. 301-302.

¹⁹ Published in the Romanian Official Journal no. 61 of 26 March 1996 and republished in the same journal no. 201 of 3 March 2006.

²⁰ See paragraph 1-3 Article 26 of the Cadastre and Real Estate Publicity Law no. 7/1996, republished: „Article 26 (1) The right to propriety and other real rights may be claimed against third persons without their record in the real estate registry if they come out from succession, accession, forced sale and adverse possession. These rights are to be previously recorded if the holder understands to use them.

(2) The real rights acquired by the state or any other person by law effect, expropriation or judicial decree may be claimed towards third persons by the same way.

(3) The holder of the rights acquired in the mentioned ways is entitled to dispose of them only if they were previously recorded with the land registry.

²¹ Pursuant to Law 7/1996 and to the Ordinance of the General Director of the National Cadastre and Real Estate Publicity Agency Ordinance no. 634 of 13 October 2006 – published in the Romanian Official Journal no. 1048 of 29 December 2006 for the approval of the regulations regarding the content and sample of the cadastral documents for land registry records by real estate is meant one or more adjacent plots , with or without buildings on the territory of an administrative entity belonging to the same owner which identity is proven by the same cadastral number and are recorded in the same land registry.

²² For a detailed presentation of the real estate publicity in the field of urbanism and territory systematization see Oliviu Puie, *Reglementări juridice în materia amenajării teritoriului și urbanismului*, Legislație, Doctrină, Jurisprudență, Ed. Universul Juridic, București, 2008, pag. 279-291.

Even from Roman time the judicial doctrine has established the following three attributes of the right to property: possession - *jus possidendi*, use - *jus utendi* and *jus fruendi*, disposition - *jus abutendi*²³.

The possession (*jus possidendi*) is the right to own the goods. In this respect it is a law element and not a fact element (which results from concrete hold of goods).

The fruition (*jus utendi* and *jus fruendi*) comprises both the use of goods and also the picking of its fruits. The *Jus utendi* is defined in the specialized literature as the right to use goods according to their nature and destination. The *Jus fruendi* is the right to pick fruits and incomes brought by the owned goods.

The disposition (*jus abutendi*) has two elements: material disposition over goods (within the corporal goods expressing the possibility to modify shape of the goods, to transform, destroy or consume their substance) and the judicial disposition (which expresses the possibility to totally or partially alienate the ownership). It is the proprietor's right to alienate his/her goods by onerous title or for free, to abandon or destroy them and also to parcel a real estate.

Among the three attributes of the right to propriety the *abusus* attribute belongs always to the owner wherefrom taking into consideration the exclusive character of the right to propriety, the conclusion that the only person entitled to fulfill dispositions acts, to dispose on the goods subject of the right to propriety, is the holder of the right to propriety, that means the owner of goods. The exclusive character comprises two ideas: the monopoly of the holder of the right to propriety and the exclusion of third parties from exercise the prerogatives of propriety.

From here comes out **the second condition** to exercise the disposition acts, i.e. its exclusive exercise by the holder of the right to propriety. But we have to mention that this second condition is not an absolute one as it is removed by the administration right.

III. Conclusions²⁴

The Institution of Prefect from allover the country must exercise with maximum exigency the administration trusteeship and to claim before the courts all disposition acts of the administration entities regarding to immovable property which is not their recorded property or if their administration right has not been recorded.

We do consider that the decisions of the local and county councils regarding the exercise of the disposition right over some properties belonging to the local administration entities or county councils have to mandatory contain the identification of the property by giving its topographical and land registry number, showing the owner and the position in sheet B of the land registry where the owner is recorded, and to mention that the property belongs to the public domain or private domain of the local administration entities, the inventory number under which the property is recorded and within the exercise by the prefect of the legality control the excerpt form the land registry, the excerpt form the inventory registry and other deeds, as the case may be (for example plotting documents) must be enclosed.

At the same time in the case of issue of some decisions by the local or county councils regarding the exercise of the administration right over some state owned real estate, these must contain the identification of the propriety by giving its topographical number and its land registry number, by sowing the owner and the position in the sheet B of the land registry where the owner is recorded, by stating the fact that the property

²³ Paul Mircea Cosmovici, *Drept civil – Drepturi reale, Obligații, Legislație*, Ed. ALL, București, 1994, pag. 14-15.

²⁴ Aspects processed by Ioan Lazăr and Arpad Ladanyi among Intrenational Conference „The national legislation and the European Convention of Human Rights” by Alba Iulia, 20-21 November 2008.

belongs to the public or private state domain, by indication the deed by which the administration right has been granted, the inventory number under which the property is recorded and within the exercise by the prefect of the legality control the excerpt form the land registry, the deed granting administration right, the excerpt form the inventory registry and other deeds, as the case may be must be enclosed.

The reasons for not recording with the land registry of the right to property and the administration right of the local administration units are mainly the following:

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1. The restoration of the property right has not entirely been established, and that is why the Article 18, paragraph 2 of Law no. 18/1991²⁵ regarding the ground stipulating that „the not allocated lands, which are at the disposal of the commission, pass to the private domain of the communes, towns or cities after finishing the restoration of the property right” may not be executed;

2. Financial resources have not been allocated for the payment of land registry record documentation, of the topographers and of the registration fees. Thus, the provisions of Article 36, paragraph 1 of Law no. 18/1991 stating that „that state owned land located within the area of the localities and under the administration of the city halls at the date of issue of this law pass into the ownership of communes, towns and cities”. By *lege ferenda* we do consider that is needed to release the local administration entities from payment of the registration fees. We do mention that according to our opinion only those properties may be recorded with the land registry which have been acquired by one of the ways stipulated by law and that the acquirement of a property which is owned by a third person is not possible following to „plotting”, or „protocol” as it occurs in may cases in practice²⁶.

3. Last but not least, we have to mention the lack of interest from the local administration entities to move for the record in the land registry.

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As far as the proprieties recorded by the Romanian state in the land registry concerns and which are administrated by the local administration entities without an administration right to be established we do consider that it is need a transfer from the state ownership into the ownership of the local administration entities under observance of the provisions of Article 9 of Law no. 213/1998 regarding the public property and its judicial status.

²⁵ Published in the Official Journal no. 37 of 20 February 1991, republished in the Official Journal no 1 of 5 January 1998.

²⁶ Civil Code , in the Charter 3 named „Various ways to acquire property ” Article 644-645, and Article 7 of Law no. 213/1998 regarding the judicial status of the public proprieties are given the ways for acquiring rights to property. The specialized literature has added court decrees establishing rights, acquiring ownership over the fruits by the good faith holder, good faith possession of movable property to the ways for acquiring properties foreseen by law. See Eugen Chelaru, Drept civil – Drepturile reale principale, Ed. C. H. Beck, București 2006, pag. 292.