
JUDGMENT No. 189

HIGH COURT OF JUSTICE OF THE VALENCIAN COMMUNITY, CONTENTIOUS-ADMINISTRATIVE COURTROOM

SECTION ONE

President
Mr. Mariano Ferrando Marzal
Magistrates:
Mr. Carlos Altarriba Cano
Mr. Edilberto José Narbon Lainez
Ms. Desamparados Iruela Jimenez
Ms. Estrella Blanes Rodriguez
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In the city of Valencia on February 28th, 2014.

Having seen the appeal numbered 231/10 filed by the court attorney Ms. Elvira Orts Rebollida, in name and representation of the company "MontePego SA", and the Town Hall of Pego, represented by Ms. Rosa Maria Correcher Pardo, against the judgment 352/2009, dated July 22nd, in the Contentious-Administrative Appeal No. 378/07 and accumulated 753,07, processed by the Contentious - Administrative Court No. 3 of Alicante, concerning delivery of land and reception of land development work, in which both parties have appeared as appellant and appealed.

RECITALS

ONE: The aforementioned Contentious Court referred the appeal to this Contentious Administrative Court request by the plaintiff, a procedure which concluded in the judgment as dated above with a ruling partially allowing the appellant's claim.

TWO: Having notified the parties involved about the aforementioned resolution, an appeal was filed by both parties substantially alleging that it should be reversed, since it was not in accordance with the law.

THREE: Each of the appellants reciprocally formalised a plea for Reversal of the Appeal, in which it was substantially stated that the judgment should be confirmed.

FOUR: The proceedings in the Court led to this appeals procedure by Court Order, with the subsequent agreement to allow the appeal for procedure, pending vote and for final judgment on the 18th, which duly took place.

In the procedure of this Appeal, all the legal formalities have been observed.

The Magistrate writing for this process is Magistrate CARLOS ALTARRIBA CANO, who states:

GROUNDS OF LAW

ONE: In these case files there are two appeals:

A) **Case file 378/07**, referring to the Judgment dated **April 27th 2007**, disallowing the appeals for reversal filed against the two previous rulings, which ordered the company to surrender land for roads, green zones and facilities, in accordance with the definitions established in Modification No. 1, 2002 of the Pego General Land Development Plan.

B) **Case file 753/07**, referring to the Judgment dated **August 2nd, 2007**, which essentially considered fractioning the obligations proposed by the company, and was ordered to submit a new draft Parcelling Project, including surrendering of all public land to the administration department, as defined in the valid land development plan, within the scope of the Partial Development Plan of Monte Pego.

Materially, we will differentiate between both processes for the purposes of this appeal, because each of them, determines the reasons for the appeal filed by each of the appealing parties.

TWO: In relation to Case File 378/07, the following factual clarifications are made:

a) On July 29th 1974 the Alicante CPU (Urban Development Provincial Commission) definitively agreed to approve the "Monte Pego SA Partial Development Plan".

This plan envisaged the surrender of 448,500 m2 of land (265,000 m2 for roads and 183,500 m2 for green zones). The implementation system was subjected to Articles 129 and 130 of the 1956 Land Law, called assignment of roads, so that the obligation undertaken by the developer was to cede land for roads and green zones only; whereas the public contributions should be acquired by the administration department. On the other hand, the deadline for implementation of the plan was 14 years.

b) This development plan was submitted in 1982 and was approved by the Town Hall on 25 October 1982, although it was published on 28th March 1989.

c) The Pego General Development Plan was finally approved by the Alicante CTU (Urban Development Territorial Commission) on November 16th 1998 and was published in the Official Gazette of the Province on March 2nd 1999. Said General Plan considered that the amount of land for roads was 159,249 m2 and green zones covering 193,500 m2, accounting for total of 352,749 m2.

d) At the Plenary Meeting of the Town Hall held on September 16th, 1999, in the part affecting this case, it was agreed to accept free cession of 80,692 m2 occupied by public roads in the General Plan, forming part of the estate numbered 19.770; delegating the Mayor to grant the deed and to summon the assignor to appear and sign.

e) In accordance with Article 29.2, the plaintiff filed a Contentious Administrative appeal, due to inactiveness by the administration to comply with the aforementioned act (with the plaintiff understanding that the act was firm). On June 8th 2007 the Court passed judgment, today being executed, partially allowing the appeal and ordering the Town Hall to formalise the deed within the deadline of 30 days.

f) By means of the agreement by the CTU on October 3rd 2002, Modification 1 of the General Development Plan was approved, which only affects the Monte Pego sector, and which contains the following determinations:

The land classified as roads is 173,915.31 m2; the area for green zones is 250,000 m2 and the land for public infrastructures is 57,317.97 m2.

On the other hand, in the instrumental Report, the following is stated: "***The affected area is developed urban land with urban facility services, and therefore development drafting is not required***".

g) In accordance with the resolution dated June 27th 2005, a file was opened to declare incompliance with assignment of roads and green zones and execution of the land development works, ending with a resolution dated **September 7th 2005**, declaring a breach of the obligations undertaken by the Company under the agreement dated July 29th 1974, by the CPU, when it approved the "Partial Touristic Residential Plan Monte de Pego SA", ordering it to proceed under the agreed terms: a) to assign the roads, green zones and free spaces in accordance with the determinations established in the General Plan, and b) to complete the development work covering the costs thereof.

h) By means of a resolution by the Mayor's Office, dated June 2nd 2006, the procedure was initiated to declare breach of cession of land for infrastructures; i.e., with regards to the 57,317.97 m2 of land for infrastructures as established in Modification 1 in 2002, which led to the resolution dated **August 14th 2006**, ordering the plaintiff company to cede the aforementioned land free of charges within the deadline of 10 days.

i) By means of the resolution dated **April 27th 2007**, the appeals for reversal against the two previous resolutions were disallowed, requesting the company as follows within the deadline of five days: "*to submit a public deed before the Town Hall offering cession of its property, classified, in accordance with the valid development plan, as green zones and roads in the Monte Pego sector, describing the estates comprising the object thereof in the same terms as those set forth in the resolution dated September 7th 2005*".

THREE: In relation to these facts, the issues involved, in addition to some that are formal in nature that we will discuss later, are the as follows:

a) Obligation of cession of land for roads and green zones.

b) Obligation of cession of infrastructures land, as imposed in the General Plan, in the first Amendment thereof in 2002.

c) Tacit cession of the land development work.

In this sense and as referred to in these case files, the court ruling, in its fundamental aspects, disallowed the appeal since it states that the appealing company is not acting as just another landowner in the development of the land, but rather as developer of the Special Plan, and is therefore subject to the specific duties applicable to it in application of the 1956 Law and the Special Plan itself, which are summarised as follows: cession of the land for roads and public green zones, and complete undertaking of the land development work and conservation thereof.

Certainly, the judgment does not define exactly which land is to be surrendered by the plaintiff and does not specifically state what is to happen with the infrastructures surface areas created in Modification 1 of 2002 in the General Development Plan. Neither does it explicitly state if tacit reception of the development work has taken place, although it is assumed this is not the case, as can be deduced from the previously transcribed paragraph.

FOUR: On the basis of this subject referring to DEVELOPMENT WORK, the APPELLANT'S position is that Tacit Acceptance of the development work has actually taken place. Thus it is stated and affirmed, based on the following arguments:

A) The lengthy period of time (Publication of the Development Project in 1989 and 14-year Stages Plan).

B) It is developed land, as the Administration Department states in the Report previously referred to.

C) Under Article 188.2 of the Valencian Land Development Law, since the roads in the sector are open to the public.

D) The very acts undertaken by the Administration Department: Charging the Property Tax; Waste Collection Charges, and collecting the Business Activity Tax.

E) The fact that planning permission licences have been granted.

F) Because the relevant offer as established in the judgment has been made (Facts D and E above).

In view of these claims, the TOWN HALL states that:

A) That the deadline to demand compliance with delivery of the development work had not expired.

B) There has never been tacit acceptance, because there has been no formal offer, nor correct execution of the work, as stems from the different reports filed in the case files.

The Court therefore considers that the decisive matters, referring to the alleged tacit acceptance, apart from the circumstantial arguments put forward by the plaintiff, are established in Article 182 of the Valencian Land Development Law, which expressly states:

2. The development work, implemented by a competent developer and located on public domain, shall be understood to have been officially received three months after the formal offer to the Town Hall if there has been no specific administrative reply, or from when it is open for public use. From the moment of reception, a guarantee period shall commence for twelve months, in which the Developer shall be responsible for correcting any construction defects that arise. Once this period has elapsed, the guarantee deposits provided by the Developer shall be refunded.

3. The maintenance expenses shall be covered by the administration department from the moment the work is received, except when claims are made for faulty construction work.

4. Reception is understood to be without prejudice to any action, including civil action, pertaining to the administration department or administered departments, for damages stemming from hidden defects.

In accordance with this rule, presumptive reception is understood to take place three months after the formal offer if no specific administrative reply is issued, and before said period has elapsed if the roads are open to the public. Therefore, the existence of the offer is essential, since if there is no offer, the procedure of presumptive reception cannot take place as provided for in the aforementioned legal text.

Since there is no evidence of a formal offer in the case files, the land development work cannot be understood to have been accepted, not even presumptively, and therefore compliance with completion and conservation lies with the developer until acceptance, either voluntary, presumptive or forced, by the administration department.

Consequently, as can be seen, the only offer made by the company refers to the area of 80,000 metres, whether for roads or green zones, which today has apparently materialised in the granting of the relevant public deed. Delivery of this land cannot be confused with delivery of the development work.

FIVE: In reference to the OBLIGATION OF CESSION OF LAND FOR ROADS AND GREEN ZONES.

THE APPELLANT, believes that since the land is developed development land, no delivery is actually required (Article 14.1 of Law 6.98).

THE TOWN HALL states this is not correct and requests confirmation of the judgment.

The Court believes that, in this sense, the Court ruling is right, clearly differentiating the concepts necessary to clarify the matter.

Actually, Article 14 of Law 9/98 affects the legal statutes of the owners, since this legal text states that in presumptive cases of developed land for development (as is the case we are dealing with according to the statements by the administration department, duly stated in the General Plan Modification Report), new cessions cannot be imposed, but rather only completion of the land development work.

However, in the case we are dealing with here, the obligation to cede does not arise because the plaintiff company is landowner, but because this was imposed in its legal statute, determined by

approval of the 1974 plan, specifically binding it to cede roads and green zones.

As such, said company was bound and must comply with everything imposed through land development ordinance, which the company itself proposed, and therefore said cession obligation continues to exist as substantive content of its legal development situation. Furthermore, this cession is what allows to consider said land as developed land.

In relation to these subjects, we should point out how this obligation should be defined and which surface area it covers. This matter, although not affected by the appealed judgment, is essential to determine it. Regarding this matter, we should state that in reference to quantification of the surface area, the company has assumed the modifications in the development plan ordinance, particularly those defined in Modification 1 of 2002 of the General Land Development Plan and has also assumed them as a modification to the contents of its obligations. This has been proved from the point of view of this case, by the following three items:

a) The acts of disposal that the company has undertaken, in accordance with the definitions of the Punctual Modification stated.

b) The land assigned to green zones and roads, as per said Modification, are expedite of any development and signs indicating lucrative exploitation.

c) There are two expert's reports indicating that the developer carried out the work, and that it has been executed with the definitions established in the 2002 Modification and only with the Partial Plan of 1974 when said plan coincides with the definitions established in the Punctual Modification.

As things stand, the Court believes that the assigned surface areas are those defined in the valid General Plan (Modification 1 of 2002), consisting of 173,915.31 m2 for roads and others, and 250,000 m2 for green zones. This is understood as a result of the principle of regulatory hierarchy and thus it has been assumed by the parties, both the administration department and the plaintiff in the legal, construction and development proceedings. Regardless, this is not damaging to the plaintiff because the resulting surface area is less than the cession determined in the 1974 Partial Plan.

SIX: OBLIGATION TO CEDE NEW LAND STEMMING FROM THE GENERAL PLAN (2002 MODIFICATION). By this we specifically refer to the surface area of 57,317.97 m2 created as intended for infrastructures in Punctual Modification 1, which is different from the road and green zones we have already discussed above.

THE APPELLANT understands that further cessions cannot be demanded in addition to those defined in the 1974 Partial Plan.

The TOWN HALL'S position is not entirely clear. There are times when the reply suggests that the obligation to cede more land cannot be extended to new land for infrastructures. On the other hand, by disallowing the appeal for reversal it ignores this matter, we do not know if this is intentional or accidental.

The judgment does not mention this matter, and we should therefore undertake an action of completion.

We have already seen, in the summary of facts we believe have been proved, that the administration department, in the Report on Punctual Modification 2, states that the land comprising the sector known as "Monte de Pego", i.e. the land considered in this case, covers all duly detailed, urban land, developed, with services, concerning which no other management instrument is pertinent. Consequently, we are dealing with land which Law 6/98 classifies as developed land, for which no obligations can be imposed for new cessions.

As things stand, the land as a whole, classified as developed, consisting of Modification 1 of the General Development Plan, cannot be enforced on the owners of the land included in the Sector, and furthermore.

a) Neither can it be enforced on the plaintiff (as landowner in the sector), since it is precisely developed land, as claimed in said Punctual Modification, subsisting in the modification, and where it is no longer possible to establish new cessions.

b) Neither can the company be enforced (as holder of the obligations stemming from the Partial Plan), because of the Legal Statutes that determined its subjective development rights, only binding it to cede roads and green zones and not the rest of the land for infrastructures (Article 160 of the 1956 Law).

c) This land for infrastructures, under the conditions we have already discussed, can only be acquired by expropriation.

As this stand, we should partially allow the appeal by the plaintiff company and limit its obligation to cede land to the surface areas that we have already defined in the previous point, i.e. those exclusively referring to the green zones and roads.

SEVEN : In relation to the accumulated case files numbered 753/07, we should make the following factual statements:

a) It has been proved that the administration department, in an attempt to clarify the obligations binding the plaintiff company, tried to determine the following items in execution of the resolutions dated February 2nd 2006, April 28th 2006 and May 30th 2006:

1) Land destined to become part of the public domain in successive development plans for the sector.

2) Development Projects that have defined the different technical details.

3) The approximate cost of the unimplemented land development work.

4) Solvency status of the company "Monte Pego SA".

5) Existence of land assigned to become part of the public domain belonging to third parties.

b) Several requirements demanded from the company were initially accomplished by the latter, since on June 28th 2006 it offered part of the land from estate 19.770 covering 61.886 m2 as cession for roads, (Folios 1331 and 1333 of the Case File), and a further 169,434 m2 of land, from the same estate to comply with its obligations, (Folios 1346 and 1347 of the Case File) without making any reference to location.

c) When the administration department demanded cession to be concreted, an appeal was filed, refusing compliance with what had previously been offered.

d) From the appealed judgment, as we have already seen, reversal was ordered and redistribution of the land.

This agreement, referring to forced redistribution of the land, was cancelled in a court judgment, which was subsequently appealed against by the administration department.

EIGHT. The positions of the party in reference to this act are as follows:

The TOWN HALL, which in this case is the appellant, requested revocation of the judgment and to maintain the legality of the request to formalise redistribution of the sector, and regarding this, states the following:

a) All the land comprising the object of cession covers a surface area of 445,501.48 m2, whereas the company "Monte Pego SA" appears to be owner of 326,669 m2, which reduced the public domain land by the area of 118,832 m2, which was the property of third or unknown parties.

b) The only suitable mechanism to force the company "Monte Pego SA" to cede all the land it was bound to cede, and said third parties who were owners of public land, so that all were benefitted, was only viable through forced redistribution of the land, by means of which:

1) The Town Hall obtained cession of the land classified as public domain, which is not actually owned by "Monte Pego SA".

2) The third party owners of this public domain land would obtain development benefits.

3) The equity of Monte Pego is not increased with the benefits conferred to third parties.

c) In order to make redistribution of the land effective, a cautionary measure was taken, in the form of a preventive annotation against the estates belonging to the company "Monte Pego SA", which the third parties could effectively benefit from, so that the former could not dispose of said land.

Therefore, on May 30th 2006 it was agreed (in enforcement of the resolution dated September 7th 2005) to initiate the procedure

to contract technical support to draft the Redistribution Project, enforcing compliance with the cession of roads earmarking 33 estates belonging to the plaintiff. The property registry refused preventive annotation of this resolution, which was confirmed by the General Directorate and finally, in a judgment passed by District Court No. 7 of Alicante.

d) On the other hand, there is no other mechanism for the Town Hall to acquire public land other than enforcing redistribution, which was forcedly imposed on the company to cede the land it was bound to cede.

THE APPELLANT, **in relation to the subject of forced redistribution demanded by the administration department, agrees with the judgment and requests confirmation because:**

a) Redistribution is only viable in the cooperation system, and is not possible in the road cession system which is as determined for the land belonging to the plaintiff.

b) It is developed land, and therefore no new cessions can be enforced.

c) The only item imposed through the 1974 Partial Plan was cession of roads and green zones, the other land should be obtained be expropriation.

d) Said resolution is retroactive since it applies a resolution to the Partial Plan that is posterior as is the case of the General Plan.

e) The resolution has affected a number of segregated registration estates, which has meant the plaintiff has been unable to formalise deeds with third party buyers.

f) A situation of defencelessness has arisen because no evidence has been proposed in the file.

h) The deadline of one month to draft the Redistribution Project is impossible to meet.

THE COURT BELIEVES THAT the Solution to this matter can be no other than that established in the District Court Judgment, since by means of redistributing the land, the

intention is to attribute and OBTAIN new cessions of land classified as developed land, contrary to what was stated in the Modification Report, by indirectly imposing management mechanisms for these new infrastructures land cessions, which, as we have said previously, is not possible, under the regulatory conditions determining ownership examined in this case.

TEN: Other minor subjects remain to be dealt with, which are to be disallowed, including, among others, the following:

A) The plaintiff alleges INCOMPETENCE OF THE MAYOR, based on the provisions established in Article 21, 1 j, of the Local Rules Regime Law, which establishes that the Mayor is competent to approve land development planning instruments of the General Plan not specifically attributed to the Plenary Meeting, as well as town planning management and land development projects.

We are not before a case of presumptive approval of land development planning instruments, but rather a case of enforcement of obligations stemming from a Partial Plan, which does not have the nature of a land development planning instrument, and therefore the Mayor is perfectly competent.

B) The questions related to subsidiary execution, as such, are not the subject matter of this lawsuit, and it is therefore not fitting to examine them.

C) It has been stated people have appeared who have not been notified about any resolution at all. This alleges defencelessness of third parties, which the plaintiff is not entitled to do, since it only the party who has been subjected to defencelessness can file appeals for this matter.

D) The right to defence has been violated. This is not a sanctioning resolution and defencelessness has not been accredited.

E) Reproduction of everything that has been said in the file is ineffective via jurisdictional channels, since the plaintiff should update the specific motives of its claims at this point.

ELEVEN: All the foregoing determines disallowance of the appeal filed by the Town Hall and partial disallowance of the appeal filed by the company Monte Pego SA. This is ruled without stating

specific imposition of payment of costs, in accordance with the contents of Paragraph 2 of Article 239 of the currently valid Jurisdictional Law.

WE HEREBY RULE

That in relation to the Appeal numbered 231/10 filed by the court attorney Ms. Elvira Orts Rebollida, in name and representation of the company "Monte Pego, SA", and the Pego Town Hall, represented by Ms. Rosa Maria Correcher Pardo, against the judgment numbered 352/2009 dated July 22nd ruled in the Contentious Administrative Appeal numbered 378/07 and accumulated appeal 753.07, heard by the Contentious Administrative Court No. 3 of Alicante, we make the following rulings:

a) To partially allow the appeal filed by the company Monte Pego, SA and disallow the appeal filed by the Town Hall.

b) To ratify, in the necessary matters, the agreements of **April 27th 2007**, disallowing the appeals for reversal filed against the two previous resolutions, enforcing the company to cede land for roads and green zones in accordance with Modification 1 of the 2002 Pego General Urban Development Plan, which we define as the surface area 173,915.31 m2 for roads and further 250,000 m2 for green zones, deducting the previously surrendered 80,000 m2.

c) To declare that the preceding obligation does not extend to the 57,317.97 m2 of infrastructures land defined in Punctual Modification 1 of the 2002 Pego General Urban Development Plan.

d) To confirm the judgment where reference is made to annulment of the Judgment of August 2nd 2007 which essentially requires the plaintiff to submit a Redistribution Project of the land, defining cession of all the public land to the administration department thus determined by the current development plans; which is annulled in the appealed judgment against this redistribution obligations, which we hereby ratify.

e) Due to the difficulty of the subjects and the partial estimations, we do not make any rulings about imposition of costs.

This is our final judgment, which we hereby state, rule and sign.

***PUBLICATION**: The preceding judgment has been read and published by the delivering magistrate, who has exercised said role throughout these appeal proceedings, holding Public Audience in this Courtroom, which as Court Clerk, I hereby certify. In Valencia, date* ut supra.

I, VICENTE ALBERT PAMPLÓ, SWORN TRANSLATOR DULY APPOINTED, AUTHORISED AND QUALIFIED DO HEREBY CERTIFY THAT THIS IS A TRUE TRANSLATION FROM SPANISH MADE IN VALENCIA, SPAIN, ON 30TH JUNE 2014.