

Last 13 December 2022, the Spanish Council of Ministers adopted the Preliminary Draft Bill that will amend the current consolidated text of the Law on Soil and Urban Planning (*Ley de Suelo y Rehabilitación Urbana*), approved by Royal Legislative Decree 7/2015, of 30 October (the “**TRLS**”), in order to improve legal certainty in terms of urbanism and to mitigate the serious effects which, in accordance with established case law, derive from the annulment of land and urban planning (the “**Preliminary Draft Bill**”).

In this vein, the Spanish Supreme Court (*Tribunal Supremo*) has established, through numerous court orders, that the declaration of invalidity of a land or urban planning instrument, as regulatory standard, entails the full nullity of the annulled provision with *ex tunc* effects, i.e., from the very moment it was annulled, as if it had never existed. Consequently, said declaration of nullity entails (i) the revival of old land and urban planning which are completely out of date and (ii) the declining nullity of derived planning and of all the urban developments approved therein, which were not final, causing very negative effects on general interests.

In order to mitigate these effects, the Preliminary Draft Bill includes the following changes:

- *Legal nature of land and urban planning*: The Preliminary Draft Bill acknowledges that land and urban planning instruments include, together with the standards, a wide number of documents, determinations and strategic decisions of non-regulatory nature.
- *Public actions*: The exercise of public actions is limited to three ways:
 - (i) Subjectively, insofar as it is reserved for natural persons and non-profit legal entities.
 - (ii) Objectively, since it must focus on material or substantive aspects of the planning and insofar as formal defects cannot be alleged unless said defect has effects on the substantive aspects of the planning.
 - (iii) Teleologically, since the exercise of public action must be ruled by the defence of general interests, forbidding it from being exercised in fraud of law, with abuse of rights, outside the principle of good faith or in defence of merely private or economic interest. In this regard, it is clear that the abandonment of public action proceedings may not entail any economic offset.
- *Nullity and voidability*:

- The general regime of nullity and voidability provided for in Law 39/2015, of 1 October, on the common administrative procedure of the public administration (“LPAC,” from the Spanish acronym) is not modified.
- However, it is acknowledged that the only formal defects that may lead to the full nullity of land and urban planning, under the terms of article 47.1. of LPAC (“those issued in total and absolute disregard of the legally established procedure or of the standards containing the essential rules for the formation of the collegiate bodies’ will”), are:
 - The omission of the environmental evaluation process.
 - The lack of public information.
 - The omission of the participation of the sectorial administrations with respect to mandatory reports, and when the correction of this defect is especially complex due to the relevance and influence that they have on the overall result of the planning.
 - Lack of memory or notoriously insufficient.
- With regards to other formal defects, the procedure may be reopened for a maximum period of one year for its correction.
- Partial nullity of planning is also accepted when they affect a certain territorial scope or when they affect certain precepts or specific determinations that are not relevant to the rest of the planning.
- The effects of invalidity are graded with respect to development planning instruments and acts issued in application of an annulled planning, since these will only be affected when they suffer from the same defect suffered by the annulled plan, and provided that they are not covered by the previous planning.

Furthermore, in accordance with the constitutional policy on the breach to comply with the obligation to resolve within the legally established period, the Preliminary Draft Bill introduces a new wording of article 11.4 of TRLS, as well as the positive silence for acts authorising the construction of assets subject to a public protection regime for social rental, thus speeding up the market placement of these publicly protected assets.

Finally, the Preliminary Draft Bill provides a new wording of article 38.2 of TRLS (on the calculation of the compensation for the right to participate in new urban actions), which was declared unconstitutional and was voided by Constitutional Court Ruling no. 218/2015, of 22 October. Thus, the new methodology used for this calculation takes into consideration the percentage of business profit derived from the urban development activity.

In the end, the Preliminary Draft Bill seeks to improve legal certainty in terms of land and urban planning, limiting the exercise of public action and bringing together the categories of defects of legality (nullity and voidability), which, from a practical point of view, shall be positively criticised. However, it is not free of problems since it tends to consolidate situations vitiated by full nullity (which should initially be imprescriptible). In any case, in our opinion, the greatest legal certainty undoubtedly lies in the difficult task of approving land and urban planning in accordance with the Law.

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