

Constitutional Court strikes the social obligation from the Flemish Land and Property Decree

For several categories of construction and subdivision projects (e.g. the erection of 50 or more apartments, or the development of subdivisions having 10 or more building plots), the Land and Property Decree dated 27 March 2009 provides for the creation of an obligatory percentage of social housing opportunities (the so-called “social obligation”) and low-income income housing opportunities (the so-called “low-income obligation”), which percentages differ for “public” and “private” projects. A number of provisions of the Land and Property Decree were challenged before the Constitutional Court, by (amongst others) a number of professional building promoters, who argued that the imposition of a social obligation in certain urban development and subdivision permits was a “disproportionate” measure. After not having nullified all provisions concerning the social obligation in a first decision of 7 November 2013, the Constitutional Court has now provided greater clarity with its decision of 18 December 2013. The Constitutional Court has found that the disproportionate imposition of a social obligation violates the free movement of capital as anchored in European law. This is the case because the social obligation is imposed without any compensation to developers, given that the support measures provided for such projects in the Land and Property Decree were – wrongly - not notified to the European Commission as state aid. For this reason the Court has also struck down all provisions (also in the Flemish Spatial Planning Codex) that are inseparably linked with the nullified provisions. The Court has therefore annulled all provisions that could result, directly or indirectly, in a social obligation possibly being imposed on the basis of the Land and Property Decree. The Court did not nullify the provisions in the Land and Property Decree relating to the obligatory creation of low-income housing possibilities, for the simple reason that these provisions were not challenged before the Constitutional Court. The conclusion on the basis of this decision is therefore: as of today, permit-granting government authorities can no longer impose a social obligation, but they can still impose a low-income obligation. This decision will undoubtedly still give rise to numerous debates and proceedings (not least claims for compensation against the permit-granting government authorities and the Flemish Region, because a social obligation had been wrongly imposed). What about the existing municipal regulations on social housing? As of today, how exactly must permit applications be filed, given that the application forms still make mention of “a social obligation”? How must the percentage of low-income housing opportunities be calculated, given that this depends (amongst other things) on the percentages of social housing possibilities included in municipal regulations on social housing?

It is also readily foreseeable that one day soon the Constitutional Court will be asked to rule on the question of whether a low-income obligation is any more compatible with the free movement of capital. Something that doesn't appear to be self-evident. To be continued, undoubtedly.

Mechelsesteenweg 127A, b1 - 2018 Antwerp

t. +32 3 260 98 60 | +32 2 790 44 44

Regentschapsstraat 58 PO box 8 - 1000 Brussels

info@schoups.be

www.schoups.com