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The compensation for the expropriation of a Land subject to Local Government use. The case of a Land Lease.

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Abstract The expropriation of property subject to Local Government uses constitutes a particular case whose regulation, as far as what concerns benefits and claims, must be sought in special rules very often done a long time ago or under different Court rulings. The question becomes very sensitive when the problem relies on who is the true owner of the property. The key issue is to investigate the origin of the issue in order to determine if the expropriated land belongs to the Local Government, or only the lease. The study was inspired by an actual case which shows how the economic condition of the land, by varying the nature of the land and therefore all the claims on it.

INTRODUCTION AND OBJECTIVE

The Law uses the institutes of the Land Lease and Leaseholder interchangeably because of a mixture or confusion, as determined by a legislative trend of bundling the first in favor of the Leaseholder (See Spiezia 1984, Palermo 1984; Ranelletti 1992; Marinelli 2003). Both identify agricultural relationships characterized substantially in granting the use of the land by the owner / grantor to another person who, agreed to cultivate it, to improve it and to pay a fee. In some cases, as the one discussed in this study, when referring to the Lease of the Land, the historical context of the institution is crucial in order to identify the true owner of the land. A not in depth analysis, in the worst case, could generate an unfair solution or otherwise an incorrect estimate of the cost.

ANALYSIS OF THE LEGISLATION AND ITS IMPORTANCE

Here we omit to recall the principles of the ancient Roman law from which the institution of Emphyteusis (Land Lease) derives (Peace, 2009). It had its maximum development in the middle Ages as a response to the need to cultivate uncultivated or unhealthy land owned by the State, the Commons or the Church. The Middle Ages, while leaving substantially unchanged the basic framework of Emphyteusis (Land Lease), refined the theories of the "*dominio diviso*"(divided land), defining new forms of contract, including the use of a land in leasing.[2] It is always, in fact, of the Middle Ages the distin-

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1 This paper can be attributed equally to the authors.

2 Changes interested various aspects of the Emphyteusis and were sometimes addressed to the benefit of the grantor, other times in favor of the Emphyteuta, in an attempt to maintain a difficult balance between the parties. The name comes from the "Libellus", which was to indicate the document that wrapped up the contract, in which there were specified the requirements impo-

ction between "*dominio utile*" (land owned), which is owned by the Emphyteuta, said therefore also "utilitarian", and "*dominio diretto*" (Land in use), which is of the grantor instead, also called "user". This distinction assumed considerable importance when related to the question on the ownership of the land. Conversion forms of collective ownership to individual ownership were thus legitimately established or recognized and therefore transformed into '*Allodio*' (full ownership of the Land) (Germanò, 1999a-b).

The question underwent a fundamental change because of the French Revolution.[3] In the Kingdom of Naples[4] under the short-lived government of Joseph Bonaparte (1806-1808), the Decree of August 2, 1806, placed an end to feudalism.[5] The mass meeting of the estates of the three domains (the feudal one, the assets of University subject to public uses, and the ecclesiastical one), assigned a large part to the former Feudal lords and the rest to the municipalities. The local government had to divide them among the citizens. The lands assigned, should be subject to perpetual fee intended to support the economy of the new municipalities.[6]

Subsequently, almost all codes preunitary born in Italy from the Restoration included in them the Emphyteusis (Land Lease). The choice of the legislature Bourbon moved towards the introduction of such institution in Civil Laws (part II of the Code for the Kingdom of the Two Sicily, 1819). This happened even in the Kingdom of the Two Sicilies (born in 1816), given the social and economic importance of the Emphyteusis (Land Lease) as an effective tool for the fragmentation of estates resulting from the abolition of the feudal system. On the other hand, the Napoleonic laws relating to the defined "public lands" remained in force until post unit Royal Decree No. 751 of 1924 then converted into Law No. 1766 of June 16, 1927.

In this norm, concerning the reorganization of the civil use in the Kingdom, alt-hough obvious the idea of a central state, there was, by the legislature, the awareness of the considerable diversity of agrarian relationships established in the pre-unification states. The Law of '27 tried to overcome this diversity leaving to the regional commissioners the task of interpreting the various special cases placed to their attention upon request of the interested parties or *ex officio*, and also the task of deciding disputes about the ownership of state-owned land.[7] The legal practitioners that followed then lost this awareness.

on Landholder. Subject of the contract was, almost always, an agricultural land that was transferred to the Landholder for a very long time, but generally less than thirty years, upon payment of an annual fee. In the medieval practice, even the institution. of the Livello has undergone significant changes due to infiltration in the discipline of the institution of specific rules of the Emphyteusis, - the obligation to renew at its expiry, the ability to convey the right to the heirs, the possibility of alienation (see Aliquò 1950; Benedict 1963, Luciani 2008).

3 In 1790, the Law on redemption of perpetual annuities affirmed the redeem ability of all rents. The Napoleonic Code of 1804 does not include the Emphyteusis, but does not expressly prohibit it; Article 530 speaks of perpetual annuities ratifying the redeemability, as it had already happened with the Law of 1790. As for many other institutions of the old regime, the failure to include the Emphyteusis in the Code Napoléon sounded like a sentence without appeal.

4 The Kingdom of Naples corresponded to the sum of present regions of Abruzzo, Molise, Campania, Puglia, Basilicata and Calabria and included some areas of the southern and eastern Lazio.

5 The first article of the decree said: "The feudal system with all its duties shall be abolished. All jurisdictions so far baronial, and any proceeds need to return to the sovereignty, from which they will be inseparable "(cf. Collection of decrees, legislations, sentences e laws of 1806, pp. 257-262).

6 The owners of the shares was, became full, free and absolute owners of the lands assigned to them, and they could dispose of them at their convenience, alienating or giving them for rent, but not before ten years(Article 31, Decree 1808). They could culturing and reserving them for their own use, stopping and prohibiting anyone to practicing grazing, collection of firewood, or water or similar (Article 4, Decree 1807), but with the requirement of an annual allowance in favor of the municipality, that the decree of 1807 did not determine, having left the discipline to the Decree of 1808.

7 Article 29: "the commissioners will decide all disputes about the existence, nature and extent of above mentioned rights, including those in which it disputed the state-owned land or ....."

These agricultural contracts have been involved in a legislative trend of bundling the first in favor of the Emphyteusis (Land Lease) (Articles 957 Public Law). The mixed up or confusion, that had arisen already at the end of the Middle Ages between *Livello* (Partial Land) and Emphyteusis (Land Lease) came to an end. The entry into force of the Code of 1865 and then of the new separate book of the Public Law on the Property (10/28/1941) culminated in the Law No. 607 of 22 July 1966[8] and No. 1138 of 18 December 1970.

In fact, these two laws attempted to subject to the rules of the Emphyteusis (Land Lease) other types of contracts or land grant relationships.

First, the Law of 1966, with reference to the contracts with content and characters similar or related to those typical of the Emphyteusis (Land Lease), and then the Law of 1970 extended the applicability of the Emphyteusis (Land Lease) also to almost all other types of agricultural contracts with clause ameliorative. The aim was to encourage "*Emphyteuti*" (Land leasers) or dealers of agricultural land for reasons of economic and social, facilitating the enfranchisement with the most convenient method of calculation of fees and capital of liberated and with more rapid and summary proceedings.

Although some parts of the laws or articles mentioned were the subject of a declaration of unlawfulness by the Constitutional Court (Case no. 37 of 1969 and no. 53 of 1974), legislative measures produced a growing confusion between these agricultural relationships. As discussed below, this confusion can lead to inequality where the land burdened by *Livello* (Land), yet be free of real estate, has become buildable due to of new urban planning and where it has been affected by forced acquisition (expropriation) because on the same was planned the construction of a public work or a work of public interest. The questions are therefore: who owns the right to availability of good? To whom should the expropriation procedure send? How are the compensations determined?

The professional delegated by Judge has the problem of determining the legal nature of the *Livello* (cession in perpetual use of land with the obligation to pay an annual fee) as revealed by the Act or by the certificate of origin and mortgage; he must therefore clarify if the *Livello* in question is different from the Emphyteusis. The response, as previously mentioned, requires a survey about the historical origin of burden.

The Constitutional Court intervened by stating that not all relationships characterized by the obligation for payment of a fee could be traced back to the Emphyteusis (Land Lease). However, it is easy to distinguish in some cases when this fee links to a mandatory relationship and those where the *Livello* (Land) links to a legal situation similar to Emphyteusis (Land Lease). In truth, contracts to improvement in Lazio (pursuant to Law 25 February 1963 n. 327) and those with content and features similar to them, as well as the Venetian and Tuscan Lands (Calderoni, 2008), since they are excluded from the declaration of unconstitutionality of the Court, fall under the framework of Emphyteusis (Land Lease). There are other cases of Emphyteusis (Land Lease) and the distinction of them requires analysis that is more detailed. In these cases, the nature of the land is "alloidal". The "*Allodio*" indicates "full private ownership of the property. It is free from the arrangement of collective ownership that are graved by fees of emphyteutic (land lease) nature imposed by various institutions:

1. the ordinances of eligibility (Art. 10 of Law 1766/1927);
2. the conciliation (Article 51 of Royal Decree 03.07.1861, art. 29 of Law 1766/1927);
3. transformations in perpetual Emphyteusis (Land Lease) (Art. 26 RD 332/1928);
4. transformations in colonies perpetual and immovable (art. 28 of the RD 10/03/1810);
5. the liquidations of civic uses on private lands (art. 7 Act 1766/1927);

8 Article 13: «The provisions of this Act shall also apply to: a) the relationship to improvement in use in the provinces of Lazio, pursuant to Articles 1 and 2 of the Law of 25 February 1963, no. 327 b) the relationship to improvement, similar in the content and characteristics to those referred to point a) and relating to agricultural land located in other parts of the national territory, c) the relationships established on the basis of atypical agricultural contracts where the elements of the Emphyteutic relationship are prevalent ... »

6. the allotments prior to Law 1766/1927 (Law 09.01.1806, art. 32 RD 3.12.1808").
Because of the judgment of the Constitutional Court No. 53 of 03.06.1974, for the types listed the legal provision on the Emphyteusis (Land Lease) does not apply. Article 972 C.C. does not apply (failure to pay the fee does not cause the devolution), article 960 does not apply (there is no requirement to improve the land of the Emphyteuta, landholder) and article 970 does not apply (there is no prescription for the unused twenty years as required by the law of the Emphyteuta, Land holder). Talking about fee (state property) of Emphyteutic (Land leasing) nature does not mean 'Emphyteutic fee'. It is a perpetual fee. It is unless freed. As stated by the Court of the Counts by resolution / opinion No. 18/2006 the fee has a public nature, it is state property. The state property transfers from the land to the fee, and its capital of enfranchisement is inalienable because it is for the community to carry out works to compensate the loss of the state property civic (according to art. 24 of Law 1766/1927). The ownership of the property is therefore private.
We cannot distinguish cases like these compared to the Emphyteusis (Land Lease), in relation to the use of the property. We need to identify and to distin-guish them from the Emphyteusis if the land is buildable (legally) and then subject to expropriation.

SOLUTION TO THE CRITICAL ISSUES

The example below shows how varied the economic condition of '*livellario*' (land owner), changing the legal nature of *Livello* (Land) and therefore all the claims on the property.
The case relates to a land located in the municipality of San Gervasio Palace (PZ) inserted into a plan of Public Housing expropriated for the construction of public works (an urban park in the service of public housing).[9] The land became the property of the expropriated with a bill of sale in which the *Livello* is mentioned and whose grantor was the Municipality. The parties to the dispute – on the one hand the private expropriated and on the other the expropriating authority, that is the municipal administration – do not agree on the type of burden / right in rem in which the land is subdued.
The expropriated supports the thesis that it is the burden and, partly because of Law No. 16 of 29 January 1974 Art. 1 which extinguishes «the relations perpetual real and personal, made prior to the date of October 28, 1941, by virtue of which government departments and autonomous agencies of the State, ... have the right to receive Emphyteutic fees, Censi, Livelli, and other cash benefits ... to a lesser extent to Lira 1,000 per year». He believes that at present the *Livello* constitutes only a historical holdover, devoid of any real economic significance the Entity formally holder.[10]
In all reality, although the above-mentioned norm does not apply to fees placed on civic and municipal lands (as confirmed by the decision of the Court of the Counts cited above). The *art.24* of the Decree 25.06.2008 n. 112, with amend-ments by Law 08/06/2008 No. 133 repealed the same provision.
The municipal administration, recalling further the contents of the Basilicata Regional Law No. 57/2000, argues that the good is state property, with the characteristics of the unavailability, inalienability, imprescriptibility and not subject to adverse possession (see Studies Commission of the Na-

9 «The inclusion of an area in the plan for public housing implies that, even if the original zoning of the land-use plan qualifies the use of land as agricultural, by virtue of the variation introduced by plan for public housing (which in this part, it must be considered planning and confirmative instrument), it has acquired the character of build ability. Specific realization of construction works (public parks, roads) uses the area. Since in this context the building rights must be proportional to average building indices, related to the total gross surface of land to be allocated to a free, if it is not considered to estimate the soil using criteria based on the comparative value of homogeneous areas» (Court of Cassation, U. Sec., 21/03/2001, No. 125; Cass. Sect. I n. 17348/2002, n. 10555/2004, n. 1336/2005, n. 8525/2006, n. 12771/2007, n. 22421/2008, n. 23584/2010 , n. 21384/2011).

10 In this sense it was also expressed Court of Melfi in the first instance judgment n. 446/02./02.

tional Council of Notaries, Study no. 777). In fact the regional Law, in paragraphs 3 and 4 of Art. 3, logically excludes from regional competence, which therefore remains to municipalities, the management of «administrative proceedings cancellation and preservation of the ancient Livelli, reported or not on cadastral registers, resulting from the valid allocation procedures prior to the entry into force of Law 16 June 1927, No. 1766.»

The present case falls just between those derived from the ancient allotments prior to 1927, already mentioned, following the end of feudalism in Southern Italy and in accordance with the laws of the Kingdom of Naples (Decree of 2 August 1806 - end of feudalism in the Neapolitan provinces) then transposed by the unified Italian state. If this proves to be the origin of the *Livello*, then the nature of the land, formerly state-owned, is now "alloidal". It should therefore only recognized the Emphyteutic nature of the fee (it is not an Emphyteutic fee) that is imprescriptible because perpetual (see judgment of the Constitutional Court No.143/97).[11] Obviously the possibility of prescription remains, in relation to the periodic levying of fees (five-year limitation of the C.C.), due to inertia of the managing entity.[12]
The compensation payable for the expropriation must be proportional to the value of full ownership upon transfer of the property. This is based on what has been said about the character of the *Livello* imposed on state-owned land - not prescriptible and perpetual - in contrast to the more non-state-owned land, it follows that the value should be estimated with reference to the characteristics of urban planning at the same time. The current legislation provides for buildable areas of expropriation compensation equal to market value.[13]
In 2011, the estimated value of the buildable area was € / sqm 120.
If, for simplicity, we assume that the surface expropriated equal to one hectare, the compensation for expropriation amounted to € 1.2 million.
At *livellario* (in this case the owner of the property) are entitled to compensation equal to the amount now estimated to which must be subtracted only the capital of enfranchisement. This capital is, in fact, the right claimed by the municipality, *i.e.* by the community, that as result of 'allodiation' is transferred from the good to the fees. In turn, the fee is revaluable,[14] it is always and exclusively related to the agricultural use of soils, *i.e.* the value of the lands in the actual quality at the time of their assignment (privatization). The enfranchisement occurs through the capitalization of the fee at a rate equal to the legal one at the time of birth of the relationship.[15]

11 On the same line we have the Orders of the Court of Potenza 29/03/2007, the Court of Matera 30/09/2008 and the Order of the Court of Melfi 13/11/2008.

12 About this land, from the documents and research carried out by the municipal administration, there is no trace of fees paid by Livellari until 1993 or required from the grantor.

13 Article 37 of Presidential Decree n.32/2001: «The compensation for expropriation of a buildable area is determined as equal to the market value of the property. When the expropriation is intended to implement measures aimed at socio-economic reform, the allowance is reduced by twenty-five percent. »

14 The Region now has the competence to the revaluation of fees (and by it, where appropriate, regional Surveyors), because the operation is inherent in the protection of the rights of the people, that have moved to the capital of enfranchisement of fees; such protection is the exclusive competence regional, Presidential Decree No. 11/'72 and Presidential Decree No. 616/77.

15 About the question of the capital of enfranchisement that, as mentioned, should be related only for agricultural use, omitting to consider the economic utility attributed to the land by the supervening buildability, it is noted that the competent offices of the Inland Revenue, albeit in terms not absolutely unequivocal, expressed different orientation in similar cases (note departmental DC ETS No. E2/15127 and May 11, 2011 prot. 29104). These documents dealing therefore cases of "Urban Emphyteusis" suggest determining the fee "by applying to the value of the area considered buildable a fair rate of return."

Since in the past the legal rate has always been of 5% (1942-1990), the enfranchisement is determined by multiplying the fee by 20. As in the case examined in the absence of reliable data relating to the fee to be paid, we can reasonably assume as reference the dominical income to 1939. Next, as regards the reevaluation of the fee we can take inspiration from the rules, which over time have foreseen its appreciation: in particular, prior art. 4 of Decree Law No. 326/87, converted into Law No. 403/87, which provided for the application of a revaluation coefficient equal to 250, and then the art. Three, paragraph 50 of the Law of 23.12.1996, No. 662 that has instead introduced a further revaluation of dominical income corresponding to 80%.
The revaluation, carried out by adopting a factor of 450, leads generally to a revalued fee much higher than current cadastral dominical income.[16] In Campania, precisely because of around 500% difference between revalued fee and current cadastral income, the Regional Federation of Doctors of Agronomy and Doctors of Forestry came to a conclusion. It held that a fair ground rent for land affected by a new agrarian contract could not be less than five times the current dominical income of the same land (see Department of Agriculture Region Campania November 2007).
The documents show that in 1939 the Dominical income attributed to this land cultivated with vineyards, was lire 130 per hectare.
The fee in 1939 is therefore equal to Hectare 1.00 x 130 = 130 Lira. The revalued fee, in 2011, is Lit 130 x 250 x 1.80 = 58,500 Lira = € 30.21; and the resulting capital of enfranchisement: € 30.21 x 20 = € 604.25.
As previously established, the capital of enfranchisement is negligible compared to the market value of the property and therefore irrelevant in the calculation of total compensation (in terms of percentage of less than one ‰ of the market value).

Compensation payable to *Livellario* = the value of the area considered buildable – The price of enfranchisement (negligible amount).

Another notation follows from the assumption of occupation (legitimate or illegitimate) before the date of the actual transfer of the property and therefore from the need of having to pay compensation corresponding to this period of unavailability of the good. Should not be subtracted from the amount determined the accumulation of fees, if in the meantime the prescription of the right to levy the same fees intervened.
It would be completely different the compensation to the *livellario* where it fulfills the conditions precedent involving the devolution of land to the state property and it was therefore determined that it is an 'Emphytuetic fee' and not, as previously, a fee of Enphyteutic nature. In this case, given that the ownership of the good is public, the compensation for the beneficiaries of the *Livello* should be equal to the value of the real right subtracted due to expropriation or unlawful appropriation. In this sense, it is also expressed in the Supreme Court, Sent. 4320/1998: «The unlawful appropriation of land granted by Emphyteusis produces the same effects of deterioration of the land according to art. 963 public codes. The Grantor and the Emphyteuta, should be compensated, in relation to the value of their rights. » This value for the grantor (dominio diretto) is the price of enfranchisement (PA). The right of the Emphyteuta, or the value of the '*dominio utile*' (Vdu), is instead determined as the value of the land (VF) minus the price of enfranchisement and procedural costs for the enfranchisement: Vdu VF = - (PA + Sp). The latter in fact, by law, shall be borne by the Emphyteuta.
Apparently, this formula returns the same result already given in the case of Allodio. However, the

16 The Constitutional Court, judgment no. 318 July 1, 2002 has declared the constitutional illegitimacy of art. 9 and 62 of the Law 03.05.1982, No. 203 relating to agricultural contracts, with the result that it is no longer possible to determine the fair rental fee of agricultural land by applying the coefficients of multiplication, provided by art. 9, to the dominical income resulting from the cadastral register of 1939. This is due to the ancient character of the latter, that does not provide the constitutional guarantee of private ownership of land and the principle of fairness in social relationships.

value of the land in the two cases is very different. The change of use of land from agricultural to building land, because of a new urban planning, produces a land rent. With reference to a land not built up, the land rent is the difference between the market value determined by its legal and factual conditions and the value attributable to it with respect to agricultural use. The surplus value generated by the land rent, which may be differential or absolute, is obviously attributed to the owner of the good, in practice it is part of the value of '*dominio diretto*', and not of the '*dominio utile*' that is instead of the Emphyteuta.

This assertion comes from the legislation. On the one hand, the obligation to improve the property falls on the Emphyteuta, on the other hand, however, it is recognized the full right to use of the property, which among other things includes the power to dispose of its economic use of the land. The Emphyteuta can therefore change the land use. Since the activity of improvement, it also request to the Emphyteuta, must be regarded as intrinsically related to the nature of the land, the change of destination (economic) should not change its character. In fact, they are part of the concept of improvement every kind of works which increases the value of the land, such as the implantation of a new culture method when these contributions an increase or improvement of the state and the productivity of land. We cannot consider as improvements the buildings constructed on soil burdened by *Livello* (State Attorney Note No. 8475 of 19.12.1991).

It has nothing to do with the concept of improvement, each processing activities building (State Council Opinion No. 661/1998), so that the grantor as the owner of the area acquires any building made by the beneficiary. An agricultural land will remain agricultural and therefore in the event of termination of the relationship (Cod. Civ. 975), «the Emphyteuta is entitled to reimbursement of the improvements - if substantiated at the time of return - to the extent of the increase in value achieved from the land due to improvements». It follows that the land rent, as that generated by a change of use (the new urban planning), cannot in any case depend on out improvement work made by the beneficiary, whatever type.

If, therefore, it was ascertained the state property of the good it would be for the leaseholder compensation corresponding to the difference between the estimated value of the land with reference to agricultural use and the price of enfranchisement. In practice, compared with the hypothesis of Allodio previously developed, in this case the compensation for the beneficiary shall be reduced by the amount corresponding to whatever land rent, that is part of the value of the 'dominio diretto' and therefore attributable to the grantor.

Compensation to the '*Livellario*' = Value of the area destined for agricultural use (including, therefore, the improvements made by the beneficiary) - Price of enfranchisement.

CONCLUSIONS

The analysis of a particular case of expropriation, that has related to land burdened by *Livello* and become legally buildable because of their position as part of a public housing, has highlighted the need to investigate the origin of the burden. This is to identify whom the owners of the goods are the community (in the figure of the Municipality grantor) or the private *Livellario*. When the land is state property, and when the state property is on the *Livello* (after the conversion of collective ownership in private property), the compensations payable to *livellario* seem nominally coincident: value of the area - the price of enfranchisement.

However, the different qualification of the *livellario*, that in the second case is the owner of the land, makes the result of the previous expression extremely divergent. This happens when a new modification of urban planning has changed the original land use, transforming it from agricultural to buil-

dable. The increase in value, that the land undergoes as a result of this change due to the phenomenon of land rent, is in fact, in the case of *Allodio*, a compensation recognizable in legal terms only to the *livellario*; it is not so, instead, when the good is state property.

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