

**Supreme Court Judgment of 28 October 2016 (STS 2324/2016)**

The Contentious-Administrative Chamber of the Supreme Court, in its judgment of 28 October, accepted the appeal lodged by a property developer, acknowledging the latter's right to collect compensation for the curtailment of its right to build in connection with two plots of its property as a result of the discovery of archaeological remains on said sites.

The plots in question, located at Rúa del Faro (San Cibrao), Lugo, on which the developer planned to build a housing development, had been granted the relevant construction permits by the Municipal Government of Cervo on 1 December 2006 and on 18 April 2007, respectively. Nevertheless, in 2010, archaeological remains were discovered in the area, leading the Department of Culture of the Galicia Regional Government to rule, in its Decision of 28 June 2010, that an archaeological dig should be carried out urgently at the sites, and that the developer should not be allowed to build the homes since there was a duty to conserve, *in situ*, any archaeological remains found as well as to adopt such technical solutions and preventive measures as might be appropriate to prevent said remains from deteriorating, in accordance with the provisions of the regulations on Historical Heritage. It is worth noting that, according to the Inventory of Archaeological Sites, these archaeological remains were in fact discovered in San Cibrao in 2005, and that the municipal construction permit for the housing development on the site was still granted subsequent to said discovery.

In that context, the developer decided to file damages proceedings against the Department of Culture for €4,404,276.92, based on the value of the plots and the damages arising from the developer's inability to execute the construction projects as a result of the supervening curtailment of its right to build, lost profit as a result of not being able to build the homes, and the costs already incurred (advertising, cost of obtaining the permits, etc.). The proceedings were dismissed by the Superior Court of Justice of Galicia which, despite acknowledging the curtailment of the right to build, considered that the owner of the land had the legal duty to conserve the archaeological remains discovered and, consequently, the legal duty to bear these limitations on their ownership rights. Likewise, the Superior Court of Justice indicated that the Department's decision did not imply that the work must be halted (since it had not yet commenced) and that "the duty of conducting the archaeological intervention was undertaken as soon as it was included in the administrative file, on 29 September 2005, that these archaeological remains had been found (...)".

Accordingly, the developer filed an appeal with the Supreme Court, which resulted in the judgment we discuss here.

After examining the case, the Supreme Court rejected the previous court rulings, accepting the appeal and partially annulling the appealed decision, and recognised the developer's right to collect damages for the curtailment of its right to build.

The Supreme Court explained that the contentious issue is to determine whether the developer was legally bound, in accordance with Law 8/95 on Galicia's Cultural Heritage, to bear the limitations on its ability to exploit the plots, in which connection the developer had construction permits.

In line with this argument, the Supreme Court sustained that the municipal construction permit affords its holder the right to build in the terms provided in the permit and within the period granted in the permit. The developer having been granted the relevant permits when the first archaeological remains had been discovered, the impossibility of implementing the projects, with no alternative solution, entails for the developer the deprivation of a right, in this case its right to build the two buildings authorised in the permits.

Consequently, the High Court concluded that the archaeological discovery implies the deprivation of a right and that, although said deprivation is provided by the rules for protecting heritage in the general interest, "the excising of that right – precisely because it is in the general interest – cannot be borne solely by its holder, which would constitute wrongful damage and, as such, is subject to compensation as the owner of the land is not legally bound to bear the damage that is caused to it directly by this protection in the general interest and benefit".

Accordingly, in the judgment, the Court ordered the payment of damages for (i) the curtailment of the right to build the property as granted in the permits, and (ii) reimbursement of the costs incurred for the plans, permits, and development of the property, although it does not grant payment of damages for loss of profit, as the mere expectation of profit for the housing development does not grant entitlement to any kind of compensation.