

擺盪在法律保留與契約自由間之 行政契約合法性探討 ——以法定山坡地劃出之切結書為例

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關鍵詞：切結書、行政契約、法律保留、契約自由、雙務契約、山坡地劃出。

Keywords： Affidavit, Administrative Contract, Principle of Legal Reservation, Principle of Freedom of Contract, Bilateral Contract, Sloping Land's delimitation.

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摘要

行政實務上，行政機關常透過要求民眾簽立切結書，承諾法無明文之事項，並據以從事後續行政作為，以利行政任務之達成。切結書的法律性質，有觀念通知、行政處分之附款、需同意之行政處分及行政契約等說法。本文案例之切結書，係由縣政府協調開發業者承諾於基地上設置水土保持設施，以換取主管機關農業委員會（下稱農委會）將該地區劃出山坡地。當事人公法上之義務，雖僅由其中一方出具切結書，他方（行政機關）義務並未一併載明於切結書，然係呈現在相關會議紀錄或往返公文中，仍具有要約、承諾之對待關係，屬雙方合意，應為一「跛足雙務行政契約」。其涉及依法行政之法律保留及尊重當事人意願之契約自由等看似相衝突原則的適用問題，惟仍宜加折衷：切結書涉及財產權的限制或減損（需支出額外的土地使用及工程費用），係基於自由意願所為，又非屬生命或身體法益，非不得逕自拋棄，應無法律保留原則適用；至於行政契約之對待給付，亦即農委會應為之山坡地劃出核准處分，則應有法律保留原則之適用。此一行政契約並應遵守行政程序法第 137 條之相關要求。

Oscillation of the Legitimacy of Administrative Contract between Principle of Legal Reservation and Freedom of Contract: the Affidavit of Delimitating Legal Sloping lands as an Example.

Hung-Ta Hsu

Abstract

In administrative practices, administrative organs commonly ask the people to sign an affidavit of stating non legal promises prior taking administrative actions for achieving administrative aims. There are some aspects about the legal quality on an affidavit, such as the subject matter, incidental provision of administrative injunction, administrative injunction with agreement and administrative contract. In this article, the cited affidavit is a kind of people's promise which sets up soil and water conservation facilities for exchanging COA's sloping-land delimitation. Duties of Public law on the parties, although there would be only one party owning the obligation to sign the affidavit which without mentioning of the other party's obligation (administrative agency), however, are present in the related record or to and from official documents of meetings, where the mutual relationship between an offer and the acceptance still exist and it is called "limped bilateral contract". Administrative contract relates to applicable problems of some conflict principles: the sub-principle of legal reservation under the administrative law abiding principle, and the freedom of contract which highlight the respect to the interested parties' voluntariness. Compromise is the best policy when principles above-mentioned are in dispute. If an affidavit involving in limitation and depletion of property right are signed with free will, there will be no legal interests of life which can be forsaken, and there is no application of the principle of legal reservation. As for considering the benefits of administrative contract, the COA's injunction about delimitating sloping lands, there should be application of the principle of legal reservation. The contract ought to comply with the Art. 137 of the Administrative Procedure Law.