

評行政機關頒布時效取得地上權 登記法規之爭議

林 清 汶*

目 次

- 壹、前言
- 貳、對於時效取得地上權之權利伸縮與競合
 - 一、對於主張時效取得地上權人權利之限制
 - 二、對於主張時效取得地上權人權利之保障
 - 三、時效取得地上權與土地所有權間法益競合之運作原則
 - (一)合於誠信原則
 - (二)合於公益性
 - (三)合於經濟效益性
 - (四)合於比例性原則
- 參、行政機關對於時效取得地上權登記審查登記制度之現況與變革
 - 一、地政機關對於時效取得地上權登記之沿襲
 - (一)早期申請人並不須檢附以行使地上權意思而占有之證明文件
 - (二)其後修訂土地登記規則第 118 條規定申請人必須提供以行使地上權意思而占有之證明文件
 - 二、現行地政機關對於時效取得地上權登記作法
 - 三、我國土地登記制度之趨勢
 - (一)我國土地登記制度採實質審查
 - (二)由實質審查制逐漸向形式審查制傾斜
 - (三)地政機關登記錯誤設有損害賠償制
 - 肆、由行政機關強以行使地上權占有意思作為時效取得要件審查之困境
 - 一、地政機關實務上僅具有形式審查功能無法判斷以行使地上權意思而占有之證明
 - 二、行使地上權主觀意思難以認定卻強求當事人提供證明文件作為審查徒增紛爭
 - 三、因時效取得地上權登記效益已有限縮趨勢
 - 四、涉及私權爭執依法不宜由地政機關作行政決定
 - 伍、結論與建議

關鍵詞：時效取得、地上權、土地登記、占有、實質審查、形式審查

Keywords：Adverse Possession, Superficies, Land Recording System, Possession, Examination as to Substance, Formal Examination

責任編輯：張煥熙

* 廣州暨南大學法學博士；世新大學 臺灣警察專科學校 助理教授。

摘要

因時效取得地上權課題向來衍生諸多爭議，有主張應保障時效取得者，亦有認為對時效取得者適法性加以嚴格審查。2010年6月土地登記規則第118條第1項新增訂為：「土地總登記後，因主張時效完成申請地上權登記時，應提出『以行使地上權意思而占有之證明文件』」作為申請時效取得地上權登記之要件；然而，行政機關對於上述事實審查及權利認定，職權幾與法院無異，且依現行登記人員專業素養實力有未逮，由行政機關擔任該項審查，未具合理性與正當性，該增訂條文內容應予廢止。為此，本文特別提出：因地政機關在實務上僅具有形式審查功能，無法落實認定以行使地上權意思而占有之證明；行使地上權主觀意思難以認定，卻強求提供證明文件作為審查要件徒增紛爭；時效取得地上權登記效益已有限縮趨勢；且涉及私權爭執依法不宜由地政機關作行政決定，等論點作為法制之依據。

Comments on The Disputes Of Adverse Possession of Superficies by The Administrative authority

Ching-wen Lin

Abstract

The topic of adverse possession of superficies has been one of controversies. This thesis will discuss the matter of providing legal assurance to the acquirer or the matter of limiting the rights and claim of the applicant. As in July 2010, the Section I of article 118 of The Land Registration Regulation was amended: "Upon the application for the registration of superficies due to positive prescription after the general registration of land, there shall be submitted documents of evidence sufficient to certify the fact of continuous occupation from the beginning of occupation to the application for registration" as a critical document to the application for recording. However, there are no differentiations between the authority of administrative agency and that of the courts in determining the claim of the applicant. These two institutions also hold parallel roles/perspective on the examination as to substance of the above facts. Considering the current recording personnel's lack of professional capability in carrying out examination judiciously, it is arbitrary and inappropriate for the administrative agency to hold the role of examination and assessment of applications. The proposition to abolish this amendment should be considered. This article points out the Land Administration in practice which has only a formal examination function but can't find the implements to exercise the right over possession. Substantive Examination by the authorities that shall contribute to many disputes at hand. The administrative authorities should not make an administrative ruling on private disputes.