

## New Civil Code of Puerto Rico: Real Property Rights

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### An McV Corporate Alert

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This is the fourth of eight Alerts on the recently enacted Civil Code of Puerto Rico (the “New Code”), which will repeal the current Civil Code of 1930, as amended (the “Previous Code”) and which becomes **effective on November 28, 2020**.

This Alert specifically addresses the most relevant changes between the Previous Code and the New Code regarding **Real Property Rights**, which are codified in the Third Book of the New Code. The changes to these rights in the New Code are as follows:

#### ■ Possession of Real Property

- Use of violence to obtain possession: Although Articles 718 and 719 state that the rightful possession of real property cannot be achieved through violence or a violent act, Article 778 suggests that possession may be achieved once the violence ceases. At that point, the applicable terms for adverse possession will begin to elapse.

#### ■ Liens and Encumbrances

- Presumption that Property is free of liens and encumbrances: According to Article 742, a real property is presumed free from any liens, charges, encumbrances or other limitations unless proven otherwise. This presumption was not a part of the Previous Code.

#### ■ Acquisition of Real Property

- Property acquired through capture: Article 747 includes air, flowing water (from rain, rivers, streams, etc.), solar and wind energy among the types of property that can be acquired through their physical capture or seizure. However, Article 747 states that exceptions may apply by virtue of rules and regulations aimed at the identification, protection or preservation of these goods.
- Property found and owner is unknown: Article 749 simplifies the process that applies when property is found and its previous owner is unknown. According to Article 749, whoever finds personal property and its owner is

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unknown must immediately deliver it to the Municipality where it was found. The Municipality will issue a public notice to that effect. If the property cannot be stored without deterioration or without making expenses that significantly diminish its value, it will be sold at a public auction eight (8) days after public notice. If three (3) months elapse from the date of the public notice and nobody claims it, the property found, or its value, will be awarded to whoever found it.

- Water-related accession: Article 756 states that accession due to the flow of water or water-related phenomena (alluvion and avulsion) will be regulated by special legislation.
- Reverse accession when building on other person's property: Article 762 grants additional rights to any person who, in good faith and with proper permits, builds on another person's property (erecting the entire building, or just a portion of it, on the other person's property) and said edification is considerably worth more than the other person's property. Under such a scenario, the person responsible for such edification will have the right to acquire the other person's property (in its entirety or just the portion invaded by the edification) by paying (i) an amount equal to the property's actual value, (ii) indemnification due to any decrease in the remnant property's value, and (iii) indemnification for any damages sustained by the other property's owner.
- Adverse possession: Articles 786 and 788 reduced the period of time necessary to acquire personal and real property through adverse possession. The acquisition of personal property through adverse possession now requires at least 2 years of possession in good faith or at least 4 years of possession without good faith. The acquisition of real property through adverse possession now requires at least 10 years of possession in good faith and with color of title or at least 20 years of possession without good faith or color of title.
- **Emergency Easements and Equitable Servitudes**
  - Temporary right-of-way for emergencies: Article 805 creates a temporary easement -whenever a state of emergency is declared by the Governor- which ensures the right to pass through, and leave necessary materials in, a person's property in order to access another person's property and reinstate a public utility.
  - Equitable servitudes: Equitable servitudes, previously recognized only by Supreme Court case law, are incorporated into the New Code beginning

on Article 813.

- **Common Ownership of Property**

- Protection to co-proprietors: Article 840 now recognizes that any co-proprietor of real property who enjoys the exclusive use of the same but to the detriment of, and without approval from, the other co-proprietors must compensate them in proportion to their ownership share.

- **Usufruct**

- Usufructuary may be reimbursed for improvements: Article 893 states that, upon the termination of the usufruct, any expenses incurred by the usufructuary to renovate and improve the property will be subject to the provisions applicable to good faith possessors, i.e., may be reimbursed. Under the Previous Code, the usufructuary had no right to reimbursement and only had the option to remove said improvements if removal did not damage the property.
- Inventory and bond requirements eliminated: The New Code eliminates the Previous Code's requirement that the usufructuary perform an inventory of the property subject to usufruct and post a bond prior to entering into the enjoyment of said property.

- **Easements**

- Easements may be established by possessor of real property rights: Pursuant to Article 941 of the the New Code, owners of real property and possessors of real property rights may establish easements over parcels of lands. In the case of easements established by possessors of real property rights, the easement shall be effective until the possessor's real property right is extinguished.
- Acquiring Easements by Adverse Possession: Pursuant to Article 945 of the New Code, the acquisition of a continuous and apparent easement through adverse possession now requires 15 years of possession. The Previous Code required 20 years of possession.
- New Types of Forced Easements: Article 956 of the New Code allows owners of real property and possessors of real property rights to establish forced right-of-way easements to connect sanitation, water, energy, communication or new technology services to general networks in certain cases.

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- **Solar and Wind Easements:** Article 963 of the New Code recognizes that owners of real property and possessors of real property rights have a right to use the solar and wind energy that ordinarily reaches the property, which cannot be limited by mutual agreement. Further, if the development of a parcel diminishes the capacity of a facility in an adjoining parcel to produce energy by solar or aeolic means, the owner of the property causing such diminishment must either (i) supply the lost energy at no cost or (ii) allow the affected property owner to transfer, at a shared cost, its existing facility to the property of the owner causing the diminishment.
- **Surface Rights**
  - **Codification of Surface Rights Principles:** A surface right is a real property right that allows a person to construct on, under or over a property or an existing edification owned by another person. The New Code codifies under Articles 971 to 990 the general principles applicable to surface rights recognized in our jurisdiction through case law precedent and certain provisions of the Commonwealth of Puerto Rico Property Registry Act, Act 210-2015, as amended.
- **Real Property Rights as Collateral**
  - **Pledges:** The New Code provides the general principles applicable to pledges. Pursuant to Article 1000 of the New Code, provisions related to pledges are not applicable to security interests constituted under the Puerto Rico Commercial Transactions Act, Act No. 208-1995, as amended.
  - **Mortgages:** The New Code also sets forth the general doctrine of mortgages. Provisions pertaining to the form, constitution, extent and effect of mortgages are contained in the Commonwealth of Puerto Rico Property Registry Act, Act 210-2015, as amended.
- **Preferential Acquisition Rights**
  - **Option to Purchase, Right of First Refusal and Repurchase Rights:** The New Code recognizes three types of preferential acquisitions rights: (i) option to purchase; (ii) right of first refusal (*tanteo*) and (iii) repurchase rights (*retracto*). Provisions specifically relating to the constitution, duration and exercise of such rights were included in the New Code.

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