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REGISTERING MORTGAGES IN THE REAL ESTATE CADASTRE BASED ON A MORTGAGE AGREEMENTS AND IMPLEMENTING CHANGES TO MORTGAGED PROPERTIES**

ABSTRACT: This paper addresses the formal and practical challenges faced by the relevant Real Estate Cadastre Office when processing changes related to mortgaged real estate. When a mortgage is registered based on a mortgage agreement in the Cadastre database, it has legal implications. Making changes to a mortgaged real estate implies altering the subject of the mortgage. However, the real estate owner cannot change the subject of the mortgage without the consent of the mortgage creditor. Since any factual change requires proper registration in the Real Estate Cadastre, it is essential to submit the necessary documents that serve as the legal basis for registration. The paper also examines specific cases that involve making changes to the subject of the mortgage.

Keywords: mortgage agreement, documents for registration, consent of the mortgage creditor, implementation of changes, real estate cadastre

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INTRODUCTION

The Mortgage Law governs the right of mortgage on real estate as a means of securing a creditor's claim. It covers the mortgage agreement, the rights and obligations of the contracting parties, the registration of the mortgage in the Real Estate Cadastre database, the settlement of mortgage creditors, and the termination of the mortgage. The adoption of the Mortgage Law in the Republic of Serbia has provided greater legal certainty and efficiency in mortgage relations. The Mortgage Law defines a mortgage as follows:

“A mortgage is a lien on real estate, which empowers the creditor, in the event of the debtor's failure to pay a matured debt, to request the collection of the claim secured by the mortgage (hereinafter: the claim) from the value of the real estate. This right takes precedence over ordinary creditors and junior mortgage creditors (hereinafter: the creditor), regardless of who is in the actual possession of the real estate.”¹

A mortgage agreement or mortgage deed, as defined by the Mortgage Law, is a contract between a real estate owner and a creditor by which the real estate owner undertakes the obligation to institute a mortgage in favor of the creditor to satisfy a secured claim in a manner set forth by law should the debt remain unpaid at maturity. The agreement can either be an independent, standalone document or part of a broader contract governing the claim, such as a loan or credit agreement. It can be concluded by the real estate owner, another authorized party, an investor, or the buyer of a property or a part of a property under construction. It must be formalized as a notarial deed (notarized affidavit) or a document certified (solemnized) by a notary public.²

The registration of a mortgage is initiated at the request of the real estate owner, debtor, or creditor. However, since the adoption of the Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities,³ the documents required for mortgage registration are submitted *ex officio* by a notary public or through e-service by a professional user, such as an attorney. Upon the submission, the competent Real Estate Cadastre Office (hereinafter: RECO) is obliged to issue a decision and conclude the registration process within five working days unless otherwise provided.

¹ Mortgage Law, Art. 2, *Official Gazette of the RS*, No. 115/2005, 60/2015, 63/2015. – decision of the CC and 83/2015.

² Mortgage Law, Arts. 9 and 10.

³ Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, *Official Gazette of the RS*, No. 41/2018, 95/2018, 31/2019, 15/2020 and 92/2023.

When making changes to a mortgaged real estate, such as demolition, reconstruction, extension, or division and consolidation of cadastral parcels, it is common practice for the Real Estate Cadastre (hereinafter: Cadastre) to require the consent of the mortgage creditor to be provided along with the documents necessary for registering these changes. If this consent is not provided, the request for mortgage registration is suspended, denied, or dismissed by a formal decision. Under the Mortgage Law, mortgage creditors generally do not withhold consent for changes to the mortgaged real estate without valid justification and usually precisely specify what their consent includes.

In the process of aligning the actual state of a mortgaged real estate with the records in the Cadastre, both the real estate owner and the competent RECO are required to act in accordance with the Mortgage Law. We will analyze specific cases involving changing the subject of the mortgage registration, detailing when it is necessary to provide the mortgage creditor's consent together with the documents for registration and when including a simple justification in the decision is enough to get the registration approved.

MORTGAGE AGREEMENT

A mortgage agreement is a contract established between a real estate owner and a creditor by which the real estate owner commits to instituting a mortgage in favor of the creditor for the purpose of satisfying a secured claim.⁴ The mortgage agreement includes the following elements: 1) name and surname, permanent or temporary residence, or business name and registered office of the creditor, the owner (pledgor), or debtor, should these be different persons; 2) detailed information about the secured claim, including the currency of payment, amount of each installment and their deadlines, interest rates, as well as the maturity date of the claim; 3) information about the mortgaged real estate; 4) details about all elements of the real estate, including integral parts and *fructus naturales* of the real estate, fixtures, and any improvements in or accretions to the value of the real estate.⁵ The mortgage agreement serves as the legal foundation for the obligation to establish a mortgage through registration in the Cadastre. Once registered, the mortgage takes full legal effect. The subject of the mortgage agreement is the registration of the mortgage to secure the creditor's monetary claim, while...

⁴ Mortgage Law, Art. 9.

⁵ *Ibid.*, Arts. 5 and 12.

“..the following can be the subject of the mortgage itself as a secured right (lien) over real property – 1) immovable (real) property (ownership rights over land, property and the like); 2) part of an immovable (real) property, in accordance with the decision on partition; 3) co-ownership share in immovable (real) property; 4) a separate part of a building that is subject to ownership or another right, including the right to disposal (apartments, commercial spaces, garages, parking spaces, etc.); 5) right to land authorizing free legal disposal, particularly the right to construction and the right to priority construction or disposal of state and/or community property; 6) a property under construction, as well as a separate part of the property under construction (apartments, commercial spaces, garages, etc.), irrespective of whether completed or not, provided that a valid building permit has been issued in conformity with the law governing the construction of the property.”⁶

In analyzing the legally defined subject of a mortgage, we find that immovable (real) property can be designated as the subject of a secured right in its entirety (as a whole), as a specific share, in co-ownership, or tenancy in common (joint) ownership. If a mortgage is registered on a specific portion, that is, part of a real estate, it must be clearly defined. If this is not possible, it is necessary to either divide the cadastral parcel or establish separate units within the property using subdivision. For the registration of a mortgage on co-ownership shares, the consent of other co-owners whose shares are not being mortgaged is not required, except when the mortgage is based on an ideal share of a property under construction, in which case the consent of all co-owners is necessary. Furthermore, when establishing a mortgage on real estate held in common, e.g., joint ownership, the consent of all joint owners is mandatory.⁷

“The first significant innovation introduced by the Mortgage Law is the ability to secure a property under construction, as well as a separate part of a property under construction. This change addresses an anomaly in Serbian land law, specifically the absence of the principle of *superficies cedit solo* in areas designated for construction.”⁸

Registering a mortgage on a property under construction, as well as on specific units, e.g., separate parts within such property, is permitted, provided that a legally binding construction permit has been issued. This provision aims to facilitate financing for construction investors, individuals, and businesses that require loans to purchase real estate, pointing to the fact that the law has

⁶ Mortgage Law, Art. 3.

⁷ *Ibid.*, Art. 6.

⁸ Živković, M. (2016). *Novo hipotekarno pravo u Republici Srbiji*. Belgrade: Faculty of Law.

recognized and addressed this need. Properties under construction are defined as properties that have not yet been completed, as well as properties that have not yet been officially registered or are only pre-registered in the Cadastre. This lack of registration stems from the disorganization of the legal framework and the absence of unity regarding laws governing real property. At the time the Mortgage Law was enacted, investors typically did not own land; instead, they held usage rights that could not be transferred or could only be transferred alongside a legally completed structure, e.g., real property. In practice, this meant that the land itself, as well as the property under construction, could not be mortgaged.⁹ During this time, when investors lacked ownership of the land, a first-order note (sourced from the land registry) was registered instead to ensure the establishment of a mortgage once the property was completed. A mortgage on a property under construction is registered on the cadastral parcel, that is, the land that the investor is listed as the owner of in the Cadastre database.¹⁰ The enactment of the Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities has made the process of registering a mortgage on a property under construction faster and more efficient. This improvement comes from notaries now submitting registration documents *ex officio* and the Republic Geodetic Authority finalizing the registration within five working days.¹¹ Since the authority responsible for issuing construction permits is required to submit confirmation of work registration and a legally binding construction permit to the competent RECO for the registration of a property under construction, providing the construction permit as proof of legal continuity along with the registration documents is no longer necessary. This is based on the Unified Guide on the Application of the Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities issued by the Republic Geodetic Authority.¹² In such cases, the authority to mortgage the property comes not from cadastral registration but from the documents reviewed by the notary public. Properties and separate parts of properties under construction are considered distinct types of properties. As a result, the decision to register a mortgage on a cadastral parcel does not have to await finalization before the next case of registering a mortgage on another part of the property under construction is addressed. This approach

⁹ Hiber, D., Živković, M. (2015). *Obezbeđenje i učvršćenje potraživanja*. Belgrade, p. 235.

¹⁰ Mortgage Law, Art. 11.

¹¹ Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, Art. 36.

¹² Announcement of the Republic Geodetic Authority No. 952-02-1043/2018-5, available at <https://www.rgz.gov.rs>. Accessed on March 1, 2024.

aims to enhance the efficiency and cost-effectiveness of the process and is in accordance with Article 31 of the Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities.¹³ If an appeal is filed against a decision to register a mortgage on a property under construction, and the competent RECO is unable to address the concerns and, thus, forwards the case to a higher authority, the “note” indicating that an appeal has been filed will not hinder further registrations on that cadastral parcel. Once the usage permit is issued and the property and its separate parts are registered in the Cadastre database, the mortgages will automatically be removed from the cadastral parcel and registered or “transferred” on the completed property and its separate parts.¹⁴ While the legal framework has strengthened security by requiring notaries public and other obligated parties to submit registration documents within specified deadlines, thereby minimizing the risk of abuse and multiple sales of apartments, there are still risks associated with purchasing properties under construction. For example, potential issues such as the death or bankruptcy of the investor may result in incomplete projects and property units. Despite these risks, banks continue to approve loans for purchasing apartments under construction.

CONCLUSION OF THE MORTGAGE AGREEMENT

A mortgage is a lien on real estate, granting the mortgage creditor the right and priority to satisfy their outstanding secured claims from the value of the mortgaged real estate through its sale. As a real property right, a mortgage is characterized by its extensiveness, meaning it extends to any improvements and increases in the real estate’s value that occur after the mortgage is established.¹⁵ Property rights are *erga omnes* rights, meaning they affect all, or in other words, apply to everyone. The effect of a mortgage as such implies that third parties can be made aware of its existence. This “absolute effect is achieved through dual publicity: the publicity of the mortgaged property and the secured claim, which is established by registering the mortgage in the Cadastre.”¹⁶ The Cadastre database logs the creation, modification, and termi-

¹³ Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, Art. 31.

¹⁴ Mortgage Law, Art. 11, para. 2, point 1.

¹⁵ Hiber, D., Živković, M. (2015). *Obezbeđenje i učvršćenje potraživanja*. Belgrade, p. 225.

¹⁶ Lazić, M. (2000). Značaj javnog registra za hipoteku. *Annals of the Faculty of Law in Niš*, 97.

nation of mortgages to ensure security, efficiency, and transparency, making all registered property rights public and accessible to anyone. The *erga omnes* effect allows the mortgage creditor to protect their interests in the event of a legal transfer (sale) of the mortgaged real estate or any damage or alterations to it. At the same time, this effect also benefits the mortgage debtor (the real estate owner) by eliminating the need to prove the absence of hidden liens, based on the principle that the information recorded in the Cadastre is accurate and trustworthy. This public nature of property rights enhances legal certainty.¹⁷ With the digitalization of the Cadastre database, this information is now available to anyone, at any time, in compliance with the Law on Personal Data Protection¹⁸ and international standards.¹⁹

The Mortgage Law defines that a mortgage can be established based on an agreement or judicial settlement (contractual mortgage), a mortgage deed/lien statement (unilateral mortgage), a statute (statutory mortgage), and a court decision (judicial mortgage), with the contractual mortgage rules applying *mutatis mutandis* to unilateral, statutory and judicial mortgages unless otherwise provided by law.²⁰ According to the legal definition of a mortgage agreement, one can be concluded between a creditor and the owner of the real estate. Since the owner can either be the debtor or a third party, the condition for entering into the agreement is met as long as the party has ownership or disposal rights over the real estate.²¹ For a mortgage agreement to be valid, the mutual consent of both parties, the creditor and the real estate owner (who is usually the debtor) or a third party, is required, guaranteeing the repayment of another's debt by registering the mortgage on their real estate. The inclusion of a *commissoria* clause and *pactum marcianum* is prohibited in a mortgage agreement. Additionally, any provision allowing *antichresis*, where the mortgage creditor could utilize the mortgaged real estate to gain profit, is void.²² Unlike the creditor, the debtor retains the right to use the mortgaged real estate, which facilitates the repayment of the debt.

The subject of a contract is a fundamental condition for creating a contractual relationship, often described as “what the contract is about” in legal

¹⁷ Lazić, M. (2000). Značaj javnog registra za hipoteku. *Annals of the Faculty of Law in Niš*, 97.

¹⁸ Law on Personal Data Protection, *The Official Gazette of the RS*, No. 87/2018.

¹⁹ Available at <https://www.rgz.gov.rs>. Accessed on June 15, 2024.

²⁰ Mortgage Law, Art. 8.

²¹ Dolović, K. (2/2010). Uloga javnog beležnika kod založnog prava na nepokretnosti. *Strani pravni život*, p. 300.

²² Hiber, D., Živković, M. (2015). *Obezbeđenje i učvršćenje potraživanja*. Belgrade, p. 245.

theory. Although the Law on Contracts and Torts does not specifically define the subject of a contract, it implies that it consists of certain obligations (such as providing something, taking action, refraining from action, or enduring something).²³ Within a mortgage agreement, the subject is the establishment of a mortgage on real estate in favor of the creditor. Therefore, it must be clearly defined both in terms of the required legal provisions and the precise identification of the property based on Cadastre records.

Slobodan Perović interprets the cause of a contract as the immediate legal purpose or a key motivation that drives a party to enter into the agreement.²⁴ The Law on Contracts and Torts uses terms like “contract purpose,” “basis,” or “decisive motive”²⁵ to describe the cause of a contract, leading to the conclusion that the primary purpose of a mortgage agreement is securing the creditor’s claim.

The Mortgage Law requires that a mortgage agreement be concluded in the form of a notarial deed or a document certified (solemnized) by a notary public.²⁶ This means that a mortgage agreement is a formal contract that, unless executed in the legally prescribed form, will not have any legal effect and will be considered null and void.

A notarial deed is a notarial document prepared by a notary public that carries the authority of an official public document.²⁷ A mortgage agreement and a pledge statement are drawn up in the form of a notarial deed when they include an explicit declaration by the obligated party stating that, based on the mortgage agreement or pledge statement, forced execution will be carried out directly upon the obligation’s maturity, either through judicial or extrajudicial means.²⁸

Concluding a contract in the form of a notarial deed requires a greater level of involvement from the notary public. The notary is responsible for drafting the agreement, ensuring the will of the contracting parties is respected, and overseeing both the proper form and content of the agreement, as well as the solemnization clause.

²³ Pajtić, B., Radovanović, S, Dudaš, A. (2018). *Obligaciono pravo*. Novi Sad.

²⁴ Dudaš, A. (1/2012). Shvatanja o kauzi ugovora u domaćoj civilistici po usvajanju Zakona o obligacionim odnosima. *Annals of the Faculty of Law in Novi Sad*, p. 483.

²⁵ See more: Dudaš, A. (1/2010). Kauza ugovorne obaveze prema Zakonu o obligacionim odnosima Republike Srbije. *Annals of the Faculty of Law in Novi Sad*, pp. 147–168.

²⁶ Mortgage Law, Art. 10.

²⁷ See Arts. 6. and 7. of the Law on Public Notaries, *The Official Gazette of RS*, No. 31/2011, 85/2012, 19/2013, 55/2014 – as amended., 93/2014 – as amended., 121/2014, 6/2015 and 106/2015.

²⁸ Law on Public Notaries, Art. 82.

A mortgage agreement or pledge statement is prepared in the form of a notarially certified (solemnized) document if it does not contain an explicit declaration by the obligated party allowing forced execution upon the maturity of the obligation.²⁹ Before certifying a mortgage agreement, the notary public will examine whether it meets the requirements for certification by assessing whether the conditions related to the parties' capacity to enter into the contract and the legality of the contract itself are met.³⁰

The rules governing the content and form of mortgage agreements also apply to unilateral mortgages, which are created through a unilateral declaration of intent by the debtor or property owner (pledge statement). This is the most common legal basis for establishing a mortgage in practice.³¹

THE MORTGAGE AGREEMENT AS A DOCUMENT FOR THE REGISTRATION OF A MORTGAGE IN THE REAL ESTATE CADASTRE DATABASE

By registering a mortgage on a real estate in the Cadastre database based on a mortgage agreement, certain rights and obligations are established. As a result,

“...the registration has a constitutive character, meaning that mortgage rights, as a non-possessory pledge (lien), cannot be established in any other way. In this case, the public registry registration serves as the sole means of making the right publicly known. Therefore, not only is the mortgage valid only once registered, but it cannot exist without being recorded in the Cadastre.”

For registration and establishment of a mortgage as a real property right to be valid, both a legal basis (*iustus titulus*) and a method of acquisition (*modus acquirendi*) are required.³² Legal doctrine emphasizes that a mortgage is the most “registration-dependent” of all real estate rights recorded in the Cadastre, as it is difficult to imagine a mortgage existing without being registered.³³ The Mortgage Law stipulates that the registration of a mortgage shall be carried out at the request of the property owner, their guardian or legal

²⁹ Law on Public Notaries, Art. 93.

³⁰ Mišćević, N. (3/2015). Forma ugovora o hipoteci. *Annals of the Faculty of Law in Novi Sad*, p. 1409.

³¹ Hiber, D., Živković, M. (2015). *Obezbeđenje i učvršćenje potraživanja*. Belgrade, 247.

³² Cvetić, R. (2016). *Savremena evidencija nepokretnosti*. Novi Sad, pp. 105–107.

³³ *Ibid.*, 226.

representative, the debtor (mortgagor), and the creditor (mortgagee).³⁴ By concluding the mortgage agreement, the property owner is obligated to establish the mortgage in favor of the creditor. An integral part of the document is the owner's unconditional statement of consent to the mortgage being registered on their real estate (*clausula intabulandi*). Dilemmas and proof of guilt arise if any party fails to submit a request for mortgage registration, potentially putting not only the real estate owner at risk of defaulting to debt but also exposing the creditor to challenges in satisfying their claims and impacting third parties affected by the registration. These issues have been addressed with the adoption of the Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, as the registration process is now carried out *ex officio*, adhering to the principle of officiality.³⁵ When examining the process of submitting the documentation for mortgage registration in the Cadastre according to the Law on Mortgages and the Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, inconsistencies can be observed in the legal norms concerning the parties required to submit the document to the competent RECO. It cannot be stated with certainty that there is a conflict of laws here, as there is no disagreement about which law should apply despite the inconsistencies in the legal norms, considering that

“..it is important to emphasize that the principle of *ex officio* procedures does not rule out the possibility of initiating and conducting the process based on the same legal grounds at the request of a party unless explicitly prohibited by law. This approach mitigates state intervention in private legal matters, ensuring that parties aren't completely excluded from the legal outcomes of their civil cases.”³⁶

The notary public, as the obligated party for submitting documents for mortgage registration in the Cadastre, undoubtedly applies the law governing the registration process. This not only ensures the relevance and efficiency of the procedure but also meets modern needs that reflect technological trends,

³⁴ Mortgage Law, Art. 11.

³⁵ See Art. 3 of the Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities.

“The principle of officiality implies that the registration process with the Cadastre is initiated and conducted *ex officio*, based on the submission of a document by the obligated party that issued, drafted, certified, or notarized the document that serves as the legal basis for registration. This principle does not preclude the possibility for the process to also be initiated and carried out at the request of a party unless otherwise restricted by law.”

³⁶ Cvetić, R. (2019). Nova pravila u postupku upisa u katastar nepokretnosti. Upis zajedničke svojine supružnika. *Annals of the Faculty of Law in Novi Sad*, pp. 1170–1171.

such as submitting documents via “electronic service desks,”³⁷ “electronic documents”³⁸, and “electronic requests”³⁹).

The obligated party submits the mortgage agreement to the competent RECO to establish a lien on the real estate. When processing the request, the Cadastre reviews both the general conditions and the formal requirements for registration. At the time of submitting the registration request, the real estate must already be registered in the Cadastre. Registration is only permitted against a person already listed in the Cadastre as the holder of rights related to the registration request or if the application is accompanied by documents proving legal continuity between the person being registered and the previously registered party. The mortgage agreement, as a document for registration, must include the place and date of drafting, e.g., notarization, a description of the property based on the Cadastre records, and the following details: the individual’s surname, first name, and parent’s name, along with their personal identification number. For foreign individuals, the agreement must also include their passport number, while legal entities must provide their name, registered office address, and company registration number.⁴⁰

When deciding on registration based on the document submitted by the obligated party, the RECO shall verify whether:

“1) it is competent for handling the submitted document; the obligated party has performed the delivery of the document; the document forming the basis for the modification registration has been adopted, compiled, certified, or authorized under the actual responsibilities defined by law; 2) the document representing the legal basis for registration with the Cadastre has been submitted *ex officio*, as well as any other documents prescribed by law; 3) the information regarding the real estate and involved parties listed in the documents which serve as the basis for registration align with the current status of the Real Estate Cadastre at the time of deciding on the registration.”

If the specified formal conditions for registration are not met and the RECO finds that there is no room for further procedure, it shall issue a decision on suspension of the procedure.⁴¹ When deciding on a registration request

³⁷ Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, Art. 2, para. 2, point 9.

³⁸ *Ibid.*, Art. 2, para. 2, point 10.

³⁹ *Ibid.*, Art. 2, para. 2, point 14.

⁴⁰ Law on State Survey and Cadastre, *Official Gazette of RS*, No. 72/2009, 18/2010, 65/2013, 15/2015 – decision of the CC, 96/2015, 47/2017 – authentic interpretation, 113/2017 – as amended., 27/2018 – as amended., 41/2018 – as amended. and 9/2020 – as amended. and 92/2023, Arts. 83–86.

⁴¹ Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, Art. 32.

submitted via e-service desk by professional users, the RECO shall check for compliance with the formal requirements for registration, including:

“1) whether it is competent for handling the request; whether the request is submitted by an obligated party (which may include a party to the procedure, a legal representative, or a duly authorized representative or proxy of that party), and whether the document forming the basis for the modification registration has been adopted, compiled, certified, or authorized under the actual responsibilities defined by law; 2) whether there is a legal interest in submitting the request in cases where it is submitted by a third party whose rights, obligations, or legal interests may be affected by the outcome of the registration process; 3) whether the request contains all the prescribed information; 4) whether the request is accompanied by a document, which forms the legal basis for registration with the Cadastre, as well as all any other documents prescribed by law; 5) the information regarding the real estate and involved parties listed in the documents which serve as the basis for registration align with the current status of the Real Estate Cadastre at the time of deciding on the registration. If the formal conditions for registering the requested modification are not met, the RECO shall issue a decision on dismissal of the request.”⁴²

A registration with the Cadastre based on submitted documents for mortgage registration is completed within five working days. This efficient registration process reduces the potential for misuse in the real estate market. The obligated party is required to submit the document to the relevant RECO via e-service within the legal deadlines, which enhances the timeliness of the data recorded in the Cadastre. This approach also addresses the previous issue of inertia among rights holders who often failed to submit the documents required for registration despite their legal obligation to do so.⁴³

A mortgage agreement is submitted by the obligated party *ex officio*, after which the relevant RECO issues a resolution. In the past, mortgages used to be entered into the database by inputting the entire textual content of the pledge statement or mortgage agreement, which unnecessarily burdened the system.⁴⁴ Today, in line with legal requirements, mortgages are registered using only the essential information on the creditor and debtor (name, surname, parent's name, personal identification number, and address for individuals, or the name, registered office, and company registration number for legal entities, as well as the amount of the secured claim, currency, interest rate, the basis for

⁴² Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, Art. 33.

⁴³ *Ibid.*, Art. 23.

⁴⁴ Hiber, D., Živković, M. (2015). *Obezbeđenje i učvršćenje potraživanja*. Belgrade, p. 248.

the registration and the validity period).⁴⁵ To enhance efficiency and reduce costs, the relevant RECO combines the procedures for registering mortgages and changing property rights holders.⁴⁶ Since the adoption of the Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, the process of registering a mortgage is carried out *ex officio* upon receiving the document from the obligated party. However, the registration process can be initiated at the request of a party only for documents that the obligated party was not legally required to submit. After receiving the registration request, a decision has to be rendered within fifteen working days, except in cases involving the registration of a mortgage, notion on mortgage sale, or other simpler administrative matters, when RECO must act within five working days from receiving the request.⁴⁷ In addition to the legally required content, the decision on mortgage registration must also include the amount of the fee for registering the mortgage with the Cadastre. This fee is based on the amount of the secured claim, and the obligated party responsible for the payment is the individual in whose favor the right is being registered. In the case of registering a mortgage agreement, this is the creditor.⁴⁸ If the individual benefiting from the registration is exempt from paying the fee for services provided by the Republic Geodetic Authority,⁴⁹ the RECO is required to review the contract to determine whether the notary public has specified who will bear the registration costs in the confirmation clause. If the contract states that the debtor is responsible for the registration fees, the RECO will act in accordance with the terms of the contract. If a mortgage agreement or pledge statement involves properties under the jurisdiction of multiple RECOs, and the mortgage is registered based on the same legal basis – the contract – the RECO that completes the registration first and requires the obligated party to pay the fee will send a decision to the other RECOs and notify them *ex officio*. This process eliminates the need to issue certificates that previously served as proof of fee payment, for which parties also had to submit requests in the past.

⁴⁵ Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, Art. 9.

⁴⁶ *Ibid.*, Art. 35.

⁴⁷ *Ibid.*, Art. 36.

⁴⁸ Law on Tax Procedure and Administration, Art. 215b, *Official Gazette of RS*. 43/2003, 51/2003, – corrected, 61/2005, 101/2005. – as amended., 5/2009, 54/2009, 50/2011, 70/2011. – harmonized dinar amounts, 55/2012. – harmonized dinar amounts, 93/2012, 47/2013, – harmonized dinar amounts, 65/2013. – as amended, 57/2014. – harmonized dinar amounts, 45/2015. – harmonized dinar amounts, 83/2015, 112/2015, 50/2016. – harmonized dinar amounts, 61/2017. – harmonized dinar amounts, 113/2017, 3/2018. – corrected, 50/2018. – harmonized dinar amounts, 95/2018, 38/2019. – harmonized dinar amounts, 86/2019, 90/2019. – corrected, 98/2020. – harmonized dinar amounts, 144/2020, 62/2021. – harmonized dinar amounts, 138/2022. and 54/2023. – harmonized dinar amounts and 92/2023.

⁴⁹ Law on Tax Procedure and Administration, Art. 18.

IMPLEMENTING CHANGES IN THE REAL ESTATE CADASTRE DATABASE FOR MORTGAGED REAL ESTATE

Making changes in the real estate cadastre based on a document for registration on a mortgaged real estate has legal effects, creating rights and obligations for the property owner (and debtor, if they are different individuals), the authority responsible for officially approving the registration, as well as the creditor in whose benefit the mortgage is established.

In the Cadastre database, changes to mortgaged real estate are made based on registration documents. These changes include updating the rights holder as well as information regarding the shape and size of the real estate. For any modifications to real estate or property encumbered by a mortgage, the owner must obtain consent from the mortgage creditor. Such changes may involve extensions, restructuring, and demolition of the property, as well as merging or subdividing cadastral parcels. The mortgage creditor will not withhold their consent without valid justification.⁵⁰

When implementing such changes on mortgaged real estate, most RECOs require the registration document to be accompanied by the mortgage creditor's consent. If this consent is missing, the request for the proposed changes is either suspended, denied, or rejected by a formal decision. In line with the Mortgage Law, mortgage creditors do not withhold consent for altering mortgaged real estate without a valid reason and clearly specify what their consent involves in the document. Given the short deadlines for registration established by the enactment of the Law on the Registration Procedure in the Real Estate and Infrastructure Cadastre, a decision to suspend the procedure or deny a request for changes is made when an "appropriate registration document"⁵¹ has not been submitted or when the applicant has failed to comply with the notice. Examples that allow for different interpretations of Article 17 of the Mortgage Law include appeals against decisions⁵² to suspend proceedings due to a lack of consent from the mortgage creditor, arguing that such consent is not required for making certain changes, as well as appeals against

⁵⁰ Mortgage Law, Art. 17.

⁵¹ Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, Art. 2. "Appropriate registration document is a document issued or compiled, certified or authenticated by the competent authority or other submitting entity, which implies the need to enter or amend the data entered in the real estate cadastre and which contains the prescribed data necessary for such entry, corresponding to the state of the cadastre."

⁵² Decision of the Republic Geodetic Authority No. 952-02-20-095-33664/2020 from 19. 12. 2021.

decisions⁵³ on registering mortgages in cases when the creditor's consent was not sought in the process of demolishing a property, that is, removing it from the Cadastre database based on a Geodetic Work Report.

These examples prompt reflection on how to overcome inconsistencies in applying the legal provision when making changes to mortgaged real estate. If we assume the legislature's intent is precise, we should not interpret Article 17 of the Mortgage Law as an oversight in failing to specify that a property's demolition or removal involves its deregistration from the Cadastre registry and that the system will automatically remove the mortgage. Instead, we should seek an interpretation aligned with the *ratio legis*.

To determine whether the owner of a mortgaged property has acted contrary to Article 17 of the Mortgage Law, we should consider **whose intent is driving the changes to the mortgaged real estate**.

If the real estate owner does not act responsibly and decides to change the mortgaged real estate of its own accord by subdividing or merging it with another real estate, we believe it's important to follow certain steps: when submitting a request to record such changes in the Cadastre database, the owner should provide not only the registration document (Geodetic Work Report) but also obtain consent from the mortgage creditor in order for the mortgage to be transferred to the new cadastral parcels.⁵⁴

If the mortgage was registered on a property that was improperly constructed, which led to it being demolished, e.g., removed from the Cadastre based on a decision on demolishing illegally constructed buildings based on the Building Legalization Law,⁵⁵ there is no need to provide the mortgage creditor's consent. In such cases, instead of consent, the provisions of the Mortgage Law will apply. Therefore, the reasoning for the decision should state that the risk of a possible demolition of an improperly constructed building on which a mortgage has been registered is borne by the real estate owner, debtor, and creditor, in accordance with their internal relationships, as specified in Article 11, Paragraph 5 of the Mortgage Law.⁵⁶ It is also worth noting that Article 45, Paragraph 2 of the Mortgage Law states that if the owner restores the subject of the mortgage (the mortgaged real estate), the mortgage will be automatically re-established by law.⁵⁷ This provision indicates that, when implementing such changes in the real estate Cadastre database, the authorities are required

⁵³ Decision of the Republic Geodetic Authority No. 952-02-20-095-8811/2021 from 27. 3. 2022.

⁵⁴ Mortgage Law, Art. 23.

⁵⁵ Building Legalization Law, *Official Gazette of the RS*, No. 96/2015, 83/2018, 81/2020. – decision of the RS, 1/2023. – Decision of the CC and 62/2023.

⁵⁶ Mortgage Law, Art. 11, para. 5.

⁵⁷ *Ibid.*, 45, para. 2.

to remove the mortgage registered on the demolished property and re-register it on the newly restored property. It also requires them to issue a decision to the mortgage creditors, who retain the right to appeal if they disagree with these changes.

If a decision on the legalization of buildings is submitted as a document for registration, altering the size or shape of the building, e.g., property, the RECO does not require the mortgage creditor's consent from the property owner. This is due to the change being registered independently of the owner's will, as the owner of the mortgaged property is obliged to align the factual state of the property with the legal one. Thus, in such cases, the mortgage creditors are simply notified about any implemented changes and granted the right to appeal the decision. The authority issuing the legalization decision is responsible for obtaining this consent, as it is the basis on which the Cadastre records the noted change.

If the subject of mortgage is destroyed by force majeure, such as a flood, fire, or earthquake, or any event beyond the owner's control, assuming they maintained it with due care and acted as a responsible owner or diligent businessperson, the reason for demolition must be recorded in the Cadastre database. Following this, the Cadastre Office will provide an appropriate explanation outlined in its decision. Article 45 of the Mortgage Law applies here, stating that the mortgage automatically ceases to exist if the subject of the mortgage, e.g., the property, is completely destroyed. The owner may also request the mortgage to be deregistered, and if the property is rebuilt, the mortgage will be re-established, that is, re-registered by law. Article 46 of the Mortgage Law specifies that, in the event of total or partial destruction of a mortgaged property, the mortgage creditor automatically acquires a lien on the insurance claim indemnity or the paid-out indemnity. This compensation is then distributed among mortgage creditors based on the priority of their mortgage registrations, so obtaining the mortgage creditor's consent is not required.⁵⁸

A mortgage may also cease to exist with the aim of satisfying public interest (such as in cases of expropriation). According to Article 47 of the Mortgage Law, the mortgage is removed from the Cadastre at the request of the new owner of the mortgaged real estate, while the mortgage creditor settles their claim by acquiring a lien on the compensation indemnity or the paid-out indemnity. If another real estate is acquired as compensation for the expropriated property in the public interest, the mortgage is then transferred and registered on the property granted to the original owner instead of the real estate that was seized in the public interest.⁵⁹ For RECO, this provision

⁵⁸ Mortgage Law, Arts. 45. and 46.

⁵⁹ Mortgage Law, Art. 47.

means that during the transfer of ownership (if the expropriation decision does not specify the real estate to which the mortgage is transferred or does not instruct for its deregistration), the RECO will deregister the mortgage only upon request from the new owner of the mortgaged property, even if the mortgage has already been terminated. To improve the efficiency of the registration process, the decision on the transfer of ownership rights must clearly instruct the Republic Geodetic Authority and relevant RECO to remove the registered mortgage from the registry.

When deregistering a mortgage during the transfer of ownership rights based on a decision by the Restitution Agency or a Commercial Court ruling due to asset sales in bankruptcy proceedings, the mortgage is removed from the registry without the mortgage creditor's consent. The RECO simply notifies the mortgage creditors of the change, granting them the option to appeal the decision as parties involved in the process.

CONCLUSION

A mortgage agreement in the form of a notarial deed or a notarized (solemnized) document serves as the legal basis for registering a lien in the Cadastre database. Since a mortgage is acquired and takes legal effect only upon registration in the relevant Cadastre (*modus acquirendi*), it is essential, at the time of registration as well as during making any changes, to verify that the document meets the formal requirements for entry into the Cadastre. A detailed analysis of the registration process in the Cadastre includes the procedure for registering a mortgage on a parcel when the mortgaged real estate is under construction, as well as the registration requirements when the mortgaged property is held in co-ownership or joint ownership.

Furthermore, emphasis is placed on the form of the contract, which is a necessary requirement for the validity of a mortgage agreement. The paper also addressed cases involving implementing changes in the Cadastre database for real estate encumbered by a lien. Such changes include demolition, reconstruction, and extensions of property, as well as the division and consolidation of cadastral parcels. The purpose of these Cadastral changes is to align the actual state of real estate with the one in the Cadastre records. In this regard, the paper examined cases where it is necessary to obtain the mortgage creditor's consent and attach it to the document serving as the basis for implementing these changes, as well as cases where it is sufficient to explain the requested change in the decision without submitting the mortgage creditor's consent.

Uniformity in procedures carried out by the Cadastre when implementing changes on mortgaged real estate would enhance the security and reliability of the Cadastre. If, *de lege ferenda*, the Mortgage Law were to include specific provisions detailing cases where the mortgage creditor's consent is required for making changes to mortgaged real estate, this would eliminate current ambiguities found in practice, thereby promoting greater transparency and efficiency in Cadastre operations.

BIBLIOGRAPHY

- Dolović, K. (2/2010). Uloga javnog beležnika kod založnog prava na nepokretnosti. *Strani pravni život*.
- Dudaš, A. (1/2010). Kauza ugovorne obaveze prema Zakonu o obligacionim odnosima Republike Srbije. *Annals of the Faculty of Law in Novi Sad*.
- Dudaš, A. (1/2012). Shvatanja o kauzi ugovora u domaćoj civilistici po usvajanju Zakona o obligacionim odnosima. *Annals of the Faculty of Law in Novi Sad*.
- Živković, M. (2016). *Novo hipotekarno pravo u Republici Srbiji*. Belgrade: Faculty of Law.
- Lazić, M. (2000). Značaj javnog registra za hipoteku. *Annals of the Faculty of Law in Niš*.
- Miščević, N. (3/2015). Forma ugovora o hipoteci. *Annals of the Faculty of Law in Novi Sad*.
- Pajtić, B., Radovanović, S, Dudaš, A. (2018). *Obligaciono pravo*. Novi Sad.
- Perović, S. (1980). *Obligaciono pravo*. Belgrade.
- Hiber, D., Živković, M. (2015). *Obezbeđenje i učvršćenje potraživanja*. Belgrade.
- Cvetić, R. (2019). Nova pravila u postupku upisa u katastar nepokretnosti. Upis zajedničke svojine supružnika. *Annals of the Faculty of Law in Novi Sad*.
- Cvetić, R. (2016). *Savremena evidencija nepokretnosti*. Novi Sad.

Laws and other regulations

- Law on State Survey and Cadastre, *Official Gazette of the RS*, No. 72/2009, 18/2010, 65/2013, 15/2015 – decision of the CC, 96/2015, 47/2017 – authentic interpretation, 113/2017 – as amended, 27/2018 – as amended, 41/2018 – as amended and 9/2020 – as amended and 92/2023.
- Law on Personal Data Protection, *Official Gazette of the RS*, No. 87/2018.
- Law on Public Notaries, *Official Gazette of the RS*, No. 31/2011, 85/2012, 19/2013, 55/2014 – as amended, 93/2014 – as amended, 121/2014, 6/2015 and 106/2015.
- The Law of Contracts and Torts, *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89. – decision of the CC and 57/89, *Official Gazette of SRY*, No. 31/93, *Official Gazette of Serbia and Montenegro*, No. 1/2003. – Constitutional Charter and *Official Gazette of the RS*, No. 18/2020.

Building Legalization Law, *The Official Gazette of the RS*, No. 96/2015, 83/2018, 81/2020. – decision of the RS, 1/2023. – decision of the CC and 62/2023.

Law on the Registration Procedure with the Cadastre of Real Estate and the Cadastre of Utilities, *Official Gazette of the RS*, No. 41/2018, 95/2018, 31/2019. and 15/2020, 92/2023.

Law on Tax Procedure and Administration, *Official Gazette of the RS*, No. 43/2003, 51/2003, – corrected, 61/2005, 101/2005. – as amended, 5/2009, 54/2009, 50/2011, 70/2011. – harmonized dinar amounts, 55/2012. – harmonized dinar amounts, 93/2012, 47/2013, – harmonized dinar amounts, 65/2013. – as amended, 57/2014. – harmonized dinar amounts, 45/2015. – harmonized dinar amounts, 83/2015, 112/2015, 50/2016. – harmonized dinar amounts, 61/2017. – harmonized dinar amounts, 113/2017, 3/2018. – corrected, 50/2018. – harmonized dinar amounts, 95/2018, 38/2019. – harmonized dinar amounts, 86/2019, 90/2019. – corrected, 98/2020. – harmonized dinar amounts, 144/2020, 62/2021. – harmonized dinar amounts, 138/2022. i 54/2023. – harmonized dinar amounts and 92/2023.

Mortgage Law, *Official Gazette of the RS*, No. 115/2005, 60/2015, 63/2015 – decision of the CC and 83/2015.

Decision of the Republic Geodetic Authority, No. 952-02-20-095-8811/2021.

Decision of the Republic Geodetic Authority, No. 952-02-20-095-33664/2020.

Online sources

The Republic Geodetic Authority's website: <https://www.rgz.gov.rs>