

Supreme Court redefines location surcharge in rent control leases

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In early 2019 the Supreme Court passed three decisions confirming and clarifying its 2017 decision which had limited landlords' right to request a location surcharge for rent-controlled apartments in desirable neighbourhoods. Based on the court's judgment, approximately 100,000 apartments no longer qualify for the location surcharge.

Background

Austrian rent control applies – subject to certain exceptions – to apartments constructed on the basis of a building permit issued on or before 8 May 1945. The permitted rent is generally established as follows.

The law sets out the reference rent for a standard apartment in each of the country's nine provinces.

The permitted rent depends on whether the apartment in question is considered 'better' or 'worse' than the standard apartment, based on certain criteria. Thus, landlords may apply a surcharge to the reference rent if an apartment is considered above average, but must deduct a certain amount from the reference rent if an apartment is considered below average.

One of the surcharge criteria is an apartment's location. Thus, if a location is considered above average, landlords may request a location surcharge.

Previously, this location surcharge would apply if the price of land in the particular area where the apartment is located was higher than the price of land taken into account by the reference rent. If so, the landlord could charge a location surcharge of 0.33% of the difference per square metre per month to the tenant.

2017 decision

In its decision of 22 November 2017, the Supreme Court applied a different logic and introduced a two-tier test.

The first step was determining the neighbourhood to which an apartment should be compared. To this end, the Supreme introduced three categories:

- high-density areas;
- medium-density areas; and
- low-density areas.

Thus, an apartment situated in a high-density area must be compared with other high-density areas in order to determine whether it is above or below average.

As regards the second step, the Supreme Court outlined that within each of these categories, a particular neighbourhood is compared with other neighbourhoods in that area. In order for a neighbourhood to qualify as above average, different criteria must be applied, such as access to public transport and local infrastructure.

New case law

In early 2019 the Supreme Court passed three additional judgments, confirming its 2017 decision.

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In these judgments, the court further explained the criteria for the location surcharge, which should also include proximity to cultural institutions such as theatres and museums, access to public transport and noise emissions.

Criticism

The Supreme Court's decision has been widely criticised.

First and foremost, the rent control system is considered far too complicated for landlords and tenants to navigate and should arguably be replaced by a set of clear and readily accessible criteria.

Second, the first step of the Supreme Court's two-tier test (zoning) may lead to strange consequences. For instance, an apartment situated in a desirable neighbourhood in a high-density area may be close to public transport and local infrastructure, but could nevertheless fail to qualify for the location surcharge because other neighbourhoods in high-density areas have more public transport or better infrastructure. By contrast, the same apartment situated in a less densely populated area could qualify for the surcharge, because other neighbourhoods in low-density areas do not have comparable infrastructure. Thus, the permitted rent for the apartment in the less populated area would be higher.

Comment

Austria's rent control system has been confirmed by the Constitutional Court and the European Court of Human Rights. Moreover, the new case law on rent control has been confirmed by several Supreme Court decisions. Therefore, the Austrian courts are unlikely to scrap the existing system.

However, the Supreme Court's vague criteria for determining whether a neighbourhood is considered above or below average leave scope to include additional indicators such as proximity to shops, entertainment, doctors and educational facilities. It is therefore advisable to obtain a certified expert's opinion on why a neighbourhood qualifies as (for example) above average in order to apply the location surcharge.

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