

Legislation on Seizure of Land for Public Needs: Problems of Improving

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Abstract: This article undertakes an attempt to give a determination of state ownership right. Thus the concept of withdrawal of property for public use is explained; the necessity of legislative and theoretical division of property is proved: public and private; importance of the financial compensation for withdrawal of lands for public use is defined. Recommendations and suggestions for improvement of the land legislation of the Republic of Kazakhstan are developed on the basis of the theoretical provisions analysis, historical experience of Kazakhstan and other states, the existing legislation of Kazakhstan. Also theoretical and practical issues regarding private and public right for the land in conditions of changing social relationships features is examined. In the conditions of modern reality, during implementation of national priority the importance of issues regarding withdrawal of the land plots for the state or municipal needs is increasing. In this regard the analysis of topical issues of norms ratio of the various ownership branches connected with withdrawal of the land plots regulation and immovable objects on it by repayment for the state and municipal needs and permission of existing collisions is getting theoretical and practical interest.

Key words: Constitution of the Republic of Kazakhstan • The Land Code of the Republic of Kazakhstan • The right to private ownership of land • The right of state ownership of land • The land • The land owner • The state • Control of the land • The state needs

INTRODUCTION

The Institute of land acquisition in Kazakhstan began to form in the Soviet era and primarily was seen as a means of redistribution of land among sectors of the economy. Its main contents were the rules of terms and conditions of land acquisition for non-agricultural needs. In the terms of exclusive state ownership The Institute of land seizure had a great importance for a consistent implementation of the principles of land use management, priority of the rights for agricultural land-use, embracing the need of land acquisition for non-agricultural purposes primarily, the land that is unsuitable for agriculture, poorer quality agricultural land, land along the roads, power lines and compensation for loss of agricultural production.

In the terms of the development of independent Kazakhstan the function of the land seizure Institute has changed. Primarily, it requires the optimal combination of public and private interests in the fields of the land use and protection, which is associated with the new regulatory and functional quality of the land law of market season, which transformed out of the public law in the private - public sector of law.

In modern conditions the seizure of land is no longer a purely administrative and technical arrangement to the land redistribution for the rational distribution of productive strength.

Therefore we cannot accept a definition of seizure which is encountered in modern theoretical literature as a legal action to drop the rights of subjects to specific land areas [1, p. 100]. According to Professor M. Kozyr, this Institute is to guarantee the integrity of the state and the protection of private property of land. His provisions are intended to ensure the removal of land by "following the law order and considering the interests of the owner. Analyzing the correlation of such concepts as "taking" and "redemption", he believes that their identification is legitimate and deals with the citizens-owners of seized land, otherwise a compensation for damages should be given to the users of the land".

The Main Part: Thus the main part of it may be noted, It is necessary to bear in mind that the priority in the institution of land acquisition is given to the public interests, as it is evidenced by the possibility of compulsory land acquisition for public needs and for

violations of land legislation. In this case, the procedure for termination of the right of property in seizures of land for public use is based solely on the principles of Command. The owner will be able to challenge only wrongful acts which were done by the authorized body in the process of withdrawal, but not the possibility of withdrawal.

It should be noted that in the world history the right of state ownership appeared during the transition from the feudal state to republic. This is proved by the provision 3 of Section IV of the Constitution of the USA of 1787: "The Congress has a right to manage land or any other property owned by the states" [2, p.152].

However, current standards of land seizure for public use and for violation of the land legislation contains a comprehensive system of legal guarantees for the protection of land rights, which indicates qualitatively new functional assignments of the Institute of land seizure in general. A new level of realization and protection of land rights within the institution of land acquisition is based on the fundamental provisions of the Constitution on the recognition and equal protection of the public and private property (Article 6), on permissibility of restrictions of the property or other rights of a citizen only by laws and only that extent which is necessary to protect the state and the public interests (Article 39), on compulsory acquisition of property for public use, which is permitted in exceptional cases provided by law and can be made if equal compensation is provided (Article 26).

All further history proves that the developed Western countries tried to escape from ownership giving it out to private persons [3, p.649] and saved the title only for protection of natural resources from destructive use by private persons [4. p.623].

Thus, according to Article 81 of Land Code of the Republic of Kazakhstan the right of private ownership of land or land use rights is terminated if:

- The alienation of land by the owner or the land use rights by the land user to other persons;
- Failure of the ownership of the owner or user of the land use rights;
- The loss of the ownership of land or land use rights in other cases provided by legislative acts of the Republic of Kazakhstan.

In addition, the land use rights may be terminated according to the following grounds:

- The expiration of the term for which was the section provided;
- The early termination of the lease contract or a contract of temporary gratuitous land use, except when the land is pledged;
- Termination of employment in respect of which the land user was granted service allotment (Article 41 of the Code).

However, this article specifically stated that the exemption, including the purchase of land from the owner and the land use rights from land users without their permission is prohibited, except when:

- Foreclosure of the land or land use rights for the obligations of the owner or land user;
- The compulsory acquisition, including through the purchase of the land for public use;
- The compulsory withdrawal of the land of owner or user that is not used for its intended purpose or used in violation of the laws of the Republic of Kazakhstan;
- The expropriation of the owner or user of land affected by radioactive contamination, providing equivalent land plot;
- Confiscation.

Thus, the legislation allows withdrawal, including the purchase of land and land use rights without the consent of the holders of title only in the collision of the private interests of individual owner or land with the public interest. In this case, the current land laws, in contrast to the former, allow withdrawal of land for public needs and for violation of land legislation, the broad interpretation themselves public needs, contains an exhaustive list of grounds for seizure of land for public use and complicated the procedure of land acquisition for violations of land legislation [5, 624 p.].

According to Article 84 of the Land Code of The Republic of Kazakhstan in exceptional cases land may be eminent domain for public use by the court if there is no other way to satisfy these needs and fair compensation of property is provided.

Western legal literature, although rather indirectly, studies the problems of state ownership in the main context of categories: "public interest" [6, p. 4], "prohibit of discrimination of ownership rights" [7, p. 152], demand of state debts in favor of private persons [8. p. 23], vesting right to vote [9, p. 18], [10, p. 32], transfer of state

owned objects to asset management [11, p. 577] and collecting payments for their use [12, p. 28]. Thus, in the Western legal literature the notion of state ownership right was studied rather poorly.

Exceptional cases for the compulsory acquisition of land for public use are:

- The international obligation;
- The provision of land for defense purposes and specially protected natural areas, recreation, recreational, historical and cultural facilities, the establishment and functioning of special economic zones;
- The discovery and development of mineral deposits (except for commonly occurring);
- Construction of roads, power lines, communication lines, pipelines, engineering and communication of public networks of settlements, as well as other objects of national importance;
- Emergency and demolition of dilapidated housing, threatening collapse (caving);
- Implementation of general plans of the settlements in the construction of the facilities subject list of exceptional cases, by this article, as well as the construction of facilities provided by state and regional programs and investment projects to ensure the public interest and the achievement of public interest objectives.

However, the situation given by the modern land law, with all its social significance, does not eliminate the problem of creating a full organizational and legal mechanism for implementing the rules of the institution of withdrawal of land expropriation for public use, privately owned or used by citizens and non-state entities.

The mechanism for implementing the institute of land acquisition should be aimed, paradoxically, to the sharp narrowing of its scope, which follows from the position of article 84 Land Code, which allows an expropriation of land for public use by the court if there is no other way to meet these needs and fair compensation of property is provided.

Narrowing the scope of application of compulsory land acquisition should be the development trend of the land legislation, which is consistent with the general pattern of development of the national legal system, the main purpose of which is the protection and realization of human rights and the interests of businesses.

In the future, the main content of the institution of withdrawal should be the rules on the state's responsibility to owners and users for the seizure of their land and for the damage caused by the withdrawal of the land. Current legislation provides only compensation for damages caused to the owner or the land due to the publication of the relevant legislation act of a state agency or other public authority and the actions (or inaction) of officials of these bodies, which can be considered as a breakthrough in land laws in the field of implementation and protection of land rights of owners and users. The conceptual basis for further development of the institution of withdrawal of land should be the idea of the primacy of rights of the owners and users in the implementation of the public interests. In this case, it should be borne in mind that even the most perfect order and fair level of compensation is not able to cover all the losses to offset the negative consequences associated with violations of the property interests of the land owners and land users. In this case, it should be borne in mind that even the most perfect order and fair level of compensation is not able to cover all the losses to offset the negative consequences associated with violations of the property interests of the land owners and land users. Moral, psychological experiences of the owner, the social, material expectations he refuses, associated with his status, changes of previously conceived economic and life plans and many other things cannot be measured and the material dimension is not covered by the category of financial compensation. Withdrawal of the land can bind some very personal, unique, memorable events. Withdrawal may cause emotional, psychological disturbances and disorders. Therefore, besides the problem of compensation for property damage, no doubt, in some time moral, psychological components of deprivation and loss caused by involuntary taking of land for public needs would become relevant. These issues in land law are not even mentioned yet. However, the situation analyzed in the article provides a basis for conclusions about the significant expansion in the scope of the term institution of withdrawal of land. Thus, under paragraph 3 of article 84 Land Code of the Republic of Kazakhstan laws may be provided by other exceptional cases of compulsory acquisition of land for public use, except those which outlined in paragraph 2 of this Article. In our view the presence of this article in the Land Code, explained that a codified land act considers a compulsory acquisition of land for public use, a universal form of

realization of the public interest in land that is methodologically flawed and undermines the unity of the existing land laws. Land Code readily admits the applicability in the construction of power lines, pipelines and communication standards on public land easement. There may be other cases where the institution is able to ensure the implementation of the servitude of the public interest without taking the land.

From the point of view of protection of land rights of the owner (the landholder) according to Professor O. Krassova's opinion "Withdrawal can be done while respecting the following four prerequisites:

- The area can be removed only by a court;
- Withdrawal is carried out in order to use the land plots for state needs;
- The loss must be compensated by the owner before the actual seizure;
- Measure of damages should be an equal, fair, that is the relevant market prices for the land [13, c. 543].

CONCLUSION

Creation of the necessary conditions for the implementation of regulatory requirements of the Land Code of the admissibility of compulsory acquisition of land for public use in exceptional cases by the court if you cannot find other way to meet these needs and provide fair compensation of the property requires the creation of legislative barriers to broad interpretation of public use themselves and exceptional cases forcible seizure of land for public use. There was a need to adjust the legislation in the legal literature in the following main points:

- A list of the state needs to be comprehensive, without the possibility of expanding the list through the adoption of new or changes to existing legislation;
- Should clarify the nature of international obligations by forcibly alienated land;
- Legally provide for the concept of "emergency housing", "dilapidated housing";
- Be provided and tighten the procedure and terms change master plans of settlements and the nature and content of the state, regional programs and investment projects with a public interest and achieving public interest objectives;

- Clearly define the public agency, by a decision which is subject to expropriation of land for the purpose of providing further construction [13, p. 18];
- It is necessary to legislate the legal definition of the concept of "equal land", which would contain the requirements for the location, size, fertility, purpose, relationship and a relationship with real estate, infrastructure and other parameters that determine the functional and the target value, the market value of the land;
- Need legislative strengthening of the legal status of the owner, as the main determining the seizure of the subject, granting it the right to claim evidence of public needs and the inevitable withdrawal as a way to ensure the public interest;
- Should legalize injustice compensation disagreement with the owner of its size as a ground for suspending the exemption;
- To do the will of the owner main condition for launching the mechanism of withdrawal.

It is necessary to highlight damages caused to the owners and land users in a system of protective measures to ensure land rights within the institution of land acquisition. The essence of the rules of damages determines their aim to prevent illegal actions that infringe on the rights of the subjects of land and implementation of compensatory and restorative functions.

REFERENCES

1. Land Law and M. Bylina, 2000. pp: 100.
2. Encyclopedia of the American Constitution, 1986. N.Y., V.2.
3. Raymond, L. and S.K. Fairfox, 1999. Fragmentation of public domain law and policy: an alternative to the Shift-to-Retention thesis // *Natur. Resour. J.* N 4.
4. Meyers, G.D., 1991. Old-growth forests. // *Boston Coll. Environ. Aff. Law Review.* N 4.
5. Krassov, O.I. and M. Land Law, 2000. Lawyer, pp: 624.
6. Lillich Richard B., ed., 1972. *The Valuation of Nationalized Property in International Law.* Charlottesville, V. 1.
7. Denza, E. and S. Brooks, 1987. *Investment Protection Treaties: The United Kingdom Experience.* London.
8. Humphrey, 1974. *The Revolution in the International Law of Human Rights// Human Rights Law Journal.*

9. Porter, A., 1918. History of Suffrage in the United States (Chicago: University of Chicago Press. Chaps, pp: 1-2.
10. Williamson, C., 1960. American Suffrage: From Property to Democracy 1760-1860. Princeton, N.J.: Princeton University Press.
11. Lynch, L. and W.N. Musser, 2001. A relative efficiency analysis of farmland preservation programs // Land Econ. 77. N 4.
12. Riebsame, W.E., 1996. Ending the range wars? // Environment (U.S.A.). N 4.
13. Doschanova, A.S., 2009. Legal provision for granting land plots for housing construction: Author. ... Candidate. jurid. Science. Almaty, pp: 21.