

LIMITATIONS OF RIGHTS OF LAND PLOT OWNERS: WHERE IS THE BOUNDARY BETWEEN REASONABILITY AND ABUSE?

Aleksey Pavlovich Anisimov * - Anatoliy Jakovlevich Ryzhenkov **

- Elena Sergeevna Boltanova ***

ABSTRACT: *The article proves that expansion of the list of the grounds for withdrawal of land plots for public needs (or limitation of rights of private owners by establishing public easements) caused by the processes of urbanization and globalization has not led to creation of an adequate system of guarantees of human rights. In this regard, the authors propose a range of measures to increase public participation in decision making as well as creation of a new legal framework of “private-public” interests and legal entities expressing them and performing a range of public functions, however, having also their own interests that often do not coincide with either private (those of land owners) or public (those of residents of settlements) interests. These legal entities must not be granted the authorities to make decisions limiting the rights of private land owners.*

SUMMARY: 1. Introduction. – 2. The Category of “Limitation of Rights of Owners of Land Plots”: Content and Correlation with the Related Legal Concepts. – 3. Issue of Distinguishing between Private and Public Interests in the Context of Termination/Limitation of the Right of Private Ownership of Land. – 4. Withdrawal of Land Plots for Public Needs: the Mechanism of Search for a Balance between Private and Public Interests. – 5. Limitation of the Right of Private Ownership by Establishing Public Land Easements: Issue of Search for a Balance of Interests. – 6. Conclusion.

*Professor of Department of Civil Law and Procedure, Kalmyk State University, doctor of juridical sciences, e-mail: anisimovap@mail.ru.

**Professor of Department of Civil Law and Procedure, Kalmyk State University, doctor of juridical sciences, e-mail: 4077778@list.ru.

***Head of Department of Civil Law, Institute of Law, Tomsk State University, doctor of juridical sciences, e-mail: bes2@inbox.ru.

1. Constitutions of the most countries of the world stipulate that the people is the bearer of sovereignty, and human rights determine the sense and content of activity of public authorities. However, human rights (even taking into account their undoubted value) are not absolute and have many natural limits (for example, prohibitions for owners to use their land plots to the detriment of neighbors). Moreover, property rights of citizens are often subject to various limitations caused by the need to pursue and protect public interests. The said circumstances require further search for a balance between private and public interests, especially in respect to issues of exercising the right of private ownership of land plots as immovable property items.

This problem exists not only in Russia, a country with just forming democracy, but also in quite developed countries of the world, including the USA. Such problems and even their aggravation in recent years require continuation of scientific discussions about the criteria of reasonability of limitations of human rights by which public authorities should be guided when making decisions on involuntary withdrawal of land plots for public needs or limitation of owners' rights by establishing easements. Undoubtedly, such a model will have strongly pronounced national features. Nevertheless, the methodology of search for a balance between private and public interests when terminating/limiting the right of ownership of land plots can be of interest to the scientific community, businessmen and legislators of all countries of the world, including the USA, countries of Eastern Europe and the post-Soviet space.

Taking into account the set goal, we divide this article into four sections. In the first one, we will try to define the terminology and establish the correlation between the concepts of "limits" and "limitations" of the right of ownership of land plots. In section 2 we will study the issue of the content of private and public interests and their consideration when terminating/limiting the right of land ownership. In the third section we will examine the peculiarities of involuntary withdrawal of private land plots for public needs. Finally, in the fourth section we will consider (in terms of public easements) the grounds and the procedure for limitation of rights of private

owners of land plots (without their withdrawal) discussing the reasonability of these procedures.

2. The issue of terminology is the basis of any research regarding national peculiarities of legal regulation of property relations. In respect to Russia, it is impossible to discuss the issue of guarantees of the right of private ownership of land without identifying the correlation of the concepts of “limitations”, “limits” and “prohibitions”. However, there is no unanimity of opinion on this issue in the modern Russian scientific legal doctrine.

Several approaches to interpreting the concept of “legal limitations” are distinguished in the Russian science of constitutional law: 1) limitation as a measure of the scope of a right (a freedom); 2) limitation as a deviation from legal equality; 3) limitation as a change of the content of rights and freedoms of man and citizen. Legal limitations manifest themselves in two main forms: either as an absolute prohibition of a certain right (a freedom) caused by objective or subjective circumstances of various types or as reduction of options of possible, allowed conduct (in terms of a certain right or a freedom) through establishment by public authorities of various types of limits (relating to territories, time, subjects, etc.) of such conduct.¹ We should note that this author equates the categories of “prohibition” and “limitation” defining one through the other one. Moreover, the second form of limitations (which, in our view, will be just limitation) is defined by the author through the category of “limits” of conduct. The latter point of view is quite common in legal science.

A.F. Kvitko believes that “limitation of a right (freedom)” should be understood as “statutory limits (boundaries) of exercise by a man (a citizen) of rights (freedoms) expressed in prohibitions, invasions, duties, liability, existence of which is determined (predetermined) by the need to protect constitutionally recognized values,

¹See ASHIKHMINA, *Constitutional legal mechanism of limitation of rights and freedoms of man and citizen in the Russian Federation*: abstract of the thesis of candidate of juridical sciences (Moscow, Academy of Management of the Ministry of Internal Affairs of Russia, 2009) 12-13.

and the purpose of which is to ensure the required balance between interests of person, society and state".² Consequently, in this approach, limitations are the limits of a legal right consisting also in prohibitions. However, equation of prohibitions, limitations and limits of legal rights seems to us not completely justified. They are categories that are related but do not coincide totally, both in private and public law.

As noted by V.S. Nersesyants, limitation is a sanctioned temporary reduction or decrease, regarding both the matter and the time of using a benefit which is the subject of a legal right. In this case, it is not the benefit itself that is limited, but the conditions of the subject's claim to it.³

In respect to the right of private ownership of land, its limitations can not consist in withdrawal of some or other authorities from its content (although it is a very common position),⁴ since in this case the very legal right will be transformed. Being limited, a certain authority is not excluded from the content of the ownership right, but can not be exercised to the full extent. Since the authority that is subject to limitation is not excluded but is still in the content of the ownership right, when the limitation is cancelled, we observe restoration of the possibility to exercise it to the full extent rather than new acquirement of this authority. This is the main difference of limitations from boundaries of the ownership right.

The boundaries (limits) of the ownership right indicate which authorities are not there in the ownership right; limitation – which of the authorities included in the content are constrained (restricted) regarding their exercise. Therefore, limitations of the ownership right inherently relate only to exercise of rights rather than to the rights themselves.⁵ This fact is also mentioned by T.V. Deryughina. In her opinion,

²See KVITKO, *Constitutional legal fundamentals of limitation of rights and freedoms of man and citizen in the Russian Federation*: abstract of the thesis of candidate of juridical sciences (Moscow, Moscow University for the Humanities, 2007) 10.

³See NERSESYANTS, *Progress in law (historical experience and prospects)*. In: *Theory of state and law*. Textbook (Moscow, Bek, 1995) 287.

⁴See MOROZOVA, *Principles, limits, grounds of limitation of human rights and freedoms according to the Russian legislation and international law*, 7 *State and Law*, 24 (1998).

⁵See KUDRYAVTSEVA, *Limitations of land ownership rights according to the Russian pre-revolutionary law*, 3 *Science of law*, 59 (1997).

limitations and limits are aimed at establishing the boundaries of rights, but the target object of limitations is emergence, exercise and termination of rights, and limits of exercise affect the mechanism of use of rights. Limitations of rights are established to prevent violation of essential rights and legitimate interests of man, society and state, these goals are strictly enshrined by the federal law. Exercise limits are for the most part aimed at balancing private interests of specific holders of legal rights. Limitations of rights must be strictly stipulated by the federal law, while exercise limits arise not only from laws but also from contracts and other transactions.⁶

We fully share this theoretical approach. Indeed, limits and limitations are not coincidental categories, although in fact they are closely interrelated. Both in private and in public law, these categories perform various (even if related and very similar) functions, differing in their place in the mechanism of legal regulation, content, procedure of establishment, etc. From the point of view of legal technique, inclusion of Article 10 dedicated to *limits* of exercise of civil rights in the Civil Code of the Russian Federation is very effective. According to this Article, exercise of civil rights exclusively with the intention to cause harm to another person, actions bypassing the law with an unlawful purpose, as well as other deliberately unfair exercise of civil rights (abuse of rights) shall not be allowed. In its turn, the correlation and interaction of the legal categories of “prohibition” and “limitation” manifests itself as follows. When the legislator wants to make one or other activity mandatorily impossible, he sets a prohibition. Prohibitions in law indicate the full duty of a subject to refrain from actions causing significant harm to the interests of an individual and a society, which bears the risk of incurrance of liability, and limitations are partial or complete restriction of legal rights, in addition, as a result of limitation, legal rights themselves do not disappear. In other words, in contrast to categorical prohibition, limitations of the right of private ownership signify only decrease (reduction) of possibilities of its subject to

⁶See DERYUGINA, *Theoretical issues in the field of exercise of legal civil rights*: abstract of the thesis of doctor of juridical sciences (Moscow, Academy of national economy under the Government of the Russian Federation, 2011) 9-20.

exercise the right to use or dispose of a plot, permanently or temporarily (for example, limitations of owners' rights in emergency situations).⁷ After cancellation of the circumstances giving rise to establishment of limitations of legal rights they are restored to the full extent (for example, after elimination of the consequences of natural disasters the requisitioned land plot is returned to the private owner).

Limitations must be established only in public (economic, environmental, social, cultural, military, etc.) interests, but not in the interests of private persons (although such a conclusion can be often observed in scientific literature),⁸ since the latter will mean abuse of rights. This is why a private land easement rather than a public easement shall be established to ensure private interests.

One of the types of limitations of the ownership right will be rules on involuntary termination of the right of ownership of land plots,⁹ as well as on reservation of plots for public needs,¹⁰ which restrict the possibility of owners to exercise authorities to use and dispose of a land plot. Since limitations do not generate new rights, they can include public easements, which allow a public subject to implement protection of public interests to the full extent in this way rather than imply emergence of the public subject's right of limited use of a land plot of another person.¹¹

The category of "limits" of exercising the right of private ownership of land plots will be different from both limitations and prohibitions. The limits of legal rights both in public and in private law denote the scope and boundaries of pursuing legal rights initially inherent in a person. The limits of owner's rights arising out of proper-

⁷See POMERLYAN, *Issues of limitation and exercise of rights of man and citizen under an emergency regime*, 6 Law and education, 114-117 (2001).

⁸See KRYLOV, *Concept and attributes of limitations of legal civil rights*, 4 New Legal Thought, 31 (2008).

⁹Legal Encyclopedic Dictionary / Chief Editor O.E. Kutafin (Moscow, Great Russian Encyclopedia, 2003) 383.

¹⁰See ARAKELIYAN, *Reservation and withdrawal of land plots in the mechanism of legal regulation of property relations (civil and legal aspect)*: abstract of the thesis of candidate of juridical sciences (Krasnodar, Kuban State Agrarian University, 2007) 26 p.

¹¹See LUZHINA, *Limitations and encumbrances of rights to immovable property in Russia and France*: abstract of the thesis of candidate of juridical sciences (Moscow, Russian Academy of justice 2006) 9-10; REZNIK, *Public land easement under Russian civil law*: abstract of the thesis of candidate of juridical sciences (Kazan, Kazan State University, 2007) 17.

ties of the object of a right are equally obvious. For example, establishment of the intended purpose¹² and permitted use¹³ of land plots are not limitations of ownership rights¹⁴, since any item of immovable property has its individual features which determine the possibilities of its use. Consequently, a ban on construction of residential buildings on agricultural land (or apartment buildings in industrial areas of cities) is not a limitation of rights of owners of land plots, it just establishes the limits of their legal right of ownership. Another typical example of limits but not limitations is the impossibility for a municipality to sell a land plot subject to limited circulation to a citizen in an auction, or to withdraw a land plot from a private owner for municipal needs in terms of lack of land use and development rules, a local level of urban planning documentation, in a municipality.

Thus, limitation of the right of private ownership of land is a restriction of possibilities of the owner to use and dispose of the property (plot) belonging to him that is stipulated by the federal law and caused by the need to pursue the public (social, environmental, etc.) interest rather than by his unlawful acts. This definition of content-related parameters of the object of our research allows proceeding to discussion of the following facet of this issue, connected with the need to find a balance between two types of interests.

3. It is necessary to study this issue because establishment of limitations of human rights may not be arbitrary, it must be justified by the need to protect public interests. However, the content of public interests in different historical periods in

¹²In Russia, the Land Code divides all land into seven types (categories), including agricultural land, land of settlements, industry and another special purpose, specially protected areas and objects, land of the forest fund, etc. Within each category of land, there is an established unique set of rights and duties of owners of land plots to use and protect such land, as well as a list of land plots that are limited or withdrawn from the civil circulation.

¹³This legal framework is used mainly within the category of land of settlements, the territory of which is divided into territorial zones as a result of urban development zoning. There are urban planning regulations determining parameters and types of permitted use of land plots established for each territorial (residential, industrial, etc.) zone.

¹⁴However, this position is very common. Ref., for example: TURITSYN, A.V. *Limitation of freedom of owners' discretion in selection of ways to exercise the right of ownership of agricultural land plots*, 6 Yurist-Pravoved, 130-132 (2009).

law of different countries and peoples, as well as the mechanism of guarantees of citizens' rights, did not coincide. Traditionally, Statements of the Roman jurist Ulpian are traditionally considered as the beginning of the discussion about the correlation between private and public interests. He attributed public law to the position of the Roman state, and private law to the benefit of certain persons, noting that there is the good in a public relation and the good in a private relation.¹⁵ The fact that the boundary between private and public interests is rather notional was mentioned by dozens of European and Russian legal scholars of the 19th-20th centuries, including R. Iering,¹⁶ V.K. Kavelin,¹⁷ G.F. Shershenevich¹⁸ and many others. The first conclusion that they made could be formulated as follows: it is impossible to clearly distinguish private interest from public, there is no wall between them. However, even if such a wall is built somewhere, it will bring not those benefits expected by its builders.

Another fundamentally important conclusion consists in the fact that the interest is the material foundation of rights, and its main purpose is to express the needs of citizens and the society, to find the balance between them.

In the modern legal science, a number of authors understand "interest" as a need (conscious intention) expressing the desire of a certain subject to use a specific social benefit.¹⁹ Accordingly, "private interest is the interest pursuit of which is determined by the own will of the subject within the limits established by the community, an integral social entity, which includes this subject. Public interest will be the interest pursued according to the will of this community".²⁰

Therefore, the nature of the needs reflected by the interest, and the charac-

¹⁵The Digest of Justinian: Translation from Latin / Managing Editor L.L. Kofanov (Moscow, Statute, 2002) 82-83.

¹⁶See IERING, The struggle for the law (Moscow, Spark, 1991) 8.

¹⁷See KAVELIN, Selected works on civil law (Moscow, JurInfoR, 2003) 76.

¹⁸See SHERSHENEVICH, Textbook of Russian civil law (Moscow, Spark, 1995) 1-2.

¹⁹See KIYKO, *Private and public law principles in civil law regulation of the state property in the economic turnover of Russia*: abstract of the thesis of candidate of juridical sciences (Volgograd, Volgograd Academy of the Ministry of internal Affairs of Russia, 2004) 16.

²⁰See PERSHIN, *Private-legal interest: concept, legal formation, implementation*: abstract of the thesis of candidate of juridical sciences (Nizhny Novgorod, Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia, 2004) 22.

teristics of the subject, the holder of such interest (an individual or a social group) are of fundamental importance within the category of “interest”. Based on the foregoing, we believe that any private land interest is a need of citizens and legal entities, owners (lessees) of land plots, to exercise freely their authorities to use and protect the land in order to obtain material or non-material benefits. Accordingly, public land interest is a set of private needs (of citizens and their associations) in a certain locality, consisting in the willingness to exercise certain collective property or non-property land rights. Meanwhile, it is obvious that different associations of citizens can have their own public interests formed according to territorial (microdistrict, quarter) or subject (construction of schools, stadiums, shopping malls) criteria. Different public interests may be not coincident, since construction of a stadium may meet the interests of residents of a metropolis but conflict with the interests of residents of a certain microdistrict.

More complex types of conflict of public interests are equally common, when one group of citizens wants to construct a casino in a city quarter, another one – a mosque (or a Christian church), and the third one – a shopping mall with a parking lot. Accordingly, whatever decision is adopted by local authorities, conflict of public interests of different groups of population of a city is often anyway inevitable, which leaves open the question of where the boundary between private and public interests is, what the difference between them is, and which of two public interests should be given preference.

In respect to Russia and its legal system, this kind of common (also for other countries of the world) conflicts of public interests are often aggravated by the policy of state authorities, which, in order to achieve immediate political or economic “victories”, adopt ineffective decisions that have long-term adverse economic, environmental or other effects. A typical example of such a kind of decisions was mass withdrawal of land plots from citizens for construction of stadiums and other sports facili-

ties required for the 2014 Olympics and the 2018 FIFA World Cup.²¹ The problem here consisted in the fact that it is hard to consider sport as public interest,²² since many citizens are indifferent to it (preferring theater or hippodrome). Therefore, such decisions meet the needs and interests of only a *part* of the population. It appears that the interests of the owner (lessee) of a land plot (and in case it is a plot where an apartment building is situated – the interests of holders of shared ownership of such a plot) will be private. Accordingly, public interest is the interest of residents of the entire country (in case of construction of an ordnance factory), a certain municipality or its part (microdistrict, quarter) in case of construction of communal or transport infrastructure facilities.

But what to do in a situation when such an object meets the interests of only a *part* of residents of the municipality, as we see in the example of stadiums? The answer lies in the need to develop a new legal framework, which is not yet in the law, and which is little discussed in the legal doctrine. The proposals available in the legal doctrine of Russia, for example, concerning development of the category “socially important” or “social” interests not coinciding with public interests,²³ are very interesting but they are evaluative categories without clear parameters. This is why we suggest relying upon the category of “subject of interest” and formulating a new legal framework on its basis – “private-public interests”.

In the Russian legal science, the issue of distinguishing between legal entities of private and public law has been discussed for many years. The main difference between them consists in the social essence of such organizations, although it is recog-

²¹2 special federal laws were adopted, they established a special procedure for withdrawal of private land

²²Similar problems with withdrawal of private land for construction of stadiums (even without organizing a football championship) we observe also in some states of the USA. Ref.: CHEN, S. *Keeping Public Use Relevant in stadium eminent domain takings: The Massachusetts Way*, 40 Environmental Affairs, 453-485 (2013).

²³See GRUSHEVSKAYA, *Imperativeness in the Russian civil law*: abstract of the thesis of candidate of juridical sciences (Krasnodar, Kuban State Agrarian University, 2010) 8-9; POLESHCHUK, A.S. *Constitutional legal fundamentals of social control in the Russian Federation*: abstract of the thesis of candidate of juridical sciences (Moscow, Moscow University of the Ministry of Internal Affairs of Russia, 2012) 28 p.

nized that many legal entities of private law perform a social mission to a greater or lesser extent. Moreover, attention is drawn to the close relationship between legal entities of public law (for example, federal public enterprises) and public authorities.²⁴ This theory appears important, especially if it is supplemented with another element – the category of “private-public legal entities”, which was first proposed by S.A. Charkin.²⁵

The peculiarities of these types of legal entities (state corporations, state companies, the Skolkovo Innovation Center) will be the fact that they are the owners of the state property transferred to them,²⁶ as well as that they perform particular social public functions. For example, by virtue of Art. 3-5 of Federal Law No. 244-FZ of 28.09.2010 (as amended on 27.10.2018) “On the Skolkovo Innovation Center”, this center is the owner of land plots on which infrastructure facilities are located, leases them out and performs a range of public functions inherent in local government bodies (street lighting and naming, road construction, etc.).

In addition, most of such “private-public” legal entities perform functions that are not connected directly with support of daily living needs of the population (space exploration, subsurface use, scientific research, etc.). Moreover, in reality this group of legal entities often have its own interests that may be not coincident with either private or public interests (of residents of municipal entities). Despite this fact, the Land Code of the Russian Federation stipulates a set of additional authorities for such subjects, for example, to initiate and participate in the procedures for involuntary termination of the right of private ownership of citizens as well as to limit the rights of private owners by establishing public land easements. There is no official exhaustive list of such private-public legal entities today, but it is obvious that it includes state corporations, state companies, the Skolkovo Center, subsurface users and natu-

²⁴See CHIRKIN, *Public and private interests of legal entities performing public functions*, 1 Russian Law Journal, 10-14 (2013).

²⁵See CHARKIN, *Land legal relations as an interbranch legal category: monograph* (Moscow, Publishing House Yurait, 2012) 225.

²⁶These are their differences from legal entities of public law (for example, unitary enterprises), which are not granted the right of ownership of the property assigned to them by the owner.

ral monopolies.

In this case we do not claim that all their activity to terminate and limit the rights of private owners of land plots is abuse of power and rights. It is certainly not the case. However, it is apparent that interest of this group of subjects is very complex and requires understanding and proper legal regulation. A particular problem consists in the fact the conflict may involve public interests of residents of neighboring municipal entities. For example, in the Russian Federation, there is an acute problem of removal of production and consumption waste from large cities with its placement in landfills in neighboring regions and municipalities. Accordingly, the following question arises: how to regulate the conflict, on the one hand, of a private interest (of a person that may be even not affected by withdrawal of a plot for construction of a landfill, but it is sufficient that the landfill will be constructed near, which will reduce the value of the plot and possibilities of its use) and a public interest of residents of the village close to which the landfill for placement of waste will be constructed, and, on the other hand, of a public interest of residents of a metropolis which have to take their waste somewhere. At the moment, the Russian legislation does not contain effective procedures that allow solving this problem. From a formal point of view, by virtue of p.2, Art.16 of the Urban Development Code of the Russian Federation, an area planning scheme project of a subject of the Russian Federation²⁷ is to be agreed with higher state executive authorities of the subjects of the Russian Federation having a common border with the subject of the Russian Federation ensuring drafting of such a scheme project, in order to meet the interests of said subjects of the Russian Federation in terms of establishment of zones with special requirements of area use in their territories (sanitary protection zones, protective, water protective zones, flood zones, etc.) in connection with the planned placement of facilities of regional significance, which may have a negative impact on the environment in the territories of the said subjects of the Russian Federation. In reality

²⁷Area planning scheme is a type of urban planning documentation containing available and planned types of area use at local, regional and federal levels.

population of municipalities do not have any leverage opportunities regarding this situation, which leads to mass protests.

Settlement of this issue consists not so much in improvement of legislation itself as in enhancement of the effectiveness of already available procedures, including approval of urban planning documentation, as well as development of environmental federalism – horizontal interaction of subjects of the federation, the interests of which are equally important.²⁸ However, in this case construction of landfills in the suburbs of Moscow will be possible after achievement of agreement with residents of Moscow region and their authorities. In this case, undoubtedly, Moscow will have to construct waste treatment plants for the neighbors rather than to pile the waste on the ground.²⁹ It will entail additional expenses of the budget of Moscow but preserve the health of residents of Moscow region and will not reduce the value of their plots.

Therefore, a means of arrangement of public interests of different groups of population (or residents of different settlements and microdistricts) is development of conciliation procedures (approval of urban planning documentation, organization of public hearings), establishment of horizontal interaction between regions and municipalities, which is now hardly observed in Russia, as well as development of a new doctrinal framework of “private-public interests”, which reflect activity of a certain group of legal entities that express interests of some population groups (sports fans, shareholders of oil companies, etc.).

In our view, *private-public interests* are the needs of certain types of legal entities partially owned by the state that are stipulated by federal laws, connected with subsurface use, construction of residential buildings, sports facilities and other im-

²⁸We will not dwell here on the concept of environmental (cooperative) federalism, fully studied in Russian and American legal science. Ref.: VOLKOV, P.V. *Theoretical and legal issues of federalism: federal power relations*: abstract of the thesis of candidate of juridical sciences (Nizhny Novgorod, Lobachevsky State University, 2004) 36; BUTLER, H.N., HARRIS, N.J. *Sue, settle and shut out the states: Destroying the environmental benefits of cooperative federalism*, 37-2 *Harvard Journal of Law and Public Policy*, 579-628 (2014).

²⁹Another conflict around garbage dumps in Moscow region begins in Ruzsky District <<https://www.sularu.com/news/10002/11019>>.

movable property items and met by means of involuntary withdrawal/limitation of the right of private ownership of land. In contrast to private-public interests, which are shared only by a number of social groups, “classic” public interests are aimed at creating the life-sustaining environment for the entire population of a particular territorial unit (municipality, region) and include placement of facilities of engineering and transport infrastructure, defense and security, power industry, environmental security, protection of cultural heritage sites, performance of international treaties, etc.

4. As we have already mentioned above, the category of “interest” has an abstract nature, however, it becomes much more concrete when the concept of “public needs” is formulated on its basis. Procedures for involuntary withdrawal of private land plots to meet them are very common in the world practice and can be observed in many countries of Europe,³⁰ Asia,³¹ Africa³² and America.³³ The content of these procedures is determined by national legal traditions and may not always comply with the universally recognized principles and rules in the area of human rights.

In Russia, after adoption of the Land Code in 2001, the procedures for withdrawal of private land plots for state needs have complied with the world standards for a long time. The situation began to change when authorities decided to simplify and accelerate the procedures for withdrawal of private land for construction of stadiums and other sports facilities for the 2014 Olympics. Afterwards such procedures were extended to withdrawal of land plots for construction of the “new Moscow” (development of new territories attached to the metropolis), as well as construction of stadiums for the 2018 FIFA World Cup. The idea of limitation of guarantees of pri-

³⁰See VOLOVICH, SHCHUROV, *Issues of withdrawal of land plots for state or municipal needs. Part 1*, 3 Property relations in the Russian Federation, 65-80 (2011).

³¹See KRASSOV, *Land law in countries of the Middle East: monograph* (Moscow, Norma, 2018) 34, 121, 191.

³²See KRASSOV, *Land law in countries of Africa: monograph* (Moscow, Norma, 2018) 254, 261, 378.

³³See BAUDE, *Rethinking the Federal Eminent Domain Power*, 122-7 Yale Law Journal, 1741-1789 (2013).

vate owners' rights, having begun with construction of local facilities, was subsequently extended to the entire territory of Russia, and the Land Code was supplemented with a special chapter regulating in detail the new (simplified) procedures for withdrawal of private land plots.

As noted in this regard by O.A. Zolotova, it means that there is unification of a special procedure for withdrawal of land for state needs, which consists in establishment of reduced terms for adopting management and judicial decisions; a simplified method of forming land plots and issuing their cadastral certificates; an extrajudicial procedure for withdrawal of land plots from state and municipal institutions and unitary enterprises; a special procedure for compensation for the cost of withdrawn land.³⁴

In this case the very expansion of the list of the grounds for withdrawal of private land plots for public needs is not something unacceptable, since objective complication of social relations in the field of land use (especially in cities) requires also an adequate response from the legislator. However, in this case there is no formation of an equally complex system of *guarantees of rights of private land owners*, which requires discussion and correction. To determine the boundary between reasonability and abuse when making decisions on involuntary withdrawal of private land plots for public needs, public authorities, in our view, should be obliged to be governed by the following principles:

1) *principle of proportionality*. This principle means that withdrawal of private property for public needs according to the simplified procedures stipulated by Chapter VII.1 of the Land Code of the Russian Federation is allowed only to satisfy public (but not private or private-public) interests, and the need to withdraw a specific plot must be *proved* by a public authority in court. There is already such judicial practice in Russia. For example, the commercial court held a resolution of a local government body on withdrawal of land plots for municipal needs invalid, since no documents

³⁴See ZOLOTOVA, *Special procedure for withdrawal of land for state needs*, 12 Russian Law Journal, 113-118 (2012).

proving the exceptional need to place facilities exactly on the disputed land plot had been presented. An agricultural land plot was supposed to be withdrawn from a closed joint-stock company to place facilities for development of the mineral raw material base of local industry enterprises and for implementation of investment projects. Meanwhile, the Land Code of the Russian Federation does not stipulate withdrawal of land plots for state or municipal needs *in order to attract investors to supplement the budget of a municipal district* and to create new jobs. This is why in this case the local authorities had no legal grounds for withdrawal of the land plot.³⁵

We observe similar attempts to withdraw land from the owners for private-public needs also in the judicial practice of the USA. For example, after some decisions limiting rights of private owners (*Berman v. Parker*, *Poletown Neighborhood Council v. City of Detroit*, *Hawaii Housing Authority v. Midkiff* and a number of others),³⁶ in 2005, the Supreme Court of the United States adopted a very ambiguous decision in the case of *Kelo v. City of New London*, having changed (expanded) the interpretation of a “social purpose” of property. The court held that a public authority may withdraw private property to transfer it to another private owner for the *purposes of economic development*, having stated that economic growth, which is used by the society due to new private initiatives, may be an acceptable “social purpose”. This opened the door for developers of planning of shopping malls and other similar construction projects which suggest withdrawal by the government of any private property that can stand in the way of their plans.³⁷

Analyzing the case of *Kelo*, we should note that the decision to implement the project of reconstruction of New London adopted by the city council implied that the plot would be provided not to an ordinary legal entity but to Pfizer, which “was a pri-

³⁵Resolution of the FCC of the Volga District of 15.06.2009 in case No. A 65-19967/2008. In: Legal Reference System “Consultant Plus”, accessed 30.04.2019.

³⁶See GHILINA, *Concept of eminent domain and its application in judicial practice of the USA*, 3 Bulletin of Tver State University. Series “Law”, 8-17 (2016); MICHELS, *Kelo v. City of New London: is the Response to Curb the Effect of the Supreme Court Decision Going too Far?* 37 Seton Hall Law Review, 530-534 (2007).

³⁷See SOMIN, *The grasping hand: Kelo vs New London and the limits of eminent domain* (Chicago: Univ. of Chicago press, 2015) 356 p.

vate organization under the control of the city government”.³⁸ This is a typical case of private-public legal entities within our concept, although there is no such a framework in the USA.

The problem in this case consisted in the fact that there was no official definition of “economic development” in the USA laws at that moment, and laws of the states contained very vague interpretation of this term. As a result, the main conclusion from the case of *Kelo* was that afterwards executive authorities could carry out involuntary withdrawal of immovable property from a private owner for development of private enterprises, even if this property did not have any other social purpose than development of the local economy. Meanwhile, after this ruling of the Supreme Court, 45 states reviewed their laws in order to protect private property better, having limited authorities of the government associated with involuntary withdrawal of private property, although, for example, in a number of states (Maryland) these changes have not been introduced.³⁹ Immediately after the case of *Kelo* seven state high courts took measures to protect rights of homeowners from the threat of involuntary withdrawal. The high courts of Ohio, Oklahoma, Pennsylvania, Missouri, New Jersey and Rhode Island have all ruled in favor of owners and against eminent domain for private gain.⁴⁰

For example, in Oklahoma in 2006 withdrawal of land for construction of a water supply system in the interests of an electrical energy plant was prohibited.

It appears that this practice indicates that the problem of abuse of private-public interests is typical both for countries with developed democracy (the USA) and countries where it is not so developed (Russia), which confirms the rightness of

³⁸See BARKACS, BARKACS, *Kelo v. City of New London: is eminent domain for economic development public use or public abuse*, 10-1 Proceedings of the Academy of Legal, Ethical and Regulatory Issues, 1-3 (2006).

³⁹See BUZBY, *Farming the Slums: Using Eminent Domain and Urban Agriculture to Rebuild Baltimore's Blighted Neighborhoods*, 38-2 William & Mary Environmental Law and Policy Review, 492-494 (2014).

⁴⁰See WALSH, C. *Kelo Case - A home lost for what???* <<https://thatwoman.wordpress.com/category/eminent-domain/>> (access date 22.05.2019).

K. Marx that stated that it is economy that determines both politics and law.⁴¹ However, our conclusion consists in the need of further development of the corresponding legal tools rather than in rejection of legal regulation of economic relations. Otherwise, judicial practice will be still controversial, adopting, on the one hand, decisions within the spirit of *Kelo*, and, on the other hand, decisions similar to those by the state supreme court of Michigan, which recently overruled one of the previous decisions and held under the state constitution that a local government could not withdraw land in order to turn it over to a private developer, even if the initiative would advance the public interest by creating many jobs and expanding the tax base.⁴²

In our view, fair settlement of this issue requires formation of clear legal principles by which public authorities could be governed when making decisions. The European Court of Human Rights made an attempt to formulate one of these principles.

For example, in the Judgment in the case of Gladysheva v. Russia (Application No. 7097/10) of December 6, 2011, the Court states that any interference with property must not only be lawful and pursue a legitimate aim but also satisfy the requirement of *proportionality*. The Court notes that a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance is inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden.⁴³ Search for such a balance had been conducted by the ECHR also before. For example, in the case of Sporrang and Lonnroth v. Sweden in the Judgement of September 23, 1982, the Court states that establishment of restrictions on development of an area of citizens from 1954 to 1979 by the municipality of Stockholm (despite the fact that

⁴¹See MARX, Contribution to the Critique of Political Economy. Preface. In: Marx K. Engels F. Selected Works. Volume 1 (Moscow, ProMedia, 2008) 335-336.

⁴²See BYRNE, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 Journal of Environmental Law, 131 (2005).

⁴³Bulletin of the European Court of Human Rights. 2012. No. 6.

this area was not withdrawn for public needs and developed) is a violation of the rights of the citizens to freely use their property without fair compensation for inflicted damages.⁴⁴

Therefore, one of the elements of the principle of proportionality must be not just interest (an economic need of a particular society group) but an exclusive social necessity (need) of an indefinite number of persons residing in the municipality or its part, satisfaction of which is impossible without withdrawal of a specific private land plot. The importance of this criterion is well observed in terms of two Russian procedures: withdrawal of land plots and immovable property items under agreements on development of built-up areas (carried out within the framework of the program for resettlement of citizens from dilapidated and hazardous housing), and the renovation program of Moscow, when the citizens were resettled from quite decent houses in the city center to the outskirts to transfer commercially attractive land for construction of shopping malls and luxury housing.⁴⁵

While in the first case the factor of “exclusiveness” consists in the impossibility to live in an unfavorable environment, in the second case we observe just a typical case of abuse of rights and prevalence of private-public interests.⁴⁶ This kind of examples is not limited only to Moscow. In particular, V.P. Kamyshansky fairly doubted that the necessity for demolition of 58 thousand single-storey houses located in the total area of about two thousand hectares in Krasnodar in 2006 corresponds exactly to municipal needs.⁴⁷ The decision of the authorities of Detroit on withdrawal of an

⁴⁴European Court of Human Rights. Selected judgements: In 2 v. / Managing Editor V.A. Tumanov (Moscow, Norma, 2000) 808 p.

⁴⁵Housing renovation program – what is the threat of resettlement under the new law <<https://videomotret.ru/watch/programma-renovatsii-zhilya-chem-grozit-pereselenie-po-novomu-zakonu/aBmdXRbjnZE>> (accessed 28.04.2019).

⁴⁶This conclusion about the correlation between private and private-public interests is proved also by the fact that resettlement of citizens from dilapidated and hazardous housing to new apartments never raises protests; the renovation program in Moscow caused mass protests of citizens who did not want to leave their homes. Ref.: Protest against renovation in Moscow grows into a spontaneous procession <<https://belsat.eu/ru/programs/protest-protiv-renovatsii-v-moskve-pereros-v-stihijnoe-shestvie/>> (accessed 28.04.2019).

⁴⁷See KAMYSHANSKY, KAMYSHANSKY, ARAKELIYAN, *Reservation and withdrawal of land plots for municipal needs*, 1 Law, 64-73 (2007).

entire district (465 acres of homes for 4,200 residents, as well as several schools and churches) can be called equally disputable; it was made to provide General Motors with a land plot complying with its specifications for construction of a new plant.⁴⁸

At the same time, the principle of proportionality must, in its turn, have natural boundaries (limits) that allow, in particular, considering the demands of citizens for compulsory provision of another land plot for the withdrawn one, instead of receiving monetary compensation, as unreasonable.⁴⁹ Therefore, the principle of proportionality must signify inadmissibility of arbitrary limitation of land rights, including withdrawal of land for private-public needs according to a simplified procedure.

2) principle of establishing limits of authorities of private-public legal entities to withdraw private land plots.

Thus, there is no exhaustive list of private-public legal entities (and their interests) in Russia at the moment, however, many of them are expressly mentioned in the Land Code (subsurface users, natural monopolies, etc.). Their special authorities consist in the possibility to participate in the procedures for withdrawal of land plots for state or municipal needs. For example, they may submit requests to public authorities suggesting withdrawal of a private land plot; the land plot may even become private property of private-public legal entities (in this case they pay compensation to the former owner).

In our view, emergence of such rules in the Land Code of the Russian Federation indicates a sharp decline in guarantees of the right of private ownership of land, while many private-public legal entities express private-public interests rather than public ones. Accordingly, we consider equation of their interests with the interests of the entire society as a violation of property rights of people. This issue can be settled

⁴⁸See BYRNE, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 Journal of Environmental Law, 139 (2005).

⁴⁹Ref.: Ruling of the Constitutional Court of the Russian Federation No. 2963-O of 19.12.2017 “On Refusal of Acceptance for Consideration of the Complaint of the Citizen Ivan Yurievich Bekhtold about Violation of his Constitutional Rights by Provisions of the Civil Code of the Russian Federation and the Land Code of the Russian Federation”. In: Legal Reference System “Consultant Plus”, accessed 30.04.2019.

by means of two actions: determination of a list of private-public needs (they arise out of private-public interests); regulation of special procedures. In our view, the list of such needs must include demolition of dilapidated and hazardous housing (slums) and construction of modern houses in their place (under agreements on development of built-up areas); construction of sports facilities; subsurface use; construction of private roads and hospitals, etc.

The main criterion of difference of public from private-public needs is the degree of their general utility (in the interests of all citizens, if they are roads or electric networks; in the interests of some citizens, if they are stadiums); the purpose of use (direct generation of profit (renovation) – for private-public needs; lack of such a purpose for public needs – military facilities); the form of ownership to which a land plot is transferred – state or municipal (for public needs); private (for private-public needs).

Use of such criteria will allow arranging many conflict situations arising in practice, related to promotion of tourism (and replenishment of the budget), and requiring withdrawal of land plots from private owners to ensure access to the beach;⁵⁰ expansion of the list of city land for its use for agricultural purposes;⁵¹ distinction between public (communications networks in cities) and private-public infrastructural needs (pipelines for oil trade).

In terms of the procedure, we should note that a decision on withdrawal of private land plots (like now) must be adopted by public authorities subject to availability of urban planning documentation and full compensation for the market value of the withdrawn land plot and all inflicted damages. In addition, we think it is important to extend the period of notice on withdrawal of land plots and establish mandatory public hearings the results of which must have a legal significance in this

⁵⁰See TENAGLIA, *Chandler v. County Commissioners of Nantucket County: Why the Massachusetts Statute Authorizing Takings by Eminent Domain for Highway Purposes Should Not Serve as a Mechanism for Conservation*, 21 Pace Environmental Law Review, 15-17 (2003).

⁵¹See PETERS, *Creating a Sustainable Urban Agriculture Revolution*, 25 Journal of Environmental Law and Litigation, 240 (2010).

case.⁵² Moreover, it is necessary to enshrine the mechanism of liability of private-public legal entities, if they have not developed the land plot within the established period, as well as the need to obtain a certificate of a regional Commissioner for Human Rights in respect of the project requiring withdrawal of private land.

3) *principle of adequacy of compensation for withdrawn land property*. The issue of fair calculation of compensations for owners of withdrawn property plays an important role in the procedure for withdrawal of land plots for public and private-public needs. Unfortunately, at the moment there are a number of problems with the understanding of “fair compensation”, and courts almost always take the side of the plaintiff (authority) and completely ignore expert calculations of the defendant (citizen). Analysis of the wide judicial practice shows that in “political” cases associated with mass withdrawal of land plots from citizens and their associations (for example, in connection with the Olympic Games in Sochi in 2014), judicial authorities did not take into account arguments of citizens about undervaluation of their property. For example, the court referred to item 26 of Article 15 of the Federal Law “On Organization of the XXII Olympic Winter Games and XI Paralympic Winter Games of 2014 in Sochi, Development of Sochi as a Mountain Climate Resort and Introduction of Alterations to Certain Legislative Acts of the Russian Federation” of December 1, 2007, and stated that the repurchase price of the land plots and (or) immovable property items located on them, as well as *the amount of losses subject to compensation in connection with the withdrawal, might not exceed the amounts determined in the valuation report*,⁵³ drawn by a state unitary enterprise.

Cases when courts, calculating compensation, ignore *all losses* of citizens associated with withdrawal of land plots are not less common. The situation is aggravated also by the fact that before upcoming withdrawal local government bodies

⁵²At the moment in Russia public hearings are organized to discuss some types of urban planning documentation, however, their results are not mandatory and are often ignored.

⁵³Ruling No. BAC-10286/13 of August 21, 2013 “On Refusal to Submit the Case to the Presidium of the Supreme Commercial Court of the Russian Federation”. In: Legal Reference System “Consultant Plus”, accessed 25.04.2019.

sometimes artificially underestimate the cadastral value of a land plot, on which calculation of compensation is based.

It is noteworthy that in a number of countries the issue of adequate (fair) compensations has been settled more effectively. For example, addenda to the State Constitution adopted in the State of Michigan (USA) stipulate that in case of withdrawal of private property authorities shall prove that withdrawal is not performed in order to transfer property to private persons for the purpose of economic development or growth of tax revenues. In addition, 125 % of the market value of the withdrawn land plots and other immovable property shall be paid to their owners,⁵⁴ which is actually compensation for moral harm suffered by the person as a result of the property withdrawal.⁵⁵ Moreover, this compensation will facilitate the search for a new home and the change in the usual way of life. It is especially relevant for low-income citizens affected by these procedures. It is also necessary to enshrine such an additional guarantee as the possibility for citizens to independently choose the audit organization performing assessment of the value of land plots, which will allow evaluating the withdrawn plots objectively and paying fair compensation,⁵⁶ as well as to create a system of special land (environmental) courts, which could consider this category of disputes in a competent manner.⁵⁷ Equal value and timeliness of payment of compensation for the property (land) withdrawn for public needs is a very important element of this principle, since the gap between adoption of a decision on withdraw-

⁵⁴See RUKHTIN, *Involuntary withdrawal of land and other immovable property in Russia, the USA and Great Britain* / under the editorship of V.P. Kamyshansky. Monograph (Moscow, Arctic- 4 D, 2007) 118.

⁵⁵In the Russian legal science, it is proposed to establish 150% compensation. Ref.: AFANASIEVA, S.D. *Constitutional and legal institution of withdrawal of land plots for public needs: comparative analysis of experience of the Russian Federation and the United States of America*: abstract of the thesis of candidate of juridical sciences (Moscow, National research University «Higher school of Economics», 2015) 14.

⁵⁶See GOLOVANOV, *Withdrawal of land plots for state and municipal needs – issues of legal regulation*, 10 *Property relations in the Russian Federation*, 113 (2013).

⁵⁷See MELNIKOV, *International experience of judicial protection of land rights and land courts in Russia*, 8-19 *Amazonia Investiga*, 278-286 (2019).

al and payment of compensation can significantly reduce the value of a land plot.⁵⁸

Therefore, the grounds for involuntary withdrawal of private land plots to public (state or municipal) ownership or private ownership of legal entities specifically mentioned in the law must comply with the principles of proportionality, adequacy of compensations, as well as limitedness of authorities of private-public legal entities. Meanwhile, the very development of procedures for withdrawal of private land plots is inevitable in the era of globalization, which is caused, in particular, by the needs of development of engineering and transport infrastructures. However, an equally complex and multilevel system of guarantees of human rights must correspond to the increasing grounds for withdrawal of private property. Otherwise, the balance between private and public interests will be disturbed.

5. The Russian legal doctrine and legislation stipulate the possibility of not only withdrawal of private property for public needs but also limitation of rights of private owners to promote particular public interests. Such a legal framework was called “public easement”. Initially, its difference from a private easement consisted in the fact that a private easement was intended to promote the interests of certain citizens and legal entities; a public easement – the interests of an indefinite range of persons (residents of a settlement or its part).⁵⁹

At the moment, there is no consensus of scholars regarding the position of a public easement among the related legal categories and phenomena. For example, A.V. Kopylov believes that public easements have nothing in common with easements known to Roman private law. They are “only limitations of ownership rights by

⁵⁸Ref.: Resolution of the Constitutional Court of the Russian Federation No. 9-II of February 11, 2019 “In the Case Concerning the Review of the Constitutionality of Part 5 of Article 13 of the Federal Law “On Peculiarities of Regulation of Certain Legal Relations in Connection with Accession of Territories to the Subject of the Russian Federation – the City of Federal Significance Moscow and on Introduction of Alterations to Certain Legislative Acts of the Russian Federation” in Response to Complaints from the Citizens A.K. Kachkovsky and A.G. Fedosov”. In: Legal Reference System “Consultant Plus”, accessed 30.04.2019.

⁵⁹See POZDNYAKOVA, *Establishment of easements on land with linear structures*, 4 Agrarian and Land Law, 57-58 (2009); KALINICHEV, *Land easement in the Russian legislation*: abstract of the thesis of candidate of juridical sciences (Moscow, Russian State Social University, 2007) 25 p.

virtue of law”.⁶⁰ On the contrary, T.V. Deryughina thinks that an easement “differs from limitation of the ownership right in purposes of establishment; subject content; objects; content; compensatory nature”; “a public easement does not belong to the category of rights of limited use of another person’s property, limitations of the ownership right, but occupies its own position in the system of real rights”.⁶¹ A third group of authors believes that a public easement is a limit of the ownership right rather than its encumbrance.⁶² In our view, the first point of view appears more preferable due to a great similarity of the procedures and legal consequences of establishment of public easements and limitations of the ownership right. A public easement can not be considered as a type of real rights because of the lack of attributes of “inseparability” of an easement from the dominant land plot and the “value of will” of the owner.

Study of the said differences inevitably raises the question of which interests are reflected by the public servitude established in Russia: private, public or private-public? In contrast to the classic ideas about an easement (including public one), implying only the possibility to use another person’s property, the public land easement provided for in the Land Code of the Russian Federation allows the possibility of construction in terms of the easement. Initially such limitations were stipulated for development of road service on federal roads. Then this list was supplemented with the rules providing the possibility to construct various linear structures in terms of an easement for organization of the 2014 Olympic Games⁶³ (and after also the 2018 FIFA World Cup), as well as in case of accession of new territories to Moscow. It is the differences of the frameworks used in the latter laws from the classic easement that

⁶⁰See KOPYLOV, *Real rights to land in Roman, Russian prerevolutionary and modern civil law* (Moscow, Statute, 2000) 62.

⁶¹See DERYUGINA, *Civil law regulation of the institution of easement in Russia*: abstract of the thesis of candidate of juridical sciences (Volgograd, Volgograd Academy of the Ministry of Internal Affairs of Russia, 2002) 6.

⁶²See KRASNOVA, *Certain aspects of the doctrine of easement in modern Russian law*, 3 *Property relations in the Russian Federation*, 7-8 (2017).

⁶³The timeless nature of many “sports easements” exceeded the term of the Olympics themselves, which in their turn, were interesting only to a part of the population, but led to violation of rights of many private owners.

led to the proposal to “reject using the term “easement” and use the wording “limitations of the ownership right for the purpose of placement and (or) operation of infrastructure facilities””.⁶⁴

We should agree with the latter proposal. Considering the issue about the legal regime of linear structures and the legal status of persons placing them, we come to a conclusion that in most cases linear structures (such as gas and other pipelines, power lines and some other facilities) belong to private persons, and only due to the social, public significance, monopolistic nature of the corresponding type of activity, relations *regarding their operation* are under particular control of the state and subject to special legal regulation.

In our view, use of many such facilities reflects private-public interests, however, the entire coercive apparatus of the state is used to promote them. In addition, it is noteworthy that before September 2018 Article 23 of the Land Code of the Russian Federation had not stipulated establishment of a public easement for construction of linear structures. This circumstance did not prevent interested organizations (gas, electricity, water supply, etc.) from requesting establishment of a private easement, and the courts from establishing exactly a private easement, although now the same needs are elevated to public ones.⁶⁵ In our view, since private persons are the owners of such facilities, the state must not establish special preferences for all of them regarding involuntary limitation of the private owners’ rights.

In other words, with consideration of the general principle of inadmissibility of arbitrary intervention by anyone in private affairs, which is addressed to all subjects of law and is a guarantee of the freedom to exercise rights and freedoms of person and citizen, the state may not establish an obvious statutory priority of interests of

⁶⁴See AFANASIEV, *Easement in civil law of the Russian Federation: theory and practice of application*: abstract of the thesis of candidate of juridical sciences (Moscow, Russian Academy of advocacy and notary, 2017) 13.

⁶⁵Ruling of the Supreme Court of the Russian Federation No. 306-ЭС17-22992 of 14.02.2018; Ruling of the Supreme Court of the Russian Federation No. 308-ЭС16-9476 of 17.08.2016; Ruling of the Supreme Court of the Russian Federation No. 308-ЭС16-14553 of 02.11.2016. In: Legal Reference System “Consultant Plus”, accessed 30.04.2019.

the future owners of private linear structures (even if their operation has a public significance) over the legitimate interests of the owners of private land plots. However, what can we see?

The current land legislation of Russia in terms of regulation of public easements does not comply with the principles of adequacy and justice, it is not aimed at the search for a balance between private and public interests, because it stipulates reduction of the term and the cost of services for registration of linear structures. A significant part of linear structures is constructed in violation of the established procedure (or the procedure for registration of rights or the procedure for technological connection of consumer facilities). Public easement was proposed to solve the existing problems as the main way of emergence of rights to land plots for placement of linear structures. Agreeing that there are public purposes during placement of most linear structures, we should note that their achievement threatens private interests of owners and does not allow speaking about a balance of interests of owners of land and linear structures.

By virtue of Article 39.37 of the Land Code of the Russian Federation a public easement may be established for placement of transmission facilities, heating networks, water supply networks, sewerage networks, communication lines and installations, linear structures of gas supply systems, oil pipelines, their integral technological parts, if the said facilities are facilities of federal, regional or local significance, or are necessary to organize power, gas, heating or water supply for population and water sewerage, linking (technological connection) to engineering networks. In contrast to the previously effective legislation, now the procedure for establishment of a public easement excludes public hearings that were an important element of the mechanism of promoting rights and legitimate interests of owners of land plots, buildings and structures, although the Constitutional Court of Russia admitted that public hearings provide everyone who can be affected by a supposed decision of an authority and an official with the possibility to participate in its discussion regardless of having

special knowledge or belonging to particular organizations and associations.⁶⁶

In connection with the new rules, land and urban development decisions on placement of linear structures in terms of public easements are largely not open and will be adopted without participation of citizens (including owners of immovable property). Issues of placement of facilities of regional and federal significance remain without discussion by the public, because the corresponding documents related to territorial planning are not the subject of social discussions (public hearings).⁶⁷

Moreover, the Government of the Russian Federation may establish cases where preparation of territorial planning documents is not required for construction or reconstruction of linear structures (it. 5, P. 3, Art. 41 of the Urban Development Code of the Russian Federation). In certain cases, social discussions or public hearings on a territorial development plan or an area demarcation plan may be not organized (P. 5.1, Art. 46 of the Urban Development Code of the Russian Federation). In addition, the grounds for construction of linear structures are programs for integrated development of communal infrastructure systems of settlements, urban districts, investment programs of subjects of natural monopolies, organizations of the utilities complex, which do not require social discussions or public hearings either. Therefore, there is violation of one of the principles of the land legislation providing for participation of citizens, social organizations and religious organizations in settlement of issues related to their rights to land (submit. 4, it. 1, Art. 1 of the Land Code of the Russian Federation), as well as one of the basic principles of the urban development activity legislation proclaiming participation of citizens and their associations in implementation of urban development activity and promotion of the freedom of such participation (it. 5, Art. 2 of the Urban Development Code of the Russian Federation).

⁶⁶Ruling of the Constitutional Court of the Russian Federation No. 931-O-O of 15.07.2010 “On the Complaint of the Citizen Olga Olegovna Andronova about Violation of Her Constitutional Rights by Provisions of Articles 39 and 49 of the Urban Development Code of the Russian Federation, Article 13 of the Law of Saint Petersburg “On Urban Development Activity in Saint Petersburg”, Articles 7 and 8 of the Law of Saint Petersburg “On the Procedure for Organization of Public Hearings and Provision of the Population with Information when Implementing Urban Development Activity in Saint Petersburg”. In: Bulletin of the Constitutional Court of the Russian Federation. 2011. No. 2.

⁶⁷Only general layouts of urban districts and settlements fall within their scope in Russia.

New rules of the Land Code about public easements violate another fundamental provision enshrined not only in the Civil Code but also in the Constitution of the Russian Federation, the principle of inviolability of the ownership right.

Violation of this principle can be illustrated with the use of some new provisions of the Land Code of the Russian Federation. First, rules of the Land Code admit that establishment of a public easement may lead not just to a significant difficulty in using a land plot (its part) and (or) the immovable property located on it but also to the complete impossibility to use the object for a certain period. The term of the difficulty in using/impossibility to use (in case of such circumstances) is a necessary element of an application of an interested person for establishment of a public easement, a decision on establishment of an easement, an agreement about the corresponding easement. The maximum term comprises 3 months for certain types of use of land plots (housing construction, private households, gardening) and 1 year as a general rule. For a whole year (!), the owner as a result of construction, reconstruction, placement of linear structures on his land plot (or its part) may be deprived of the authority of possession and use, actually having a “bare ownership right”, although this concept is not used in the Russian science of civil law

However, even after “active” urban development actions on the land plot there is a new structure, and limitations of the rights of the owner of the land plot (in fact it means deprivation of the possibility to possess and use the corresponding part of the land plot) remain effective.

Second, violation of rights and legitimate interests of owners of immovable property is also indicated by the rules that if they fail to sign a public easement agreement within 30 days, and to challenge the decision on establishment of the public easement in court, the owner of the public easement that has made a notarial deposit for the public easement, shall be entitled to exercise the public easement, including performance of the required (including construction) works.

It means that now the property side of limitation of use of land plots (the main thing is to compensate the owner for his inconvenience) is preferable in the Land

Code of the Russian Federation to such an extent that the very essence of the ownership right is negated. Following one of the constitutional provisions on advance and, probably, equivalent compensation, the Land Code violates another basic provision on the necessity of availability of constitutionally protected purposes and their compliance with the nature of limitations. Probably, understanding this, in it. 5, Art. 39.39 of the Land Code of the Russian Federation the legislator prohibited (excluding some exceptions) establishment of public easements for placement of linear structures on land plots belonging to citizens and intended for individual housing construction, gardening, private households. In the Russian judicial practice, it is possible to find interesting cases, decisions which indicate how ambiguously the nature of “public needs” is defined when an easement is established. For example, the court rejected establishment of a public easement on plots determined in the development plan and the quarters area demarcation plan for placement of roads, in connection with the applicant’s failure to provide evidence of interests of the local population therein”.⁶⁸ It appears that in this way the court made a distinction between private-public interests (of legal entities) and public interests (of the population of the municipality).

Therefore, by its legal nature, an easement is not aimed at (and does not imply) termination of the right to use the encumbered part of the land plot, while exercise, material implementation of the right to develop land provided to the dominant owner by the Land Code of the Russian Federation – to construct a *surface* facility – leads to an actual impossibility to use the developed part of the land plot by its owner.

Construction of buildings (road service facilities) as well as various structures by the dominant owner in general contradicts easement relations, and availability of the relevant rules is the result of a political decision. This is why in the scientific literature it is fairly noted that enshrining of a legal framework of public easements in the

⁶⁸Ref.: Appellate Decision of Perm Krai Court of 12.11.2012 in case No. 33-10282. In: Legal Reference System “Consultant Plus”, accessed 02.05.2019.

Land Code of the Russian Federation is unjustified and looks like a desire of the legislator to settle public law issues with the use of a set of private law tools not intended for this purpose.⁶⁹

Meanwhile, we should note that in most cases linear structures are under or above the earth's surface and their availability, for example, in confined urban built-up areas is needed objectively. The nature of development, the length of linear structures (often location on a significant number of land plots having different owners) determine the complexity of registration of other rights to land plots (for example, lease). Consequently, in the long term, development of a new type of real rights, which would correspond to the possibility to use a land plot of another person for construction of linear or similar structures to a greater extent must be the task of the legislator (in order to ensure a balance between private and public interests). Probably, it is the right of development discussed in legal science and provided for in one of draft laws on alteration of the Civil Code of the Russian Federation.⁷⁰ However, even now it is necessary to correct rules of the Land Code of the Russian Federation in terms of transferring the burden of initiating court proceedings (with all arising procedural consequences) from owners of private land plots to the other party (private-public legal entities interested in construction of linear structures), as well as to prohibit economic activity on land plots of other persons before obtaining the consent from their owners or court decisions.

Such measures will allow getting closer to achievement of a balance between private and public interests, will create the basis for elimination of the "skewness of interests", their disharmony. In addition, we should note that we mean not so much the conflict of private and public interests as the conflict of private and private-public interests – the legitimate interest of one private person (the owner of immovable property) and the interests of another private person (the owner of a public ease-

⁶⁹See KOZLOV, *Land easement in the current Russian law*, 9 Issues of Russian and international law, 264 (2016).

⁷⁰See POPOVA, *Right of site development in the modern civil law*: abstract of the thesis of candidate of juridical sciences (Moscow, Moscow Academy of Economics and Law, 2016) 28 p.

ment) under the cover of public interest. Meanwhile, only public interests and (or) rights of third parties are acceptable to limit inviolability of the right of private ownership.

In our view, up to reformation of the land legislation, even now it is necessary to take two important legislative measures. First, expanding public participation (as in case of withdrawal of land plots for public needs) in discussion of urban planning documentation (area planning schemes), as well as making the results of social (public) hearings on establishment of public easements mandatory. Moreover, it is necessary to revoke a range of legislative decisions mentioned above, including establishment of a ban on construction of facilities on a part of a land plot encumbered with a public easement.

Second, for purposes of and procedures for establishment of public land easements, it is necessary to distinguish public from private-public interests and needs. The experience of the USA is of interest in this sense, there in cases about attempts of involuntary limitation of rights of private owners with an easement for laying of pipelines the court made a distinction between oil pipelines as common carriers and private carriers by defining private carriers as pipelines serving the sole purpose of moving the owner's oil from its own wells to its own refinery, even if the movement crossed state boundaries.⁷¹

It appears that also in Russia it is necessary to separate private-public interests (construction of oil pipelines can hardly be recognized as public interest)⁷² from "classic" public interests (construction of roads, supply of population with water or electricity). Accordingly, the current framework of public easement must not apply to private-public interests – in order to promote them, a private easement without any participation of public authorities must be established.

⁷¹See JENSEN, *Eminent Domain and Oil Pipelines: A Slippery Path for Federal Regulation*, 29-2 Fordham Environmental Law Review, 321-328 (2017).

⁷²See GARTINA, *Civil law regulation of land easements in the Russian Federation: issues of theory and practice*: abstract of the thesis of candidate of juridical sciences (Moscow, Institute of legislation and comparative law under the Government of the Russian Federation, 2009) 20-21.

6. Unreasonable denial, termination or limitation of the right of private ownership signifies refusal of the state to respect rights and freedoms of man and citizen. The trends of transition from the tasks of protection of private property to almost socialist ideas about the priority of widely understood public interest over private one existing in Russia and the USA give rise to concern and require discussion and adjustment. Meanwhile, the very need to limit human rights is beyond doubt – otherwise, egoism of one owner can leave a whole city microdistrict (quarter) without light and water. The problem is that expansion of the state powers to intervene in private property, which is inevitable in terms of urbanization and globalization, has not led to proportional growth and complication of guarantees of human rights that allow determining the balance between private and public interests and block the abuse of regulatory powers by public authorities.

Settlement of such a complex issue can not be simple and particularly universal for all countries of the world. However, trends of limitation of rights of private owners are inherent in many countries of the world regardless of their degree of democracy development (which exists in the USA but is still absent in Russia). It means that also arrangement of the system of guarantees of human rights will be subject to particular regularities common for all countries.

In respect to Russia, it signifies the need to develop the system of social (public) hearings, to form the concept of private-public interests (and legal entities expressing them), with exclusion of the latter from the field of state support in the form of involuntary withdrawal of private land plots for public needs and establishment of public easements. Compilation of a clear and exhaustive list of private-public and public needs, despite all the drawbacks of such a decision from the point of view of standards of the legal technique, nevertheless, in the specific conditions of Russia, can have a positive effect, clearly determining parameters and types of state intervention in private affairs, thereby establishing additional protection of rights of private owners from arbitrary limitations, including by means of private, rather than public, easements.

When distinguishing between public and private-public interests, it is necessary to consider the factor of “directness” of promotion of public interests (for example, oil trade is an important task, however, the main benefit from it is received by oil companies but not citizens), as well as the factor of “direct life necessities” of population (which excludes stadiums).

Creation of an appropriate system of guarantees of withdrawal/limitation of private land plots will provide a stimulus to development of the national economy and attraction of investments, which is very important for development of Russia.