



A Legal Analysis of Limited Property Right House

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Abstract

With the proposal of the market policy of constructing unified urban and rural construction land, the issue of small property right house again turns to be a hot issue in the real estate industry. Through an analysis of the current market condition of small property right house, relevant legislation and reasons for formation of small property right house, this paper proposes measures to resolve the issue of small property right house in a correct way, with an expectation of further enriching study on legal theory of small property right house, providing reference for making a correct decision by relevant departments and making pygmy effort for facilitating construction of a harmonious society.

Key words: Small property right house; Relevant legislation; Binary land ownership system

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INTRODUCTION

In the recent years, development of real estate industry has been swift in China. As the price of commercial residential building in urban areas has been on a constant increase, small property right house with price advantages has encountered a hot sell in a lot of cities. It is manifested by the survey data that, by the end of March 2012, small property right house had occupied more than

15% of the market supply amount of the housing market in a large number of cities. Small property right house in Beijing accounted for more than 20% of the total market supply amount, and small property right house in Shenzhen accounted for more than 40% of the total market supply amount. According to relevant data from the statistical bulletin of construction of villages and small towns and the State Statistics Bureau, by the end of 2012, through multiple forms and approaches of merger of village and town, reconstruction of old city, new rural construction, direct development and cooperative development of village and town, the number of small property right house had reached 6.6 billion square meters, accounting for 20% of the real house construction area in stock all over the country. However, considering the current legal regulations, both development and sale of small property right house are prohibited by law and drift away out of legal protection. On one hand, the national law bans small property right house by explicit order. On the other hand, the market of small property right house still simmers below the surface. Thus, a series of economic, social and legal problems arise. For example, the well-known case of “Painters Village” in Beijing made the issue of small property right house again become a focus of attention by researchers.

1. DEFINITION OF THE CONCEPT OF SMALL PROPERTY RIGHT HOUSE

Currently, different researchers have different understanding in the concept of small property right house. It is generally believed that small property right house is classified by the license-issuing authority of house ownership certificate. That is to say, that the nation produces and issues house ownership certificate and certificate of use right of state-owned land is called “large property right house”, whereas that township government or villagers’ committee privately produces

and issues “house ownership certificate” is called “small property right house”, also called “township property right house” or “village property right house”. “Hint of Risk in Purchasing Commercial Residential Building” promulgated by the Ministry of Housing and Urban-Rural Development on June 18, 2007, and “Notice Regarding Strictly Implementing the Laws and Regulations of the Rural Collective Construction Land” promulgated by the General Office of the State Council on December 30, 2007, mention the concept of “small property right house”. Hence, we can summarize “small property right house” as “a kind of house property which is constructed on rural collectively owned land whose sale object is not a member within the collective organization, without surrendering related expenses such as land transferring fees, in which the township government or villagers’ committee issues an ownership certificate.”

2. EXISTING RELEVANT LEGISLATION ON THE ISSUE OF SMALL PROPERTY RIGHT HOUSE IN CHINA

2.1 Land Management Law

Article 43 in “Land Management Law” stipulates, “Any entity or individual who intends to use land for construction has to apply to use the state-owned land in pursuant to the law, of course, excluding initiating township enterprise villagers construction house using farmers collectively owned land after approval in pursuant to the law or (township) village public facilities and public welfare establishments construction using farmers collectively owned land. The state-owned land which the former article mentions to be used in pursuant to the law contains the land owned by the state and the land owned collectively originally but expropriated by the state.” Article 63 stipulates, “The use right of farmers collectively owned land is not allowed to be transferred or rented for non-agricultural construction. Nevertheless, this does not include such transfer of the use right of land in pursuant to the law because of bankruptcy and merger of enterprises which comply with the overall planning for land utilization and obtain the right of construction in pursuant to the law.” These two articles explicitly stipulate that collectively owned land should not be used for development of real estate. Although “Land Management Law” has not made any direct stipulation on the issue of small property right house, it has indirectly prohibited small property right house by constraining transfer of the use right of collective construction land.

2.2 Other Normative Documents the Country Has Recently Promulgated

In December 2004, the State Council issued “Decision of the State Council on Intensifying the Reform and

Tightening of Land Management”, which explicitly stipulates that, “It is prohibited rural collective economic organizations transfer and rent illegally collectively owned land for non-agricultural construction.”

On June 18, 2007, the news spokesman of the Ministry of Construction issued “Hint of Risk in Purchasing Newly Constructed Commercial Residential Housing”, which explicitly discloses, “Urban residents should not purchase houses constructed on collectively owned land.”

On December 30, 2007, the State Council issued “Notice on Strictly Implementing Laws and Policies about Rural Collective Construction Land”. The Notice requires to “strictly control the scale of rural collective construction land and to prohibit enlarging the scale of rural collective construction land in any name without authorization.” Furthermore, the notice explicitly points out that urban residents are not allowed to purchase house site, farmers house or “small property right house” in rural areas.

Thus, it can be judged from the above legal stipulations that development and sale of small property right house is against legal regulations.

3. AN ANALYSIS OF THE REASONS FOR FORMATION OF SMALL PROPERTY RIGHT HOUSE

3.1 The Factor of Real Estate Price

In the recent years, price of the real estate in all areas across the country has been on a constant increase, whereas the price of “small property right house” is only 40%-60% of the price of commercial residential house in the same position, and is even only 30%-40% of the price of commercial residential house in the same position. In the process where the price of commercial residential house stays at a high level and soars all the way, it is without doubt that expensive land price has added fuel to the fire. The Ministry of Land and Resources has ever organized relevant entities to make a typical analysis of 40 properties for sale. The result shows that whether in the case of supply of land through agreement or in the case of “bid, auction and listing”, the proportion of land price to the price of house is approximately 25%-30%. A research report by the Development Research Center of the State Council indicates that, during the period from 2000 to 2004, the land price increasing by 50% is a major motive for increase of house price. The one who benefits the most is the local government and the real estate land agent. As a matter of fact, ever since the 90s in the 20th Century until today, dependence of the local government on land transferring fees revenue has increased with a geometric magnification. It is indicated in the Chinese social development blue book in 2007 presented by the Chinese Academy of Social Sciences that, the land

transferring fees all over the country in 1990 was only 1.05 billion Yuan. And in the year 2010, the total amount of land transferring fees all over the country reached 550.5 billion Yuan. During the period of the twenty years, land transferring fees revenue accumulated to 2.19 trillion Yuan. It is found through a horizontal comparison that, in coastal economically developed areas, land direct tax and indirect tax from urban expansion account for 40% of local revenue above the line. The net revenue of land transferring fees accounts for 60% of local receipts not covered in the budget. Thus, it is quite difficult to promote social indemnificatory housing, such as, economically affordable housing and low rent housing. As the price of urban commercially residential housing stays at a high level and the social indemnificatory housing of economically affordable housing and low rent housing is in short supply, even if urban residents are quite aware that purchase of small property right housing will not get legal housing ownership and may encounter a lot of risks, they are still willing to take a chance so as to improve their residential condition.

3.2 The Factor of Land Ownership System

The fundamental reason for existence of small property right house is the binary land ownership system. According to stipulations in Article 10 in the Constitution, the subjects of land use are mainly classified into two categories, namely, the country directing at land in urban downtown areas and farmer collective directing at land in rural and urban suburb areas. Although collective land ownership and state-owned land ownership are equal in the Constitution, according to stipulations of Article 6 in “Law of the People’s Republic of China on Urban Real Estate Administration” and Article 63 in “Land Administration Law of the People’s Republic of China”, only state-owned land can be used for development of real estate, and rural collectively owned land can’t be directly used for development and construction of commercially residential housing. Only land that that is changed from collectively owned land to state-owned land after compensation and expropriation of relevant department can be transferred to qualified real estate development enterprises for development. This is considered based on the administrative management function of the country and defines that collective land can only be expropriated for public benefits. Yet, both the Constitution and the law have not provided any specific stipulation on the definition of “public benefits”. Therefore, under the banner of “public benefits”, the government makes inroads on farmers collective interests, which emerges in endlessly. On one hand, local government bans collectively owned land from directly entering land circulation market. On the other hand, the local government expropriates collectively owned land at a low price and then transfers the land to the real estate land agent at a price that is dozens

of times and even hundreds of times of the expenses of expropriation and compensation. Some collective economic organizations build houses on the collectively owned land in all kinds of names in order to protect their own economic interests and gain economic benefits in the process of land sale.

4. MEASURES TO RESOLVE THE ISSUE OF SMALL PROPERTY RIGHT HOUSE

Although small property right house has a large market, its danger will be more serious if no measure is taken to resolve this issue. Hence, it is necessary to face up to this issue. According to the current legal regulation, small property right house is against legal construction. The usual handling method of “Land Management Law” in the case of illegal construction is not to confirm its ownership and dismantle and confiscate illegal construction and illegal gains within a definite time. Since small property right house exists at a large amount in a lot of cities, the method of dismantling within a definite time not only wastes resources, but also is not to the benefit of social stability. The law has always been an adjuster of interests. The theoretical core of the economics of law is that all legal activities, including all legislations, judicature and the entire legal system, as a matter of fact, play a role of distributing scarce resources. Therefore, all legal activities should aim at the effective allocation and reasonable utilization of resources, namely, maximization of efficiency. In accordance with the viewpoint of the economics of law, it is necessary to be cautious in handling and resolving the issue of small property right house, make overall plans and take all factors into consideration and make a specific analysis in accordance with specific problems.

4.1 Major Measures to Deal With Small Property Right House within the Current Legal Framework

4.1.1 Handling of Small Property Right House That Occupies Cultivated Land for Development and Construction

“Cherishing completely and using rationally each Cun of Land and practically protecting cultivated land” is the basic national policy which is absolutely not allowed to vacillate. Occupation of cultivated land for development and construction of small property right house runs counter to the basic national policy and is a behavior that violates the law. It is a must to be determined to restrain small property right house that prepares to occupy cultivated for land for planning to construct or being constructed in strict pursuant to the legal regulations and to compulsorily tear down small property right house that has been completed and to recover to cultivated land.

4.1.2 Handling of Small Property Right House That Does Not Occupy Cultivated Land for Development and Construction

The small property right house that does not occupy cultivated land for development and construction is entitled to get house ownership certificate if the project complies with the urban construction plan and the overall plan for land utilization, signs a contract of land transfer after approval by the people's government above the provincial level and surrenders land transferring fees. This can not only guarantee the tax revenue of the nation, but also promotes development of village collective economy. Meanwhile, this also protects interests of house purchasers. As for small property right house that does not occupy cultivated land for development and construction, if the project is not completely consistent with the urban construction plan and the overall plan of land utilization, the government may buy it back at a cost price and use it as welfare-oriented public housing or low rent housing.

4.2 Measures to Fundamentally Resolve the Issue of Small Property Right House

The original source of small property right house comes from constraint of "Land Management Law" on circulation of the use right of collective construction land. Therefore, establishment of the system for circulation of the use right of collective construction land is the essence to resolve the issue. It is suggested to revise "Land Management Law". As for the operational behavior that needs to use farmers' collective land, the use right of collective construction land is allowed to circulate freely and the owner of collective land and land use entity negotiate to resolve the issue of circulation of the use right of collective construction land. On the premise that it complies with the overall land planning, the use right of collective construction land can be circulated with multiple modes, including transfer, rent and sublet of the use right of collective construction land. In this way, circulation of the use right of collective construction land will become a pure market transaction behavior and part of small property right house will become legalized, which returns land interests to farmers. This will be helpful to resolve the "three rural" issues and establish the legal concept of right equality and protection and is to the benefit of development of the market economy and social stability.

The positive meaning of reforming the current circulation system of the use right of collective construction land to enable small property right to be legalized.

First, it helps to reduce the cost of real estate, restrain the housing price and realize home ownership. As the current land supply channel is narrow and single, the amount of the use right of land is far from satisfying the

need of urban residents' real estate construction. Small property right house can add to the supply amount of housing and helps to restrain the price of house that has grown rapidly. Therefore, legalization of small property right can not only really realize "home ownership", but can also mitigate the pressure of the government on social indemnificatory housing. The price of small property right is lower than the price of economically affordable housing, so even if part of expenses of taxation or land transferring fees are surrendered, it can still be classified to the scope of indemnificatory housing and, to a certain extent, makes up for vacancy of the government function.

Second, it helps to add to the monetary income of farmers and resolve the three rural issues. Transaction of small property right house will, objectively and necessarily, cause the capital of urban residents to flow to rural areas and increase the monetary income of farmers. According to some economists, one of the current economic problems is the high marketization of demand and serious shortage of supply marketization. That is to say, in some industries, such as, medical care, education and real estate, the phenomenon generally exists that the government excessively and deeply intervenes in the supply system, which gives rise to artificial monopoly of supply. In order to resolve this issue, the best way is to let the supply system fully marketized and to reduce and even cancel intervening and participation of the government in the market evaluation system.

Finally, it helps to break down urban and rural demarcation, push forward development of urban and rural integration and form integration of urban and rural economy. If small property right house becomes legalized, it means acknowledging legalization of circulation of rural collectively owned land. We are at present conducting construction of small towns and reform of urban and rural system and have approved Chongqing and Chengdu as the experimental area of the whole range of reforms in urban and rural areas. And a lot of other provinces also begin to fumble for a reform. For example, Wuhu City in Anhui Province launched the experimental circulation of the use right of farmers' collectively owned construction land in 2000. On October 21, 2004, the policy of "Experimental Method for Circulation of the Use Right of Rural Collective Construction Land in Beijing" was promulgated. And experimental circulation started in the two towns of Yanqing and Huairou. Rural collective construction land in the two experimental areas can be used for circulation, such as, rent and transfer.

When circulation of rural collectively owned land becomes legalized, quite a large number of farmers will be emancipated from constraint of land and will not only live on the traditional agriculture. This also plays an assignable role in the socialist new rural construction and in really realizing overall urban and rural development.

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