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Кому: Дмитрий Валерьевич Пятков, culick.katya@yandex.ru

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Land Parcel as an Object of Ownership in Russia: Difficult Choice between "European" and "Asian" Regulatory Models

Dmitry V. Pyatkov[1], Ekaterina M. Kulik[1]

[1] FSBEI of HE "Altai State University", Barnaul, Russia

pitkov@yandex.ru, culick.katya@yandex.ru

Abstract. The article examines the concept of land parcel in the context of modern economic and legal policy of the Russian state. The reason for the study was the draft law on amendments to the Civil code of the Russian Federation. The article presents some qualitative data on formalized rule that edifices are an integral part of the land plot. Currently, the land parcel is legally defined through the term "surface". The authors conclude that the term "surface of the earth" should be considered in a mathematical sense. This is the boundary between the earth and the air, that is, a two-dimensional topological manifold. The subsoil and the airspace are excluded from the land parcel by law. Therefore, there is no reason to consider the land plot as a volume three-dimensional object. The soil layer, edifices, and water bodies as three-dimensional substances cannot be part of a flat land plot in such circumstances. If there are edifices associated with it, the land parcel will be considered as an integral part of another complex thing. The authors propose to name such a real estate complex "premises". The research was built upon the latest foreign literature, historical and other scientific information. Mathematical understanding of the surface, rather than geographical is taken as the basis for determining of the land parcel.

Keywords: Object of Civil Rights · Real Estate · Land Parcel · Subsoil · Edifices · Ownership

1 Introduction

Currently, work on a draft section of property rights of the Civil code of the Russian Federation was resumed (draft Federal law No. 47538-6/5 "On amendments to part one of the Civil code of the Russian Federation"). The discussion about real estate as the most important object of property rights continued with renewed vigor. One of the possible models to follow is European regulatory experience. Modern Russian jurisprudence exposed its flaws, unsustainable soviet and not just institutes became apparent. However, the modern discussion of property and real estate has a distinctive feature. On the one side, we are trying not only to adopt the best, most advanced western patterns, but also to capture cutting-edge trends of the world jurisprudence. On the other side, not like before we are more careful in evaluating foreign legal system: there is an understanding of the general imperfection of legal mechanisms. Researchers seek to understand the national specifics of real estate law in other countries: if there is something to adopt or there are peculiar solutions designed only for a certain society. In the same time, cautions are heard, that we have to consider all the pros and cons before changing Russian real estate law drastically. Perhaps its disadvantages are just its features, which may in the future become its advantages in the competition of legal systems.

Let us take the example. Professor of the Russian School of Private Law R.S. Bevzenko is known in Russia as a convinced and consistent advocate of the idea that land plot is a unity, which includes land and connected with it edifices. He insists on abandonment of the "Asian" model, which involves "horizontal division" and separate ownership of buildings and land plots. Instead, he proposes moving to the "European" model, when a land parcel serves as the only real estate, the only object of real property rights, with the building considered as an integral part of the land plot (Bevzenko, 2017).

At the same time, another representative of the same School, D.V. Tretyakova writes: "It is worth giving up the strict dichotomy, when legal system, which acknowledges and practices the concept of the single property, is clearly recognized as more developed than legal systems that allow dualism. Dual system admits traditional land plots, buildings, or even horizontally divided volumes of empty space as immovable property. Dualism is not always a sign of underdevelopment or primitiveness. On the contrary, a number of European researchers consider it to be more progressive" (Tretyakova, 2019). At the same time, both researchers are equally inspired by European jurisprudence. There are real apologists of national Russian civil law among the most respected Russian specialists. K.I. Sklovsky and V.S. Kostko, while exploring the concepts of things and real estate, remark: "Without denying the usefulness of studying alien legislations, however, we must note that there are and will be issues that do not have satisfactory settlements in other core jurisdictions" (Sklovsky & Kostko, 2018). Perhaps the most exciting thing about it is that in comparison with "older" European codifications the authors consider the solutions of the junior Russian Civil Code more logical and convincing. Although, according to the authors, decent the concept of thing could not be found in neither Russian or any other civil code nor it has no proper theoretical

interpretation.

Unfortunately, development of scientific discussion does not correspond with the rapid progression of law making. There is a chance that critical amendments, which are reflected in the draft law section of property rights of the Civil code of the Russian Federation, would be given legal effect and become the rule of law. We consider some of them clearly erroneous and interfering with the development of Russian law and public life. We consider this article as a desperate attempt to draw the attention of law-making participants to several drawbacks. Major problem we have been focusing our attention and critique on is the concept of real estate, in particular, representation of a land plot as a three-dimensional object, which includes volumetric objects like buildings, soil layer and isolated water bodies and so on as component elements.

2 Materials and Methods

A theoretical basis of the research is a number of scientific publications of modern Russian and foreign authors. The research largely is of a comparative legal nature. It analyzes not only land definitions that exist today in the legislation of various countries of the world, but also possible future legislative solutions.

As necessary, knowledge of mathematics and natural Sciences, primarily geography, is used. This is due to the ambiguity of the category “surface”, which underlies the definition of a land parcel.

The legal framework for the study was the Civil Code of the Russian Federation, the Land Code of the Russian Federation and other Federal acts. The method of historical interpretation and the methods of formal logic are actively used. This methodology has shown the scientific and legal inconsistency of the allegations that the land, being a surface, can be a three-dimensional space. Metamorphoses of the legislative definition of the land parcel became a strong argument in the discussion.

Much attention is paid to the draft Federal law No. 47538-6/5 “On Amendments to Part One of the Civil Code of the Russian Federation”. This project has become the main object of our criticism. It officially formulates the rule of the single property, according to which the structure may be an integral part of the land plot. Thus, the idea of a land plot as a volume three-dimensional substance is confirmed. That contradicts the most acceptable in modern conditions definition of a land parcel as a part of the earth's surface.

3 Results

Understanding the land plot as a complex structure that can include edifices and any other objects of the material world, does not fit into the context of the modern economic and legal policy of the Russian state. Current Russian legislation does not contain no reference to consider the subsoil and airspace as part of the land parcel. Moreover, it is worth noting that over time the mention of the soil layer as part of the land plot was deleting from the legal definition. Presumably, this did not happen

by accident. Until 2008, a land plot was defined in article 6 of the Land code of the Russian Federation as part of the land surface (including the soil layer), the boundaries of which are described and certified in accordance with the established procedure. At present, article 6 of the Land Code of the Russian Federation delineates a land parcel as a real thing, which is a part of the earth's surface and has characteristics that allow it to be qualified as ascertained thing.

Neither the soil layer, nor edifices or any other physical substances can be a part of the land parcel due to the essential differences between these objects. The key term in the delineation of land is the phrase "land surface". This is an ambiguous term. The earth's surface can be considered as a natural science category (from a geographical point of view) and as a mathematical category. In the first case, the surface of the earth looks like a three-dimensional, volumetric substance, corpus, which has a complex structure (part of the atmosphere, hydrosphere, part of the crust, biosphere). It is noteworthy that in such definitions, the word "earth" always begins with a capital letter – "Earth". In the second case, the surface can be defined as a boundary of the body, in other words as a two-dimensional topological manifold. It is clear that, being the boundary of the body, the surface cannot include the body itself, as a two-dimensional object cannot hold a three-dimensional one. With particular regard to the surface of the earth as the boundary of the earth that separates the earth from the air, it cannot include three-dimensional bodies. Only two dimensions are available for the surface. This is how we tend to explain the disappearance of the soil layer from the definition of the land parcel. After all, the soil layer has a volume, exists in three dimensions, it can be associated with the earth's surface in its mathematical perception, but it cannot be a part of the surface, could not be considered an element of the land plot. Our assumption that the legislator uses the mathematical concept of the surface is also confirmed by paragraph 9 of Article 22 of the Federal Law "On state registration of real estate". It states that the area of a land plot is the area of a geometric figure formed by the projection of the boundaries of the land plot on a horizontal plane.

Land plots and buildings may be considered as parts of a single real estate complex, which can be called, for example, premises, the exact name for such a complex is not of primary importance now. In Russian law enforcement real property cadastre practices the term "household" had been used for a long time. Household was defined as a residential building (houses) and edifices serving it (them) located on a separate land plot. The concept of "household" was used in the field of public utilities and was not designed for the sphere of entrepreneurship and other professional economic activities (Ministry of Construction, Housing and Utilities of the Russian Federation, 2008). Household did not include a land parcel, but the connection with a particular plot was clearly spelled out in the definition. Household as a complex of edifices meant a state accounting unit and was only partially relevant in the field of civil law. As an object of civil rights, the concept of "premises" can become a successor of "household" and receive a wider scope of application. The advantage of the term "premises" is that it will include a land plot and emphasize the main importance of the plot in the structure of the real estate complex.

Premises can be defined as a united immovable complex consisting of a land

parcel and related edifices and/or underground structures. The law can also specify that the owner of land has title to the soil and the right to use the subsoil and air space within the boundaries that correspond to the boundaries of the land, to the extent defined by the laws on subsoil and use of airspace.

No need to stipulate. the soil layer ownership as a necessary part of premises as a real estate complex in any piece of legislation, since the soil layer is more of a movable property. Subsoil cannot be deemed included in premises ownership due to exclusive state ownership of subsurface resources.

Those spaces cannot be in the structure of an item that generally belongs to an individual or legal entity. Current legislation does not imply inclusion air space in the list of objects of civil rights as well as a component of object. Here we fully agree with D. V. Tretyakova, who writes: "The Air Code of the Russian Federation contains public law norms and does not say anything about the height to which the rights of land owners apply. The restrictions on the minimum flight height established by the bylaws are more likely to ensure the safety of the flights themselves and not to protect the rights of land owners" (Tretyakova, 2019).

4 Discussion

At present, it is increasingly common among specialists to understand land as primarily a legal category. On the contrary, some authors have criticized the perception of a land plot as a physical substance, as a part of the earth's crust, a land mass. For example, K.I. Sklovsky and V.S. Kostko, disagreeing with the legal resolution of the Presidium of the Supreme Commercial Court of the Russian Federation of 04.22.2008 No. 16975/07, write: "Of course, the surface of the earth, i.e. an abstraction, contrary to the opinion of the Court, does not exist in nature, but it can be understood which an appeal to geometry. It only exists in the human mind and arises as a result of a rather long-term society development" (Sklovsky & Kostko, 2018).

However, this does not mean that there is any solid opposition to the understanding of land plots as a physical substance. For example, Christian von Bar states that a land plot does not get the quality of physicality even though it consists of soil. He calls land parcels "normative things" (Von Bar C., 2018). Nevertheless, his reasoning leads to a conclusion that normative thing means that the boundaries of a parcel are measured and determined in the course of legally normalized procedures. That is, the land parcel is a result of bureaucratic determination of parameters, which are not formed naturally and do not exist in nature. At the very beginning of his research, Christian von Bar notes that land plot as a normative thing has a physical substrate though.

O.I. Krassov is also trying to declare the "normativity" of the land. In one of his studies he states: "The object of land relations is always a legal category that reflects the most characteristic legally significant features of the corresponding object of nature. Legislator formulates legal fictions, which often differ significantly, if not radically, from scientific and everyday ideas about a natural object" (Krassov, 2004). Further, O. I. Krassov writes that legal relations do not arise about the land

as a natural object. It seems that the author finally loses touch with the living nature and supports the idea of speculative things, but that was not the case. Soon O.I. Krassov returns to a quite natural and touchable phenomena: “Land parcel is a part of the land surface (including the soil layer), the boundaries of which are described and certified in cadastre with the established procedure by the authorized state body, as well as everything that is above and below the surface of the land plot” (Krassov, 2004).

We find Christian von Bar's criticisms of European jurisprudence, which does not reach a consensus on what a land plot is, more interesting: “Therefore, for example, in the Netherlands, grond (meaning ‘ground’) is defined in Article 3:3 of the Burgerlijk Wetboek (BW), which, in turn, invokes Article 5:20 of the BW (material describing in more detail what objects forming the subject matter of the right of ownership of the grond are encompassed). It includes the surface of the earth. The surface of the earth is, in its turn, understood as signifying the upper limit of ownership of immovables (see C. Asser [-F.H.J. Mijnssen et al. (eds). Zakenrecht, 15th ed. Deventer, The Netherlands 2008, p. 108, item 81) and is itself the subject matter of the right of ownership (T.M. Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek. Parlementaire stukken, Book V: Zakelijke rechten. Deventer, The Netherlands 1981, p. 120)” (Von Bar C., 2018).

This is a very valuable point for us. It turns out that in the Netherlands lawyers distinguish the earth and its surface as a whole and a part. Since the surface of the earth is only a component part of the earth, there may be other components. Probably, we are talking here, in particular, about edifices. K.I. Sklovsky and V.S. Kostko mention similar point: “Roman jurists made an impressive effort to distinguish between the concepts of superfices ("surface of the earth") and solis ("earth")”(Sklovsky & Kostko, 2018). If the Romans made a great effort to distinguish these concepts, then we have to make an effort to preserve the obtained distinction. Notably, the modern concept of a land plot as a three-dimensional object in a form of a pyramid is assessed by K.I. Sklovsky and V.S. Kostko as a deviation from Roman traditions.

Some authors are close to the idea that objects located on a land should not be included in the plot, but together with these objects parcel forms a single real estate complex, a new thing. For example, S.I. Gerasin begins his research with a very encouraging statement: “Land plots and construction structures located on them are actually a single whole. Both components of this unified whole are used for the same purpose” (Gerasin, 2009) The land as an element of a new united object is mentioned in the first two paragraphs of a multi-page study. Later in the text, auther does not offer a new name for such an object but writes about the land plot. S.I. Gerasin clearly sympathizes with the idea that a single real estate object is a land plot, and building structures are an integral part of it. What prevented the author from developing the idea in a different direction remains a mystery to us. Perhaps the researcher was influenced by the practice of many European countries, which he explored in his work, or a tendency to reduce legal categories to things of the physical world.

We noticed that some Russian lawyers give too much confidence to foreign experience and traditions. Sometimes it looks strange. For example, R.S. Bevzenko

believes that a single real estate item, which is formed by recognizing the building as an integral part of the title to land, is the best solution and the highest point in the developed legal thought in European jurisprudence (Bevzenko, 2017). Usually, in European law enforcement practice, a building should be considered as a part of a land plot, but if the land plot does not belong to the owner of the building by right of ownership, and, for example, the owner only has a building leasehold, then the building should be considered a part of this right.

We suppose, this is the highest point of compromise, not legal thought. Most likely, this decision was a necessary step for German jurisprudence, which is not obligatory to adopt by other legal systems. Subjective law and the building are too different phenomena in their essence. We tend to form a single immovable thing by bringing qualitatively different objects (a land plot as a two-dimensional surface of the earth and a three-dimensional building) to a common denominator, to use the language of mathematics. We do not neglect the differences between a land plot and a building (two-dimensionality and three-dimensionality), but highlight their common properties: utility, discreteness, strong connection with the earth, etc. These common properties are embodied in a single real estate complex called "premises".

5 Conclusion

A land parcel, basically, can be considered as a volume three-dimensional substance that includes the soil layer, the subsoil, the air space, and edifices. This is appropriate in cases when private ownership of the subsoil is possible, and the airspace is included in civil circulation. In Russia, there are none of these conditions. Therefore, to consider the land plot as a flat two-dimensional object would be the best solution. This decision can also be justified by the legal history and experience of other countries. But the main thing is that this decision fits well into the context of the existing state policy in the field of law and economics.

Currently, it is premature to capture in legislation a concept of a land plot including buildings as a part. Part of the whole (building) has to have the characteristics of the whole (land plot). Since these objects are fundamentally different (a two-dimensional land plot and a three-dimensional structure), in modern conditions they should be considered as two components of a new derived object - "premises". Utility, discreteness, strong connection with the land, human control – these are the characteristics of premises that allow you to combine in its composition such diverse substances as land and buildings.

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