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Abstract

China is a socialist country and all land in China belongs to Chinese citizens as a whole. Article 10 of the 1982 Constitution upholds the Chinese land policy that reflects the traditional view of socialism - land of the country must be owned by the country (State) or its agricultural Collectives. State-owned enterprises or other organizations, which cannot own land themselves, may use land with permission from the State.

With the development of the Chinese economy and increasing economic reforms, the need for both residential and commercial space has grown rapidly. This emerging real estate demand led to an amendment to the Constitution of the People's Republic of China in 1988. Under this amendment, private investors may obtain land use rights from the government and the holder can retransfer these land use rights to a third party subject to certain conditions. This article extensively discusses this important amendment, the current system of land use rights in China and its application to the booming Chinese private real estate market.

Keywords

Cornell, real estate, China, land use policy, land use rights, property rights in China

Land Use Rights in China

Zhenhuan Yuan¹

Introduction

China is a socialist country and all land in China belongs to Chinese citizens as a whole. Article 10 of the 1982 Constitution upholds the Chinese land policy that reflects the traditional view of socialism - land of the country must be owned by the country (State) or its agricultural Collectives. State-owned enterprises or other organizations, which cannot own land themselves, may use land with permission from the State.

With the development of the Chinese economy and increasing economic reforms, the need for both residential and commercial space has grown rapidly. This emerging real estate demand led to an amendment to the *Constitution of the People's Republic of China* in 1988. Under this amendment, private investors may obtain land use rights from the government and the holder can retransfer these land use rights to a third party subject to certain conditions. This article extensively discusses this important amendment, the current system of land use rights in China and its application to the booming Chinese private real estate market.

Land Use Rights and Land Use System

Although private ownership of land is not possible in China, under the Constitution's Amendment Act of 1988, land use rights become divisible from *land ownership*, thus making it possible for the land use rights to be privatized. China has adopted a system of registering both land use rights as well as ownership of property. Applications for registration must be submitted to land and housing administration departments of local government bodies. Upon verification, certificates are issued by the government body at the corresponding level. In addition, the State Administration of Land has recently issued a circular on *Implementation of the Administration of Urban Property Law by Improving Land Registration*, which specifies that registration should be applied for in the following situations²:

1. Pre-sale of commercial premises
2. Granting of a lease
3. Change of land conditions
4. Obtaining land use rights by way of granting or allocation and building of houses on the land for real estate development
5. Mortgage of real estate

Stemming from this separation of land ownership and land use rights ownership, transfers of land use rights have accounted for most of the business activity in the primary real estate

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market since 1998. The Chinese Land Administration Authority has established an administrative practice of granting permission on behalf of the government to prospective land users willing to pay the required land transfer fees.

The 1988 amendment to the Constitution is a significant step. Until this amendment, the land use system had not been established on a leasehold basis. In the past, most Chinese organizations and business entities were assigned free property for use. Because of this historical reason, a dual land use system is currently operational. On the one hand, new private investors have to pay for the use of the required site. On the other hand, old owners who are already in possession of the rights to use still control the land obtained free from the State. Both owners may transfer their rights to other parties under certain conditions. Although the ultimate landowner, the State, is entitled to claim part of the profits from the owners of free land use rights, a lack of binding legal provisions to force the State to make these claims has exempted owners from being asked to do so.

The State Land Administration Bureau is the regulatory authority responsible for overall administration of the State's land. All the land has to be registered and recorded by it. In turn, the Bureau issues a land registration certificate for entitlement of any specific use. No rights can be acquired from the primary market or further traded on the secondary market unless the site has been granted such a certificate. To obtain these rights, land users need to apply to the Bureau for approval. Thus the Bureau plays the most significant role in regulating land use activity in both the primary and secondary market.

Rules Regulating Land Use

The *Land Administration Law* 1987 is the earliest comprehensive piece of legislation on land use. Its purpose is to "strengthen land administration, maintain the socialist public ownership of land, protect and develop land resources, make proper use of land, effectively protect cultivated land and meet the needs of socialist modernization"³³. The *Land Administration Law* emphasizes the rational use and protection of land. It requires government bodies at all levels to formulate land use plans so that cultivated land is not converted into other uses without proper approval and justification. Government bodies at different levels are required to follow the guiding principles of the central government and to use the land rationally and economically. Land administration authorities of local governments are authorized to be in charge of land administration within their regions. Land administration authorities and other relevant departments must carry out land surveys and prepare statistics, so that the central government can supervise implementation of the State policy.

Under the *Land Administration Law*, land in urban areas and cities is owned by the people as a whole or the *State*, and land in rural and suburban areas is owned by *Collectives*. Collectives denote people as a whole in a small geographical area, for example, a village or a town. This is in contrast to the *State*, which denotes all the citizens of China as a whole. Understanding this division of ownership is important for private investors because land use rights for urban land may be granted only by the *State*.

Rules Governing Property Transactions

To regulate real estate markets, there are currently two pieces of legislation in China - the *State Council Regulations* and the *Urban Real Estate Law*, both adopted in 1994. The most important aspect of any real estate transaction in China is that of obtaining land use rights. Without land use rights, the aboveground structures will be of very little value. There are two ways to secure land use rights 1) by grants or 2) by allocation. In both methods, land use rights may be granted by local government bodies at city or county level on behalf of the State. The fundamental difference between the two methods is the intended use of the land. Land use rights may be allocated for the following uses:

1. State establishments or military purposes
2. Urban infrastructure or public facilities
3. Projects related to energy, communications or water conservancy, and others selectively supported by the State
4. Other purposes as provided by laws, administrative regulations and rules

Under the *Urban Real Estate Law*, land use rights can be allocated by local governments only for State-supported projects and public works. For allocation, land users may be required to pay compensation or resettlement fees; but in many cases, land use rights can also be allocated on a gratuitous basis. Land use rights obtained by way of allocation are not restricted to a specific term, unlike land use rights obtained through grants. Nevertheless, an important restriction on the land use rights obtained through the method of allocation is that such land use rights may not be transferred by the land use right owner unless 1) appropriate approval is obtained, 2) transferee complies with all procedures to grant land use rights, and 3) granting fee is paid to the State. Only land use rights obtained by grants are freely transferable in the secondary market, circumventing the multitude of restrictions applied when transferring land use rights obtained by allocation.

The land use rights of State-owned land may be granted to land users for a specific term. In return for grants of land use rights, users must pay the State a granting fee. If the land involved belongs to Collectives, the land must be first requisitioned by the State and converted into State-owned land before rights can be granted to private land users. In addition, to obtain land use rights by grants, it is necessary for land users to follow urban development plans and all the local government approval procedures.

The *Urban Real Estate Law* specifies that land use rights may be granted through auction, bidding or agreement between the parties concerned. The methods of auction and bidding are preferred under the law over the method of agreement between parties. This is because the government is concerned that land use rights fee may not be correctly assessed if the matter is left to private parties to determine. Therefore, the *Urban Real Estate Law* sets a minimum land use rights fee. It is stipulated that where land use grant fees is determined through agreement between private parties, the fee

must not be lower than the prescribed lowest price in State provisions. After the approval process, the land user and the land administration department of the local government must enter into a contract in writing. Such a contract gives both parties the right to compensation in case one party breaches the contract. For instance, after the local government and the land user conclude a contract and the land user has paid the fee, if the local government fails to provide the land under the contract, the land user is entitled to 1) withdrawal from the contract, 2) reimbursement of fee, and 3) compensation. Like other contracts, a contract for granting land use rights may be modified upon the mutual agreement of the parties involved. As discussed, under the Chinese law, the transfer of land use rights or real estate must be certified by a written contract. The administrative departments of big cities, such as Beijing, Shanghai, Shenzhen and Guangzhou, have designed standard contract forms for transfer of land use rights or real estate. Nevertheless, these forms sometimes are criticized as very rudimentary and incapable of protecting the interest of purchasers.

Local governments are prohibited from usurping land use rights before the contract expires. Under the following listed circumstances local government bodies have authority to withdraw the grant of land use rights:

1. Land use unit is dissolved or has moved away
2. Land is vacant for 2 consecutive years even after approval
3. Land is used in a way inconsistent with the approved scope
4. Public roads, railways, airports, mining areas, etc., have been abandoned upon due verification and approval

In case of special circumstances relating to public good, the State may redeem the land and pay appropriate compensation to the land user.

The *Urban Real Estate Law* requires that a contract for granting land use rights specify the maximum number of years for use of the land. The maximum number of years is prescribed by the State Council according to the intended use, with the following broad-based guide⁴:

1. Seventy years for residential purposes
2. Fifty years for industrial purposes
3. Fifty years for the purposes of education, science, cultural, public health and physical education
4. Forty years for commercial, tourist and recreational purposes
5. Fifty years for comprehensive utilization or other purposes

In practice, transferring parties strictly follow the above broad guidelines set by *State Council Regulations*. However, under the *Urban Real Estate Law*, land users may apply for an extension of the land use rights grant contract one year prior to the contract expiration date. Once the application is approved, both parties should enter into a new contract. If land users do not apply for such an extension or if the application is rejected, land use rights will be reclaimed by the State without compensation.

To mortgage real estate, property ownership along with land use rights to the property site must be mortgaged together. The mortgagee has priority in compensation to be paid with funds obtained upon sale of the mortgaged real estate. A mortgage must also be in writing and be registered with the relevant local government.

The authority to approve transfer of land use rights gives some government bodies immense power. In practice, government bodies at county level do most of the approvals, though they can only grant approvals for land up to a certain size. To get around this limitation, applicants started sub-dividing large land use plans into a number of sub-plans. They treated each sub-plan as a separate plan for approval, so that the local government would have the authority to approve. The central government was concerned with this devious practice. On 22nd July 1989, the State Council issued a notice on the authority to approve land use rights. This notice prohibited land users from sub-dividing their land use plans and emphasized that government bodies should follow the spirit of the *Land Administration Law*. This limited corruption and reigned in local government practices.

Conclusion

The real estate market in China is still relatively young. The *Land Administration Law* and the *Urban Real Estate Law* standardize and regulate administration of the real estate market in China. However, due to the recent adoption of these two laws, there are many criticisms and concerns regarding their implementation. In March 2004, China's top legislature, the *National People's Congress*, adopted an amendment to its Constitution stressing that China respect and protect private property. The constitutional amendment adds, "the State should give compensation" to the original stipulation that "the State has the rights to expropriate urban and rural land". Under the amendment, residents' housing on State-owned land should be compensated for as private property at a market-based price. This is an important shift in the Chinese real estate law towards ushering a greater private property orientation as well as a tilt towards greater market reforms.

Sources

² http://www.isinolaw.com/jsp/realestate/REAL_transrules.jsp?LangID=0

³ Land Administration Law of the People's Republic of China

⁴ State Council Regulations

“Urban Real Estate Law of the People's Republic of China”

“Chinese Real Estate Law”, Isinolaw Research Center