

IMPROVEMENT OF THE PROCEDURE OF DIVISION OF RENTED LAND PARCELS IN UKRAINE

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Abstract

The current situation in land leasing in Ukraine is analyzed, when a tenant of a land parcel with immovable property is sold in part, which causes the following controversy: the land parcel in someone's lease has buildings or constructions owned by another physical or legal person (other than the tenant). The interested party wastes a lot of time on resolving this controversial situation with the existing procedures in Ukraine. This problem is not always solved professionally because of the lack of sellers' and buyers' knowledge of specific features of land management and geodesy. Three main variants of mutual location of the seller's and the buyer's buildings and constructions are defined, which determines the possibility of dividing a land parcel. Recommendations on the improvement of the procedure and normative legal acts of Ukraine concerning the issue are developed, aimed at significant acceleration of signing and registering new lease agreements.

Keywords: land parcel, land parcel division, technical documentation on land management, lease agreement, tenant.

Introduction

According to the Land Code of Ukraine (1990, 2001), Civil Code of Ukraine (2003) and the law of Ukraine "On Land Lease" (1998) a large number of businesses and individuals received land parcels for rent for the construction of different objects as well as for operation of existing property. With time, circumstances change and land parcel tenants – owners of real estate, sell part of their property. Sometime the whole area of rented land parcel cannot be rationally used or no new building can be constructed to expand the activities. In this case, the tenants want to get rid of the part of leased land parcel and new property owners want to formalize documents on rent of the relevant part of the main land parcel. At first glance, all this can be easily solved. However, procedural steps are rather complicated and it does not take less than during the first time privatization of the land parcel.

Part 2 of Article 377 of the Civil Code of Ukraine (2003) states that "The size and cadastre number of land parcel, title transfer due to the transfer of ownership of a house, building or structure are essential terms of the contract that provides for the acquisition of ownership rights of these items (except for apartment buildings)". This article is also violated if the seller hesitates or does not want to document a part of the land, especially when they have the state act for perpetual use of land. Besides, a buyer cannot register only part of the land parcel in the state land cadastre and registry because there is lease contract or the act of the permanent use of the whole land parcel. In addition, it is impossible for a person to have two different rights on one land parcel. The new owner of the building can apply to the court, but it is also a complex and long procedure.

From the above it is clear that the improvements in the procedure for signing and registering of new lease contracts are important for businesses and individuals, as well as for the land reform in Ukraine as a whole. Such propositions will improve the social conditions of our society.

Research methodology and materials

The division of land parcels is the subject of many legal acts of Ukraine (Land Code of Ukraine (2001), Civil Code of Ukraine (2003), the law of Ukraine "On Land Lease" (1998), the law of Ukraine "On Land Management" (2003) and others, some scientific and academic papers by famous scientists of our country have analyzed it, but the detailed study of this issue is not found except for the research paper of Riabchii V.A., Riabchii V.V., 2014.

Article 31 of the Law of Ukraine "On Land Lease" (1998) defines the cases of termination of the lease, however, there are no cases of transfer of ownership of the property.

The aim of the article is the development of proposals for improving the procedure for signing and registering new lease contracts in cases when the landholder does not sell whole real estate, but only part of it.

First we introduce the following terminology. The main land parcel is a land parcel on which the real property of the main tenant (landholder) is situated. The main tenant is a seller of the property. The buyer of the property is the purchaser of the right to lease (future tenant) on the part of the main land parcel.

In most cases, the seller at the time of the transaction or after its conclusion gives the buyer a notarized consent of withdrawal of the land parcel with specified area of land parcel. Everything seems to be fine, but at best the boundary during the division of a land parcel is firstly established visually. So after establishing a geodetic boundary there must be discrepancies in the area specified in the agreement and it is good if there is space to change (shift) this boundary.

A thoughtful reader can fairly argue here: "What is the division of land parcel? Land parcel is not in ownership but in use! If it were his property, then it would be a different matter, divide as you want". Definitely.

According to Article 56 of the Law of Ukraine "On Land Management" (2003) there must be the consent of the owner of land on the division. Moreover, these land parcels have been registered as state or municipal property since the beginning of 2013. But in reality the land parcels have always been divided and it used to be called as determination of the order of use of land. In addition, it may be that land parcel, depending on the location of buildings is indivisible in general, however, neither the seller nor the buyer knows about it. Therefore, the following steps are proposed: the seller must order a draft of land-management division of a land parcel from the land surveying company, so that the work can be continued with the use of it.

After drafting the division of a land parcel, the seller and the buyer can address the notary to develop the agreement and authorize the project. Project division of a land parcel is certified by a notary, because it indicates the boundary of the division of the main land parcel and areas of parts obtained as a result of its division. After finalizing the transaction at the notary, both the seller and the buyer order technical documents from the land surveying company on land management for the division of land for the seller and the technical documentation of land use to install (restore) the boundaries of land parcel for the buyer. However, it is necessary to obtain the consent of an appropriate council for the division of a land parcel and the land management documentation. It is also necessary to set the terms on which lease contracts will be signed between the seller and buyer.

Discussion and results

To solve the issues, the following should be considered. In fact, part of the property from the seller is alienated without anyone's permission (consent), but only by mutual agreement. In accordance with Part 2 of Article 377 of the Civil Code of Ukraine (2003), the right to use land transfers with the sale. Obtaining a permission or consent to perform these operations on land management may take long (a few months or longer). And then there is a conflict between the seller and the buyer: "Who has to pay the rent?" The tenant does not want to pay rent for the entire (main) land parcel, a future tenant has no reason to pay the rent. Ironically, both the buyer and the seller are right.

Thus the need appears to establish such a procedure that would meet regulatory legal acts of Ukraine and, at the same time, significantly reduce the period during which the seller and the buyer are able to establish the right to lease the relevant parts of the main land parcel.

Justification of division of land parcel

From the practical experience, we point out individual customers' considerations regarding authorization or consent for the division of land parcels. Which state legal acts of Ukraine and who can prohibit the rightful owner of property renting a land parcel from selling or donating part of it, rather than the whole? The answer is: "Nobody!". And then the seller and the buyer ask unnecessary questions: "Why then is there a necessity of obtaining a permit if land parcel can be divided or partially divided?" No comments.

In addition, there are strong arguments for not obtaining this permit, namely the boundaries of a land parcel are approved and adopted, and there is signed and valid lease contract on the main land parcel. Two new land parcels do not go beyond the outer boundaries of the main land parcel. The purpose of

all buildings of the main tenant has not changed. And the terms of new lease contracts of parts of the main land parcel shall not exceed the term of the lease remaining for the main land parcel.

But there is a rule and it must be followed. Therefore, the main tenant and the purchaser of the right to lease must file a petition to the chairman of the relevant Council to provide guidance to the appropriate services to perform the required operation for the conclusion of the lease. The council needs to know about the changes on the land parcel granted on lease, which have already occurred and are only planned.

For this, technical documents on land management for the division of a land parcel are developed for the seller and the technical documentation of land management to establish the boundaries of the land parcel for the buyer. Developed technical documentation of the project on land management division must be sent to departments of State Land Agency in cities to check and determine cadastral numbers. After obtaining the extracts from the State Land Cadastre, relevant documentation is forwarded to the City Council to draft a decision. The decision must state that the lease on the main land parcel is terminated by agreement of the parties and new land parcels become the property of the respective council, and they must be registered by this Council and tenants, and the new lease contracts must be signed.

Consequently, it is necessary to make amendments to point "e" of Article 56 of the Law of Ukraine "On Land Management" (2003), namely, the expression in brackets as follows: "except for the cases of the division of land parcel concerning the acquisition of ownership of a residential house or part of it, and non-residential buildings for various purposes situated on it".

The necessary documents for signing a lease agreement:

Now it is necessary to consider what documents are necessary for the lease. Under Article 15 of the Law of Ukraine "On Land Lease" (1998) "... an integral part of the land lease agreement is:

- the plan or scheme of a land parcel that is leased;
- the cadastral plan of the land parcel with the mapping restrictions (encumbrances) in its use and prescribed land servitudes;
- the act defining the boundaries of a land parcel;
- the act of acceptance and transfer of leased facility;
- the project of land allotment if it is developed under the law".

If this list is compared to the list set out in Article 56 of the Law of Ukraine "On Land Management" (2003), we can see that even in case of presence of all documents, the lease cannot be concluded, as no act of defining the boundaries of land parcel; and there should be a project of land management on land allotment. In addition, the technical documentation of land management for the division of land parcel is prepared by order of the main tenant of land parcel. It is enough to get an act of acceptance and transfer of boundaries marks. And for the purchaser of the right to lease it is necessary to have the act of acceptance and transfer of boundaries marks on storage for all boundaries of the newly formed land parcel, not just on the boundary of division.

Documents on land management

Let us find out what documentation should be on land management and what it must contain for the purchaser of the right to lease. Obviously, this documentation on land management for the division of a land parcel should be supplemented by the act of establishment (updating) of the boundaries of the land parcel. This act is signed only by the purchaser and lease rights tenant. There should be developed technical documentation on land management according to applicable laws and regulations of Ukraine, except for the coordination of boundaries of the land with the owners or users of adjacent land parcels, and as already noted, without obtaining permission. Once the main land parcel boundaries were agreed with the main tenant and they have not changed and the purpose of buildings has not changed as well (Riabchii, Riabchii, 2014). In addition, the project of land parcel division should be added to this technical documentation of land management.

Variants of division of a land parcel:

The possible cases (options) of the division of the main land parcels should be considered:

1. The best option is when buildings stand apart. There are two separate driveways and walkways to both owners' buildings, no common parts of buildings and structures. In this case, no comment, and the basic land parcel can be called "divisible".
2. There are no passages in site conditions of placement of buildings on the land, and they cannot be built. In this case, it is offered to divide the basic land parcel into three parts. Two separate land parcels are allocated for the seller and buyer, while the third one is common – in their joint lease for passage, walk and more. In this case, this basic land parcel might be called "partly divisible".
3. One cannot perform the division of land parcel by mutual arrangement of buildings, structures. For example, the first floor belongs to the seller, and the second – to the buyer. In this case, the only possibility is a joint lease. The rental payment for the land in common use is proportional to the parts (areas) of real property owned by the seller and the buyer. This basic land parcel's title is "indivisible".

A list of the main documents for the project of land parcel division:

Now we will define the list of main documents in the division project of land parcel and their functions.

1. A copy of the lease contract to the main land parcel will testify that the lease is valid (validity has not expired) and customer ordering the division is really a lessee (the person who has the right to use this land). This allows the performer to sign a contract to implement the project division of land parcel.
2. Actual topographical plan scaled 1:500 with the boundaries of land parcel and signatures of the purchaser and the tenant of the right to lease. This plan is required for review, illustrative purposes and vision of relief throughout the land to be divided. This plan is a graphical application to the act of establishment of the boundary of the main land parcel.
3. The act of establishment of the boundary of main land parcel signed by the tenant and the purchaser of the right to lease with a graphical application. The signed act will attest that the latter agreed on the boundary of division of the main land parcel.
4. Cadastral plans for each part of the land on which it is divided, with the lengths of sides between the points of boundaries marks, the perimeter and area of the land parcels as well signed by the tenant and purchaser of lease rights. These plans will testify that these people know exactly the size of each project land parcel and their areas.

There is another important aspect to be done in the project and the appropriate division of land management documentation, namely, to determine restrictions and encumbrances that have been established; determine the boundaries and areas of land parcel parts which are subject of restrictions; development of appropriate plans. These plans must also be signed by the tenant and the purchaser of the right to lease.

It should be noted that the project of division is necessary to timely determine the possibility of separation of the main land parcel; and the seller and the buyer will address the notary and write a petition to the local authority, which brings the clarity and precision of the possibility of separation and area of land parcel. In addition, the project will be the basis for the development of appropriate documentation of land division.

Conclusions and recommendations

Summing up, the proposals developed for the division of land parcel for lease significantly reduce procedure and the time spent on issuing new lease contracts on part of the land. Also, these proposals can be applied to the land parcels which, according to the previous Land Code of Ukraine (1990), were granted for permanent use to private and not utility legal entities having state acts on the right of permanent use. But according to the Land Code of Ukraine (2001) newly created land parcels of the main land user and purchaser of land use rights may be granted only for rent for the maximum period (up to 50 years).

The prospect for further research is to detail the procedures and the list of documents required in cases when the main land parcel is indivisible and to improve procedures for combining the land parcels.

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