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Brief Analysis on Institution of Rural Collective Construction Land Transfer

ZOU Xiu-qing *

School of Tourism and Urban Management, Jiangxi University of Finance and Economics, Nanchang 330032, China

Abstract From the viewpoint of strengthening the government management and control of rural collective construction land transfer, this paper gives relevant definitions and puts forward institution and policy of construction land for township enterprises and rural housing land. It is expected to provide institutional guarantee for standardizing the market order of rural collective construction land use right transfer.

Key words Rural collective construction land, Transfer, Institution

To strengthen management and control of rural collective construction land, properly develop and utilize land, practically protect the cultivated land, standardize market order of rural collective construction land use right transfer, and promote sustainable, healthy and rapid development of urban and rural economy, the government should work out practical rural collective construction land transfer institution in accordance with provisions of the *Constitution*, the *Law of Land Administration of the People's Republic of China*, and relevant regulations and policies. On the basis of the existing laws and regulations, this paper presents proposals for rural collective construction land use right transfer institution.

1 Definition of basic concepts

The collective construction land refers to the land owned by farmers' collective, situated in rural areas and authorized for use in accordance with laws. It includes construction land for township enterprises, rural housing land, and construction land for township and village public facilities and public undertakings. The construction land for township enterprises can be called construction land for collective business operation. The collective construction land use right transfer includes initial circulation and secondary circulation, which flows to the first-level market (initial circulation market) and the second-level market (secondary circulation market). The former refers to circulation market formed by collective land owner giving the land use right to land users in the manner of transfer, lease, valuing and contributing the land use right as shares; while the latter refers to circulation market formed by units or individuals (who have obtained collective construction land use right) transferring or hiring out land use right.

The circulation of collective construction land should adhere to fair, equitable and voluntary principles. In one of the

following cases, the collective construction land can be transferred in compliance with laws: (i) rural collective construction land that is approved for non-public projects, but beyond the scope of urban construction land determined in the overall planning of land utilization; (ii) the rural collective operating construction land (land for township enterprises) obtained in accordance with laws; (iii) rural housing land legally obtained by farmers for building houses. It is strictly prohibited to use collective land in trade, business, and real estate development.

2 Specific provisions on use right circulation of different types of collective construction land

The collective construction land mainly includes the land for township enterprises and rural housing land. Here, how to specify the use right circulation of these two types of collective construction land will be analysed.

2.1 Circulation of land for township enterprises The land for township enterprises refers to land legally used by various economic entities held by agricultural collective economic organizations in rural collective land. Its subjects of the ownership are rural collective economic organizations at village and township levels, and subjects of land use right are rural collective economic organizations or farmers.

2.1.1 Conditions of circulation. Circulation of land for township enterprises should meet following conditions: (i) conforming to overall plan of land use; (ii) in compliance with laws; (iii) approval of owner of land for township enterprises, excluding the cases of ownership change due to bankruptcy or merger.

2.1.2 Ways of circulation.

(i) The transfer of use right of land for township enterprises. In special cases, such as bankruptcy and merger, rural collective economic organization, as the status of land owner, transfers land use right to land users in certain years, and land users make certain payment. Collective construction land for operational projects must be transferred in the manner of tendering, auction or other public manners.

The years for transferred land use right shall be determined

with reference to provisions on years for land use right of state-owned construction land. The longest land transfer period should not exceed that the maximum period for transfer of land use right of state-owned construction land with the same application.

(ii) The Transfer of use right of land for township enterprises. Owner of land use right transfers the land use right to others in the manner of valuing and contributing the land use right as shares or exchange.

Its operating procedure and the income distribution of land circulation are relatively flexible. The years for land use right is the value of the agreed period for transfer of land use right deducting the years already passed during the use of original use right owner.

(iii) The mortgage of the right to the use of the land for township enterprises. Township enterprises provide liability performance guarantee to mortgagee in the way of not transferring possession of land. Both parties should sign written mortgage contract and make registration of mortgage.

(iv) The land use right of land for township enterprises is valued and contributed as shares. Such case is similar to township enterprises transferring land use right due to merger. Therefore, it is preferred to formulate related laws and institutions with reference to provisions on the transfer of right to use construction land for township enterprises.

2.1.3 Distribution of income. The income shall be distributed on the principle that "the person who owns the land will be benefited and return comes from investment". Although township enterprises obtain construction land owned by farmers' collective without compensation, they have invested a lot and have been operating in the land, and the land value has risen. As a result, township enterprises can share land circulation income in a large proportion, which may be greater than the proportion in the circulation income of rural housing land. There are two reasons. Firstly, township enterprises may have built factories, workshops or infrastructure in the land, so the land value is obviously increased. Secondly, the income shared by township enterprises from land circulation will not be given to some person, but will be shared by employees of township enterprises, or specifically farmers in the village. Therefore, it can directly increase farmers' income.

In these situations, the land circulation income shall be distributed after paying relevant taxes of land circulation.

2.2 Circulation of rural housing land Rural housing land plays a special role in rural areas, so there are special provisions:

2.2.1 Cancellation of limitation on circulation target. It is required to cancel the limitation that rural housing land can only be transferred or only the land use right can be hired. House being transferred with land or land be transferred along with house are basic requirements for realization of rural housing land circulation.

2.2.2 Cancellation of limitation on circulation object. The circulation of rural housing land shall not be limited to villagers in the collective. If we continue to limit the object, the circulation of rural housing land will be greatly restricted, and consequently

leading to sacrifice of efficiency. On the other hand, to prevent speculation in rural housing land, we should limit, through related legislation, the quantity of housing land owned by the same natural person, legal person or organization. This can draw on the experience of operating mechanism of stated-owned land market.

2.2.3 Gradual realization of free circulation of housing land. From different perspectives, to smoothly realize free circulation of land use right of rural housing land, actions at initial stage should not violate existing laws and regulations. At present, China forbids separate circulation of the right to use housing land. Thus, the circulation should stick to the principle of land transferred along with houses. In other words, house and accessories thereof become necessity of circulation of housing land. In addition, there is no forbiddance on renting the right to use housing land. On the principle of "Absence of Legal Prohibition Means Freedom", it is practical and feasible to solve the circulation of land use right of housing land through introduction of the rental system.

Free circulation of the right to use housing land is the development direction. To make the circulation of state-owned land use right not restricted, many conditions should be met. Firstly, the economy should have sustainable and healthy development. Secondly, there should be perfect rural social security system. Government or other organizations should provide basic survival guarantee, rather than simply providing land. Finally, full development of real estate market in rural areas provides internal impetus for circulation of land use right of rural housing land. In view of these, it is required to solve following problems; firstly, speed up cleaning of rural housing land; secondly, make clear of subjects of ownership of collective land; thirdly, enhance compensation for circulation of the right to use rural housing land.

2.2.4 Establishment of institution for the right to use rural housing land in combination with paid and unpaid method. For a long time, the distribution of housing land has been used as basic welfare enjoyed by internal members of rural collective economic organizations. Then, it is free to obtain and utilize land use right of housing land. As a result, the situation of housing land use is chaotic. However, the compensation system will increase burden of most farmers. In this situation, it is required to establish paid and unpaid combined housing land use institution. In the original obtaining of housing land, it is required to firmly implement the unpaid obtaining and use system. Nevertheless, if the housing land use exceeds standard, the part that exceeds the standard shall be charged with normal fee for use of housing land, because such part is beyond the scope of welfare policy. In the derivative acquisition, it is required to implement charge system, and the specific amount shall be determined by local government and the collective organization according to actual conditions, but shall not be lower than the lowest limit stipulated by the state. If the housing land use right is obtained through purchasing, inheritance or grant, as well as application of mortgage, the assignee, provided meeting the requirement of enjoying the welfare for the first

time, may continue to use without compensation. Otherwise, the housing land use right should be incorporated into range of market adjustment, and the assignee should pay corresponding fee for use of housing land.

2.2.5 Ways of circulation.

(i) Transfer of the right to use housing land. Owners of housing land use right can transfer the land use right through purchasing, exchange, gift and inheritance, and house and other accessories on the housing land can be transferred together with the housing land. The ownership of rural housing land will not be changed, and is still in the possession of farmers' collective. The change merely lies in subjects of housing land use right, so it will neither influence retention and exercise of housing land use right, nor influence economic benefit of farmers' collective.

(ii) Leasing of the right to use housing land. As a lessor, the owner of housing land use right leases out the right to use housing land together with buildings and accessories thereon to lessee. Both parties sign the leasing contract, and the lessee pays certain rental charges to the lessor. After the lease term expires, the lessor has the right to take back the right to use the housing land.

(iii) Mortgage of the right to use housing land. Buildings (if any) on rural housing land will be provided with mortgage right, rather than limited to the principle of "land being transferred along with house". Farmers who lose their right to use housing land due to realization of mortgage right can not apply the right to use housing land. Members of farmers' economic organization do not have ownership of housing land, so they have no right of disposition. In this situation, as guarantee of liability performance, members of farmers' economic organizations can not mortgage their rural housing land independently. However, owner of housing land use right has ownership of buildings and accessories on their housing land, so they can mortgage the buildings thereon independently. When there is change of building ownership due to realization of mortgage right, the right to use rural housing should be transferred at the same time. Members of farmers' economic organizations can obtain capital and fully realize the benefit from the property they own through mortgaging buildings on their housing land, which is favorable to raising fund for developing production.

(iv) The centralized living area for replacement of housing land should be selected in accordance with overall plan of land utilization and urban planning. The meeting for making proposal of housing land replacement should have participation of villager representatives. The proposal should be discussed at villagers' meeting and should be approved by more than two thirds of representatives of villager meeting or villagers' representative meeting.

The nature of replacement of housing land is circulation of land use right, so the property of collective land will not change. After replacement, the original administrative village system can be changed by administrative means, while the land and other assets owned by original economic organization

will not change in ownership.

3 Other specific provisions

3.1 Using the land in strict accordance with its application Land users shall use the collective construction land in strict accordance with planned and contractual application, and shall not change the land application without authorization. If it is really necessary to change the land application, land user shall obtain approval of the transferor, submit to the competent authority of land and natural resources at county level for approval, and apply for registration of alteration.

3.2 Conditions of taking back land in advance The collective construction land use right legally obtained is under protection of laws and regulations, and owners of collective land shall not take back their land before expiration of circulation contract of collective construction land. In one of the following cases, the land administrative departments of related people's governments shall take back the land use right of collective-owned land with the approval of the people's governments that originally gives the approval or the people's governments with the power of approval:

- (i) Use land for the sake of public interests;
- (ii) Use land for adjustment in re-building old city districts in order to implement urban construction plans;
- (iii) When the term for the land use right expires according to what is agreed upon in the contract for compensated use of land, the land user has failed to apply for extension or failed to get approval for extension;
- (iv) The use of land originally allocated has been stopped due to cancellation or removal of units;
- (v) Roads, railways, airports and mining sites that have been approved to be abandoned.

Proper compensation should be given to land use right users whereas the use right of collective-owned land is taken back according to the provisions of (i) and (ii) in the preceding paragraphs.

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