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Discussion on Registration Validity Doctrine of Housing Land Use Right

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Abstract Relationship between the registration and right change of housing land use right is not clearly stipulated in the *Property Law*. Land registration involves functions of private law and public law. It is partial to only considering private rights dimension when deciding whether registration validity doctrine or registration confrontation doctrine should be implemented in housing land use right. Compilation of land use planning, implementation of land use control and promotion of arrangement project in rural residential area all rely on sound and complete housing land registration data. To clarify housing land right adscription, eliminate hidden troubles causing housing land dispute and promote the establishment of harmonious countryside can never be achieved without housing land registration data. To carry out registration validity doctrine of housing land use right can effectively guide farmers' registration behavior and thus build a perfect registration information system of housing land use right. After the cross-village and even cross-town arrangement in rural residential areas, rural acquaintance society has transformed into semi-acquaintance society and even stranger society. Therefore, housing land use right commending its existence with registration in public form has been a necessary choice in legislation.

Key words Real estate registration, Housing land use right, Registration validity, Registration confrontation

Article 9, section 1 in *Property Law* of China stipulates that establishment, change, transfer and elimination of real property right shall be valid with legal registration and shall be invalid without legal registration, subject to the provisions of law. So, *Property Law* of China adopts the legislative style of real property right taking registration validity as general principle and registration confrontation as exception. Article 155 in *Property Law* stipulates that the transfer and elimination of registered housing land use right requires timely registration modification and cancellation. And scholars claim that registration of housing land use right has the effect of ruling housing land users' punishing rights and the obligees cannot dispose the rights with housing land use right being unregistered. Draft of real right law stipulated that housing land use right was established with the approval of county government. However, the obligees should register and should not act against a third party without registration. It is quite controversial among the academic circles that whether registration validity doctrine or registration confrontation doctrine should be adopted in the establishment of housing land use right. And those paying great attention to this issue are mainly scholars of civil law and most of them put forward different viewpoints from the perspective of effect dimension of real estate registration. Value function of real estate registration, especially land registration, should be taken into account when deciding whether registration validity doctrine or registration confrontation doctrine should be adopted in the establishment of housing land use right.

1 Study on value function of real estate registration

Taking a wide view of the evolution of real estate registration in western society, it can be found out that real estate registration system originates from land tax system. Up till the modern society, western commerce and industry have become increasingly advanced and land mortgage registration based on burden of real estate ownership began. Meanwhile, commodity transactions among various western countries have been increasingly frequent. According to the *Cass Law*, clarified definition of property right is the precondition for market transaction. In order to reduce the transaction risks, exchange counterparts should investigate the property right subjects as well as the condition of real estate before transaction. So, the publicity of land right adscription is quite necessary in the time of commodity economy. There is no wonder for scholars to assert that the predominant legal principle of land right registration is to achieve required property right publicity for the change of land right and provide legal basis for the transaction of land right. Land use possesses externality, therefore, development and utilization of land resources as well as the implementation of public policies like environment protection need comprehensive, current and accurate land use data and cadastral data. The information can not only provide certain basis for some public law action like land use planning and land use control but also monitor land utilization as well as right alteration in order to effectively cope with the unfavorable phenomenon in the market and exert the "visible" impact. Therefore, whether the land registration information mastered by the registration institute is complete and accurate has direct connection with practical problems of value goal like the effective protection of land resources as well as scientific and reasonable utilization. Land registration, as a basic work of cadastral management, has taken up an increasingly important role in land

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resource management in modern society, which fully justifies the indispensability of public law function of land registration.

2 Institutional change of rural housing land property right registration in China after liberation

After liberation, detailed measurement and delimitation of rural land were carried out in land reform in China. Ministry of Internal Affairs of the central government issued *Instruction on Marking Land and House Property Certificate* in November, 1950. According to the instruction, *Land and House Property Certificate* should be issued on both the newly-distributed land and the original land of farmers after land reform. At that time, land and house property certificate was the legal evidence of private land and house. During the upsurge of cooperative movement and the establishment of people's commune, land collective ownership took form and developed, then formally replaced land private ownership and occupied a dominant position. However, land registration was almost ignored during the transfer from farmers' land property right to collective property right. The time between 1953 and 1982 can be basically regarded as a period when there was no land registration in China. From 1986 on, land registration has become a part of cadastral management. And China has established a relatively perfect city house and other real estate registration system till the later period of the 1980s. However, work concerning real estate registration was weak in the wide countryside. *Notice on Strengthening Land Management and Restricting Farmland Disorder by the Part Central Committee and the State Council* was issued in March 1986. By October 31, 2004, initial registration of housing land in most areas has been basically completed and the average coverage rate of issuing certificate accounted for 71%. But there was big differences in the progress in various provinces. Coverage rates of issuing housing land registration certificate in Shanghai, Gansu, Guangxi and Hebei achieved over 90% while those in Xinjiang, Guizhou, Beijing and Hainan were lower than 40%.

Though housing land use right registration has been gradually carried out throughout China, disputes in housing land transaction emerge in endlessly with the upsurge of country housing construction since the registration work has not been prevalent yet. Although the causes of these problems are multivariate, admittedly, what cannot be neglected is the lack in legislative mode of registration validity doctrine of housing land use right.

3 Registration validity doctrine: a should-be choice for housing land use right registration

Overview of real estate legislation in various countries throughout the world display the prevailing of real property registration system. Effect of real property registration in countries throughout the world mainly involves registration validity doctrine and registration confrontation doctrine. Under the mode of registration confrontation doctrine, real right alteration come into effect since parties reach an agreement on real estate property, not taking registration as execution requisite. But, if it is not registered,

change of real estate property cannot oppose the third party acting in good faith. France and Japan is representative for this mode. Under the mode of registration validity doctrine, compulsory registration is usually implemented in real right alteration. Registration has the effect of property right publicity and it is also the execution requisite for real property alteration. Registration validity doctrine reflects the country's sound intervention on transaction to some extent. Germany's civil law adopts registration validity doctrine, which is the legislative appeal of economic and social progress in Germany.

Scholars advocate that it is not quite meaningful to adopt registration validity doctrine and the reasons can be generally classified as follows. Firstly, with the current housing land approval system in China, land right is still clear even though it is not registered after getting housing land. Secondly, according to the present regulations, circulation of housing land use right is just allowed with the collective economic organization. Collective economic organization is still acquaintance society and registration does not have great importance in the publicity of property right. Thirdly, with a vast territory, it is impractical to carry out comprehensive and substantive examination of land registration in the countryside. Fourthly, compulsory registration will increase farmers' burden and may be infeasible. Based on the above reasons, most scholars claim that the acquisition and alteration of housing land use right adopt registration confrontation doctrine and even do not necessarily require registration. With reference to registration confrontation doctrine, housing land use right is easy to be established, which keeps the convenience for the original acquisition of housing land use right. Beside, parties can decide whether to apply registration or not according to actual condition to maintain the efficiency of users' right. Meantime, as for those who have registered, the third party can understand the actual right of housing land through checking the registration book and thus to maintain transaction security.

It is believed that the above opinions need to be discussed. The theoretical basis of advocates of registration confrontation doctrine in housing land use right is that housing land use right is private in characteristic, so whether property right alteration should be registered should be in accordance with the parties' willing. From the perspective of a genetic method, real private property is reflected on land division and the original land privatization stems from homestead distribution. Since houses and housing land are closely linked, it is undeniable that private properties of housing land use right are more essential than any other land property and it is indisputable that housing land use right is private in nature. In contemporary society, there represents a tendency of public right intervention in private-right autonomy fields to a large extent for the needs of maintaining public benefits. "when conflicts between private benefits and public benefits cannot be resolved with present rules and parties' autonomy in execution of power may result in heavy loss that cannot be made up for in public benefits, social orders and ecological environment, administrative li-

cense should be established. Therefore, the writer holds that it is partial to only considering private rights dimension when deciding whether registration validity doctrine or registration confrontation doctrine should be implemented in housing land use right.

It should advocate that housing land use right adopts registration validity doctrine and the supporting reasons are as follows. Firstly, cadastral information about housing land provides basis for land resource management and is the basic material for the compilation of land use planning, village and town planning as well as implementation of land use control. Whether the information is complete and current affects the effective protection and reasonable utilization of land resources. Housing land use right registration provides abundant information like boundary of land parcel, exact position of boundary point and precise area of registered property right. Whether the data are accurate, real and renewable during daily work is the foundation for implementing planning and control. Meanwhile, housing land registration can provide a favorable information basis for land use control and land registration department can effectively scrutinize land use alteration through registration. However, since registration validity doctrine has not been carried out in the acquisition of housing land use right in China, most villagers do not have conceptual emphasis on registration and are unwilling to register actively so that land use control cannot exert effective impact in land use alteration. Experience shows that multipurpose cadastral information established through land registration is more valuable and up to date, thus more beneficial to establishment and implementation of planning.

Besides, complete and accurate registration information and basic materials about housing land use right provide reliable guarantee for the successful arrangement in rural residential areas. Currently, arrangement in rural residential areas is no doubt an essential means for promoting the construction of socialist new countryside. It is a complicated and systematic project and will inevitably break the original land use pattern. Residential arrangement will be certainly followed by adjustment in land property. Based on the present practice of housing land arrangement in China, information like land right, area and location of housing land as well as houses should be comprehensively mastered. Housing land prices should be evaluated with appropriate evaluation method and registration should be processed before the arrangement. However, practically speaking, lack of housing land registration information in some places results in the unclear boundary site of housing land and unclarified land right, which eventually causes difficulties in promotion and implementation of arrangement project in rural residential areas.

Based on the above analysis, compilation of land use planning, implementation of land use control and promotion of arrangement project in rural residential areas depend on complete and sound housing land registration information. Only with registration validity doctrine and the original as well as alteration registration deciding the acquisition of housing land use right, can people's registration behavior be effectively guided, which is beneficial to

establishing a perfect registration information system of housing land use right.

Moreover, housing land use right registration helps to reduce transaction cost and maintain transaction security. Over quite a long time, dual land system of town and country and household registration system stem from the 1950s and establish a highly-separated dual social structure. Seen from the perspective of sealing in rural society, strangers are rarely involved in the transaction of real estate. Besides, present laws stipulate that transaction of housing land use right is restricted within the collective economic organization. Therefore, registration of housing land use right basically has no connection with transaction security. In view of rural settlement hollowization and disordered extension of housing land since the 1980s, construction of central villages has been generally promoted through "combining small-sized villages, diminishing natural villages and transforming city villages". After the cross-village and even cross-town arrangement in rural residential areas, subjects of housing land use right have not been restricted within the village collective economic organization. Therefore, it is impractical to judge land right of the counterparts based on personal understanding during the transaction. Apparently, a new trust mode should be established in strange environment in order to increase the transparency of land right. And housing land use right commending its existence with registration in public form has been a necessary choice in legislation.

Furthermore, registration of housing land use right is beneficial to building harmonious countryside and reducing lawsuit cost. In rural society, disputes resulted from land problems account for a relatively high proportion in rural civil disputes. And quite a number of housing land disputes is caused by unclear boundary sites and unidentified four boundaries of land. Basically, these conflicts can be classified as those with government confirmation of right and those without government confirmation of right. In terms of the first situation, the people's court is entitled to directly accept as a civil case and legally bring in a verdict through trial. But the second situation is relatively complicated. Disputes caused by unclear boundary sites of housing land and without right confirmation do not belong to jurisdiction of the people's court. Even though the cases are accepted and put on record, lawsuit should be dismissed and be treated by the people's government. If parties appeal against the government treatment, administrative litigation is permitted. After the administrative judgement document come into effect, parties can request civil litigation. In terms of this dimension, adopting housing land registration validity can guide parties to register and clarify land right, which can eliminate potential troubles causing housing land disputes from headstream.

Based on the above analysis, we believe that registration of housing land use right is not only the requirement for land planning and land use control but also the objective demand of arrangement in rural residential areas and has great practical meaning in maintaining harmony as well as stability in rural society.

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