

ON THE DIVISION OF LEASED LAND PARCELS

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Statement of the problem

According to the Land Code of Ukraine [4], Civil Code of Ukraine [5] and the law of Ukraine "On Land Lease" [2] 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.

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. But procedural steps are rather complicated and it does not take less than during the first time privatization of the land parcel.

Article 50 of the Law of Ukraine "On Land Management" [1] states that "land management projects on land allocation are developed in the case of change of use of land or the development of new land parcels". That is, if the boundaries of land parcel have changed, it is necessary to draft land management. In this case, the new land parcels will be within the main land and their total area is equal to the area of the main of land parcel.

Quite often the main land parcel tenant does not want to renew the lease because surveying and land management work should be paid, which results in violation of the regulations of part 4 – 6 articles 120 of the Land Code of Ukraine [4] by the owner of some part of a building as they cannot arrange to rent the appropriate part of the land: "In case of acquisition of ownership of a residential building or structure by more persons, the right to land is determined in proportion to the share of persons in ownership of an apartment house, building or structure. In the case of acquisition of ownership of a residential building or structure by any persons who are unable to own land parcels, they transfer the right to use the land on which the residential building or structure are situated on a rental basis. The contract that provides for the acquisition of ownership of a residential building or structure involving the transfer of a part of land may be signed after detachment of this part as a separate plot of land and giving it a separate cadastral number".

Part 2 of Article 377 of the Civil Code of Ukraine [5], 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 rights ownership 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.

Thus a buyer can not 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. And the person cannot have two different rights on one land parcel. The new owner of the building can apply to court, but it is also a complex and long procedure.

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

Analysis of recent research and publications related to the solution of this problem

Division of land parcels is the subject of many legal acts of Ukraine [1 - 5] and some scientific and academic papers by famous scientists of our country, but the detailed study of this issue is not found.

In article 31 of the Law of Ukraine "On Land Lease" [2] are defined the cases of termination of the lease, however there are no cases of transfer of ownership of the property.

The aim of the article

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.

Main part

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 division of 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 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".

There is no doubt that this is correct. Indeed, according to article 56 of the Law of Ukraine "On Land Management" [1] 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 – determining the order of use of land. In addition, it may be that land parcel, depending on the location of buildings in general is indivisible, however neither the seller nor the buyer knows about it. Therefore, the following steps are proposed: the seller must order the 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 land parcel the seller and the buyer can address the notary to develop the agreement and authorize the project. Project division of land parcel is certified by a notary, because it indicates the boundary of the division of 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 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.

To solve the issues, consider the following. 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 [5] the right to use land transfers with the sale. Obtaining 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 arises the need 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.

Consider the experience of 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 raise 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 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. Purpose of all buildings of main tenant is 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.

The main thing is the development of technical documents on land management for the division of land parcel for the seller and the technical documentation of land management to establish the boundaries of 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" [1], 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".

Now consider what documents are necessary for the lease. Under Article 15 of the Law of Ukraine "On Land Lease" [2] "... an integral part of the land lease agreement is:

- plan or scheme of land parcel that is leased;

- cadastral plan of the land parcel with the mapping restrictions (encumbrances) in its use and prescribed land servitudes;

- act defining the boundaries of land parcel;
- act of acceptance and transfer of leased facility;
- 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" [1], 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 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.

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 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. In addition the project of land parcel division should be added to this technical documentation of land management.

Consider the possible cases (options) the division of the main land parcels:

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. In site conditions of placement of buildings on the land there are no passages, 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. By mutual arrangement of buildings, structures, one cannot perform the division of land parcel. 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 title – "indivisible".

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.

Note 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

Summing up, the proposals developed for the division of land parcel for lease significantly reduce procedure and 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 [3], were granted for permanent use to private and notutility legal entities having state acts on the right of permanent use. But according to the Land Code of Ukraine [4] 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.

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.

References

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2. Law of Ukraine "On Land Lease" of 06.10.1998 № 161-XIV, as amended by the Law of Ukraine on 04.07.2013 № 406-VII.
3. The Land Code of Ukraine from 18.12.1990 № 561-XII, as amended by the Law of Ukraine on 08.06.2000 № 1805-III (*lost its validity on 01.01.2002 under the Land Code of Ukraine of 25.10.2001 № 2768-III*).
4. The Land Code of Ukraine from 25.10.2001 № 2768-III, as amended by the Law of Ukraine on 24.10.2013 № 661-VII.
5. Civil Code of Ukraine from 16.01.2003 № 435-IV, as amended by the Law of Ukraine on 27.03.2014 № 1170-VII.

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Current situation in land law is analyzed on partial lease of land with real property. Proposals to improve the procedures and legal acts of Ukraine on this issue are offered in order to significantly accelerate the conclusion and registration of new leases.