Withdrawal of Land Plots for Public Needs in Russia: Problems and Ways of Search of Balance of Private and Public Interests

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Abstract
Within the framework of analysis of the current Russian legislature, scientific doctrine, and judicial practice regarding the withdrawal of land plots from owners by redemption, the authors prove that, in addition to public needs (state and municipal), there are public–private needs aimed at the pursuit of interests for certain members of society. Delegation of participation in the withdrawal of private land plots for public–private needs by the authorities and reassignment to certain commercial legal entities partially owned by the state often leads to social tensions because the society perceives many such cases of withdrawal of land plots from civil owners as injustice. At the same time, considering the U.S. experience, the authors state the interstate nature of this problem. This situation requires not only the development of legislation or changes in judicial practice but also a change in the conceptual approach regarding the withdrawal of land plots for public and public–private needs, and an enhancement of the axiological (value-conscious) approach, which should be considered by all branches of government.

Keywords
ownership right, withdrawal of land plots, private and public needs, guarantees of rights of owners, value-conscious approach to law

Introduction
The procedure for withdrawal of land plots for state or municipal needs is an inevitable component of legislation in most countries of the world. This procedure is a kind of fee for progress; the emergence of railroads, water supply mains, sewerage systems, and other facilities ensuring the comfort and well-being of citizens have led to “the reverse side of the coin.” Everything has its price, including the price of terminating ownership rights.

The very problem of the withdrawal of land plots for public (state and municipal) needs is multifaceted and may be considered from philosophic, economic, sociological, and other perspectives. Considering the many great works of culture and art (e.g., “Roadwork” by American writer Stephen King, 1981; “Leviathan” by Russian film director Andrey Zvyagintsev, 2014; and other works), it is possible to conduct research on the creative and artistic approaches of authors to this problem.

Furthermore, the procedure of involuntary termination of ownership rights is governed by legal rules that allow consideration of both the interests of the affected party (the owner of the plot) and the interests of the state and society. The search for civilized means to solve this issue has been conducted for many centuries. It is believed that the search began in biblical times, when King Ahab in Samaria offered Naboth compensation for the latter’s vineyard (“Eminent Domain,” 2008). However, in its modern version, the concept of the balance of private and public interests developed after the adoption of the Declaration of the Rights of Man (1789) in France, which declared that ownership “is an inviolable and sacred right” and “no one may be deprived thereof except in cases of an explicit social need established by law and subject to fair and advanced compensation.” In the United States, a similar procedure appeared after the adoption of the Fifth Amendment to the U.S. Constitution (1791),

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Private and Public Interests and Needs: Available and Suggested Criteria for Distinguishing One From the Other

Correlation of Private and Public Interests Regarding the Issues of Termination of Rights to Ownership to Land Plots

The issue of the differentiation of public and private interests extends outside the framework of legal research alone and is closely connected with the essential philosophical, ethical, social, and legal issue of the interrelation of the individual and the state; this is basically insoluble beyond the axiological method and beyond the research on the system of values and hierarchical relations of social and individual values (Aksenova, 2007). Identification of the most clear boundaries of private and public interests can resolve the essential issue; this will affect all aspects of human relationships, including the correlation of freedom and nonfreedom, initiative, the autonomy of will and statutory regulations, and the limits of state intervention (Antokolskaya, 1995).

One of the most successful definitions of “interest” was suggested by R. Ihering, who believed that interest is the material basis of law, and its main purpose is the adjustment of interests in society and finding balance between them (Ihering, 1991). Indeed, interest has a conceptual and defining role because a right that is not connected to or reflective of vital interests is not of real value for people. Interests not protected by rights are legally defenseless (Pershin, 2004).

It is beyond any doubt that the line between private and public interests is conditional. The 19th century classics of civil law noted that in fact, the area of individual private interest is not sharply separated from social public one; however, if ever such a separation could occur, it would not bear that fruit which is expected; conversely, it would make privacy and private legal relations intolerable and impossible. (Kavelin, 2003)

We should agree with this approach of the impossibility of a sharp demarcation between private and public interests because any public interest in land is the aggregate of the private interests (interests of citizens and their associations) of those residing in a certain area. Furthermore, various citizen associations may have different public (the aggregate of private) interests that develop on a territorial (street, district in a city) or subject basis (construction of schools, stadiums, and shopping malls).

This approach makes it possible to distinguish public interest, the implementation of which is objectively important for all people residing in this area (e.g., construction of a hospital complex and highway); in addition, public interests (interest of certain social groups) and the interests of these groups may contradict each other, private interests (interests of individual citizens) or state (municipal) interests. For example, one group of citizens may prefer to construct a casino in an urban quarter, whereas the other group may prefer to construct a mosque, and a third may prefer a shopping mall with a parking lot. Then, a question arises regarding whether termination of land rights of certain persons with the objective to transfer it to others is just.

A typical example of a conflict of private and public interests was the reconstruction of the central part of Krasnodar; this decision was adopted in 2006. Consideration of this issue made many Russian scientists ask, “What are the municipal needs and interests in this case?” The scientists noted that...
one should have a great imagination to suggest that on February 10, 2006 it became necessary to meet exactly the municipal needs . . . to withdraw the land plots and to demolish 58 thousand single-storey houses located in the total area of approximately two thousand hectares in the central part of Krasnodar.

At the same time, the land plots were to be purchased by the municipal entities not by private investors defined as a result of being selected to participate in the reconstruction of the central part of Krasnodar (Kamyshansky, 2006). A similar conflict occurred in 2006 on the outskirts of Moscow in Yuzhnoye Butovo district, where Moscow authorities decided to withdraw 54 ha of land, to demolish single-storey houses and to use that area to construct elite apartment buildings. A portion of the residents agreed to voluntary removal; the other residents organized a number of civil disobedience acts.

Citizens losing their property in favor of the enrichment of private individuals will always be considered an injustice. In Butovo, injustice was the reason for a protest by owners of individual houses subject to demolition against the city administration’s decision to transfer their land plots to a multistory commercial construction project. The plot owners assessed the situation as a dispute between two private owners (the buyer and the seller) primarily regarding the value of the immovable property for which the buyer used administrative pressure to conserve funds (Volovich, 2008).

Regarding the attribution of reconstruction of Krasnodar center to municipal needs, we should note that, at the moment of reconstruction, this was not the case. According to the current legislation (Art. 56.3 Land Code), public needs include the demolition of blocks of flats, followed by construction of modern residential buildings in the same location; however, the mass demolition of individual residential buildings is no longer stipulated by the current legislation. Construction of new residential buildings instead of dilapidated and hazardous blocks of flats is a typical case of public–private interests.

The private or public nature of the Sochi 2014 Olympic Games is equally ambiguous. Of 4,212 ha of land, which was intended for the construction of 243 Olympic venues, 3,553 ha belonged to the state, and the remaining 679 ha belonged to private individuals (Chudakova, 2008). There were 1,865 land plots and 259 flats located in this area (“Statistics on Withdrawal and Provision,” 2014). It is not surprising that in Sochi in May 2008, 200 residents of the Imereti Lowland protested against withdrawal of land and demolition of their homes to construct Olympic venues. As a result of the clashes with the police, people who defended their properties were hurt. The governor of Krasnodar Territory said that the actions were necessary “to abruptly stop all illegal actions of these pseudoprotesters who are trying to put their personal benefit above the public one which implies the 2014 Olympic Games” (Strantsova, 2009).

Such a citizen response can be understood through the traditional understanding of law by the Russian population; this is not as officially prescribed “totality of mandatory rules of law,” but rather as law as social order based on social agreement and compromise as a means to implement freedom, justice, and equality (Livshits, 2001).

This raises the question of whether Olympics are public needs and how to incorporate citizens’ opinions, which no one had inquired of before deciding on issues that directly affected them. It appears that this situation is another typical example of “public-private” needs; for these, the compulsory termination of private land ownership rights should be conducted solely in compliance with procedures that consider residents’ opinions by means of public hearings.

The situation in which the termination of citizens’ rights to land is necessary to implement a “foreign” state or municipal interest appears to be more complicated. For example, it is occasionally necessary for an urban district (municipal entity) to build an aeration station for processing sewage. The station’s construction within city boundaries is prohibited by sanitary rules. Therefore, such construction occurs in the countryside surrounding the city and can lead to the withdrawal of land plots from individuals for municipal needs. There is no doubt that the residents of this rural area are against such construction. Therefore, in this case, a conflict of municipal but not private interests is observed. There are no clear legal means to resolve such conflicts between the interests of residents of different municipalities in Russia, although it is obvious that the dispute’s settlement should involve participation of a state-authorized constituent entity of the Russian Federation. Special focus regarding this problem should be on the lack of clearly defined procedures for the withdrawal of land plots belonging to one public (municipal) owner in favor of another (e.g., for construction of the said aeration station).

Thus, one should distinguish private (individual and social groups) and public interests (state and municipal). In our view, private interests can be met by establishing a private easement but not through withdrawal of a land plot. Public (state and municipal) interests can be realized both by establishing a public easement and through withdrawal of land plots for public needs. Public–private interests, which, in Russia, involve certain commercial legal entities partially owned by the state, have an intermediate position. These legal entities perform a certain public function. Therefore, some of them are entitled to participate in procedures for withdrawal of land plots by redemption for public needs. Consequently, these entities acquire a right to ownership of the withdrawn land plots and the facilities constructed there. Lack of clear regulation of this procedure often leads to abuses, violates public notions of freedom and justice, and often appears immoral in the eyes of the population.

Concept of Public Needs Existence of Which is a Ground for Withdrawal of a Land Plot From a Private Owner

In the scientific doctrine, legislation, and juridical practice, the question regarding appropriate interpretation of the legal
category of state and municipal needs remains unresolved. Land legislation does not contain such a definition. The “state needs” referred to in the legislation on the bidding procedure for goods and services’ procurement for state needs have excessively specific land relations, and therefore cannot be applied.

At the same time, Article 49 Land Code includes a list of cases that delineate when land plots may be withdrawn from private owners for state or municipal needs. This list includes the following: the implementation of international treaties of the Russian Federation; construction or reconstruction of state (or local) facilities (subject to the lack of other possible modes of construction and reconstruction of these objects), such as federal power system and regional power system facilities; nuclear power facilities; defense and state security facilities; and federal transport and communication facilities. The list of objects is not exhaustive because “other grounds” are also noted in that article.

Public needs are usually understood as the needs of the Russian Federation, its constituent entities and municipalities. These needs are based on the property of citizens and legal entities that express a common interest, and are related to the protection of the fundamentals of constitutional order, morality, health, rights, legitimate interests of other persons, defense and security. The satisfaction of these needs, which are generally listed in the federal law, is impossible except by means of an involuntary termination of the right of private ownership while balancing private and public interests (Altengova, 2012).

It appears that this understanding is excessively narrow because the list of state and municipal needs is much wider, which follows from Article 49 LC RF (particularly given that this list can be extended by federal laws). However, the understanding of “exclusiveness” of public needs enshrined in the law and confirmed in juridical practice makes it impossible to redistribute land plots for the purpose of a simple increase in the tax collection from a certain area.

This is the position that Russian courts usually hold. Thus, in one case, the arbitration court invalidated the resolution of the local government on the withdrawal of land for municipal needs because no documents proving the exceptional need to place facilities exactly on the disputed plot of land were submitted. From the case materials, it is clear that the goal was a withdrawal of the agricultural land plot from a closed joint-stock company to place facilities for development of the raw mineral material base of local industrial enterprises and to implement the “Ceramics Factory” and “ISUZU and FIAT Truck Centre” investment projects. As was noted in the court decision, the Land Code of Russia does not stipulate withdrawal of land plots for state or municipal needs with the objective to attract investors to raise money for the municipal budget and to create new jobs. Therefore, in this case, the local authorities had no legitimate grounds for withdrawal of the land plot (Resolution of the Federal Arbitration Court of Povolzhsky District of 15.06.2009).

In consideration of the repeated attempts to withdraw land plots from private individuals to transfer to other private individuals, it is necessary to prove the legality of this behavior. Many Russian scientists believe that the lack of a clear definition of state and municipal needs in the legislation makes it possible to interpret the definitions to the prejudice of private owners. The definitions may often include not only state needs but also the private economic interests of public authorities as ordinary owners. Therefore, it is necessary to establish more precise criteria regarding the concept of commonwealth interests (Tuzhilova-Ordanskaya, 2007).

Other authors suggest using the term public needs because the concept “state and municipal needs” does not always coincide with the actual needs of society. These authors believe that the construction of roads, mining, and similar activities are often conducted not by the state but by commercial organizations; therefore, these cases are unlikely to be legitimately referred to as “state needs” (Syrodoev, 2004).

Indeed, the proposed term is now widespread in the legislation of many countries. In Spain, withdrawal of a land plot is possible solely if it is required due to “social expediency or social interests”; in Sweden, it is “important public interests.” In Italy, “common interests” are required; in Portugal, “public interests” are necessary. In Germany, the purposes of “commonwealth” are referenced, and in the United States, the term used is “socially useful purposes” (Dikhtyar & Kleimenova, 2008).

In general, we should agree with this proposal. With regard to Russian conditions, it should be noted that, in addition to private and public needs, there is an objective possibility, indirectly noted in the Russian legislation (but not named directly), of withdrawal of land plots based on the initiative of a number of legal entities to construct facilities that perform public functions that we propose to call “public-private facilities.” These facilities include sports stadiums, hotels, and elite residential complexes. The possibility of withdrawal of land plots for such construction is currently limited.

Lack of understanding of a clear distinction between public and private needs leads to the common position of the complete impossibility of withdrawal of land plots for public needs when there is a subsequent transfer to ownership (lease) by private individuals who fulfill certain public (social) objectives regarding their activities.

For example, in one court decision, it was stated that withdrawal of land plots, with reference to state and municipal needs, to provide these to other persons for construction is not allowed according to Article 49 Land Code of the Russian Federation (Resolution of the Federal Arbitration Court of Moscow District of May 26, 2004). O. I. Krassov believes that a land plot may not be withdrawn for private needs; therefore, private land property may be withdrawn for use only by state or municipal entities. Private property may be transformed solely into state or municipal property. Accordingly, only state or municipal institutions may use it (Krassov, 2000).

In contrast, other scientists believe that local authorities who reserve land or facilities for municipal needs are entitled
to provide for the construction of not only municipal properties or facilities for its use in accordance with local authority functions but also certain other facilities for private needs (Zavialov, 2007). Ugo Mattei notes that, currently, the commonwealth involves not only the interests of the entire state but also its certain agencies and private companies that operate in society’s interest. Consequently, the legislator may admit withdrawal of property from one private owner with its subsequent transfer into another person’s private property for its use in society’s interest (Mattei & Sukhanov, 1999).

We share a similar position, considering that, in the modern world, redistribution of spatially limited land resources is inevitable. Therefore, the problem of law is not to trail the objective modernization process of urban area development but to set goals and incentives for the development of this process while guaranteeing owners’ rights.

However, supporting the possibility of involuntary withdrawal of land plots from private individuals with their further use by commercial legal entities in society’s interest, we consider it necessary to comply with the criteria of balancing private and public interests based on the understanding of law as a tool for the provision of justice. Thus, a suitable criterion was suggested by the European Court of Human Rights. In the judgment in the “Gladysheva v. Russia” case (application no. 7097/10) of December 6, 2011, the Court notes that any interference with property not only must be legal and have a legitimate objective but also satisfy the requirement of proportionality. The Court states that there must be an equitable balance between the needs arising from the common interests of society and the need to protect basic human rights; the tendency to such an equitable balance is typical of the whole Convention. The required balance will not be achieved if the interested person bears the individual and excessive burden (Case “Gladysheva v. Russia” (application no. 7097/10) of December 6, 2011). The search for clear criteria on “proportional interference” with private affairs requires the development of new warranties of the rights of the property owners as well.

Thus, what is meant by public (state and municipal) needs, considering the evaluative nature of this category?

Public needs are the needs of the population of Russia (region, municipality) stipulated by the federal laws, the satisfaction of which is impossible without withdrawal of land plots with just compensation to private individuals for transfer into ownership by the Russian Federation, its constituent entities and municipalities. Their further use must be for infrastructure, defense and security, power industry, specially protected natural areas, and international treaties’ implementation facilities.

Public–private needs are the needs of a number of social groups that are stipulated by federal laws and related to subsurface management, construction of facilities for health care, education, sports, residential buildings and other similar facilities. These are fulfilled by commercial legal entities partially owned by the state by means of the involuntary withdrawal of land plots from private individuals with a guarantee of their rights.

Subjects and Procedure of Withdrawal of Land Plots for Public Needs: Pros and Cons of the Current Legal Regulation

Initially, after the entry of the Land Code (2001) into force, the level of guarantees of the rights of private land owners in Russia was sufficiently high and did not cause any particular comments. Guarantees of the rights of land owners during withdrawal of the land plots for state or municipal needs were defined in the Land Code (Article 55 enshrined the prior and fair compensation of the cost of land plots; Article 63 pointed to the necessity for a prior notice of owners 1 year before the supposed withdrawal), the Civil Code (Articles 279, 282), and the Urban Development Code. The latter, in particular, to ensure a reasonable balance of private and public interests, stipulated the necessity to link the withdrawal of land plots for state and municipal needs to the content of territorial planning documents of the Russian Federation, its constituent entities and municipalities (such a necessity is now stipulated by Part 4 Article 9 Urban Development Code).

The guarantee is based on the fact that state authorities and local authorities may not adopt decisions on land reservation, on withdrawal, including by redemption, of land plots for state or municipal needs, on transfer of land from one category into another if territorial planning documents are not available, except in cases stipulated by federal laws. This rule means that the general layout and other urban planning documentation should include the planned future state or municipal facilities, the construction of which requires withdrawal of land plots from private individuals. Accordingly, the population will be able to familiarize themselves with these layouts during public hearings.

The statutory system for land withdrawal relation subjects was logical as well; they were represented by bodies of state or local authorities as one component, and citizens and legal entities as the other component. No exceptions to the general rules were available; no legal entities had privileges; however, exceptions to this general procedure gradually began to emerge.

For the first time, a special legal procedure of withdrawal of land plots for state or municipal needs was introduced by a special federal law for the construction of the Olympic venues in Sochi (Federal Law No. 310-FZ of 01.12.2007 “On Organization of the XXII Olympic Winter Games . . .”), then for the construction of the facilities necessary to organize the Asia Pacific Economic Cooperation summit in Vladivostok. Later, the procedure was supplemented by two other federal laws governing the withdrawal of land plots for public needs in territories annexed to Moscow (as a result of its expansion; Federal Law No. 43-FZ of 05.04.2013 “On Peculiarities of Regulation of Certain Legal Relations Associated . . .”), and related to the areas required for the construction of the 2018 Football World Cup facilities (Federal Law No. 108-FZ of 07.06.2013
“On Organization in the Russian Federation of the 2018 FIFA . . .”). These laws provide conditions for shorter withdrawal of land plots (area planning designs are accepted without public hearings; withdrawal is allowed if there are no approved area planning documentation; in the “new Moscow” until December 31, 2015, in case of withdrawal of land plots or other immovable property, the owner shall be notified of the forthcoming withdrawal at least 5 months before the forthcoming withdrawal).

After the analysis of all four of the abovementioned federal laws, O. A. Zolotova notes that they indicate unification of a special procedure of land withdrawal for state need. The laws include the establishment of reduced terms for the adoption of administrative and judicial decisions; simplified formation of land plots and issue of corresponding cadastral certificates; extrajudicial withdrawal of land plots from state and municipal institutions and unitary enterprises; and a special procedure for compensation of the cost of withdrawn land plots (Zolotova, 2012).

All these exceptions to the rules could be explained by politicians’ desire to hasten the organization of Olympic events that were important for them or the summit in Vladivostok. However, recent amendments to the Land Code of the Russian Federation follow this trend, which leads to a further overall decline in the guarantees of private property rights; this is grounds for discussions regarding the fairness and appropriateness of these procedures. How does this manifest?

The latest amendments to the Land Code of the Russian Federation (Federal Law of the Russian Federation No. 499-FZ of December 31, 2014 “On Amendments to the Land Code . . .”) introduced a new right of commercial companies specifically referred to in the law to participate in the procedures of involuntary withdrawal of land plots by redemption for public needs. Three types of such organizations are noted in the Land Code of the Russian Federation: subjects of natural monopolies; legal entities that are licensed to perform work provision of which the means of withdrawal of land plots is stipulated by Article 49 Land Code of the Russian Federation; mining companies (It.1 Art. 56.4 Land Code). What is their authority?

1. They are entitled to apply for withdrawal of land plots for state needs at competent state agencies.
2. They are entitled to apply to the court for involuntary withdrawal of a land plot and the immovable property on it if, within 90 days after the rightholder’s receipt of a draft agreement on withdrawal of immovable property, the owner fails to submit the signed agreement on withdrawal of immovable property.
3. If the decision on withdrawal is made based on an application of the Russian Highways State Company, the agreement on withdrawal of immovable property is concluded on behalf of the Russian Federation by the said State Company, and the signing of the agreement on the part of the federal executive body is not required.
4. Compensation for withdrawn land plots and (or) immovable property located on them is performed at the expense of the corresponding budget of the budgetary system of the Russian Federation and, if the decision on withdrawal is made based on an application for withdrawal filed by the abovementioned organizations at the expense of these organizations.
5. After termination of the right of private ownership of the withdrawn plots and immovable property located on them, they become owned by the Russian Federation, a constituent entity of the Russian Federation, municipality, or a company that filed an application for withdrawal on the basis of which the decision on withdrawal of the land plot and the immovable property located on it was made (Art. 56.2-56.11 Land Code).

The above brief review shows a sharp decline in guarantees of the rights of private ownership of land and the emergence of the possibility for commercial legal entities (partially owned by the state) to actively participate in the withdrawal of land plots from private owners with the land plots’ transfer into private ownership by such commercial organizations.

In our view, there is a need to develop a doctrinal concept of balance of private and public interests that meets the criteria of fairness, appropriateness, and reasonableness, and contains the required mechanism of guarantees of land rights of the citizens and their associations.

1. Interference with the rights of owners with the objective to limit or terminate the rights shall be proportionate in nature. For this purpose, it is necessary to distinguish public and private–private interests:
   - To set an exhaustive list of grounds for withdrawal of land plots for public needs. This list shall include defense and security facilities, infrastructure needs (linear facilities: electric and other networks, communication facilities, roads, railways, pipelines), space facilities, power industry facilities, implementation of international treaties, and the creation of specially protected natural areas (reserves and national parks). Expansion of this list may be allowed solely by means of amendments to the law (Art. 49 Land Code Russian Federation).
   - In turn, the list of public–private needs cannot be exhaustive; however, it is necessary to clearly define the approximate parameters. The list should include demolition of dilapidated and hazardous housing (slums) and construction of modern buildings in their place (under the agreement on development of built-up areas, Art. 46.2 Urban Development Code); construction of sports facilities; subsurface management; and construction of private roads and hospitals. The main criterion for the distinction of public and
public–private facilities is the extent of their common usefulness (for the benefit of all citizens, if they are roads or electric networks, for the benefit of a portion of the citizens, if they are stadiums); the purpose of use (indirect profit [electric networks] or the absence of such a purpose at all [military facilities] for public needs; the direct profit [for public–private needs]); the type of ownership into which the plot is transferred, state or municipal (for public needs); or private property (for public–private needs). In other words, the criteria consist of terms of withdrawal of a land plot for public needs; the land plot is transferred into state (municipal) ownership and used by legal entities on the basis of the right of permanent (perpetual) use (e.g., institutions or federal state-owned enterprises). For public–private purposes, a plot is transferred into ownership of a commercial legal entity partially owned by the state (e.g., according to Art. 7.1 Federal Law No.7-FZ of 12.01.1996 “On Nonprofit Organizations,” property transferred to a state-owned corporation of the Russian Federation shall be ownership of the state-owned corporation). However, this criterion is optional because, in both cases, the withdrawn plot may be leased.

At the same time, the relational subject for the withdrawal of land plots for public–private needs may not be any commercial legal entity but solely a legal entity partially owned by the state (typical example of which is Russian Railways Open Joint-Stock Company; the percentage of shares owned by the Russian Federation is 100).

2. The issue of the equitable calculation of the compensation paid to owners of withdrawn property plays an important role in the procedure of withdrawal of land plots for public and public–private needs. Unfortunately, currently, with the lack of calculation methods for fair compensation, courts nearly always side with the plaintiff (authority) and totally ignore expert calculations on behalf of the defendant (citizen). Analysis of extensive judicial practice shows that, in “political” cases associated with the mass withdrawal of land plots from citizens and their associations (e.g., in connection with the Olympic Games in Sochi in 2014), the judicial authorities do not consider the arguments of citizens that the estimated value of their property is understated. Thus, in one such case, the court referred to Item 26 Article 15 Federal Law “On Organization of the XXII Olympic Winter Games and the XI Paralympic Winter Games in 2014 in Sochi, Development of Sochi as a Mountain Resort and Inclusion in Certain Legislative Acts of the Russian Federation” of December 1, 2007, and stated that the redemption price of the land plots and (or) other immovable property located on them, as well as the amount of losses to be recovered in connection with the withdrawal may not exceed the amounts specified in the evaluation report (Decision of August 21, 2013 No.VAS-10286/13 “On Refusal to Submit the Case to the Presidium of the Supreme Arbitration Court . . . ”), which was drafted by a state unitary enterprise. Cases of ignoring all losses of citizens in connection with the land plot withdrawal during the compensation calculation are as common.

Regarding the method of losses’ calculation, it should be noted that the value of a land plot and its buildings for a citizen is determined not by its market value but by the possibility to maintain the usual habitat. According to our view, this concept includes proximity to the native places and graves of relatives, maintenance of the circle of communication, the existing modes of life and much more. At the same time, the older the owners of the property are, the more important the listed factors are for them. These factors are often noted in applications filed with the executive authorities and the courts by citizens who have been evicted from their homes and land; they provide the authorities’ focus on the fact that these are the houses where their ancestors lived and died, where their children and grandchildren were born. There have been cases of suicides by citizens who did not want to move from their homes into the suggested panel building apartments (Kravchenko, 2013).

It can be said without prejudice that the equal value compensation will always be incomplete because, during the determination of such compensation, the listed circumstances are not considered. Therefore, we can draw the obvious conclusion that the compensation paid to a citizen upon withdrawal of a land plot and other immovable property should always be greater than the value of its market value by the amount necessary to compensate for, conditionally, nonpecuniary damage. The determination of the amount of compensation, which does not allow a citizen to acquire any property with similar consumer properties, is extremely unacceptable.

In a state focused on the satisfaction of the interests of its citizens, the social factor should be decisive in the legal regulation on withdrawal of land plots for state and municipal needs. In consideration of withdrawal, inevitably, the mechanisms established by the legislation should provide for the possibility of overcoming the negative effects of withdrawal, at least to an extent. In this regard, not only financial but also natural compensation for citizens (at their option) by means of provision of a similar land plot in the area where they had previously lived should be provided. The provision of land plots that are as close as possible to the location of the previous land plot will maintain the previous owner’s habitat and circle of communication, and thus minimize the negative consequences of the withdrawal procedure (Zavialov, 2010).

A similar rule is already included in Item 2 Article 351 Civil Code of Ukraine, according to which a person whose
ownership right is subject to termination shall be entitled to request provision of another land plot, the value of which is considered during the determination of the redemption price; this plot shall be located within the area that is subject to the powers of the relevant local government body or executive authority (e.g., within the city or another municipal entity).

The positive experiences of other countries should be noted as well. Thus, the amendments to the Michigan Constitution (United States) stipulated that, in case of withdrawal of private property, the authorities shall prove that the purpose of withdrawal is not a transfer of the property to private individuals with the objective of economic development or increasing tax revenues. At the same time, 125% of the market value of the withdrawn land plots and other immovable property must be paid to their owners (Rukhtin, 2007). In fact, the excess of the market value is the nonpecuniary damage.

We propose a calculation of additional compensation for such owners based on the extent of the nonpecuniary damage (from 1% to 50% above the market value) associated with the specific situation of a citizen or a legal entity, whose land plots are subject to withdrawal for public or public–private needs (e.g., in accordance with the period of use of the land plot by the family; the amount must be different if this period is composed of 1 year or 50 years). A similar scheme should be applied to companies that are subject to withdrawal (in accordance with the number of jobs or the value of products).

It appears that the courts must be provided strict instructions to consider the estimated value of land plots and immovable property; this can be provided by independent appraisers and submitted by the owners of the withdrawn land plots and immovable property. These appraisers, in our opinion, should be certified and integrated into professional self-regulatory organizations. It is reasonable to make greater use of mediation to reduce the tension of conflicts.

This issue needs further discussion. In addition, because the state does not provide owners whose land was withdrawn with equivalent compensation, it promotes the destruction of the fundamental rules of cooperation and trust in society. People begin to believe that the state treats them unfairly, remembering the informal rule denoting that the benefits and costs of government actions should be distributed proportionally among the members of the society. This belief leads to a kind of loss that is reflected in the fact that, for example, people no longer invest in their land due to well-founded concern that the latter will be involuntarily purchased without sufficient compensation. In the long run, this belief inevitably affects the overall economic well-being of the society (Afanasieva, 2013).

3. Mandatory availability of territorial planning documents (general layout), land use and development regulations, planning designs in a municipal entity. In addition, mandatory availability of regional and local standards of urban design must be a binding condition. The essence, for example, of local regulations is that they establish a set of estimate indicators of the minimum permissible provision level of the local population with electricity, heat, gas, water supply and sewerage facilities; roads of local significance; and physical culture and mass sports, education, health care, disposal of solid household waste facilities as well as land improvement facilities. In addition, the regulations contain estimate indicators of the maximum permissible level of territorial availability of such facilities for the municipal entities’ population (villages, urban districts).

This document should not only be published and posted on the Internet but also endure public hearing procedures, which is currently not stipulated by Article 29.4 Urban Development Code.

Regarding facilities of municipal significance that have a future construction plan, the emergence and discussion with the municipal entity’s population will increase the awareness of citizens regarding the authorities’ plans and mitigate the potential social conflicts between the government and society. The results of the public hearings must be mandatory.

4. In terms of withdrawal of land plots for both public and public–private needs, not only the whole package of approved urban planning documentation (as noted above) but also evidence that the facility may not be located elsewhere, as well as evidence that the exclusive necessity of the very facility on the withdrawn plot is in the interests of the local population, is required. The possibility of available special (simplified) procedures for withdrawal of land plots for public or public–private needs must be completely excluded.

This conclusion can also be justified by the fact that, in contrast to densely populated Europe, Russia is a minimally developed country; its huge spaces remain uninhabited without infrastructure facilities. Therefore, if it is necessary to hold various summits and Olympics, instead of the demolition of homes and eviction of residents, it is much more reasonable to develop the steppes and wastelands.

5. It is necessary to govern the procedure of return of a withdrawn plot to its owner if there is no longer a public need for it. This problem occurs constantly, not only in Russian judicial practice but also in the practice of European states. For example, the Constitutional Court of Austria considered an interesting case for the return of a land plot withdrawn for state needs. Financial compensation was paid to the owner; however, 3 years later, the owner discovered that the withdrawn land plot was not used for public purposes. Consequently, his recourse to the general jurisdiction court was to request a return of the land plot (after returning the compensation); the request was denied with reference to the civil legislation. The court held that the subjective civil right ceased to
exist due to the withdrawal of the plot; consequently, the plaintiff’s claims had no substantive basis. When the owner appealed to the Constitutional Court, he won. This case is connected to “termination of the subjective constitutional private ownership rights is to be associated not with the moment of the actual withdrawal of the land plot but with implementation of the purpose for which the land plot was withdrawn” (Gadzhiev, 2006, p. 34).

As is noted by the European Court of Human Rights, if there is no withdrawal of land for a longtime after the decision on compulsory expropriation, such withdrawal is a violation of Art. 1 Protocol No. 1 to the Convention “On Protection of Human Rights and Fundamental Freedoms” of 04.11.1950. This withdrawal disturbs the “fair balance” that must exist between the protection of ownership rights and the requirements of common interest (Sporrong and Lunnroth v. Sweden. Judgment of the European Court of Human Rights, 1982). Fulfillment of this requirement often encounters various obstacles in Russia. For example, a resident of Tyumen Region A (owner of a land plot and immovable property) appealed to the district court via a lawsuit seeking to invalidate the orders of the head of the administration of Nizhnetavdinsky district on September 22, 2008. “On Withdrawal of Land Plots for Municipal Needs,” the owner alleged this order did not include a list of facilities that were to be located on these land plots, and it did not note whether they belonged to facilities of municipal significance or whether they complied with the general layout of the corresponding municipal entity. As a result of judicial review, this order was canceled. Similar court decisions on similar cases are not rare (Krylova, 2013).

Thus, a clear legislative framework provision for binding fulfillment of the withdrawal purpose may limit the public authorities’ appetite and reduce the frequency of private property withdrawal cases.

Legal Structure of “Eminent Domain” in the U.S. Law: Comparative Legal Analysis of its Attractiveness for Russia

Pursuant to the Fifth Amendment of the U.S. constitution, a government can acquire real and personal belongings of a citizen for public purpose, and the person must be provided just compensation. The Fifth Amendment’s public use clause is applicable to state governments through the Fourteenth Amendment Clause. Therefore, the taking of property for private purpose is unconstitutional. Legislatures can also delegate the power of eminent domain to agencies for public purposes. The government’s advantage in exercising the power of eminent domain need not benefit a large number of people. The use can be solely for a community of people or residents of an area. However, the benefit should not be for solely one person (“Eminent Domain,” 2015).

Initially, Congress did not provide for the right of federal authorities to eminent domain if the land was needed to implement federal projects. More than 50 years after the founding of the United States, the Supreme Court confirmed the absence of the federal government’s right to eminent domain. From the founding until the Civil War, the federal government was believed to have eminent domain power solely within the District of Columbia and the territories but not within states. The federal government acquired the right to take land through eminent domain after the Supreme Court established the existence of this power in the 1875 case of Kohl v. United States; this power is now taken for granted (Baude, 2013).

To exercise the power of eminent domain to ensure the public good, the government must prove that four elements are present: (a) private property, (b) must be taken, (c) for public use, (d) and with just compensation. It is very important for the last element that the price is the market price. Crops, grass, trees, minerals, and all other items located on the land plot withdrawn for public use are considered.

Condemnation proceedings are conducted as quickly as possible, and consist of two phases: proceedings that relate to the right of the condemner to take the property and proceedings to set the amount of compensation to be paid for the property taken (“Eminent Domain,” 2008).

The abovementioned 14th Amendment requires that a taking must be for “public use” to be allowable. In the 1954 case of Berman v. Parker, the Supreme Court of the United States decided that “public use” could be interpreted as for a “public purpose” (“Eminent Domain Takings for Private Development,” 2015). The Court upheld the use of eminent domain to develop slum areas for possible sale to private interests. The purpose of the act in question was to improve areas that were injurious to the public health, safety, morals, and welfare of the community (Mills, 2015). However, this understanding of “slum areas” is controversial.

In the case of City of Las Vegas Downtown Redevelopment Agency v. Pappas, the Supreme Court of Nevada agreed that the city of Las Vegas was in a state of “blight,” and thus gave official permission for the alienation of property to construct a parking garage that served several casinos. The Court concluded that the center of the city suffered from the economic downturn, which involved downward trends in the business community, relocation of existing business outside of the community, business failures, and loss of sales or visitor volumes. However, it is clear that virtually any area of any city may occasionally experience some crisis economic phenomena, including loss of visitors as a source of income (Afanasieva, 2013).

In the judgment on the case of Poletown Neighbourhood Council v. City of Detroit, the Michigan Supreme Court supported the planned purchase of a large plot of land to construct a General Motors assembly plant, meaning, in this case, the need for Detroit’s economic development as the public purpose. In the judgment on the Hawaii Housing Authority v. Midklif case, the U.S. Supreme Court recognized the constitutionality of the Hawaii Land Reform Act of 1967 providing for the possibility of the withdrawal of land plots to reduce the concentration of land belonging to a number of large land-
owners. Subsequently, after the purchase, the land was supposed to be leased (Krasov, 1993).

In 2005, the Supreme Court issued a largely unpopular decision in the case of Kelo v. City of New London, expanding the interpretation of “public purpose” further. In the decision, the court held that the government could take private property to transfer it to another private owner for an economic development purpose, claiming that the economic growth enjoyed by the community from new private developments could constitute a valid public purpose. This opened the door for developers planning shopping centers and other similar construction projects to look to the government to take any private property that may prevent their plans (“Eminent Domain Takings for Private Development,” 2015). However, the problem included the fact that the U.S. legislation has no official definition of “economic development,” and state acts contain vague references to this term. Consequently, the main conclusion of the Kelo case was that thereafter, government authorities could perform compulsory withdrawal of property from a private owner to develop private companies, when this property had no public purpose except for the development of the local economy. In addition, following this judgment by the Supreme Court, 43 states have now reformed their laws to better protect property owners and have limited the government’s eminent-domain-related authority. Seven states’ high courts have stepped in post-Kelo to protect the rights of homeowners against eminent domain abuse. The high courts of Hawaii, Ohio, Oklahoma, Pennsylvania, Missouri, New Jersey, and Rhode Island have all ruled in favor of property owners and against eminent domain for private gain (Walsh, 2009).

However, C. Kerekes and D. Stansel found “virtually no evidence” of eminent domain’s economic benefit. The researchers found no statistically significant relation between eminent domain activity and the level of government revenue. In this regard, we should support the conclusion that private property is a fundamental tenet of the free market system. When individuals are allowed to use their property in the manner they deem fit, the most efficient use of property becomes a rational behavior. In turn, tax revenues are maximized as individuals benefit from the value of their property (Hathaway, 2015).

The list of types of “public purpose” is not exhaustive in the United States, and may include involuntary withdrawal of private property for the construction of schools, streets, highways, parks, airports, dams, water reservoirs, construction of public housing, hospitals and public buildings (including those resulting from the elimination of slums), and the construction of oil pipelines. In the latter case, the legislation and the judicial practice require the establishment, where possible, of easements instead of the full withdrawal of land plots. This trend is caused by the increased withdrawal of land plots from owners for public needs (e.g., in the state of Texas) due to hydraulic fracturing (fracking) for oilfield activity. In these cases, landowners are encountering increased pressure from pipeline companies to take land for easements (“Eminent Domain Texas,” 2015). In this regard, the Russian legislation should include that land may be withdrawn solely if there is no other location of public or public–private facilities or establishment of easements is impossible.

Another trend, which is equally important and worthy of support, is the availability of large powers by constituent entities of the federation (states) in the United States for termination of rights of private ownership of land plots (“Eminent Domain Update,” 2006). Much of this power belongs to municipalities, which may adopt regulations on this matter. For example, in Queen Creek (state of Arizona), the Town Council unanimously approved a resolution prohibiting the condemnation of private property for economic development purposes (Local Legislation on Eminent Domain, 2015). Russia as well as the United States is a federation; however, the possibility of legal regulation of land ownership relations (in terms of their withdrawal) by constituent entities representative of state power from the Russian Federation (territories, regions) is very limited. It appears that the U.S. experience should be further studied and introduced. For example, at the constituent entity level of the Russian Federation, such endowment of power would increase the volume of guarantees of citizens’ rights to reflect the regional specifics. Therefore, we cannot agree with the theorists believing that to protect the rights and legitimate interests of owners and other right holders of land, it is necessary to specify the rule of Item “c” Paragraph 1 Article 72 Constitution of the Russian Federation, which states that “issues of emergence, limitation and termination of the right of ownership of land plots shall fall within the sole competence of the Russian Federation” (Balin, 2011, p. 8).

In our view, the task is exactly the opposite; it is necessary to develop and expand the joint competence area of the Russian Federation and its constituent entities to increase the latter’s land relations rights.

Providing a positive assessment of many aspects of the legal regulation of the withdrawal of land plots in the United States, we should note that the existing practice of protection of citizens’ rights when taking land plots for public needs (Kelo case) leads to a number of critical comments (particularly because the land plots taken after review of the case of Kelo v. City of New London were not developed by the company that initiated these proceedings).

In this regard, the Russian ban on withdrawal of land plots for public needs associated with the economic development of municipalities appears to be a progressive phenomenon.

Conclusion

Recognition of private ownership rights as “sacred and inviolable” has played a positive role in history; however, the current model of guaranteed rights of private property owners does not exclude involuntary withdrawal of such property for the needs of the state and society. After the analysis of the current Russian legislation, the scientific doctrine, and the juridical practice of withdrawal of land from the owners by redemption, we
conclude that in addition to public (state and municipal) needs, objectively, there are public–private needs aimed at the pursuit of interests not of the whole society but of a certain portion (e.g., sports fans, for construction of an Olympic stadium). At the same time, at the scientific doctrine and juridical practice levels as well as in the mass public consciousness, many government acts regarding withdrawal of land plots from owners are perceived as unjust, which leads to negative social consequences.

There are a number of modes to solve the problems that exist in this field, which are far beyond law itself. In their economic component, it is necessary to enhance the purchase price calculation formula; in the legal component, both to change federal legislation and to expand the rights and authorities of the federation’s constituent entities to settle the issues of acquisition and termination of ownership rights considering local conditions and traditions. In a philosophical regard, it is necessary to continue studying the world outlook of the population and its responses to decisions of the government that affect the rights of the land plot owners. Our main conclusion regards the necessity of developing a value-conscious approach to the legal aspects of the termination of owners’ rights in regarding the withdrawal of their land plots for public or public–private needs.

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