



Definition of public interest in land expropriation

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ABSTRACT. It is realistic and necessary to study the definition of public interest in land expropriation. Through combing the laws and regulations related to the definition of public interest in land expropriation in China, this paper finds that the relevant laws are not clear about the legislation, review and interpretation of public interest, and there are still many problems such as the large discretionary power of the government, the drawbacks of the land financial system, and the imperfect public interest dispute mechanism. Therefore, it is suggested that the definition of public interest in land expropriation in China can start from these four aspects: the cooperation of various organs (legislative, administrative and judicial) to define the scope of public interest; we should establish and improve the identification and handling mechanism of public interest disputes; we need allow non-pure public interest to profit; we should promote the reform of rural collective construction land market entry system.

Keywords: Land expropriation Public interest Definition of public interest

1 Introduction

In recent years, with the rapid development of China's economic construction, the urbanization process has been greatly accelerated, and the contradiction between land supply and demand has become more and more prominent. Under the situation that the supply of state-owned land exceeds the demand, the government inevitably needs to expropriate collective land in order to resolve this contradiction. However, there are more and more bloody conflicts caused by land expropriation. The causes of land disputes mainly come from the decision of expropriation, expropriation procedure and expropriation compensation. This paper sets aside the expropriation procedure and expropriation compensation, and focuses on the expropriation decision. One of the key points involved is the public interest. From May 23 to June 23, 2017, the Ministry of natural resources publicly solicited opinions from the public on the land administrative law of the People's Republic of China (Amendment) (draft for comments). During the consultation period, 262 units and individuals from all walks of life put forward 840 opinions and suggestions, mainly focusing on five aspects, including the definition of public interest. The definition of public interest in land expropriation is still controversial and

needs to be dealt with practice. Therefore, it is realistic and necessary to consider the definition of public interest in land expropriation.

2 Problems and reflections on the definition of public interest in land expropriation in China

The newly adopted amendment (draft) to the land management law in 2017 “liberates” public interest from an overly broad and abstract level, and restricts the government from abusing public interest and damaging private interest. Compared with the past, it is a great progress, but its limitations need to be considered, and it is still difficult to operate in practice.

2.1 The law is difficult to undertake the heavy responsibility of legislation, review and interpretation of public interest

First of all, the Chinese Constitution gives the power of land expropriation, but it obviously can't bear the heavy responsibility of providing legislative, review and interpretation basis for ordinary laws - the definition of public interest in the constitution is vague, and it is difficult to bear the heavy responsibility in the definition of public interest.

Secondly, the land expropriation in China is controlled by the administrative departments throughout the process. Neither the authorization of the legislature nor the right of democratic participation of the citizens affected by the right are provided, let alone the requirement of judicial review.

From this point of view, the land element that can create enormous wealth has no legislative status in the definition of public interest in its expropriation, and can't be reviewed by the judicial organs. Therefore, it is not surprising that land expropriation for private interest does not meet the needs of public interest.

2.2 Unclear definition of public interest gives the government greater discretion

Recalling the “nail households” case in Chongqing that caused a great stir in China in 2013, even if it is put under the current law, it may not be able to explain the public interest involved. It can be seen that listing public interest doesn't solve all the disputes, and it won't make the land acquisition all right.

The current land expropriation legislation in China lacks the procedure for determining public interests. In practice, the connotation of public interest is determined unilaterally by the administrative organs, and public interest is limited to the internal approval process of the administrative organs. In addition, neither laws and regulations nor academic circles have made a conclusion on the relationship between public interest and commercial interest in land expropriation, which is bound to cause chaos. The abuse of land expropriation right caused by the government's economic interest, system inducement, performance incentive and intergovernmental competition is the best proof. The

ambiguous definition of public interest makes it an excuse for some people to intervene in other people's real rights for seeking personal interest, and provides space for rent-seeking and corruption. What's more, in the list of public interest in the 2017 land management law amendment (Draft) of China, there is still legal provision to cover the public interest. "The need of other public interest" expands the space for the definition of public interest, and also gives the government, which is both a referee and an athlete, greater discretion. However, there is no judicial supervision on public power.

2.3 The commercialization of land expropriation reveals its disadvantages

Most of the local government finance in China comes from land finance. The so-called land finance mainly refers to the income obtained by the local government through the acquisition of land collectively owned by farmers at a low price, converting it into state-owned land, and then transferring the right to be used state-owned land at a high price. This income accounts for a sizeable proportion of the total income of the local government. The land finance system of local governments is created according to the land management law. Its essence is the commercialization of land expropriation, which is equivalent to encourage local governments to lower the legitimate income of farmers and increase the income of the government itself. In fact, in recent years, the government's income from land sales has been growing rapidly, and its dependence on land finance has become increasingly strong. It is inconceivable that this is within the scope of the law. Moreover, due to information asymmetry and other reasons, the legitimate income of farmers can't be guaranteed. Then, the government's Land Expropriation based on the price difference earned under the urban-rural dual land system may be based on public interest, but in practice, not every case can be completely equivalent to land expropriation for public purposes.

This is indeed the product of China's unique land system, and also leads to the disadvantages of land resource allocation: most of the land acquired by the government through expropriation is allocated in a non-market way, and the non-market allocation of government land and municipal facilities land has led to the construction of infrastructure such as large squares, roads and luxury office buildings ahead of schedule. A large number of lands allocated for the purpose of public interest are used for business purposes, resulting in land income being unfairly occupied. An important reason is that the government can forcibly expropriate farmers' land at a price lower than the market, which certainly doesn't guarantee the public interest in land expropriation. The Third Plenary Session of the 18th CPC Central Committee once again proposed establishing a unified urban and rural construction land market, narrow the scope of land acquisition and standardize the procedures of land acquisition. This reform plan hasn't been substantially promoted so far, and the dependence of local governments on land finance is the main reason why it is difficult to shake.

2.4 The dispute settlement mechanism of public interest is incomplete

At present, land expropriation disputes in China mainly exist in the ways of negotiation and conciliation, administrative reconsideration, administrative adjudication, court settlement, letters and visits. However, these dispute settlement mechanisms have defects and problems, which to a certain extent also lead to the land expropriation disputes can't be well resolved. For example, if it is an image project, a political achievement project, etc. The definition of public interest will be controversial. On the other hand, there is a phenomenon that the expropriated people are unwilling to be expropriated and continue to confront the government because they have economic benefits due to the geographical location of the expropriated land. Once the definition of public interest is indeed ambiguous, disputes will arise. But at present, the handling mechanism of such disputes in China is not perfect.

3 Perfect Way of Defining Public interest Land Expropriation in China

3.1 Cooperate with each other and define the scope of public interest

Legislative recognition of public interest in land expropriation

. Although the amendment to the land administration law (Draft) in 2017 adopts the mode of summary and enumeration to give meaning to the word “public interest” in the land acquisition, under the framework of “coarse rather than fine” in China’s legislation, the legislative level of public interest is only limited to the provisions in bold lines. The opinions on the reform of the land acquisition system in the “three land reform” pilot implemented in 2014 have given us a good idea. As an abstract concept, public interest itself, even if all existing cases are listed exhaustively, it is difficult to avoid new situations in actual operation. In this case, after the principle of public interest in land expropriation is stipulated, why not hand over the work of formulating specific laws and regulations and detailed rules of public interest to the local authorities? In this way, the local authorities can combine their own actual conditions, adapt measures to local conditions, and make the formulation of documents not put on the shelf and have better practical guidance. In addition, referring to the idea of combining legal provisions with individual cases in the definition of public interest in German land expropriation. China can appropriately empower the courts to define public interest in individual cases through legislation.

In China, there is no clear legal framework for public interest in land expropriation. First of all, as the fundamental law of China, the constitution mainly provides for the content of principles and abstractions, and doesn't specify the connotation and scope of public interest. As a guiding law, the constitution should clearly define public interest, so that there are laws to follow and constitutions to check in practice. Secondly, although the amendment to the land management law (Draft) in 2017 defines the public interest in the form of summary and enumeration, and has a cover clause, it is far from enough, and there are still problems in practice; Finally, land expropriation is an important and complex systematic project. China's unique “urban-rural dual” land system

undoubtedly increases greater difficulties in practice. It is urgent to formulate the land expropriation law.

Administrative review of public interest in land expropriation

. When the government conducts land expropriation, it shall fully demonstrate and explain the public purpose of land expropriation. The distinct hierarchy of administrative organs in China also provides a good platform for administrative review, but it has not been well utilized. The administrative organ with the power to approve and decide the land requisition shall examine the local land requisition application with “high standards, high requirements and strict control”. The local government shall obtain its consent before implementing the land requisition decision. If it does not conform to the public purpose, it shall not be approved. After approval, if the requisitioned person or interested person has an objection to the public purpose and requests for administrative reconsideration, the reconsideration organ shall review the public interest again. If it doesn't conform to the public interest, it shall be corrected.

Judicial review of public interest in land expropriation

. The Court's examination of public interest should have an important premise, that is, the court can accept the administrative litigation filed by the expropriated person against the land acquisition approval decision. The passivity and neutrality of Judicature determine that if the expropriated person has any objection to the public purpose of land expropriation, he must apply to the court and specify that the public interest should be reviewed. When reviewing the public interest of land expropriation, the court should not only define the public interest according to laws, regulations and administrative rules, but also make a balance of interests and value judgment from the aspects of “interest, majority, proportionality, procedural legitimacy and open participation” according to the circumstances of individual cases.

3.2 Establish and improve the identification and handling mechanism of public interest disputes

After narrowing the scope of land acquisition and defining public interest, the amendment to the land management law (draft) needs to consider establishing and improving the public interest dispute identification mechanism in land acquisition. Only in this way can the government effectively prevent rent-seeking behavior, protect the rights and interests of farmers, reduce the government's spear and shield, and reduce the pressure on rural collective commercial construction land to enter the market to a certain extent.

In terms of specific measures, adopt the mode of "summary + enumeration + exclusion"

. The definition of public interest in land expropriation only adopts the general mode, which is difficult to operate in practice; However, the enumeration of public interest

can't be exhaustive, and the legislative mode of enumeration can't reach the standard of comprehensive coverage. This simple and absolute approach, which only adopts the exclusion mode, has the meaning of "rather lack than abuse". It opposes various interests and is difficult to maximize public interest. Then the mode of "generalization + enumeration + exclusion" can be adopted to summarize the situations that can be summarized into the public interest category, and reverse list the situations that do not belong to the public interest.

In particular, considering that in practice, some local governments engage in pure commercial development activities in the name of public interest, which damages the legitimate rights and interests of the expropriated people, the negative exclusion of public interest will help to make the concept of public interest clearer and limit the government's abuse of expropriation power based on public interest.

On the value level, balance the interests of all parties involved

. Whether it is through substantive or procedural means, to solve the public interest dispute, we need to pay attention to how to balance the interests of all parties during the collection. First, the right to personal safety and health is of course higher than the property right. Secondly, we should fully consider the impact of expropriation on the expropriated and the degree of damage to interests; Finally, it should be understood that "public interest are higher than private interest" is not absolutely true under any circumstances. Private interest doesn't need to make unprincipled concessions under any circumstances. The principle of proportionality should be taken into account in terms of the degree of impact and the degree of damage to the interests of the expropriated, so as to minimize the damage.

In terms of legality and reasonableness, the following factors should be considered: first, whether the types of public interest for which the expropriation decision is made are expressly stipulated in the law or meet the requirements of the law; second, consider whether the purpose of the expropriation decision is direct and mainly for public interest; third, consider whether the beneficiaries of the expropriation decision are non-specific and the majority in quantity; fourth, consider whether the expropriation decision will cause disproportionate losses and burdens to the society and citizens, make a judgment on the necessity and proportionality of the expropriation behavior, and take the principle of minimum damage to the private person as the principle, so as not to cause excessive loss of interests to the expropriated person; fifth, consider weighing the loss of private interest and the profit of private interest to prevent the result of improper transfer of private property; sixth, considering the substitutability of expropriation, if the goal of achieving public interest can be achieved through other methods that are less harmful to private interest, the method of less damage to private property rights should be adopted as far as possible, and private property rights should be fully respected.

Public interest has become the only legitimate reason for the transfer of collective land ownership in land expropriation. The government's land expropriation should be the only way to do it for the public purpose after trying all the methods, instead of naturally taking land expropriation as the first way to solve the problem.

In the system design, construct a public interest dispute resolution mechanism

. At present, there are four modes for the construction of public interest dispute resolution mechanism in the theoretical circle. First, whether there is a major dispute or not, it is directly decided by the government. Second, if there is a dispute, no expropriation decision will be made. Third, if there is a major dispute, it shall be decided by the government, experts and representatives of the expropriated. Fourth, where there is a major dispute, it shall be ruled or decided by a third party, including the higher-level government, the people's Congress at the same level, the court at the same level, and the special administrative adjudication institution. Article 14 of the regulations on the expropriation and compensation of houses on state owned land promulgated by the State Council stipulates that "if the expropriated person is not satisfied with the housing expropriation decision made by the people's government at the city or county level, he may apply for administrative reconsideration according to law, or may file an administrative lawsuit according to law."

In practice, it is suggested that where there are objections to the public interest in land acquisition, the responsible department should organize relevant departments to hold hearings to ensure the public's right to know and participation to determine whether they belong to the public interest category.

3.3 Land expropriation allows non pure public interest to profit

The public interest mixed with commercial interests can be expropriated

. Nowadays, there are very few land expropriation projects without commercial interests. Land expropriation projects for economic development and urban construction are fundamentally related to the interests of the broad masses of people. Scholars who oppose the incorporation of commercial interests into public interest are mainly based on the following considerations: first, commercial projects have risks and long effective periods. It is more difficult to accurately measure their contributions to urban construction and economic development, and it is difficult to have scientific measurement and constraint conditions; second, the phenomenon of unequal income of commercial projects can easily lead to disputes and social contradictions, and also increase the emotional damage caused by the change of life style and living environment of the expropriated, which can't be compensated by expropriation compensation; third, the government still plays the role of "referee and athlete". Most commercial projects have huge profits. The government's discretion provides a platform for the abuse of land acquisition rights and rent-seeking behavior; Fourth, even without land acquisition, commercial projects can achieve win-win results according to market rules and market transactions. In reality, there are not a few such cases.

It is unrealistic to expropriate land for pure public interest and exclude other interests in the development of the times and the current national conditions. The author believes that various special situations in the actual operation process can't be excluded "across the board". For commercial projects that have a significant impact on economic development and urban construction and must obtain land through land acquisition, they can be identified on the basis of expert review and public consultation. It is necessary to specify the proportion of commercial interests in land acquisition, clarify the specific

contents of the project to the expropriated and the expropriated, and add the compensation for commercial interest. This will make the public welfare of land acquisition more transparent, improve the government's credibility, create an authoritative government, and reduce the communication costs in land acquisition.

Establish a land expropriation system for non-pure public interest

. Nowadays, China is carrying out the reform of the land system, invigorating land resources and encouraging rural land circulation. In order to ease the shortage of land under the high-speed development of economic construction, ensure the red line of arable land, implement the policy of "increasing linkage" and promote the index transaction, all of which are in violation of the Constitution's Land Expropriation Based on the purpose of public interest. In the face of this situation, the way to solve the problem is to establish a non pure public construction land system to ease the social demand of non pure public interest for land acquisition. The work of the law is not to kill this new thing, but to formulate relevant norms, control its edge within an appropriate range, and ensure that there are normative guarantees and relief channels. The purpose of land acquisition for non-public interest is precisely this new thing. The urgent task is to formulate the corresponding laws so that the people who lose land can have legal protection.

3.4 Promoting the reform of the market entry system for rural collective commercial construction land

Under the management system of the separation of urban and rural land, rural land belongs to the village collective and urban land belongs to the state. If rural land is to be changed into urban construction land, it must be expropriated and become state-owned land. This directly leads to the government becoming the monopolist of the supply of construction land. It also greatly restricts the access of rural collective construction land to the market and deprives rural collective land of the right to enjoy the same income as urban land. At the same time, it also allows for the government to "sell land to make money". The price difference obtained by the government in the resale of land is not entirely based on public interest, and the issues of interest distribution and expropriation compensation involved are not discussed for the time being. The existing problems require the reform of China's land system. Based on the clear public interest, rural collective operating construction land should enjoy the same rights as urban state-owned land -- it can enter the land transaction market and enjoy the land appreciation income equally.

4 Conclusions

Under the background of China's unique land system, land expropriation is a complex task, and the definition of public interest is an important issue in land expropriation. This study reflects on the problems existing in the definition of public interest in land expropriation in China. It is suggested that the definition of public interest in land

expropriation in China can start from these four aspects: the cooperation of various organs (legislative, administrative and judicial) to define the scope of public interest; we should establish and improve the identification and handling mechanism of public interest disputes; we need allow non-pure public interest to profit; we should promote the reform of rural collective construction land market entry system.

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