



Property Rights of Investors to Real Estate to be Built in the Future

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ABSTRACT.

The article is devoted to the issue of investor's rights protection in terms of investing in real estate objects to be built in the future. In particular, the author analyzes the legislative novelties of the Law of Ukraine "On Guaranteeing Real Property Rights to Real Estate Objects to be Constructed in the Future". The author identifies the advantages and disadvantages of the mechanism of investor protection in Ukraine. The author establishes that the purpose of the Law of Ukraine "On Guaranteeing Real Rights to Real Estate Objects to be Constructed in the Future" is to create legal mechanisms for the State to guarantee real rights and is aimed at improving the legislative regulation of relations in the field of attracting funds of individuals and legal entities to the construction of real estate objects.

Along with the provisions that are progressive and urgent, there are a number of problematic issues of the Law of Ukraine "On Guaranteeing Real Rights to Real Estate Objects to be Constructed in the Future": First, the imperfection of the legislative interpretation of the definition of "future real estate object", which is a key aspect in the context of regulating a special property right to an object to be built in the future; secondly, the controversial interpretation of the essence of a special property right to an object under construction, a future real estate object through the prism of certain powers of possession and disposal, which contradicts the Law of Ukraine "On Valuation of Property, Property Rights and Professional Valuation Activity in Ukraine". The author makes a number of recommendations aimed at improving the mechanism for protecting the rights of investors of residential and non-residential real estate under the Law of Ukraine "On Guaranteeing Real Property Rights to Real Estate Objects to be Constructed in the Future". In particular, the author determines that the term "special property right" used in the Law of Ukraine "On Guaranteeing Real Rights to Real Estate Objects to be Constructed in the Future" should be interpreted as a real right.

Keywords: protection of investor's rights, future real estate object, special property right, legal nature of special property right, object under construction.

Statement of the problem.

The military actions in Ukraine have resulted in numerous destructions of real estate on the territory of our state. One of the most urgent tasks is to rebuild and restore the infrastructure destroyed as a result of hostilities. The construction of real estate is also a top priority in some regions of Ukraine. In such circumstances, the problem of improving the legal mechanism for protecting investors of real estate to be built in the future is becoming quite acute.

Analysis of recent research and publications.

The issues of investor protection have attracted the attention of Ukrainian scholars. Among them, in particular: O. M. Vinnik, O. V. Ilkiv, V. M. Kosak, T. Y. Rim, and others.

However, the mechanism for protecting investors' rights provided for by the Law of Ukraine "On Guaranteeing Real Property Rights to Real Estate Objects to be Constructed in the Future" has not been analyzed in scientific works. This, in turn, necessitates a study of the legal nature of the special property right of investors to real estate to be built in the future.

Summary of the main research material.

As is well known, on October 10, 2022, the Law of Ukraine "On Guaranteeing Real Rights to Real Estate Objects to be Constructed in the Future" No. 2518-IX dated August 15, 2022 (hereinafter - Law No. 2518-IX) came into force [1].

First of all, it is worth noting that Law No. 2518-IX structures the “vague” and broad legislative field, which was presented, before its entry into force, in only two special laws [2, p. 103]: The Law of Ukraine “On Investment Activity” [3] and the Law of Ukraine “On State Registration of Real Property Rights and Encumbrances” [4].

Law No. 2518-IX aims to create legal mechanisms for the state to guarantee real rights to real estate under construction and future real estate, the right to perform construction work on which has been obtained from the date of entry into force, and is aimed at improving the legislative regulation of relations in the field of attracting funds from individuals and legal entities for real estate construction. Its provisions offer a number of innovations and are certainly progressive and urgent, and their implementation will significantly increase the level of legal support for the subjective civil rights of participants to legal relations in the relevant area, and in case of their violation - will help to stop illegal manifestations and eliminate their consequences [5, p. 192-193].

Among other things, Law No. 2518-IX strengthens the guarantees of the rights of residential real estate investors by introducing a mandatory form of such agreements - a sale and purchase agreement, while fixing its essential terms. The novelties of such an agreement, in particular, include mandatory information on the legal grounds for the developer's acquisition of ownership of the land plot; guarantees regarding the first sale of the future real estate object; and guarantees of the absence of third-party rights to the future real estate object.

In view of the above, the adoption of the relevant law seems to us to be a completely expected and logical step. After all, the existing legislation on investment and financing of real estate construction has demonstrated the inability to fully protect the rights of investors in construction, to ensure transparent fundraising, which has made the construction market unattractive for both domestic and foreign investors, as well as the declarative nature of the protection of investors' rights against unscrupulous developers. This is confirmed by the number of residential unfinished projects that have not been completed for many years, as well as by court practice in this area.

At the same time, the most important novelty of this law, in our opinion, is the introduction of a “special property right”. In particular, a special property right to an object to be built in the future. However, it is worth noting that this legislative innovation is not properly regulated.

Firstly, it is difficult to recognize the legislative interpretation of the definition of “future real estate object” as successful, which is a key aspect in the context of regulating a special property right to an object to be built in the future. Thus, for example, according to the legislator's position set forth in clause 6 of part 1 of Article 1 of Law No. 2518-IX, “future real estate is a part of a subdivided object of unfinished construction provided for in the construction project documentation, which, after the commissioning of the completed object, will become an independent real estate object (apartment, garage box, other residential or non-residential premises, parking space, etc.) Future real estate objects are divided into future residential real estate objects (apartment, other residential premises, etc.) and future non-residential real estate objects (garage box, other non-residential premises, parking space, etc.)” [1]. As we can see, the existing definition in the legislation is characterized by duplication. In our opinion, it would be advisable to restate clause 6 of part 1 of Article 1 of Law No. 2518-IX as follows: “future real estate object” means a component part of a subdivided object of unfinished construction provided for in the construction project documentation, which, after the commissioning of the completed object, will become an independent residential real estate object (apartment, other residential premises, etc.) and/or a future non-residential real estate object (garage box, other non-residential premises, parking space, etc.).

Secondly, the interpretation of the essence of the special property right to an asset under construction, a future real estate object through the prism of some of its powers seems to be controversial.

Thus, according to clause 10 of part 1 of Article 1 of Law No. 2518-IX, “a special property right to an object under construction, a future real estate object (hereinafter - special property right) is a type of property right to an object under construction, a future real estate object, which consists in - possession and disposal of such an object at will, regardless of the will of other persons, unless otherwise provided by law, and arises after obtaining the right to perform construction work, but not before the state registration of such a right, and terminates after the commissioning of the completed construction object and state registration of ownership of the relevant real estate object; - the right of the person for whom such a right is registered to demand completion of the construction of the object (including the object, the part of which is the future real estate object) and its commissioning, which results in the acquisition by such a person of the ownership of the real estate object that meets the technical characteristics of the relevant object specified in the contract” [1].

As rightly noted in the scientific literature, the consideration of a special property right to a future real estate object through the legal possibilities of possession and disposal characterizes the relevant right as a real right, but at the same time gives rise to problems of its protection at the stage of construction of the relevant object. That is, when such an object does not yet exist in kind. After all, the currently available methods of protecting rights are not able to provide a person with the possibility of direct possession in this case. As a way out of this situation, D. S. Spesivtsev proposes to consider the special property right under study as a set of certain legal opportunities which develop in a dynamic aspect, i.e., as legal opportunities which, depending on the circumstances, replace each other in the content of subjective law. The author substantiates his position by stating that at the stage of construction commencement, a special property right is a legal opportunity for an investor to demand that the customer (developer) carry out construction, and also an opportunity (mainly before others) to acquire ownership of a thing created as a result of construction or to participate in the completion of the facility if the customer fails to fulfill the relevant obligation. From the beginning and until the completion of construction of the relevant future object (premises, apartment), the special property right becomes the right to a conditional part in the de facto object of unfinished construction. As soon as the floor is laid, the enclosing structures are constructed, etc., the investor becomes the owner of the relevant space, which begins to acquire the characteristics of a room, apartment, etc., i.e. the owner of the construction materials (although this is very conditional due to the specific legal regime of the relevant building structures). At this stage, its legal status approaches the status of a customer under a contractor agreement,

depending on the degree of fulfillment of its obligations to the customer (developer) of the construction. If the investor has fulfilled its obligations, for example, by 50%, then its right of claim is transformed into ownership by 50%, and in the remaining 50% it remains a right of claim [6, p. 101-102].

In addition, the provisions of Article 3 of the Law of Ukraine “On the Valuation of Property, Property Rights and Professional Valuation Activities in Ukraine” (hereinafter referred to as Law No. 2658-III) state: “property rights that can be evaluated are any rights related to property other than the right of ownership, including rights that are integral parts of the right of ownership (right of possession, disposal, use), special property right to an object of unfinished construction, future real estate, as well as other specific rights (right to conduct activities, use of natural resources, etc.) and the right of claim” [7]. In other words, as we can see, in this law, the legislator separates the special property right to an asset under construction, a future real estate object, from the powers of possession and disposal. Thus, it can be concluded that there is a certain inconsistency between the provisions of Law No. 2518-IX and Law No. 2658-III. Obviously, such a situation will not contribute to effective law enforcement in the area under study. It should be noted that a property right, which can be defined as a “right of expectation,” is an integral part of property as an object of civil rights. A property right is a limited real right under which the holder of this right is endowed with certain, but not all, rights of the property owner, and which certifies the right of its holder to obtain ownership of real estate or other real right to the relevant property in the future. Thus, the holder of a property right is granted the opportunity to obtain ownership of real estate or other property rights in the future.

The owner of property rights is also endowed with the right of claim, as defined by Article 3 of the Law of Ukraine “On the Valuation of Property, Property Rights and Professional Valuation Activities in Ukraine”. The content of real property rights is not only the right to act, but also the right to demand the creation of the relevant real property and its transfer. This indicates the binding nature of property rights to objects under construction and objects to be built in the future [8, p. 339]. The same position was taken by the court practice. Thus, in its ruling of January 30, 2013 in case No. 6-168ц12, the Supreme Court as part of the Judicial Chamber on Civil Cases stated that property rights to real estate that is the object of construction (investment) are not real rights to someone else's property, since the object of these rights is not “someone else's property”, and also not a right of ownership, since the object of construction (investment) does not exist at the time of the establishment of the mortgage, and therefore there can be no ownership right to it [9].

Thirdly, it should be noted that the specificity of this “special property right” lies not only in its objects, which are “unfinished construction object” and “future real estate object”, but also in the fact that it is subject to registration in the State Register of Real Property Rights and Encumbrances on the same grounds as real property rights. It is worth noting that this feature has caused considerable difficulties in terms of construction in the current environment, which has led to a slowdown in construction due to long waits for the register to start functioning. For example, in December 2022, the Association for Financial and Investment Management (hereinafter referred to as the Association) addressed MPs and public authorities for clarification on how to work in the absence of the State Register of Real Property Rights. In its appeal, the Association noted: “Developers are ready, but cannot start building due to the fact that starting from 10.10.2022, in order to start construction and its financing, all participants in the process (customers, developers/developers and financial institutions that raise funds to finance construction) must comply with the provisions of Law No. 2518-IX, namely: to start construction and its financing, information about the future construction object and a certain guarantee share must be entered into the State Register of Real Property Rights. In view of the above, the procedure for registering a property right is shown in Fig. 1.

The procedure for registering a special property right to a future real estate object

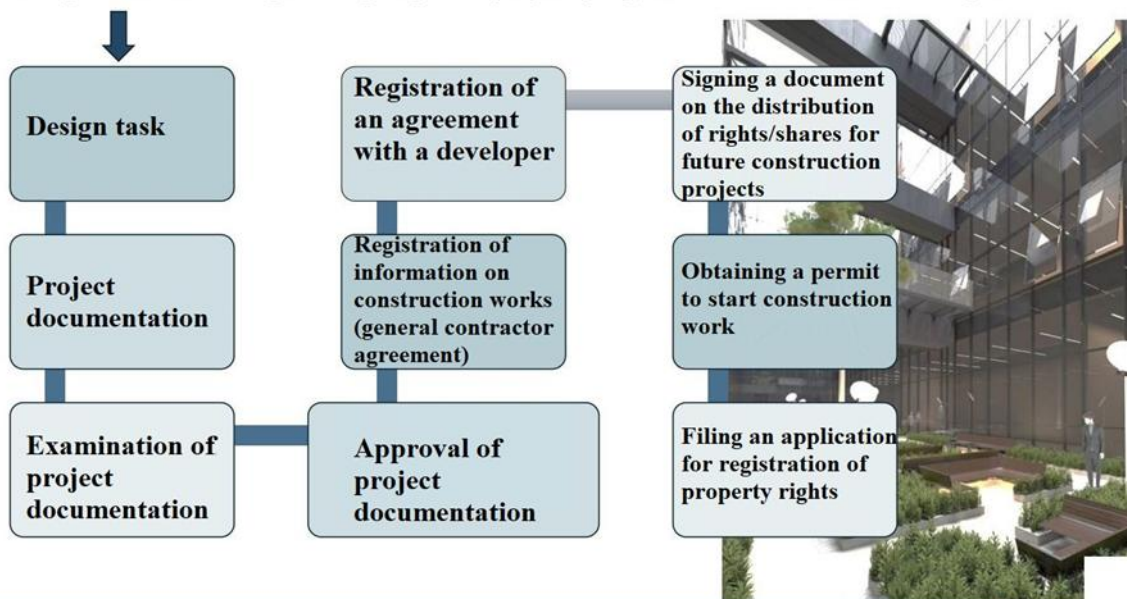


Fig.1 Procedure for registering a property right to a future real estate object

However, according to the information of state registrars, it is currently impossible to perform registration actions regarding a special property right to an object under construction, a future real estate object, encumbrances of such a right due to the failure to bring the State Register of Real Property Rights to Real Estate in line with the changes provided for by the Law of Ukraine “On Guaranteeing Real Rights to Real Estate Objects to be Constructed in the Future” of 15.08.2022 No. 2518-IX” [10].

Conclusions from the study and prospects for further research in this area.

Thus, the adoption of the Law of Ukraine “On Guaranteeing Real Property Rights to Real Estate Objects to be Constructed in the Future” No. 2518-IX dated August 15, 2022 and the legislative consolidation of the “special property right to an object under construction, a future real estate object” can undoubtedly be recognized as a positive and important step and a way to improve the protection of investors' rights, which is very important in today's conditions. However, like every new regulatory act, this law has not only positive aspects, but also certain drawbacks that need to be addressed. These are, in particular: First, the imperfection of the legislative interpretation of the definition of “future real estate object”, which is a key aspect in the context of regulating a special property right to an object to be built in the future; secondly, the controversial interpretation of the essence of a special property right to an object under construction, a future real estate object through the prism of certain powers of possession and disposal, which contradicts the Law of Ukraine “On the Valuation of Property, Property Rights and Professional Valuation Activities in Ukraine”.

An investor's right to a real estate object to be constructed in the future, including an object under construction, has a real legal nature. Therefore, the term “special property right” used in the conceptual framework of the commented law should be interpreted as a real right.

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