

Easement procedure and factors which defined it in Ukraine

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Summary. In the article various factors defining procedure of a land easement establishment when forming the new land plots are analyzed. All factors are combined into 4 groups. The analysis of influence of each group of factors on a land easement procedure in Ukraine is made.

Key words: right-of-way, utility, easement, easement procedure, easement establishment, factors.

a lot of time, demands considerable efforts and financial investments. The decision making of the formation of the land plot with the need to establish an easement is influenced by various factors, which act at different stages of easements establishment. This article is devoted to the study of the factors influencing the procedure of establishment of land easements in Ukraine.

INTRODUCTION

In recent years the demand for the land plots for cottage construction has increased in the cities of Ukraine [7]. In land resource-constrained environment in the cities suitable for housing construction the new land plots which aren't serviced with utility systems and access roads are being created. It is possible to close this gap at the expense of the adjacent land plots, which brings owners of the plots to agreement. The agreements are not always formalized, as a result, citizens appeal to court. Provision of utility systems and an access to roads for new land plots is possible by official establishment of land easements.

The procedure of establishment of land easements is not clearly defined by Ukrainian law. And there is no procedure for formation of the new land plots requiring establishment of easements. Despite the adoption of a number of laws [19, 12, 13, 14] in which the stages of establishment of land easements are defined, the establishment procedure is still difficult and unclear, takes

PREVIOUS WORKS AND PUBLICATIONS

The problem of establishment of land easements in Ukraine is studied insufficiently, despite its relevance. The most numerous publications are devoted to discussion of legal and regulatory aspects: the content of a land easement right of and its types, establishment and force, termination conditions [25, 26, 15]. Taking into consideration the unsettled procedure of easements establishment in Ukraine it is important to study and investigate international experience [16]. The experience of Scandinavian and European countries where the easement right has been successfully exercised for a long time will positively influence on functioning of a land easement in Ukraine [9, 17].

When establishing easement the questions arise of a monetary value of both the easement right, and the land plots under the action of this right. Ukrainian specialists have published a number of works devoted to the study of theoretical aspects of ease-

ment right monetary value [3, 4, 2]. In some works the necessity of procedure of formation and registration of a land easement for the cities of Ukraine is proved [6] and practical experience of establishment and registration of land easements of different type in Ukraine is generalized [10].

PURPOSE OF WORK

To analyze factors influencing the easement procedure in Ukraine when forming the new land plots which aren't provided with utility service and an access to roads.

EXPOSITION OF BASIC MATERIAL

While establishing easement several adjacent land plots can be involved to remove shortcomings. Further the land plot in favor of which the land easement is established will be the dominant one with adjacent plots being servient plots.

There is a large number of types of the land easement right which can have either positive or negative character. An easement is positive when the dominant plot owner has the right to do certain actions against servient land plots (passage, driveway access, utilities laying, etc.). The easement forbidding servient land plots owner to do certain actions is negative (for example, not to prevent water drainage from the adjacent plot). This article focuses on the positive private land easements.

The new land plots for cottage housing with the need of easement establishment result from 2 main cases - creation of the new land plots and division of existing mostly when receiving inheritance.

The establishment of a land easement begins with a study of the legal, technical and financial conditions for the formation of a land easement, insufficient consideration of which may lead to negative consequences of further operation of property. When establishing easement through adjacent plots it is necessary to choose the best option. There-

fore such factors as planning characteristics of the land plots, spatial structure and utility capacity and road location significantly influence the decision making on establishment of a land easement. Besides, these factors influence a land easement cost and change of market value of all adjacent land plots involved (table 1).

A set of factors influencing procedure of a land easement was defined as a result of the analysis of domestic experience of a land easement establishment and considering conditions of its further functioning, as well as the existing practice of new land plots formation. All of them were grouped into:

1. Legal, 2. Financial, 3. Planning, 4. Other.

The influence of the factors that are part of all groups can be considered as positive if the procedure of a land easement establishment is fast, inexpensive and clear for the land plot owners. Furthermore, planning characteristics of the land plots involved in a land easement establishment don't change for the worse and the market value of land is not reduced or there is a slight decrease.

The extent of the influence of factors is different. Group of legal factors act on the whole country, whereas other groups of factors have local influence on the residential district where the land plots are located.

Group of legal factors

- Easement establishment under Real Estate Formation
- Easement establishment procedure & Registration in the Real Estate Register
- Technical regulations for Easements establishment
- Compensation procedure
- Documents for Easement establishment

To date, Ukraine hasn't adopted a specific law on a land easement establishment and new land plots formation. The only attempt in this direction is the draft law "On land easements", developed in 2004 [1]. But it hasn't been adopted so far.

Procedure of formation of the new land plots where land easement is needed isn't approved in Ukraine. Certain parts of procedure and the process of the new land plots formation are stated in various legislative

acts. In particular, in the Land and Civil code, a number of laws, resolutions and other acts. The Land Code contains the general definition and the incomplete list of types of land easements. Also here the general principles of establishment, action and cancellation of a land easement are given. In certain articles of the Land Code the formation of the new land plots as a result of subdivision or amalgamation is defined in general. But the process of establishment of a land easement when forming the new land plots isn't defined.

According to Ukrainian law [18, 19], private land easement may be established by the agreement between land owners, as well as the will and judgment. The contract is concluded between the owners of land in accordance with civil law by general rules. The standard form of contract for land easements has not been developed and approved. The contract may contain a validity period of land easement, a land plot plan with an indication of the easement area, the amount of monetary compensation to the owner of servient land plot, the periodicity of payment for the use of the land easement, the amount of payments and other items by mutual consent.

A number of laws determine obligation of land easement registration in the register of rights [13, 14, 18, 19], but registration procedure and a set of all the necessary documents, isn't quite clear.

The most widespread type of the easements established for new land plots for housing construction is right-of-way and utility easement [8]. It is important to define easement parameters according to building codes.

The size of land plots when laying driveway or utility is determined by Building codes. The size of the easement plot when laying utility is conditioned by the technical parameters such as the driveway width and size of sanitary protection zones. In Ukraine, road and utility construction is regulated by building codes [5, 22, 24, 27] that define their technical characteristics and certain limitations. The complexity lays in the fact that the codes don't state clearly technical

characteristics and limitations specifically for easements.

When establishing land easement the questions of financial compensation and easement payment always arise between the owners of the dominant and servient land property. According to Ukrainian law, the owner of the servient land plot may claim compensation for the land easement and recurrent fee. However, the legislation does not regulate these questions. Compensation payments are generally calculated by an independent appraiser on the basis of analysis of prevailing prices for such land plots in the real estate market and by the appraiser's own experience.

Different types of documentation are necessary at each stage land easement establishment (the formation and registration) [12, 14].

The technical documentation is developed for utility and cadastral documentation is necessary to identify the limits of the right of way. In order to establish various kinds of easement such as utility laying (water supply system, sewerage, gas pipeline, electrical network, etc.) technical documentation for each utility is developed. Types of documents and their number may vary in different regions and it is responsibility of the local utility companies.

Important component of a land easement establishment is geodetic surveying. According to the legislation the following documents are necessary for registration of a land easement: the application of the owner of the dominant property, land easement agreement, materials of geodetic surveying, the electronic exchange file, personal information of owners of the land plots involved in a land easement and some others.

Financial factors

Residential district - related factors:

- Changing of Properties Market Value
- The change of Tax payment

Land plot-related factors:

- Construction expenses
- Building materials expenses
- Expenses for project preparation

Some factors of this group have impact on the residential district, and some of them influence directly on the land plots involved in establishment of a land easement.

The effect of a land easement for the dominant property is the increase of market value, whereas for servient property market value decreases. The amount of the State Duty Tax depends on the amount of market value of the land plots. According to Re-stated Tax code [20] the State Duty Land Tax comes to local budgets. Thus, change of market value of the land plots influences filling of local budgets.

In case of land plots the cost of construction works and building materials are of great importance for owners. For the dominant property owner of the expenses will increase if utilities and roads are located far from the land plot and vice versa. In case of the optimal land easement expenses for the owner of the dominant property have to be minimum. It means that it is necessary to look for options for a land easement with an access to the nearest available roads and utilities. In this case there will be a reduction of land easement costs and reduction of the amounts of compensation payments due to reduction of the area of action of a land easement.

Easement documents preparation costs should include costs of utilities technical project, preparation of cadastral map and the registration of easement in the State Register of Rights.

Financial expenses also include surveying after easement is established. It is surveying to determine the areas of action of easement, geodetic coordinates, easement action planning and electronic exchange file creation containing geodetic information.

Financial expenses when easement is established in Ukraine are quite high, and the procedure for easement establishing takes up a lot of time. The reason is the lack of legislative regulation of procedure of land easement establishment and a large number of participants involved in the procedure from government agencies, private companies, individuals whose authority isn't clearly defined.

Planning factors

Residential district - related factors:

- Planning structure of residential district,
- Road network density and spatial structure,
- Utility capacity, density and spatial structure.

Land plot-related factors:

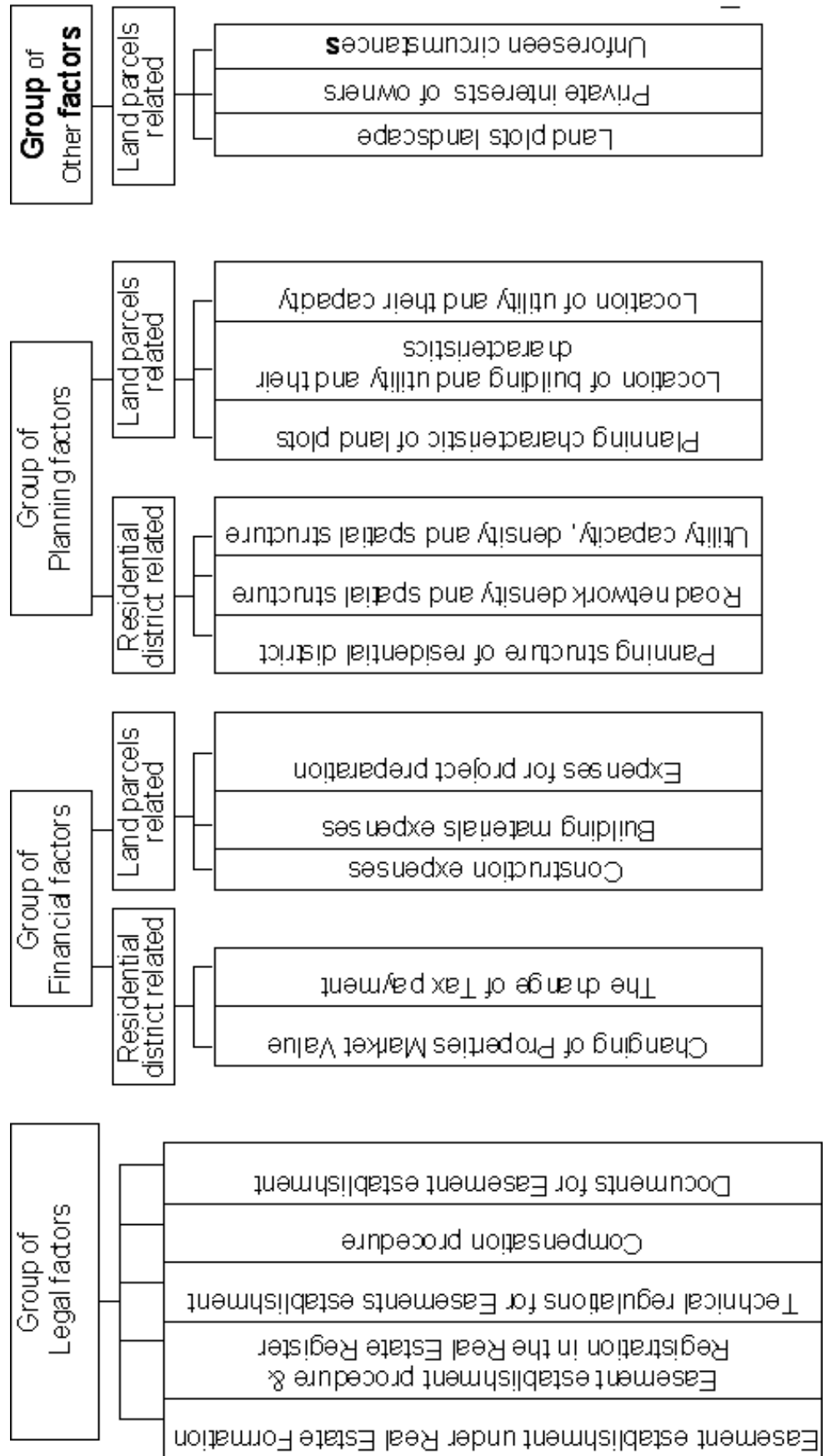
- Planning characteristic of land plots,
- Location of building and utility and their characteristics,
- Location of utility and their capacity.

The planning structure of the residential district where the land plot is located is of great importance for decision-making on formation of the new land plot with easement.

One of the important characteristics of the planning structure of a residential district is roads and utility layout. [11, 23] The spatial structure and density of roads and utility capacity is of great importance. If the roads are far away or have an uncomfortable location, it will be difficult to establish right-of-way and costs for construction work and materials, surveying will increase. This also considerably increases the technical documentation preparation costs. A similar situation occurs when you connect to nearby utilities. The reasons for this may be a low density and capacity of utilities.

Planning characteristics of the land plots are referred as to land plot related factors. Planning characteristics of servient property are of greater importance for the best establishment of a land easement. The area, length of borders, configuration, length of frontal border of the land plot with an access to roads and utilities are essential for a land easement establishment. A land easement area is limited in use for the land owner due to sanitary protection zones round utilities and easements of other types. Thus one of the main requirements to land easement cancelling according to Cadastral Registry of Ukraine is impossibility to use servient plot as intended.

Table 1. Factors which defined Easement procedure in Ukraine



Thus, if the servient plot has insufficient space, the narrow front border, or complex configuration, it will be extremely difficult to establish easement in the least burdensome way. Easement area for right-of-way, or utility easement can occupy a significant part of land and significantly complicate or make impossible the use of the land.

Utilities location and capacity are also of great importance when establishing land easement. If the nearest utilities are of low capacity, it is impossible to connect new users to them. Solution to the problem can be either new utility corridors of appropriate capacity or connection to more distant utilities. Of course, the best option for a land easement establishment is the location of utilities of sufficient capacity at the minimum distance from the land plot. In all other cases the length of utilities will be bigger and more expensive.

The group of other factors includes:

- Land plots landscape,
- Private interests of owners,
- Unforeseen circumstances.

Geomorphologic characteristics of land are of great importance for the utilities laying and driveway formation. Compound relief can cause technical difficulties in utilities and roads laying. At best, compound relief can create additional difficulties for engineering solutions and related to them additional financial cost. At the worst, it will be impossible to establish land easement due to complex technical solutions and a significant increase in the cost of work.

One of the factors having a major impact on the further procedure of land easement is personal interests of land owners.

If the owners of land fail to reach agreement this issue can be settled in court. The decision on the easement establishment is taken by court on the base of alternatives, developed by forensic experts.

During a land easement establishment unforeseen circumstances of various origin can happen. They can be of natural and anthropogenic origin, affecting the physical characteristics of land plot. Among them there are landslides, landslip seams and others. Acci-

dents with the persons involved in procedure of a land easement establishment belong to unforeseen circumstances too. These include accidents with land owners and contractors, financial bankruptcy of land plot owners and circumstances, resulting in the change of land owners and others. These factors and some other factors of political, economical and legislative origin are not considered in detail in the article but they should be taken into account in the general approach to the easement formation.

CONCLUSIONS

The major factors influencing a land easement establishment procedure is the group of legal factors.

Land plot related planning and financial factors have considerable impact at a stage of decision making on a land easement establishment and expediency of property formation. Insufficient study can lead to the wrong decisions when forming the new land plots and to considerable financial and moral damage.

In easement establishment several plots of land and a large number of persons may be involved. Improper new land plot formation with incorrectly established land easement can have significant consequences. The adoption of economically viable and socially equitable solution is possible only by studying and considering all the factors that are not being considered currently when establishing easement in Ukraine.

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**ФАКТОРЫ, ВЛИЯЮЩИЕ НА ПРОЦЕДУРУ
УСТАНОВЛЕНИЯ ЗЕМЕЛЬНЫХ
СЕРВИТУТОВ В УКРАИНЕ**

Аннотация. В работе проанализировано различные факторы, влияющие на процедуру установления земельных сервитутов при формировании новых земельных участков для

жилищного строительства. Все факторы объединены в четыре группы. Проведен анализ влияния каждой группы факторов на установление земельных сервитутов в Украине.

Ключевые слова: право прохода и проезда, инженерные коммуникации, сервитут, установление сервитута, факторы.