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The land sites occupied by the archaeological heritage sites in the Russian Federation and Great Britain: legal matters

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Abstract

This paper reports on the research on the legal matters concerning the specifics of the economic use of the land sites, within the boundaries of which objects of archaeological heritage are located in the Russian Federation and the United Kingdom of Great Britain and Northern Ireland. The judicial practice of various time and levels, related to the transfer of such land sites into private property in the Russian Federation, has been analysed. The court practice of the Russian Federation has been consolidated and the trends in the development of these relations within the law enforcement approach of the judicial authority have been ascertained. The legal status of the land sites in the Russian Federation, within the boundaries of which objects of archaeological heritage are located, has been investigated in terms of their designation to a special type of civil rights, as well as the acquisition and cessation of ownership of such land sites. The mechanism of adding the archaeological sites on the Unified National Register has been studied and the issues identified. The experience of Great Britain on the matters of ownership of the land sites occupied by the archaeological monuments is discussed, as well as the consequences of their inclusion into the special National Record. Special attention is given to the matters of conducting the historical-cultural examination of the land sites consigned to the land or building development. The issues associated with the building activities on such land sites have been identified. The experience of the United Kingdom in dealing with this matter proves to be of interest. The matter of compliancy of the landlords' responsibility for funding the historical-cultural examination with the Constitution of the Russian Federation has been investigated. The amendments to the legislation of the Russian Federation aimed to regulate such relations have been proposed.

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Keywords

Archaeological heritage sites, land sites, state historical-cultural examination, legal issue, economic use, ownership.

Introduction

Due to the lack of legislation concerning the preservation of the archaeological sites in the Russian Federation, there arise the conditions leading to their deterioration as the result of economic activities during the land development. The body of the legal issues includes protection of the archaeological monuments discovered on the private lands, arranging and conducting the archaeological survey of the land sites which are transferred into the private ownership, as well as the archaeological survey at each stage of planning and conducting building and construction works. These matters have become particularly topical due to the lucrative contract with China for the transfer of natural gas through the territory of the Republic of Altai. It is generally recognized that the territory of this subject of the Russian Federation preserves a large number of the archaeological sites. Besides, nowadays there are extensive residential and commercial building developments. These factors necessitate the development of the system regulating the aforementioned relations in the Russian Federation and the experience of the United Kingdom proves to be highly instructive in this respect.

Main part

According to Article 27 of the Land Code of the Russian Federation [Land Code of the Russian Federation of 25th October 2001, No. 136-ФЗ, 2001], the land sites owned by the federal or local governments which enclose archaeological monuments are subject to the restrictions on commercial exploitation. The land sites classified as those restricted for commercial exploitation cannot be transferred into the private ownership, except in cases stipulated in the federal laws. The federal laws makes no provision for such cases. The judicial practice refuses such possibility even after the completed archaeological survey. A twenty-year old precedent is indicative in this respect: the decision No. 91-Г06-10 [Decision of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation No. 91-Г06-10 of January 2007, 2017] of the Supreme Court of the Russian Federation of 31st January 2007 declaring as contravening the federal legislation and inoperative the sub-paragraph 2 of clause 2.3 Provision for protection of the lands of historical and cultural purposes of the city of Pskov (affirmed by the decision of the first Regional Assembly of deputies of Pskov Region of 29th June 1995), which states that the contested clauses contravene Article 27 of the Land Code of the Russian Federation and Article 23, Part 2 of Article 31, Part 3 of Article 49, Part 1 of Article 50 and Part 2 of Article 63 of the Federal Law "On the protection of cultural heritage sites (historical and cultural monuments) of the ethnic groups of Russian Federation" [Federal Law No. 73 of June 25, 2002].

As it followed from the case papers, the legal provision contested by the procurator can be found in the Provision for protection of the lands of historical and cultural purposes of the city of Pskov, which constitutes a supplement and was affirmed by the decision of the Pskov Regional Assembly of 29th June 1995 "On the measures of protection of the cultural heritage of the city of Pskov" as amended on 13th July 2006. The subject of that supplement was the relationships in respect of the protection of the historical and cultural monuments. According to paragraph 1 of clause 2.3 of the aforementioned Provision, the transfer of land with archaeological monuments into the private ownership is not allowed. In the meantime, there is a provision for the transfer of land comprising archaeological monuments into private ownership after conducting the full archaeological survey and completion of the corresponding expert examination by the dedicated monument protection authority. The argument of the cassation appeal claiming that the first-instance court did not take into account that the disputed

legal norm makes provision for the transfer of ownership of the land sites which, after completion of the respective expert examination, cannot be restricted for use, because following the archaeological survey they were considered unoccupied sites of archaeological heritage, was not given credence to.

Since then, such provisions have not been affirmed at the level of the subjects of the Russian Federation. According to Article 28 of the Federal law No. 73 of 25th June 2002 "On the Cultural Heritage Sites (Historical and Cultural Monuments) of the Ethnic Groups of the Russian Federation", it is the state historical-cultural expert examination that determines the presence or absence of cultural heritage monuments on the land sites. However, it is doubtful that if the examination does not confirm the presence of archaeological monuments of the land site, what argument would be raised against the transfer of the land in private ownership.

If one revisits the judicial practice of the recent years, then, for example, by the ruling of the Supreme Court of the Russian Federation of 2nd June 2017 No. 308-ЭС17-5743 [Decision of the Supreme Court of the Russian Federation No. 308-ЭС17-5743 of June 2, 2012, 2023] it was found that the plaintiff's claims of Zarya Ltd. to the Department of Property Relations of Krasnodarsky Krai concerning the denial of the transfer of the agricultural land into their private ownership, were found to be contrary to law, because the department was in possession of the official information stating that there was an archaeological monument within the boundaries of the claimed land site. Another example is that of Farming Enterprise Volgotransgaz-Yeysk Ltd., who approached the Department of Property Relations of Krasnodar Krai with the application for payed ownership of a leased allotment. The department denied the purchase of the above land, arguing that the site comprised archaeological monuments. Dissatisfied with the denial pronounced, the company appealed to the arbitration court, who came to the conclusion that there were legal grounds for adjudication of the Department's denial to grant the disputed land site to the company illegal. The Supreme Court of the Russian Federation by its decision No. 308-КГ16-19298 [Decision of the Supreme Court of the Russian Federation No. 308-КГ16-19298 of January 17, 2017, 2023] of 17th January 2017 found unproven the fact of existence on the territory of the disputed site of a public water body and archaeological sites according to the coordinates stated by the Department of the State Protection of the Cultural Heritage Sites for the Krasnodarsky Krai and denied the cassation appeal by the Department of Property Relations of Krasnodarsky Krai for the court hearings of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation.

Therefore, it can be concluded that the courts of the Russian Federation have become more knowledgeable on the matters of the archaeological sites and, on one hand, carefully consider the formal evidence of the existence of archaeological monuments on the land sites, and on the other hand, provide effective protection of rights of the owners of such land sites.

According to Article 49 of the Federal Law No. 73 of 25th June 2002 "On the Cultural Heritage Sites (Cultural and Historical Monuments) of the Ethnic Groups of the Russian Federation" an archaeological monument discovered on a private land site becomes the state property while the land site remains in the previous ownership. The archaeological monument and the site land remain in the civil circulation separately. The Russian legislative body has addressed this matter quite ambiguously. On one hand, it precluded the possibility of transfer of such land sites into the private ownership, while on the other hand, it protected the rights of the owners of such lands. This raises the question as to whether it is possible to consider such a land site be restricted in commerce. The legislative body does not give to the state the priority right to purchase such land sites. The law prescribes special circumstances for termination of the ownership of a land site which comprises an archaeological monument in case of its mismanagement, viz., the possibility of mandatory buyout from the landlord.

However, to implement this it is necessary that the archaeological monument is included on the register. However, in the scientific literature it has been argued that the development of the Unified Register is complicated "since the condition for including an object on the register implies the existence of the territorial boundaries of the archaeological site duly determined and registered in the National Land Cadastre" [Kolontsov, 2010]. Clause 4 of Article 49 of the Federal Law No. 73 of 25th June 2002 'On the Cultural Heritage Sites (Cultural and Historical Monuments) of the Ethnic Groups of the Russian Federation' stipulates that "in the absence of defined territorial boundaries of the scheduled archaeological monument … is considered to be the area of the land, waterbody or part thereof occupied by the respective archaeological site." This regulation calls for changes. Due to the lack of a mechanism of registration of the information about the presence of archaeological monuments into the National Land Cadastre, the land sites occupied by the archaeological monuments fall in the private ownership.

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In the United Kingdom, the Ancient Monuments and Archaeological Areas Act 1979 [Ancient Monuments and Archaeological Areas Act 1979, www] constitutes the main statutory and regulatory enactment. The Act of 1979 was passed by the British Government and has become the last document in a series of laws on the ancient monuments which provide the state protection of the archaeological heritage of England, Wales and Scotland. The legislation also stipulates that the archaeological sites are under care of the Secretary of State. Also the term of 'guardianship' is introduced which implies that the ancient monument remains in private ownership, but the care and access to it are provided by the respective national heritage authority.

In the Great Britain, each local Government appoints the authority responsible for identification and registration of archaeological sites in the National Record. The fact that the archaeological monument has been registered in the National Record does not affect the land ownership. This also does not imply any additional right of public access or additional responsibilities of upkeeping such an

object. Registering the monument in the National Record gives the authorised representatives some rights of access to the archaeological monument, yet in most cases this happens with the permission of the landlord. Only in exceptional circumstances this may be possible without taking into account the opinion of the owner of the land occupied by the archaeological monument [Scheduled Monuments: A Guide for Owners and Occupiers, www].

As for the economic use of the land sites, the following arrangements are current in the Great Britain: the owner of the land occupied by the archaeological monument, is requested to obtain permission of the Secretary of State for conducting any commercial work which can cause damage or alteration of the appearance of this object [Scheduled Monuments: A Guide for Owners and Occupiers, www]. The executive authorities of the local governments can provide free assistance in planning such works. Besides, some repair and upkeep grants are available for the owner of the land occupied by archaeological monuments.

According to Article 30 of the Federal Law No. 73 of 25th June 2002 "On the Cultural Heritage Sites (Cultural and Historical Monuments) of the Ethnic Groups of the Russian Federation" the land sites scheduled for economic use and building development are subject to the preceding historical and cultural examination. Such an examination is carried out by means of archaeological survey which is conducted in accordance with Article 45 of the Federal Law No. 73 of 25th June 2002 'On the Cultural Heritage Sites (Cultural and Historical Monuments) of the Ethnic Groups of the Russian Federation' upon the permission (the permit for archaeological excavations and surveys also known as "Open List") issued for maximum one year under the statutory procedure of the Government of the Russian Federation. The permit is issued to the individuals who possess specific knowledge to conduct archaeological excavations, on the basis of the Statue of Procedure for Obtaining Permits (Open Lists) for the Right to Conduct Survey and Investigation of Archaeological Monuments [Statue of Procedure for Obtaining Permits, 2023]. To obtain an Open List it is necessary to submit copies of the qualification papers (diplomas, graduation certificates etc.) which confirm that the applicant has suitable education, knowledge and skills necessary to conduct archaeological fieldwork. Clearly, it is necessary to be a specialist with a high scientific qualification obtained from a higher education institution in order to obtain the Open List to conduct an archaeological survey and prepare a quality scientific report. However, such specialists conduct the surveys with the scientific aims and during summer; besides, their number is rather insufficient. Sometimes they just cannot provide the services of this kind, even although the developers are ready to provide unlimited funds. This often leads to breaking the law, which is evidenced by the judicial practice examples: unauthorised building development subjected to demolition which threatens the integrity of the archaeological monuments.

In the Great Britain, there are various commercial archaeology companies which have formal accreditation (licence) to conduct archaeological works. Such companies usually employ the university graduates specialising in different aspects of archaeology. Let us consider the mechanism of their work by a particular example. Planning of new roads and housing developments is regulated by the Act 'Planning Policy Guidance 16: Archaeology and Planning [Planning Policy Guidance 16, www]' which requires the developer to conduct preliminary archaeological survey. The developer contracts the work to a commercial archaeology company who conducts the full range of activities and prepares all necessary paperwork to allow beginning the building works. If the commercial archaeology company finds any artefacts or archaeological monuments, it acts in accordance with the Treasure Act 1996 Code of Practice (Ind Revision) [Treasure Act 1996 Code of Practice (Ind Revision), www]. If the finds are not declared as treasure trove, they are returned to the shared ownership of the developer and the landlord. The new owners often donate the finds to the local museums. If the finds are declared as

treasure trove, the British Museum receives the priority to purchase the treasure. If the archaeological contractor announces the discovery of a new archaeological monument, the development works are delayed until the full survey and retrieval of the artefacts, but the discovery of the archaeological artefact or monument does not imply invalidation of the permission for commercial use of the land site. An important aspect of the above procedure is that the commercial company receives payment for the professional services, i.e., site survey, reporting the finds and preparation of the consent documents for the developer, and does not acquire any rights on the finds. Even if the company discovers a treasure trove, it will not receive a penny for reward and all payment are made according to the agreed schedule. Their job is to protect the developer from lawsuit by the state and monument protection authorities. For instance, in March 2012 BBC reported on the discovery of a hoard of Roman coins during the preliminary survey on the building site for a new hotel and spa in Bath [Woman who found coin worth 2000 in garden becomes first to be prosecuted for not reporting treasure, www]. The hoard comprises 30,000 silver coins dated ca. AD 270 and constitutes the fifth largest hoard ever found in the south United Kingdom. The hoard was transferred to the British Museum for conservation which was estimated to take about one year. In the meantime, a public fund-raising campaign was launched to collect money (estimated over £2000) for the purchase, conservation and exhibition of the hoard. It would seem that similar mechanism could create new market of the commercial archaeology services in Russia. The demand for personnel is growing and the opportunity to get fair wage will raise the professional profile of the archaeologists.

Article 31 of the Federal Law No. 73 of 25th June 2002 "On the Cultural Heritage Sites (Cultural and Historical Monuments) of the Ethnic Groups of the Russian Federation" stipulates the responsibility of the developer to fund the archaeological survey of the land sites. Developers aim to reduce the costs, including the cost of the historical and cultural examination. It has been argued that the state authorities should order archaeological services and pay for the historical and cultural examination, because they run the tenders for investors and allot the sites for development [Aleksandrova, 2006]. Obviously, the land site with completed positive historical-cultural examination will be in high demand from the investors in the building development.

Conclusion

The court practice of the Constitutional Court of the Russian Federation bears records of attempts by the landlord to declare contradicting to the Constitution of the Russian Federation the responsibility to pay for the historical-cultural examination [Decision of the Constitutional Court of the Russian Federation No. 2755-O of December 9, 2014, 2023]. As an example, we refer to the decision of the Constitutional Court of the Russian Federation No. 2755-O of 12th December 2014 on the denial to accept for consideration of the complaint of a violation of the constitutional rights in clause 2 of Article 31 and clause 4 of Article 36 of the Federal Law No. 73 of 25th June 2002 "On the Cultural Heritage Sites (Cultural and Historical Monuments) of the Ethnic Groups of the Russian Federation". We believe that the legislator rightfully obligated the landlords, whose land site enclosed an archaeological monument, to pay for the conduct of the state historical-cultural examination, as well as the consequent land and construction works, because the purpose of such examination essentially includes identification of the archaeological monuments. I believe that it is necessary to amend clause 6 of Article 47 of the Federal Law No. 73 of 25th June 2002 "On the Cultural Heritage Sites (Cultural and Historical Monuments) of the Ethnic Groups of the Russian Federation" by additional responsibility, namely, "to request the conduct of the state historical-cultural examination as per Article 28 of the

given Federal Law."

Therefore, resolving the aforementioned problems at the level of the law in the Russian Federation and the use of the relevant experience of the Great Britain will allow preservation of the archaeological monuments for the future generations.

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Земельные участки под объектами археологического наследия в Российской Федерации и Великобритании: правовые вопросы

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Аннотация

В статье исследованы правовые вопросы, связанные с особенности хозяйственного использования земельных участков, в границах которых расположены объекты археологического наследия в Российской Федерации и Соединённом Королевстве

Великобритании и Северной Ирландии. Проанализирована судебная практика разных лет и разного уровня, связанная с передачей таких земельных участков в частную собственность в Российской Федерации. Проведено обобщение судебной практики Российской Федерации и выявлены тенденции развития этих отношений в правоприменительном подходе судебных органов. Исследован правовой режим земельных участков Российской Федерации, в границах которых расположены объекты археологического наследия, в вопросах отнесениях их к особому виду гражданских прав, вопросы приобретения и прекращения права собственности на такие земельные участки. Изучен механизм внесения объектов археологического наследия в Единый государственный реестр и выявлены проблемы. Представлен опыт Великобритании по вопросам собственности на земельные участки под объектами археологического наследия и последствия включениях их в специальный Реестр. Отдельное внимание уделено вопросам проведения историко-культурной экспертизы на земельных участках, которые передаются под хозяйственное освоение или строительство. Выявлены проблемы, связанные со строительством на таких земельных участках. В решении данной проблемы представляет интерес опыт Соединённого Королевства Великобритании и Северной Ирландии. Изучен вопрос о признании не соответствующей Конституции Российской Федерации обязанность собственников земельных участков оплачивать проведения историко-культурной экспертизы. Предложены дополнения в законодательство Российской Федерации, с целью упорядочить такого рода отношения.

Для цитирования в научных исследованиях

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Ключевые слова

Объекты археологического наследия, земельный участок, государственная историко-культурная экспертиза, правовой вопрос, хозяйственное использование, право собственности.

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