

LEGAL REGIME OF ENERGY INFRASTRUCTURE

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**GAPS IN LEGAL REGULATION OF PUBLIC SERVITUDE
FOR THE PURPOSES OF CONSTRUCTION OF A LINEAR FACILITY
OF THE GAS SUPPLY SYSTEM****Anikanov P.S.**

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Abstract. The article examines the legislation regulating the implementation of public servitude for the purpose of operation, reconstruction, and construction of linear facilities of the gas supply system. The author identifies gaps in the rules of law and issues that arise in the application of these rules at all stages of the public servitude validity. The paper analyzes the major conditions and principles governing the approval of public servitudes in relation to privately owned land plots and the mechanism of formation of payment for the use of public servitudes. The author emphasizes the necessity of detailing certain concepts and improving existing rules, given that the rules introduced in 2018 pertaining to the approval of public servitudes for specific purposes, including for the operation, reconstruction and construction of engineering facilities for the gas supply system, require supplementation and partial amendment. This is due to the fact that they do not fully align with the State's objectives of gasifying the country in the shortest possible time.

Keywords: energy law, legal regime of power facilities, linear facility of gas supply system, public servitude.

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**ПРОБЕЛЫ ПРАВОВОГО РЕГУЛИРОВАНИЯ
ПУБЛИЧНОГО СЕРВИТУТА В ЦЕЛЯХ СТРОИТЕЛЬСТВА
ЛИНЕЙНОГО ОБЪЕКТА СИСТЕМЫ ГАЗОСНАБЖЕНИЯ****Аниканов П.С.**

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Аннотация. В статье рассматривается законодательство, регулирующее осуществление публичного сервитута с целью эксплуатации, реконструкции и строительства линейных

объектов системы газоснабжения. Автор выявляет пробелы в правовых нормах и проблемные вопросы, возникающие при использовании данных норм на всех этапах действия публичного сервитута. В работе проанализированы основные условия и принципы утверждения публичного сервитута по отношению к земельным участкам в частной собственности, а также механизм формирования платы за пользование публичным сервитутом. Автор указывает на целесообразность детализации определенных понятий и усовершенствования существующих норм, поскольку введенные в действие в 2018 г. нормы, касающиеся утверждения публичного сервитута в специфических целях, в том числе для эксплуатации, реконструкции и строительства объектов инженерного типа системы газоснабжения, нуждаются в дополнении и частичном изменении ввиду того, что они не в полной мере отвечают поставленным перед государством задачам по газификации страны в максимально сжатые сроки.

Ключевые слова: энергетическое право, правовое режим энергетических объектов, линейный объект системы газоснабжения, публичный сервитут.

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The availability of natural resources on the territory of a State is one of the most significant factors in determining the long-term prospects for its development. The most critical, relevant, and demanded energy resources include such types of fuel as oil and gas, which are essential for a number of reasons.

Russia is the sixth largest holder of oil reserves and the third largest producer of oil in the world. In terms of gas, Russia occupies the top position in the world with regard to gas reserves and the second position with regard to gas production. It should be taken into account that Russia will have sufficient oil reserves for only 21 years, while its gas reserves will last for 75 years [1].

Moreover, gas is a more environmentally friendly, energy-intensive, and inexpensive resource compared to oil. It can be transported either in a liquefied form or through gas pipelines. The second option appears to be the most preferable, as it allows for the transportation of significant volumes of gas over long distances with minimal risks.

In 2021, the Government of the Russian Federation approved an action plan for the introduction of a socially oriented and economically efficient system of gasification and gas supply of the constituent entities of the Russian Federation. According to this plan, by 2030 the level of gasification of the population of the constituent entities of the Russian Federation should reach 82.9% [2].

To achieve such high performance, it is necessary that all elements of the system function as a unified, coherent mechanism. This ensures that each stage of

gasification, including the necessary permits, gas pipeline construction or commissioning, proceeds according to a pre-determined scenario.

It is understood that the legislative framework in this scenario serves as a kind of bridge, connecting the ambitious idea with the projected result.

The construction of a gas pipeline is a complex process that involves, among other things, the identification of land plots to be used for the location of the gas pipeline and the registration of the necessary titles to these land plots.

Public servitude has emerged as a highly convenient method for formalizing titles to land and land plots required for the location of linear facilities [3], including gas pipelines, after Federal Law No. 341-FZ [4] dated August 3, 2018, (hereinafter referred to as the Law) amended the land legislation to simplify the procedure for the location of linear facilities.

Even during the process of formulating and refining the draft of the aforementioned normative legal act, experts expressed uncertainty regarding the structure selected by the legislator.

In this context, M.V. Bocharov pointed out that, from the standpoint of social development, this law is both necessary and useful. It enables the formalization of placement of engineering structures that are in public need to be completed three or four times faster. As we all know, engineering structures are indispensable for housing construction, industrial development, and modern agriculture — and these are precisely the challenges afflicting our society [5].

According to Ye.A. Sukhanov, however, land plots for the purposes specified in the Law will be transferred for use to the subjects of public servitudes not by agreements with their owners, but by decisions of public authorities adopted on the basis of “reasonable proposals” of entities requesting the establishment of public servitudes. With regard to private ownership of land, this approach is at least somewhat perplexing. It is evident that the construction of a linear facility across a land plot effectively eliminates the land’s economic value and, in many instances, impedes its normal use. This results in the owner being left with a “naked right” (*nudum ius*) [5].

After nearly six years of implementation, it can be concluded that the Law, as its name suggests, was intended to simplify, systematize, and expand the algorithms of using the structure of public servitude to locate various linear facilities. However, it has proven to be a contradictory piece of legislation, giving rise to a number of issues, particularly in situations where the land plots intended for the establishment of public servitudes are privately owned.

Chapter V.7, Establishment of Public servitudes for Certain Purposes, of the Land Code of the Russian Federation (hereinafter referred to as the Land Code of the Russian Federation) contains gaps, inconsistencies, and valuation concepts that leave room for free interpretation and judicial discretion, where a proper degree of “transparency” and legal certainty will not only help avoid disputes, but also accelerate the process of establishing public servitudes and the conclusion of the relevant agreement between the gas distributor and the owner of the land plot.

Free interpretation, i.e. the possibility for the servitude holder or the owner of the land plot to interpret the meaning of the rule of law in their favor, which results, for example, in a disagreement regarding the amount of payment for the use of public servitudes, or the disagreement of the holder of title to the land plot with the order to approve the public servitude due to the presence, in their opinion, of conditions that make further use of the land plot for its intended purpose impossible, inevitably leads to a court dispute.

Consequently, the contested matter is left to the discretion of the court, which appears to be an unsatisfactory solution due to the existing deficiencies in the legislation and improperly interpreted wordings.

For example, a refusal to approve a public servitude will ensue if the activities for the implementation of which a public servitude is sought, including restrictions on titles to a land plot provoked by such

activities, will result in the impossibility of operation or significant difficulties in the operation of the land plot and the real estate unit located on it as permitted for a period exceeding three months in respect of land plots intended for housing construction (including single-family home construction), personal subsidiary farming, gardening, or horticulture by citizens for non-commercial purposes, or one year in respect of other land plots.

Firstly, it is unclear what is meant by the term “significant difficulties”. It is also unclear how these difficulties differ from the impossibility of use and by what criteria such difficulties can be identified in relation to each land plot, given that a linear facility of the gas supply system is laid through a certain number of such plots and the decision to approve public servitudes is basically made for all land plots at once.

There is no doubt that a private land owner will perceive the construction of a linear facility of the gas supply system on their land plot as a reason for the impossibility of its future use, because such an encumbrance, which, by the way, cannot be waived, detracts from the land plot’s marketability.

The servitude holder, in this case the gas distributor, despite the fact that disagreements arise only when approving public servitudes on privately owned land plots, will endeavor to minimize the already impressive costs by laying the route of the gas pipeline along the optimal and shortest trajectory. This is often not possible, as the distributor is unable to choose through which land plots to lay the linear facility.

Secondly, the issue of establishing public servitudes is referred to the competence of state or local authorities based on the purpose of establishment. That is to say, the degree of “significant difficulties” is determined when deciding on the petition of a person interested in establishing a public servitude without the participation of the land plot owner. Given the lack of transparency and certainty in the concept of “significant difficulties”, this will exacerbate the degree of disagreement between the land plot owner and the servitude holder.

Furthermore, the phrase “significant difficulties” is used in clause 13 of Article 23 of the Land Code of the Russia Federation, which stipulates that owners of titles to land plots may petition the relevant authorities responsible for the approval of public servitudes and request a commensurate remuneration where the approval of public servitudes has resulted in significant difficulties in the use of the land. If this provision is interpreted in a formal manner, the remuneration for

public servitudes is contingent upon “significant difficulties” in the use of the land. Does this imply that, in the absence of such difficulties, the land plot owner will be unable to demand a commensurate remuneration for the approval of the public servitude?

It is also necessary to consider the relationship between this rule and Article 39.46 of the Land Code of the Russian Federation, which requires the person who benefits from the establishment of a public servitude to pay for it. That is, it can be assumed that clause 13 of Article 23 of the Land Code of the Russian Federation serves as a special rule to Article 39.46 of the Land Code of the Russian Federation and is subject to compensation separately from the remuneration for the use of public servitudes (i.e., only in the presence of “significant difficulties”). This is particularly relevant in light of the fact that clause 13 of Article 23 of the Land Code of the Russian Federation refers to the Methodological Recommendations [6] on the calculation of remuneration for the use of public servitudes. Or are there completely different factors involved in the approval of public servitudes?

It is of interest to note that clause 7 of Article 39.46 of the Land Code of the Russian Federation also addresses the Methodological Recommendations with regard to the establishment of remuneration for public servitudes. At the same time, clause 8 of Article 39.46 of the Land Code of the Russian Federation stipulates that remuneration for public servitudes is payable to the land proprietor with whom an agreement on the use of a public servitude was previously concluded in accordance with the established procedure, i.e. there is a predetermining condition for such remuneration.

The manner in which compensation is to be made in the event of “significant difficulties” in the operation of a land plot and real estate on it is not specified in clause 13 of Article 23 of the Land Code of the Russian Federation. Furthermore, the rationale behind the designation of municipal or state authorities as the obligatory entities responsible for making such compensation is unclear. In practice, however, the remuneration for the use of public servitudes is paid by the gas distributor who builds and subsequently operates the gas pipeline. This is because it is the organization that requests the encumbrance of a land plot with a public servitude and subsequently concludes the necessary agreement with the land plot owner.

It appears that clause 5 of Article 23 of the Land Code of the Russian Federation (which, in accordance with clause 2 of Article 39.39 of the Land Code

of the Russian Federation, is mandatory when approving public servitudes) is quite contradictory. This is because the encumbrance of a land plot with a public servitude does not deprive the title holder of the rights of disposal, use, and possession of this land.

Given that the impossibility of use, as stipulated in subclause 4 of clause 1 of Article 39.44 of the Land Code of the Russian Federation, albeit for a certain period of time, directly contradicts the right to use, i.e. literally prevents the operation of the land plot by the title holder, the cumulative interpretation of the above articles gives rise to legal uncertainty.

It is possible that the legislator intended to convey that the impossibility of use is temporary and therefore does not deprive, but only restricts the title holder in their right to use. However, in this case, the article should contain a more detailed and clear wording.

It is not permitted to undertake major repairs, reconstruction, operation, or construction of gas pipelines on land plots used for any personal purposes, including gardening, personal subsidiary farming, horticulture, and single-family home construction, through the approval of public servitudes, in accordance with clause 5 of Article 39.39 of the Land Code of the Russian Federation. This is, in principle, a reasonable and logical position to take.

But there is one aspect that requires further consideration. The aforementioned rule stipulates that in exceptional cases (for example, reconstruction, capital repair, and operation of engineering structures) the approval of public servitudes remains permissible.

It can be concluded, therefore, that only the approval of public servitudes for the purpose of construction of a gas pipeline on lands intended for personal needs, such as gardening, horticulture, personal subsidiary farming, and single-family home construction, is inadmissible.

At the same time, the procedures to be performed for major repairs and reconstruction of a gas pipeline are nearly identical to those for construction.

It remains unclear why the construction of engineering structures was excluded from the purposes for which public servitudes may be sought for certain types of land plots.

It turns out that the gas distributor should consider this legal restriction when constructing a gas pipeline and be prepared, if necessary, to enter into a lease agreement with the owner of land intended for personal needs, such as gardening, horticulture, personal subsidiary farming, and single-family home

construction. However, the owner may refuse to enter into such lease agreement if they consider it not profitable for themselves. This may affect the entire construction process, as the design documentation will have to be modified.

In accordance with the stipulations of clause 1 of Article 39.41, the period during which the operation of a land plot will be significantly challenging or entirely impossible includes the period of current or major repair, construction, and reconstruction of a gas pipeline.

Accordingly, in order to circumvent the refusal to approve a public servitude and the subsequent necessity to purchase a land plot from the title holder (Article 39.48 of the Land Code of the Russian Federation), the gas distributor is obliged to perform any works (gas pipeline construction, reconstruction, or repair) on land plots other than those intended for personal needs, such as gardening, horticulture, personal subsidiary farming, and single-family home construction, within a period not exceeding one year. Furthermore, on land plots used for single-family home construction, etc., the aforementioned works are to be performed within three months.

It is evident that the legislator's approval of the above terms was driven by the objective of ensuring the implementation of clause 8 of Article 23 of the Land Code of the Russian Federation, which pertains to the establishment of public servitudes on the most unburdensome conditions for the land plot owner. However, this approach may potentially compromise the quality of works performed by the gas distributor and subsequently the safety of operation of the constructed, reconstructed, or repaired gas pipeline, which in turn is classified as a hazardous production facility. Any breakdown of this facility may result in catastrophic consequences.

In the context of the terms of establishing public servitudes, it is important to note the following.

In general, perpetual infrastructural public servitudes play a significant role in the implementation of private-public interests of holders of public servitudes for specific purposes [7].

For the purposes of constructing and subsequently operating a linear facility of the gas supply system, the perpetual nature of public servitudes or their establishment for the period of gas pipeline activity is considered to be the most suitable option for a number of reasons.

Firstly, as a general rule, a linear facility of the gas supply system provides settlements, large production facilities, and health care, education, social protection, and social security facilities with energy resources. This is of high importance for the development of infrastructure.

Secondly, a constructed gas pipeline does not in any way impede the intended use of a land plot, provided that certain safety requirements are met.

Thirdly, the land plot owner will receive compensation for the public servitude in perpetuity, in addition to the benefits they will derive from the use of their land plot.

However, the current legislation permits the approval of public servitudes for the purposes of operation, reconstruction, and construction of, inter alia, linear facilities of gas supply systems only for a fixed term of 10 to 49 years.

Furthermore, the Land Code of the Russian Federation does not provide a mechanism for the prolongation of previously established public servitudes if necessary. Instead, it merely authorizes the servitude holder to request servitude approval for a new term before the expiration of the existing servitude. It is unclear whether the previous servitude will be extended or a new servitude will be approved.

In accordance with clause 4 of Article 39.47 of the Land Code of the Russian Federation, the term of agreements on the use of public servitudes should coincide with the term of public servitudes approved by the decision on their establishment.

The question remains as to whether it is possible to simply make the necessary amendments to the existing agreement concluded with the land owner in accordance with Article 39.47 of the Land Code of the Russian Federation, or whether it is necessary to conclude a new agreement. In light of the aforementioned considerations, it is pertinent to inquire as to the remuneration for public servitudes in such circumstances.

Furthermore, questions arise regarding the rules governing the process of making a land plot fit.

As previously stated, the period when the use of a land plot becomes impossible or significantly challenging includes the period of engineering structure construction. In accordance with subclause 4 of clause 1 of Article 39.44 of the Land Code of the Russian Federation, in the case of gas pipeline construction, this period should not exceed one year.

By virtue of clause 6 of Article 39.43 of the Land Code of the Russian Federation, when requesting the

approval of public servitudes for the purposes of engineering structure reconstruction or construction, public servitudes are approved for the location of such structure.

The Ministry of Economic Development of the Russian Federation, in its Letter No. ОГ-Д23-3142 dated April 2, 2020, states that the concept of “location of linear facilities” includes the construction, reconstruction, and operation of linear facilities [8].

It means that when a public servitude is established, let’s say, for a period of ten years, the construction of a linear facility of the gas supply system will be completed within a maximum of one year. The remaining nine years will be dedicated to the operation of the facility.

The Land Code of the Russian Federation stipulates that the servitude holder should render the land plot exploitable in accordance with its permitted use no later than within three months after the completion of operation, conservation, demolition of the engineering structure for the purpose of location of which the public servitude was approved, its current or major repair, and construction.

It is not entirely clear whether the servitude holder is obliged to perform works to make the land plot fit for use after each stage (construction, repair, and operation) specified in clause 8 of Article 39.50 of the Land Code of the Russian Federation, or whether they are obliged to do so at the end of all stages.

The latter option will place the land plot owner in a disadvantageous position, as they would be at risk of having their plot rendered serviceable only after 10 years.

The very nature of the measures taken to render the land plot fit for use, in the context of the meaning of “significant difficulties”, is also suggestive. In such a situation, is the land plot owner entitled to seek an appropriate remuneration from the state or local authorities in accordance with clause 13 of Article 23 of the Land Code of the Russian Federation?

The most critical issue in regulating the approval of public servitudes is the mechanism for determining the amount of compensation for public servitudes. It is the amount of this remuneration that often leads to litigation between the servitude holder and the land plot owner, and there is a rational explanation for this.

The remuneration for public servitudes is determined in accordance with the Federal Law on Appraisal Activities in the Russian Federation and the

Methodological Recommendations (clause 7 of Article 39.46 of the Land Code of the Russian Federation).

The Methodological Recommendations define the remuneration for public servitudes as the difference between the market value of land (in the case of establishing a servitude over a privately owned plot) before and after the approval of a public servitude.

In accordance with clause 1 of Article 66 of the Land Code of the Russian Federation, the market value of a land plot is determined in accordance with the federal law on appraisal activities. This law defines the market value as the most probable price at which it is possible to sell the relevant property being appraised on the open competitive market [9]. While it is possible to calculate the market value of a land plot before the approval of a public servitude, for example, through sales comparison or by analyzing sales offers for similar land plots in the region, the market value of a land plot after the approval of a public servitude is a much more complicated issue.

Consequently, the market value of a land plot is an inherently unstable estimate. Indeed, the legislator has delegated the calculation of remuneration for public servitudes to the discretion of an expert, as the court, confronted with a discrepancy between the servitude holder and the land plot owner regarding the amount of remuneration for a public servitude, will arrange a forensic examination.

In practice, there are often situations where three expert opinions are presented to the court (case No. A05-6826/2021) [10], in which the amount of remuneration for public servitudes differs significantly. The expert representing the land plot owner absolves the amount of remuneration for the public servitude, whereas the expert representing the servitude holder arrives at a very modest result. The forensic expert attempts to find a solution that strikes a balance between the two positions.

In light of these circumstances, it is evident that there is no objective and fair amount of remuneration for public servitudes.

Furthermore, the provisions of the Land Code of the Russian Federation on public servitudes are replete with valuation terminology, such as “the least onerous conditions” (clause 8 of Article 23 of the Land Code of the Russian Federation), “rational use of land” (clause 9 of Article 23 of the Land Code of the Russian Federation), etc.

On top of all that, clause 3 of Article 23 of the Land Code of the Russian Federation stipulates that public

servitudes should be approved in accordance with the Land Code of the Russian Federation. The provisions of the Civil Code of the Russian Federation on servitudes (which are, in fact, quite scarce) are not applicable to legal relations existing in connection with the approval, implementation, and termination of public servitudes. In light of the aforementioned considerations, another question arises: do the general rules of the Civil Code of the Russian Federation also apply to the agreement on the use of public servitudes, or is it necessary to apply exclusively Article 39.47 of the Land Code of the Russian Federation?

In conclusion, it should be noted that the rules introduced in 2018 regarding the approval of public servitudes for specific purposes, including for the operation, reconstruction, and construction of engineering structures of the gas supply system, require supplementation and partial amendment. This is due to the fact that they do not fully align with the State's objectives of gasifying the country in the shortest possible time.

The legislation provides certain tools that simplify the location of a number of power industry facilities on land plots and the registration of titles to such plots for energy companies. Nevertheless, it is now necessary to construct an integral legal framework that ensures a comprehensive consideration of the multifaceted interests of the parties involved in complex legal relations arising from the location of electric power facilities [11].

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