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Public Easement: Updates and Prospects for the Development of Laws

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Аннотация

The article analyzes the procedures provided for by the laws related to the establishment of a public easement in accordance with Chapter V.7 of the Land Code of the Russian Federation, in view of the general requirements for the regulation of easement in accordance with the civil and land laws of the Russian Federation, current changes in this institution of limited real rights in order to identify ambiguous requirements that prevent the formation of consistent law enforcement practice at the level of decisions of government authorities, local self-government and courts in the absence of authoritative guidelines such as, for example, the generalization of judicial practice in the relevant category of cases, and the ways of possible development of public easement institution are formulated.

The purpose of this research is to formulate questions arising during the analysis of the requirements of Chapter V.7 of the Land Code of the Russian Federation and identify gaps in legislative regulation, as well as reasonable judgments thereto in order to find possible directions for further development of the public easement institution.

Ключевые слова: energy law, legal framework of oil and gas transportation infrastructure facilities, easement, public easement, limitation of right

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¹ Among the many types of facilities, the creation of which may be in demand in the modern world, the most acute issue from the point of view of legal regulation of construction procedures is the placement of linear facilities, since the legal relations arising in the process are at least at the intersection of civil, land, urban planning and environmental laws. The importance of the Russian FEC facilities, including oil and gas transportation infrastructure, heat supply, electric power industry, etc., can hardly be overestimated, their effective functioning ensures Russia's national security in the energy industry and creates real conditions for the country's economic growth. As noted by Marat Khusnullin, Deputy Prime Minister of the Russian Federation, at the meeting of the Head of State with members of the Government of the Russian Federation held on March 10, 2022, "...the construction industry will be one of the drivers of the recovery and development of our country's economy" (meeting of the President of the Russian Federation with members of the Government of the Russian Federation held on March 10, 2022, >>>> The main characteristic of a linear item of immovable property from the standpoint of the immovable property registration laws is its length. In this regard, it should be mentioned that the length of main oil pipelines and petroleum product pipelines in Russia in 2018 exceeds 70 thousand km [1], heating networks at the end of 2020 are 167.4 thousand km, the total length of the gas transportation system today is 178.2 thousand km, and electric power transmission lines of only 110–750kV voltage class more than 490 thousand km. The development and modernization of the Russian FEC infrastructure, the creation of safe conditions for its operation require the construction of new and reconstruction of existing FEC facilities, their scheduled repairs and timely maintenance. The above, as well as some other circumstances (from unresolved issues with crossing the boundaries of land plots to sanctions pressure from other states) one way or another, they require increased attention and the introduction of additional features and exceptions from the general rules when regulating relations arising from the placement of linear facilities.

² As Gennady A. Volkov, Aleksandr K. Golichenkov, Dmitry V. Khaustov rightly note: "the regulation of easements enshrined in the Russian civil laws currently in force does not take into account the modern, significantly changed conditions. The regulation that existed in the days of Ancient Rome cannot always be applied unconditionally today" [2].

³ An important event of 2018 for the entire industry and scientific community was the adoption of Federal Law No. 341-FZ dated August 3, 2018, "On Amendments to the Land Code of the Russian Federation and Certain Legislative Acts of the Russian Federation in Terms of Simplifying the Placement of Linear Facilities" (hereinafter referred to as Federal Law No. 341-FZ), whereby the legislator significantly modernized the existing institution of public easement or established a completely new institution for domestic laws; an issue that may still be studied by representatives of Russian legal science. At the same time, as Mikhail V. Bocharov rightly notes, "From the point of view of social development, this [Law](#) is necessary and useful". [3].

4 Federal Law No. 341-FZ introduced large-scale changes in laws (10 federal laws were amended, a new Chapter consisting of 14 Articles of the Land Code of the Russian Federation was introduced), which revolutionarily simplified and accelerated procedures related to registration of land rights in order to fulfill objectives for construction, reconstruction, major repairs (the possibility of establishing a public easement for the purposes of engineering structure major repairs was introduced later with the adoption of Federal Law No. 284-FZ dated July 14, 2022? “On Amendments to Certain Legislative Acts of the Russian Federation”, which will be discussed later) and the operation of engineering structures. With the adoption of the said law, utility structures in land laws are understood as electric grid facilities, heating networks, water supply networks, wastewater disposal systems, communication lines and structures, linear gas supply system facilities, oil pipelines and petroleum product pipelines, integral technological parts thereto, if these facilities are facilities of federal, regional or local significance, or are necessary for the organization of public electricity, gas, heat, water supply and wastewater disposal system, connection (technological connection) to the utilities system, or are transferred in connection with the expropriation of land plots on which they were previously located (Article 39.37(1) of the Land Code of the Russian Federation).

5 There is no need to dwell in detail on its advantages in comparison with the existing mechanisms for registration of land rights for similar purposes by land expropriation and/or registration of lease relations, since these innovations, including the lack of the need for the registration of land plot formation in order to encumber them or the possibility to proceed with the implementation of a public easement prior to the registration of relations with the owner of the property, the authors have repeatedly noticed [4]. As Mikhail Bocharov notes, speaking about the terms of registration of permits and approvals in accordance with Federal Law No. 341-FZ, “It allows arranging the placement of utility structures in which there is a public need three to four times as fast.” [5].

6 The gradual development, starting from September 1, 2018, (the law effective date) of the novelties of Federal Law No. 341-FZ, is still accompanied by discussions of legal scholars regarding the legal nature of the new public easement. Sergey A. Sinitsyn notes: “Historically, the legal regulation of easements, dispute resolution and the search for a balance between the interests of the owner and the easement holder, on the one hand, and the accumulation, generalization and development of concepts about the specifics and place of easements in the system of limited real rights, on the other hand, have traditionally been the most controversial issues of property law in aspects of the development of laws, law enforcement and doctrine.” [6]. As Evgeny A. Sukhanov points out: “...in the Land [Code](#) there is fundamentally no regulation of limited real rights, with the exception of easements, and the construction of a public easement provided for by it does not in fact constitute a special type of easement, but in fact draws up an indirect, disguised seizure of land from the owner...” [7]. According to Viktor A. Mayboroda: “The provisions of the said [Law](#) , which also made amendments to the very concept of easement on land, essentially established a new institution in land law, which allows for the legal use of a land plot not in accordance with its category and permitted type of use, but according to the purpose of establishing a public

easement.”[8]. Aleksei Zavyalov notes that “In fact, this is just an easement, but in relation to which the norms of the Russian Civil Code do not apply.”[9].

⁷ Despite the fact that the analysis of the legal nature of the public easement established in accordance with Chapter V.7 of the Land Code of the Russian Federation is not directly the subject of this study, it seems that the early identification of the essence of this institution will strengthen its legal structure and will undoubtedly give an additional impetus to further development, which will undoubtedly be positively perceived by the industry community.

⁸ In this regard, the following position is proposed on this issue.

⁹ To date, there is no single understanding of the essence of the easement in the literature. Some civil law scholars consider an easement as a limitation of ownership right¹[10], “another position — the concept of understanding an easement as an encumbrance — found its development in the papers by A.A. Khorev, A.I. Maslyaeva, N.M. Korshunova and I.Yu. Akkuratova”²[11].

¹⁰ Speaking about the public easement previously known to Russian laws, provided for in Article 23 of the Land Code of the Russian Federation, the author shares the points of view of Evgeny A. Sukhanov and Aleksandr V. Kopylov. In particular, that “public easements have nothing to do with limited real rights (easements), but are examples of limitations on the rights of owners of relevant natural objects, since they are not directed against specific authorized persons, but allow the use of these objects to any number of unspecified persons (the public at large)” (E.A. Sukhanov) [12], and also that public easements are “only limitations on ownership rights by operation of law” (A. Kopylov) [13]. In the light of the above, it should be assumed that the previously known public easement should be qualified as a public limitation of rights in the interests of the public at large. In turn, the classic easement provided for in Article 274 of the Russian Civil Code is a subjective limited real right (see the paragraph of the second preamble of the Review of Judicial Practice in Cases of Establishing an Easement on a Land Plot approved by the Presidium of the Supreme Court of the Russian Federation on April 26, 2017). A. Gusakov noted that “Easements are nothing more than surrogates of natural qualities lacking in land plots, and seem to represent an expansion of the volume of ownership of one plot at the expense of another.” [14].

¹¹ According to Vladimir S. Em and Evgeny A. Sukhanov: “The very same subjective civil law as a measure of behavior permitted to the subject is traditionally considered as a set of some elementary powers (legally secured opportunities): for one’s own actions and for the requirements of certain behavior from obligated persons, as well as for the use of various measures to protect their rights and legally protected interests.” [15]; the elements that we see in Chapter V.7 of the Land Code of the Russian Federation.

¹² Thus, analyzing the norms of Chapter V.7 of the Land Code of the Russian Federation, it becomes obvious that the new public easement does not fall under any of these categories. This conclusion suggests itself based on the fact that the new public easement: (a) is subjective, which clearly follows from the updated Article 5 of the Land Code of the Russian Federation, which is supplemented by the concept of “public

easement holders”); (b) is not a real right, primarily because such a right is not presented in Section II of the Russian Civil Code, as well as due to the fact that such an easement is established, including with respect to land; (c) besides, it can be called a right of limited use with a big stretch. The reason to believe that this type of right is limited actually follows from the name, as well as a number of requirements of land laws, in particular that the use is fixed-term (Article 39.45 of the Land Code of the Russian Federation), work in the relevant territory is performed according to a pre-agreed schedule (Article 39.47(1)(10) of the Land Code of the Russian Federation), and at the end of its validity period, the land plot must be restored to its original condition, including the demolition of erected facilities and reclamation work (Article 39.50(8) and (9) of the Land Code of the Russian Federation). However, it can hardly be called a limited right, which allows the construction of not only linear, but also site (non-linear) facilities (for example, electric grid facilities, which include transformer and other substations, distribution points), which is limited to a period of 49 years and can be repeatedly extended, in fact, as long as it is required by the holder of a public easement. Also, in some cases, the placement of utility structures named in Article 39.37 of the Land Code of the Russian Federation, by operation of law, requires fencing and access control to the territory burdened with such a “limited” right, if, for example, we are talking about a transformer substation (Rules for Arrangement of Electrical Installations (PUE)). 6th Edition, approved by USSR Ministry of Energy and Electrification Main Technical Directorate and State Energy Supervision on October 5, 1979) Clause 7.7.10) or the main pipeline, individual elements whereof must be fenced (Rules for the Protection of Main Pipelines, approved by Ministry of Fuel and Energy of the Russian Federation (Mintopenergo of Russia) on April 29, 1992, Federal Mining and Industrial Supervision of the Russian Federation (Gosgortekhnadzor of Russia) on April 22, 1992, No. 9, Clause 4.3).

¹³ Thus, the new public easement includes the “best qualities” of the named institutions of Russian law in connection therewith, according to the author, it could be qualified as a subjective restriction of rights for public needs.

¹⁴ In this regard, the question arises about the place of the introduced regulation in the structure of the Land Code of the Russian Federation, in view of the attempt to formulate the content of this right, which is extremely reminiscent of the institution of land expropriation.

¹⁵ There is a very thin line between the two options for registration of land rights (expropriation / new public easement) and the criterion of choice is only one, whether the planned activity will lead to the impossibility or significant difficulty in using the land plot (Article 23(10) of the Land Code of the Russian Federation). At the same time, the law admits that this boundary may also be violated during the implementation of a public easement, since the law also admits that the subsequent implementation of a public easement may lead to the impossibility of using the land plot, although the agreement contains a schedule and deadlines for the work, which the applicant obviously indicates based on the construction schedule as part of the project documentation (Clause 23(u) of the Regulation on Project Documentation Section Composition and Requirements for their Content, approved by Russian Government Decree No. 87 dated February 16, 2008). However, even then there is no obligation to ensure the land plot expropriation or to terminate the implementation of a public

easement, but only the right of the property owner under easement to demand the redemption of immovable property owned by him (Article 39.48 of the Land Code of the Russian Federation) arises.

¹⁶ In addition, as Aleksey A. Zavyalov notes: “the norms regulating the use of public [lands](#) are concentrated in the block of articles of the Land Code of the Russian Federation under the general number 39” [16].

¹⁷ In view of the above arguments, perhaps a new public easement would look more organically in the block of articles under the general number 56, would be formulated as “the right of limited use for state or municipal needs” and would not become an alternative to the institution of expropriation, but would come to its aid to create those facilities, the creation and operation of which are not possible instead of, and along with the main type of use of the land plot, the list of which is enshrined in Article 39.37 of the Land Code of the Russian Federation (this approach, however, will require an appropriate revision of Article 49 of the Land Code of the Russian Federation).

¹⁸ On September 1, 2022, Federal Law No. 284-FZ dated July 14, 2022, “On Amendments to Certain Legislative Acts of the Russian Federation” (hereinafter referred to as Federal Law No. 284-FZ), previously prepared and submitted to the State Duma of the Russian Federation by the Legislative Assembly of Orenburg Region Draft Federal Law No. 1056281-7 “On Amending Certain Legislative Acts of the Russian Federation (In Part of Improving the Regulation of Certain Issues of Establishing an Easement)” came into force. According to a short explanatory note, the bill was aimed “at establishing a systematic consistency of terms used in certain statutes and regulations, in the norms governing the types of easements established.” In particular, in connection with the remaining references in Federal [Law](#) No. 257-FZ dated November 8, 2007, “On Highways and Road Activities in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation” (hereinafter referred to as Federal Law No. 257-FZ) and Federal Law No. 101-FZ dated July 24, 2002, “On the Turnover of Agricultural Land” of terminology (“private easement”), which was used in laws, including Article 23 of the Land Code of the Russian Federation before the adoption of Federal Law No. 171-FZ dated June 23, 2014, “On Amendments to the Land Code of the Russian Federation and Certain Legislative Acts of the Russian Federation”.

¹⁹ In fact, Federal Law No. 284-FZ has solved much more pressing issues and questions.

²⁰ First of all, Article 23(19) of the Land Code of the Russian Federation was clarified, which removed the question of whether there were independent grounds for establishing a public easement in Federal Law No. 257-FZ, since previously this norm provided only for the specifics of its establishment by highway and road activity laws. Also, a number of provisions that created real issues in law enforcement practice were excluded from Federal Law No. 257-FZ. For example, regarding the definition of the body authorized to establish a public easement within the boundaries of the right-of-way of the highway, in particular, if the utility structure for the placement of which the rights to land are issued crosses the right-of-way of the public highway.

²¹ Article 25(4.2) of Federal Law No. 257-FZ, as previously amended, provided that “decisions on the establishment of public easements in respect of land plots within the boundaries of the allotment lanes of highways are made by a government authority or local self-government body authorized to provide these land plots to the owners of highways, according to the statements of the utilities system owners.” At the same time, according to the norms of federal land laws, the authorities making decisions on the establishment of a public easement are defined in Article 39.38 of the Land Code of the Russian Federation. Often, the doubling of the norms defining the authorities authorized to establish a public easement gave rise to many legal disputes, since the relevant authorities did not seek to make decisions, believing that their adoption was beyond the established competence. The Supreme Court of the Russian Federation clarified this issue, which stated in one of the definitions that “a public easement for the placement of one facility cannot be established by different federal executive authorities” (See Ruling of the Supreme Court of the Russian Federation No. 305-ES22-13371 dated September 27, 2022, in case No. A40-141376/2021). Rosreestr adhered to a similar position, noting in Interpretation No. 11-8484-AB/21 dated November 16, 2021, that “In accordance with Article 39.41(6) of the Land Code of the Russian Federation, the boundaries of the public easement for the purposes provided for in Article 39.37(1), (3) and (4) of the Land Code of the Russian Federation are determined in accordance with the established documentation on the planning of the territory by the boundaries of the zones of the planned placement of facilities, and in the event that for the placement of utility structures, highways, railways, the development of documentation on the layout of the territory is not required, within the limits not exceeding the size of the corresponding exclusion zones. At the same time, a public easement is subject to establishment in respect of the whole linear facility, since otherwise is not provided for by the Land Code of the Russian Federation. Thus, the adoption of several decisions on the establishment of a public easement for the placement of various parts of a linear facility by several authorized authorities is not provided.” Thus, in the case of a proposed intersection of a linear facility with a highway right-of-way, the issue of determining the authorized authority was resolved in favor of the norms of the Land Code of the Russian Federation, the authorized authority in accordance with Federal Law No. 257-FZ was defined only in cases where the structure was completely located within the right-of-way boundaries.

²² Along with this amendment, other provisions concerning the regulation of public easement were also excluded from Federal Law No. 257-FZ, since similar provisions were enshrined in the Land Code of the Russian Federation by Federal Law No. 341-FZ.

²³ In particular, the norms regarding the procedure for filing an application for the establishment of a public easement, the composition of the attached documents, the requirements for the content of the decision on the establishment of a public easement, as well as the norms concerning the entry into an agreement on the implementation of a public easement, the rules establishing the forms of sample agreements and the procedure for determining the payment for a public easement, the grounds for termination of a public easement and the requirements for bringing the relevant land plot in a condition suitable for its use in accordance with the permitted use after the termination of the easement.

24 The amendments concerning the payment for a public easement seem to be material. So, (1) if, in accordance with Federal law No. 257-FZ, payment determined in the amount of 0.12 per cent of a land plot per year (Order of the Ministry of Transport of Russia No. 240 dated September 5, 2014, “On Approval of the Procedure for Determining the Payment for Public Easement in Relation to Land Plots Within the Boundaries of the Right-of-Way of Highways (Except for Private Roads) for the Purpose of Laying, Transferring, Reorganizing Utilities Systems and Their Operation” (repealed due to the issuance of Order of the Ministry of Transport of Russia No. 364 dated September 13, 2022), then on the basis of the Land Code of the Russian Federation payment for a public easement shall be determined in accordance with Federal Law No. 135-FZ dated July 29, 1998, “On Appraisal Activities in the Russian Federation” as the difference in the market value of the rights to a land plot before the establishment of a public easement and after its establishment, if it is in state or municipal ownership the land plot is encumbered with the rights of third parties (Order of the Ministry of Economic Development of Russia No. 321 dated June 4, 2019, “On Approval of Guidelines for Determining the Payment for Public Easement in Relation to Land Plots that are Privately Owned or are in State or Municipal Ownership and Provided to Citizens or Legal Entities”); (2) if the payment for a public easement in accordance with Federal Law No. 257-FZ was determined in relation to a specific land plot, then in accordance with federal land laws, a public easement can be established both in relation to plots and in relation to lands.

25 Thus, at least two administrative procedures on the way to establishing a public easement (a land plot formation and the entry of information about its cadastral value into the Unified State Register of Immovable Property) were excluded. Moreover, the approach of determining the payment based on the market value of the land plot or the market value of the rights thereto seems more fair and allows establishing a reasonable amount of payment for a public easement, which should be “commensurate with the material benefit that the owner of the land plot acquires as a result of the establishment of the easement, compensating for the limitations that the owner of the land plot undergoes, burdened with an easement” (Clause 12 of the Review of Judicial Practice in Cases of Establishing an Easement on a Land Plot approved by the Presidium of the Supreme Court of the Russian Federation on April 26, 2017). V. Savinykh draws attention to the fact that “in some cases, the cadastral value of a facility may differ from its market value, which is justified by the tax-oriented nature of the cadastral value” [17]. Meanwhile, D. Totochenko notes that “In accordance with [Article 65](#) of the Land Code of the Russian Federation (hereinafter referred to as the Land Code of the Russia), the use of land in the Russian Federation is paid, while the legislator indicates two forms of payment for land. These are land tax (before the introduction of the immovable property tax) and rent. However, this list of forms of payment for land is not exhaustive. For some reason, there is no third form of payment for land, the payment for an easement, in this legal norm. It is quite logical that the easement payment is an independent form of payment for land, which does not apply to the forms of payment specified in [Article 65](#) of the Land Code of the Russian Federation. In this regard, we believe that it is required to make an addition to the Land Code of the Russian Federation, including therein a payment for an easement as an independent form of payment for land.” [18].

²⁶ Meanwhile, Federal Law No. 284-FZ introduced more amendments to the procedure for establishing a public easement for certain purposes, provided for in Chapter V.7 of the Land Code of the Russian Federation, than Federal Law No. 257-FZ did. One of the most important amendments is the introduction of the grounds for establishing a public easement for the purpose of major repairs of utility structures to Article 39.37 of the Land Code of the Russian Federation, as well as reconstruction and major repairs of their sections and parts.

²⁷ The prerequisites for introducing such amendments were legislative adjustments introduced by previously adopted Federal Law No. 254-FZ dated July 31, 2020, “On the Specifics of Regulating Certain Relations in Order to Implement Priority Projects for the Modernization and Expansion of Infrastructure and on Amendments to Certain Legislative Acts of the Russian Federation”, which, among other things, established the possibility of performing major repairs of main gas pipelines, oil pipelines and petroleum product pipelines by the method of parallel pipeline laying, in which it is allowed to change the location of the pipeline axis while simultaneously increasing its category (Article 52(10) of the Urban Development Code of the Russian Federation), as well as the possibility of preparing design documentation, carrying out its expertise and issuing a construction permit for part of the capital construction facility, which is a transportation infrastructure linear facility.

²⁸ Also, the prerequisites were the amendments provided for by Federal Law No. 124-FZ dated May 1, 2022, “On Amendments to the Urban Development Code of the Russian Federation and Certain Legislative Acts of the Russian Federation”, which established that the basic information about the structure may change as a result of its major repairs, and also provides that if the linear facility has been reconstructed, overhauled, including reconstruction, overhaul of its sections (parts), the design solution shall indicate information on the coordinates of those sections (parts) that have been changed as a result of the work performed.

²⁹ The full-fledged application of these simplifications in the urban development and immovable property registration laws was unattainable without corresponding edits of land laws, allowing for similar features in terms of registration of land rights for the reconstruction, major repairs of parts of linear facilities. Thus, the amendments introduced by Federal Law No. 284-FZ, allowing for the possibility of establishing a public easement for the purpose of major repairs of utility structures, as well as reconstruction and major repair of their sections, parts, have become a logical continuation of those opportunities that were previously laid down by the aforementioned statutes.

³⁰ It should also be noted that the laws regarding the establishment of a public easement has become more flexible in terms of defining the boundaries of a public easement and if earlier in the doctrine and law enforcement practice, including the practice of the Supreme Court of the Russian Federation (see, for example, Ruling of the Supreme Court of the Russian Federation No. 305-ES22-13371 dated September 27, 2022, in case No. A40-141376/2021; Ruling of the Supreme Court of the Russian Federation No. 305-ES22-20092 dated October 27, 2022, in case No. A40-229238/2021) there was a strong opinion that a public easement for the purposes specified in Article 39.37 of the Land Code of the Russian Federation is established for the entire

length of the corresponding linear facility, then it should be assumed that the introduction of the possibility of obtaining a construction permit in relation to a part of the structure and, moreover, the establishment of a public easement in relation to a part (section) of a utility structure will make their own adjustments to the practice of applying the legal provisions governing the procedure for establishing a public easement in terms of its establishment for the entire length of the utility structure.

³¹ Despite all the advantages of the new public easement and high expectations of a widespread transition to this institution of registration of land relations in order to place linear facility after 5 years from the date of its introduction, it is not required to talk about a coherent practice of application, and some provisions still cause reasonable doubts.

³² (1) The requirements of Article 23(8) and (9) of the Land Code of the Russian Federation, whereby a public easement is established on the terms least burdensome for the use of a land plot in accordance with its intended purpose, and in relation to agricultural lands, a public easement shall be executed in view of the requirements ensuring the rational use of land, may serve as an example of the approach of the least interference in the sphere of private property and ensuring the rational use of land. However, it is not clear from the provisions of Chapter V.7 of the Land Code of the Russian Federation or other norms of laws currently in force what these requirements are expressed in and what their further development is. Article 39.43(3) of the Land Code of the Russian Federation indirectly ensures the implementation of the above principles, which provides that the authorized authority has the right, subject to agreement with the future easement holder and property owner under the easement, to approve a different version of the boundaries of the public easement than that provided for by the petition (in addition, the terms of the public easement may be subject to court consideration if will be challenged by the property owner). However, what will guide the authorized authority, the court or the property owner in search of other options for the boundaries of the public easement and whether they will want to take on such responsibility, given that the location of the boundaries of the zone of the planned placement of the facility is determined by the approved government authority in the territory development project, in view of the design location of the linear facility axis, which is prepared based on the requirements of technical regulations, codes of rules, in view of the materials and results of engineering surveys, and, moreover, may be a high-risk facility, is a big question.

³³ Another example of this principle is the previously mentioned provisions of Article 23(10) of the Land Code of the Russian Federation, which provides that if the placement of the facility specified in [Article 39.37\(1\)](#) of the Land Code of the Russian Federation on the land plot will lead to the inability to use the land plot in accordance with its permitted use or material difficulties in its use during the term exceeding the period stipulated by [Article 39.44\(1\)\(4\)](#) of the Land Code of the Russian Federation, the placement of the specified structure on a land plot owned by a citizen or a legal entity on the terms of a public easement shall not be performed. However, in fact, this norm may confuse all participants in the procedure for establishing a public easement: the applicant, who cannot be sure that an easement can be established with respect to the land plot, the authority that will have to make a decision on this issue, and the right holder of the land plot, who cannot know for sure the scope of his powers in this

procedure (to enter into an agreement on the implementation of an easement or to demand the redemption of property owned by him). It should be assumed that it will not be easy for the judicial authorities to draw a conclusion on the possibility or impossibility of further use of the land plot in accordance with its permitted use, and there are many reasons for this. For example, a land plot may have a type of permitted use, which includes a number of other types, such as use in agriculture or entrepreneurship (Rosreestr Order No. P/0412 dated November 10, 2020 “On Approval of the Classifier of Types of Permitted Use of Land Plots”), which allow for fairly extensive disposal of property, or a land plot may be assigned a type of permitted use prior to the approval of the Classifier of Types of Permitted Use, which is recognized as valid (Article 34(11) of Federal Law No. 171-FZ dated June 23, 2014, “On Amendments to the Land Code of the Russian Federation and Certain Legislative Acts of the Russian Federation”), and the content of this type of use is not directly defined in the laws, etc. Even if we do not take any “exotic” examples, it will still be difficult to establish that a public easement prevents the use of a land plot for its intended purpose, which must be carefully investigated in each specific case (in view of the area and configuration of the land plot, its permitted use, current activities on such a land plot, as well as part of the plot, which falls within the boundaries of a public easement, the nature of the planned activity of the easement holder, etc.). As E. Povetkina points out: “And here it is of great importance to fill this criterion—“the impossibility of using a land plot”—with specifics: when exactly does this impossibility arise? Does, for example, the placement of electric grids with a voltage class up to 35kV exclude the use of the land on which they are located or not? And if the grid voltage is 500kV? This is a question to which the [Law](#) does not and cannot give an answer, because everything will depend on the specific circumstances: the area of the land plot, its purpose, the overall layout of the territory, etc.”[19], which is confirmed by the conclusions of the authority authorized within the legal regulation in land relations. Thus, in the Interpretation No. 11-10464-AB/22 dated November 30, 2022, Rosreestr indicates that “The laws does not provide for an exhaustive list of criteria based on which it can be concluded that it is impossible or materially difficult to use a land plot (part thereof) and/or an item of immovable property located on such a land plot in connection with the establishment of a public easement. We believe that the conclusion about the impossibility of using a particular land plot should be made based on the type of its permitted use, the possibility of its development and limitations arising in connection with the establishment of a public easement on the implementation of certain types of activities on such a land plot.” Anna Markelova emphasizes that “With the significance of restrictions in judicial practice, it is allowed to apply by analogy [Article 23\(10\)](#) of the Land Code of the Russian Federation, whereby if the placement of a facility leads to the impossibility of using a land plot in accordance with its permitted use, then a public easement shall not be established, and the land plot shall be expropriated.”[20].

³⁴ The laws does not give clear answers to these questions, it should be assumed that practice will show.

³⁵ Vladimir K. Andreev notes that “The truth and effectiveness of legal regulation of a particular circle of public relations can be established only in the process of applying the relevant norms of law and achieving the result that the legislator expected.”[21]

³⁶ (2) Federal Law No. 384-FZ dated December 30, 2009 “Technical Regulations on the Safety of Buildings and Structures”, the urban development laws of the Russian Federation, the demolition of a building or structure is defined as an independent stage of the life cycle of the relevant facility along with the periods of engineering surveys, design, construction, operation, reconstruction, and capital repairs. The Urban Development Code of the Russian Federation has been supplemented by a separate chapter (Chapter 6.4 of the Urban Development Code of the Russian Federation) devoted to the procedures for the demolition of capital construction facilities, providing for a number of administrative procedures. As part of the implementation of this Chapter of the Urban Development Code of the Russian Federation, the Government of the Russian Federation approved the requirements for the composition and content of the activity management plan for a capital construction facility demolition (Russian Government Decree No. 509 dated April 26, 2019, “On Approval of the Requirements for the Composition and Content of the Activity Management Plan for a Capital Construction Facility Demolition”), which, among other things, require a description of the land plot, within the boundaries of which it is planned to perform the capital construction facility demolition, as well as descriptions of related activities, including justification of collapse zones and hazardous zones, indication of places of storage of materials, determination of the list of measures for reclamation and landscaping, etc., which is impossible without properly executed land rights. The other forms the composition of an administrative offense in accordance with Article 7.1 of the Russian Code of Administrative Offences.

³⁷ Unlike the above-mentioned statutes, the Land Code of the Russian Federation and, in particular, its Chapter under consideration do not pay due attention to the procedures for the demolition of those utility structures that can be created on the terms of a public easement. It is assumed that the demolition of such facilities is among the powers of the owner of a public easement, as is explicitly stated in Article 39.50(3)(4) of the Land Code of the Russian Federation, and he will be able to exercise such a right without unnecessary administrative barriers on the basis of an established public easement. However, this regulation is clearly insufficient, for example, for those cases when it comes to an underground pipeline, the operation of which does not require registration of land rights (Article 90(8) of the Land Code of the Russian Federation). In addition, the situation may be more complicated if such a pipeline is completely decommissioned.

³⁸ It turns out that if we are talking about an underground pipeline, it can be demolished by pre-registering a public easement for operation in accordance with Chapter V.7 of the Land Code of the Russian Federation or Article 3.6 of Federal Law No. 137-FZ dated October 25, 2001, “On the Enactment of the Land Code of the Russian Federation”, although it is not about operation at all and it will be somewhat strange. But if this facility is decommissioned, there are no grounds for establishing a public easement at all, it will also not be possible to rent a land plot, in view of the requirements of Article 39.20(1.1) of the Land Code of the Russian Federation and the institution for the use of land or land plots in state or municipal ownership, without providing and establishing easements, it is impossible to use due to the lack of a suitable grounds for issuing the appropriate permit. One can only hope that a government authority or local government body will establish an easement in accordance with

Chapter V.3 of the Land Code of the Russian Federation, believing that the list of cases of its application is much broader than the three described in the law, or hope that the pipeline passes through private territory and it will be possible to negotiate in a civil procedure.

³⁹ The situation is no easier when the demolition of a utility structure is performed as part of its reconstruction. Thus, in accordance with Article 55.30(2) of the Urban Development Code of the Russian Federation, for the purpose of a capital construction facility demolition, the developer or technical customer provides preparation of an activity management plan for the capital construction facility demolition as an independent document, except for two cases: (1) a demolition of a number of facilities for the construction of which a construction permit is not required, for example, a garage for own needs, a residential building erected on a garden plot or a garden house, an individual residential building, a non-capital structure, a structure or auxiliary buildings; (2) demolition of a capital construction facility for the construction of a new capital construction facility, which is performed in accordance with the procedure established by [Chapter 6](#) of the Urban Development Code of the Russian Federation for the construction of capital construction facilities.

⁴⁰ Thus, in the case of reconstruction, for example, of a main oil pipeline, a number of technological features of this procedure should be taken into account, which is as follows. First of all, the reconstruction of the main oil pipeline in accordance with the approved design documentation can be designed by the method of its parallel laying. In this regard, it should be noted that according to Clauses 1 and 3 of CH 452-73 “Standards of Land Allocation for Main Pipelines”, the width of the strip of land allocated for short-term use for construction, reconstruction of underground main pipelines depends on the diameter of the pipeline, the number of pipelines laid in parallel, and ranges from 20 to 30 meters. According to Article 39.41(6) of the Land Code of the Russian Federation, the boundaries of the public easement are determined in accordance with the boundaries of the zones of the capital construction facility planned placement established by the territory development documentation, determined precisely in accordance with the land allotment standards (Russian Government Decree No. 564 dated May 12, 2017 “On Approval of the Regulations on the Composition and Content of the Documentation on the Territory Development Providing for the Placement of One or More Linear Facilities”).

⁴¹ Thus, considering that the pipeline is laid parallel to the existing one, and the territory development project defines only the area of the planned location of the facility, the size of which is the minimum necessary for the construction and installation work on the construction of the projected pipeline section, it does not take into account the territory occupied by the existing pipeline to be dismantled (demolished) and, moreover, does not take into account the zones of placement of temporary or auxiliary structures required to perform demolition work, but that’s another story.

⁴² At the same time, due to the requirements of the laws on urban development activities during the construction, reconstruction of the capital construction facility, the complex of works on the demolition of the capital construction facility and the demolition activity management plan itself are included in the design documentation if the capital construction facility demolition is required in connection with the execution

of these construction works. It is also worth mentioning that the permit for the commissioning of the facility is a document that certifies the completion of construction, reconstruction of the capital construction facility in full in accordance with the construction permit and project documentation.

⁴³ In view of the above, in cases of demolition of the main oil pipeline as part of the work on its reconstruction, the developer also has to look for various options for registration of rights to the land occupied by the decommissioned section of the main pipeline for the purpose of its dismantling (demolition) and taking a set of measures for the reclamation and improvement of such land in accordance with the requirements of laws. The absence of any decisions on this issue seems at least strange, since on the one hand, the laws make it possible to perform the reconstruction of utility structures named in Article 39.37 of the Land Code of the Russian Federation on the terms of a public easement, but on the other hand, in some cases it does not allow completing a set of relevant works on the terms of a public easement, although however its establishment in relation to the territory occupied by the dismantled facility seems more justified due to the presence of dominant estate. In general, it is possible that there is no independent basis for establishing a public easement for the purpose of demolishing a utility structure or its individual sections, parts can be considered as a gap in the current regulation of Chapter V.7 of the Land Code of the Russian Federation, since this is the only case when both the dominant estate and the servient estate are present, provided that the new public easement is considered as a subjective right.

⁴⁴ In general, the institution of a “new” public easement is seen in the structure of land rights registration methods as the most promising for domestic laws and is already becoming a priority both for organizations implementing large-scale infrastructure projects and for companies providing the placement of local networks and connection thereto.

⁴⁵ It seems that in the future, the institution of public easement, as a way to ensure the implementation of large-scale projects, should concentrate other goals in particularly important, capital-intensive and profitable areas for the domestic economy. For example, for the implementation of projects in renewable energy sources or subsoil use, which, by the way, has been questioned by the courts more than once as an unconditional basis for land expropriation [22] (see, for example, the Ruling of the Supreme Court of the Russian Federation No. 307-ES22-10598 dated July 7, 2022, in case No. A13-3968/2021; Ruling of the Supreme Court of the Russian Federation No. 303-KG18-18537 dated November 22, 2018, in case No. A04-777/2018).

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Public Easement: Updates and Prospects for the Development of Laws

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Abstract

The article analyzes the procedures provided for by the laws related to the establishment of a public easement in accordance with Chapter V.7 of the Land Code of the Russian Federation, in view of the general requirements for the regulation of easement in accordance with the civil and land laws of the Russian Federation, current changes in this institution of limited real rights in order to identify ambiguous requirements that prevent the formation of consistent law enforcement practice at the level of decisions of government authorities, local self-government and courts in the absence of authoritative guidelines such as, for example, the generalization of judicial practice in the relevant category of cases, and the ways of possible development of public easement institution are formulated.

The purpose of this research is to formulate questions arising during the analysis of the requirements of Chapter V.7 of the Land Code of the Russian Federation and identify gaps in legislative regulation, as well as reasonable judgments thereto in order to find possible directions for further development of the public easement institution.

Keywords: energy law, legal framework of oil and gas transportation infrastructure facilities, easement, public easement, limitation of right

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