

Dialogue

Interview with DR. JIN JINPING,
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This Column is produced by the SGLA in cooperation with Peking University Law School.

In-house lawyers and lawyers in private practice are often perplexed by various issues that arise in the practice of law in China. In an effort to further improve and develop the legal profession, this column offers lawyers the chance to engage in a dialogue focusing on business law issues with professors from Peking University Law School.

SGLA Law Journal: How can a mortgagee protect its legal rights and interests in a situation where a developer mortgages its land use rights but is unable to develop the land within the prescribed time and the government repossesses the land use rights?

JinJinping: The repossession of land use rights by the government in accordance with the *Law of the People's Republic of China on the Administration of Urban Real Estate* constitutes an administrative legal relationship, which is fundamentally different from the establishment of mortgage, which is a type of civil legal act. The mortgagee is not entitled to claim compensation from the government where the government repossesses the land use rights. At the same time, the repossession of the land use rights by the government in accordance with the law is deemed to be an original acquisition, and as a result the mortgage right owned by the original mortgagee will perish where the subject matter perishes. In such a circumstance, the main reason for the State to repossess the land use rights is attributable to the developer's failure to develop the land in a timely manner in accordance with the grant contract for state-owned land use rights and the applicable laws and regulations. The developer's act causes the land use rights to perish, and the developer is at fault. In accordance with the provisions of Article 51 of the *Security Law of the People's Republic of China*, the mortgagee is entitled to require the developer to provide security equivalent to the value of the mortgaged land use right.

SGLA Law Journal: Can a court issue an enforceable judgment in a situation where a majority public owned developer attempts to avoid the public bidding regulations by causing a party to file suit to demand a transfer of land use rights, and how would a land management department resolve such a conflict between the administrative rules and the legal judgment?

JIN Jinping: In accordance with the *Interim Measures for the Administration of the Transfer of the State-owned Property Rights of Enterprises* (the "Measures"), issued by the State-owned Assets Supervision and Administration Commission and the Ministry of Finance, the transfer of the state-owned property rights must be conducted by a legally established property rights trading institution. A grant of state-owned land use rights must be handled through public bidding procedures conducted in the various regional trade centres. As to the nature, the Measures are administrative regulations that regulate specific issues of the state-owned assets administration without conflict with higher ranking laws. Accordingly, in a hearing the court should apply the provisions of the Measures and cannot issue an enforceable judgment. We think the land administration department should not only abide by laws and regulations but also should take specific policy requirements into consideration when carrying out its work. The department should implement policy within the legally permitted scope on the condition that the relevant policy is not in violation with the basic principles of law. Where the policy involves a conflict with any provision of a higher ranking law, we suggest a review of the policy in accordance with the relevant legal procedures.

SGLA Law Journal: What is the legal relationship between an enterprise that invests in primary land development and the government agency entrusted to grant the land use rights (the land reserve centre, development zone management committee, etc.)? What is the legal nature of a situation where a developer raises its own development capital during the development process — a loan or an investment?

JIN Jinping: In accordance with the applicable regulations, land planned for business use should be included with land primarily developed by the land reserve, and it should be publicly granted by means of the “tender, auction and listing” procedures upon the completion of the primary land development by the land reserve centre.

Current law does not leave much room for an enterprise to participate in primary land development. As for the existing laws and the practices in various regions, an enterprise such as a developer cannot become an entity involved in primary land development. Such a developer merely acts as a construction entity when it participates in a specific primary land development. Hence, we think the government agency and the enterprise that participates in a primary land development establish a contractual legal relationship in which the enterprise carries out the construction in accordance with the requirements of the government agency and the government agency pays the due contract price. The enterprise’s act of privately funding the development should be deemed as an act of development with advance payment. The investment act does not meet the legal requirements for an entity that carries out primary land development nor does it correspond to the practice in various regions.

SGLA Law Journal: Currently China has no policy or standards that govern pre-sales of industrial real estate (as opposed to the regulations that govern pre-sales of residential real estate). Do you have any suggestions regarding the establishment of such a system?

JIN Jinping: With the rapid development of the economy and the continuous improvement of the real estate industry in China, the development of industrial real estate has become one of the focal points for the development of the real estate industry. This is not only beneficial to the further development of the real estate industry but also meets the requirements for the rapid development of China’s industrial infrastructure. The establishment of a pre-sales system for industrial real estate is an important point in the development and construction of industrial real estate, and therefore, the State should consider promoting the establishment and improvement of this system at the suitable time. What must be understood is that unlike the presales of commodity housing, industrial properties are normally built and transferred as a whole and construction standards for industrial and commodity housing also differ. Thus, when establishing a pre-sales system for industrial real estate, we should take these distinctions into account and improve the systems concerning engineering construction, real estate registration and so on in order to meet the requirements of the pre-sales of industrial real estate.

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