

The Risks of Purchasing Superficies Right-Based Housing: The Perspective of Consumer Protection

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Abstract

This paper investigates the risks of buying superficies right-based housing for consumers and takes the Zone T-9 development project in Taipei city as a case study. It explores the potential risks consumers face when purchasing such housing and the question of how they can safeguard their personal rights and interests. Interviews were conducted with scholars of related fields and industry specialists who have participated in this project. Based on the results of an analysis of the literature and the conducted interviews, the author found that consumers face five major risks in the future use of superficies right-based housing: the lease contract periods, formalized contract provisions in violation of integrity principles, inability to list lease rights as mortgage objectives, taxation-related issues, and existence/absence of priority principles with regard to ordinary creditor's rights. Finally, this paper suggests that as consumers' rights and interests are impaired, they can claim rights with regard to special trusts and execute the right of withdrawal after consumer lending and use arbitration law to protect their rights and interests. However, as consumers buy these kinds of commodities, they still should carefully assess the abovementioned risks.

Keywords: Superficies right-based housing, Housing usage rights, Housing Use certificates, Lease Contracts, Mortgage

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Introduction

In recent years, housing prices in exquisite areas in urban centers in Taiwan have remained constantly high. The highest prices are recorded in the Taipei area. Recent statistics published by Realtors reveal that the house price to income ratio is a whopping 11.9 in Taipei City. In other words, homebuyers have to spend an amount equivalent to 11.9 years' salary when purchasing housing in Taipei City. The house price to income ratio in the three major urban areas of Taoyuan, Taichung, and Kaohsiung, on the other hand, does not exceed 4.5 (less than half as high as in Taipei).

Due to the prevalent traditional belief in Chinese society that land possessions equal wealth, the ownership rights for the building and the land are usually tied together for housing purchases. This is the main reason why prices are so high. A separation of the ownership rights of the land and the building would result in a significant reduction of housing prices. This phenomenon led to the birth of superficies right-based housing (sales are confined to the ownership rights or usage rights for the building) as a new commodity. Superficies right-based housing has turned into a hot commodity in Taipei City. Notable examples of hot-selling superficies right-based projects in Taipei City include the "Zone T-9 Joint Development Project – Q Square" in the vicinity of Taipei Main Station (below referred to as "Zone T-9 Q Square"), "Regency Tokyo" in the Ximending District, "Taipei Garden" in the Xinyi development zone, "Nanjing 333" on Nanjing East Rd, "Nanjing Donglu" and "DC Plaza", and "Baocheng Hepan Huangjia" on Tayou Road.

In addition, the sale of designated surface rights through public bidding has also turned into one of the strategies for the activation of assets of state-owned enterprises in the context of relevant policies in recent years. (Ministry of Economic Affairs, 2013). This also indirectly stimulated the sale of superficies rights for state-owned land through public bidding. Superficies rights have also turned into one of the mainstream commodities of the future real estate bidding market. This is one of the main factors spurring the growing popularity of superficies right-based housing.

As for the signing of contracts for the purchase of housing usage right certificates by consumers, both residential and office areas must be entrusted due to the regulations pertaining to development and management of the project. The management team of this project therefore entrusted the ownership rights for residential and office areas to banks before the initiation of sales. Consumers therefore signed a "Contract for the Transfer of Usage Rights for Residential and Office Assets for a Fixed Period and the Lease of Superficies Right-based Land in the Context of the Zone T-9 Development Project in the Taipei Main Station Designated Area" directly with the banks. The term for the lease of superficies right-based land and the usage rights begins on the possession date and ends on January 25, 2054.

If the contract is terminated before January 25, 2054, the lease term for the superficies right-based land and the usage rights will expire simultaneously (See Fig.1). As a matter of fact, consumers purchase "housing usage certificates" and are therefore only entitled to the transfer and resale of these certificates. The absolute legal validity of the housing usage certificates of "Zone T-9 Q Square" differs greatly from that of other types of superficies right-based housing.

The former only represents a certificate of creditor's rights behavior in form of a private contract, while the latter constitutes a title deed issued by government agencies. Furthermore, housing usage certificates of "Zone T-9 Q Square" also differ from general housing lease rights. Upon expiry of the housing usage term, consumers must unconditionally vacate the property and may not exercise the guarantee of "Sale does not Break the Lease". The contract guarantee risks associated with the purchase of housing usage certificates for superficies right-based housing therefore require further clarification. This represents the first research motivation of this paper.

Moreover, according to the regulations prescribed in Article 449 of the Civil Code, the term of a lease contract may not exceed 20 years. Consumers therefore acquire termed "Zone T-9 Q Square" housing usage certificates in form of two 20-year and one 5-year contracts (for a total of 45 years) in the context of this special housing sale project. Article 840 of the Civil Code states that "Upon expiry of the designated term for the superficies rights of general superficies right-based real estate, the owner of the land shall compensate the superficiary based on the market price of the buildings. The superficies right term may be extended based on agreements between the land owner and the superficiary who may continue to use the housing".

However, the purchasers of housing usage certificates of the "Zone T-9 Q Square" are not entitled to compensation in accordance with Article 840 of the Civil Code upon expiry of the usage term. The rights of consumers are therefore not safeguarded as should be expected (Department of Government Ethics, Taipei City, 2006).

Consumers are not entitled to lease rights for this project and they are therefore in a disadvantaged position as far as the safeguarding of their rights and interests are concerned compared to the lease right, ownership right, and superficies right status of traditional real estate transactions. In view of the disadvantaged position of consumers who have purchased housing usage certificates, the protection of their housing rights and interests is an issue which deserves closer scrutiny. This issue is the second research motivation of this paper.

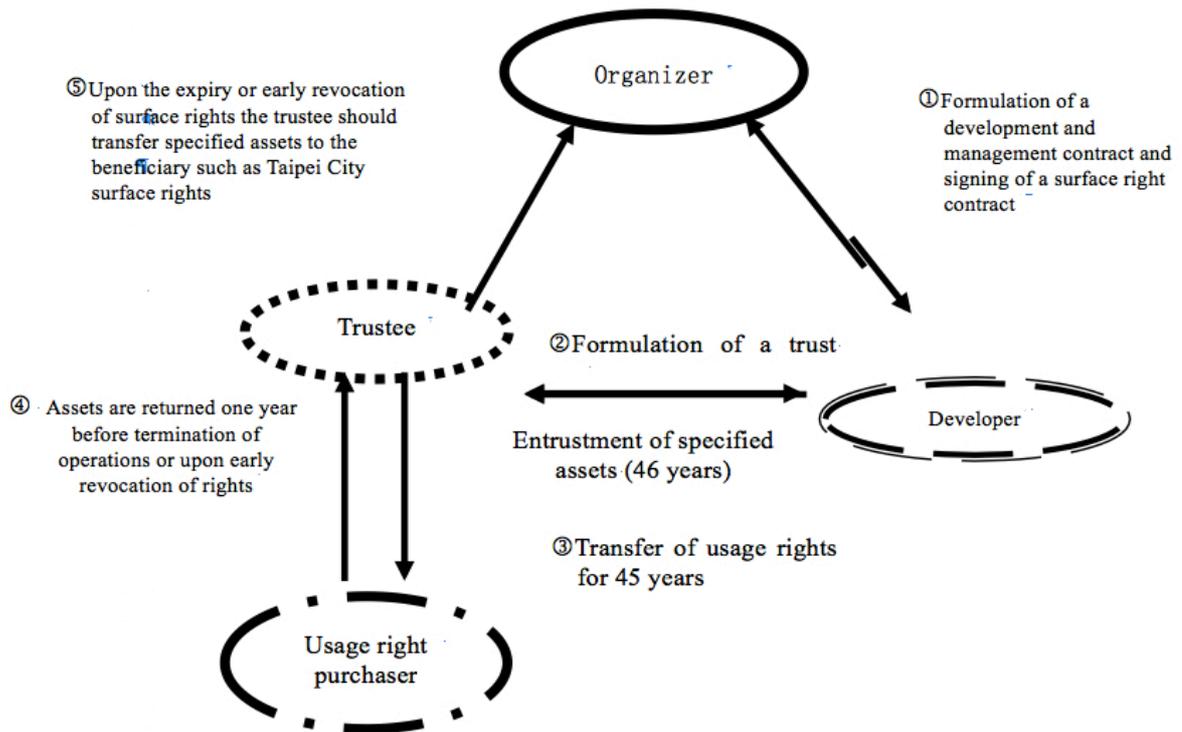


Fig.1 Trust operation model and flow chart for Zone T-9 Transit Station BOT Project

Data source: Xiu-Ju Liang (2006)

An ordinance from the Finance Ministry in 2004 states that the buyer of housing built on state-owned land whose superficies rights have been acquired through public bidding is only entitled to usage rights. Similarly, a tenant is not entitled to use superficies right-based housing for which a usage certificate has been issued for a period of 50 years as collateral for a bank loan. Applications for bank loans are therefore hard to obtain since only a very small number of banks are willing to grant loans to purchasers of certificates and the interest rates are comparatively high (around 3.5-4%) and LTV ratios are low. Consumers therefore face potential loan risks when purchasing usage certificates for superficies right-based housing. This requires further analysis and constitutes the third research motivation of this paper.

Since the purchase of housing usage certificates for “Zone T-9 – Q Square” by consumers, official land prices have increased by 40% over a period of three years (as of 2013). However, consumers are not required to pay land value increment taxes when selling their rights since they are not the owners of the land or building structures. Consumers therefore face risks associated with changes of taxation and relevant fees when purchasing certificates for superficies right-based housing. This represents the fourth research motivation of this paper.

This paper analyzes the "Zone T-9 - Q Square" project from the perspective of consumers. Potential risks consumers face when purchasing housing usage certificates and potential effects on their rights and interests are analyzed through a literature review and interviews with three scholars of related fields and industry specialists who have participated in this project. The main research objectives can be summed up as follows:

1. Exploration of the different risks associated with the purchase of housing usage certificates for superficies right-based housing
2. Analysis of how to safeguard the rights and interests of consumers who purchase housing usage certificates for superficies right-based housing

Reference literature

1. Right of disposal of superficies rights, transfer, and provision of guarantees

The definition of superficies rights has turned into a new favorite in all sectors. Although there is no lack of examples for the lease of surface rights for land under the current system, the regulations of the ROC Civil Code are not sufficient to regulate the relevant legal relationships as far as the management of land use is concerned, let alone consolidate superficies rights to stimulate social and economic development. Regulations governing obligations and rights of the superfiary are either lacking or unclear. This not only impairs the rights and interests of involved parties but also the social benefit associated with superficies rights. An affective consolidation of superficies rights is therefore conducive to social and economic development. This issue is of great concern for the development and use of land data and there is an urgent need for legislative action with regard to this issue.

2. Lease rights of superficies rights

A right in rem is a right of disposition and may be freely disposed of. In other words, ownership rights, usufructuary rights, or real rights of security may be freely transferred to other people. Whether or not lease rights can be freely transferred, sublet, or disposed of is an indicator to determine whether or not lease rights are rights in rem. Due to the fact that the Civil Code defines tenancy relationships as debt relations with a focus on the human element, the transfer or subletting of lease rights without permission has no legal effect on the lessor who may use this as a reason to terminate the lease contract (Article 443 of the Civil Code). However, in the field of real estate lease (particularly the lease of land), a proper acknowledgement of the right of lessees to freely transfer, sublet, or dispose of land lease rights is deemed necessary to allow the land lessee to recover the capital invested in structures on the land.

3. Formalized contracts with regard to superficies rights

The terms and conditions of formalized contracts have been formulated in advance by enterprise managers. Their counterparts (consumers) are usually not able to negotiate contracts before signing them or express their opinions. In case of doubts regarding formalized contracts, the users should bear the risks and interpretations should be favorable to the counterparts (Wei-Chao Lin, 2002)

4. Issues pertaining to the definition of superficies rights for state-owned land for non-public use

The legal basis for the definition of superficies rights for Taipei municipal land is provided in Article 65 of the Management Regulations Governing Taipei Municipal Property setting out that “Management authorities may devise appropriate usage plans for non-public use real estate, implemented upon approval by the city government, to increase revenues in accordance with the following regulations”(Yuan-Feng Lin, 2005) . Usage fees are charged in advanced and investors provide capital for the construction of housing, which may be used for a limited period. The city owns the property rights for these buildings. In addition, improvements may be made to the land and used for a limited period (property rights belong to the city). Finally, other appropriate uses that further the rights and interests are also permitted. The contract period for individual cases of definition of superficies rights for Taipei municipal land is 70 years. Upon expiry of the contract, building structures are transferred to the Taipei City Government without compensation.

Conclusion and recommendations

The “Zone T-9 – Q Square” development project is very complicated and complex. At the start of the project, it was planned how to evade the exercise of recourse rights by general creditors. This greatly harms the interests of consumers and generates no benefits. The terms and provisions of the contract are characterized by great inequality. The project also constantly skirts the problems related to “Sale does not Break the Lease”. The conclusion and recommendations provided in this section are as follows:

The usage rights for this project expire on January 25, 2054, whereupon all structures are claimed by the city government without compensation.” Sales of housing usage certificates are presented in a way to mislead consumers into believing that they are equivalent to usage right transactions. Certain competent authorities or scholars even erroneously believe that these certificates are equivalent to 45-year lease rights. Housing usage certificates are not identical to lease rights. This point can’t be emphasized enough. The fact that the term “usage rights” has been adopted instead of “lease rights” represents an innovative sales method. This is a clever strategy which is however highly controversial as far as business ethics are concerned. The advance sale of housing usage certificates by investors to raise funds from consumers partially transfers potential risks during the development process to consumers in an attempt to conceal the risks pertaining to construction and operations.

This leads to business ethics concerns and the generation of numerous unexpected problems.

The ownership rights to the land of the “Zone T-9 – Q Square” development project belong to the Taipei City Government and the Taiwan Railway Company. The property rights for the commercial building structures were entrusted to banks in a compulsory and unified manner during the development period. However, the 45-year housing usage certificates that consumers acquire by signing contracts with trustee banks are in violation of regulations of current laws that prescribe a maximum lease period of 20 years. Operators are suspected of evading existing laws and regulations through meticulous design and fail to safeguard the rights and interests of consumers in the “Zone T-9 – Q Square” development project. A special law should be enacted regarding the purchase of housing usage certificates to allow the application of regulations regarding lease contracts prescribed in the Civil Code. This will give housing usage certificates an independent status separate from lease, loan for use, and consumer loans. Legal loopholes will further negative investment practices on the part of operators in the future with this project as a precedent. This runs against the spirit of rule of law.

The problems evolving from the project should be addressed earlier than preventable legal problems. Are the two 20-year contracts and the 5-year contract which are not in effect yet legally valid and what legal relationships should apply? What is the basis for claims in case of legal disputes with regard to rights and benefits? Scholars, specialists, and legal experts interpret these issues in different ways. The government should establish a comprehensive legal foundation in a timely manner.

This project pioneered the sale of housing usage certificates. This strategy will lead to unprecedented problems. Ordinance No. 09731434000 issued by the Law and Regulation Commission of the Taipei City Government on June 5, 2008 clarifies that the so-called “housing usage certificates” are certificates which were created independently by the operators and competent authorities should be consulted regarding the relevant legal relationships. The commission is obviously shirking its responsibility and evades issues pertaining to strict legal responsibilities and the safeguarding of consumer rights and interests in the future.

Finally, this study recommends that the restrictions on compulsory execution of trust property prescribed in Article 12, Paragraph 1 of the Trust Law should be eliminated for consumers who purchased housing usage certificates

In addition, the “Zone T-9 – Q Square” Development project is based on a regulation prescribed in Article 12, Paragraph 1 of the Trust Law setting out that “Compulsory execution of trust property shall not be allowed”. In other words, consumers are fully responsible for risks associated with inadequacies in the field of investor property or engineering quality control that lead to failure to meet contract obligations or disasters and incidents beyond human control during the construction or operation period based on the trust regulations. Due to the unequal access to information, compulsory execution cannot be achieved through recourse to appeal, not to mention the award of compensation.

Moreover, although it is clearly stated that “If amendments of government decrees, conditions beyond human control, or other factors that prevent the resale to the transferor upon the handover of designated residential and office assets lead to the termination of the development project or the loss of said residential and office assets, any party may terminate this contract and the transferor shall return the remaining amount of the contract price after depreciation to the transferee” and “If natural disasters, geological changes, or amendments of government decrees, conditions beyond human control, or other factors not attributable to the transferor before the handover of designated residential and office assets lead to the termination of the development project or the suspension of construction of said residential and office assets, any party may dissolve this contract.”

However, in view of the fact that the failure to fulfill debt obligations in the context of this contract cannot be legally contested and the regulations forbidding the compulsory execution of trust property, the restrictions on compulsory execution of trust property prescribed in Article 12, Paragraph 1 of the Trust Law should be eliminated for consumers who purchased housing usage certificates.

Additionally, the insurance mechanism should be strengthened and laws should be enacted prescribing that consumers who purchased housing usage certificates as transferees are eligible to receive all benefits and are responsible for all dangers upon handover of the designated residential and office assets. Benefits and dangers should be jointly borne by all parties. The government and the investors should make joint payments to strengthen the insurance mechanism to provide guarantees for consumers who purchased housing usage certificates under conditions of reasonable and normal usage. The government and the investors should assume joint responsibility for repairs, maintenance and compensation for designated residential and office assets, facilities, and equipment. Consumers should also not be responsible for repairs in case of public construction disasters due to improper construction or faulty planning or damage caused by natural factors. Even if contracts prescribe that the responsibility must be borne by consumers who purchased housing usage certificates, accountability should be based on the principles of fairness and integrity.

Finally, laws should be amended and enacted to guarantee preferential protection by special law for purchasers of household usage certificates as far as the use of special trust funds is concerned. The government should also provide rent subsidies in form of special purpose funds for ordinary housing and build BOT superficies right-based housing to prevent speculative behavior and stabilize housing prices.

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