

# Legal Choice for Conflict Between Right to Purchase and Right to Mortgage of Garage in Execution Objection: On the Necessity of Forbidding Garage to Set Up Mortgage by Law

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**Abstract:** As an important pillar of China's economy in recent years, the real estate market that involves real estate sales, lease, transaction, mortgage and other trading activities is a high incidence field of legal disputes. Different transactions have different legal consequences, but when the rights form conflict, the existing legal system is also in an awkward position because of the lack of regulation. China's property law gives owners the special priority to use the garage, but the mortgage financing function of garage still exists. Due to the characteristics of garage such as large quantity, wide range and publicity, the conflict between the purchase right formed by garage transaction and the mortgage right formed by garage mortgage not only leads to legal conflict, but also often causes social stability problem caused by group visits. With the theoretical basis and possibility of practical operation, the way of ban on garage mortgage in law should be the solution to resolve the conflict.

## 1. Problem Statement

In October 2002, Chen bought an underground parking space from A development company, paid off the price, and has occupied and used it since he moved into the house he bought before. In September 2003, A company got a bank loan and conducted mortgage registration by using some commercial houses and underground parking spaces [1]. In October 2004, in the trial of the loan dispute between A company and the bank, the court ordered that when A company failed to pay off the loan debt, the bank had the right to be paid in priority with the proceeds from the discount of A company's existing houses and underground parking space or the auction and sale of the collateral. When executing the judgment, the court sealed up part of the commercial houses and parking spaces of A company in May 2005, including the parking space purchased by Chen. In October 2010, the court ruled that Xue who inherited the creditor's rights and other rights determined in the original loan judgment was the execution applicant [2-3]. In 2013, the court planned to dispose of the sealed commercial houses and parking spaces. After that, Chen raised an objection to suspension of execution to the court, while the court of first instance held that Chen only had the right of obligatory claim against the parking space in dispute, but could not oppose Xue's priority of compensation as the mortgagee, thus Chen's claim was rejected. The court of second instance held that, according to the provisions of "Reply on the priority of compensation for construction project price"(hereinafter referred to as the "reply") by the Supreme People's Court, the consumer rights and interests of the buyer of real estate enjoy the tilt protection. After the buyer pays all or most of the price, even if the transfer registration of the purchased real estate is not completed, the rights and interests of general mortgagee can not resist the consumer rights and interests."As an auxiliary facility of the building, parking space of the community is built to serve the residence of owners in the whole community, which belongs to the category of real estate and has independent use value and commercial value. The behavior of the owner buying and using the underground parking space is a kind of life consumption behavior, and the consumer rights and interests enjoyed by the owner for the parking space are closely related to their life, which involves the owner's living civil rights and interests. However, Xue's inheritance is essentially a kind of commercial behavior of investment and management. When the consumer rights and interests of Chen are damaged by the

execution of Xue's mortgage, it is more in line with the value pursuit of fairness and justice of law and judicial interpretation to give priority to the protection of consumer rights and interests of buyer."Therefore, the new judgment supported Chen's claim [4].

According to the basic theory that the traditional real right is higher than the creditor's right, mortgage is real rights of security, the purchased house without transferring ownership only enjoys the creditor's right, and which of the two rights comes first is not a question, while the issuance of the "reply" seems to overturn the traditional theory, and it is interpreted in practice that the consumption right interest can resist the mortgage of the real estate, even if the mortgage right is confirmed by the effective judgment of the court. Even after the termination of housing contract, the buyer's creditor's rights based on the seller's return of the price are still interpreted as the right of consumption, which is higher than the mortgage. Thus, even the legal mortgage may face the risk of being denied, and the security and stability of transaction may be destroyed at any time. The reason is the misreading of theory or the choice of reality, which is worthy of reflection [5].

## 2. Problem Analysis

The "reply" issued under special background plays a role of rule guidance in the solution of conflicts among multiple rights in the construction project, such as the house buyer's right, the construction company's project payment right, and the bank's mortgage right, which provides the court with a "sword of justice". As for the nature of priority of compensation for project payment, it is full of controversy from the beginning of Article 286 of the contract law. After that, it has gradually become a consensus to regard it as a legal mortgage.

The "reply" has directly stipulated that the above right is superior to the mortgage and other creditor's rights, so whether it is a legal mortgage has lost its significance. The stipulation of Article 2 in the "reply" that "after the consumer has paid all or most of the money for purchasing the commercial housing, the priority of the contractor to be compensated for the project price shall not be against the buyer" put forwards the consumer right, but theoretically speaking, the right of consumption, the priority of compensation, mortgage and creditor's rights belong to different fields, which are differentiated according to different standards, then it is impossible to sort and distinguish them in the same order. When explaining the theoretical basis, the drafter of the "reply" raised the consumer right to survival interests, and believed that "according to the comparison between the two, the interests of consumer belonging to survival interests should be given priority, and the interests of contractor belonging to business interests should take the second place." "No. 16 reply F.S. (2002) also considers the need to protect the interests of consumers in order to stabilize social order under the current situation." In the implementation of the "Caiwei villa project" case, Jinan Intermediate People's court also believed that "the consumer as buyer shall enjoy the priority because the interests of consumers belong to survival interests, while the interests of banks, builders, etc. belong to the business interests, thus the survival interests should be protected first, and the business interests should be in the second place." "From the perspective of maintaining the rights to subsistence and development of the masses, it has formed the opinion that the basic creditor's rights of the house purchasers should be paid in priority compared with the construction project price of contractor and the mortgage right of mortgagee." In this regard, the author believes that the rights to subsistence and development belong to the concept of political category, while the right to mortgage belongs to legal category, and there is no comparability. The first article of the "reply" uses "superior" and the second article uses "confrontation", and the biggest contradiction of the three kinds of rights conflicts lies in the priority, while it is not clear whether the different terms mean different meanings of expressions, thus in judicial practice, it is not improper to understand "confrontation" as "inferior to". Since then, there has been a strange phenomenon caused by the "reply", that is, the rights in different category have also been listed in order. If we want to root the abstract political rights in the civil field, the closest law is the "Consumer Protection Law", where the consumer should be defined as the natural person for living consumption, that is, the commercial housing used for living and no other commercial housing used for living under the name of buyer. Whether consumers or not, the civil rights arising from the purchase of commercial

housing can only be creditor's rights, and the principle of civil law is that the real right is higher than the claims, which is broken by the "reply", thus making this creditor's rights to the right to subsistence in political category."Home ownership" is everyone's basic right, so the right of consumers must be limited to residence rather than generalization. In practice, house purchase for investment, improvement-type houses and commercial houses are not the objects of the original intention of the law.

Judging by this standard, the right of the buyer to purchase parking space which can't resist the priority of compensation for project payment and the mortgages not the basic survival right of buyer, and the parking space is not the survival place of buyer. The purchase and use of parking space a kind of living consumption behavior is not related to the right to subsistence, so it is not the object to be protected by the "reply". The judgment of the case by the court in this paper is questionable.

As shown in the case, is there any other relief approach for the buyer's right to the garage? The author believes that the "Property Law" of our country provides special protection for parking spaces. Article 74 of this law stipulates that "parking spaces should first meet the needs of owners". The owner can obtain the right to use the parking space by purchasing or leasing. This article of the "Property Law" is a mandatory provision with effectiveness. Any violation of this provision will be invalid if the developer or the owner of parking space disposes the parking space to someone other than the owner. If we can deny the validity of mortgage on garage, the owner's right to buy the garage can certainly be guaranteed [6-7].

### **3. Extension of Thinking: the Necessity of No Mortgage on Garage**

As an important part of the real right system of security in property law, mortgage is the most widely used and ideal form of security in practice, which is known as the "king of security". In order to maximize the value of things, property law and guarantee law both prescribe the types of property that can be mortgaged and can't be mortgaged by enumerating, and there is no more dispute in practice. However, at present, due to the emergence of garage as a special property, and the regulation of existing property law on garage rights, it is worth studying whether the garage can be used as the property of mortgage. The case in this paper reflects the conflict between the realization of garage mortgage and the use right of buyer, which is universal in a large number of real estate disputes, and to a certain extent related to social harmony. The author believes that the garage should be restricted as the property that can not be mortgaged. The reasons are as follows:

(1) The garage with commonweal and publicity is not suitable for mortgage. The widespread existence and application of mortgage guarantee lies in its maximum realization of the value of things. The collateral is the property provided by debtor to guarantee the full performance of his debt, which is exchangeable and assignable, and the debtor will not destroy its value and form during its continuous use before delivering it after mortgage. However, the exchange and transfer of some properties may bring damage to the public interest of the state or society, whose realization of exchange value will be limited by the law. Among the six types of property that can not be mortgaged as stipulated in Article 184 of the "Property Law", they are either related to national interests and fundamental national systems, such as land ownership, cultivated land, homestead, household plots, private mountain and other collectively owned land use rights; or they are related to social public welfare undertakings or social public interests such as the facilities for education, medical care and other social public welfare of social organizations and public welfare institutions, including schools, kindergartens, hospitals and so on. As far as the garage is concerned, "the essence of parking space and garage is an integral part of the overall environment of the community, which is built to provide the convenience for the owners in the whole community, so its utilization should serve the needs of owners to purchase the proprietary parts; meanwhile, the problems of parking space and garage also belong to the scope of owners' membership, whose use and transfer should be subject to the use of buildings in the whole community and the interests of all owners."It can be seen that the right of garage with certain commonweal and publicity is related to the interests of non-specific groups, thus it's not all property that can absolutely be exchanged on

the market, with the value attribute of mortgage prohibited by law.

(2) The garage shall not be sold at will. The paragraph 1 of Article 74 of the "Property Law" clearly stipulates that "within the building area, the parking space and garage planned for parking cars shall first meet the needs of the owners", which reflects the value orientation of giving priority to the protection of owners' rights and interests in legislation. This provision is mandatory in nature, belonging to the mandatory provision with effectiveness, thus any contract concluded in violation of this provision shall be declared invalid. Imagine that if the garage is set with mortgage, when the developer is unable to pay the debt, the creditor will auction the garage to exercise mortgage, but it must first meet the needs of owner, while the form of "meeting the needs of owner" does not only mean selling. The paragraph 1 of Article 5 of the "interpretation on specific application of laws in the trial of disputes over the differentiated ownership of buildings" issued by the Supreme People's court stipulates that if the construction unit disposes the parking space and garage to the owner in the manners of selling, complementary using or leasing in accordance with the allocation ratio, it shall be determined that its behavior conforms to the provisions of paragraph 1 of Article 74 of the property law that "the needs of owner shall be first met". According to the above provision, the owner has the right not to participate in the auction, while if the sale is conducted with a third party or the public other than the owner, which violates the mandatory provisions, the sale is invalid and not protected by law. Therefore, the scope of auction participants is bound to be limited, which will lose the competitive significance of market participation in auction. Then, due to the restrictive provisions of the law on the use of garages, the market exchange value of garages cannot be maximized, thus it cannot meet the realization of mortgage guarantee function.

(3) The garage is inconvenient to mortgage due to its controversial ownership. "Property Law" and "Guarantee Law" both stipulate that "property with unclear or disputed ownership and use right" shall not be mortgaged. Although this provision is for a specific property with ownership disputes, the ownership of garage is controversial from the legal system level. The ownership of garage is stipulated in the "Property Law", whose paragraph 2 of Article 74 stipulates that "the ownership of the parking space and garage planned for parking cars within the building area shall be agreed upon by the related parties in the manners of selling, complementary using or leasing". In this regard, there are different opinions in the theoretical circle, such as "the ownership of developers", "the common ownership of owners", and "the theory before and after the implementation of law for distinguishing property". Since the ownership of garage is inconclusive, why do we have to set up mortgage for garage to cause the trouble in practice?

(4) Setting up mortgage on garage may affect social order. With the development of urbanization in China, driving as a component of modern social order has become an important part of urban people's daily life, thus parking space and garage are the important auxiliary facilities for the community owners to live together, which belongs to the supporting facilities of the community in nature. Providing garages to meet the needs of owners as much as possible is an essential element of every real estate development project, while the contradiction between the construction of parking spaces and garages in residential areas and the increasing parking demand of owners has gradually become a more difficult social problem to solve. Developers conduct the overall mortgage on garages, so the form of group disputes is often shown in the case of garage rights protection. If the garage is mortgaged, once the creditor exercises the mortgage, the community garage will be used or controlled by others other than owners, which will inevitably affect the immediate interests of owners. The conflict between owner's rights and mortgagee's rights will inevitably affect the normal life of the community, and then intensify the existing "parking difficulty" social problems, which is not conducive to the construction of a harmonious society. In this sense, garage is not only a property with economic value, but also a function of promoting social good governance.

The provision that the garage "shall first meet the needs of owners" in the "Property Law" has the Chinese characteristics, while why can't we make provisions with Chinese characteristics on the prohibition of garage mortgage? Based on the above analysis, the author believes that no matter from the perspective of legal theory or social sense, it is necessary for the law to make the following

provisions: The garage shall not be mortgaged. If a mortgage is set up, the mortgage shall be invalid.

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