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硕士学位论文

合作开发房地产合同中 合作双方权益保护之研究

**Legal Analysis on the Protection of the Cooperators' Rights and
Interests in the Co-operative Real-estate Development Contract**

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内容摘要

随着我国经济的高速发展，房地产开发亦呈现出迅猛的发展态势，近几年以来，房地产行业一直是社会各界聚焦的热点问题。基于房地产行业需要投入的资金额巨大，开发周期较长，投资风险高等特点，加上我国城市土地稀缺性以及我国特有的土地制度等诸多原因，房地产开发商舍弃独立开发而越来越来多的选择合作开发这一房地产开发模式。在合作开发成为房地产开发的重要模式之一的同时，由于其合同涉及行政审批许可、物权、合同等诸多法律关系，加上房地产行业高风险的特点，合作开发过程产生诸多纠纷的趋势愈演愈烈。然而，由于我国房地产行业诞生时间短，管理制度尚未成熟，房地产法律体系不健全，特别是针对合作开发房地产方面的规定更为稀缺，这导致了在相应的理论研究和实务处理过程中对合作开发房地产纠纷未能形成统一认识，纠纷解决效率低下，当事人合法权益未得到充分保障。因此，房地产合作开发的法律实践迫切需要展开这一领域的理论研究。本文便是以合作开发房地产合同为研究对象，意在通过对合作开发房地产合同的概念、类型、性质和法律特征以及效力及其影响因素等方面进行阐述，以便在深入探索合作开发房地产合同的同时结合实践对合作开发房地产合同履行过程中合作双方权益保护和纠纷的解决提出笔者的法律建议，希望能为合作开发房地产合同引发的纠纷形成高效的解决机制提供助益。

在诸多以合作开发房地产合同为研究对象的法学领域的文献资料中，对合作开发房地产的研究大致分为以下板块：一、探讨合作开发房地产合同的法律性质。这一板块的研究意在探讨颇具争议的合作开发房地产合同的概念和性质。二、分析合作开发房地产合同的效力的认定。这部分研究试图阐明合作开发房地产合同的表现形式，并介绍各种合作开发房地产合同的模式和本质，对合同的成立、生效、履行、变更、终止和解除作深入论述。三、对合作开发房地产过程中合建房屋的权属、登记的研究。这部分研究试图结合我国《物权法》等相关内容，对合建房屋的产权的原始取

得人等方面进行研究。四、论述合作开发房地产的合法性。此部分研究意在结合相关法律条文的规定的基础上，论述合作开发房地产的合法性问题。五、从国家干预的角度出发对合作开发房地产合同进行探讨。此部分论述以相关法律法规及政策性规定为依托，探讨相应法律规定的漏洞和政策规定的不足之处，同时提出国家干预合作开发房地产合同的措施。六、对合作开发房地产合同的法律纠纷的解决提出法律建议。这方面的研究意在通过对房地产立法的完善提出相应建议，同时对纠纷预防和处理提出相应建议。以上研究的维度各不相同，对相同问题例如合作开发房地产合同的性质等方面得出的结论不一，争议颇大。针对此种情况，笔者试图在阅读大量已有文献的基础上，结合自身法学知识，运用文献研究法、比较分析法、规范实证法以及价值分析法等研究方法对合作开发房地产合同内容进行深入研究。

本文正文分为四个部分。第一部分合作开发房地产合同概述。本部分对合作开发房地产合同的概念、类型、性质、法律特征进行详细阐述。第二部分合作开发房地产合同的效力及影响因素。本部分内容首先对合作开发房地产合同的成立和生效谈起，包括成立要件、生效的一般要件和特殊要件等内容，再则对影响合作开发房地产合同效力的因素作重点分析。第三部分合作开发房地产合同的履行及其法律问题。本部分内容重点探讨了合作开发房地产合同合同履行的责任以及若干典型的法律问题，为最后一章的内容作铺垫。第四部分合作开发房地产合同中合作双方权益保护的法律责任建议。本部分试图遵循本文展开的主线，即合同概述、生效、履行、纠纷解决，分别从宏观、微观的维度对合作双方合法权益的保护提出具有建设性的建议。

关键词：合作开发房地产合同；分析；权益保护

Abstract

With the fast growth of China's economy, the real-estate development also shows the state of the rapid development. The real estate industry has always been a hot issue in recent years. More and more the real estate developers turn to choose the real estate development model called the co-operative real-estate development. Generally speaking, these problems are generated by the following factors: the gigantic capital investment, the long development cycles, the high investment risk and the other inherent features existing in the real-estate development. Moreover, the particular reasons in China, such as the scarcity of land resources and the current land system, also influence the real estate developers' selection preference. In the meantime, because the contract related to the co-operative real-estate development involves many legal matters, which include the administrative examination and approval of real estate development, the real right and the contractual itself, coupled with the high risk of the real estate industry, the process of co-operative development is likely to cause a lot of disputes. However, the imperfect real-estate's legal system in real-estate development, lead to a lot of problems, among which exist the issues of the inharmoniousness between theory and practice, the low efficiency of dispute resolution and the rights of the parties not being fully protected. Therefore, the legal practice of the co-operative development needs urgently researching the theory. This paper adopts the co-operative development as the research object, setting forth its definition, categories, nature, legal characteristics, effectiveness and the factors of influencing. Then it puts forward suggestions on the rights protection of both partners during the Cooperation, hoping that this paper is of great theoretical and practical significance to increase the likelihood of effective problem solving.

In many cooperative development of real estate as the research object of the contract law in the field of literature, the study of cooperative development of real estate is roughly divided into the following parts: cooperative development of real estate, and to examine the legal nature of the contract. The research of this plate is intended to discuss the controversial concept of

cooperative development contract of real estate and property. Second, the analysis of the effectiveness of the cooperative development of real estate contract. This part of the study attempts to illustrate the performance of the cooperative development of real estate contract form, and introduce all kinds of cooperation mode and the nature of the contract, real estate development to the establishment of the contract, in operation, performance, alteration, termination and deeply discussed. Three, to the cooperative development of real estate & housing ownership, in the process of registration. Part of this research is trying to combine our country the property law and other related content, property of & housing in the perspectives of the original one. Fourth, discusses the legitimacy of the cooperative development of real estate. This research aims to combine some relevant legal provisions, on the basis of the provisions of the deals with problems of the legitimacy of the cooperative development of real estate. Five, from the perspective of state intervention to discuss cooperation development of real estate contract. This section discusses, which is based on relevant laws and regulations and policy provisions, discusses the vulnerabilities of corresponding laws and regulations and policy deficiency, and puts forward measures of state intervention in the cooperative development of real estate contract. Sixth, the cooperative development of real estate contract law legal advice on the solution of the dispute. This aspect of the study is intended to put forward the corresponding Suggestions for the perfection of legislation of real estate, and puts forward corresponding Suggestions for disputes prevention and treatment. Above research dimensions of each are not identical, to the same problems such as the nature of the cooperative development of real estate contract conclusion is differ, be quite controversial. Aimed at the situation, the author is trying to read, on the basis of the existing literature, combined with their own knowledge of law, using literature research, comparative analysis, empirical method and the methods of value analysis method to conduct the thorough research to the cooperative development of real estate contract content.

In this paper, the text is divided into four parts. The first part of cooperative development of real estate contract overview. This part of the concept of cooperative development of real estate contract, type, nature and features of the law in detail. The second part of the validity of the cooperative

development of real estate contract and its influencing factors. This part of the first cooperation of the contract of real estate development and effect, including established condition, general requirements and special requirements, etc, moreover the influential factors of the cooperative development of real estate contract effectiveness as a key analysis. The third part of the performance of the contract and the cooperative development of real estate legal problems. This part mainly discusses the cooperative development of real estate contract responsibility for the performance of a contract and several typical legal issue, for the content of the last chapter. The fourth part of the cooperative development of real estate cooperation in protection of the rights and interests of both sides in the contract of legal advice. This part tries to follow this article on the main line, namely overview, effect, fulfill the contract, dispute resolution, respectively from the macro and micro dimensions for the protection of the legitimate rights and interests of cooperative parties put forward constructive Suggestions.

Keywords: co-operative real-estate development contract; analysis; the protection rights and interests

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