

Digital Building Permit As a Complex Permitting Document

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ABSTRACT

The article puts forward a proposal for the formation of a digital building permit as a complex permitting document, the formation and issuance of which will include compliance with the requirements for landscaping both at the start of construction and at its completion. The digitalization of urban planning regulation, on the one hand, and the digitalization of the construction area of regulation should be harmonized through the improvement of the structure of the urban planning plan of the land plot, the implementation of which for the location of the capital construction facility will include the implementation of measures for landscape reconstruction of the development area. A comprehensive permitting document in the sense under discussion covers the stages of capital construction immediately preceding capital construction and the stages of subsequent landscape transformation of the territory, which compensates for the anthropogenic load of the erected object. The totality of each of the load values in the further development of the considered regulation, combined into a single data set (big data), will make it possible to resolve the issue of the load of the entire settlement as a whole with all possible certainty, without using calculation methods, whose estimates are of a probabilistic nature.

Keywords: integrated building permit, architectural and landscape reconstruction, digitalization of urban planning activities, digitalization of construction

Article 747 of the Civil Code of the Russian Federation formulates several additional obligations of a customer in a construction contract, which appear solely due to special characteristics the subject-matter of this contract. Among other things the customer shall ensure transportation of goods to the address of the facility under construction, connection of temporary power supply networks, water and steam pipelines; and provide other services. When talking about provision of other services, we should consider Part 4 Article 52 of the Urban Planning Code of the Russian Federation, which states: when construction, reconstruction, overhaul of a real estate is performed under a construction contract with a developer (technical customer, other person), the latter shall prepare a land for construction and (or) a real estate facility for reconstruction, or overhaul, and deliver materials and results of engineering surveys, project documentation, and a building permit to the other party of the contract, be it a sole proprietor or a corporate legal person.

The above-quoted regulation makes it clear that it is the customer's responsibility to prepare the land and ensure that its condition shall meet legal requirements on suitability, and obtain a building permit. A building permit in modern regulatory environment and the law enforcement practice serves as a bifurcation point, a kind of milestone, which means shifting from one stage of a construction project to another. The stage preceding the building permit relates not as much to contractual legal relations, as to solution of both technical and financial issues. Moreover, at this stage, financing issues prevail over technical regulation, since the project, as a rule, is financed by a bank that has its own established set of requirements, which rarely can be smoothly solved by the customer of a capital construction.

It should be mentioned that landscape culture regulations are not covered either by the civil law that establishes legal principles for valuable consideration under the contractual obligation, or by the construction codes (at the federal level — the Urban Planning Code of Russia and the corresponding regional acts), that list principles of public regulation of licensing and permit issuing in the capital construction treated as a technological area with an increased hazard for participants in the construction processes, due to which operations can only be performed under ultimate extent of regulations. Landscape culture environment is deemed as characteristics of real estate under capital construction, which are aimed not only at satisfying its functions in the real estate or territorial development, but also at meeting environmental requirements of society and aesthetic needs of the community residents where the real estate is being constructed.

Certain regions or communities are taking steps to control the described relations as early as at the stage of visualization of the capital construction facility to be erected in the general architectural concept of the area. For, St. Petersburg has a regional Law of St. Petersburg No.692-147 dated December 2, 2015 "On procedure for approval of architectural and urban planning appearance of a housing construction facility and non-residential capital construction projects"; its normative regulation involves the facility appearance approval to be issued by the authorized executive body (for types of facilities as

prescribed by regulations). By virtue of legal regulations, no approval of the architectural and urban planning appearance of the facility shall prevent issue of a building permit; however, formally this provision has not been documented.

Requirement to get approval of the architectural and urban planning appearance relies upon clause 130 of the exhaustive list of procedures in housing construction, attached to the Decree No.403 of the Government of the Russian Federation dated April 30, 2014, therefore, approval can be obtained through a judicial review procedure, covering not only residential housing, but also other capital construction facilities (Resolution of the Judicial Board for Administrative Cases of the Supreme Court of the Russian Federation of September 14, 2017 No.78–APG17–12).

The same way, administrative procedures for approvals of the construction facilities appearance have been adopted in a number of other constituent entities, for example: Moscow region, Yamalo-Nenets Autonomous District, municipalities — the cities of Kazan, Simferopol, Yuzhno-Sakhalinsk, Yalta, etc.

However, as shown above, approval of architectural and urban planning is a standalone case in external appearance legal regulation; and relates, as a rule, only to the facade. Meanwhile, by virtue of the proposed regulation landscape reconstruction is a visual representation of the facility not only in terms of beautification of the community territory, but also in terms of the anthropogenic load of the capital construction facilities on natural resources, including consumed resources: water (consumption, sewage), air (greenery) and space (zones, land plots) — the load that a community makes on the environment and natural resources.

It should be remarked that the legal nature of relationship in territory development and, makes it possible to classify a construction contract into several categories by the parties involved thereto: the customer is a public authority (such relations are usually governed by the Federal Law No.44–FZ of 05.04.2013 “On the contract system in procurement of goods, works, services to meet state and municipal needs”); parties to the contract are private persons — participants in shared construction (governing law is Federal Law No.214–FZ of 30.12.2004 “On Participation in Shared Construction of Apartment Buildings and Other Real Estate Facilities and on Amending Certain Legislative Acts of the Russian Federation”); and both parties are entrepreneurs liaised by investment relations — governing law is the Federal Law No.39–FZ of 25.02.1999 “On investment activities in the Russian Federation in the form of capital investments.” Obviously, each category and type of contractual relations has its own peculiar characteristics in terms of the rights and obligations of the parties, and in case of public entity the situation is more complicated, since the latter can influence the contractual relationship. Any of the listed contractual relations can be supplemented with landscape reconstruction provisions.

However, it is an ordinary situation that a developer gets a building permit, which serves as a starting point for the parties to fulfill their counter obligations under a contract, related to construction as a type of business.

The law enforcement research articles show that a construction permit confirms the compliance of the designed construction with the requirements of both urban planning and land legislation. For instance, E.A. Ostanina points out that this approach is supported by Article 51 of the Urban Planning Code of the Russian Federation, and by the logic of legal practice, which severely punishes construction without a permit⁵⁹. However, this document also one more practical effect in terms of claims about unauthorized construction. The law enforcement trend focused on legalization of already finished capital construction projects used to be applied by the courts was identification of list of actions to get a missing construction permit and, after it has been obtained, recognition of the construction facility as meeting requirements of Article 222 of the Civil Code of the Russian Federation, that is, claiming the facility as legally constructed⁶⁰. However, we gradually started to realize that a capital construction facility shall comply not only with sanitary-hygienic, fire-prevention regulation, building codes and rules, but also with urban (engineering) planning, social and communal infrastructure to ensure sustainable life of residents of such capital construction facilities; thus, this shift in understanding led to a gradual change in legal practice and amendments in the law on unauthorized construction (Federal Law of August 3, 2018 No.339–FZ “On Amendments to Part One of the Civil Code of the Russian Federation and Article 22 of the Federal Law “On the Enactment of Part One of the Civil Code of the Russian Federation”). Obviously, development of such understanding of capital construction permits should, over time, incorporate also general ecological and aesthetic ideas of the majority about the construction, which will satisfy not only functional needs of the customer, but the needs of the community. Anthropogenic load in off-design, or rather, non-complex development (otherwise called point-development) brings up the issue of limited communal resources, followed by administrative limitation in utilities consumption. Striking evidence of such situation is the Russian resort city of Sochi⁶¹.

Regulation in the construction relations can be further improved by combining construction-regulating procedures and civil right regulation procedures related to construction facilities in terms of their legal and economic acknowledgment as real

⁵⁹ Ostanina, E. A. What Does the Building Permit Permit? Commentary on the Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated September 27, 2016 No.309–ES16–5381 // The Herald of Commercial Justice of Russia. 2016. No.11. P. 19.

⁶⁰ Shcherbakov, N. B. The Value of Building Permits. Commentary on the Resolution of the Presidium of the Supreme Court of the Russian Federation Dated 11.11.2015 in Case No.301–PEK15 // The Herald of Commercial Justice of Russia. 2016. No.1. P. 25–27.

⁶¹ Memo “Interruptions in water supply in the Central District of the city discussed on November 20 at the operational headquarters meeting, held by Aleksey Kopaigorodsky the head of the resort,” like many others, illustrates the situation with district water supply interruptions in Sochi [Electronic resource]. URL: <https://kubnews.ru/obshchestvo/2020/11/20/zhiteli-sochi-chetvertyy-den-ostayutsya-bez-vody/> (date of access: 26.04.21). Similar note [Electronic resource]. URL: <http://www.privetsochi.ru/blog/sitiproblem/88022.html> (date of access: 26.04.21).

estate. For example, it is proposed to combine commissioning of a capital construction facility and registration of the title into a single procedure⁶².

However, there might be another trend, also focused on optimization of relations under a construction contract: to combine the procedure for obtaining permits for earthworks (preparation of land to make it suitable for construction), construction permits, and registration the land with the urban planning plan; which shall make a unified information and support document, indicating compliance (non-compliance) of the construction facility with the requirements of engineering, social and communal infrastructures, which will be supported by a digital platform offering visualization of actual technical condition of the capital construction facility, and visualization of the planned environmental and aesthetic reconstruction intended for beautification of the developing territory. Such digital optimization on a single platform will gradually provide visual representations not only about development in compliance with general settlement plan, but also about general anthropogenic load together with real proposal of required compensatory or reconstruction measures in order to restore the balance of natural resources, impaired during construction of the facility.

In practice, before initiating capital construction, it is necessary to perform so-called earthworks and felling (demolition) of green spaces, and ensure connection of the constructed (reconstructed) facility to the utilities networks. In a formal legal sense, before obtaining a building permit, as specified in Part 2 Article 48 of the Civil Code of the Russian Federation, it is necessary to prepare project paperwork, which means a package of documents with text materials annexed with maps (diagrams) that describe architectural, functional and technological, structural and engineering solutions for construction or reconstruction of capital construction facilities or their parts. Regional landscaping-governing legislation uses a legal institution of earthworks permit, as a rule, it is called an order for earthworks. To give evidence of regional regulation, we can name Article 20 of the Law of Moscow dated April 30, 2014 No. 18 "On Landscape Improvement in Moscow", Resolution No.2433 of the Administration of Yekaterinburg, Sverdlovsk Region dated November 27, 2020 "On Approval of Administrative Regulations for the Municipal Service "issue of earthworks permit", Resolution No.3585 of the Executive Committee of Kazan Municipal Unit of December 7, 2020 "On Amending No.4520Resolution of the Executive Committee of Kazan dated 01.08.2014 "On Approval of Administrative Regulations", etc. There is no legal uniformity in term of earthworks here, but, as a rule, it means work related to excavation of soil to a depth of more than 30 cm (except of arable work), installation and driving of piles during construction of facilities and structures of all types, underground and on-the-ground engineering networks, communications, as well as dumping soil to a height of more than 50 cm (as per Article 4 of the Law No. 191/2014–OZ of Moscow Region of 30.12.2014 "On Landscape Improvement in Moscow Region").

The same refers to a permit for cutting green spaces. The permit application procedure is regulated either at the municipal or regional levels, depending on distribution and redistribution of landscaping authorities. For example, in Moscow, the permit application procedure (cutting consent) is regulated by the No.121–PP Decree of Moscow Government of February 27, 2007 "On Amending Resolution No.743–PP of Moscow Government dated September 10, 2002 ", which approved the Rules for creation, maintenance and protection of green spaces in Moscow.

Similar procedure is applied approval of the architectural and town-planning appearance of the capital construction facility, examples of which can be seen above.

Insofar as the above-described procedures are not within the unified system of legal regulation and not linked with causal relation, developers usually ensure them simultaneously, for the alleged purpose of time saving. It means that an earthworks permit application and the earthworks are performed in isolation from demolition (cutting) of green spaces, the project documentation for the capital construction is prepared and approved in accordance with the terms of reference of the construction contract in isolation from other routines. In fact, all these measures are actually construction works of the so-called zero cycle, thus, the developer applies for a construction permit, while performing construction. However, it is quite possible that a construction permit will not be issued, and are more than enough formal legal reasons to refusal, so in this case results construction works shall be qualified as an unauthorized building subject to demolition. There is bright and illustrative example of such a situation in the case No.A75–12454 / 2016, resolved by the Decision No.304–ES18–2923 of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 07.08.2018 — the case is included in the Review of Judicial Practice of the Supreme Court of the Russian Federation, No.4, 2018. There plenty of cases that show obvious overconfidence of the developer who wants to save time, but comes to negative results and failure of the construction contract. It seems that construction technologies and speed of construction are somewhat ahead of the administrative and licensing system that regulates relations in capital construction.

The concept of "New Rhythm of Construction", that is expected to ensure normative constructional regulation under the National Action Plan aimed at improvement of employment and income, economic growth and long-term structural changes in the national economy (approved by the Government of the Russian Federation on September 23, 2020, protocol No.36, section VII), can accelerate construction procedures, reform the regulatory legal system in urban planning and construction.

⁶² On amendments to Article 55 of the Urban Planning Code of the Russian Federation and certain legislative acts of the Russian Federation in terms of ensuring state registration of titles based on a commissioning permit for a capital construction facility: draft Federal Law No.1099901–7 [Electronic resource] // System ensuring legislative activity. URL: <https://sozd.duma.gov.ru/bill/1099901–7> (date of access: 31.01.21).

We believe that for the purpose of reformation it is advisable to get a unified digital space that will combine all licensing procedures, before, during and after obtaining a construction permit, such base shall also involve permissive (prescriptive) requirements for landscape reconstruction on a developed territory, when a capital construction facility is commissioned. This procedure can be called "digital integrated building permit". The idea of digitalization of the construction industry is not a new doctrine. For instance, we agree Yu. G. Leskova that application of information (digital) technologies and creation of digital platforms for self-regulation of construction is an urgent matter and requires legal regulation⁶³.

Besides, public law regulation of licensing in construction relations provides more opportunities for development in this direction. For instance, these relations can be regulated in the current system of information support for the developer in urban planning (for an unlimited number of access), where an Urban Plan for the Land (hereinafter referred to as the UPL) is created. In accordance with Part 1 Article 57.3 of the Civil Code of the Russian Federation, UPL is a document that contains information for the purpose of architectural and civil engineering design, construction and reconstruction of real estate within the limits of land; in some cases, UPL can be obtained before selection of land based on an approved land survey project and (or) layouts of the land on the cadastral plan of the territory⁶⁴. UPL is presented in a package of documents for a construction permit. In accordance with clause 16, part 3 Article 57.3 of the Civil Code of the Russian Federation, UPL shall include details of public authorities that establish requirements for improvement of the territory, that is, the plan only shows the list of requirements, but not the fact that the developer complies with them or has applied for a permit to comply with them.

This information must be recorded in box 10 of the UPL form, approved by Order No.741 / pr of the Ministry of Construction of Russia dated April 25, 2017.

Thus, the current regulations provide an opportunity to prohibit commencement of land preparation for development and legalization of the so-called earthworks on the federal level by clarifications to be introduced into the UPL form, and first of all, by applying digital visualization of the construction facility and the existing landscape reconstruction of the territory. Such clarifications shall not only list requirements for the territory improvement, but also divide them into categories: 'to be fulfilled before obtaining a construction permit', and 'to be fulfilled after commissioning of the facility'; also, clarifications shall include totally consumed resources (averaged anthropogenic load). It would be recommendable to ensure further sustainability of the construction sector by implementing requirements to landscape (or architectural and landscape) reconstruction that include not only land improvement works, but also making the land (as an element of the planning structure) comply with the natural environment of the climatic zone, which means not only decorative elements and greening, but also landscape works and works to preserve of macroclimatic conditions, including hydrological ones. The prospect of transforming the rules of community beautification into the rules of architectural and landscape reconstruction is still under discussion, however, public authorities are creating tools to accumulate opinions of residents⁶⁵, and construction industry in general must take this opinion into account as a formal element.

One can object that improvement of the territory falls within the powers of local self-government bodies and therefore in cannot be included into federal regulations under the existing system of the powers separation; however, this objection is not sound, since we imply that federal regulations shall only include information whether improvement requirements are complied with, and details of the requirements. This consolidation of information does not contradict the principles of organization of local self-government⁶⁶. Therefore, UPL can record not only improvement requirements, but also the fact of their fulfillment so that the next permissive stage — issue of a construction permit shall no longer rely on tentative agenda that allows the developer to save time for their benefit, but shall ensure legal certainty in the sequence of the licensing procedures.

In order to put into life the above-described plans of the Government of Russia in terms of digitalization of the construction industry, it is important to create a digital integrated construction permit, which will cover the whole range of works, starting from land preparation (earthworks, felling, etc.). The integrated permit will prescribe landscape reconstruction measures; that being completed (the permit being redeemed), the facility will be commissioned and the title to the constructed or reconstructed facility will be registered. Moreover, creation of a united database (big data) about the total load will give the idea not only about the anthropogenic load, but also about protection of personal non-property rights of tenants — the rights to a favorable environment. This is a new characteristic in protection of subjective rights of parties to civil circulation and public regulation of urban planning, which is widely discussed in the modern research papers as digital transformation of subjective civil rights⁶⁷.

Based on the foregoing, we can, firstly, claim the necessity to introduce a digital construction permit as an obvious stage in development of the construction industry that meets modern requirements of the structure of a construction contract;

⁶³ Leskova, Yu. G. Application of Information (Digital) Technology in Self-Regulation as a Condition for the Development of the Construction Sector and the Legal // *Civil Law*. 2018. No.5. P. 9–11.

⁶⁴ Mayboroda, V. A. Urban Plan of Land Plot: Substitution of Managerial Function for the Information One // *Town-planning Law*. 2016. No.3. P. 3–6.

⁶⁵ See, for instance, Order No.913/pr of the Ministry of Construction of the Russian Federation of December 30, 2020 "On approval of guidelines for involvement of citizens, their associations and other persons in issues of urban environment development".

⁶⁶ Babichev, I. V. Regulations and Principles of the European Charter of Local Self-Government as a Component of the Legal Doctrine of the Russian Self-Government Model // *Constitutional and Municipal Law*. 2018. No.6. P. 67–74.

⁶⁷ Razuvaev, N. V. Digital Transformation of Subjective Civil Rights: Problems and Prospects // *Theoretical and Applied Law*. 2021. No.1. P. 18–38.

secondly, include in the legal concept of a digital integrated construction permit other requirements of land improvement, including landscape reconstruction requirements; thirdly, reorganize the structure of the urban plan of the land, which must be obtained when applying for an ordinary construction permit and include a visual digital representation of the future appearance of the capital construction facility and landscape reconstruction as a set of measures compensating for the load on natural resources; and only when such measures are performed, the developer shall obtain a similar integrated (digital) permit for commissioning.

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