

On the Problems of Application of Institute of Cancellation of the Documentation on a Lay-out of Territory, Recognition of Separate Parts of Such Documentation not Subject to Application

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ABSTRACT

The article discusses the problems of applying a relatively new institution of urban planning legislation: cancellation of territory planning documentation, recognition of certain parts of such documentation inapplicable. The author tries to identify the differences between the cancellation of such documentation and the recognition of its individual parts as inapplicable, considers a number of issues related to the possibility of canceling the territory planning documentation that meets the legal requirements. Attention is also paid to the determination of the list of the persons authorized to cancel the territory planning documentation, the need for public hearings in the process of such cancellation. Finally, the author draws the main conclusions, once again drawing attention to the presence of systemic shortcomings of the existing public law regulation.

Keywords: territory planning documentation, cancellation, public hearings, trust in state actions, administrative law

1. Introduction, problem statement

In August 2019, the federal law “On Amendments to the Urban Planning Code of the RF (hereinafter the UPC of the RF) and Certain Legislative Acts of the Russian Federation”¹ entered into force introducing the institution of cancellation of territory planning documentation, recognition of certain parts of such documentation as inapplicable².

Art. 2 of the UPC of the RF places construction among the principles of urban planning legislation, including on the basis of the territory planning documentation (hereinafter the TPD)³ necessary for formation of a comfortable urban environment.

For example, in the absence of such documentation, it is impossible to ensure step-by-step development of the territory in order to synchronize construction of housing and social infrastructure facilities, construction of large linear facilities providing the population with communal resources, transport accessibility of the territories.

According to O. A. Zharkova, there is a rather noticeable legal vacuum in the legislation regarding TPD⁴. For example, the sources of funding of the preparation (development) of such documentation are not clearly defined, which allows public authorities to “stimulate” individuals to develop a TPD at their own expense, according to the principle: if you do not develop a TPD, you will not receive a construction permit, you will not be able to implement the project on other grounds⁵.

At the same time, having invested significant funds in the development of TPD, the investor does not receive any guarantees that the planning solutions being part of such documentation can really be implemented⁶.

The dynamism of the urban planning legislation⁷ entails constant adjustment of urban planning documentation which, in its turn, leads to situations where different types of such documentation start

¹ On Amendments to the UPC of the RF and Individual Legislative Acts of the RF: Federal Law dd. 02.08.2019 No.283-FZ (hereinafter FZ No.283-FZ). The statutory regulation and judicial practice are given according to Consultant Plus RLS.

² See: p. 18–20 Art. 45 of the UPC of the RF.

³ Which currently includes territory planning and demarcation projects (hereinafter TPP, TDP) according to p. 4 Art. 41 of the UPC of the RF.

⁴ Zharkova O. A. Provision of Land for Construction Purposes and Documentation on the Planning of the Territory [Predostavlenie zemel'nogo uchastka dlya celej stroitel'stva i dokumentaciya po planirovke territorii] // Statute [Zakon]. 2013. № 5. Pp. 65–72.

⁵ For the existing practice of issuing urban planning plans of land plots without specifying the place of the permissible location of the capital construction facility in the absence of a developed TPD, see [Electronic source]: URL: https://zakon.ru/blog/2014/5/16/novaya_praktika_vas_rf_dlya_togo_chtoby_stroit_gradostroitel'nogo_plana_nedostatochno_eshhe_obyazatel (accessed on: 08.03.2020).

⁶ In other words, that it will be really able to build the capital construction facilities planned in such documentation.

⁷ In 2019 alone the UPC of the RF was amended six times.

contradicting one another. For example, it is quite possible that after the approval of the territory planning project (hereinafter the TPP), the land use and development rules (hereinafter the LDP) will be changed, which will entail the impossibility of placing facilities in accordance with the parameters contained in the PPT. The possibility of implementing planning decisions as part of the TPD may be also influenced by the adjustment of the rules in the field of normative and technical regulation (sets of rules).

For example, the previously approved TPP provided for the creation of a school for 250 students, while the existing standard technical regulation allow for the height increase for educational organizations, which allows placement of the facility of a significantly greater capacity^{8,9}. In addition, the possibility of placing facilities in the TPD may be influenced by the plans of the public authorities to create infrastructure facilities (motor roads, for example)¹⁰. 10. In the situations considered above, it becomes necessary to adjust the TPD, which is often just as time-consuming and costly as approving new documentation. In view of the above, the analysis of the possibility of cancellation, recognition of the TPD (its individual parts) as inapplicable as an “alternative” to amendments to the TPD is of undoubted practical interest. This analysis will be the subject of this article.

2. Cancellation of territory planning documentation and its recognition as inapplicable. Differentiation of the notions

Paragraphs 18-20 of Art. 45 of the UPC of the RF use the following wording: the procedure of amending the TPD, the procedure of canceling such documentation or its individual parts, the procedure of recognizing certain parts of such documentation inapplicable.

Even the application of the grammatical interpretation of this norm allows making the unambiguous conclusion that the recognition of parts of the TPD as inapplicable is not the same as the cancellation of such documentation.

The correctness of this conclusion is also confirmed by the fact that even before the adoption of FL No. 283-FZ, the UPC of the RF contained a list of cases in which the TPD was declared ineffective (including in part)¹¹.

The adoption of AFL No. 283-FZ clearly highlighted the possibility of the existence of two independent Procedures (the cancellation of the TPD and the recognition of certain parts of the TPD as inapplicable were separated).

When analyzing these notions, it is necessary to take account of the practice existing at the level of the supreme judicial authority of including TPDs into regulatory legal acts¹².

As noted by M. B. Rumyantsev, the general principle of cancellation and suspension of the operation of regulatory legal acts is the provision that this function primarily belongs to the law-making bodies that adopted them¹³.

Accordingly, cancellation of a regulatory legal act (TPD) is an integral part of the lawmaking process carried out by public authorities within their competence.

The need to cancel TPD may be due to a wide variety of circumstances¹⁴ (for example, the obsolescence of the space-planning solutions contained in it), among which the recognition of such documentation as ineffective on the basis of a court decision is worth noting.

⁸ In certain situations, it may be necessary to change both the parameters and the functional purpose of the capital construction facility stipulated in the TPD. For example, the previously approved TPP provided for the placement of a retail facility, but now the shortage of places in preschool institutions has reached such a level that it requires placement of a kindergarten.

⁹ Thus, the availability of a previously approved TPD may prevent effective satisfaction of the public interest in providing the population with infrastructure facilities.

¹⁰ This situation may be viewed from another side: creation of the facilities stipulated by the TPD can “put an end” to creation of linear facilities servicing, among other things, public interests.

¹¹ Part 12.6 of Art. 45 of the UPC of the RF, part 21 of Art. 46.9 of the UPC of the RF.

¹² See: cassational ruling of the Judicial Chamber on Administrative Cases of the Supreme Court of the RF (hereinafter the SC of the RF) dd. 05.06.2019 No. 87-KA19-1, appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd. 30.01.2019 No. 45-АПГ18-2, ruling of the Judicial Chamber on Economic Disputes of the Supreme Court of the RF dd. 18.12.2014 No. 306-ЭС14-3391 in case No. A06-2224/2013.

¹³ Rumyantsev M. B. Abolition of Legal Norms in Legislative Process of the Russian Federation as a Law-making Decision [Otmena pravovyh norm v zakonodatel'nom processe RF kak pravotvorcheskoe reshenie] // State Power and Local Self-government [Gosudarstvennaya vlast' i mestnoe samoupravlenie]. 2018. № 11. Pp. 37–41.

¹⁴ More difficult to consider is the question of whether a public authority can cancel a TPD that has not been recognized ineffective by the court, which fully complies with the norms of the current legislation, but hinders the effective implementation of public interests? A possible answer to it will be given in Section 3 of this article.

It seems important to note that the court recognition of a regulatory legal act (including TPD) as ineffective does not mean that this act is canceled.

In the practice of the Constitutional Court of the RF (hereinafter the CC of the RF), a position was developed that the court recognition of a regulatory act contrary to the federal law is not its cancellation by the court itself, the more so its invalidation from the moment of publication, but means its recognition as ineffective¹⁵ and, therefore, it shall not be applied from the moment the court decision comes into force.

Besides, it should be noted that an act recognized by a court as illegal cannot be considered effective, entailing legal consequences, regardless of whether it will be formally canceled by the body that issued it¹⁶. Moreover, the court may declare the relevant regulatory legal act ineffective both from the moment of the court decision and from the date of its adoption¹⁷.

Thus, the public authority canceling the TPD declared ineffective by the court decision, only confirms its invalidity.

As distinguished from the cancellation of the TPD which may be due to various circumstances (including a court decision), the recognition of certain parts of the TPD inapplicable can only be the result of the adoption of a relevant regulatory legal act by public authorities. This predetermines that while the cancellation of a regulatory legal act can be carried out with a retroactive effect (i.e., the act is recognized canceled from the date of its entry into force), the suspension of a regulatory legal act is possible only from the moment when the act ordering its suspension was adopted.

Also note possibility of drawing certain “parallels” between the institutions of recognizing certain parts of the TPD inapplicable and suspending the validity of a regulatory legal act¹⁸ which allows identifying a certain control function incorporated in the content of part 18-20 of Art. 45 of the UPC of the RF.

Let us imagine the following situation: a local self-government body developed a TPD for placing a facility of local significance (a library, for example)¹⁹, but later this territory became necessary to a constituent entity of the RF for placement of a facility of regional significance²⁰ (a snow-melting station, for example).

In the situation under consideration, it seems logical to suspend the operation of the municipal regulatory legal act on the approval of the TPD in order to meet the public needs of a higher level rather than to cancel this act, given that the effect of the suspended act, unlike the canceled act, can be renewed²¹.

Thus, the use of the institution of recognition of the TPD inapplicable instead of the cancellation of the TPD will avoid the need to re-develop such documentation, obtain all approvals, thereby contributing to saving municipal budgets.

Speaking about the cancellation of TPD, recognition of its individual parts inapplicable, I would like to draw your attention to two points.

Firstly, it seems necessary to amend parts 18–20 of Art. 45 of the UPC of the RF in order to be able to recognize the TPD inapplicable as a whole rather than its individual parts only.

Otherwise, the existence of this institution makes no sense at all due to the fact that the parts of the TPP that are not recognized as inapplicable (for example, in terms of determining the boundaries

¹⁵ See: Ruling of the CC of the RF dd. 27.01.2004 No. 1-П. In a dissenting opinion to this decision, Judge A. L. Kononov also concludes that differentiating between the recognition of the illegality of regulatory acts in terms of the consequences into ineffective (i.e., obviously having no real effect) and invalid (i.e. non-existent) is not convincing or even understandable.

¹⁶ See: Ruling of the CC of the RF dd. 27.01.2004 No. 1-П.

¹⁷ See: On the practice of court consideration of cases of challenging regulatory legal acts and acts containing clarifications of the legislation and possessing regulatory properties: Resolution of the Plenum of the SC of the RF dd. 25.12.2018 No. 50, par. 38.

¹⁸ This institution is provided for by Art. 48 of Federal Law dd. 06.10.2003 No.131-FZ “On the General Principles of Organization of Local Self-Government in the RF”.

¹⁹ According to Part 19 of Art. 1 of the UPC of the RF, facilities of local significance are capital construction facilities, other facilities, territories necessary for local authorities to exercise powers in issues of local significance and within the transferred state powers and having a significant impact on the socio-economic development of municipal districts, settlements, urban districts.

²⁰ Part 20 of Art. 1 of the UPC of the RF defines facilities of regional significance as capital construction facilities, other facilities, territories necessary for exercising powers in issues referred to the jurisdiction of the constituent entity of the RF, state authorities of the constituent entity of the Russian Federation, and having a significant impact on the socio-economic development of the constituent entity of the RF.

²¹ The independent regulatory legal act “On renewal of the effect of the TPD” will have to be adopted.

of the zones for placing facilities) do not allow achieving the goals of non-application of the TPD, preventing the implementation of public needs of a higher level²².

Secondly, there is a need to specify the understanding of the term “part of the TPD” at the level of legislation or to have it clarified at the level of the Ministry of Construction of Russia. We believe that such parts should be imply not only TPD sections according to Art. 42, 43 of the UPC of the RF, but also the part of the territory for which such documentation was developed.

Such an understanding of the term “part of the TPD” is supposed to allow using the institution to meet public needs in the placement of facilities of particular significance without the need to carry out a “complete revision” of such documentation every time. Moreover, its correctness is evidenced by the fact that the amendments made by Federal Law No. 283-FZ to Art. 41.1 of the UPC of the RF provided for the possibility of preparing TPD both regarding the elements of the planning structure²³ and individual land plots.

Summing up, it seems possible to draw the following conclusion regarding the relationship between the TPD cancellation and the recognition of its separate parts inapplicable: procedurally these institutions are not identical, but in essence they entail the same legal consequences (the TPD recognized ineffective or inapplicable does not entail legal consequences)^{24, 25}.

3. On the possibility of cancelling the TPD complying with legislative requirements

Within the frames of this section, we will try to answer the question already raised earlier about the possibility of canceling the TPD complying with legislative requirements.

At first glance, it seems logical that the public authority that has adopted a regulatory legal act (hereinafter — the TPD) should be able to cancel it. First, it correlates with the recognition of the scope of discretion of public authorities in the field of urban planning policy at the level of judicial practice²⁶.

Secondly, it takes into account that the need for such cancellation may be mediated by the public interest in the formation of a comfortable urban environment^{27, 28}.

At the same time, the discretion of public authorities in the possibility of canceling the TPD cannot be unlimited in view of the fact that the cancellation of the TPD affects both public interests and the interest of private individuals in the possibility of real implementation and effective protection of their rights.

For example, the persons involved in urban planning activities within the boundaries of the TPD operation are interested in maintaining the TPD taking into account that if such documentation is canceled, they cannot start implementing their projects. Moreover, such cancellation will create significant risks for the implementation of the projects already being implemented with regard to the impossibility of obtaining permission to commission the facilities under construction (paragraph 5, part 6, article 55 of the UPC of the RF)²⁹. The persons who do not plan to carry out construction (reconstruction) may also be interested in maintaining the TPD effect as a guarantee of the fulfillment of the obligations to create infrastructure facilities by the public authorities³⁰.

²² In other words, the constituent entity of the RF will be unable to place a snow-melting station in the parameters stipulated for the location of the library, or, for example, if the zone of the planned location of this school is not cancelled in the TPD, the purpose of its location will not be achieved, either.

²³ According to part 35 of Art. 1 of the UPC of the RF, an element of the planning structure is part of the territory of a settlement, urban district or inter-settlement territory of a municipal district (block, microdistrict, district and other similar elements).

²⁴ Further on, using the term “cancellation of the TPP” in this article, we will also mean its recognition as inapplicable.

²⁵ Accordingly, on the basis of such documentation, capital construction facilities cannot be built; it cannot serve the basis for making the decision on the possibility of withdrawing land plots for state (municipal) needs.

²⁶ See: appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd. 22.01.2020 No. 53-АПД19-51.

²⁷ For example, within the framework of the examples already cited by us, when TPD is canceled in order to ensure the possibility of placing infrastructure facilities of a larger capacity without contradicting the requirements of the current regulation.

²⁸ Imagine a situation in which the previously approved TPD did not provide for the placement of sports facilities within the boundaries of the block, but with the growth of its population, sports facilities “in the neighborhood” no longer cope with the influx of those willing. At the same time, there are land plots in the block intended according to the TPD for placement of trade facilities, while the LDP provides for “sports” as a permitted kind of use for them, among other things. We believe that in this case, the public authorities should be able to cancel the TPD in the part that preventing placement of sports facilities.

²⁹ See: [Electronic source]. URL: https://zakon.ru/blog/2018/09/07/ob_ocherednom_gradostroitelnom_koshmare_dlya_biznesa_ili_obratnoj_sile_zakona_342-fz (accessed on: 12.03.2020).

³⁰ In other words, the citizens living within the boundaries of the block are interested in having the healthcare and social infrastructure facilities promised to them really built.

Thus, when TPD is canceled, it is necessary to ensure that an appropriate balance is found between private and public interests.

If we consider the possibility of canceling a TPD complying with legislative requirements from the point of view of the current regulation (*de lege lata*), one can come to disappointing conclusions: a catastrophic situation has developed in which public authorities, having adopted the relevant procedure, may be able to cancel the TPD subject to no restrictions.

Moreover, it should be taken into account that within the framework of the existing regulation, when judicial control over the appropriateness of the adopted regulatory legal acts is impossible³¹, there may be situations when public authorities use the TPD cancellation institution just “hiding behind” the public interest, but in reality — in disregard of the legitimate purpose. For example, the TPD cancellation can be used as a means of encouraging developers to take on “social responsibility” for various infrastructure facilities³².

The current situation seems to result not from the imperfection of the urban planning legislation but from the systemic problems of the Russian administrative law which is poorly developed, according to A. A. Ivanov³³.

Firstly, the administrative law is still perceived by many as a branch primarily regulating the issues of bringing to administrative responsibility, exercising control and supervisory activities, but not the general procedure of the relationship between individuals and public authorities.

No law on administrative procedures consolidating the general principles of administrative law has been adopted so far, although the need for its urgent adoption has been highlighted by many scientists³⁴.

This predetermines the existence of gaps in the implementation of the principle of maintaining the confidence of citizens and legal entities in the actions of public authorities. At present, this principle is only occasionally applied by the SC of the RF and the CC of the RF; however, it is not possible to say that any system of its application has been established³⁵.

However, in foreign legal order, this principle underlies the doctrine of the legal force of administrative acts, within the framework of which risks are distributed between the public administration and a private person when such an act is canceled³⁶.

Secondly, individual institutions of administrative law are not properly regulated, either. In particular, insufficient attention is paid to identifying the substance of the notion of “administrative management”, the study of the category of administrative acts³⁷, their classification.

For example, the current legislation lacks classification of administrative acts into favorable (that is, creating a person’s right or having any legally significant advantages [benefits]) and burdening (entailing adverse consequences for addressees)³⁸, known even to many post-Soviet states³⁹.

As noted by A. F. Vasilieva, such a classification is both of theoretical and practical significance. For example, the procedure for cancelling favorable administrative acts has a number of specific features conditioned upon the operation of the principle of protecting the confidence of citizens (legal entities) in the actions of the state⁴⁰.

According to Yautrite Briede, a lawful (favorable) administrative act can be canceled, firstly, in the case when the addressee could not have legal confidence in the invariability of the administrative act

³¹ For the existing models of regulatory compliance verification see: [Electronic source]. URL: https://zakon.ru/blog/2019/07/16/teorii_normokontrolya_v_dele_o_zaprete_vyezda_policejskim_za_granicu_k_opredeleniyu_po_delu_luzhnyh (accessed on: 12.03.2020).

³² In other words, unless you build a kindergarten and hand it over to the city free, we will cancel the TPD.

³³ Ivanov A. A. Problems of the Russian Public Law: View from the Outside [Problemy publichnogo prava Rossii: vzglyad so storony] // The Herald of Economic Justice [Vestnik ekonomicheskogo pravosudiya Rossijskoj Federacii]. 2017. № 2. Pp. 46–59.

³⁴ See: [Electronic source]. URL: <http://www.vestnik.vsu.ru/pdf/pravo/2015/03/2015-03-04.pdf> (accessed on: 12.03.2020).

³⁵ See: [Electronic source]. URL: https://zakon.ru/blog/2019/07/16/ustranenie_posledstvij_svoih_oshibok_-_otvetstvennost_publichnoj_vlastiesche_raz_napomnil_ks_rf (accessed on: 12.03.2020).

³⁶ See: [Electronic source]. URL: https://dpp.mpi.de/07_2018/07_2018_37_77.pdf (accessed on: 12.03.2020).

³⁷ Such notions as a regulatory legal act, a non-regulatory act, an administrative act are not enshrined in the current legislation.

³⁸ See: [Electronic source]. URL: <http://elib.sfu-kras.ru/handle/2311/2211?show=full> (accessed on: 12.03.2020).

³⁹ See: Art. 11 of the Administrative Code of the Republic of Moldova, parts 6, 7 of Art. 1 of the Law of Turkmenistan on administrative procedures [Electronic source]. URL: https://online.zakon.kz/Document/?doc_id=38575176, <http://infoabad.com/zakonodatelstvo-turkmenistana/zakon-turkmenistana-ob-administrativnyh-procedurah.html> (accessed on: 12.03.2020).

⁴⁰ See: [Electronic source]. URL: <http://www.dslib.net/admin-pravo/administrativno-pravovoe-regulirovanie-publichnyh-uslug-v-germanii-i-rossii.html> (accessed on: 12.03.2020).

and, secondly, in case of a substantial change of the facts and circumstances and the interests of the public regarding the cancellation of the act which exceed the rights and interests of the addressee⁴¹.

Accordingly, when implementing such cancellation, public authorities should take account of the need to achieve a balance between private and public interests which can be ensured, inter alia, through the recognition of the need for justification of the decisions to cancel administrative acts (including TPD)⁴² not fixed at the level of the existing regulation, which, in our opinion, is one of the negative consequences of the existence of the already mentioned “global gaps” in the Russian administrative law.

We would also like to point out that the current legislation has not regulated the problem of the possibility of issuing administrative acts (in particular, TPD) under certain conditions, which is often a practical necessity. Imagine a situation in which a developer is interested in the approval of the TPD which implies placement of schools, which is currently prevented by the normative sanitary protection zones⁴³ of the industrial enterprises located outside the block.

According to part 2 of Art. 41 of the UPC of the RF, in preparation of the TPD before establishing the boundaries of zones with special conditions of the use of the territory, account is taken of the size of these zones and restrictions on the use of the territory within the boundaries of such zones which are established in accordance with the legislation of the Russian Federation.

The action of the above norm significantly reduces the efficiency (variability) of the use of the territory actually ordaining to take account of the restrictions that have not yet been established⁴⁴.

In addition, this norm prevents the possibility of parallel implementation of TPD development and urban planning preparation of the land plot (i. e., to remove the restrictions preventing its development), which significantly increases the project implementation time⁴⁵. Accordingly, the current legislation is subject to adjustment to recognize the possibility of TPD approval under certain conditions.

We believe that *de lege ferenda*, the list of cases in which it is possible to cancel the TPD which complies with the legal requirements should be as follows⁴⁶. This documentation may be cancelled:

- if the implementation of measures, including the creation of capital construction projects stipulated by the TPD threatens public interests (poses a danger to human life or health, to the environment, cultural heritage sites), which must be confirmed by the availability of particular documents (materials);
- if the TPD was accepted subject to performance (non-performance) of certain actions (for example, under the condition that the person interested in preparing the TPD undertakes the obligations to reduce the boundaries of the sanitary protection zones), and this condition recorded in the regulatory legal act on approval of such documentation or another regulatory legal act has not been fulfilled (fulfilled with substantial violations⁴⁷).

⁴¹ *Briede Ya.* Cancellation of the Administrative Act, Subject to Latvian Supreme Court Case Law [Otmena administrativnogo akta s uchetom sudebnoj praktiki Verhovnogo suda Latvii]. Yearbook of Public Law Administrative Law. Comparative Law Approaches: Collection of Essays [Ezhгодnik publichnogo prava Administrativnoe pravo: sravnitel'no-pravovye podhody]. Moscow, Infotropic Media, 2014. Pp. 419–427.

⁴² At least at the level of issue of explanatory notes to relevant decisions.

⁴³ According to part 4 of Art. 1 of the UPC of the RF, sanitary protection zones are a kind of zones with special conditions of the use of the territory.

For more detail about the classification of sanitary protection zones see: *Kirsanov A. R.* “Undetermined” Sanitary Protection Zones, or On Legal Grounds and Consequences of Inclusion of Indicative and Estimated Sanitary Protection Zones in Land Use and Construction Rules [“Nedoustanovlennyye” sanitarno-zashchitnye zony, ili O pravovykh osnovaniyakh i posledstviyakh vklucheniya v pravila zemlepol'zovaniya i zastroyki orientirovochnykh i raschetnykh sanitarno-zashchitnykh zon] // Property Relations in the Russian Federation [Imushchestvennyye otnosheniya v Rossijskoj Federacii]. 2019. № 7. Pp. 83–89.

⁴⁴ See: appellate ruling of Sverdlovsk regional court dd. 14.02.2018 No. 33a-3140/2018, Appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd.12.09.2018 No. 4-АПГ18-13.

⁴⁵ For example, clause 4.3.1 of Appendix No. 1 to the Resolution of the Government of St. Petersburg dated 21.06.2016 No. 524 “On the Rules of Land Use and Development of St. Petersburg”, duplicating Part 2 of Art. 41.1 of the UPC of the RF, states that, as part of the developed TPD, the zone for the location of capital construction facilities, the placement of which is limited in accordance with the legislation of the RF within the boundaries of zones with special conditions of use, may be determined in the absence of the restrictions prohibiting placement of such facilities.

⁴⁶ Analysis of the regulation of municipal entities shows that they are often very “negligent” in adopting the procedure stipulated by part 20 of Art. 45 of the UPC of the RF, using the following wording: “Cancellation of the territory planning documentation (its individual parts) is possible according to the procedure ordained by the current legislation in case of revealed grounds for its cancellation (cancellation of its parts).” See, for example: Resolution of the Administration of Samara City District dated 05.09.2019 No. 654 “On Approval of the Procedure for Preparing TPD for Samara City District and the Procedure for Making the Decision on Approving the TPD for Samara City District”.

⁴⁷ Accordingly, there is a need for a separate procedure regulating the procedure for recording the relevant violations.

This ground for canceling the TPD will become relevant only if, at the level of the current regulation, the already mentioned problem of the admissibility of adopting administrative acts (including TPD) subject to performance (non-performance) of certain actions is resolved, and the procedure for assuming certain obligations by individuals that mediate the possibility of approving an administrative act is regulated.

In view of the above:

- in case of the emerging circumstances that did not exist at the time of the adoption of the TPD, in the presence of which at the time of adoption of such documentation the public authority could not adopt it, and the maintenance of this documentation in force does not correspond to the objectives of the integrated and sustainable development of the territory⁴⁸;
- in a situation when the availability of an approved TPD prevents placement of a facility of federal, regional (local) significance or does not allow placement of such a facility with the technical and economic indicators that would be achievable if it were located in the absence of such documentation⁴⁹. At the same time, the need to locate the relevant facilities must also be justified, for example, in the documents of territorial planning adopted by the public authorities.

We believe that an independent analysis is also required for the case when the possibility of canceling the TPD is due to the fact that its maintenance in force prevents the implementation of activities for integrated and sustainable development of the territory with account of the criticism faced by institutions of implementation of such activities as allowing total seizure of land plots from rightsholders in favor of other individuals⁵⁰.

Accordingly, it seems important to note the fact that in all cases of TPD cancellation, the need for such cancellation must be duly justified by its initiator. For example, as already mentioned, if the implementation of measures, including the creation of capital construction projects stipulated by the TPD, threatens public interests, documents (materials) must be presented confirming the existence of the relevant “threat”.

In this case, according to our position, it is impossible to establish an exhaustive content of the justification for canceling the TPD (i.e., a specific list of documents [materials]) at the level of the adopted regulation.

The “sufficiency” of the presented justification will be ultimately still determined by the public authority making the decision to cancel the TPD. The assessment of this “sufficiency” will be within the discretion (administrative discretion) of the relevant body and will be carried out with account of the availability of a number of legal positions of the SC of the RF, according to which the policy of urban planning, development of the territory provides the state with a wider scope of discretion than is the case of regulation of exclusively civil rights⁵¹.

The Draft Regulation of the Government of the RF “On approval of the rules of amending TPD approved on the grounds of the decisions of authorized federal executive bodies, cancellation of such documentation or its individual parts, recognition of certain parts of such documentation inapplicable and on amendments to the Regulation of the Government of the RF dated 26.07.2017 No. 884” states in paragraph b of Clause 26 that the application for cancellation of TPD prepared by the initiator of such cancellation must contain a reasoned justification of the need to cancel the TPD. Moreover, if the justification of the need to cancel the TPD requires presentation of additional documents or materials, such documents or materials shall be attached to the application of the initiator⁵². In other words, the procedure is based on the “open composition” of the provided justification.

At the same time, according to clause 30 of the Draft, the public authority refuses to make a decision to cancel the TPD only if there is no justification for canceling the TPD, without evaluating it substantively, which cannot be agreed with in view of our position given above.

⁴⁸ An example of such a circumstance may be considered to be a change in the norms of the federal legislation, its adoption resulting in prohibition of construction on a certain territory.

⁴⁹ This case should provide for mechanisms confirming the presence of a public interest in the cancellation of such documentation to avoid potential abuse. For example, the justification prepared by a public authority that it actually cancels the TPD (part of it), for example, to ensure creation of a hospital rather than to complicate the implementation of stakeholders' construction projects.

⁵⁰ For more detail see: [Electronic source]. URL: <https://urban.hse.ru/data/2016/12/29/1114674201/%D0%B2%D0%BE%D0%BF%D1%80%D0%BE%D1%81%D1%8B%201,%202,%203.pdf> (accessed on: 12.03.2020).

⁵¹ See: appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dated 25.12.2019 No.51-АПА19-19: appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dated 19.09.2018 No. 7-АПГ18-5.

⁵² See: Draft Regulation of the Government of the RF “On approval of the rules of amending TPD approved on the grounds of the decisions of authorized federal executive bodies, cancellation of such documentation or its individual parts, recognition of certain parts of such documentation inapplicable and on amendments to the regulation of the Government of the RF dd. 26.07 2017 No. 884” (hereinafter the Project).

Also note that the current regulation lacks the circumstances preventing the issue of guidelines or clarifying letters of the Ministry of Construction of the RF on how to motivate the need to cancel TPD, including statement of the examples of the documents and (or) materials that may be attached to the declaration of the need for such cancellation. We believe that the emergence of appropriate guidelines, letters is a matter of the “near future”.

Let’s move on to the analysis of the subject composition of the persons entitled to demand the TPD cancellation.

4. On identification of the range of the subjects entitled to demand TPD cancellation

The first approach presupposes that any person, natural or legal, should be able to apply for a TPD cancellation.

At the same time, the fact that such a person lives outside the boundaries of preparation of documentation should not restrict his right to apply for cancellation of such documentation.

At first glance, it seems proper that a person living in the vicinity of the proposed garbage plant (on the territory of an adjacent block) may be interested in applying for the cancellation of the TPD regarding the placement of such a plant, in view of its influence on the comfort of living in the populated locality as a whole, and not only on certain territories⁵³.

Another approach is based on the fact that the subject composition of the persons who can apply for the TPD cancellation should be reduced, for example, to the rightsholders of the real estate units located within the boundaries of the TPD development, or exclusively to the public authorities that took part in the preparation of such documentation⁵⁴.

Let us analyze the outlined approaches.

On the one hand, it is recognized at the level of judicial practice by virtue of the recognition of the TPD to be regulatory legal acts that its norms are designed for repeated application and are addressed to an indefinite range of persons⁵⁵.

Accordingly, since TPD can affect the rights and obligations of an indefinite number of persons, any person should be able to apply with a petition to cancel such documentation.

In addition, it is necessary to note the existence of the concept of the right to the city⁵⁶ which can be perceived in Russian realities with account of the rights recognized at the constitutional level to favorable living conditions (favorable environment)⁵⁷. According to the supreme judicial authority, the existence of the right to a favorable environment which, as applied to cities, is understood as the integrated and sustainable development of the territory, mediates the possibility of challenging urban planning decisions taken by public authorities⁵⁸. Hence, there are no grounds for limiting the subject composition of the persons entitled to apply for the TPD cancellation.

On the other hand, the very existence of the right of all and everyone to demand cancellation of a regulatory legal act (TPD) adopted by public authorities is hardly compatible with the principles of stability of regulation, legal certainty, including the possibility of foreseeing the consequences of their behavior for the participants of the relevant legal relations⁵⁹.

In our opinion, such a right is essentially similar to the institution of *actio popularis* which is aimed at providing individuals with the opportunity to protect public interests by their actions⁶⁰.

⁵³ One can even imagine a situation when the facility located in one constituent entity of the RF (for example, a repository of radioactive waste) will affect the value of real estate units in the territories of adjacent municipalities within the boundaries of another constituent entity.

⁵⁴ For example, in accordance with clause 20 of the Resolution of Kaluga City Government dated 14.08.2019 No. 203-н “On approval of the procedure of preparation and approval of the TPD developed on the basis of the decisions of Kaluga City Government, the procedure of its amendment and cancellation”, the decision on cancellation of such documentation can be made only on the initiative of the authorized body (Department of Architecture, Urban Development and Land Relations of the city of Kaluga).

⁵⁵ See: ruling of the SC of the RF dd. 06.09.2018 No. 303-KГ18-13853 in case No. A04-1875/2018; appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd. 30.01.2019 No. 45-АПГ18-22.

⁵⁶ *Medvedev I. R.* Public Discussions of Urban Development Projects in the Light of Law № 455-FZ [Obshchestvennye obsuzhdeniya gradostroitel’nyh proektov v svete Zakona № 455-FZ] // Statute [Zakon]. 2018. № 3. Pp. 181–195.

⁵⁷ See: Art. 39, 42 of the Constitution of the RF.

⁵⁸ See: appellate ruling of the Judicial Chamber on Administrative Cases of the SC of the RF dd. 10.01.2018 No. 78-АПГ17-20.

⁵⁹ See, for example: Ruling of the CC of the RF dd. 17.10.2017 No. 24-П.

⁶⁰ See, for example: [Electronic source]. URL: http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_II_documents/ECE.MP.PP.2014.5_rus.pdf (accessed on: 13.03.2020).

As Martin Kaiser notes, the existence of this institution can lead to situations when the parties to the administrative legal relationship cannot be completely sure that the administrative act will not be “appealed” by third parties unexpectedly for them⁶¹.

According to A. Zhagaryan’s position, the legality of a regulatory legal act must not be questioned by an unlimited range of persons, for any reason at that, including those related only to abstract assumptions of a subjective-evaluative nature about the possible violations that may result from the application of this act⁶².

In view of the foregoing, we believe that for our country where urban planning activities were carried out for a long time not under the conditions of legal regulation, but within the framework of the action of the mechanisms of administrative-point adoption of town planning decisions⁶³, the best variant would be the compromise variant of determining the subject composition of the persons authorized to apply for cancellation of TPP.

In other words, any natural (legal) person should be able to apply for cancellation of TPD, but they must prove that they have a legitimate interest in the implementation of such cancellation⁶⁴.

Also note that in the list of the persons authorized to demand cancellation of TPD (initiators) the Project identifies, among other things, individuals or legal entities interested in the construction, reconstruction of a federal facility or an interregional capital construction facility. At the same time, the Project lacks mechanisms of determining the availability of a relevant interest.

We suppose that the presence of such an interest may be evidenced, for example, by the fact of the availability of the relevant facility stipulated by the TPD in the investment program of a natural monopoly entity planning to create such a facility.

According to our position, it is advisable to issue guidelines or letters of the Ministry of Construction of the RF explaining the list of the circumstances that may evidence that individuals or legal entities have a legitimate interest in canceling the TPD.

The application of this approach allows providing the necessary level of guarantees for the participation of interested persons in determining the prospects of the spatial development of the territory⁶⁵, which is especially important in the absence of a developed system of public law ensuring an adequate level of protection of the rights of individuals, and also presupposes the presence of a “barrier” against obvious abuse.

5. On the need for public hearings (public discussions) in TPD cancellation

In order to observe the human right to favorable living conditions, the rights and legitimate interests of the rightsholders of land plots and capital construction facilities, the UPC of the RF provides for public hearings (public discussions) in TPD preparation⁶⁶.

Without dwelling in detail on the delimitation of these institutions, let us pay attention to their common shortcomings.

For example, part 2 of Art. 5.1 of the UPC of the RF significantly limits the potential range of participants of public hearings⁶⁷ regarding the TPD to the citizens permanently residing in the territory for which such documentation has been prepared, to the rightsholders of the land plots located within this territory and (or) capital construction facilities located in them, as well as to the rightsholders of the premises being part of the specified capital construction facilities. As I. R. Medvedev notes, it is obvious that certain projects affect both the fragment of urban land limited by a design assignment, and the

⁶¹ See: [Electronic source]. URL: https://dpp.mpil.de/05_2016/05_2016_105_210.pdf (accessed on: 14.03.2020).

⁶² Zhagaryan A. A. The Right to Challenge a Normative Act as an Integral Method of Judicial Protection: Problems of Regulation and Implementation in Administrative Proceedings [Pravo na osparivanie normativnogo akta kak neot’emljemyj sposob sudebnoj zashchity: problemy regulirovaniya i realizacii v administrativnom sudoproizvodstve] // The Herald of Civil Procedure [Vestnik grazhdanskogo processa]. 2019. № 3. Pp. 263–287.

⁶³ See: Town Regulation: Basics of Regulation of Urban Development in the Conditions of the Real Estate Market Formation [Gradoregulirovanie: osnovy regulirovaniya gradostroitel’noy deyatel’nosti vusloviyah stanovleniya rynka nedvizhi-mosti] / Trutnev E. K. (ed.). Moscow, 2008. P. 110.

⁶⁴ Foreign legal orders determine this variant as quasi actio popularis. See: [Electronic source]. URL: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2011\)018-rus](https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2011)018-rus) (accessed on: 17.03.2020).

⁶⁵ In accordance with such a principle of the implementation of urban planning activities as the participation of citizens and their associations in the implementation of urban planning activities, it requires ensuring the freedom of such participation (part 5 of article 2 of the UPC of the RF).

⁶⁶ Part 1 of Art. 5.1 of the UPC of the RF, part 13.1 1 of Art. 45 of the UPC of the RF, part 5 Art. 46 of the UPC of the RF.

⁶⁷ Using the term “public hearings” in what follows, we will mean both direct public hearings and public discussions.

formed environment of the district as a whole, which will affect a larger number of people than is provided for by the UPC of the RF^{68, 69}.

Thus, at the level of the current regulation, there is a trend to limit the subject composition of the participants in public hearings. The UPC of the RF does not contain provisions ordaining mandatory public hearings when TPP is canceled.

We believe that the issue of the need for their implementation can be resolved by the constituent entities of the RF (municipalities) within the framework of the adoption of the procedure of TPD cancellation approved in accordance with Part 18, 19 of Art. 45 of the UPC of the RF. In determining this need, the following circumstances should be taken into account.

In judicial practice, a position was formulated on the orientation of the procedure of public hearings to ensure comprehensive consideration of the interests of the population, respect for the human right to favorable living conditions, rights and legitimate interests of rightsholders of land plots and capital construction facilities⁷⁰.

Accordingly, the situation in which the persons making their proposals at public hearings in the framework of the TPD preparation are deprived of the opportunity to express their views on the cancellation of such documentation is contrary to the purpose of this institution.

It is also necessary to take into account that the canceled TPD may contain planning solutions, regarding the implementation of which the population has certain legitimate expectations⁷¹.

We believe that in this case, the public authorities are obliged, within the framework of an open and transparent procedure of public hearings, to explain the motives that guided them in canceling the relevant documentation to the citizens⁷², and the citizens should have the opportunity to ask public authorities questions about plans for the further use of the territory.

In view of the foregoing, we believe that appearance of methodological recommendations at the level of explanations of the Ministry of Construction of Russia instructing the constituent entities of the RF (municipalities) to hold public hearings when TPD is canceled.

6. Main conclusions

The following main conclusions may be drawn based on the results of the article.

1. The institution of TPD cancellation is undoubtedly necessary for the purposes of the implementation of urban construction activities, contributing to both improving the comfort of the urban environment and reducing the time required to implement large infrastructure projects.
2. Cancellation of TPD and recognition of its individual parts inapplicable entail the same legal consequences, differing only procedurally.
3. In view of the fundamental problems in the Russian administrative law, a catastrophic situation arises when public authorities can cancel the TPD without any restrictions. The need to comply with the principle of maintaining the confidence of citizens and legal entities in the actions of the state is completely ignored.
4. In terms of determining the subject composition of the persons entitled to demand cancellation of the TPD, the most optimal approach is the one assuming that all interested parties can apply for such cancellation if they prove that they have a legitimate interest in such cancellation.
5. The current legislation contains uncertainty about the need to hold public hearings when TPD is canceled. We believe that they should be carried out with account of their focus on ensuring the interests of the population in the process of implementing urban planning activities.

In conclusion, let us pay attention to the fact that the very introduction of the TPD cancellation institution into the legislation clearly demonstrates the need to improve the system of public law in the RF.

Until "general rules of the game" governing the relationship between public authorities and private individuals are established, there is a significant risk that the institutions of sectoral legislation (such as the TPP cancellation) will be applied contrary to the goals of their introduction into the legal regulation system.

⁶⁸ Medvedev I. R. Public Discussions of Urban Development Projects in the Light of Law № 455-FZ [Obshchestvennyye obsuzhdeniya gradostroitel'nykh proektov v svete Zakona № 455-FZ] // Statute [Zakon]. 2018. № 3. Pp. 126–137.

⁶⁹ For example, the case of construction of a garbage plant already given by us.

⁷⁰ See: review of the practice of consideration by courts of cases related to changing the type of permitted use of a land plot (approved by the Presidium of the SC of the RF on 14.11.2018).

⁷¹ Let us imagine a situation where TPD involves placement of social infrastructure facilities.

⁷² For example, that the cancellation of such documentation is not related with a refusal to fulfill obligations to create infrastructure facilities, but ensures formation of a comfortable urban environment by increasing the capacity of social infrastructure facilities.

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