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## **THE SPECIFICS OF THE REGISTRATION OF REAL ESTATE RIGHTS WITH NO CONSTRUCTION PERMIT REQUIRED**

<https://doi.org/10.31085/2541-8823-2020-5-1-18-26>

**Abstract:** The regulation of legal relations dealing with the real estate is influenced by the reforms carried out in the Russian civil law over the last 2 years. A lot of changes related to real estate were introduced. We shall outline the introduction of new objects of civil law rights of changes in the Land Code and changes in duration of state registration of real estate property rights. The conditions for the notaries to participate in the preparation and make real estate deals were recreated. At the same time social and economic projects implemented in the country aim at reviving the economy, in particularly, through the involvement of new lands in civil commerce and development of construction sector. As a whole, it continuously supports the scientific interest in the legal regulation of civil relations of the real estate.

The aim of this work is to study the procedures of state registration of real estate rights in cases when the construction permission is not required.

**Keywords:** registration of real estate rights, building permission, real estate, law, enterprise right.

### **Introduction**

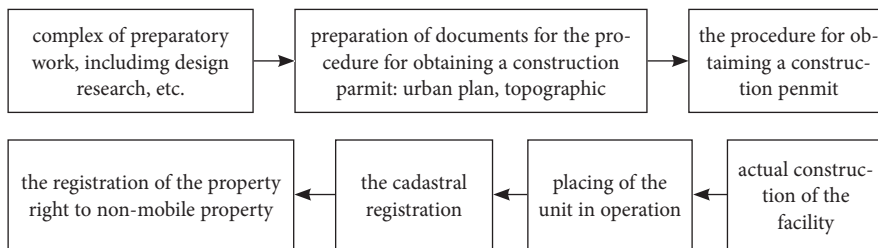
The development of civil commerce is one of the essential tasks of modern Russian civilistics. Article 219<sup>1</sup> of the Civil Code of the Russian Federation states

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<sup>1</sup> Гражданский кодекс Российской Федерации (часть первая): Федеральный закон от 30.11.1994 № 51-ФЗ (ред. от 03.07.2016) // СЗ РФ. 1994. № 32. Ст. 3301; 2015. № 27. Ст. 3945 [The Civil Code of the Russian Federation (Part One): Federal Law of November 30, 1994 No. 51-FZ Article 3945].

that ‘the right of ownership of buildings, structures and other newly created real estate subject to public registration arises since the registration.’ It highlights the primary legal importance of the state registration. Construction correlates with the creation of real estate. As one of the key sectors of the economy, it contributes to many related industries. The legal regulation is challenging as the construction industry bears special social significance.

Article 51 of the Town Planning Code of the Russian Federation<sup>1</sup> views the procedure for obtaining a construction permit according as one of the most difficult administrative procedures. In most cases it is time- and money-consuming for the developer. At the same time the procedure for obtaining a construction permit is not the ultimate goal of participants in a civil life. It is an intermediate stage of putting an object into operation and further registration of its ownership. A property becomes a full-fledged object of civil rights and satisfies the interests of participants in civil commerce, only after the registration of right. In general, the process of managing a real estate is represented in Figure 1.



**Figure 1. The process of managing a real estate**

However the Federal legislation modifies the specified scheme for the management of a real estate. In particular, Paragraph 17 of Article 51 of the Town Planning Code of the Russian Federation<sup>2</sup> defines a list of cases with no construction permission required. In particular, Subparagraph 3 indicates that a building permit is not required in case of construction of auxiliary buildings and structures on the land plot.

This exception allows the participants of civil commerce to achieve their ultimate goal under certain conditions. In other words, to register ownership without intermediate administrative procedures.

<sup>1</sup> Градостроительный кодекс Российской Федерации: Федеральный закон от 29.12.2004 № 190-ФЗ (ред. от 03.07.2016) // СЗ РФ. 2005. № 1. Ст. 16 [The Town Planning Code of the Russian Federation: Federal Law dated December 29, 2004 No. 190-FZ Art. 16].

<sup>2</sup> Там же.

The stages of creating and introducing a real estate object into the civil commerce predetermine its specifics. Namely, the process is controlled by the Federal Service for the State Registration, Cadastre and Cartography (Rosreestr) represented by its territorial administrations, local self-government bodies, executive branch of a subject. Several federal laws, by-laws, laws of constituent entities of the Russian Federation, acts of local self-government bodies, to some extent, regulate these legal relations. Such a variety of legal acts causes different interpretations and application of legal acts and the implementation of certain procedures. In contrast, the Federal Tax Service is crucial in taxation, registration of legal entities and individual entrepreneurs. The service performs relevant registration actions, administrative procedures, and supervision. Due to the large scope of powers, it can formulate uniform approaches to the process of implementing its functions.

Thus, legal regulation of the creation of a real estate is a combination of technical norms and requirements, administrative regulations and civil law on emergence, exercise and protection of property rights.

The Supreme courts thoroughly analysed and generalized law enforcement recent practice of exercise and protection of property rights to real estate. As a result, the Decision of the Plenum of the Supreme Court of the Russian Federation No. 10, the Plenum of the Supreme Arbitration Court of the Russian Federation No. 22 dated April 29, 2010, the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated December 9, 2010 No. 143, and the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 15.01.2013 No. 153 were published.

Important findings are given in specific case judgments. In particular, the Decision of the Presidium of the Supreme Arbitration Court of the Russian Federation dated September 24, 2013 No. 1160/13 in the case of No. A76-1598 / 2012 is essential. Taradanov R. A. analyzed the court position manifested in this decision<sup>1</sup>.

The court faced several issues in resolving the dispute. Firstly, is a fence considered as a property? Secondly, if fence is a real estate property, is it necessary to register its ownership? The applicant's claims were dismissed, citing this provision.

However, the applicant questioned the need for permission to build a fence as real estate. He tried to prove the fence to be the auxiliary property and the apply to Subparagraph 3 of Paragraph 17 Article 51 of the Town Planning Code of the Russian Federation.

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<sup>1</sup> *Тараданов Р.А. К вопросу о допустимости придания вспомогательным зданиям, строениям и сооружениям статуса недвижимого имущества. Комментарий к Постановлению Президиума ВАС РФ от 24.09.2013 № 1160/13 // Вестник ВАС РФ. 2014. № 6. С. 54–65 [Taradanov R. A. On the issue of the permissibility of giving auxiliary buildings, structures and structures the status of real estate].*

This issue is the subject of present research. Currently, participants of the civil commerce erect real estate-like buildings without a construction permit. It may cause further problems in registering property rights, administrative and civil liability.

The key task is to determine the criteria for classifying real estate as auxiliary<sup>1</sup>. The current legislation gives no clear answer. A systematic analysis of the legislation of the Russian Federation showed that certain norms and provisions on the 'auxiliary use' are found in legal acts regulating the construction industry. The Town Planning Code of the Russian Federation does not define auxiliary use.

In the letter dated June 25, 2009 the Ministry of Regional Development of the Russian Federation No. 19669-IP / 08 defines buildings and facilities for auxiliary use as facilities of a reduced level of responsibility according to GOST 27751-88 'Reliability of Building Structures and Foundations' in 2009, namely greenhouses, summer pavilions, small warehouses and etc. The letter also indicated that buildings are classified as auxiliary in case there is also the main building, construction or structure on the indicated area. In such a way the function of a new building or structure is auxiliary to the main one. However, since July 1, 2015, GOST 27751-88 was substituted by the interstate standard GOST 27751-2014 'Reliability of building structures and foundations. Basic provisions'. It gives no criteria of auxiliary use objects when classifying buildings and structures.

The auxiliary buildings and structures are mentioned in Paragraph 10 of Art. 4 of the Federal Law of 30.12.2009 No. 384-FL 'Technical Regulation on the Safety of Buildings and Structures'<sup>2</sup>. The law states that buildings and structures of a lower level of responsibility involve buildings and auxiliary facilities related to the construction or reconstruction of a building or structure, or located on land plots provided for individual housing construction.

Thus, the nature of auxiliary use of the property is only interpreted by the law.

At the same time, the legislation has established a simplified procedure to register ownership of the real estate available for constructed auxiliary facility. The Article 25.3 of the Federal Law dated July 21, 1997 No. 122-FL 'On the state

<sup>1</sup> *Ширвиндт А. М., Щербаков Н. Б.* О понятии строений и сооружений вспомогательного использования: к вопросу о целях градостроительного законодательства и корректном толковании закона // *Имущественные отношения в Российской Федерации*. 2016. № 7. С. 24–37 [*Shirvindt A. M., Scherbakov N. B.* On the concept of buildings and structures of auxiliary use: to the question of the goals of urban planning legislation and the correct interpretation of the law (2016)].

<sup>2</sup> «Технический регламент о безопасности зданий и сооружений»: Федеральный закон от 30.12.2009 № 384-ФЗ (ред. от 02.07.2013) // *СЗ РФ*. 2010. № 1. Ст. 5 [Technical regulation on the safety of buildings and structures': Federal Law dated 30.12.2009 No. 384-FZ].

registration of rights to real estate and its transactions<sup>1</sup> enumerates the grounds for state registration of ownership of the created real estate (if its construction does not require building permits), namely, documents confirming the erection and describing the real estate, title document of the real estate location.

To register ownership of the real estate, one needs to apply to the Federal Service for the State Registration, Cadaster and Cartography (Rosreestr). It makes the entry in the State register of rights. Before registering the right, the indicated property is introduced into the State cadastre as provided in the Federal Law dated 24.07.2007 No. 221-FL 'On the State Real Estate Cadastre'.

Article 25.3 of the Federal Law dated July 21, 1997 No. 122-FL states that no reports, decisions or other documents of state (municipal) authorities requiring no building permit are needed.

Paragraph 235 of the Order of the Ministry of Economic Development of Russia dated 09.12.2014 No. 789 'On approval of the Administrative Regulations of the Federal Service for the State Registration, Cadastre and Cartography for the provision of state services of state registration of rights to real estate and transactions with it' (Registered in the Ministry of Justice of Russia on 28.04.2015 No. 37039) states that "when conducting a legal examination of the submitted documents, the state registrar is obliged to take the necessary measures to obtain additional documents (information), for the state registration of rights, in particular confirmation of the submitted documents' authenticity or the reliability of the information indicated therein". The obligation rests on the Article 19 of the Federal Law of July 21, 1997 No. 122-FL.

The Federal Service for the State Registration, Cadaster and Cartography (Rosreestr) performs the required verification independently. The results of the measures taken are not available for the applicant of the registration of the right. At the same time, the actions are strictly limited by the established legal procedural terms. The authorized bodies cannot always provide an accurate comprehensive answer for a request, since there are fewer documents submitted by the applicant under article 25.3 of the Federal Law dated July 21, 1997 No. 122-FL as compared to the list of documents required for obtaining a building permit in the Paragraph 7 Article 51 of the Town Planning Code of the Russian Federation.

Thus, after legal examination, and determination of grounds for the state registration of law, the registrar decides on the need of a building permit to

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<sup>1</sup> «О государственной регистрации прав на недвижимое имущество и сделок с ним»: Федеральный закон от 21.07.1997 №122-ФЗ (ред. от 03.07.2016) // СЗ РФ. 1997. № 30. Ст. 3594 ['On state registration of rights to real estate and transactions with it': Federal Law dated July 21, 1997 No. 122 – FZ].

construct the specified facility. In such a way, the registrar determines the need to comply with the permit requirements and restrictions.

The review of the regulatory legal basis concerning the permits for urban development in the largest cities of the Volga Federal Region showed that municipal and administrative units often fail to perform a preliminary analysis of design and other documentation and do not confirm the need for the permit. The specified powers are not directly provided for by the regulations of these bodies. As a result, the control by the local government is rather subsequent but not preliminary.

Thus, prior to applying for a building permit or for the state registration of a right to real estate, participants in a civil commerce cannot know for sure whether the property they are building is subject to the exception established by Subparagraph 3 of Paragraph 17 of Article 51 of the Town Planning Code of the Russian Federation.

In these conditions, the legal uncertainty faced by a participant in a civil commerce may be revealed through a systematic analysis of federal, regional and local legislation. It leads to serious negative consequences due to the following types of responsibility:

- administrative liability for the construction of the facility without permission to build and operate it, established in Part 1 and Part 5 of Article 9.5 of the Administrative Code of the Russian Federation<sup>1</sup>;
- civil liability due to an unauthorized construction of a facility as provided in the Article 222 of the Civil Code of the Russian Federation.

At the same time, the executive bodies of legal entities face certain risks. Essentially, the Head can initiate and authorize the construction of a facility violating the law, which may cause losses and civil prosecution<sup>2</sup>.

Alternatively, legal uncertainty caused by the lack of clear criteria for accurate identification of the object of auxiliary use, stimulates the unfair participation in the civil commerce.

On the one hand, the decision by the state registrar to register ownership of a facility with an auxiliary use actually eliminates the need to obtain a building permit, the examination of the project, etc. The decision of the registrar provides a person with a property right, which subsequently may be disputed only in court.

<sup>1</sup> Кодекс Российской Федерации об административных правонарушениях: Федеральный закон от 30.12.2001 № 195-ФЗ (ред. от 06.07.2016) // СЗ РФ. 2002. № 1 (ч. 1). Ст. 1 [Code of Administrative Offenses: Federal Law dated December 30, 2001 No. 195-FZ Art. 1].

<sup>2</sup> Богданов А. В., Клячин А. А. Условия и основания гражданско-правовой ответственности лица, осуществляющего функции единоличного исполнительного органа акционерного общества // Вестник Пермского университета. Юридические науки. 2012. № 3. С. 62–72 [Bogdanov A. V., Klyachin A. A. Conditions and grounds for civil liability of a person acting as the sole executive body of a joint stock company (Perm, 2012)].

It makes the registrar the ultimate authority. The legal and linguistic uncertainty, i. e. the use of vague, uncommon and ambiguous terms and categories for evaluation, is viewed as a factor promoting corruption (see the Decision of the Government of the Russian Federation, dated 26 February, 2010 No. 96). In this case, assumingly, the term ‘auxiliary use’ in Subparagraph 3 of Paragraph 17 of Article 51 of the ‘Town planning Code of the Russian Federation’ is uncertain even when considered within legal provisions.

On the other hand, a real estate ownership may be registered without permits as an unfair civil commerce. This may be due to several reasons: to save time and money for the construction; actual discrepancy between the constructed object and the requirements of urban planning, land and other legislation.

The court is a final stage in protecting the rights of a person who erected a property without a building permit and faced legal uncertainty.

The Article 12 of the Civil Code of the Russian Federation claims legal recognition as one of the ways to protect civil rights. Persons apply to the court for recognition of a real estate ownership. This issue, however, bears certain specifics. Namely, the State cadastral registration, the State registration of property rights, and obtaining permits are administrative procedures. Following the objectives of the legal proceedings, the court should not replace the legitimate functions of the state bodies in registering rights to real estate. The substitution of administrative procedures is described in similar terms in the Decision of the Federal Antimonopoly Service of the Volga Region dated December 19, 2012 (case of No. A55-10278 / 2011), the Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 12.05.2009 No. 17373/08 (case of No. A06-470 / 2008-9). The courts indicated that court application bypassing administrative procedures, was in fact a circumvention of the law on state registration.

The Paragraph 26 of the Decision of the Plenum of the Supreme Court of the Russian Federation No. 10, the Plenum of the Supreme Arbitration Court of the Russian Federation No. 22 dated 04.29.2010 clarifies the issue of illegal construction and states that the court must determine whether the legalization measures were taken for the illegal construction, in particular, obtaining the building permit and / or the act of putting the facility into operation. In case of the permit refusal, the reason should be clarified.

Conclusions. In general, the legislation provides the obligations of participants in civil commerce to obtain a building permit for a real estate. At the same time, the established exceptions are provided in Subparagraph 3, Paragraph 17, Article 51 of the Town Planning Code of the Russian Federation. However, implementing the specified right, the participants in the civil commerce may face certain legal risks. Present research work suggests a number of recommendations.

To avoid and eliminate given legal uncertainty, the term ‘real estate of auxiliary use’ should be clarified and correlated with the classifications of facilities provided in legal acts and regulations, building codes, rules, and standards. The participants in civil commerce should assess legal risks and validity of the rules’ application.

**Methods of research:** The research is based on a complex of methods of scientific cognition. The research applies both to the general and specific scientific methods such as analysis, synthesis, formal and comparative methods.

**Conclusions:** The research reveals legal uncertainty in the legal procedures of the state registration of real estate rights.

**Research perspective:** Given research work studies a number of specific features of state registration of a new or old real estate correlated with standards of the Town Planning Code of the Russian Federation and existing state standards. The research perspective is to study other trends and features of legal regulation and assess their impact on civil commerce of a real estate.

**Practical relevance:** The research results can be used in legal practices of commercial companies as the research briefly discusses issue of simplified procedure of rights’ registration.

**Social relevance:** Currently, civil law defines the State registration of rights as the final and integral element to acquire real estate property right. A number of complex and financially consuming administrative procedures including building permission should be performed prior to registration of a real estate right. At the same time the legislation provides a simplified procedure of registration, removes additional administrative barriers in certain cases, and reduces duration of acquisition of rights for a new real estate. Many participants of civil commerce seek simplified procedure of registration of rights which contributes to the detailed research work.

**Significance:** The research work is of practical and theoretical significance to the students, Master’s degree students, those who study entrepreneurial and proprietary right and lawyers who deal with state registration of real estate rights.

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#### **Recommended citation**

**Zagoruiko I. U.** The specifics of the registration of real estate rights with no construction permit required. *Kazan University Law Review*. 2020; 1 (5): 18–26. <https://doi.org/10.31085/2541-8823-2020-5-1-18-26>.