AMENDMENTS TO THE RUSSIAN CONSTRUCTION CODE

September 2, 2011

To Our Clients and Friends:

On July 18, 2011 three Federal Laws were passed, introducing several important amendments to the Town Planning Code of the Russian Federation (the "Town Planning Code"), namely:

- Federal Law No. 215-FZ on Amendments to the Town Planning Code of the Russian Federation and Certain Legislative Acts of the Russian Federation ("Law No. 215");
- Federal Law No. 243-FZ on Amendments to the Town Planning Code of the Russian Federation and Certain Legislative Acts of the Russian Federation ("Law No. 243"); and
- Federal Law No. 224-FZ on Amendments to Articles 51 and 56 of the Town Planning Code of the Russian Federation and Certain Legislative Acts of the Russian Federation ("Law No. 224").

These amendments resolve two major sets of issues by:

- introducing the rule that building permits are tied to the land plot, rather than the developer; and
- defining capital repairs, clarifying the definition of redevelopment and abolishing the requirement to obtain a permit for most forms of capital repairs.

The provisions of the above laws took effect on July 22, 2011.[1]

[1] *There is a special procedure (which is not treated in this update) for the entry into force of certain provisions of the above laws.*

BUILDING PERMITS TIED TO THE LAND PLOT, RATHER THAN THE DEVELOPER

Law No. 224-FZ puts an end to the long drawn-out uncertainty about whether a building permit was "transferable." Under Law No. 224-FZ, building permits are now tied to the relevant land plot, and not to the developer; in the event of transfer of rights to such land plot the building permit remains valid. The new holder of rights must notify the relevant authority responsible for the issuance of building permits and provide certain information confirming transfer of rights to the respective land plot.

The Town Planning Code already contained a provision previously, whereby "a building permit shall remain valid upon the transfer of rights to a land plot and capital construction facilities,"[2] which could be interpreted as indicating that the building permit was transferable. However, this rule was not enforceable. In practice, the new titleholder had to apply for a building permit from scratch because the law was applied based on the principle that the permit was issued not in respect of the land, but rather in respect of the developer.

Under the new rule, the new titleholder of the land plot may carry out the construction or redevelopment of capital construction facilities on such land within the scope set forth in the building permit issued to the former titleholder.

This rule also applies in those cases where a land plot was created by combining two or more land plots, for either or both of which a building permit has been issued, and in those cases where a land plot was created by partition, redistribution or carve-out (although in such case a new urban development plan would have to be obtained in respect of the new land plot and any urban development restrictions that may apply to such land plot taken into account).

Law No. 224-FZ sets forth a clearer distinction between the powers of the various levels of governmental authority responsible for issuing building permits. The general rule remains unchanged: building permits are issued by the municipal authority where the land plot is situated. However, depending on the purpose of the facility to be built on such land plot, or the specific features of the geographical location, the application for a building permit may need to be filed with the relevant federal governmental authority or governmental authority of a constituent entity (*sub'ekt*) of the Russian Federation.

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[2] *See Art. 51.21 of the Town Planning Code.*

A new concept introduced by Law No. 224-FZ is the early termination of a building permit. Consistent with the principle of tying rights to the land plot with the building permit, Law No. 224-FZ establishes four termination grounds: (1) compulsory termination of the rights to the land plot, including expropriation for state or municipal needs; (2) abandonment of rights to the land plot; (3) termination of a lease or other agreement serving as the ground on which the rights of the holder of rights to the land plot were created; and (4) termination of subsoil use rights, if the building permit was issued in respect of a land plot made available to a subsoil user and necessary for the conduct of operations in connection with subsoil use.

DEFINING CAPITAL REPAIR AND REDEVELOPMENT; PROCEDURE FOR CAPITAL REPAIRS

For the first time a definition of capital repair[3] of immovable property is introduced at the legislative level (separately for capital construction facilities and for linear facilities, such as transportation, communications and utilities lines). Previously, the concept of "capital repairs" was mentioned in a wide range of legislative acts, none of which defined the term[4].

Until the latest changes were introduced, the Town Planning Code operated on the basis of the concepts of "construction," "redevelopment" and "capital repairs," but defined only "construction" and "redevelopment." In practice, this often led to confusion between the concepts of "redevelopment" and "capital repairs." Thus, it was possible for the regulatory authorities to classify the restoration of a collapsed roof or supporting columns of a building as capital repairs, rather than redevelopment (as would be the case now, after the new changes).

The definition of "redevelopment" has also been somewhat revised: in particular, redevelopment no longer includes "modification of engineering services networks." Furthermore, as with capital repairs, redevelopment is defined separately for linear facilities and for all other capital construction facilities.

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[3] *The concept of "current repairs" is not within the scope of the town planning regulations. "Current repairs" (as well as "capital repairs") is an important concept governed (primarily in the context of leasing) by civil law. However, the term is not defined in law. If we follow the logic of the law, then it is most likely that "current repairs" should be taken to mean all work that is not included in the concept of "redevelopment" or "capital repairs."*

[4] *Given this, a description of works constituting capital repairs was provided in a range of governmental regulations (see, e.g., Decree of Gosstroy USSR No. 279 dated December 29, 1973; Decree of Gosstroy Russia No. 15/1 dated March 5, 2004).*

Pursuant to the amendments introduced by Law No. 215 redevelopment is distinguished from capital repairs according to the following criteria[5]:

- Redevelopment implies changes to the more fundamental features of a facility (height, number of floors, area, total space), while capital repairs principally imply replacement and/or restoration of individual structural elements without any significant reconfiguration of the whole facility or any part thereof[6];
- Redevelopment principally relates to structural design (other than replacement and/or restoration of individual structural elements), while capital repairs relates to non-load bearing structural elements (and capital repairs also cover replacement and/or restoration of individual load-bearing structural elements), as well as engineering services systems and networks.

Law No. 243 introduces a provision whereby it is no longer required that all project documentation be prepared for capital repairs: only certain sections of the project documentation need be prepared (depending upon the type of work to be undertaken). Generally, such documentation does not require submission for state expert review[7].

Previously, capital repairs were covered by the general requirements in place for new construction and redevelopment, which, *inter alia*, necessitated obtaining building permits and commissioning permits. However, in practice, there were often cases where a developer would not obtain a building permit for capital repairs, or would obtain such building permit, but would ignore the requirement to obtain a commissioning permit for the capital repairs, which would create additional potential risks for investors.

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[5] *These criteria are applicable to capital construction facilities that are not linear facilities. There are special conditions established for linear facilities; however, on the whole, the distinctions between redevelopment and capital repairs are the same.*

[6] *Such approach was foreshadowed in Ruling of the Plenum of the Supreme Court of Russian Federation and the Plenum Supreme Arbitrazh Court of the Russian Federation No. 10/22 dated April 29, 2010 on Certain Issues Arising in Judicial Practice in Hearing Disputes in Connection with the Protection of Property Rights and Other Proprietary Interests ("Ruling 10/22"). Paragraph 28 of Ruling 10/22 sets forth that redevelopment (as opposed to capital repairs, which was not expressly stated, but nevertheless assumed) creates new immovable property. The amendments to the Town Planning Code covered in this update expand on and supplement this approach.*

[7] *The only exception to this is project documentation prepared for capital repair of public roads.*

Under the new rules there is no longer a requirement to obtain either a building permit or a commissioning permit to undertake capital repairs[8]. In addition, no state expert review is required for capital repairs.

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We would be happy to answer any questions you may have on these or any other related matters.

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[8] *These amendments also go hand-in-hand with Ruling 10/22, according to which redevelopment creates new immovable property and, if such redevelopment is carried out in breach of the relevant regulatory control, then the resulting redevelopment ("unauthorized redevelopment") will be demolished as unauthorized construction (unless the property can be brought back to the state it was in prior to such works). In keeping the requirement for permits in place in respect of redevelopment and abolishing such requirement for capital repairs, the Town Planning Code confirms that in the course of redevelopment new immovable property is created, while in the course of capital repairs it is not.*