

# Client Update

## Supreme Court: Construction Permits Should Be Obtained Before Commencement of Construction

### MOSCOW

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In its ruling dated June 16, 2015, in Case No. A07-7616/2014 (the “**Supreme Court Ruling**”) the Judicial Chamber of the Supreme Court of the Russian Federation on Economic Disputes set forth its position<sup>1</sup> on one of the most problematic issues arising in the course of the implementation of construction projects, namely: the question of whether a construction permit can be obtained after construction has already commenced.

Below we briefly review the key provisions of the Supreme Court Ruling and related issues.

### CONDITIONS OF ISSUANCE OF CONSTRUCTION PERMIT

According to the facts of the case, a company involved in the construction of a residential building applied to the competent authority for a construction permit. However, the authority rejected the application because the company had already begun construction of the residential building without a permit. The company challenged the rejection of its application in court. The courts of first instance and appeal instance dismissed the company’s lawsuit, while the cassation court vacated these court decisions, finding that the rejection by the competent authority of the application for the issuance of a construction permit was unlawful. The case was considered by the Judicial Chamber of the Supreme Court of the Russian Federation on Economic Disputes, which vacated the ruling of the court of cassation, and the Supreme Court thereby deemed lawful the

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<sup>1</sup> We note that the position of the Judicial Chamber of the Supreme Court of the Russian Federation on Economic Disputes refers to the resolution of a specific dispute and is not binding on other courts hearing disputes on similar issues. However, trends in the development of court practice and the positions of the regulatory authorities in the construction industry support the position set forth in the Supreme Court Ruling.

rejection of an application for the issuance of a construction permit after construction had already commenced.

Until this case was heard by the Judicial Chamber of the Supreme Court of the Russian Federation on Economic Disputes, there was extensive court practice on the question of whether it was possible to obtain a construction permit after construction had already begun. The courts indicated that a construction permit should be obtained prior to actual commencement of construction and, in the opinion of the courts, the moment when the application for a construction permit was received by the competent authority - before or after completion of construction — had no legal relevance.<sup>2</sup>

The principal conclusions of the courts in favor of the argument that a construction permit must be obtained **prior to commencement of work** at the site consist of the following:

- Pursuant to Art. 51.1 of the Town Planning Code of the Russian Federation a construction permit is a document entitling the developer to carry out construction or renovation of capital construction facilities;
- It follows from this rule that a developer may commence construction of a facility only after a construction permit is obtained, and all actions required by the law have been performed and documents prepared for the purposes of obtaining a permit and undertaking the construction have been issued;<sup>3</sup>
- An application for a construction permit filed with the competent authority after construction has begun constitutes an attempt to circumvent the requirements of town planning legislation and, thus, legitimizes unauthorized construction using administrative means (Art. 10.1 of the Town Planning Code);<sup>4</sup>
- If a developer has all of the documents required to obtain a construction permit, submission of such documents to the competent authority is not

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<sup>2</sup> See, e.g., VAS Ruling dated 20.02.2012 in Case No. A22-670/2010; VAS Ruling dated 02.12.2013 in Case No. A47-14258/2012; Ruling of Urals District FAC dated 15.08.2013 in Case No. A47-14258/2012; Ruling of North Caucasus District Arbitrazh Court dated 02.12.2014 in Case No. A53-9898/2014; Ruling of North-Western District FAC dated 03.03.2014 in Case No. A13-1020/2013; Ruling of Urals District FAC dated 13.02.2013 in Case No. A71-114/2012.

<sup>3</sup> See Supreme Court Ruling.

<sup>4</sup> Ruling of East-Siberian District FAC dated November 26, 2009 in Case No. A78-3001/2009.

sufficient to obtain a construction permit. The developer must submit these documents prior to the commencement of construction of the facility.<sup>5</sup>

### RISK OF BUILDING BEING DEEMED UNAUTHORIZED CONSTRUCTION

Applicable civil law contains an exhaustive list of grounds whereby a completed real estate property may be deemed unauthorized construction, and the absence of a construction permit in respect of the completed facility is one such ground.

If there is no construction permit for a facility (including where the rejection of an application for a permit was challenged in court and the court found that such rejection was lawful), the completed facility may be deemed an unauthorized construction. As a general rule, real estate found to be unauthorized construction must be demolished, unless ownership title to the unauthorized construction is established by a court (Art. 222 of the Russian Civil Code).

A review of court practice shows that ownership title to an unauthorized construction (where the property was constructed without obtaining the necessary permits) may be established if the following criteria have been met:

- The applicant applied to the competent authorities for issuance of a construction permit in a timely manner and included all of the documents envisaged by the law;
- There is evidence that it was not possible to obtain a construction permit prior to commencement of construction (e.g., evidence of unlawful rejection of an application for issuance of a construction permit by the competent authorities).<sup>6</sup>

Therefore, in order to avoid potential disputes and the risk of completed property construction being deemed unauthorized construction in the absence of the necessary permits and approvals, we recommend that construction permits be obtained prior to the commencement of any construction work, and that all enquiries and submissions to the competent authority regarding the issuance of

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<sup>5</sup> See Supreme Court Ruling.

<sup>6</sup> Par. 26 of Ruling No. 10 of the Plenary Session of the Supreme Court of the Russian Federation, No. 22 of the HAC Plenary Session dated April 29, 2010; par. 9 of Information Letter No. 143 of the HAC Presidium dated December 09, 2010; Ruling of West-Siberian District FAC dated July 15, 2013 in Case No. A45-24783/2012; Ruling of the Arbitrazh Court of East-Siberian District dated December 18, 2014 in Case No. A78-5211/2014; Ruling of the Arbitrazh Court of East-Siberian District dated September 10, 2014 in Case No. A19-12644/2013; Ruling of North Caucasus District FAC dated May 21, 2014 in Case No. A32-22542/2013.

a construction permit prior to commencement of construction work at the property be documented.

Amendments have recently been made to Art. 222 of the Civil Code in respect of regulation of the unauthorized construction regime.<sup>7</sup> These amendments will be covered in more detail in our next client update.

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Please do not hesitate to contact us with any questions.

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<sup>7</sup> See [Bill No. 59895-6](#) on Amendment of Part One, Article 222 of the Civil Code of the Russian Federation and the Federal Law on the Entry into Force of Part One of the Civil Code of the Russian Federation (approved by the Federation Council on July 8, 2015).