

LEGAL REGULATION IN THE FIELD OF TERRITORIAL PLANNING AND URBAN ZONING: MAIN PROBLEMS AND WAYS TO SOLVE THEM

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ABSTRACT

Objective: Purpose of the study is to investigate the main features and characteristics of a single land-use planning document of urban zoning for the legislation of the Russian Federation.

Method: The article uses methods of content analysis of novels of Russian law and comparative analysis with individual foreign legal systems. The analysis is carried out both from the point of view of the corresponding normative-legal relations of the new document in the system of already existing regulation and from the point of view of the expected practical application of new norms creating a new document in urban planning.

Results: The authors have analyzed the most significant aspects of combining urban planning documents into a single document. The authors have also analyzed the consequences of the integration of the new document into the field of urban development and have made proposals for practical improvement of the regulation development in this area. The authors have concluded that a single land-use planning document as an instrument of urban development is in demand only by an economic subject of construction activity and does not meet the interests of citizens.

Conclusions: the authors have proposed practical steps to equalize the balance of interests between all subjects of urban development activities for execution by public authorities since a person, their rights and freedoms constitute the highest value in the Russian Federation.

Keywords: Single document. Territorial planning. Master plan. Urban zoning. Planning structure.

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INTRODUCTION

Problem statement

Since December 19, 2022, Federal Law No. 541-FL "On Amendments to the Urban Planning Code of the Russian Federation and Article 18.1 of the Federal Law 'On Protection of Competition'" has included the possibility of combining two planning and zoning documents into a single document in the system of regulating relations between territorial planning and urban zoning of the Russian Federation.

The system of territorial planning in modern Russia was formed as a result of a combination of the post-Soviet system of development planning and market influence in the use of the territorial spatial basis as a means of production in forestry and agriculture and as a real estate object for construction purposes. This set of factors is not unique, but the socialist planning model underlies integrated planning in the modern context of ensuring sustainable development.

Describing the first element of this combination, it is necessary to point out that there was no absolute denial of the previous period of development in the transitional period of 1991-1993 in Russia, and over time the institutions of state-building of the socialist model have been successfully integrated into the state-building of modern Russia. Territorial planning, as an element of general economic planning at the national, regional, and local levels, can be safely attributed to such institutions. The second element of the combination – the market impact on the organization of territorial planning – is based on the circumstance of classifying a land plot as a real estate object, which, like any real estate object, has a market price that should be formed from the balance of supply and demand. However, a land plot is not just an object the civil turnover of which is equivalent to the turnover of any other thing. Firstly, as S. Clemens (Mark Twain) wittily put it, "Buy land, they're not making it anymore", that is, the product has a supply limit on the market (McIntyre, 2009). Secondly, land has a twofold economic nature: on the one hand, it is a means of production. On the other hand, it is a spatial basis for the construction of other objects on it: buildings and structures. Thirdly, and most importantly, the earth is a natural resource, the exhaustion of which is fraught with the collapse of the next generations. That is, in essence, the earth as a natural resource is not the property of the present, but of the future.

However, territorial planning in the regulatory system is divided into two levels:



a) strategic planning, which, according to the provisions of the Federal Law of June 28, 2014 No. 172-FL "On Strategic Planning in the Russian Federation", includes territorial planning schemes at the federal and regional levels;

b) local territorial planning, the documentation of which is implemented either in a scheme for the territory of a municipal district or in a master plan for the territory of a settlement or an urban district.

At the level of local self-government territorial planning is not exclusively the will of public authorities, but appears as the result of a consensus between the interests of public authorities, private property, and the local community (fraternity, ummah, commune, municipality, etc.) (Chavis & Wandersman, 1990). Gaining consensus in the system of current regulation in the Russian Federation of the foundations of local self-government and the foundations of urban development is formalized through the procedure of public hearings or discussions.

Urban planning zoning in the system of the current regulatory legal regulation in Russia is the consolidation at the local level of the type (types) of permitted use of a land plot in a specific territorial zone. However, the rule of such consolidation is such that it acts only forward in the arrow of time, categorically not having the possibility of any revision in relation to the already existing development. Only new construction objects or reconstructed construction objects should meet the current zoning requirements (permitted uses and other limiting parameters: height, margins, permissible area of the site, etc.) The standard life of the existing facility in the event of changes in regulations and zoning is also not legally fixed (Dinić & Mitković, 2011; Ms et al., 2022; Saehu et al., 2022). That is, it is possible to maintain the operation of the object by means of capital repairs even in an alien environment, for example, a warehouse in an area of multi-apartment residential development.

Thus, the problem of this study is the identification of a consistent possibility of simultaneous consent of the local community both with respect to the prospects of its own territorial development and the existing urban zoning (land use).

METHODS

Our methods included comparative analysis, content analysis, and the construction of inductive and deductive syllogisms. Since the single land-use planning and urban zoning document under study was a multicomponent regulator of the totality of economic, social, and environmental relations, the comparative analysis was carried out in comparison with



individual foreign legal systems, including in comparison with similar regulatory instruments in the American legal system.

Content analysis was used to identify the meaning of the novels of Russian legislation, which used the method of implementing normative competencies considered in the study, due to the lack of authentic law enforcement practice. Inductive syllogisms were used in a systemic relationship with general theories of competencies and their redistribution in the system of state-building of the Russian Federation. The conclusions of the study were formulated using the method of deduction.

RESULTS AND DISCUSSION

Economic and legal essence of a single land-use planning and zoning document

Within the meaning of the novel provisions of Article 28.1. of the Urban Planning Code of the Russian Federation, a single land-use planning and zoning document of a settlement or an urban district is a combination in a single document adopted by the authorized body at a time of both territorial plannings, displaying the boundaries of settlements, and urban planning zoning, displaying the boundaries of territorial zones.

The emphasis on the display of borders in a single document was carried out by us intentionally: these borders are a corresponding legal instrument to the institute of registration of rights to real estate objects, including land plots. That is, it is the borders, their representation in the system of urban planning regulation, in the public-legal sphere that is the bridge to private-law relations, to relations based on equality of the parties. In this regard, large economic entities have an interest in the reverse effect: from the sphere of civil turnover, the sphere of creating surplus value, to influence the sphere of public interest, pursuing the goal of increasing surplus value due to such an impact.

Territorial zoning is carried out in the land use and development document, but the very potential possibility of its implementation is established by law only in relation to certain categories of land: settlements for agricultural purposes not classified as land, special-purpose lands, recreational areas and resorts (Mayboroda, 2016). The distinction between these categories, lands, and legal regimes is established by the border of the settlement in accordance with paragraph 2 of Article 83 of the Land Code of the Russian Federation. The border of a locality as a geographical and legal phenomenon allows classifying all categories of land into two types (excluding reserves): those used for functional purposes (lands of settlements) and those having a purpose (agricultural, special, conservation, forest, and water). This is an



important classification for understanding the different nature of the types of land categories because lands that have priority of use within the meaning of the principles of the second and sixth land legislation (sub-paragraphs 2 and 6 of paragraph 1 of Article 1 of the Land Code of the Russian Federation) are not endowed with the possibility of extending urban planning regulations to them, that is, the opportunity for development. The difference in the economic potential between lands endowed with the potential for development and lands deprived of such an opportunity by law is obvious. Therefore, the border of a settlement is also an economic phenomenon: changing this border makes it possible to include new lands in the built-up territories, or, on the contrary, exclude from the individual lands endowed with the possibility of development that has fallen into the lands of settlements mistakenly, unreasonably, or due to the commission of a crime. For example, the lands of the Sochi National Park. Exclusion of lands from the composition of the lands of settlements in the presence of demand for such lands, in addition, significantly, due to the creation of a deficit, raises the market investment attractiveness in relation to the remaining lands in the settlement.

Thus, the border of a locality to be displayed in a single document gives it functional and independent economic and legal properties, in addition to the intended property of only territorial planning.

The boundaries of territorial zones included in the analyzed law as part of a single document are the establishment of legal regimes for aggregates of land plots in a specific zone and the limiting parameters of their development determined in relation to these land plots. Part 1 of Article 38 of the Urban Planning Code of the Russian Federation refers to the ordinary marginal parameters of development: the area of land plots; minimum margins from the boundaries of land plots for the placement of buildings, and structures; the height of buildings and structures; the maximum percentage of development within the boundaries of the land plot. In addition, acts of local self-government bodies (public authorities when redistributing powers) establish additional limit parameters in certain territorial zones. For example, requirements for facades of buildings, requirements for entrance groups, requirements for materials used in construction, etc. The set of additional limiting parameters changes in different regions, and municipalities, which affects the marginality (profitability) of land development and the appearance of the territory. Thus, for instance, the classical development of St. Petersburg, which does not imply deviations in the placement of the building from the boundaries of the land plot, formed an ensemble in monolithically perceived built-up areas, a particular consequence of which is well courtyards. Zoning also serves as a tool for social engineering



and the segregation of the population according to various criteria in world practice, especially in American practice (Monkkonen, 2019).

In a single document, causality is assumed between the establishment of functional zoning by a land-use planning document and urban zoning determined by the rules of land use and development. There is no such causality in the ordinary legal order. However, it was revealed within the meaning of legal regulation by the Supreme Court of the Russian Federation, approved by the Presidium of the Supreme Court of the Russian Federation on November 14, 2018 (Bulletin of the Supreme Court of the Russian Federation No. 5, 2019) in paragraph 57 of the Review of Judicial Practice of the Supreme Court of the Russian Federation No. 3 (2018). The Supreme Court pointed out that the establishment of territorial zones specifies the provisions of territorial planning documents to determine the legal regime for the use of land plots, without changing the purpose of the territory classified as functional zones.

Accordingly, by embodying in the normative regulation the provisions on the display of borders in novels on a single document, the legislator of Russia embodied the opinion of the Supreme Court of Russia on the interconnectedness of zoning in the general plan and zoning in land use. The Russian Federation has received a continental legal system in general, in the paradigm of which the court is not the creator of the law, but is its implementer. This is why the legislator of Russia, when implementing a single document, did not consider the following circumstances.

The legal consequences of the adoption of the territorial planning document are established in Article 26 of the Urban Planning Code of the Russian Federation. The most important of them are the preparation and approval of documentation on the planning of the territory and the adoption within six months of programs for the integrated development of municipal infrastructure systems, transport infrastructure, and social infrastructure of settlements.

The documentation on the planning of the territory identifies the elements of the planning structure and, based on the standards of urban planning design, determines the sufficiency (provision) of the district, quarter, or another element of the planning structure with the objects of the above-mentioned infrastructures and their territorial accessibility to the population. Simply stated, the totality of these documents places kindergartens, schools, polyclinics, roads, water pipelines, etc. in specific districts and neighborhoods, objects in quantity and in places sufficient and accessible for the population to receive the full range of social, communal, and transport services. After that, territorial zoning should take place, aimed at a specific



redistribution of land resources for the placement of these objects, in the parameters specified in the programs and at the expense of the sources defined in these programs.

Dismantling in a single document of this stage in the implementation of urban planning activities, that is, territorial zoning immediately based on functional zoning, means that the public authorities of Russia do not assume the need for territorial planning documents to fulfill the function of providing the population with communal, social, and transport infrastructure facilities at the expense of the budget. The documents of territorial planning in the hypostasis of a single document are intended only for the function of regulating property relations: determining the intended purpose through the establishment of the boundaries of the settlement and determining the types of permitted use in urban zoning. The entire role of a single document is reduced to a tool for the capitalization of land and land plots for use as a spatial basis for development. The social nature of the development, which was in balance with the commercial one through integrated development programs, is simply thrown out of the regulatory system and its acquisition is possible only in the institute of integrated development of the territory. In this institution, the public authority sells the right of development in exchange for the burden of building social, communal, and transport infrastructure. The idea of a complete rejection of zoning is already debated in the doctrine, but the arguments currently given in favor of the abolition of zoning are not convincing (Gray, 2022).

The reform of the institution of documentation on the planning of the territory under such circumstances will be the predictable step of the Russian lawmaker.

Thus, the documentation on the layout of the territory in the current law enforcement practice is qualified as a normative legal act (Decision of the Arbitration Court of the North Caucasus District of August 19, 2016, No. F08-3969/16 in case No. A32-16300/2015; Appeal Ruling of the CC on Administrative Cases of the Moscow Regional Court of April 07, 2021, in the case N 33a-11555/2021, etc.). Such an idea of the territory planning documentation (the TPD) as a normative legal act is based on the fact that both the documentation on the planning of the territory (subparagraph "a" of paragraph 1 of Part 3 of Article 42, paragraph 2 of Part 6 of Article 43 of the Urban Planning Code of the Russian Federation) and the documentation on the surveying of the territory (paragraph 2 of part 6 of Article 43 of the Urban Planning Code of the Russian Federation) as part of the TPD contain the display on the drawings of the projected red lines, within the boundaries of which public use territories are formed, which are understood as territories freely used by an unlimited number of persons, including squares, streets, driveways, embankments, coastal strips of public water bodies, squares, and boulevards (paragraph 12 of Article 1 of the Urban Planning Code of the Russian Federation; similarly, the



content public land plots, given by paragraph 12 of Article 85 of the Land Code of the Russian Federation). That is, the territories of common use themselves are a circumstance that presupposes the normativity of the TPD as a legal act: the extension of the action to an indefinite circle of persons and the repeated application. In addition, the order of its adoption, which includes the procedure for achieving consistency with related copyright holders, speaks in favor of the statement about the regulatory nature of the TPD.

However, the essence of the TPD is not only in the establishment of red lines; it is primarily in the allocation of elements of the planning structure, the characteristics of which as an architectural and legal phenomenon should be highlighted. We can not forget that the TPD is divided by law into the approved part and materials for justification. The urban planning legislation does not contain requirements for the publication of documentation on the planning of the territory, but taking into account the well-established idea of the regulatory nature of the TPD, the approved part is published in accordance with the procedure established for the publication of acts of local self-government bodies.

The regulatory legal act of the federal executive body authorized in the field of construction approved the list of elements of the planning structure (Order of the Ministry of Construction and Housing and Communal Services of the Russian Federation dated April 25, 2017 No. 738/pr). The situation is similar to the authorized body in the field of addressing objects (Order of the Ministry of Finance of the Russian Federation No. 171n dated November 5, 2015). Both of the above normative legal acts do not give a meaningful definition of the most significant of the planning structure elements' names: what is a district, what is a quarter and what is a micro-district – each time it is a discretion in a specific document of territorial planning, urban zoning, or – directly in the TPD. We should mention the Code of Rules SP 42.13330.2016 "Urban planning. Planning and development of urban and rural settlements" (approved by order of the Ministry of Construction and Housing and Communal Services of the Russian Federation of December 30, 2016, N 1034/pr), containing definitions of a quarter, district, micro-district, etc. However, the Code of Rules is not a normative legal act in this part. With regard to such elements as the territory of common use, the territory of gardening or horticulture by citizens for their needs, the territory of the transport interchange hub, the territory occupied by a linear facility and (or) intended for the placement of a linear facility, the road network and the territory of the vineyard and wine-growing terroir there is their semantic content with corresponding norms (Mayboroda et al., 2021).

Such objects as a district, a quarter, and a micro-district as elements of the planning structure allocated by the TPD each time receive situational architectural and legal certainty



from the TPD that such an element allocates. It is especially important to emphasize the significance of the commonly overlooked legislative provision – the proposal of the second paragraph 2 of Part 3 of Article 42 of the Urban Development Code of the Russian Federation, from the content of which it follows that the provision on the characteristics of the planned development of the territory, as an element of the approved part of the TPD, should contain information on planned conservation measures in relation to the territorial zones in which it is planned to place federal objects, of regional and local significance. Indicators of the provision of the territory with municipal, transport, and social infrastructure facilities and the actual indicators of territorial accessibility of such facilities for the population should be preserved. In other words, from this norm, the causality between zoning and the TPD following it appears. The opposite, that is, a situation in which the TPD is the cause, and zoning is the consequence, is provided only by the institute of integrated development of the territory.

The TPD under such circumstances is a regulatory legal act only in part. Consequently, there are no formal legal obstacles to the integration of this part into a single document. From the point of view of combining all the regulatory properties of urban planning documentation in one document, such a consequence seems to be immediate and necessary.

That is, in our opinion, the next step in regulating urban planning documentation will be the inclusion of the display of red lines in a separate drawing as an appendix to single land-use planning and urban zoning documents. In this case, the attached drawing extracts its normative property from the subsequent TPD, and the entire TPD following a single document with red lines will be a non-normative act.

All the circumstances described in this section do not take into account the institution of achieving public consent in the sustainable development of the territory, preserved in a single document – public hearings or public discussions.

Importance of public discussions and hearings in territorial planning

Both in the Russian system of regulation of urban planning and local self-government relations (Mayboroda, 2014) and in global practice, decisions on the development of the territory are debated with the population and the local community. The general legal principle that the good of the people is the supreme law (*Salus populi suprema lex esto*) (Arrieta-López, 2022; Locke, 2010; Narváez, 2021) is so pervasive in all modern legal systems that the mere assumption of the possibility of making and implementing decisions that affect the general interest of ensuring life seems to be simply incredible. The historical experience of voluntarism



in territorial planning is perfectly reflected in the myth of the Tower of Babel. Although the death of the Babylonian civilization was caused by illiterate irrigation and not by a mixture of languages, the experience of reaching a consensus in settlement planning probably began to form at this time (Gumilev, 2019).

The key study of this issue in modern conditions was published back in 1969 and the relevance of this work is obvious (Quick & Bryson, 2016). Sherry R. Arnstein in the study "The Ladder of Civic Participation" identified eight steps for the convenience of perception of the possibility of participation of the local community in territorial planning: manipulation, psychotherapy, information, counseling, pacification, partnership, the delegation of authority, and civic control (Arnstein, 1969). With regard to the regulation of these relations in the Russian Federation at the federal level, the provisions of Articles 5.1. and 28 of the Urban Planning Code of the Russian Federation should be noted, which do not imply the possibility of differentiating the degree of participation of the local community in public hearings. That is, according to the law in Russia, local self-government bodies in the Russian Federation cannot delegate any powers to local communities, formalize a partnership with the local community, and (or) implement civil control over the procedures of discussions and hearings. The practice has formed a rule on co-optation to a collegial body that organizes public hearings of individual activists of the local community but this provision has not found its formal legal consolidation at any of the levels of the organization of public power. Therewith, the conclusion on the results of public discussions or public hearings is taken into account by the head of the local administration by virtue of part 9 of Article 28 of the Urban Planning Code of the Russian Federation. That is, the result of public hearings and discussions in the system of the current regulatory legal regulation of the preparation and approval of master plans (similarly with respect to the rules of land use and development) does not have a normative nature of mandatory execution by public authorities, including by an official with competence to send the draft of the specified document to a representative body of local self-government. Doctrinal achievements about the tools and possibilities of gaining public consent in territorial planning are not considered in the rule-making activities of the legislative branch of the Russian Federation.

The procedures under consideration in the system of Russian legislative regulation do not relate to the procedures of direct democracy, and their conduct does not mean the totality of the will of each of the participants in the procedure of public discussion or public hearings. Collective will as a result of hearings as a single entity is not formed by the local community, unlike, for example, the formation of collective will by the local community – the right holders



of land shares in agricultural land, although the procedures are very similar in appearance (Mayboroda, 2018 Mballa & Lara, 2021).

The historical source of the origin of this particular form of discussion is the actual reception of Roman law from the Eastern Roman Empire. This refers to the institute of acclamation, established by the edict of Emperor Constantine the Great. This edict provides an opportunity to glorify in public places "the most just and diligent rulers, so that we can reward them accordingly, and, on the contrary, we grant the right to accuse unjust and unfit rulers by voicing complaints so that the power of our control affects them" (Filatov, 2011, p. 56). Today's institution of public discussions, public hearings, including in land and urban planning law, also assumes only the possibility of glorifying the relevant decision or another project under discussion (Alanzi, 2022; Clune, 2021; Mayboroda, 2022).

Nevertheless, this method is perceived in everyday consciousness as a way of giving legitimacy in relation to the situation under consideration – documents of urban planning and zoning. Through acclamation, these acts, at the level of decisions still being drafted, endow the content of these documents with the nature of consensuality achieved in the procedure for its adoption between residents and public authorities at the local level (Mayboroda, 2021, 2022; Peresada et al., 2022). Such a nature, or rather its perception, allows the representative authority to refer to the existing approval ("praise") in the future, completing the opinion in the minds of residents that since the proposed documents are approved by the people themselves, who best understand their own good, these documents are legitimate.

Back to the single document. We established from its content that it combines the resolution of two issues: territorial planning and urban zoning. Public hearings and discussions, as well as the document, are proposed to be unified.

Unified public hearings on the issue of planning and land use represent a combination of interests incompatible in a single debate process and the impossibility of allocating priority in which such a discussion is held. Territorial planning pursues the goals of placing objects of federal, regional, and local significance. That is, the priority in planning is the public interest, which is so dominant in this event that the pursuit of other goals is simply unacceptable. Therefore, the public authority acts as a systemic actor in achieving public consent. Public authority finances the placement of these facilities. That is why it delimits the spheres of its interests and competencies by the border of settlements: the lands of settlements in the competence of municipalities; agricultural lands – in the regional; lands of forest and water funds – in the federal.



The number of actors is significantly wider with regard to land use (territorial zoning). These are all available copyright holders, having not a public interest in development, but a private legal interest in participating in the turnover of the most liquid assets (land plots), the degree of liquidity of which is volatile to restrictions and limit parameters established by urban planning regulations.

Consequently, with the presumed good faith and reasonableness of the participants of the public consensus, the law sets an a priori unattainable goal for them during public hearings and public discussions. Therefore, the opposite will be true – carrying out the procedure not to reach an agreement, but to simulate the procedure.

CONCLUSION

The economic and legal analysis of the single document presented in this paper allows concluding the following:

- Firstly, a single land-use planning document as an instrument of urban development was created in the interest of an economic subject of construction activity and cannot meet the needs of other subjects of urban development.

- Secondly, the display of borders in a single document entails the actual difficulties of their entry into the Unified State Register of Real Estate Registration, which does not display the boundaries of functional zoning. That is, territorial planning operates with an object territory, and urban zoning with an object is a land plot; in one document public and private objects and the economic interests of their use are combined.

- Thirdly, the procedure of public hearings, and public discussions conducted simultaneously with regard to planning and zoning has the properties of an oxymoron, it contradicts itself and will be reduced to a simulation of the procedure.

- Fourthly, it is predicted that the documentation on the planning of the territory will lose its regulatory properties by extracting the regulatory properties of red lines from it and including them (in a separate drawing) in a single document.

SUGGESTIONS

Due to the fact that a person, their rights and freedoms constitute the highest value in the Russian Federation, public authorities must take practical steps to acquire a new balance of interests between all subjects of urban planning activities, to equalize the balance of interests



between all subjects of urban planning activities. The norm of part 4 of the analyzed Article 28.1. The Government of the Russian Federation has been delegated the authority to determine the composition of materials for the justification of a single document of territorial planning and urban zoning of a settlement or urban district. In this regard, we consider it necessary to include in the composition of these materials an in-depth study of the totality of social, economic, and environmental factors of the development of a territory, bearing in mind the normative consolidation:

- methods of social analysis of the composition of the inhabitants of the territory (age, gender, education, level of offenses, ethnic composition, etc.);
- methods of economic analysis consisting of a generalization of the available profitability and expected profitability as a result of the adoption of territorial planning documents and the timing of achieving the said profitability;
- methods of greening transport, utility, and energy infrastructures based on the assumption of the possibility of achieving a certain degree of hydrocarbon neutrality to the planning horizon of a single document.

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