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MODIFICATION OF CONSTRUCTION PERMITS AND TRANSFER OF SUBJECTIVE RIGHTS

Amending construction permits is important for regulation of construction. Serbia had an inflexible system that did not allow it, due to lack of transferability of the underlying rights and state monopoly over construction land. Enabling ownership of construction land made it necessary to allow the transfer of construction permits. This was done while maintaining the system of issuing construction permits to developers and focusing on digitalization. This made the rights from administrative decisions transferable, which should not be the case. The root of confusion is a lack of distinction between public and private law aspects of construction. Comparatively, coupling construction permit with a developer is traditional in the former Yugoslav countries. In countries that did not have a socialist period, public and private law aspects of construction are distinguished and construction permit is coupled with the land. This solution is an indication for future development of construction law in Serbia.

Key words: *Construction permit. – Amendment of construction permit. – Transfer of construction permit. – Private and public law of construction.*

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1. INTRODUCTION: BETWEEN SUBJECTIVE RIGHTS AND ADMINISTRATIVE ACTS

The construction of buildings is a cornerstone of any economy. Since the 19th century – and today in particular – this sector has been thoroughly regulated because of the need for spatial and urban planning, to achieve sustainable development, and to facilitate the coexistence of large numbers of people in relatively small areas in large cities. Planning, as an activity integral to building construction, is implemented, in legal terms, through a system of issuing construction permits. From this viewpoint, a construction permit, in fact, is a means of ensuring that spatial and urban plans are actually implemented.

For almost two decades now, the question of the complexity and duration of the process of obtaining a construction permit, i.e. obtaining a construction permit has long been a stumbling block to doing business in Serbia, with significant ramifications for economic indicators and economic growth in general. This consequently prevented developers from commencing construction within a reasonable timeframe,¹ making the realisation of investment projects uncertain and more expensive. Despite clearly defined deadlines for issuing permits, months of waiting – which in practice had a tendency to sometimes turn into years – has to an extent given rise to the wave of illegal construction.² In order to speed up the procedure and encourage investment, the amendments to the Planning and Construction Act of 2009 (hereinafter: PCA 2009),³ adopted in 2014, introduced a unified procedure which, *inter alia*, covers the procedure of issuing construction permits and brought it into the digital age by availing of e-government mechanisms.

Due to the value of real estate, significant involvement of labour and capital, and their importance for the long-term design of living and working space, obtaining construction permits is not a simple procedure in any legal system. Changes that can surface once a project has already started and the permit already issued by the authority present additional legal challenges during construction. The changes can be twofold. First, they may stem from changes to the building itself, in terms of the design for which the permit had been issued – in that case, what we have is a

¹ For additional information from the analysis of problems with obtaining construction permits until 2012, see USAID (2012, *passim*).

² For additional information about the problem of illegal construction, see Nikolić (2016a, *passim*).

³ Planning and Construction Act, *Official Gazette of the Republic of Serbia*, Nos. 72/2009, 81/2009 – corrigendum, 64/2010 – Constitutional Court ruling, 24/2011, 121/2012, 42/2013 – Constitutional Court ruling, 50/2013 – Constitutional Court ruling, 98/2013 – Constitutional Court ruling, 132/2014, 145/2014, 83/2018, 31/2019 and 37/2019.

change in the objective (or narrower) sense of the word. The other option involves a change of developer during construction, and we refer to it as a change in the subjective sense of the word, or transfer of a construction permit. Since Serbian law belongs to the circle of systems in which a construction permit is issued to a specific developer, who is named in the administrative act and thus authorised to build, a change of titleholder of the land (and of a building's developer) requires that the administrative act be amended. This provision, as we will see in the comparative analysis, is not employed in all legal systems, but has become commonplace in Serbia. It poses a litany of dilemmas and challenges, which we will address further on in this article.

2. HISTORICAL OVERVIEW OF THE TRANSFERABILITY OF CONSTRUCTION PERMITS IN SERBIAN LAW

In order to better understand the provisions under applicable law, it is necessary to briefly explain its origins, i.e. the situation and problems that existed prior to the enactment of the current provisions. Prior to the enactment of the PCA in 2009, construction land was state-owned – with a few relatively negligible exceptions⁴ – and developers based their property right to construction on the “right of use”. The right of use of undeveloped construction land was, on the other hand, non-transferable by way of a transaction, as it was a derivative of social (and later state) ownership of construction land as the only constitutionally allowed form of property;⁵ thus, any kind of “subjective change” (transfer) of a construction permit was out of the question (because the right that enabled the developer to build was in and of itself non-transferable). In commercial practice, non-transferability of the right of use was circumvented in two ways: first, if any sort of building existed on the land, even if it existed only in the registries, or even if it existed only legally and not as a matter of fact, transfer of the title to the property led to the transfer of the right to use the land⁶ and, second, if the holder of the right of use

⁴ We refer here to the right of use of other construction land referred to in Article 84 of the Planning and Construction Act, *Official Gazette of the Republic of Serbia*, Nos. 47/2003 and 34/2006.

⁵ We refer here to Article 60 of the 1990 Constitution of the Republic of Serbia. For details on the origins of the system of public/state property ownership of construction land, see Begović, Mijatović, Hiber (2006, 7 *et seq.*). For changes in the legal framework governing urban construction land and the non-transferability of the right of use, see Živković (2014, 230, 232–236).

⁶ This is thanks to the provision contained in Article 3 of the Purchase and Sale of Real Estate Act, *Official Gazette of the Republic of Serbia*, Nos. 42/1998 and 111/2009, which is also retained in the current Purchase and Sale of Real Estate Act, *Official Gazette of the Republic of Serbia*, Nos. 93/2014, 121/2014 and 6/2015.

of undeveloped construction land was a legal person (usually a limited liability company), then the right of use could be indirectly sold by way of sale of membership rights in the company in question (the subject of the sale would be a 100% interest in a company whose only asset was the right to use the land, which happens to be the method that is still in use due to favourable tax consequences). However, if the holder of the right of use was a natural person, and there was no building on the land, not even a virtual one, then there was no possibility of transfer; in such cases, in practice, developers would finance construction “under the name” of the holder of the right of use, which created legal uncertainty and numerous (unnecessary) legal complications, vis-à-vis both acquisition of the property and from a tax perspective. The possibility of transferring an (otherwise non-transferable) right of use, i.e. the possibility of subjectively changing the construction permit, was introduced for the first time into the legal system under the Mortgage Act of 2005, through its provisions governing settlement when the subject of a mortgage happens to be a building under construction. Namely, this Act stipulated (and still does), first, that a building under construction may be mortgaged, and, second, that where the mortgage creditor is settled by way of the sale of the unfinished building and the right to build (complete the construction) as determined in the construction permit. Under this Act, the right to build is transferred *ipso iure*, whereby the construction permit authority is required to issue a construction permit to the entity that purchased the “building under construction” under the process of settlement, “in its own name”.⁷

One of the cases that gave a clear demonstration of the numerous problems caused by the then property-title regime of urban construction land, in combination with the regulations that governed the construction of buildings at the time, was the Telenor case. Norwegian telecommunications company Telenor entered the Serbian market in 2006 by winning an auction at which the assets of former Mobtel operator (Mobi 63) were sold, together with a mobile telephony licence. The Mobtel company was not for sale, as it had in fact lost its license at the end of 2005, rather its assets directly, which included a number of mobile telephony base stations. However, in respect of those base stations that were still awaiting construction permits or occupancy permits, the legal situation was such that the construction permit was issued in the name of Mobtel, or Mobtel had the right of use or some other right that authorised it to apply for construction permits for specific locations. As the rights under construction permit decisions could not be sold or purchased due to their administrative and legal nature, Telenor was unable to formally

⁷ See Article 39 of the Mortgage Act, *Official Gazette of the Republic of Serbia*, Nos. 115/2005, 60/2015, 63/2015 – Constitutional Court ruling, and 83/2015.

obtain occupancy permits, i.e. the right that would authorise it to finish construction of the base stations and see it become their rightful owner. At that time, while assisting a leading expert in the field of administrative law and, in particular, administrative procedure, one of the authors of this article was involved in drafting a legal analysis, the terms of reference of which were to explain that, although a construction permit, as an administrative act and administrative and legal basis for acquiring rights to build, is indeed non-transferable, the property law basis for said permit, as a civil subjective right, is – in principle – transferable, and in that specific case it was transferred to Telenor. Therefore, although the construction permit was issued in Mobtel's name, the occupancy permit could in fact be issued in Telenor's name. At the time, this view was quite revolutionary, and many of the lawyers in the state administration failed to fully understand it.

The following was the subject of the discussion, on a theoretical level: it is indisputable that subjective rights, which are administrative-legal in nature, are non-transferable, which also applies to rights under a construction permit, which is issued in the form of an administrative act (decisions in administrative procedure). Only subjective civil rights are transferable, but not all of them (see Vodinelić 2014, 47). When the status of a holder of a subjective civil right is a prerequisite for the acquisition of a subjective right of an administrative-legal nature, such as, for example, the status of a titleholder to land who can obtain a construction permit to construct a building on a specific land plot, then it is logical that the change of the holder of that subjective civil right creates, for its new holder, a requirement to request that the administrative-legal power attached to said right be “transferred” to it as well. However, since subjective administrative rights are non-transferable, “transfers” are indirect and effected as follows: in a new administrative act, the same (administrative subjective) right is assigned to the new holder of the subjective civil right to which it pertains, with the simultaneous termination of that (administrative subjective) right for the earlier holder of the subjective civil right.

At the time when, instead of the formally non-transferable right of use (which – in the 1990s and especially the 2000s – was, incidentally, often transferred in practice by contract, with a number of instances in which state authorities actually recognised the effect of such transfer), the right to own urban construction land was made possible by constitutional reform, i.e. when a transferable subjective civil right became the basis for obtaining a construction permit, it became necessary to amend the legislation governing the issuance of construction permits and make provision for their indirect “transfer”, where the transfer concerned a civil right that served as the basis for its issuance.

3. THE ROOT OF THE PROBLEM – THE RELATIONSHIP BETWEEN PRIVATE LAW POWERS AND PUBLIC LAW ASPECTS OF CONSTRUCTION LAW

In socialist Yugoslavia, the construction of buildings was almost entirely governed by public law. Understandably, the socialist system did not look favourably on private property, especially where real estate and in particular construction land, as the most valuable and economically most important, were concerned. Hence, the possibility of owning construction land privately had been precluded under the Constitution for decades (construction land was the “reserved domain” of public i.e. state property). This had far-reaching consequences for the legal framework governing real estate in general, as well as the construction of buildings. First, the principle of unity of real estate was abandoned, and the building title system was separated from the land title system.⁸ Second, since ownership of a building did not arise from title (or other power) to land (construction was based on the right of use, which was not of a private law character), the impression was created that ownership was acquired depending on the public law aspects of construction, usually only by acquiring the occupancy permit, which created a mix of the public and private aspects of construction.⁹ Third, generations of spatial and urban planners were educated in a system that did not recognise land ownership, and thus an entire set of property rights (bearing in mind that spatial and urban plans that, in a way, restrict property rights on construction land, have to be subject to the test of necessity in a democratic society as well as proportionality),¹⁰ remained far-removed from the minds of the planners and those designing the curricula by which new plans were formed (see Živković, Milenković 2012, 185–187). Fourth, even among lawyers there is no awareness today that by use of private law instruments (property right such as easement, or contract i.e. obligation) it is possible to regulate the right to build in a way that limits the possibilities provided for under the urban plan – for example, that a developer can promise his neighbour that he will not build a building that is more than five stories high, regardless of the fact that the urban plan permits eight stories, or that he will not erect a building that is more than 15 metres high, regardless of the fact that the urban plan permits 25 metres. If this concept is lost

⁸ On the importance of the principle of unity of real estate, see Gavella *et al.* (2007, 82–91); Živković (2014, 238, footnote 29).

⁹ This problem remains today and is reflected in the fact that a permit is a prerequisite for registration of property in the real estate registers. The issue of acquiring property by construction is therefore one of the issues that needs to be theoretically and normatively clarified in Serbian law today.

¹⁰ This is one of the issues that requires a more serious theoretical consideration under Serbian law.

on lawyers, it is obvious that the issue is completely incomprehensible to today's urban planners. Finally, given that construction land could not be privately owned for such a long time, a number of property rights related to it were "wrested" from public law, so, for example, the owner of construction land – even today, when the title to construction land is recognised and existing – has virtually no authority to subdivide his plot or covert his land into several plots if he so desires.

In the field of building construction, the legal transition – to put it mildly – has been void of serious theoretical reflection or ideas as to how the area should be systematically regulated and what the objective thereof would be, i.e. what sort of legal system was to be achieved through transition. The transition, therefore, was driven solely by the current needs of business, and was led by lawyers who had sound practical know-how but lacked a broader view of this legal area. Nonetheless, practical know-how gained in a system that needs to be changed by way of transition is not the best recommendation for someone to legally design the desired transition. In Serbia, however, there were no other people who could complete this, or people who were more capable to do the job; consequently, procrastination was inevitable. This led to frequent legislative amendments and the recurrence of certain problems that seemed simply "unsolvable", such as, for example, so-called "illegal construction"

The problem with the confusion of private and public aspects of constructing buildings has contributed greatly to the development of regulations related to the modification of construction permits, especially "subjective" modification – its transfer. Without getting into the details of the confusion, in a comparative overview below, we will introduce the systems that exist in countries that did not experience a period of socialist legislation and which developed their construction regulations without upsetting their legal traditions. This overview could be ground-breaking in the context of developing similar relations in Serbia.

4. ISSUING CONSTRUCTION PERMITS UNDER SERBIAN LAW

As noted earlier, in order to speed up the procedure and encourage investment in the country, amendments to the Planning and Construction Act of 2014 introduced a unified procedure, which included, *inter alia*, the procedure for issuing construction permits. Application of some of the provisions relating to the so-called 'one-stop-shop' system began on 1 March 2015, while the deadline for completing the transition to the unified procedure "in procedures for issuing acts concerning rights to construct and use buildings"¹¹ was set for 1 January 2016. Additionally,

¹¹ Article 132(3) of PCA 2009.

one of the main differences between the former procedure for obtaining a construction permit¹² and the new system was the move to a central electronic system. Accordingly, documents now must be submitted in electronic form, signed using a qualified electronic signature.¹³ The procedure for issuing a construction permit begins with the submission of an application through the central information system, whereby it is also necessary to submit an extract from the construction permit design, the actual construction permit design, proof of payment of the administrative fee, and proof of the appropriate right over land or building.¹⁴ The unified procedure also requires the competent authority to obtain *ex officio* all the necessary documents, which are issued by the holders of public powers,¹⁵ making it easier for applicants than in the former system. In accordance with the law, the competent authority must issue a construction permit within five working days of submission of the application.¹⁶ The purpose of this provision was to significantly speed up the process and allow developers to obtain a permit and start construction very quickly. However, in addition to the issue surrounding the efficiency of authorities when it comes to obtaining data, and requirements by and approval from other authorities, there is also the question of their objective ability i.e. staffing capacity to complete the entire procedure within the short deadlines, having in mind the austerity measures imposed on and employee redundancies made in state administration and local self-government authorities.

A construction permit decision contains information about the developer, the building covered by the permit, i.e. the building to be removed or reconstructed, the land plot, the validity period of the construction permit, the documents underlying the permit, information about the financier where a contract between the developer and financiers is attached, the contribution to the development of the construction land,

¹² For additional information on the issuance of building permits prior to the amendments of 2014, see Vučetić, Dimitrijević (2013, *passim*); Wickel, Schell, Nikolić (2014, 51–57); Pljakić (2011, 7).

¹³ See Article 3 of the Rulebook on the Procedure for Implementation of the Unified Procedure by Electronic Means, *Official Gazette of the Republic of Serbia*, Nos. 113/2015, 96/2016 and 120/2017.

¹⁴ “... unless that right is recorded in a public ledger or is established by law, i.e. if the Act prescribes that such proof is not required.” In some cases, other documentation must be submitted in addition to the above. See Article 16 of the Rulebook on the Procedure for Implementation of the Unified Procedure by Electronic Means. As appropriate rights over land, the law lists title, the right of lease for publicly-owned construction land, as well as the right of use of construction land prior to the process of conversion. Article 135 PCA 2009. For additional information on the issue of conversion, see Nikolić (2016b, 44–49).

¹⁵ Article 8d of the PCA 2009.

¹⁶ Article 8d(2) of the PCA 2009. A fine ranging from RSD 25,000 to RSD 50,000 or incarceration of up to 30 days is prescribed for a misdemeanour committed by an official who fails to issue a permit within the specified time limit, Article 209 of the PCA 2009.

and in some cases information about the rights and obligations of the developer and holder of public powers.¹⁷ The construction permit is issued in the developer's name, but it may also be issued in the developer's name and the financier's name, with the developer's approval and if a certified contract is attached to the construction permit application.¹⁸ This can significantly speed up delivery of the project, since it facilitates takeover of the project in the event the developer is declared insolvent or bankrupt, and paves the way for the financier to finish construction of the building without interruption. This delivers substantial savings at the project financing state and mitigates the risks to some degree.

5. MODIFICATION OF A CONSTRUCTION PERMIT DECISION IN SERBIA

The Planning and Construction Act adopted in 2009 introduced provisions for modification of a construction permit decision in the both objective and subjective sense of the word. Up to that point, under the Planning and Construction Act of 2003, a developer could obtain a construction permit based on altered documentation, i.e. modified main design if during construction it was necessary to deviate¹⁹ from the documentation, i.e. the main design underlying the original decision, due to altered circumstances that could not have been foreseen.²⁰ According to the new Act, construction permit decisions may be modified, in the objective sense of the word, if due to altered financial and other circumstances or changes in the availability of infrastructure the original decision needs to be aligned with the design.²¹ There was space left to also make modifications on other grounds. Furthermore, decision modification applications must be submitted if changes occur, during construction, in relation to the construction permit, or the main design i.e. the construction permit design, implying deviation from the location, dimensions,

¹⁷ Article 22 of the Rulebook on the Procedure for Implementation of the Unified Procedure by Electronic Means.

¹⁸ Article 135a of the PCA 2009. Differentiating between developers and financiers is also a relic of the time when construction permits were based on a non-transferable right of use, so the financier was actually the "real" developer, while the developer was an entity who had (non-transferable) ownership grounds for obtaining a permit for that specific location. Today, the provision is used by project-finance financiers, although, in terms of comparative law, the security of their interests is now quite commonly safeguarded in different ways. This problem does not exist where construction permits are not issued "in someone's name".

¹⁹ The deviation pertains to changes in the position, dimensions, purpose and shape of the building. Article 119(2) of the PCA 2003.

²⁰ Article 119(1) of the PCA 2003.

²¹ Article 142(1) of the PCA 2009.

purpose, shape of the building and other parameters, due to which construction must be halted.²² Construction permit decisions are modified under a unified procedure also, which begins with the submission of an application through the central information system. The application must be accompanied by a new construction permit design, i.e. a copy thereof.²³ The competent authority may decide to modify the construction permit if changes are in line with the planning document.²⁴

A significant change that was introduced by the Act of 2009 was the possibility of changing the construction permit in the subjective sense of the word (transferring the construction permit). Namely, if there is a change of developer after the construction permit decision becomes final, the new developer is required to submit an application to modify the decision within 15 days of the change occurring.²⁵ The application must be accompanied by proof of title, or other right to the land or building concerned.²⁶ Applications in respect of privately owned land must be accompanied by a contract for the sale of the construction land and the building under construction,²⁷ or proof of other legal grounds for conveyance, as well as proof of tax paid, if tax is payable in that specific case.²⁸ If a developer is a tenant on publicly-owned construction land, applications must be accompanied by a copy of the document from the real estate register certifying the tenancy right of the new owner of the building.²⁹ If a construction permit has been issued for the purpose of

²² Article 142(1)(2) of the PCA 2009.

²³ It is also necessary to obtain modified zoning ordinance if the changes do not comply with the previous one. Article 142(3)(4) of the PCA 2009. For additional information on the technical documentation for modifying a construction permit decision, see Čukić, Vasiljević (2017, 79).

²⁴ The deadline for issuing a decision is five working days from the day of receipt of proper documentation, as is in the case for issuing a construction permit decision. Article 142(5) of the PCA 2009.

²⁵ Article 141(1) of the PCA 2009.

²⁶ Article 141(2) of the PCA 2009. The Act mentions the title to a building under construction; however, that is “not theoretically correct because title to a building under construction cannot be held”. See Hiber and Živković (2015, 238).

²⁷ The Registry of Real Estate, Overhead Lines and Underground Ducts (Registration Procedure) Act stipulates that in the case of registration of a building under construction, a separate part thereof, or the transfer of the rights to a building under construction or a separate part thereof, an annotation to that effect must be registered without a specified deadline, based on the “final construction permit, technical documentation underlying the construction permit, and confirmation that notice has been given of the works to be carried out under that permit, i.e. based on a contract for the sale/purchase of the building”. Article 11 of the Registry of Real Estate, Overhead Lines and Underground Ducts (Registration Procedure) Act, *Official Gazette of the Republic of Serbia*, Nos. 41/2018, 95/2018 and 31/2019.

²⁸ Article 141(3) of the PCA 2009.

²⁹ Article 141(4) of the PCA 2009.

building additional floors or converting common areas into residential or commercial units, applications must be accompanied by a contract for the sale of the building under construction, i.e. other legal grounds for conveyance, the contract concluded with the residents, and proof of tax paid where tax is payable.³⁰ The competent authority should issue a decision modifying the construction permit decision within 8 days from the application submission date.³¹ This decision does not modify other parts of the original construction permit; it merely changes the name/business name of the developer, which also must be indicated in the construction permit design.³² The possibility of transferring a construction permit is critical when transferring rights to a building under construction. This was not an option under the previous Act, and the new developer had to apply for a new construction permit irrespective of the fact that one had been already issued for the same building. The current solution makes it much easier to continue construction after a change of developer. This new arrangement is also significant for pledges on real estate, i.e. the issue of settling the mortgagee in the case of a building under construction being mortgaged.³³ Nevertheless, the new developer must still go through the administrative procedure for transferring the permit, the administrative authority is forced to engage in private law relations (“ownership grounds”), while in theory the transfer of rights under an administrative decision remains a violation of the rule on non-transferability of such subjective rights. In that regard, the next step toward simplification would be a system that links a construction permit to the real estate and not to a particular developer, which from a comparative law perspective would not be anything new.

6. COMPARATIVE LAW MODELS FOR MODIFYING CONSTRUCTION PERMITS: MUST A PERMIT BE ISSUED TO THE DEVELOPER?

In this respect, the situation in neighbouring countries is similar to that in Serbia. In most of them, it is possible to modify the construction permit decision in both the objective and subjective sense of the word. In Croatia, for example, pursuant to the Construction Act, a developer can apply to modify or supplement a construction permit³⁴ at any time

³⁰ Article 141(5) of the PCA 2009.

³¹ Article 141(9) of the PCA 2009.

³² Article 141(9)(10) of the PCA 2009.

³³ See: Hiber, Živković (2015, 237–238).

³⁴ For additional information on the procedure for issuing construction permits in Croatia, see: Jovanović, Aristovnik and Rogić Lugarić (2016, 13–15).

prior to obtaining the occupancy permit.³⁵ If developers change, the new developer is required – as in Serbia – to submit an application to modify the permit within 15 days, and must halt construction until a decision is passed.³⁶ Applications must be accompanied by proof that there is a legal interest in issuing the permit, or permission from the developer named in the original construction permit (the developer being replaced), while in some cases applications must also be accompanied by proof that the applicant may carry on the activities of a developer, if so required under law with regard to certain buildings.³⁷

In Bosnia and Herzegovina this matter is regulated at the entity level. In the Federation of Bosnia and Herzegovina, under the Spatial Planning and Land Use at the Level of the Federation of Bosnia and Herzegovina Act, a developer is also required to submit an application to modify or supplement the construction permit where there is any deviation from the main design.³⁸ Applications for change of developer can be submitted at any time prior to issuance of the occupancy permit, accompanied by the valid construction permit and proof of acquisition of title.³⁹ In the Republic of Srpska the Spatial Planning and Construction Act provides for modifications to a construction permit in the objective sense of the word if the developer wants to alter the technical documentation, main design, or make changes related to “location, purpose, construction, equipment, environmental protection or stability, functionality, dimensions, i.e. the external appearance of the building”, in which case it is also necessary to halt construction until a decision is made.⁴⁰ If developers change during construction, the new developer must notify the urban planning-construction inspectorate thereof.⁴¹ However, unlike the law in the Federation of Bosnia and Herzegovina, this Act does not lay down any further details regarding the impact of the change of developer on the construction permit.

³⁵ Article 125 of the Construction Act, *Official Gazette*, Nos. 153/2013, 20/2017 and 39/2019.

³⁶ Article 127(1)(3) of the Construction Act.

³⁷ Article 127(2) of the Construction Act.

³⁸ Article 59 of the Spatial Planning and Land Use at the Level of the Federation of Bosnia and Herzegovina Act, *Official Gazette of the Federation of BiH*, Nos. 2/2006, 72/2007, 32/2008, 4/2010, 13/2010 and 45/2010.

³⁹ Article 60 of the Spatial Planning and Land Use at the Level of the Federation of Bosnia and Herzegovina Act. It means acquiring the title to the land on which construction is to be carried out.

⁴⁰ Article 135 of the Spatial Planning and Construction Act, *Official Gazette of the Republic of Serbia*, Nos. 40/2013, 2/2015 – Constitutional Court ruling, 106/2015 and 3/2016 – corrigendum, 104/2018 – Constitutional Court ruling.

⁴¹ Article 109(6) of the Spatial Planning and Construction Act.

In November 2017 Slovenia enacted a set of construction laws, namely the Architecture and Engineering Act (*Zakon o arhitekturni in inženirski dejavnost*),⁴² the Construction Act (*Gradbeni zakon*)⁴³ and the Spatial Planning Act (*Zakon o urejanju prostora*).⁴⁴ These acts introduced numerous changes, which, *inter alia*, also pertain to construction permits. Regarding modification of a construction permit decision, there are certain differences in regard to the Building Construction Act (*Zakon o graditvi objektov*),⁴⁵ which previously governed this matter. Previously developers had been required to submit applications to modify a construction permit if changes occurred during construction or reconstruction, in terms of deviation from the conditions stipulated in the issued decision, especially where they could affect the environment, health at work, or safety of the building.⁴⁶ The modification had to be made using the same procedure as for issuing the construction permit, however, in some cases it was possible to apply using a fast-track/summary procedure.⁴⁷ It was also possible to modify the construction permit in the subjective sense of the word, using the fast-track/summary procedure.⁴⁸ Under the current Construction Act, minor deviations from the construction permit during construction are permitted, provided that they do not involve other land and comply with the spatial planning document that was in force when the permit was issued; that the outside dimensions do not deviate more than 0.3 m or are less than what was originally envisaged; that the changes do not affect the opinion issued by the competent authority;⁴⁹ and that the purpose of the building remains the same.⁵⁰ Therefore, in such cases it is no longer necessary to modify the construction permit; it is however necessary for

⁴² Architecture and Engineering Act, *Official Gazette of the Republic of Slovenia*, No. 61/2017.

⁴³ Construction Act, *Official Gazette of the Republic of Slovenia*, Nos. 61/2017 and 72/2017 – corrigendum.

⁴⁴ Spatial Planning Act, *Official Gazette of the Republic of Slovenia*, No. 61/2017. All these acts came into effect on 1 June 2018.

⁴⁵ Building Construction Act, *Official Gazette of the Republic of Slovenia*, No. 102/2004 – consolidated text, 14/2005 – corrigendum, 92/2005 – ZJC-B, 93/2005 – ZVMS, 111/2005 – Constitutional Court ruling, 126/2007, 108/2009, 61/2010 – ZRud-1, 20/2011 – Constitutional Court ruling, 57/2012, 101/2013 – ZDavNepr, 110/2013, 19/2015, 61/2017 – GZ in 66/2017 – Constitutional Court ruling.

⁴⁶ Article 73(2) of the Building Construction Act.

⁴⁷ “If such changes do not violate the conditions of use of adjacent land and buildings, cultural heritage preservation conditions and nature preservation conditions, or do not change the conditions that were in force at the time when the construction permit was issued”. Article 73(3) of the Building Construction Act.

⁴⁸ Article 73(4) of the Building Construction Act.

⁴⁹ The opinion of the competent authority must be obtained before applying for a construction permit. See: Article 31 of the Construction Act.

⁵⁰ Article 66(1) of the Construction Act.

the designer to provide written confirmation of the admissibility of the changes being contemplated, and they must be entered in the construction log prior to their implementation.⁵¹ Modification of a construction permit in the objective sense of the word is permissible where deviations are greater than those listed above.⁵² Applications may be submitted during the period of validity of the construction permit, and no later than 10 years after it becomes final and binding.⁵³ Should there be a change of developer during construction, the change must be reported to the administrative authority in charge of construction-related issues (therefore, there is no repeat of the procedure so that the permit can be issued “in the name” of the new developer).⁵⁴

Northern Macedonia is also one of the countries where it is possible to modify a construction permit in the objective sense of the word. Under the Construction Act, a construction permit may be modified during construction if modifications are in line with the urban plan.⁵⁵ Regarding a change of developer, the new developer is required to notify the competent authority of the change within 15 days and submit proof of its status.⁵⁶

In this context, it is also worth mentioning the changes that have been introduced in Montenegro. The Spatial Planning and Construction Act, enacted in 2017, abolished the need for construction permits, save for complex engineering structures.⁵⁷ Construction of buildings is no longer permit-based, but instead on information about the works and documents⁵⁸ submitted to the competent inspection authority. As for

⁵¹ Changes to the structure, installations and technological arrangements should be approved by the project manager and must comply with the new parts of the design. Article 66(2) of the Construction Act.

⁵² Save where the change relates to the very essence of the building and its purpose, in which case an application must be submitted for a new building permit. Article 67(1) of the Construction Act.

⁵³ Article 67(2) of the Construction Act.

⁵⁴ Article 66(3) of the Construction Act.

⁵⁵ Article 69 of the Construction Act, *Official Gazette of the Republic of Macedonia*, Nos. 130/2009, 124/2010, 18/2011, 36/2011, 54/2011, 13/2012, 144/2012, 25/2013, 79/2013, 137/2013, 163/2013, 27/2014, 28/2014, 42/2014, 115/2014, 149/2014, 187/2014, 44/2015, 129/2015, 217/2015, 226/2015, 30/2016 and 31/2016.

⁵⁶ The competent authority should also pass a decision within 15 days. Article 70(1) of the Construction Act.

⁵⁷ These are motorways, national and regional roads, railways, bridges with spans greater than 30m, tunnels longer than 200m, airports, oil pipelines, electricity transmission lines, ports, dams, chemical and heavy industry plants, etc. See: Article 172 *et seq.* of the Spatial Planning and Building Construction Act, *Official Gazette of Montenegro*, Nos. 64/2017, 44/2018 and 63/2018.

⁵⁸ It is necessary to enclose the main design, the report on the positive audit of the main design, proof of designer or auditor liability insurance, contractor agreement,

changes that occur during construction, these are regulated as part of the modification to the revised main design, owing to shortcomings and unforeseen circumstances.⁵⁹

It is possible to modify the main design due to other circumstances too, e.g. to improve the functionality of the building for instance, provided that the modification is in line with the urban-technical requirements. Modifications may be made at any time before application for registration in the real estate register.⁶⁰ In the event of a change of developer during construction, the new developer is required to furnish notice thereof to the competent inspectorate within 30 days, accompanied by evidence of the title to the land or other rights to build on the land, as well as proof of title to the building.⁶¹

Austria has a system that is slightly different from the aforementioned acts, which apply in the states that made up the former Yugoslavia. In Austria it is left to the provinces to regulate construction matters, i.e. to issue construction permits. Each province – and there are nine in total⁶² – has its own set of regulations governing this matter. Regarding modification of a construction permit in the objective sense of the word, we note the case of Carinthia, whose regulations govern the possibility of subsequent modification. The application must be accompanied by designs that are consistent with the modification, and permission from the owner or co-owner if the applicant is submitted by someone else. Also, other provisions apply depending on what the construction permit had been issued for, i.e. what the change pertains to.⁶³ The Vienna regulations permit deviations from the original design during construction. Modifications made to the design⁶⁴ are viewed as part of the original design and do not affect the extension of the validity of the construction permit.⁶⁵ Thus, the modification pertains to the existing

engineer's contract, proof of title to the land, or other right to build on the land, i.e. proof of title to the building. Article 91 of the Spatial Planning and Building Construction Act.

⁵⁹ See: Article 97 of the Spatial Planning and Building Construction Act.

⁶⁰ Article 98 of the Spatial Planning and Building Construction Act.

⁶¹ Article 94 of the Spatial Planning and Building Construction Act.

⁶² Burgenland, Kärnten, Niederösterreich, Oberösterreich, Salzburg, Steiermark, Tirol, Vorarlberg, Wien.

⁶³ Article 22 of the Kärntner Bauordnung 1996 – K-BO, LGBl Nr 62/1996, Letzte Änderung LGBl Nr 66/2017.

⁶⁴ In this case, the modification of the design refers to a design that was already approved by way of a construction permit. What we have here is a change that occurred after the construction permit decision came into force; if the application for a modification has been submitted prior to that, then what we actually have is an application for a new building permit. Kirchmayer (2014, 359–360).

⁶⁵ Article 73 (1) of the Bauordnung für Wien, LGBl. Nr. 11/1930, Letzte Änderung LGBl. Nr. 27/2016.

permit, which remains in effect after the modification (Kirchmayer 2014, 360). However, there are limits to which deviation or change can be considered to be a modification of the design, and when it constitutes an entirely new design.⁶⁶ The significant difference between the system existing in the abovementioned countries and Austria manifests itself in the modification of the construction permit in the subjective sense of the word. There are no specific provisions in Austrian legislation governing modification of a construction permit due to a change of developer, as is the case in most of the countries mentioned above. In Austria, a construction permit has a “proprietary effect”, the so-called *dingliche Wirkung*, meaning that its issuance is tied to a particular piece of land or a particular building, and that a change of owner thus does not affect it.⁶⁷ In other words, a construction permit is issued to a “respective holder” of the right that allows construction (property right, or right to build on the land). The legal successor assumes the status of its’ legal predecessor, and the rights and obligations established by the decision remain unchanged regardless of the change of the subject (Kirchmayer 2014, 534–535).⁶⁸ The legal predecessor is required to provide the successor with all necessary information and documents.⁶⁹ A change can also occur during the construction permit issuing process (Kirchmayer 2014, 536). A similar solution is explicitly provided in almost all the provinces of Germany; this is commonly referred to as the “effect of the permit vis-à-vis the legal successor” (*Die Baugenehmigung wirkt auch für und gegen den Rechtsnachfolger*) (Brenner 2009, 192, Rn 701).⁷⁰ Namely, Austria

⁶⁶ See: Article 73(1); Article 60c of the Bauordnung für Wien. Kirchmayer (2014, 359). If the deviation is such that it in fact constitutes a new design, the application of rules governing design modification cannot be invoked and a new building permit must be obtained. See: Kirchmayer (2014, 360).

⁶⁷ Even if the permit had been issued to a specific person, it has the same effect if it “pertains to a specific thing and depends solely on its characteristics, and not on the person” Kirchmayer (2014, 536). See: Article 53 of the Oberösterreich Bauordnung 1994, LGBl.Nr. 66/1994, Letzte Änderung LGBl.Nr. 95/2017; Article 129b of the Bauordnung für Wien; Article 9 of the Niederösterreich Bauordnung 2014, LGBl. Nr. 1/2015, Letzte Änderung LGBl. Nr. 50/2017; Article 53 of the Kärntner Bauordnung; Чл. 55 Tirol Bauordnung, LGBl. Nr. 57/2011, Letzte Änderung LGBl. Nr. 129/2017; Article 22 of the Burgenländisches Baugesetz 1997, LGBl. Nr. 10/1998, Letzte Änderung LGBl. Nr. 79/2013; Article 52 of the Vorarlberg Baugesetz, LGBl.Nr. 52/2001, Letzte Änderung LGBl. Nr. 78/2017.

⁶⁸ If the building is not being constructed by the landowner, then the landowner must notify the competent administrative authority about the holder of the right to construct the building which is located or being constructed on his/her/its plot. Article 129b of the Bauordnung für Wien; Article 9 of the Niederösterreich Bauordnung.

⁶⁹ Article 53 of the Oberösterreich Bauordnung.

⁷⁰ The articles or paragraphs contained in the 15 provincial building regulations (*Bauordnung*) that provide for such a solution are listed in footnote 30 on the same page (Note: Germany has 16 provinces).

and Germany make a proportionately clearer distinction between the private and public aspects of construction, and consequently there is no legal connection between the holder of the permit and the holder of the private law authority to construct a building on a piece of land – the developer does not necessarily need to own the land, since that aspect is “not a concern” of the permit issuing authority (Brenner 2009, 197, Rn 721). It goes without saying that, should a permit be sought and obtained by someone who is not the owner, in the case of construction the actual landowner would have (private) legal means to oppose construction in the event that a non-owner had started construction on someone else’s land; in such a case, the existence of a construction permit cannot help the non-owner. In short, private and public construction rights are mostly autonomous and mutually independent. The only effect of the private right to construction on that which is public is reflected in the ability of the competent authority to refuse to issue a construction permit due to lack of legal interest, while the effect of the public right to construction on private powers is virtually non-existent, except in very limited cases when construction regulations appear as regulations of a protective nature (for example, provisions governing the minimum distance required between buildings or provisions governing fire protection walls) (Brenner 2009, 3). As explained above, the socialist legal order of the past has caused construction legislation to “shift” wholesale and exclusively into the sphere of public law, and owing to this tradition current legislators in all countries of the former Yugoslavia are now struggling to come to terms with the fact that private property has made a return to construction land transactions – as has happened in Serbia over the past ten years.

7. CONCLUSION

The issue of possible modifications to construction permit is an excellent example of the complexity of construction rights and fallaciousness in this area of Serbian law throughout history. On the one hand, the possibility of modification – especially that which is subjective – became necessary in practice when it was permitted to hold the title to construction land, and in that sense the change should be welcomed. On the other hand, this solution remains one that is a “half-measure”: by solving one problem, it reveals several new ones, admittedly smaller. It seems that the problem can be solved in a completely satisfactory and systematically aligned manner only by adopting a solution that exists in countries that had no “socialist phase”, in which a construction permit actually has real effect and is tied to the land in question and not to any particular developer.

Consideration of the issue of transferability of a construction permit and the relationship between civil and administrative aspects of this process has led us to a problem of greater proportions – that of distinguishing between private and public law aspects of construction rights and, more broadly, the legal framework governing real estate. Historic heritage has led to the complete neglect of the private law aspect of the legal framework governing real estate in the Serbian law of today. This is further compounded by the fact that, of all the parts of civil law, property law is the only one that has not yet undergone a full legislative transition (the incomplete codification from 1980 still applies), even though that is where it was needed the most. This research cannot do anything more than note the identified discrepancies and problems. We hope that the questions that remain open will inspire future legal research and pave the way for further transition of the legal framework governing real estate in Serbia.

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