



**Ivane Javakhishvili Tbilisi State University**  
**Faculty of Law**

# **Journal of Law**

**№1, 2019**



უნივერსიტეტის  
გამომცემლობა

UDC(კუბკ) 34(051.2)  
ბ-216

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ISSN 2233-3746

**Davit Churghulia\***

## **The Ways of Solving the Legislative and Practical Problems of Construction Permit in the Light of New Construction Code**

*The article deals with the problematic issues construction permit legislation and practice, as well as analysis in the Light of New Construction Code. As for today, architectural and construction activities are undergoing rapid changes, and therefore there is a need to improve regulatory legislation. Improvement in construction legislation is inconceivable without the relationships associated with construction permit.*

*Nowadays the most important issues that need further study and research are the specifics of the construction permit, the peculiarities of the administrative proceedings and the involvement of all interested persons or authorities in the corresponding administrative proceedings, depending on the complexity of the decision.*

*The article addresses such issues as: construction permit as a Law Institute of Construction order, Construction Eligibility Control, Construction Activities subject to construction permit, Legislative Regulation of developmental approval and General procedures for Issuing a construction permit, Administrative Proceedings for permit, a list of permissive documentation and the persons responsible for submitting the application, as well as the participation of other administrative bodies and role of experts.*

*The article uses a comparative legal approach and aims to identify the abovementioned problems, to find solutions for them, through a detailed analysis of existing legislation and practice, in the prism of new regulations. This analysis will hopefully contribute to the research and development of construction law.*

**Key words:** *Construction permit, Construction order, Administrative proceeding, Construction code, Expertise, Permit Documentation List, Control of permission, Exceptional permit.*

### **1. Introduction**

Separate institutes of construction law should be studied with special approaches. This area has become even more important because construction business has been among the leading industries well developed within the last decade. Accordingly, the process of updating and amending the laws regulating this industry and its analysis is relevant.

Many discussions and working meetings were held on the topic of construction legislation both in the system of government bodies and civil society.<sup>1</sup> There were invited foreign experts who shared their views and experience, and several plans aimed at improvement and Europeanization of construc-

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<sup>1</sup> It is noteworthy that the Institute of Administrative Sciences of Tbilisi State University (hereinafter TSU) held forums where the issue of construction legislation reforms were discussed. See: *Kalichava K., Giginishvili D., Knorr A.*, Materials of the Institute of Administrative Sciences of TSU, Perspectives of Administrative Sciences, Book 2, Tbilisi, 2016 (in Georgian); *Gegenava A., Giorgadze D., Kalichava D., Stelkens U.*, Book 3, 2017 (in Georgian); *Joxadze V., Stelkens U.*, Book 4, 2018 (in Georgian).

tion legislation were drafted. The above discussions and hard work of local government, state executive bodies and experts led to good results and were reflected in the new Construction Code<sup>2</sup> which is a new document in Georgian legislative environment and its adoption is a big step forward. Despite this and some other positive changes amending and developing construction legislation still remains an essential challenge.

Some of the most important issues, which currently need more detailed research, are the specific characteristics of construction permit and the administrative proceedings of issuing it, also, considering the complexity of the decision to be made, ensuring participation of all interested parties and authorized bodies in the administrative procedures. Besides, the goal to be achieved by issuing a construction permit should be clearly defined. The main essence of construction legislation reform is that construction permit, as the most important element of construction law has to ensure construction order. That is why the following issues are on the agenda: necessity of detailed research of construction permit as the main instrument of construction law and order; solving the problems in practice; actual implementation of existing legal tools; creation of legal institutes for making lawful decisions and appropriate use of existing instruments. The goal of the present article is to outline the above problems and search for the solutions based on the detailed analysis of the current legislation and practice, through the prism of the new legislative regulations.

## **2. Construction Permit as a Legal Institute of Construction System**

Construction law comprises both public and private construction laws.<sup>3</sup> The public construction law itself shall be divided into the law of construction planning and the law of construction order. Construction planning implies planning territory and regulates using and organizing it. Construction order is related with the construction object and determines the legal requirements for the premises to be built.<sup>4</sup> The relationships connected with issuing construction permit are part of the construction order law.

Construction permit is one of the most important instruments of construction order law and it serves as a main tool for the authorized bodies issuing permits to implement all the means provided by administrative law to check permissibility of construction object and its compliance with current factual urban planning environment. When issuing a permit the main goal of an administrative body shall be not only ensuring the formal lawfulness of the permit but also protection of the constitutional rights of ownership, life, health, safe environment and cultural heritage. Also the construction permit has to ensure observance of construction law and order and create basis for the right future construction development.

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<sup>2</sup> Law of Georgia “Code of Georgian Space Planning, Architectural and Construction Activities”, 20.07.2018, 3213 RS, will enter into force on June 3, 2019.

<sup>3</sup> *Turava P.*, Basic Concepts and Institutions of Construction Law, *Journal of Law*, №2, 2009, 121 (in Georgian).

<sup>4</sup> *Ibid*, 121-123.

### **3. Controlling Permissibility of Construction and Construction Activities which are Subject to Permission**

Whenever construction order is mentioned in literature or researches, of course, it does not imply only to the permit issuing regulations or state supervision of construction; construction order is also related with the general issue of construction permissibility. The concept of construction permissibility itself includes three modeling configurations:<sup>5</sup>

- Preventive prohibition with the disclaimer of issuing a permit;
- Repressive prohibition with the possibility of cancelling the prohibition; and
- The obligation of notification.

All these three configurations have the same goal: restricting construction until the state will be expressed.<sup>6</sup> Restricting construction before expression of appropriate will is a kind of an instrument which forces the legislator to fulfill its obligation to create appropriate legal basis for conducting such works. At the same time the above configurations are determined for protecting public interest. Along with the collective favor public interest should include the aspect of basic rights too, because the act of permission in parallel with considering public interest implies statement of overcoming others' rights.<sup>7</sup> Selection of appropriate permit control models shall be based on respective criteria, which include public interest and the needs arising from the constitutional law and order.<sup>8</sup>

As it was already mentioned above, considering some specific characteristics and for ensuring order in the construction industry, permission is required for a number of construction works. That is why Georgian legislation determines the list of works for which construction permit is required. Naturally, it is aimed at establishing construction order and obligates the person conducting construction works to get a permit, which serves as preventive prohibition with the possibility of issuing a permit while the prohibition is replaced by the permit issued.<sup>9</sup>

Legislation of Georgia determines the list of the works for which construction permit is required. Permit shall be issued for a new construction (including but not limited to installation); reconstruction of an existing building; demolition of a building; changes in a construction document for which a new permit is needed.<sup>10</sup> However, there is an exception in the legislation. There are some works for which notification of the permit issuing administrative organ about conducting such works is enough and the permit seeker expects only respective approval as a response.

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<sup>5</sup> Brenner M., *Offentliches Baurecht*, Heidelberg, 2010, 190.

<sup>6</sup> See Kalichava K., *Kopaleishvili M.*, Control of Admissibility of Construction Activities in Georgia (Reforms Need and Prospectives) *Administrative Law, Scientific Journal*, Vol. 2, Tbilisi, 2016, 94 (in Georgian).

<sup>7</sup> *Ibid*, 94-95.

<sup>8</sup> Kalichava K., *Environment Protection Law*, Tbilisi, 2018, 249 (in Georgian).

<sup>9</sup> Turava P., *Basic Concepts and Institutions of Construction Law*, "Journal of Law", № 2, Tbilisi, 2009, 127 (in Georgian).

<sup>10</sup> Resolution №57 of the Government of Georgia on the Rule of Issuing Construction Permit and Permit Conditions of 27.03.2009, article 36, lhg 38 (in Georgian).

#### 4. Construction Permit – Constitutional Right or a Controlling Mechanism

Receiving a construction permit means that one may conduct construction works and enables the owner of the piece of land to use his/her property respectively. Along with many other benefits, a piece of land enables its owner to develop its living environment according to his/her needs and also gain some profit from entrepreneurship. Accordingly, a piece of land which can be used as a construction site is one of the guarantees of the owner's freedom of conducting construction, but there may arise some issues which must not contradict the legislation requirements. The right of using a piece of land for construction purposes may be limited by law.<sup>11</sup>

The ownership right should not be understood narrowly. On the one hand, it is an institute and on the other hand, it includes a person's right to freedom of construction<sup>12</sup>. Despite the fact that an owner of piece of land has the freedom of conducting construction under the current legislation of Georgia, this freedom extends only to the point where others' legitimate rights and interests arise and where the threat of violating others' rights occurs. It should be taken in consideration that the measures of protecting the property rights guaranteed by the Constitution and its principles are valid only when the construction owner acts in accordance with the principle of using his/her property lawfully and proportionally.<sup>13</sup> Accordingly, the importance of balancing the benefits to be gained with a construction permit and the rights protected under the legislation, particularly by the Constitution of Georgia, is obvious. Which is more important in this case – realization of construction right or the good to be protected by preventive prohibition of construction?

Preventive prohibition of construction right is aimed to protect the following principles:

- Life and health safety;
- Ensuring safe environment;
- Protection and maintenance of cultural heritage;
- Protection and realization of property rights.<sup>14</sup>

Protection of human rights is naturally considered to be the fundamental issue and goal of rule of law. However, in case of construction permit it is difficult to determine unanimously whether it is more important to protect the rights of the owner of land or the rights of the persons who may suffer irreparable damages resulted by the construction. Accordingly, it is very important to use construction permit, the main instrument of construction order correctly. Construction permit shall ensure regula-

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<sup>11</sup> Brenner M., *Offentliches Baurecht*, Heidelberg, 2010, 13.

<sup>12</sup> Turava P., *Basic Concepts and Institutions of Construction Law*, "Journal of Law", № 2, 2009, 2009, 123 (in Georgian).

<sup>13</sup> Comp: Churghulia D., *Problematic Issues of Protection of the Rights of Owners of Neighboring Property in Issuing Construction Permits and Construction Planning*, "Journal of Law", № 2, 2017, 315-329 (in Georgian).

<sup>14</sup> Turava P., *Basic Concepts and Institutions of Construction Law*, "Journal of Law", № 2, 2009, 2009, 127 (in Georgian).

tion of the activities subject to permission in a way that other person's rights are not violated. That is why it is necessary to add more clarity to the legislation regulating issuing construction permits by providing detailed definitions of the activities which are subject to permission, appropriate documentation, role of expertise and analyzing the construction site environment. Thus, we can avoid the threats which make the citizens think that realization of construction rights is more important than protection of the fundamental rights.

It may be concluded that in case of amending the legislation and clearly determining the comprehensive pre-conditions of issuing construction permit, without any "exceptions", and if construction permit is not some "unexpectedness" for interested parties, we may achieve the declared goals and establish construction order.

## **5. Legislative Regulation of Construction Permit**

According to the current legislation of Georgia the rules and conditions of issuing construction permit are provided in the law of Georgia on "Licenses and Permits"<sup>15</sup> and the Code of Georgian Space Planning and Architectural and Construction Activities which was adopted on June 20, 2018 and entered into force on June 3, 2019. This is a big step forward because the scattered legislative acts regulating construction law relationships and lack of codification remained a significant problem during the last decade.<sup>16</sup>

Construction permit is a permit of specific hierarchy and it is issued through respective stages. Before enactment of the new construction code there were three stages in the procedure of construction permit issuing: the 1<sup>st</sup> stage – determining the urban construction conditions (approving the conditions of using a piece of land for the construction); 2<sup>nd</sup> stage – agreeing the architectural- construction project; and the 3<sup>rd</sup> stage – issuing a construction permit.<sup>17</sup> Similar regulations on the stages of issuing construction permit are also included in the new Construction Code but the stage of approving the architectural projects is described and outlined more accurately, because it is the most important stage of issuing a permit.

On each of the above stages independent administrative proceedings are conducted. The administrative legal acts issued at each stage have to comply with Chapter IV of the General Administrative Code of Georgia (GACG) which sets forth the requirements for administrative acts. Construction per-

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<sup>15</sup> According to the amendments of 20.07.2018 the definitions and procedures related to issuing construction permit were excluded from the Law on Licenses and Permits. This amendment entered into force on June 3, 2019.

<sup>16</sup> About the structure and innovations of Georgian Space Planning and Architectural and Construction Activities Code, before enforcement of the code, see TSU Administrative Scientific Institute materials, Perspectives of Administrative Sciences, Book 2, Tbilisi, 2016, 29-61 (in Georgian).

<sup>17</sup> Resolution №57 of the Government of Georgia on the Rule of Issuing Construction permit and permit Conditions" of 27.03.2009, article 19, lhg 38.

mit is issued in accordance with the simple administrative procedure under Chapter VI of GACG and the rules set forth in the regulations referring to issuing construction permit and permit conditions.

## **6. General Procedures and Characteristics of Issuing Construction Permit**

In order to understand the legal relationships within the procedures of issuing construction permit, we should shortly review these procedures and underline the problematic issues.

Each stage of construction permit issuing procedures has specific characteristics. The first stage is approval of the conditions of using a piece of land for construction. It should be mentioned herein that the permit seeker is entitled get the conditions of using a piece of land for construction only if appropriate piece of land is provided. Determining validity of a piece of land for construction means that construction works are allowed on it. Different construction conditions are determined for each type of sub-zone based on the characteristics of the piece of land and type of construction allowed in the certain zone. Therefore, the construction-law status of a piece of land is main condition for future construction development.<sup>18</sup> In addition, the new construction code provides for more accurate and improved regulation of construction-law status of a piece of land and clearly defines that the conditions of using a piece of land for construction may be issued only on a piece of land included in a developed urban construction system. If there is no urban construction regulation plan approved for the territory to be used for a construction determining conditions for a piece of land separately or/and making changes to them is not allowed.<sup>19</sup>

In the conditions of using a piece of land the construction coefficient is determined, as well as the construction intensity coefficient; greening coefficient; the rule of placing communication networks on the piece of land; functions of the building, number of floors, etc. It is obvious that at the first stage of issuing construction permit some of most accurate and important conditions are determined and they should be fully observed in order to go through the following stages successfully.

According to the new Construction Code the importance of the stage of approving the conditions of using a piece of land for construction is relatively decreased, unlike the previous regulations. The pre-condition of using a piece of land for construction is inclusion of the piece of land in the developed system of urban construction. Accordingly, the conditions of using a piece of land shall be determined only on the basis of approved construction development plans.

The older regulations set 5 years validity term for the approved conditions while the new Code decreased the term to 3 years. It is a good change because the above conditions refer to very important issues (conditions of placing the building and coefficients, etc.) and considering the growth of construction in the country long validity term for those conditions would not be appropriate. By decreasing the term the permit issuing authorities get more mechanisms of control which is a positive trend.

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<sup>18</sup> *Giorgadze L.*, Construction-legal Status of the Land, “Journal of Law”, № 1, 2016, 358 (in Georgian).

<sup>19</sup> Law of Georgia, the Code of Georgian Space Planning and Architectural and Construction Activities, 3213, 66-69, 20/07/2018.



The next stage after approving the conditions of using a piece of land is approving the architectural-construction project. For the purpose of having an architectural-construction project approved the permit seeker shall present architectural project and/or respectively, a construction scheme and/or technological scheme. The second stage is optional for a customer. The goal of this stage is to ensure safety and stability of investments. Essentially, it is close to the institute of administrative promise when a party has legal trust in regard with administrative act. The act of approval issued at this stage is a sound guarantee of receiving a construction permit in short terms. Therefore there is always a higher investment interest on the piece of land on which an architectural-construction project is approved.<sup>20</sup>

The procedure and the stage of approving architectural project under the new construction Code does not differ from the older regulations but there is one important innovation: presenting a conclusion of an accredited inspectorate or a certified expert is mandatory together with submitting detailed architectural project and technological scheme. It will significantly improve the quality of drafting documents and have positive impact on the construction process in whole. Another important innovation in the new law is that in case of submitting architectural project for approval detailed architectural project; results of prior project research and engineering geological research report have to be submitted too. Thus the stage of project approval gains more importance.<sup>21</sup>

Issuing a construction permit is a final stage of permit issuing administrative proceedings when an individual legal act providing legal basis of starting construction works, is issued.

According to the new construction code construction issuing procedure comprises to stages: (1) determining the conditions of using a piece of land for construction and (2) issuing the construction permit except for the case when approving architectural project is needed.

However, there is an exceptional rule for the stages of issuing construction permit. Three stages are not required if there is an urban construction regulation plan directed at the construction object, which itself defines the urban construction conditions. In such case either the administrative proceedings for the second and third stages are carried out, or both stages are combined in the third stage according to the customer's request. Also, after approving the urban construction conditions the customer may request to include the second stage in the third stage.<sup>22</sup> The above procedure envisaged by the new construction code does not differ from the procedure provided in the older regulation but the second stage – approval of architectural project is more emphasized in the new code. Thus the legislator focuses on the importance of this stage.

The specific characteristic of the administrative proceedings of issuing construction permit is that different administrative procedures are carried out at each stage. Formal administrative proceed-

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<sup>20</sup> Kalichava K., Construction Law, Khubua G., Sommermann K. P. (eds.), Legal Grounds for Public Governance, TSU Administrative Sciences Publication, Vol. 3, Tbilisi, 2016, 291 (in Georgian).

<sup>21</sup> Law of Georgia, the Code of Georgian Space Planning and Architectural and Construction Activities, 3213, 106, 20/07/2018.

<sup>22</sup> Kalichava K., Construction Law, Khubua G., Sommermann K. P. (ed.), Legal Grounds for Public Governance, TSU Administrative Sciences Publication, Vol. 3, Tbilisi, 2016, 290 (in Georgian).

ings are used at the first stage while the second and the third stages are conducted according to simple administrative procedure rules.

## 7. Permit Documentation List and the Persons Responsible on Submitting Application

The legislation regulating construction activities determines the list of documents required for issuing a permit (including approval) on different buildings. This list is some tool for construction permit issuer because it has a “directing” function and enables the administrative organ to monitor observance of construction legislation requirements.<sup>23</sup>

In connection with the list of documents, it is important to define who can be authorized to draft such documents. Current legislation of Georgia does not provide for any definition of certified specialist in construction industry.<sup>24</sup> The permit issuer body is obligated to get an expertise statement in exceptional cases. Unfortunately, the only criteria for evaluating expert’s knowledge are the experience and an education certificate which the expert himself/herself presents while there are no legislative mechanisms for checking this information. The role of expert evaluation implemented in Georgia is not quite clear because there are no rules and conditions determined for recognizing such experts.

In this direction the new Construction Code introduces an important innovation. The Code provides for mandatory certification of architects and engineers. It also introduces an accredited inspectorate body and an institute of certified expert, that will significantly increase construction safety and ensure accuracy and competence of the expertise statements. There is a promising clause included in the transitional provisions of the new Code, which states that appropriate normative acts about the rule of certifying architects and construction engineers and inspecting construction objects by accredited inspectorate body and certified expert and insuring their responsibility, shall be adopted in the nearest future. Hopefully, such regulation will result significant changes in construction industry.

Unlike the legislation of Georgia, in European countries (e.g. Germany) only certified architects and engineers are authorized to draft and sign the application on issuing a construction permit.<sup>25</sup>

Similar regulations are in force in the United States of America. Certified architects with special knowledge participate in project planning and document drafting process. Moreover, at different stages of projecting (e.g. organizing communication networks, making constructive part, etc.) specialists with respective licenses have to be involved. Their participation and communication with the permit issuing administrative authority, including but not limited to preliminary consulting, is mandatory.<sup>26</sup>

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<sup>23</sup> Kalichava K., Control of Admissibility of Construction Activities in Georgia (Reforms Need and Prospectives) Administrative Law, Scientific Journal, *Kopaleishvili M.* (ed.), Vol. 2, Tbilisi, 2016, 95 (in Georgian).

<sup>24</sup> Ibid, 95.

<sup>25</sup> Kalichava K., Construction Law, *Khubua G., Sommermann K. P.* (ed.), Legal Grounds for Public Governance, TSU Administrative Sciences Publication, Vol. 3, Tbilisi, 2016, 289 (in Georgian).

<sup>26</sup> Ravi S., The Development Permit Process, Building Department Administration, 3<sup>rd</sup> ed., ICC, Ch. 7., USA, 170-171.

Legislation of Russian Federation is also interesting because the project documentation there is prepared and submitted for issuing permit by an architect or an engineer, either private person or an employee of the company conducting the projecting works. However, an important exception in the legislation of Russian Federation, which is a bureaucratic element, should be mentioned: the projector presents the documents to the permit issuing agency or a so called multifunctional center which is also authorized to present the documentation to an authorized organ.<sup>27</sup>

## **8. The Construction Permit Issuing Authorities**

Legislation of Georgia determines the list of administrative bodies authorized to issue construction permit but it seems that their authorities are not consistent and are scattered in different agencies. Before enactment of the new construction code, the powers of issuing construction permit was granted to state executive organ as well as to a local government body. Besides, the legislation determined the agencies responsible on issuing construction permits in the autonomous republics of Abkhazia and Adjara. At the local government level construction permit regulations were implemented by respective representative and executive bodies of a self-governing area, in accordance with the code of local self-government. And the Ministry of Georgia of Culture and Sports was obligated to participate as another administrative body, in the administrative proceedings on issuing permits in cultural heritage protection zones (except immovable monuments of cultural heritage).

The new regulations still maintain and even strengthen the role of local government in the process of issuing construction permit. However, the legislative norms regulating issuing construction permits for the capital of Georgia greatly differ from the powers of other towns. It is also evidenced by the fact that the Ministry of Economics and Sustainable Development of Georgia participates in the administrative proceedings on issuing a construction permit for IV class building, as another administrative organ, when the construction permit is issued within the administrative borders of Tbilisi. In other towns/regions the Ministry of Economics and Sustainable Development is an important participant of administrative proceedings on issuing permit. It shows independence rate of local self-government bodies. There are some other problematic issues related with the competence of local self-government authorities too.

Another question on the powers of issuing construction permit is related to the permits for the V class buildings because it is also included in the competence of the Ministry of Economics and Sustainable Development.

As refers to Tbilisi, the capital of Georgia, the construction permit-issuing powers there are granted to the structural entity of the municipal executive body.

The Code provides only for general regulations on the above issues. More details should be expected in the normative acts to be adopted in accordance with the Code.

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<sup>27</sup> Construction Code of Russia, Article 51, 22/12/2004.

### **8.1. Participation of Other Administrative Bodies**

The Applicable legislation of Georgia provides for the possibility of other administrative bodies' participation in the construction permit issuing procedures. In some cases, it is related with construction of buildings in special areas, which are subject to special regulation (e.g. border and coastlines, protected territories, gas pipelines, etc.). However, other administrative organs are also actively involved in the proceedings of issuing construction permits on living and industry buildings in settled areas.

Participation of another administrative body in a permit issuing proceeding is usually caused by formal and material aspects. For example, involvement of cultural heritage, monument protection or environmental institutions in permit issuing proceedings ensures consideration of respective legislation and progressive knowledge. Moreover, such involvement contributes to legitimacy of permit issuing procedures.<sup>28</sup>

If a construction permit is issued on the territory included in historical-cultural heritage protection zone the Ministry of Georgia of Culture and Sports shall be involved. However, there is a different regulation for Tbilisi where there are many cultural heritage monuments on which construction permits are issued with the help of a committee composed of representatives of municipal government of Tbilisi and the Ministry of Culture and Sports. The goal of such regulation is to protect cultural heritage and value of the immovable monuments.

According to the changes recently made to the construction permit issuing procedures, if a new construction starts within the administrative borders of Tbilisi the Municipality City Hall shall conduct the permit issuing proceedings with the help of a structural unit responsible for environment protection policy (except the case when a II class individual living house is built on an area free from green plants), and an unit responsible for transport policy. Based on the amendments the construction permit seeker shall obtain and present a greening project of the project territory if it is considered necessary. The project has to be drafted and signed by appropriate specialist while the rules of looking after the plants already existing or to be planted have to be observed. According to the best practice established recently the project shall be sent to the municipal unit responsible on environment protection policy, which shall provide its opinion. It is obviously a step forward from the point of view of decreasing the impact of construction on the environment but it must not cause expansion of bureaucratic procedures and prolongation of administrative proceedings.

There should be mentioned another innovation, which also relates to the administrative proceedings of issuing construction permit and introduces the obligation of presenting a traffic organization scheme, in certain cases, on the territory of Tbilisi. The scheme has to include the transportation/road infrastructure of the projected territory and show its connection with the territory under research (except the II class buildings). Also, there has to be submitted a statement on evaluating the impact of the project solutions on the existing transportation/road infrastructure under research (except for the build-

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<sup>28</sup> *Kalichava K., Kopaleishvili M. (ed.), Control of admissibility of construction activities in Georgia (Reforms Need and Prospectives) Administrative Law, Scientific Journal, Vol. 2, Tbilisi, 2016, 96 (in Georgian).*

ings with less than 6000 square meters space or/and nightclubs, warehouses, industrial and entrepreneur units, museums, libraries and religious buildings). The goal of the above changes is to prevent transportation overloads caused by construction and increasing settlements in the capital of Georgia and ensure preliminary study and improvement of transport flow. Naturally, such amendments are part of the reform of construction legislation but the latter has to be implemented in parallel with amending the adjoining sector legislation in order to ensure appropriate fulfillment of these goals and tasks.

With regard to participation of another administrative body in the construction permit-issuing proceedings the issue of the buildings subject to ecological expertise has to be underlined, that is directly related to decreasing negative impact on the environment. The current legislation defines the buildings for which construction permits require ecological expertise<sup>29</sup>. There are some very interesting opinions about ecological expertise provided in the legal literature: “the statement of ecological expertise has some negative votum meaning in Georgian Law. Namely, a positive statement of ecological expertise is a mandatory pre-condition of issuing construction permit; otherwise, permit will not be issued. Considering that, the legislator does not define the conditioned (anticipatory) prerequisites, drafting an ecological expertise statement respectively is a result of wide discretion because of which the construction permit automatically gains repressive character”.<sup>30</sup> Accordingly, there is a view that the role of ecological expertise, as it is in developed European countries (e.g. Germany), primarily has to be of procedural character and related to evaluation of the aspects affecting environment rather than having a negative votum function.<sup>31</sup>

Although both of the above mentioned innovations greatly contribute to decreasing the negative impact caused by transport and ecological issues, it is also important to have the above procedures conducted on the basis of comprehensive studies by the permit issuing authority and checking and evaluation of the submitted documents by respective experts, in order to ensure that they are not formally implemented.

Another issue related to involvement of other administrative bodies is fire safety. A permit issuing agency shall consult Emergency Management Service, the legal person of public law under the management of the Ministry of Internal Affairs of Georgia, which has to provide its opinion about fire safety of a planned construction in order to ensure observance of the fire safety requirements in the premises under state fire safety supervision. It is a significant advancement of construction legislation. The practice showed that failure to observe the fire safety rules threatens not only those premises where fire may start but also but it can become a source of increased threat for the lives and health of neighboring property owners. However, there are some procedural problems. As a result of legislative amendments, the Emergency Management Service was excluded from municipal structure and now it

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<sup>29</sup> The list of the buildings which are subject to the ecological expertise and the rules of carrying out the expertise are regulated by the Code of Environmental Evaluation of Georgia.

<sup>30</sup> *Kalichava K., Kopaleishvili M.* (ed.), *Control of Admissibility of Construction Activities in Georgia (Reforms Need and Prospectives)* Administrative Law, Scientific Journal, Vol. 2, Tbilisi, 2016, 96 (in Georgian).

<sup>31</sup> *Ibid*, 96.

is a unit of state executive body that may cause some communication obstacles as there is no united electronic record keeping system. Though, this issue can easily be solved.

The new rules of Construction Code focus such important aspects of the above issue that their observance and implementation shall have vital importance. The Code clearly states that one of the main reasons of regulating neighboring border zone is protection of fire safety. Thus, the new Code emphasizes both the importance of neighboring border and additional guarantees for fire safety. Hopefully it will be appropriately reflected in respective legal act on regulating use and planning of territories which has to be adopted in accordance with the Code. Nowadays the existing distances between neighboring border zones and buildings are beyond any criticism and cannot definitely ensure protection of fire and construction safety.

Thus, it is obvious that in the construction permit-issuing administrative proceedings there are quite versatile procedures which differ from ordinary proceedings. Multiple participants ensure that all important circumstances for issuing an act are researched within the administrative proceedings and therefore, make it very interesting.

## **8.2. Participation of Interested Parties in the Administrative Proceedings**

The General Administrative Code of Georgia defines the interested party as any physical or legal person or administrative organ to which the administrative act refers and whose legitimate interest is directly and immediately affected by administrative-legal act or an administrative body's action.<sup>32</sup> Undoubtedly, the direct and immediate impact in construction law has to be determined with high standards of proof. Besides, the most important issue of human rights has to be considered. The interested parties must have the opportunity to express their opinion before the real threat of violating their rights occurs. Therefore, participation of an interested party in permit-issuing proceedings is an important factor for increasing legitimacy of the proceedings. The construction permit issuing administrative unit is usually in a difficult situation when it has to ensure protection of the rights of all parties involved. The need of reforming construction legislation in this direction is proven by problematic practical issues and a big number of court disputes.

Before reviewing the characteristics of participation of interested parties we should mention one issue which is most difficult to solve. How can a person who may suffer damages get information about a planned construction? The current legislation offers only the information banner. However, the information banner which is mandatory for the permit seeker to place at the first stage of permit-issuing proceedings<sup>33</sup> includes notification only about the fact that construction is planned on the piece of land and the permit-issuing administrative proceedings are conducted. At the first sight the information provided on the banner is enough but the legislation does not set forth any limitations for correct-

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<sup>32</sup> General Administrative Code of Georgia, Article 2, LHG 32 (39), 1, 15/07/1999.

<sup>33</sup> Law of Georgia, the Code of Georgian Space Planning and Architectural and Construction Activities, 3213 rs, 110, 20/07/2018.

ing the construction, changing its function, volume and exterior by the owner before or after starting the construction works while the interested party cannot get any information about that. Accordingly, some interested parties may not be involved in the permission-issuing proceedings at all. What happens with the interests of these persons? While some measures are taken against the construction seeker the third party whose legitimate interests may be affected by certain activities, is still even in worse condition because of the silence.<sup>34</sup> In this case it is very difficult to determine who is the interested party from the construction law point of view and how his/her “legal condition can be worsened”.<sup>35</sup> How can balance be maintained in compliance with law and order? Construction legislation should provide detailed provisions about the guarantees of protecting the public-law interests of neighbors during the whole proceedings. Information banner cannot serve as an alternative solution. It is an essential defect of legislation which needs reform.<sup>36</sup> Starting a law suit in civil court is not a solution for an interested party either.

In this regard, unfortunately, the new Code does not provide for any actual measures. According to the Code, for the purpose of providing the interested party with information about starting each stage of construction permit-issuing proceedings, the information banner has to be placed 3 calendar days prior to starting the administrative proceedings on the side of public border zone of the construction site. And the interested party whose legitimate interests are directly and immediately affected by the planned construction shall be included in the administrative proceedings in accordance with Article 95 of the General Administrative Code of Georgia.<sup>37</sup> Again this provision is too general and placing an information banner only cannot solve the problem. The new Construction Code does not require strict observance of the information included in the banner. Moreover, the Code does not provide for any limitations for the constructor and customer in regard to prohibition of changing the information provided on the banner after the first stage. Placing the banner makes no sense in such case because if the interested party learns from the banner that it is planned to build an individual house in his/her neighborhood and has no complaints but finally, after the construction works are finished it turns out to be a high-rise apartment building or a multifunctional enterprise it means that the designation of the banner is fully ignored and the interested party is deprived of the possibility of using the instruments of protecting his/her right. Thus, it is another big legislative defect which threatens the success of reform in this direction.

Another example of inappropriate communication with the interested parties during permit-issuing proceedings is issuing construction permit based on a principle that “silence implies consent” i.e. if the decision on issuing a construction permit is not made within the due dates the permit shall

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<sup>34</sup> *Tsiklauri I., Giorgadze L. (ed.)*, Issues of Administrative Proceedings for Issuing Construction Permit, Davit Batonishvili Institute of Law, Tbilisi, 2013, 122-123 (in Georgian).

<sup>35</sup> *Kalichava K., Kopaleishvili M. (ed.)*, Control of admissibility of construction activities in Georgia (Reforms Need and Prospectives) Administrative Law, Scientific Journal, Vol. 2, Tbilisi, 2016, 97 (in Georgian).

<sup>36</sup> *Ibid*, 97.

<sup>37</sup> Law of Georgia on Space Planning of Georgia, Architectural and Construction Activities Code, 3213 rs, 110, 20/07/2018.

be considered to be issued. In such case the permit seeker has the right to demand the permit certificate after expiration of set time and the permit issuer is obligated to issue it immediately. The above principle is used to ensure issuing respective written acts by administrative bodies within due dates and to protect legitimate interest of the persons who have right to receive a permit. Thus, if the permit seeker requests construction permit and submits the photo of the information banner together with other required documents, but the administrative body does not or cannot make a decision, the latter is obligated to issue a permit certificate. In such case neither the interested parties are invited nor their opinions are heard nor are the important circumstances researched. Accordingly, the right of the interested party to have access to any and each stage of the administrative proceedings is completely ignored. On the one hand using the principle – “silence implies consent”, is a guarantee of protecting construction law rights of a permit seeker from administrative body’s unlawful actions but on the other hand it puts the interested parties in complete “silence”.

### **9. The Role of Expertise**

Expertise is very important for construction activities because some construction and installation works are characterized with high risk factors.

When reviewing the role of expertise at the stage of administrative proceedings of issuing construction permit it should be mentioned that according to the applicable legislation presenting an expertise statement is mandatory for the III class constructions, which itself has to provide only the assessment of compliance of the architectural parts of construction project documents with “Technical Regulation on Approving the Construction Safety Rules” approved by the Government Resolution №41 of January 28, 2016. As refers to IV class buildings, expertise is required for the following parts of construction project documents: engineering geological research; base, foundation and other basic constructions; and architectural parts in regards to compliance with “Technical Regulation on Approving the Construction Safety Rules” approved by the Government Resolution №41 of January 28, 2016. In case of V class buildings there is a wide range of project parts subject to expertise which is common for high risk constructions. In case of IV class constructions mandatory expertise of the impact on neighboring buildings is not required. The permit issuer is obligated to require such expertise only in case of necessity. Thus, the legislator leaves this issue within the administrative body’s discretion. It should be considered as an evident defect of legislation which must be improved.

It should be mentioned that expertise is especially important for defining whether the construction affects neighboring buildings.

For generalizing the issue of affecting neighboring buildings studying court practice is most relevant because it can play important role in finding the ways of solving the problem. Usually the court is unambiguously demanding in regard with the expertise. In some cases even if the expertise has been conducted the court considers that additional expertise is needed for the purpose of solving the dispute. Considering the specific characteristics of affecting neighboring buildings and increasing the risk of damage, the court clarifies that if there is a building in poor condition it is necessary to



study the possibility of affecting a living house with construction works accurately and despite the fact that an expert statement is submitted to the court it might not be enough for solving the dispute. The court rules that important circumstances have to be determined and alternative accurate expertise has to be conducted in order to resolve the case appropriately.<sup>38</sup>

Resolution №41 which is a new act in construction legislation is also noteworthy because it provides for strengthened safety requirements before issuing construction permit. However, the range and competence of experts drafting respective statements is not clearly determined therein. Just a specialist (architecture) with a diploma and 10-year experience cannot ensure fulfillment of the goals of the Resolution.

Accordingly, the above argument is proven - the role of the expertise established in Georgia is quite unclear because there is no appropriate rule and conditions of recognizing such experts. However, the prospects of increasing the role of expertise are outlined because this issue has already been reflected in the new construction code that hopefully will strengthen the role of expertise in the process of issuing permit. According to the Code of Georgia of Georgian Space planning, Architectural and Construction Activities, expertise of construction documents shall be conducted by an accredited inspectorate and/or certified expert in the cases and according to the rules determined by legislation of Georgia. An accredited inspectorate and a certified expert shall be a person who shall have appropriate insurance and whose competence shall be approved by respective authorized body. Accredited experts' inspectorate and/or certified expert shall issue appropriate expertise statement and a recommendation (if necessary) which are needed to reduce to the minimum the risks related with construction works/projecting activities. The accredited inspectorate and certified experts shall be granted appropriate authorities in accordance with the legislation of Georgia.<sup>39</sup>

Another favorable regulation and important definition related with the role of expertise is also included in the new Construction Code of Georgia: if any reasonable doubts arise in regard to the expertise statement at the stage of issuing permit the permit issuing administrative body shall have the right to demand explanations from respective expertise agency/person and also have a second expertise conducted. If another expertise statement is positive again its costs shall be paid by the administrative body but if the statement is negative the costs shall be paid by the permit seeker if the latter does not dispute the results of the second expertise. If the permit seeker does not agree with the results of the second expertise he/she may demand the third expertise which shall be decisive. If the third expertise statement is positive the costs shall be paid by permit issuing administrative body. In case of making incorrect expertise statement the expert shall be held responsible in accordance with respective agreement and Georgian legislation.<sup>40</sup> Such detailed regulation is a positive innovation and will contribute to strengthening the role of expertise and evaluation of the experts' work.

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<sup>38</sup> See the decision of July 18 2012, №bs-1015-1007 (k-11) of the Supreme Court of Georgia.

<sup>39</sup> Law of Georgia - the Code of Georgia of "Georgian Space planning, Architectural and Construction Activities", LHG, 3213, 99, 20/07/2018.

<sup>40</sup> Ibid, 106.

We may conclude that before the legislative norms about expertise enter into force and are fully developed the experts should fulfill their obligations appropriately and in good faith, within the scopes of current regulations in order to avoid further problems.

## **10. Simplified and Exceptional Permits**

Current legislation of Georgia includes a list of constructions for which no construction permit is needed. Also, there are exceptional permits envisaged.

According to the Construction Code buildings are divided into 5 classes. The first-class buildings need no permit. Class of a construction is determined in accordance with the parameters of the building to be built or demolished. Accordingly, a list and characteristics of the construction works for which permit is not required is also determined. The list is quite long and includes façade works, also, construction of separately placed temporary and non-temporary buildings and communication network.

While the first-class premises need no permit, the constructor is still obligated to comply with the legislation requirements including but not limited to the construction regulation documents. The constructor/customer of the first-class building has to notify the permit issuing body of intended construction works.

At the first sight it may seem that the legislation allows conducting construction without any permit but actually, the freedom of construction is strongly limited by the same legislation which completely ignores the concept - “without permit”. The person who intends to start construction has to notify the permit issuing authority in order to agree its works. The written approval from the side of administrative body is an instrument characterized with the features of administrative legal act.<sup>41</sup> The written approval has all requisites of individual legal act and its contents also cause no doubts regarding its legal character.

The new Construction Code also regulates this issue. The Code states that for the first-class constructions simple notification is required unless otherwise determined by this Code. It should be noted that within the administrative borders of a municipality or a part of it, the municipality Council has the right to replace the obligation of receiving construction permit for II class buildings with the obligation of providing detailed notification. If the detailed notification does not require the actions, procedures and documents similar to permit issuing proceedings it will be an important advancement.

Despite the fact that the procedures have been simplified the necessity of amending legislation, determining detailed procedures and simplifying them still remains an important issue. An interested party should have a right to conduct certain type of construction without going through construction permit issuing, notification or other procedures. It would be reasonable to determine and clarify the types of the constructions which can be conducted without permit/approval, in accordance with con-

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<sup>41</sup> *Tsiklauri I., Giorgadze L. (ed.), Issues of Administrative Proceedings for Issuing Construction Permit, Davit Batonishvili Institute of Law, Tbilisi, 2013, 125 (in Georgian).*

struction planning regulation, on some territories which are not included in historical, cultural or other specific areas. It will contribute to establishing construction freedom. Therefore, for the purpose of monitoring compliance of constructions with respective regulations state supervision of construction has to be strengthened at legislative level.

As refers to releasing from construction-law requirements within the scopes of free discretion, there is an “ugly” institute of special zone agreement still operating in Georgia. It implies changing functional zones, increasing/changing basic parameters (coefficients) on which permit decisions are based. The above institute is allowed by the legislation as an alternative type of construction planning. However, such changes should to be implemented only for social or city construction reasons.

Recently, in the capital of Georgia, especially, the number of construction permits issued on the basis of special (zone) agreement has significantly increased which consequently were materialized in the disproportionate and chaotic city constructions. Therefore, proportionally increased the complaints of the citizens with regard to researching lawfulness of such permits and they have to apply to the court for protecting their rights. The court practice on the cases involving permits issued on the basis of special (zone) agreements determined that it is reasonable to use the special zone agreement only for particular social need.

In this direction the court practice unambiguously supports high standard of proving the necessity of exceeding the coefficients and appropriate compensation. The court ruled that exceeding the maximum coefficients shall be allowed only provided that appropriate conditions exist and they are clearly determined in the legislative/subordinated acts regulating the specific institute or generally construction activities. Thus, when discussing the issue of exceeding the coefficients, an administrative body shall research whether such changes are needed for spatial-territorial planning of a certain district or its architectural development or other particular reasons related with the territorial development; the administrative body should also consider if the changes could be compensated and balanced with any other measures which could be taken to ensure prevention of affecting healthy living and working conditions and environment, compliance with the requirements of transportation and engineering infrastructure; and if such increase of coefficients are opposed by other public interests.<sup>42</sup>

It should also be mentioned that the Georgian model of special (zone) agreement implies monetary compensation.<sup>43</sup> Naturally it cannot counterbalance the architectural, construction and planning compensation which consequently causes imperfect, unequal living and working conditions.

The new construction Code has to play decisive role in solving the issue of special zone agreement. According to the Code, the maximum construction coefficient and/or the maximum construction intensity coefficient determined by the fundamental provisions may be exceeded on the basis of detailed construction plan if it can be compensated by other measures and is conditioned by special city

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<sup>42</sup> See the decision of April 20 2017, №bs 930-922 (2k-16) of the Supreme Court of Georgia.

<sup>43</sup> *Kalichava K., Kopaleishvili M.* (ed.), *Control of Admissibility of Construction Activities in Georgia (Reforms Need and Prospectives)* Administrative Law, Scientific Journal, Vol. 2, Tbilisi, 2016, 101 (In Georgian).

construction development needs (e.g. protecting and developing urban values); it will not contradict public interests and will not worsen hygiene and sanitary conditions in living and working environment.<sup>44</sup> This provision should be considered as one of the most important gains of the new Code. Many of the above issues should be regulated in accordance with the court practice, which will greatly contribute to putting the construction process in strict legal framework.

We may conclude that despite the incomplete current legislation and inappropriate practice the new construction code provides for important positive regulations but still more legislative clarifications are needed. The special (zone) agreement institute should be abolished and the parameters for existing construction zones should be determined in a way that ensures maintaining coordinated city planning and construction policy.

## **11. Conclusion**

The article reviewed the important issues of current legislation and practice related with construction permit as the fundamental element of construction activities and main institute of construction law and order. The current legislation and practice was compared to the new construction code which is a main document of construction legislation reform. The article showed that current legislation and the respective practice cannot respond the existing challenges in this sphere and important innovations and clarifications are needed. It is noteworthy that on the light of the new Construction Code the fundamental problems of current legislation are even more noticeable.

Nevertheless, by adopting the new Construction Code some important issues were solved: exact regulation of border zone in the process of issuing construction permit has been provided; the list of construction works on which detailed notification has to be submitted for getting a permit has increased; evaluation of the expertise criteria in the process of issuing construction permit has become mandatory and the expert certification requirements have been determined; exceeding the parameters which serve as basis for issuing permit, has been limited; there has been defined the list of subordinated normative acts which have to be adopted and include detailed regulations needed for appropriate implementation of the Code.

There was also underlined in the article that despite many positive changes offered by the new Code it still does not cover number of important issues: strengthening the function of information banner which is the main guarantee of providing information to interested parties; participation of interested parties and administrative bodies in the permission issuing proceedings; clear and unambiguous regulation of construction and construction intensity coefficients; clarification of the works to be conducted without construction permit, etc.

Comparative law method and detailed analysis of new legislation were used to show that despite adopting modern normative documents many key issues still have be developed and more clearly

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<sup>44</sup> Law of Georgia on Space Planning of Georgia, Architectural and Construction Activities Code, 3213 rs, 41, 20/07/2018.

regulated. However, the prospect of adopting number of subordinate normative acts in accordance with the Code lets us be optimistic and look forward to creating better legislation.

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