

Russia Practice

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Unauthorised structures: new approaches and amendments to legal regulation

Introduction

Federal Law No. 339-FZ dated 3 August 2018 entered into force on 4 August 2018 (hereinafter the “Law” or “Law No. 339-FZ”)¹. It introduces material amendments to Article 222 of the Civil Code of the Russian Federation (RF Civil Code) on unauthorised construction and certain other norms of the RF Civil Code. The Law aims to improve previous norms of the RF Civil Code on unauthorised structures whose practical application raised a number of complex issues. For these purposes, the Law updates the concept of an unauthorised structure and clarifies the specific structures that do not fall under that category. The Law also expands the options for “legalising” an unauthorised structure and limits the instances in which the local government authorities may adopt decisions to demolish an unauthorised structure without a court decision.

1. Criteria for classifying a property as an unauthorised structure

Law No. 339-FZ updates the legal definition of an unauthorised structure. Previously, Article 222 of the RF Civil Code had indicated the following criteria for an unauthorised structure:

- Building, structure, facility (only real estate properties!),
- Erected on a land plot which had not been provided for these purposes, or the permitted use of which does not permit the construction of this property on it, or
- Erected without having obtained necessary permits, or
- Erected in violation of town planning and construction norms and rules.

Law No. 339-FZ adds the following points to the aforementioned criteria:

- The absence of approvals was added to the lack of required permits;
- The permitted use of a land plot, the requirement to obtain corresponding approvals, permits and/or town planning and construction norms and rules should be established on the commencement date of the erected structure and remain in force on the date of its identification.

BEITEN BURKHARDT comments:

Such criterion of an unauthorized structure as the “lack of required approvals” requires further clarification. Town planning legislation

does not contain the concept of “approval of construction”, unlike a construction permit, which is understood to mean a decision of the competent state or municipal authority that has the impact of a legislative ruling.

In general, the new norm can be assessed positively in that the mandatory requirements on buildings and facilities being erected must have effect not only on the start date of the construction, but also on the date of the discovery of the unauthorized structure. This opposes the formal application of the law by the supervisory authorities and constitutes, to all intents and purposes, legalization of an unauthorized structure by virtue of the adoption of a new (softer) law after the start of its construction. However, for the same reason the selection of the “date of the discovery of the unauthorized structure” is arbitrary, as firstly this date may be determined in different ways by numerous bylaws, and secondly the fate of the unauthorized structure is determined definitively by the court or (in limited instances) by the competent local governmental authority.

2. Properties not constituting unauthorised structures

Pursuant to Law No. 339-FZ, properties “erected or created in violation of the limitations on the use of a land plot established by law if the owner of this property had not known or could not have known about the action of the indicated limitations in respect of the land plot it owned” have been removed from the definition of an unauthorised structure.

BEITEN BURKHARDT comment:

This norm aims first and foremost to protect bona fide property developers – persons who never intended to construct an unauthorised property, but had no access to full information on the land plot being developed, for example, about conservation zones by virtue of objective factors. It follows from a literal interpretation of the law that limitations on the use of a land plot should be understood to mean limitations on rights to the land indicated in Article 56 of the Land Code of the Russian Federation. These limitations should have been entered in the Unified State Register of Real Estate (EGRN). In practice, however, this does not always happen. It is often the case that such limitations are documented in the excerpt from the EGRN, but are not broken down, thereby significantly complicating the receipt of information. Accordingly, the EGRN should be the sole source from which the owner of a real estate property is able to find out about the existence of any limitations in full. This assumes the prompt and full entry of records in the EGRN on the encumbrance of rights to land.

3. Legal consequences of declaring a property to be an unauthorised structure

Article 222 of the RF Civil Code stipulated the demolition of an unauthorised structure on the basis of the decision of a court or the

¹ Federal Law No. 339-FZ dated 3 August 2018 “On the Introduction of Amendments to Part One of the Civil Code of the Russian Federation and Article 22 of the Federal Law “On the Entry into Force of Part One of the Civil Code of the Russian Federation”.

competent local government authority. It also offers the option of declaring the title to an unauthorised structure, if claimed, to an interested party that has title, the right of lifetime ownership with right of succession or right of perpetual use, to the land plot on which the unauthorised structure was erected.

Law No. 339-FZ proposes an alternative solution to demolition – Clause 2 of Article 222 of the RF Civil Code now stipulates that an unauthorised structure should be brought into line with the parameters established by land use and development rules, area planning documentation or mandatory requirements on construction parameters.

Amendments have already been introduced to Article 55.32 of the Town Planning Code of the Russian Federation (hereinafter the “**RF Town Planning Code**”), which establish the specifics for demolishing unauthorised structures or bringing them into line with established requirements². Clause 9 of Article 55.32 indicates that an unauthorised structure is brought into line with the established requirements through its reconstruction.

The timeframe for bringing an unauthorised structure into line with established requirements cannot be less than six months or more than three years.

The Law indicates two types of decisions adopted by a court or local government authority in accordance with Article 222 of the RF Civil Code:

- on demolition,
- on demolishing the structure or bringing it into line with established requirements.

A decision on demolition is issued if the unauthorised structure cannot be brought into line with established requirements. In the second instance a decision is issued on demolishing the structure or bringing it into line with established requirements, including the possibility of alternative performance at the discretion of the compelled party. This conclusion follows from Clause 11 of Article 55.32 of the RF Town Planning Code which regulates issues on the enforcement of the decisions of courts and local government authorities regarding unauthorised structures.

Clause 2 of Article 222 of the RF Civil Code also adds a norm on prohibiting the use of an unauthorised structure.

BEITEN BURKHARDT comment:

The new procedure makes it possible in each specific instance to decide on a possible preservation of the results of unauthorised construction, *inter alia*, with due consideration of the social and economic interests of municipalities (for example, in view of providing housing for citizens). At the same time, in the absence of clear-cut criteria of “irrecoverable” unauthorised structures, this could lead to abuses. When elaborating such criteria, clearly it would be wrong to be governed only by the utility of such structures for a specific group of people and the lack of any threat to people’s lives and health, as this could result in the violation of other no less important issues of public interest (favourable living environment, the preservation of the historical look of residential areas, etc.).

4. Procedure for declaring a property to be an unauthorised structure

Capital construction projects constituting unauthorised structures are demolished or brought into line with established requirements mandatorily on the basis of a court decision or (as determined in the law) the decision of the local government authority.

4.1 Administrative (extrajudicial) procedure

Law No. 339-FZ limited and streamlined instances where the administrative (extrajudicial) procedure for declaring a property to be an unauthorised structure applies.

Prior to the entry into force of the Law, local government authorities were entitled to adopt a decision to demolish an unauthorised structure created on a land plot that had not been duly provided for these purposes if this land plot was located in a zone subject to special terms of use or in a communal area or in an easement area of the public utilities of federal, regional or local significance.

Within seven days of the adoption of the decision on demolition, the competent authority was required to send a copy of this decision to the person that created the unauthorised structure, including the timeframe for its demolition, which could not exceed 12 months. If this person was not identified, the competent authority was entitled to arrange for the demolition of the structure using its own resources two months after publishing a notice on the planned demolition on its official website. Consequently, unauthorised structures would be demolished administratively within extremely tight deadlines which limited rights to judicial protection.

The new version of Clause 4 of Article 222 of the RF Civil Code stipulates that local government authorities may only adopt a decision to demolish an unauthorised structure in instances where:

- It was created on a land plot in respect of which there are no documents of title and where the need for such documents was established in accordance with legislation on the commencement date of the construction of such property, or
- It was created on a land plot, the type of permitted use of which does not permit the construction of such a property thereon and which is located within the boundaries of a communal area.

The local government authority may also adopt a decision to demolish a structure or bring it into line with established requirements in instances where:

- It was created on a land plot, the type of permitted use of which does not permit the construction of such property thereon, and this structure is located within the limits of a zone subject to special terms of use, provided that the regime of this zone does not permit the construction of such a property, or
- There is no construction permit, provided that the zones subject to special terms on use and the need for such a permit had been established before the construction date of said property.

At the same time, local government authorities may not adopt such decision in respect of unauthorised structures created on land plots

² Federal Law No. 340-FZ dated 3 August 2018 “On the Introduction of Amendments to the Town Planning Code of the Russian Federation and Certain Legislative Acts of the Russian Federation”.

that are not state-owned or municipally-owned, except in instances where their preservation creates a threat to people's lives and health.

The Law also prohibits to adopt a demolition decision regarding real estate properties the title to which has been registered or declared by a court or in respect of which the court issued a decision on the dismissal of statements of claim for the demolition of the unauthorised structure.

In all other instances, the court adopts the decision to demolish an unauthorised structure or bring it into line with established requirements.

The timeframe for the demolition is established with due account of the nature of the unauthorised construction but may not be less than three or more than 12 months.

4.2 Procedural aspects

Pursuant to the amendments to procedural legislation, cases involving disputes on the demolition of unauthorised construction or bringing this construction into compliance with the established requirements must be sanctioned by the court of first instance within a period not to exceed one month after the date of receipt of the application in court (Article 152 of the Commercial Procedural Code (APK) and Article 154 of the Civil Procedural Code (GPK)).

At the request of the claimant, the court is entitled to award to the claimant the monetary amount to be recovered from the respondent in case of non-performance of the court order in the amount established by the court based on the principles of justice, proportionality and the inadmissibility of deriving profit from illegal or bad faith actions (Article 174 of the APK and Article 206 of the GPK).

Finally, at the claimant's request the court is entitled to order immediate execution of a decision, if the unauthorised construction poses a significant threat to the life and health of citizens or a delay in the execution of the decision could lead to significant damages for an indeterminate group of persons (Article 182 of the APK and Article 212 of the GPK).

BEITEN BURKHARDT comment:

The Law provides clearer instructions on the possible demolition of an unauthorised structure pursuant to the administrative procedure. However, these measures look more like an attempt to prevent the most egregious examples of abuses by the public authorities that became possible due to the granting of additional powers to the authorities. It would be more correct to limit such powers to instances when the preservation of the unauthorised structure creates a direct threat to people's lives and health. All the more so since, according to the adopted amendments, the judicial procedure ensures the prompt consideration of this category of cases.

5. Acquisition of rights to an unauthorised structure

If the requirement to bring an unauthorised structure into line with established requirements is met, a person owning the land plot (and also enjoying lifetime ownership with right of inheritance or perpe-

tual use of the land plot), on which the unauthorised structure is erected, acquires title to said structure. A similar right also applies to the lessee of the land plot if the land plot is publicly owned and was provided for construction purposes, and provided that the process of bringing the structure into line and declaring title to the structure does not contravene the law or a contract.

BEITEN BURKHARDT comment:

The new procedure provides an opportunity to recognise rights to an unauthorised structure for a major category of landowners – the lessees of land plots provided to them for construction purposes. Given that land plots are also provided in Russia for construction purposes on lease rights, this conclusion would appear consistent. In this case, certain approaches elaborated by judicial practice have subsequently been developed in legislation.³

6. Legal consequences of non-compliance with the requirements imposed on unauthorised structures

The Law introduces amendments to Article 285 of the RF Civil Code on the confiscation of a land plot being used in violation of legislation. For example, one of the grounds for the confiscation of a land plot from its owner will be the creation of an unauthorised structure on the land plot and non-compliance with obligations to demolish the structure or bring it into line with established requirements.

Law No. 339-FZ does not expressly stipulate similar mechanisms in respect of parties that possess a land plot on other rights than title. At the same time, the aforementioned Federal Law No. 340-FZ dated 3 August 2018 adds a norm to Clause 2 of Article 45 of the RF Land Code stipulating that the right of perpetual use of a land plot and lifetime ownership with right of inheritance cease necessarily if such parties create or erect an authorised structure on the land plot, or fail to discharge obligations to demolish or bring the unauthorised structure into line with established requirements by the deadlines established by a corresponding decision. Similar norms are applied in the event of a lease (Article 46 of the RF Land Code).

BEITEN BURKHARDT comment:

It goes without saying that these innovations incentivise compliance with the requirements on legislation by any person that built an unauthorised structure on a land plot that they don't own. In the case of the owners of a land plot, this confiscatory norm is disproportionate. It should also be borne in mind that the area of the entire land plot being confiscated might exceed significantly the part directly occupied by the unauthorised structure. Therefore, the confiscation of the entire plot would appear to be an excessive measure, while the new norms of the RF Land Code only stipulate its partition if other properties are located on this land plot.

7. Practical relevance

Law No. 339-FZ, and also other related legislative amendments signify another change of course in the development of the longstanding history of the "fight" against unauthorised structures. This time

³ "Overview of Judicial Practice on Cases Related to Unauthorised Construction" (approved by the Presidium of the RF Supreme Court on 19 March 2014).

the clear goal of the legislator was to correct any "exaggerations", above all related to abuses if the administrative procedure for demolishing unauthorised structures is applied. The new regulation is aimed at reinforcing judicial protection of the rights of owners of real estate properties. It also introduces an additional way of "legalising" unauthorised structures – bringing them into line with established requirements. This will create the terms and conditions for improving town planning policy and the mutual relations of developers with the oversight and supervisory authorities of the municipalities, and strengthening the legal certainty of the decisions that they adopt. Accordingly, the agenda was to adopt clear-cut regulations, with the consolidation of criteria for clarifying unauthorised structures as properties to be demolished or brought into line with the established requirements.



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