

# BIRCH LEGAL

## Legal Alert

The Plenum of the Supreme Court  
approved new clarifications on  
unauthorized structures

On 12 December 2023, the Plenum of the Supreme Court of the RF ("SC RF") adopted Resolution No. 44 "On certain issues that arise in judicial practice when applying the rules on unauthorized structures" ("**Resolution**").

The new Resolution contains 48 items summarizing the court practice that has developed regarding issues of regulating the legal status of unauthorized structures and the possibility of preserving them.

For the 13 years leading up to the adoption of the Resolution, the practical issues concerning the application of the rules on unauthorized structures were regulated by the joint Resolution of the SC RF and the Supreme Arbitration Court dated 29 April 2010 No. 10/22 ("**Resolution No. 10/22**"). The Resolution replaces items 22–31 of Resolution No. 10/22, provides clarifications on issues not covered in Resolution No. 10/22, elaborates on the provisions of Resolution No. 10/22 and also expounds on an array of controversial applications of the legal rules on unauthorized structures.

## 1 Significant Changes

Amendments to legislation no longer serve as grounds for recognizing an object as an unauthorized structure

Previously, structures could be legally recognized in many cases as unauthorized due to violation of new requirements that were approved after the start of construction work. Now, such changes may not serve as grounds for recognizing a structure as unauthorized. On the contrary, in the event that an object no longer meets the criteria of an unauthorized structure according to new legislation, the court will side with the developer and will allow the structure to be authorized.

The objects which may not be recognized as unauthorized structures have been clarified

The SC RF has unequivocally defined when an unfinished structure may be recognized as unauthorized: once the foundation is complete. Also, the SC RF indicated that the rules on unauthorized structures do not apply to sea- and aircraft, inland navigation vessels and other objects that are not immovable property due to their natural properties but are nevertheless subject to the rules on immovable property, as well as non-stationary commercial facilities and other movable property, paving, fencing and other inseparable improvements to the land plot. In order to remove such objects from one's land plot, it is necessary to apply to the court with one of the following two demands: 1) the removal of a violation of a right not associated with the deprivation of possession on the basis of Article 304 of the Urban Planning Code of the Russian Federation; 2) in case of a threat to the life and health of citizens - a prohibition on the operation of the relevant object.

Controversial situations practically complicating the legalization process for unauthorized structures were reviewed

The court reviewed several practical situations in which the disputed object may not be considered an unauthorized structure: 1) when construction work is completed in compliance with the type of permitted use for the site, but the object is not used for its intended purpose; 2) when permits issued for construction/commissioning are revoked by the authorized agencies or the court in the course of self-regulation; 3) when construction is completed in violation of restrictions on the site's permitted use (for example, sanitary protection zones) of which the developer was not and could not have been aware.



## Demolition of an unauthorized structure is only applicable if it is proportion to the violation

The SC RF demonstrated that not just any formal violation may serve as grounds for a structure's demolition by using examples of objects lacking the necessary permission or in violation of urban planning and building regulations. In these cases, demolition is permissible only if the unauthorized structure poses a threat to third parties. Furthermore, the SC RF called on the courts to independently raise for discussion between the parties the issue of the possibility of preserving the structure after the violations are eliminated. According to the SC RF, if the violations can be remedied, the court is obliged to make a decision allowing for the preservation of the structure.

Below are more detailed comments on these and other clarifications of the SC RF.

## 2

### Criteria for unauthorized structures

The SC RF listed the criteria among which only one is required to have a structure recognized as unauthorized:

the land plot on which the structure is located was not provided in accordance with the established procedure

the permitted use of the land plot on which the structure is located does not provide for the construction of such a structure on said land plot on the date of the start of its construction and on the date the structure is identified

the construction of the structure is carried out without obtaining the approvals and permits required by law if the requirement to obtain the appropriate approvals and permits was established as of the date of commencement of construction and is valid on the date the structure is identified

the structure is built with violations of urban planning and construction regulations if said regulations were established as of the date of commencement of construction and were valid as of the date the structure was identified

The SC RF took the list of criteria above directly from Article 222 of the Urban Planning Code of the RF without making any changes or additions from its side.

Also, the SC RF notes that the list above is exhaustive and that neither state authorities of the constituent entities of the Russian Federation nor local governments have the right to extend said list with additional criteria (paragraph 2).

It is also worth mentioning that the SC RF put an end to the issue of the possibility of recognizing an object as an unauthorized construction if the requirements for construction were changed (for example, the boundaries of public areas (red lines) were reestablished) after the start of legal construction. Before, this issue was the subject of countless disputes and was taken into account by the courts on a case-by-case basis considering the nature of the changes to the legislative requirements as well as all factual circumstances surrounding the performance of the relevant construction work<sup>[1]</sup>. The SC RF indicates in the Resolution that amendments to the requirements for construction may not serve as grounds for recognizing an object as an unauthorized structure (paragraph 2).

Special attention ought to be paid to the SC RF's conclusion that if a disputed object's criteria for being an unauthorized structure are eliminated as of the date of the relevant court decision or changes in legislation, the court shall refuse to demolish said disputed object and/or bring it into compliance with the newly established requirements (paragraph 2).

[1] See, for example, Resolution of the Twenty-first Arbitration Court of Appeal dated 04 December 2023 No. 21AP-5152/2023 in case No. 83-6181/2023, Resolution of the Twenty-first Arbitration Court of Appeal dated 07 June 2022 No. 21AP-125/2022 in case No. A83-13437/2017, Resolution of the Seventh Arbitration Court of Appeal dated 13 November 2017 No. 07AP-8831/2017 in case No. A67-3091/2017

Unauthorized structures include those that are **partially** located on a land plot that does not belong to the person who carried out the construction of said structure based on a right that allows for its construction. In this case, the parties can apply to the court with a demand to determine the boundaries of the land plot on which the disputed structure is located (paragraph 16).

3

### What must be taken into account when planning construction on a land plot

To determine whether it is possible to build a particular structure on a land plot, the following must be taken into account:

restrictions imposed by the agreement under which the land plot is being used, namely the intended use of the land plot (paragraph 18, paragraph 20)

category of land and the type of permitted use of the land plot (paragraph 18)

restrictions imposed by urban planning regulations (paragraph 19)

restrictions related to the location of the site within the boundaries of a zone with special conditions for the use of the territory (paragraph 21)

If the court establishes in the course of its consideration of the case that the person who constructed a disputed structure on a land plot that was not provided to him under the established procedure has the right to register the rights to said land plot in accordance with the provisions of the law (for example, in the event a land plot with residential buildings is granted to the state), then the court will reject the claim for the demolition of the unauthorized structure (paragraph 17).

4

### Disposal of an unauthorized structure

The disposal of an unauthorized structure may not be carried out by the person who constructed it while he has not obtained the property rights to said structure, and he therefore does not have the right to execute any transaction until the court recognizes such a right.

Particular attention should be drawn to the fact that unauthorized structures cannot be included into an inheritance estate. However, the heir who has received the right to the land plot on which the unauthorized structure is located has the right to apply to the court with a demand for recognition of his ownership of such a structure (paragraph 4).

5

### Unauthorized reconstruction

A structure resulting from the reconstruction of immovable property during which the dimensions of the structure or its parts were altered (height, number of stories, area, volume) may be recognized as unauthorized. However, in contrast to paragraph 28 of Resolution No. 10/22, the SC RF underscores in the Resolution that for the purpose of bringing such a structure into compliance with the requirements of the law, it is not necessary to carry out construction work on the entire structure: if technically possible, it is enough to dismantle only the part that was created during the reconstruction process (attic, extension) (paragraph 5).

In the case of reconstruction of an apartment building entailing a reduction in the size of the common property of the owners of premises and the parking spaces in such a building, it is mandatory to obtain the consent of all the owners (paragraph 27).

## 6

## Unauthorized structures and shared ownership

The SC RF indicated that in the case of construction on a land plot that is under shared ownership or of reconstruction of a structure belonging to several persons under shared ownership, such construction or reconstruction may be carried out only with the consent of the other co-owners. A similar approach is applied to the legalization of reconstruction of apartment buildings, which requires obtaining a decision from the general meeting of owners of parking spaces and premises in the building (paragraph 27, paragraph 28).

Moreover, in the case of an unauthorized reconstruction, the court will also consider the issue of the need to redistribute the shares of co-owners along with the issue of recognizing the ownership of the unauthorized reconstructed object (paragraph 28).

## 7

## What is not affected by the rules on unauthorized structures

Unlike Resolution No. 10/22, the provisions of the Resolution clarify the list of objects that are not subject to the rules on unauthorized structures. Thus, the provisions of Article 222 of the Urban Planning Code of the RF on unauthorized structures are not applicable to (paragraph 6):

objects that are not immovable property due to their natural properties, but are subject to the regime of immovable property (sea- and aircraft, inland navigation vessels)

movable property, e.g., non-stationary retail facilities

inseparable improvements to the land plot (paving, fencing)

In order to remove the abovementioned objects from one's land plot, an interested person must apply to the court with a demand to remove the violation of a right not associated with the deprivation of possession on the basis of Article 304 of the Urban Planning Code of the Russian Federation or in the case of a threat to the life and health of citizens—a demand to prohibit the operation of the relevant object (paragraph 6).

Previously in judicial practice, questions often arose about the moment at which an unfinished construction object becomes an independent immovable thing and from what moment the rules on unauthorized structures can be applied to an object under construction. According to the position previously formed by the SC RF, it is necessary to establish the fact of completion of the foundation construction work (or similar work) for the purpose of recognizing an object under construction as an immovable thing. Pits and foundation piles, without a foundation, are not recognized in practice as real estate<sup>[2]</sup>. Thus, the courts came to the conclusion that an object under construction is not a real estate object if, regardless of the degree of readiness of the disputed object, the foundation work has not been completed or the constructed foundation of such an object does not correspond to the design documentation<sup>[3]</sup>. In the Resolution, the SC RF not only indicates the possibility of applying the rules on unauthorized structures to unfinished construction projects as reflected in paragraph 30 of Resolution No. 10/22, but also, taking into account previously formulated approaches in judicial practice, draws attention to the fact that the structure cannot be recognized as unauthorized before the construction of the foundation (paragraph 5).

[2] Ruling of the Supreme Court of the Russian Federation of 21 March 2016 No. 310-ES15-6547 in case No. A84-469/2014

[3] Paragraph 24 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of November 17, 2011 No. 73, paragraph 38 of the Resolution of 23 June 2015 No. 25, Determination of the Supreme Arbitration Court of the Russian Federation of 17 July 2017 No. 305-ES17-8352 in case No. A40-122553/2015

## 8

## Cases in which an object cannot be recognized as an unauthorized structure

The disputed object cannot be recognized as an unauthorized construction in the following cases:

The structure was completed in compliance with the permitted use of the site but is not used for its intended purpose (paragraph 19)

A construction permit, a commissioning permit, notifications about the compliance of the parameters of an individual housing structure or a garden house (built or reconstructed) with the established parameters (requirements of the legislation on urban planning activities) and the admissibility of placing such an object on a land plot were revoked by the authorized agencies or the court in the course of self-regulation (paragraph 26)

The structure was erected in violation of restrictions on the site's permitted use of which the developer was not and could not have been aware (including if there is no information about restrictions in the Unified State Register of Real Estate; approval has been received from the authorized body for the construction of the relevant facility) (paragraph 22)

## 9

## The registration of rights to ownership will not prevent an object from being recognized as an unauthorized Structure

Ownership of an unauthorized structure can be acquired only if the violations committed during construction are eliminated and then confirmed as eliminated by the court (paragraph 4). Moreover, even the formal registration of the right to a structure in the Unified State Register of Real Estate cannot cancel the effect of this rule: in this case, it is also possible to make a decision on the demolition of an unauthorized structure (paragraph 8), which will be the basis for making a record in the Unified State Register of Real Estate on the termination of ownership rights (paragraph 34).

However, it is important to take into account that only the court is authorized to make a decision on the demolition of an unauthorized structure the ownership of which was formally registered in the Unified State Register of Real Estate. Local government bodies cannot make such a decision (paragraph 9).

In addition, in accordance with paragraph 9, only a court can also consider demands for the demolition of a structure the ownership of which is recognized as existing regardless of its registration in the Unified State Register of Real Estate (real estate, the rights to which arose before 01/28/1998) or is considered to have arisen before such registration (for example, the right of ownership of the heir before inclusion of an indication of it in the Unified State Register of Real Estate).

In large part, these clarifications are new in relation to Resolution No. 10/22.

## 10

## Parties to the dispute on the demolition of an unauthorized structure

In accordance with paragraph 12, the plaintiff in a dispute over the demolition of an unauthorized structure or bringing it into compliance with established requirements can be any person whose rights and interests are in one way or another violated by the preservation of such a structure, including:

an owner of the land plot on which the structure is located

a holder of another property right to such a plot

the legal possessor of such land

In the event that a claim for the demolition of an unauthorized structure or for bringing it into compliance with established requirements is brought in the public interest, the plaintiff may be:

a prosecutor

an authorized state body acting within its competency

These clarifications reiterate those previously contained in paragraph 22 of Resolution No. 10/22. However, in the new Resolution as compared to Resolution No. 10/22, more attention was devoted to the identity of the defendant in the dispute over the demolition of an unauthorized structure.

Thus, the Supreme Court of the Russian Federation noted that the defendant in such a dispute is the person who carried out the unauthorized construction. Moreover, if the construction was carried out with the involvement of a contractor, the defendant will not be the contractor, but the customer.

In a situation where ownership of an unauthorized structure was transferred to another person, who in a normal situation (in the absence of the unauthorized structure criteria) would have acquired the right of ownership, such person is the defendant. For example, if a sale and purchase agreement is concluded in relation to an unauthorized structure, the buyer will be the defendant.

In cases where it is impossible to identify the defendant according to the above rules, the defendant will be the person who has the right of ownership or other rights (the right of lifelong inheritable possession or permanent perpetual use) in relation to the land plot on which the structure is erected.

However, if such a person transfers the plot for temporary possession and/or use to another person (for example, a tenant), then the identity of the defendant depends on the time of construction of the unauthorized structure. So, if the unauthorized structure was built after the right to the lease arose, then the defendant will be the tenant, and if before, the owner of the land (paragraph 13).

It is important that if the defendant in such a dispute turns out to be a person who did not carry out the unauthorized construction (for example, the same buyer of the unauthorized structure), and the court obliges him to demolish the unauthorized structure or bring it into compliance with the established requirements, such a person has the right to demand compensation for losses from the one who actually carried out the construction (paragraph 35). This rule is also not new and was previously contained in paragraph 24 of Resolution No. 10/22.

## 11 Statute of limitations for disputes over the demolition of an unauthorized structure

In the event that the preservation of an unauthorized structure does not create a threat to the life and health of others, the statute of limitations for the demand for its demolition or for it to be brought into compliance with established requirements is three years and begins from the day when the plaintiff became aware of the fact of the violation and the identity of the defendant.

A different rule has been established for the requirement to demolish an unauthorized structure or bring it into compliance with established requirements if the structure poses a threat to the life and health of citizens: the SC RF confirmed its old clarification (paragraph 22 of Resolution No. 10/22), in accordance with which the statute of limitations does not apply to such a claim.

What is new is the clarification according to which the statute of limitations also does not apply in a situation where the unauthorized structure does not interfere with the possibility of possessing the real estate of the person who is asking for its demolition / restoration in accordance with established requirements. For example, the claim of the owner of a plot adjacent to the one on which an unauthorized structure was erected is not limited by the statute of limitations (clause 15). In this case, such a person may suffer inconvenience from an unauthorized structure, but it does not in itself interfere with the possession of his property.

## 12

### Interim measures for disputes over the demolition of an unauthorized structure

In paragraph 14, the SC RF provides guidance that was previously missing in its explanations regarding possible interim measures in a dispute over the demolition of an unauthorized structure. In this case, a prohibition may apply to such actions as:

construction work

operation of the disputed object

completion of registration actions in relation to the disputed structure

It is interesting to note that construction work and operation may be prohibited not only to the defendant himself but also to any other persons.

If a decision of an authority to demolish an unauthorized structure is contested, the validity of the relevant decision may be suspended.

## 13

### Proportionality of being made subject to demolition

The SC RF included in the text of the Resolution several points expressing the general idea of the need to ensure the proportionality of an unauthorized structure being made subject to demolition to the violation committed. For example:

although the erection of a structure without the necessary permission constitutes it being unauthorized, the mere presence of this fact is not sufficient to make a decision on demolition. Courts and other authorized bodies must take into account that a structure erected without permission can be demolished only if its use does not meet safety requirements and may lead to a violation of the rights of third parties (paragraph 25)

in case of violation of urban planning and building codes and regulations, the demolition of an unauthorized structure is possible only if such a violation is significant in terms of possible consequences. For example, if the maximum number of stories or the height requirement is violated and this violation is significant for the safety of the erected structure, it may be grounds for demolishing the structure. On the other hand, a violation of the minimum setback distances from the boundaries of other land plots most likely does not create such a danger that requires the demolition of the structure (paragraph 29)

Furthermore, the SC RF encourages lower courts to actively promote the preservation of structures in those situations where it is appropriate.

Thus, paragraph 30 states that the court has the right to independently bring up for discussion the issue of the possibility of preserving an unauthorized structure after bringing it into compliance with the established requirements regardless of the wording of the stated requirements. The court may also invite the defendant to provide additional evidence, including the conclusion of a construction and technical examination.

In development of this idea, paragraph 31 notes that when establishing the removability of violations committed during construction, the court must make a decision providing for two possible methods of its execution: demolition of the unauthorized structure or bringing it into compliance with the established requirements. In this case, the court is not obliged to indicate the specific construction work that the defendant is obliged to carry out.

The idea of proportionality was also included in Resolution No. 10/22 (paragraph 26). However, in the new Resolution, the SC RF paid much more attention to it.



## 14

## Consequences for nonfulfillment of the court's decision

A new point is the clarification in paragraph 37, according to which failure to comply with a court decision to demolish an unauthorized structure / bring it into compliance with established requirements is grounds for:

unilateral refusal by either party of the land lease agreement

forced termination of rights to a land plot

confiscation of the land

In this case, the obligation to execute the court decision follows the right to the land plot on which the unauthorized structure is located (paragraph 38). In the case of singular or universal succession in relation to such a plot, the court or bailiff makes a decision on the procedural replacement of the defendant (debtor).

For example, the buyer of a land plot on which an unauthorized structure is located becomes the person obliged to ensure its demolition or bring it into compliance with established requirements and may lose the right to the plot if these obligations are not fulfilled.

## 15

## Legalization of an unauthorized structure

In relation to an unauthorized structure, the court may decide not only to demolish it / restore it in accordance with established requirements but also to recognize the ownership of such a structure.

The right to file a corresponding claim in court is possessed by a person who owns the land plot on which an unauthorized structure is erected that is in lifelong inheritable possession or in constant perpetual use (paragraph 39). It does not matter whether the structure was erected by this person. For example, a person who inherited a plot of land with an unauthorized structure may demand the recognition of his right to it (paragraph 41). Separately, the SC RF emphasizes that a tenant to whom a plot was provided for construction can apply to the court to demand recognition of his ownership of an unauthorized structure erected on such a plot.

Satisfying the requirement to legalize an unauthorized structure leads to the emergence of ownership rights by a court decision (paragraph 40) and is possible if the following conditions are simultaneously met:

the person who erected the object has rights in relation to a land plot allowing the construction of such an object on it

the structure meets the established requirements as of the day of application to the court

preservation of the structure does not violate the rights and legally protected interests of other persons and does not create a threat to the life and health of citizens (paragraph 39)

The defendants in such disputes may be:

- a local government authority at the location of the structure
- other authorized federal executive bodies
- a public authority of a constituent entity of the Russian Federation



If a claim is brought for recognition of the right to a structure erected by another person, this other person must also be brought in as a defendant (paragraph 42). This approach differs from the decision proposed earlier in paragraph 25 of Resolution No. 10/22, according to which the developer, who does not own the land plot, can be the only defendant in a claim for the legalization of unauthorized construction, and the local government body or state body is the only defendant in relation to the claim of the developer who has the right to the land plot.

The SC RF limits the procedural autonomy of participants in this category of disputes. Thus, it is prohibited for the defendant to admit a claim or approve a settlement agreement without the court establishing the circumstances required by law to recognize the ownership of an unauthorized structure (paragraph 44).

# Key contacts for further information



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