

Unauthorized Creation and Modification of Real Estate in Russian Federation

Creación y modificación no autorizada de bienes inmuebles en la Federación de Rusia

Authors

Natalya Anatolyevna Yushchenko¹, Rustem Robertovich Magizov¹
Alexey Dmitrievich Gulyaev¹

Natalya Anatolyevna Yushchenko¹ – PhD in Law, Associate Professor, Department of Legal and Social Sciences, Higher School of Economics and Law, NCHI KFU, NAJuschenko@kpfu.ru, 7-917-267-90-90, Id scopus: 57192959289, ORCID: 0000-0002-0498-1737.

Rustem Robertovich Magizov¹ – PhD in Law, Associate Professor, Department of Legal and Social Sciences, Higher School of Economics and Law, NCHI KFU, rustemleng@rambler.ru, +7- 929-723-23-23, ORCID: 0000-0001-7918-0371.

Alexey Dmitrievich Gulyaev.¹ – master student of the 1st year of study, field of training 40.04.01. "Civil law, family law, private international law", aleksei.gulyaev@mail.ru, +7-987-406-47-60, ORCID: 0000-0003-0678-1955.

¹Kazan Federal University.

e-mail: NAJuschenko@kpfu.ru.

Tel.: +79172679090.

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Abstract

The scientific article is aimed at a comprehensive study of unauthorized actions in relation to real estate in Russia. It is established that today there is no comprehensive concept of unauthorized actions in the legal literature and Russian legislation. It turns out that some studies of legal scholars are devoted to the study of narrow concepts mediated by unauthorized actions, such as: unauthorized construction, unauthorized reconstruction, unauthorized redevelopment, unauthorized reorganization, unauthorized change of the functional purpose of the premises. It is determined that the study of the institute of unauthorized construction is based without the analysis of unauthorized actions for the initial creation and (or) immovable property change, which is insufficient and requires further comprehensive in-depth theoretical study. The authors come to the conclusion that judicial practice also did not come to the understanding of unauthorized actions in the process of law enforcement. The legislation is grouped into two parts: legislation regulating the unauthorized creation and unauthorized change of real estate objects. Specific signs of actions for the unauthorized creation and (or) the change of real estate objects are revealed. The general methodological basis was formed by the general scientific



(dialectical) method of cognition, comparative legal, logical methods, which made it possible to consider the theoretical and practical problems of certain types of unauthorized action understanding in relation to real estate in the current Russian legislation. An attempt to substantiate the essence and legal nature of unauthorized actions can be useful for the development of legal science, improvement of legal norms and the comprehensive integration of civil, housing and urban planning legislation.

Key words: unauthorized actions, unauthorized construction, real estate reconstruction, real estate redevelopment, real estate reconstruction, civil legislation.

Resumen

El artículo científico tiene como objetivo un estudio integral de acciones no autorizadas en relación con los bienes raíces en Rusia. Está establecido que hoy en día no existe un concepto integral de acciones no autorizadas en la literatura legal y la legislación rusa. Resulta que algunos estudios de juristas se dedican al estudio de conceptos estrechos mediados por acciones no autorizadas, tales como: construcción no autorizada, reconstrucción no autorizada, reurbanización no autorizada, reorganización no autorizada, cambio no autorizado del propósito funcional de las instalaciones. Se determina que el estudio del instituto de construcción no autorizada se basa sin el análisis de acciones no autorizadas para la creación inicial y (o) cambio de propiedad inmobiliaria, lo cual es insuficiente y requiere un estudio teórico exhaustivo más profundo. Los autores llegan a la conclusión de que la práctica judicial tampoco llegó a comprender las acciones no autorizadas en el proceso de aplicación de la ley. La legislación se agrupa en dos partes: legislación que regula la creación no autorizada y el cambio no autorizado de objetos inmobiliarios. Se revelan signos específicos de acciones para la creación no autorizada y (o) el cambio de objetos inmobiliarios. La base metodológica general estuvo formada por el método científico general (dialéctico) de cognición, métodos legales comparativos, lógicos, que permitieron considerar los problemas teóricos y prácticos de ciertos tipos de comprensión de acciones no autorizadas en relación con los bienes raíces en el ruso actual. legislación. Un intento de fundamentar la esencia y la naturaleza jurídica de las acciones no autorizadas puede ser útil para el desarrollo de la ciencia jurídica, la mejora de las normas legales y la integración integral de la legislación civil, habitacional y urbanística.

Palabras clave: acciones no autorizadas, construcción no autorizada, **reconstrucción inmobiliaria**, remodelación inmobiliaria, reconstrucción inmobiliaria, legislación civil.

1 Introduction

The actions for the unauthorized creation and (or) change of real estate objects are independent, volitional, carried out under their own responsibility, the actions of a subject of civil law to create and (or) change real estate.

Unauthorized actions have a deliberately negative assessment, since they are carried out contrary to the norms established by the current legislation, which includes unauthorized construction, reconstruction, redevelopment, reorganization, change of the functional purpose of the premises. Unauthorized actions are contrary to the law and violate the rights and legitimate interests of other subjects of civil law.

Unauthorized actions are based on the absence of permits necessary for the creation or change of real estate objects.

Taking into account the fact that the actions of the subject to change and (or) create real estate objects are determined precisely by will, it is possible to judge the presence of a volitional moment only after the direct implementation of an unauthorized action, the result of an individual's activity. In the absence of a material result of a volitional action implementation, it is inappropriate to talk about an external manifestation of will (expression of will). Will does not become objectified; it remains "desire". It is not possible to evaluate thoughts and desires from a legal point of view, and these elements have no legal significance.

The expression of will, as a legal fact, becomes more and more important in civil law nowadays. However, there is no definition of will in the current civil, housing and urban planning legislation.

2 Methods

The study of problematic aspects of unauthorized creation and (or) the change of real estate objects is based on a systematic analysis of the legislation that regulates the specified area of legal relations.

The legislation regulating the unauthorized creation and (or) the change of real estate objects, including the consequences of such actions, should be divided into two large groups:

1. Legislation regulating the unauthorized creation of immovable property and the consequences of such actions. Unauthorized construction is a type of unauthorized creation of a real estate object.



2. Legislation regulating unauthorized changes in immovable property and the consequences of such actions. The types of unauthorized changes in real estate objects are unauthorized: reorganization, redevelopment, reconstruction, change of the premise functional purpose.

The first group mainly includes legal norms reflected in the RF Civil Code (hereinafter - the RF Civil Code). The Article 222 of the RF Civil Code enshrines the concept of unauthorized construction, the right of ownership, which can be recognized by a court or in another procedure established by law only in exceptional cases. [1, p. 138]

The rule on unauthorized construction was included in order to prevent, on the one hand, unauthorized actions of persons carrying out unauthorized construction, and on the other hand, to eliminate legal uncertainty regarding the unauthorized construction of an object. [2, p. 73] The referential nature of this rule is traced, also in legal regulation along with civil, land and town planning legislation.

The RF Land Code (hereinafter referred to as the RF LC) does not directly provide for unauthorized actions, however, it indirectly determines the consequences of such actions and provides provisions on the suppression of actions that violate the rights to land concerning citizens and legal entities or creates a threat of such a violation (Article 60).

The RF Urban Planning Code (hereinafter referred to as the RF UPC) establishes the norms that provide the procedure for the construction and reconstruction of capital construction facilities. Thus, construction and reconstruction are carried out on the basis of a building permit. The actions to create or change immovable property can only be carried out in accordance with town planning regulations (the rules for land use and development within the boundaries of a certain territorial zone). An exception to the general rule is the creation of an object of individual housing construction (residential building) or a garden house. [3, p. 58]

The RF Housing Code (hereinafter referred to as the RF HC) provides for the following types of changes in real estate objects: transfer of non-residential premises into residential premises and residential premises into non-residential premises in an apartment building. Housing legislation is a system of legislative and other normative acts regulating housing relations of citizens, legal entities, state authorities and local authorities regarding the changes in residential premises, i.e. the legal regulation of such legislation does not apply to other premises. The actions to change the premises in an apartment building are subject to their approval by the local government. In the absence of such coordination, the actions of the person who carried out the reconstruction or redevelopment will be unauthorized in fact and lead to legal consequences. In exceptional cases, it allows the preservation of the premises in a converted or redesigned state, if such an action does not violate the rights and legitimate interests of citizens or it does not pose a threat to their life and health.

Courts generally have different perceptions of unauthorized change types in real estate objects. However, the practice of applying the legislation is ambiguous. This is due to the shortcomings of legal regulation, in particular due to the lack of consolidation in the legislation of specific concepts: "residential premises" and "non-residential premises", "premises" and "real estate", etc.

Besides, it is very difficult for courts to distinguish one type of change in real estate from another, since according to the RF Housing Code, residential premises can be both reconstructed and re-planned, which, in turn, is covered by the concept of "reconstruction" enshrined in the RF Civil Code, and non-residential premise, according to the RF Civil Code, can only be reconstructed, although the type of change in such a premise may imply both reorganization and redevelopment. This is another problem of legal regulation that requires an early resolution.

It should be noted that world practice has not developed a unified approach to the formation of a unified system of legal regulation of unauthorized actions to create or change real estate objects [4, pp. 117-118; 5, p. 354].

3 Results and discussion

The signs of unauthorized actions are defined in the current legislation. The signs are applicable only to a specific type of unauthorized action: unauthorized construction, unauthorized reconstruction, unauthorized redevelopment, unauthorized reorganization, unauthorized change of the premise functional purpose.

The signs of unauthorized construction, according to the Article 222 of the RF Civil Code, are the following ones:

1) Erection of a building (a structure) on a land plot, construction on which is not allowed. Field land plots can be used exclusively for the production of agricultural products without the right to erect any structures on them. In this case, unauthorized erection of a building (a structure) on a field land plot will be considered a sign of unauthorized construction. In the event of a legal dispute, a decision will be made to demolish such a building. Courts in law enforcement practice pay attention to this feature as one of the criteria defining a structure as an unauthorized building. [6]

2) Lack of building permission. This feature is only relevant if a building permit is necessary. The lack of a building permit itself cannot serve as the basis for refusing a claim concerning the recognition of ownership of



an unauthorized building. [7] The court must establish whether the person who created the unauthorized building took appropriate measures to legalize it.

3) Violation of urban planning and building codes and regulations. The court establishes the fact of compliance with urban planning and construction norms and rules during the construction of the corresponding facility. [8]

4) The person who carried out the construction does not have the rights established by law in relation to the land plot on which the building was erected. If the person who has carried out the unauthorized construction does not have the rights to the land plot, the unauthorized construction will be demolished.

5) The erected structure poses a threat to human life and health.

Unauthorized reconstruction has the same features as unauthorized construction, with the exception of a building (a structure) erection on a land plot on which construction is not allowed. A feature of unauthorized reconstruction is the existence of an immovable property, erected on a legal basis and with certain technical characteristics, prior to the reconstruction work. With this the difference between the signs of unauthorized reconstruction and unauthorized construction is connected.

The signs of unauthorized redevelopment are the following:

1) Changing the configuration of the premises, requiring the introduction of appropriate changes in the technical passport of the dwelling.

2) Lack of grounds provided for by law for the implementation of redevelopment (document confirming the adoption by the local government of a decision on the approval of redevelopment). [9] This circumstance does not prevent the preservation of the premises in a re-planned state.

3) Violation of the redevelopment project submitted for obtaining the approval of the local government.

The signs of unauthorized reorganization are the following:

1) Installation, replacement or relocation of utilities (water supply, sewerage, electricity, heat supply), sanitary, electrical or other equipment.

2) No changes made to the technical passport of the premises due to the carried out reconstruction.

3) Lack of grounds provided by law for the implementation of the reorganization (a document confirming the adoption of a decision on the approval of redevelopment by the local government). The courts also draw attention to the fact that the basis for the reconstruction is the consent of the common property owners in an apartment building.

4) Violation of the restructuring project submitted for obtaining the approval of the local government. The court, despite deviation from the project, can keep the premises in a reconstructed state, if such a state does not violate the rights and legitimate interests of citizens, and does not pose a threat to their life or health.

The signs of an unauthorized change in the functional purpose of the premises (re-profiling) are the following:

1) Carrying out activities in the premises or their use contrary to the functional purpose of the premises (permitted use type).

2) The absence of a document issued by a local government body on the change in the functional purpose of the premises (for example, on the transfer of a residential premises to a non-residential premises).

In the presence of the considered signs, the action can be unambiguously defined as unauthorized.

4 Conclusions

When they study unauthorized actions to create and (or) change real estate objects, it is necessary, first of all, to refer to the concept of real estate. The RF legislation does not contain an exact definition of "real estate". The existing positions of legal scholars also do not allow to define real estate unambiguously, containing all its characteristics. It seems necessary to develop a universal concept of "real estate", and its inclusion in the civil legislation of Russia.

The rules governing the unauthorized creation and (or) the change of immovable property, as well as the consequences of such actions, are scattered across various legal acts, and there is no single approach to their logical generalization. These norms are mainly reflected in civil, land, town planning and housing legislation.

The lack of consistency for normative legal regulation gives rise to different law enforcement practices on the same issues.

The most acceptable approach to the systematization of legislation regulating the unauthorized creation and (or) change of real estate objects is the consolidation of legal norms. [10] Civil and land legislation regulates the unauthorized creation of real estate objects. Unauthorized changes in real estate objects are enshrined in urban planning and housing legislation.

The current legal regulation is not devoid of shortcomings, in the context of determining the unauthorized nature of legal relation subject activities. To solve this problem, it is necessary to integrate legal regulation in this area comprehensively, which can be carried out by including an intersectoral norm in the civil legislation concerning the unauthorized creation and (or) change of real estate objects.



5 Summary

Unauthorized actions are the actions committed by an individual of his own free will, violating the mandatory requirements of the law, the rights and interests of others.

With regard to the creation and (or) change of immovable property, unauthorized actions are the actions committed by an individual, in the absence of the necessary permits provided by law for the creation and (or) modification of an immovable property.

Theoretical studies on the definition of "unauthorized actions" are also scarce and require further comprehensive and in-depth study. It can be unambiguously concluded that the solution to this problem will be the creation of a universal legal norm reflecting the criterion of "arbitrariness" and its inclusion in the current legislation, however, it is necessary to act very carefully, guided by the principle of legislation consistency and avoid its violation.

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References

- [1] K.Yu. Lebedeva, "Legal Positions Of The Constitutional Court Of The Russian Federation On Application Of Provisions Of Item 4, Article 222 Of The Civil Code Of The Russian Federation (About Demolition Of Unauthorized Construction)", *Tomsk State University Journal of Law*, № 28, pp. 137-148, 2018
- [2] E.N. Primova, M.N. Primova, "Declaration Of Proprietary Rights To Unauthorized Construction: Is It The Offense Legalization?", *Science and world*, № 4 (56), Vol. I. pp. 67-74, 2018.
- [3] A.V. Ivanenko, "The Unauthorized Construction: Analysis Of Innovations Of Russian Civil Law", *Power of law*, no. 1 (25), pp. 50-62, 2016.
- [4] M.K. Somiah., G. Osei-Poku, I. Aidoo, "Relative Importance Analysis of Factors Influencing Unauthorized Siting of Residential Buildings in the Sekondi-Takoradi Metropolis of Ghana", *Journal of Building Construction and Planning Research*, № 3, Vol.3. pp.117-126, 2015.
- [5] H. Yahel, "The Conflict Over Land Ownership and Unauthorized Construction in the Negev", *Contemporary Review of the Middle East*, Vol. 6. Is. 3-4, pp. 352-369, 2019.
- [6] V. Kudryavtseva, N. Vasileva, "On some problems of the legal regime of unauthorized construction objects", *MATEC Web Conf.*, Vol .212. № 09002, 2018.
- [7] E. Voskresenskaya, V. Snetkov, A. Tebryaev, Z. Askarov, "Atypical real estate objects: legal regime and control system", *MATEC Web Conf.*, Vol.106. № 08055, 2017.
- [8] B. Gongalo, L. Gudovicheva, A. Gubareva, L. Dobrynina, "High-Rise Construction in Densely Dwelled Cities: Requirements for Premises Insolation and Consequences of their Violation in Russian Law and Jurisprudence", *E3S Web Conf.*, Vol. 33. № 03069, 2018.
- [9] E. Voskresenskaya, N. Zhilskiy, E. Shariapova, "Legal regulation of land granting for construction in cities with federal status", *MATEC Web Conf.*, Vol. 170. № 01058, 2018.
- [10] M. Semyakin, L. Dobrynina, A Gubareva, L. Gudovicheva, "Problems of modeling further development of civil legislation of the Russian Federation", *MATEC Web Conf.*, Vol. 170. № 01069, 2018.

Yushchenko N.A. Graduated from Udmurt State University in the field of "Jurisprudence" (2000). She defended her thesis in 2009 on the topic "Legal regulation of commercial concession and franchising in Russia and abroad." She was awarded the title of Associate Professor in 2015. For more than 15 years she has been engaged in scientific and pedagogical activities.

Magizov R.R. In 2000 he graduated from the Nizhny Novgorod Law Institute of the Ministry of Internal Affairs of the Russian Federation. In 2004 he defended his thesis on "Procedural coercive measures". In 2010 he was awarded the title of Associate Professor. Since 2005 he is the Head of the Legal Department of INEKA, NCHI KFU. Since 2018 he is the Head of the Department of Legal Disciplines, NCHI KFU.



Gulyaev A.D. In 2015 he graduated from the Naberezhnye Chelny College of Economics and Construction named after E.N. Batenchuk. In 2019 he graduated from the Kazan (Volga Region) Federal University with the degree in Jurisprudence (bachelor's degree). Since 2019 he has been studying at Kazan (Volga Region) Federal University in the field of jurisprudence (Master's degree). Since 2018 he carries out professional activities as a lawyer at "Domkor Industry" LLC.