

Legal opinion

Legalisation of unauthorised construction after 19 September 2020

Amendment to Construction Law

19 September 2020 marked the coming into force of the Act of 13 February 2020 Amending the Construction Law and Some Other Acts (henceforth the Amendment; Journal of Laws 2020, item 471). It introduced a number of changes aimed at cutting red tape around construction projects and giving investors greater legal protection. One area in which significant changes have been made is legalisation of construction projects started or conducted in violation of the law. A separate new chapter, 5a, has been added to the Construction Law's text, titled "Proceeding regarding construction projects started or conducted in violation of the law." As the government, which authored the Amendment, says in its explanatory memorandum¹, this will help tidy up regulation of the matter and make specific provisions easier to find.

New procedure for legalising unauthorised construction

Under provisions in effect since 19 September, where a structure has been built or is being built: 1) without a requisite building permit or 2) without a requisite notice of construction, or despite an objection having been raised to the notice of construction, the construction supervision authority orders construction to be halted. The authority may institute safeguard measures as part of the suspension notice, as deemed necessary and appropriate. For example, it may order that the structure or the construction site

be secured, or it may order the abatement of a danger. In the suspension order, the authority also informs the investor that they can apply to have the structure legalised, and that there is a legalisation fee (and how this fee is calculated).

The investor has within 30 days of receipt of the suspension order to apply for legalisation. If the investor fails to submit such an application, or withdraws it, the authority issues a demolition order. If the investor applies for legalisation, the authority initiates the legalisation procedure. It begins by ordering the investor to submit requisite legalisation documentation, giving the investor at least 60 days to do so. In the case of structures built without a building permit, the legalisation documentation is the documentation required when applying for a building permit, plus two additional documents, namely: (i) a technical design that takes account of the construction work completed; and (ii) a statement from the mayor or president that the project is consistent with the local zoning plan or a zoning decision. In the case of structures built without a notice of construction, a site plan has to be enclosed.

If legalisation documentation is not submitted within the time limit provided, the authority issues a demolition order (Article 49e (3)).

If legalisation documentation is submitted within the time limit provided, the authority checks it for completeness, and reviews the site plan for compliance with Construction Law provisions, including the technical-construction provisions. For structures already built, compliance with provisions in force at the time of their completion is determined. If the authority finds no irregularities in the legalisation documentation submitted (or if irregularities identified by the authority have been rectified by the investor), the authority orders the investor to pay the legalisation fee.

¹ Source: <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=121>, access: 5 October 2020

It is only when the fee has been paid that legalisation is effected. The authority issues a legalisation decision, in which it approves the construction design or site plan, and allows construction work to resume (where applicable). Importantly, legalisation does not release the investor from the obligation to obtain an occupancy permit. And in case of failure to pay the legalisation fee, the authority issues a demolition order (Article 49e (5)). The authority may also opt to carry out an environmental impact assessment before issuing a legalisation decision, in cases where making such an assessment is both required (under the Act of 3 October 2008 on Access to Information on the Environment and its Protection, Public Participation in Environmental Protection, and the Environmental Impact Assessment) and feasible, meaning that it is possible to consider alternative solutions and to establish environmental protection conditions for the project.

Simplified legalisation procedure

The Amendment also introduced a separate, simplified legalisation procedure for old unauthorised structures, completed at least 20 years earlier. As the explanatory memorandum notes, it applies mainly to structures built before the current Construction Law came into force (1995). It is expected that the simplified procedure will encourage owners to legalise them, which will clarify their legal status and help improve their safety (e.g. by subjecting them to compulsory, periodic inspections).

In the simplified procedure, the construction supervision authority orders the owner to submit legalisation documentation, giving them at least 60 days to do so. The main required documents include: a declaration of legal title to use the property for construction purposes; an as-built geodetic inventory; and an opinion by a licensed construction expert stating that the technical condition of the structure (i) does not pose a hazard to human life or health; and (ii) that it can be safely used for the current or intended purpose.

Importantly, there is no legalisation fee. The authority's role is limited to checking whether the condition is met that no proceeding had been initiated regarding the structure, and checking the submitted legalisation documentation for completeness. Compliance with the local zoning plan is not determined. As the explanatory memorandum points out, since the local government has accepted the structure's existence for 20 years – it would have become aware of its existence when drawing up or updating the local zoning plan – questioning its compliance only now, after all these years, would not be justified.

In the simplified legalisation procedure, the construction supervision authority issues a legalisation decision in case (i) the submitted legalisation documentation is complete (or gaps identified by the authority have been rectified); and (ii) the opinion by a licensed construction expert concludes that the technical condition of the structure does not pose a hazard to human life or health, and that it can be safely used for the current or intended purpose. Conversely, it issues a demolition order in case (i) legalisation documentation has not been submitted within the time limit provided; (ii) gaps identified by the authority in the submitted legalisation documentation have not been rectified within the time limit provided; or (iii) if the opinion by a licensed construction expert concludes that the technical condition of the structure poses a hazard to human life or health, or that it cannot be safely used for the current or intended purpose.

Unlike in the standard legalisation procedure, here the legalisation decision serves as the legal basis for occupancy.

Jacek Choromański, Lawyer
Miller, Canfield, W. Babicki, A. Chelchowski i Wspólnicy Sp.k.