



A new legalisation procedure concerning unlawful building work in Poland

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ABSTRACT:

This article presents the characteristics of the simplified legalisation procedure concerning unlawful building work which has been in force since 19 September 2020 in Poland. The newly-introduced solution will enable to make the buildings or their parts made unlawfully more than 20 years ago legal in a significantly simplified scope, beneficial for the building owners and administrators. The so-called old unlawful building work can be legalised in this procedure, provided complete legalisation documents are submitted, with no need to pay the legalisation fee and even when the buildings or structures do not comply with the area development plans. However, legalisation is possible solely if it is verified that the technical condition of the building or structure does not pose any hazard to human health or life and ensures its safe use. The article discusses the assumptions of the amendment and summarises the introduced regulation.

KEYWORDS:

simplified legalisation procedure; unlawful building work legalisation; unlawful building work; construction law, administrative procedure

1. Introduction

Building processes in Poland are controlled by the Construction Law of 7 July 1994 [1] which governs the aspects of construction, use and maintenance of buildings and structures. Stipulates the rights and obligations of the participants of the building process as well as provides rules for the operation of public authorities[2]. Additionally, Articles 48–49i of the said Act contain provisions concerning legislated procedure for when building works are started and performed in violation of the Construction Law. The Act does not include the legal definition of an unlawful building work, but it can be derived from regulations concerning unlawful building work legalisation; that the unlawful building work is the development of the whole project or a part thereof without obtaining the building permit required by law or the notification or despite an objection raised against that notification.

The developed unlawful building work may result from ignorance of the regulations which does not, however, release the investors from the necessity to legalise the project. In other cases the unlawful building work may be a conscious departure from obtaining a permit where the investor is aware of the project's non-conformity with the regulations and, consequently, the legal inability to obtain permits during administrative procedures. It may also serve to accelerate the erection of the building or structure, the process of which, is usually extended by the preparation of permit documents and the waiting time associated with said permits or submitting the notification. The building control authorities competently initiate procedures in connection with construction law violations and intervention is justified in the interest of public protection, ensuring order in the construction sector as well as in spatial governance [3].

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Investors, owners or administrators of buildings or structures, often are aware of their non-conformity with the applicable regulations, and rarely undertake their legalisation without prompting. This could stem from the financial outlays which incur when commissioning the required technical documents or from costly legal fees. Also, if it is impossible to make the building or structure compliant with the applicable regulation, the unlawful project may be threatened with a demolition order. The probability of the existence of buildings, structures or parts thereof which have not been legalised so far (so-called old unlawful building work) is confirmed by the fact that the building control authorities do not hold information on the unlawful building or structure erection *ex officio* [4]. As a rule, the authorities are informed about unlawful building works by third parties.

The scope of this article covers the presentation of simplified unlawful building work legalisation introduced by the Act of 13 February 2020 amending the Construction Law and some other acts (Journal of Laws 2020 item 471), hereinafter referred to as the amending act. The new procedure comes into force in Poland from 19 September 2020 and, thanks to the simplified legalisation requirements contained within, seems a highly important solution concerning the legalisation of old unlawful building works. It should be stressed that there has never been as lenient a regulation in Polish construction law. Based on this, the article contains reference to the rationale behind the basic legalisation of unlawful building work, presents the scope of the simplified legalisation procedure and the assumptions of the amendment based on publicly available grounds provided by its authors.

2. Simplified legalisation procedure

2.1. General characteristics of the unlawful building work legalisation

Unlawful building work is negatively judged in Poland which is why making the completed project compliant with the law requires legal regulations [5]. This is only possible through legalisation by following the procedure established in the provisions of Construction Law. These legislations have been approached by Polish legislators many times over the last one hundred years [6].

The legalisation of unlawful building work has so far been governed by the Regulation of the President of Poland dated 1928 concerning construction law and housing estate development [7], Construction Law dated 1961 [8], Construction Law dated 1974 [9] and also by the Construction Law of 1994 which is currently in force. The provisions of the Construction Law of 1974 are now considered liberal due to multifaceted legalisation opportunities, particularly as legalisation fees do not need paid [10]. In practice, some investors perform unlawful building work before the legalisation process is completed. This usually serves to avoid obtaining the building permit [11]. The legalisation provisions introduced by the Act of 1994 were much stricter as they included an obligatory order to demolish the unlawful building work by 2003 [12].

In the amendment to the Act, which comes into force from 19 September 2020, the legalisation procedure is governed in Article 48 and 49 [13]. At present, the building control authority initiates the procedure *ex officio* and issues a decision to suspend building works. In the said document, the authority notifies the investor as well as the building or structure owner or administrator of the possibility to apply for the legalisation of the building or structure, or a part thereof, and of the need to pay the legalisation fee and how the fee is calculated. However, initiation of the legalisation procedure depends on the legalisation application. Submission of the legalisation application results in the legalisation procedure being initiated *ex officio* by the control authority and the issuance of the decision imposing the obligation to submit legalisation documents (according to Article 48b(2)). Submission of incomplete documents by the investor results in the decision obliging them to rectify the non-conformities. However, submission of complete documents and their favourable assessment by the authority in terms of its compliance with the provisions of the Construction Law and with the technical building regulations

are grounds for starting the subsequent legalisation procedure, i.e. imposing the legalisation fee. The procedure to legalise the unlawful building work is finished with the issuing of a legalisation decision approving the building permit design or the plot plan or site development plan, and also allowing resumption of the building works if they have not been completed (Article 49(4)). On the other hand, if the legalisation application is not submitted by the required deadline, or if it is withdrawn, if the legalisation documents are not submitted by the appointed deadline, if the provision concerning non-conformity rectification in the legalisation documents is not performed in a timely fashion, if the legalisation fee is not paid by the appointed deadline or if the building works are continued despite the suspension decision, the building control authority will be obliged to issue a mandatory demolition order.

Accordingly, the legalisation procedure is at the moment dependent on the investor's will and entails submission of the documents and payment of the legalisation fee.

2.2. Provisions in the simplified legalisation procedure

Starting from 19 September 2020, the Construction Law contains a new and additional formula of unlawful building work legalisation, the so-called simplified legalisation procedure (Article 49 f-i) is unusual as it does not demand very burdensome requirements in order to legalise the building or structure, or its part.

If a building, structure or a part thereof is found to be built without the required building permit decision or notification or despite an objection raised against the said notification, the building control authority initiates the simplified legalisation procedure. A condition precedent, with respect to the possibility of initiating the said procedure *ex officio* by the building control authority, is a period of at least 20 years which must elapse after the construction is completed (Article 49f(1)). Consequently, the legalisation procedure will be possible following every 20 year period after the unlawful building work is completed. The simplified procedure can also be used for unlawful building works completed before the applicable Construction Law came in force (i.e. by 1 January 1995) to which, as a rule, the provisions of the Construction Law of 1974 apply. However, in this case the simplified procedure will apply solely at the request of the building or structure owner or administrator who may choose the more favourable procedure (Article 49f(2)).

The building control authority is entitled to order the protection of the building, structure or any part thereof and the removal of any hazard (Article 49f(3)) by a decision if any hazard to human health or life is found. The first legalisation deed in the simplified procedure shall be the decision concerning the obligation to submit legalisation documents. The deadline should be at least 60 days after the decision is delivered (Article 49g(2)). The legalisation documents include: a statement of the title to use the real property for building purposes, geodetic post-completion survey of the building or structure and a technical expert's report prepared by a person holding the relevant building licence. The submitted expert's report should prove if the technical condition of the building or structure: a) does not pose any threat to human life or health and b) enables the use of the building or structure safely in line with the existing or intended use (Article 49g(2)). The parties shall be entitled to file an appeal against the decision imposing the obligation to submit documents (Article 49g(3)).

The authority will be obliged to verify the submitted legalisation documents in terms of their completeness. Based on the submitted expert's report, the authority should verify that the technical condition of the building or structure does not pose any threat to human life or health and enables the use of the building or structure safely in line with the existing or intended use (Article 49h(1)). Any incompleteness of the legalisation documents shall result in a decision concerning the obligation to rectify any shortcomings by the appointed deadline (Article 49h(2)). When the analysis of the submitted documents verifies the documents are complete and the technical condition is appropriate, the control authority will issue a legalisation decision which will also be a decision allowing the use of the building or structure. Such a decision provides grounds for using the unlawful building work (Article 49i(1)).

In the simplified legalisation procedure the authorities will issue a demolition permit when: the legalisation documents are not submitted by the appointed deadline, the documents mentioned in the decision are not complemented and also when, according to the technical expert's report named in Article 49g(2)(3), the technical condition of the building or structure poses a threat to human life or health or does not enable the safe utilisation in line with the existing or intended use (Article 49i(2)). If there are any non-conformities in the technical condition of the building or structure detected, the Act does not provide for any possibility to issue any decisions to rectify any non-conformities of the technical condition of the building and to legalise the building or work, but indicates the need to issue a demolition order right away.

2.3. Justification of the introduced amendments

The building control authorities must develop the rules for applying the newly introduced simplified procedure regarding unlawful building work legalisation. Similarly, the decision-making process or the doctrine stance will only be created over time by the actions of those authorities and parties interested in the legalisation. Consequently, one of the basic documents containing the guidelines which, according to the author, are required to implement those regulations is, undoubtedly, the grounds for the amending bill [14].

In the grounds for the Act it was noted Construction Law violation in the form of unlawful building work does not expire even when such a building or structure has existed for many years. In this respect, the building control authorities are obliged to initiate measures regardless of the date when the buildings or structures were erected. It may be claimed that the authors of the draft simplified legalisation procedure were aware of cases when the buildings, despite their long existence, have been non-compliant with the local regulations or technical regulations (e.g. concerning the maintenance of the relevant distances to the adjacent plots), but the control authorities have not carried out any procedures concerning them as they were not aware they had been erected unlawfully. Moreover, the article author remarks that according to the public judicature of the administrative courts, the building control authorities, due to the intervention of people reporting unlawful building work, have carried out procedures concerning such works dating back even to the 1960s and these procedures often last many years. The significant flow of time results in difficulties concerning relevant evidence and explanatory procedures (often because of the changing owners of the buildings or structures). Such procedures and decisions of the authorities are often challenged by the parties thereto who represent different legal interests in a given case. What is more, in the grounds to the amending bill it was stressed that until 1994 there was no statutory obligation to keep the building documents which made it difficult for the authorities to determine if the investor actually held such documents or a building permit. Even more so, as particularly with respect to older unlawful building works from before 1994 the courts often indicated the absence of the building permit decision or documents cannot prove the building or structure is illegal [15]. This is why, it was considered justified to legalise the buildings or structures which are used and embedded in the land and which were erected unlawfully many years ago. The acceptance of those unlawful building works is also proven by the absence of any complaints and interventions from the neighbours or local communities addressed to the government administration bodies for more than 20 years.

It was remarked also that the unlawful use of buildings or structures results in the absence of the building control authorities' control over their correct performance and technical condition. What is more, it was stressed that the legalisation of old unlawful building works can improve the precision, update the land and building register and increase the communes' earnings related to the real property taxes.

Referring to the neglect of the provisions of the area development plans in the simplified procedure, the draft authors stressed that the area development plans, which are currently in force, were adopted after 31 December 2003. This is why, it was decided that the commune authorities have been aware of the buildings or structures in their territory as unlawful building

works were surveyed by the communes when preparing the plans. All the same, the projects completed by that time were considered accepted and compliant with the spatial policy of communes.

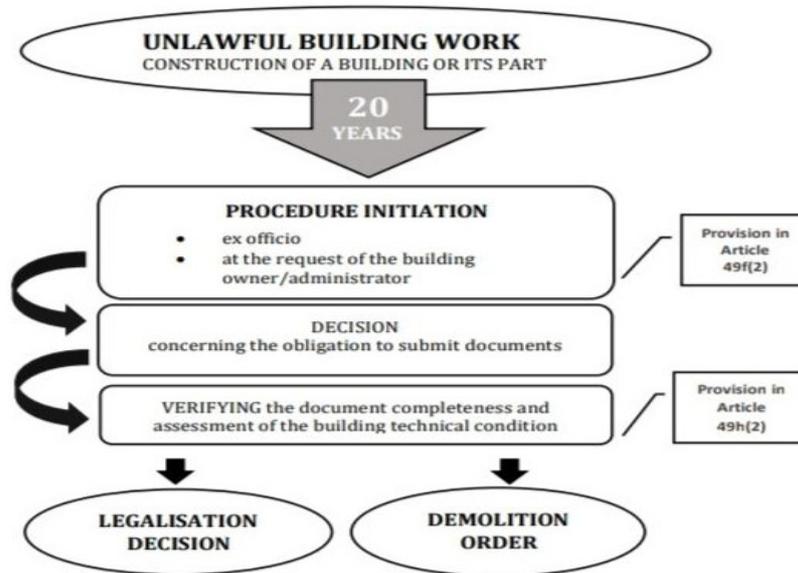


Fig. 1. The simplified legalization procedure

3. Conclusions

The simplified legalisation procedure opens up new, liberal opportunities for people interested in making unlawful building works, completed more than 20 years ago, legal. The legalisation of the building or structure, or a part thereof without the legalisation fee, as well as the absence of any required building or structure compliance with the local law, i.e. provisions of the area development plans, is particularly positive in this respect. In the simplified procedure the building control authority does not investigate the provisions of the area development plan, the compliance of which is one of the grounds enabling the legalisation of a building or a structure in the standard legalisation procedure. Moreover, in the simplified legalisation procedure, the compliance of those buildings' or structures' performance with the technical regulations is not important except when such a non-compliance would result in hazard to human health and life and would affect the possibility to use them safely. This is why it should be mentioned that an adverse premise for legalising a building or structure in the simplified legalisation procedure will be any non-conformity of the technical condition of the building resulting from the technical expert's report submission. In those cases the legislators did not provide the opportunity to issue any decisions ordering to remove any non-conformities of the technical condition of the building, but solely pointed to the legitimacy of issuing a demolition order. In this scope, the control authority will issue decisions based on the submitted documents.

To sum up, there are three conditions required to complete the simplified legalisation procedure with the legalisation decision. They include: starting the procedure 20 years after the construction is completed, the correct technical condition of the project, and also the absence of any complaints and interventions connected with the implemented decision. According to the author of this article, the introduced procedure should receive a positive rating as it makes it possible for the owners or administrators of buildings or structures to ensure that the unlawful building work, which has remained in the incorrect state, becomes legal in a more efficient and less burdensome way. What is more, it should be noted that from the government administra-

tion bodies' perspective, legalisation of old unlawful building works is also highly important as it will enable the regularisation of the legal status of real properties, update the land and building register and, as it was provided for in the bill, it will increase the earnings of communes from real property taxes.

Reference works

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Nowa formuła postępowania legalizacyjnego samowoli budowlanych w Polsce

STRESZCZENIE:

Niniejszy artykuł przedstawia charakterystykę obowiązującego od 19 września 2020 roku w Polsce uproszczonego postępowania legalizacyjnego samowoli budowlanych. Nowo wprowadzona instytucja w sposób korzystny dla właścicieli i zarządców obiektów w znacznie uproszonym zakresie pozwoli doprowadzić samowolnie wykonane ponad 20 lat temu obiekty budowlane lub ich części do stanu zgodnego z prawem. Warunkiem zalegalizowania tzw. starych samowoli budowlanych w tej procedurze jest przedłożenie kompletnych dokumentów legalizacyjnych, bez konieczności wniesienia opłaty legalizacyjnej oraz nawet w sytuacji niezgodności obiektów z miejscowymi planami zagospodarowania przestrzennego. Legalizacja jest jednakże możliwa wyłącznie w razie stwierdzenia niestwarzającego zagrożenia dla życia lub zdrowia ludzi stanu technicznego obiektu budowlanego, przy tym pozwalającego na jego bezpieczne użytkowanie. W artykule omówiono założenia nowelizacji oraz podsumowano wprowadzoną regulację w języku angielskim.

SŁOWA KLUCZOWE:

uproszczona procedura legalizacyjna; legalizacja samowoli budowlanej; samowola budowlana, prawo budowlane; postępowanie administracyjne