

SERBIA: Real Estate

Legalization declared unconstitutional

On 7 June 2013, the provisions of the Law on Planning and Construction (*Zakon o planiranju i izgradnji*, Official Gazette RS no. 72/2009, 81/2009, 64/2010, 24/2011, 121/2012 and 42/2013) on legalization of buildings (Articles 185 through 200) ceased to be in force as a result of the publication in the Official Gazette of the decision of the Serbian Constitutional Court declaring the respective provisions unconstitutional. The decision was actually rendered six months ago, but the Constitutional Court withheld its publication in order to allow the legislator to amend the provisions found to be unconstitutional. However, this gentleman's offer was not accepted by the Serbian Parliament, which failed to amend the law.

The Constitutional Court held that the quashed provisions were unconstitutional because they had created separate and different legal regimes applicable to the acquisition of ownership on construction. This bifurcation, according to the court, favored owners of illegal constructions. The court admitted that it may be constitutional to apply different legal regimes to the same right if this were necessary in order to level the playing field for persons or groups whose social status justifies affirmative action. However, the court found that this principle cannot be applied to promote the interests of those who came into disadvantageous position by breaching the law, in this case by constructing illegally. In the opinion of the court, this would be contrary to the rule of law, the principle of equality in law and the prohibition of discrimination which are all guaranteed by the Constitution (and the European Convention for the Protection of Human Rights and Fundamental Freedoms, with its protocols).

Particularly problematic, in the opinion of the Constitutional Court, was the provision containing a presumption that co-owner/co-user has given its consent to legalization if he/she knew or could have known of illegal construction but failed to object to it during construction works. The court also singled out the provision requiring that a note be entered into the real property cadastre stating that the Republic of Serbia does not guarantee for stability and safety of legalized building. According to the Constitutional Court, the state may not abandon its obligation to guarantee protection of human life and health as well as the obligation to indemnify those who incur damages as a result of improper actions of state authorities.

The Constitutional Court did not find legalization objectionable in principle, but objected to the procedure set forth by the law. The court further emphasized that, given that the goal of legalization is to preserve existing illegal buildings in order to decrease losses which would arise in case of their demolition, any legalization should be based on the requirement that investor complies with substantially all formal requirements applicable to construction activity, to the extent reasonably possible. Special treatment, emphasized the court, can be introduced only with respect to persons whose social status justifies such positive discrimination.

The Ministry in charge of construction affairs has announced a new bill on legalization which is now under public debate and which should become law in the next couple of months. The bill is, obviously, aimed at addressing the views of the Constitutional Court and overcoming the deadlock in the legalization process.