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Problems of rectification of violations in protected zones of main gas pipeline facilities. The regulatory aspect

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Аннотация

Sustainable development of any territory stipulates a number of restrictions. Legal amendments in terms of determination of restricted use zones have brought about the need for their determination, establishment and registration with the Unified State Register of Real Estate within the established term. This article reviews features of legal regulation of restricted use zones and in particular, protected zones of main gas pipelines taking into account the novelties introduced by separate legal acts in 2018. The purpose of the study is an evaluation of consequences of changes, determination of features of legally established guarantees with regards to subjects of legal relations taking into account the balance of interests of gas transport companies and land users. The author covers some challenging issues related to the legal regime of protected zones of main gas pipelines, analyzes the judicial practice, describes the concept of and requirements to protected zones of main gas pipelines, justifies restriction standards and specifies the measures adopted in respect of land plots located in protected zones. The author concludes that there is a need to adopt a regulation on protected zones of main gas pipelines, brings forward recommendations for improvement of provisions of urban development and land laws.

Ключевые слова: energy law, legal regime of energy facilities, protected zone, main gas pipeline, restricted use zone

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¹ In the establishment of restricted use zones (RUZs), in particular, protected zones of main gas pipelines (PZMGPs), the legislator stipulates the need for creation of safe conditions for operation of hazardous industrial facilities.

² In accordance with Art. 2 of Federal Law No. 69-FZ of March 31, 1999 On Gas Supply in the Russian Federation, such zones are established according to the procedure determined by the Government of the Russian Federation along gas pipeline routes and around other facilities of the gas system in order to ensure normal conditions of its operation. Regulation of the Government of the Russian Federation No. 1083 of September 8, 2017 On the Approval of Rules for Protection of Main Gas Pipelines and Amendment of the Regulation on Submission of Additional Data Displayed on Public Cadastral Maps by Federal Executive Bodies, Government Authorities of the Constituent Entities of the Russian Federation and Local Self-Government Authorities to the Federal Executive Body (Its Territorial Bodies) Authorized by the Government of the Russian Federation to Perform State Cadastral Registration, State Registration of Rights, Maintenance of the Unified State Register of Real Estate and Provisions of Data Contained in the Unified State Register of Real Estate (the “Main Gas Pipeline Protection Rules”) establishes that the protected zone along gas pipeline routes spreads 25 meters away from the pipeline axis on each side.

³ Before 2019, gas transport companies Gazprom, PJSC, and the Gazprom Group were heavily involved in the judicial work aimed at rectification of violations in PZMGPs.

⁴ By that time, there developed the practice of judicial satisfaction of claims for demolition of buildings, constructions, structures erected in PZMGPs, which was generally positive for Gazprom, PJSC.

⁵ Paragraph 5, Clause 6, Article 90 of the Land Code of the Russian Federation, Articles 28 and 32 of Federal Law No. 69-FZ of March 31, 1999 On Gas Supply in the Russian Federation introduced a prohibition against erection of any buildings, constructions, structures within the established minimum differences to facilities of the gas supply system without approval of the company that owned the gas supply system or its authorized organization. Any buildings, constructions and structures erected closer to facilities of gas supply systems than minimum differences established by construction regulations and rules were to be demolished at the expense of legal entities and individuals that committed the violation.

⁶ The Constitutional Court of the Russian Federation consolidated the existing judicial practice in this case category by stating in its ruling No. 2318-O of October 6, 2015, that regulation of the legal regime of land plots with facilities of the gas supply system is required for alignment of state, public and private interests in this sphere for the purposes of creation of favorable residential conditions by compliance with the requirements introduced by regulatory acts and urban development regulations and rules

and control over their performance, and that the restrictions on the actual use of land plots with facilities of the gas supply system established by the federal legislator in view of the fire hazard characteristics of gas transported through gas transport networks and the special conditions of use of such land plots and the regime of performance of economic activities at such land plots stipulated in view of the above are aimed not only at ensuring of safety of facilities of the gas supply system at its operation, maintenance and repair but to prevent accidents, catastrophes and other potential unfavorable consequences and thus protect life and health of citizens, ensure safety [1].

⁷ However, Federal Law No. 342-FZ of August 3, 2018 On Amendment of the Urban Development Code of the Russian Federation and Separate Legal Acts of the Russian Federation (“Law No. 342-FZ”) that entered into effect on January 1, 2019, has introduced considerable amendments to the establishment of the RUZ legal regime including the PZMGP regime that could not but influence the existing judicial practice. Adoption of this regulatory act has indeed resulted in the reduction in the number of claims filed by gas transport companies against individuals and legal entities violating the PZMGP by various constructions.

⁸ Following the adoption of Law No. 342-FZ, Paragraph 5, Clause 6 of Art. 90 of the Land Code of the Russian Federation, Art. 28 and 32 of Federal Law No. 69-FZ of March 31, 1999 On Gas Supply in the Russian Federation have ceased to be in effect, however, the positive judicial practice of gas transport companies has been largely based on the provisions of these regulations.

⁹ The regulations that cease to be in force have been of imperative character and prohibited construction and location of any real estate units in the RUZ. At the time, Paragraph 5, Clause 6 of Art. 90 of the Land Code of the Russian Federation mirrored the requirements specified in Part 6 of Art. 28 of the Federal Law On Gas Supply in the Russian Federation and additionally stated that the “boundaries of protected zones with facilities of the gas supply system are determined based on construction regulations and rules, main pipeline protection rules, other regulatory documents approved according to the duly established procedure”.

¹⁰ Law No. 342-FZ, where the majority of provisions are of the blanket character, is complicated for understanding and application even by professional lawyers. Besides, it is characterized by legal uncertainty and incorrectness of the legal structure expressed in the fact that Part 4 of Art. 32 of the Federal Law On Gas Supply in the Russian Federation that ceased to be in force on January 1, 2022, in fact remains in effect until January 1, 2025, being mentioned as a reference provision in Part 58 of Art. 26 of Law No. 342-FZ [2].

¹¹ In accordance with Art. 106, Clause 1, of the Land Code of the Russian Federation, the Government of the Russian Federation should approve regulations in respect of each RUZ type that would determine the procedure for establishment, amendment, termination of existence of RUZs, the list of restrictions on the use of land plots, real estate units within the boundaries of the indicated zones and the list of federal government agencies authorized to adopt the respective resolutions.

¹² Besides, Art. 28, Part 6, of the Federal Law On Gas Supply in the Russian Federation has also been changed and contains just the following requirement:

“Protected zones of gas pipelines are established at land plots adjacent to facilities of gas supply systems for the purposes of safe operation of such facilities”.

¹³ Thus, starting from January 1, 2022, the procedure, conditions of use, legality of presence and restrictions on use of land plots in the RUZ are governed by Chapter 19 of the Land Code of the Russian Federation only, and this is the reason why the applicable laws currently contain neither the prohibition against any construction in the PZMGP nor the liability of persons committing violations to demolish constructions in these zones, while the liability to ensure safe functioning of main gas pipelines (MGP) stipulated by Federal Law No. 116-FZ of July 21, 1997 On Industrial Safety of Hazardous Production Facilities, Federal Law No. 69-FZ of March 31, 1999 On Gas Supply in the Russian Federation, the Main Gas Pipeline Protection Rules and the liability for violations of the PZMGP is imposed fully on the MGP owner and the operating company.

¹⁴ Although the amendments introduced into the Land Code of the Russian Federation with regards to RUZs have specified their types, determined the procedure for and legal consequences of their establishment, gas transport companies now come across some matters not resolved from the regulatory standpoint. In particular, implementation of novelties requires adoption of new regulations that determine the legal regime of the protected zone (PZ).

¹⁵ Since no regulation on the PZ in respect of MGPs have currently been adopted in accordance with Art. 106 of the Land Code of the Russian Federation, there is a gap in the applicable laws that concerns legal regulation of PZ restrictions, which, in fact, is evidence of the absence of a direct legal prohibition against construction in PZs of main gas pipelines and the absence of the obligation of persons who have committed PZ violations to demolish unauthorized constructions [3].

¹⁶ The Main Gas Pipeline Protection Rules determine the legal regime of PZs and describe their size and boundaries but fail to regulate the PZ establishment procedure or determine the need for adoption of the respective resolution or the authority adopting such resolutions while Part 17 of Art. 26 of Law No. 342-FZ stipulates the need to submit an application for zone establishment to the authorized body. It is worth mentioning that there is currently no Protected Zone Regulation stipulated by the Land Code of the Russian Federation [4].

¹⁷ The Main Gas Pipeline Protection Rules and engineering provisions and rules stipulate no clear PZ establishment procedure and fail to determine the need for adoption of the respective resolution by authorized bodies. Provisions concerning a prohibition against erection of any buildings, constructions, structures in the PZ are now contained only in the Main Gas Pipeline Protection Rules [5].

¹⁸ One more ambiguous aspect is the practice of further judicial application of the provisions of Part 4 of Art. 107 of the Land Code of the Russian Federation stating that permitted use (designation) and (or) parameters of buildings, structures commissioned prior to the RUZ establishment date, permitted use of land plots need to be brought in compliance with restrictions on the use of land plots within the RUZ boundaries, and buildings, structures, facilities under construction that cannot be located in the RUZ need to be demolished within three years from the establishment of such zone.

¹⁹ As follows from the word-for-word interpretation of the provision above, the period of limitation of actions may be applied in respect of claims for rectification of PZ violations by demolition of constructions. The period of limitation of actions in respect of the majority of violations has now expired considering that 2019-2020 was the peak of activities of gas transport companies aimed at registration of the PZ data in the Unified State Register of Real Estate that PZ establishment is associated with according to the law.

²⁰ The following question arises in this regard: what should an MGP owner or an operating company do if courts start major dismissal of claims for demolition of constructions located in the PZMGP due to missing period of limitation of actions? Maybe the legislator has foreseen Part 7 of Art. 107 of the Land Code of the Russian Federation for such situation stating that if the establishment or amendment of the RUZ results in the impossibility to use a land plot and (or) a real estate unit located at such land plot, title holders of buildings, structures, erection of which has triggered adoption of the resolution on the establishment or amendment of the RUZ, real estate developers, government authorities, local self-government authorities are obligated to buy out such land plot and (or) the real estate unit located at such land plot. If so, we can only guess what final price Gazprom, PJSC, will pay for rectification of violations by means of buy-out of land plots and real estate units located in the PZMGP.

²¹ Prospects for making decisions that are positive for gas transport companies has been also significantly reduced by adoption of Federal Law No. 339-FZ of August 3, 2018 On Amendment of Part One of the Civil Code of the Russian Federation and Article 22 of the Federal Law On the Implementation of Part One of the Civil Code of the Russian Federation that has amended the wording of Article 222 of the Civil Code of the Russian Federation (CC RF) [6].

²² The new version of the indicated article consolidates presumption of defense of the good faith real estate developer. By virtue of Paragraph 2, Clause 1, Article 222 of the CC RF, a building, structure or other construction erected or built in violation of the legally established land plot use restrictions is not referred to unauthorized constructions if the owner of such unit has been unaware of or could not be aware of the existence of the said restrictions in respect of the land plot it owns.

²³ Today, just the mere statement of the fact that real estate units are located in the RUZ does not constitute an unconditional ground for claim satisfaction and demolition of disputed constructions [7].

²⁴ If the developer has been aware of the PZ, the built construction can be acknowledged unauthorized in accordance with the rules of Art. 222 of the CC RF stipulating no compensation to the person who has erected the construction, and if the developer has been unaware of or could not be aware of the existence of the respective restrictions, the construction can be demolished only upon a respective prior compensation.

²⁵ In the past, the persons that have erected buildings, constructions, structures in the PZ had to prove that they have performed such actions in no violation of the law, but today, illegal developers in the PZ can be acknowledged “good faith owners”, and the obligation to prove bad faith actions of such persons in the court hearing of the case is

imposed on the owner of the gas supply system or the organization authorized by such owner.

²⁶ The Energy Committee of the State Duma of the Russian Federation held a round-table conference in November 2021 on the subject of Relevant Issues of Statutory Regulation of PZ and Zones of Minimum Distances to Main or Industrial Pipelines, the participants discussed the most relevant issues of further development of the RUZ laws [8].

²⁷ The Committee reviewed in advance the bill On Amendment of the Land Code of the Russian Federation and Separate Legal Acts of the Russian Federation in Terms of Improvement of the RUZ Laws prepared by the Federal Service of State Registration, Cadastre and Cartography of the Russian Federation (Rosreestr) but not presented to the Government of the Russian Federation yet, and this bill aroused a multitude of questions in view of the complete change in the approach to the problem [9].

²⁸ Thus, the bill stipulated exclusion of PZs of gas pipelines, oil pipelines and petroleum product pipelines, ammonia pipelines including gas distribution and gas consumption networks, PZs of electric power facilities, PZs of hydropower facilities and PZs of heat networks from the list of RUZ types. The Bill governs any further relations with regards to the pipeline transport not as the RUZ but just as the zone of minimum distances to main or industrial pipelines.

²⁹ Chairman of the Energy Committee of the State Duma P.N. Zavalny believes that such approach is not applicable to facilities of the fuel and energy complex. In fact, the bill lifts any barriers to construction of real estate units and performance of activities close to main pipelines. Taking into account the status of a main pipeline as a source of increased danger, this may result in considerable growth of the number of accidents and uncontrolled development of the PZ and lead to even more severe consequences. Moreover, the bill, if adopted, will devalue the already taken efforts aimed at improvement of laws in terms of arrangement of relations between land plot owners and owners of pipeline transport facilities (lease agreements, servitudes, etc.) and granting of public access to the data on PZMGP boundaries. The committee representatives have identified obvious problems of the existing regulation based on the results of the workshop, however, absence of the legal mechanism to solve the situation is still relevant [10].

³⁰ The foreign experience in the matter under consideration shows that, for example, the rules and the procedure for establishment of PZMGPs contained in the laws of the Republic of Kazakhstan are similar to the Russian ones, but have some characteristic features.

³¹ Art. 14 of Law of the Republic of Kazakhstan No. 20-V of June 22, 2012 On Main Pipeline establishes a prohibition against erection of any buildings and constructions in the PZ within the minimum distances established by construction regulations and rules and disallows imposing the duty to buy or acquire for use land and water sites within the boundaries of the protected zone of the main pipeline on main pipeline owner or operator [11]. The operator may repair and maintain MGPs and perform works aimed at prevention of emergencies within the boundaries of PZMGPs upon prior notification of land owners (land users) and further compensation of caused

damage, or without prior notification and with further compensation of caused damage in case of liquidation of an emergency [12].

³² Laws of the Republic of Kazakhstan contain no provisions on the duty of specific persons to demolish a construction and provide a respective compensation.

³³ In the meantime, the United States of America have no legal consolidation of the PZMGP provisions, and federal regulations contain no information on any minimum distances for construction of houses close to main gas pipelines. The only pipeline safety initiators are non-profit organizations such as the Gas Pipeline Security Fund that view the establishment of partner relations between the residents that own constructions, the government and the industry and facilitation of origination of large communities and better environment as their main tasks [13].

³⁴ Based on the systemic analysis of the provisions of the Land Code of the Russian Federation, the Urban Development Code of the Russian Federation, Law No. 342-FZ, foreign and Russian laws in the industrial safety sphere with regards to the establishment of RUZs and implementation of consequences related to their establishment, we arrive at the following conclusions.

³⁵ Government authorities, organizations and individuals are legally obligated to fulfill the obligatory requirements to ensure safety of life, property and the environment.

³⁶ RUZs are established in order to eliminate the opportunity of damage to facilities pipelines consist of, and compliance with the special regime of land plot use within the limits of minimum distances is caused by the aggregate of hazardous production factors of the transmission process and hazardous features of the transmitted medium (destruction of a pipeline or its elements accompanied with dispersion of metal and soil fragments; product combustion in case of pipeline destruction; open fire and thermal impact of the fire; explosion of the gas-air mixture; collapse of and damage to buildings, constructions, installations; low oxygen concentration; smoke; product toxicity) [14].

³⁷ However, we should keep in mind that the applicable laws of the Russian Federation considering the introduced amendments in terms of gas pipeline protection are still not developed in full.

³⁸ The problem of implementation of Part 14 and Part 17 of Art. 26 of Law No. 342-FZ appeared due to the fact there has been no prior procedure for RUZ establishment irrespective of the need for the respective zone, and the new procedure has not been developed yet.

³⁹ Implementation of the updated legal provisions that regulate the procedure for establishment, amendment and termination of existence of RUZs and determine the limits of performance of economic activities in such territories is now seriously obstructed by the absence of the required legal framework (the Government of the Russian Federation has still not approved any RUZ regulations and has not determined the executive bodies authorized to establish RUZs), ambiguous interpretation of the requirements of Law No. 342-FZ, lack and inconsistency of the law enforcement practice and other factors.

⁴⁰ That said, in the absence of the centralized policy of Gazprom, PJSC, in this sphere, gas transport companies use their discretion to solve the following dilemma: to overlook PZ violations putting in danger the public at large in the PZ and MGP facilities that may be damaged by third parties or to apply to court in conditions of the current imperfect RUZ laws, based on which each specific court can issue any resolution: from claim dismissal because of, for example, omission of the period of limitation of actions or the defendant's lack of awareness about the existence of the PZMGP to forcing the gas transport company to buy out the land plot and contested real estate units located in the PZMGP.

⁴¹ Thus, the applicable laws give owners of land plots and constructions located in the PZMGP an opportunity to interpret the mentioned shortcomings in their favor, while the owners of main gas pipelines bear the burden of proof in court and negative consequences in form of damage compensation.

⁴² The regulation on protected zones of main gas pipelines in accordance with Art. 106 of the Land Code of the Russian Federation needs to be adopted as soon as possible [15].

⁴³ Besides, since there are no RUZ provisions on the initial stage, the introduction of the following amendments to Federal Law No. 342-FZ should be reviewed:

⁴⁴ - to revise Part 5 of Art. 27 of the law to read as follows: "Paragraph 4, Subclause b, Clause 3 and Subclause b, Clause 4, Article 8 of this Federal Law enter into effect from the date of entering into effect of resolutions of the Government of the Russian Federation on the approval of provisions on protected zones of pipelines (gas pipelines, oil pipelines and petroleum product pipelines, ammonia pipelines) and zones of minimum distances to main or industrial pipelines (gas pipelines, oil pipelines and petroleum product pipelines, ammonia pipelines), adoption of which is stipulated by Clause 1 of Article 106 of the Land Code of the Russian Federation".

⁴⁵ - to supplement the law mentioned above with articles to read as follows:

⁴⁶ "If buildings, constructions and structures not referred to main pipeline facilities have been erected prior to the date of official publication of this Federal Law or prior to the date of registration of the data on the boundaries of protected zones of pipelines (gas pipelines, oil pipelines and petroleum product pipelines, ammonia pipelines) and zones of minimum distances to main or industrial pipelines (gas pipelines, oil pipelines and petroleum product pipelines, ammonia pipelines) with the Unified State Register of Real Estate, no losses stipulated by Articles 57, 57.1, 106, 107 of the Land Code of the Russian Federation in view of the establishment of such zones are subject to compensation.

⁴⁷ The provisions of Clause 4 and 5 of Article 107 of the Land Code of the Russian Federation are not applicable to any legal relations arising prior to the date of official publication of this Federal Law or prior to the date of entering the data on the boundaries of protected zones of pipelines (gas pipelines, oil pipelines and petroleum product pipelines, ammonia pipelines) and zones of minimum distances to main or industrial pipelines (gas pipelines, oil pipelines and petroleum product pipelines, ammonia pipelines) in the Unified State Register of Real Estate".

- to supplement Article 27 of this law with Part 6 to read as follows: “The provisions of Subclause d, Clause 16 of Article 9 of this Federal Law enter into effect from the date of entering into effect of resolutions of the Government of the Russian Federation on the approval of provisions on protected zones of pipelines (gas pipelines, oil pipelines and petroleum product pipelines, ammonia pipelines) and zones of minimum distances to main or industrial pipelines (gas pipelines, oil pipelines and petroleum product pipelines, ammonia pipelines), adoption of which is stipulated by Clause 1 of Article 106 of the Land Code of the Russian Federation”.

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Problems of rectification of violations in protected zones of main gas pipeline facilities. The regulatory aspect

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Abstract

Sustainable development of any territory stipulates a number of restrictions. Legal amendments in terms of determination of restricted use zones have brought about the need for their determination, establishment and registration with the Unified State Register of Real Estate within the established term. This article reviews features of legal regulation of restricted use zones and in particular, protected zones of main gas pipelines taking into account the novelties introduced by separate legal acts in 2018. The purpose of the study is an evaluation of consequences of changes, determination of features of legally established guarantees with regards to subjects of legal relations taking into account the balance of interests of gas transport companies and land users. The author covers some challenging issues related to the legal regime of protected zones of main gas pipelines, analyzes the judicial practice, describes the concept of and requirements to protected zones of main gas pipelines, justifies restriction standards and specifies the measures adopted in respect of land plots located in protected zones. The author concludes that there is a need to adopt a regulation on protected zones of main gas pipelines, brings forward recommendations for improvement of provisions of urban development and land laws.

Keywords: energy law, legal regime of energy facilities, protected zone, main gas pipeline, restricted use zone

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