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Illegal occupation: can homeowners obtain eviction or can unwanted guests stay?

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Introduction

There may be various reasons why a building remains vacant for a certain period. This may be, for example, because the owner does not use it, because it cannot be rented out in its current condition, or because legal proceedings have delayed the planning and approval of a replacement and renovations.

In Zurich and other Swiss cities, unauthorised occupation of a property by an individual or groups of people is a frequent and disturbing occurrence.

Unfortunately, in practice, it has become persistently challenging and almost impossible for homeowners to end illegal house occupations, in particular because of a lack of support from relevant authorities and the police. The question therefore arises whether homeowners can do something about the situation and whether the authorities and the police are fulfilling their legal mandate.

Legal claims of concerned homeowners

Civil law

According to the Swiss Civil Code,⁽¹⁾ any owner has the right to use force in order to defend their property against unlawful interference by third parties (right of defence). If a property is seized from the owner secretly or by force, the owner may immediately seize back the property by expelling the offender (recovery right).

In both cases, the owner must refrain from using any force that is not justified by the circumstances. They should, as a matter of priority, call in official assistance (police). Of several defence options, they must choose the one that violates the legal interests of the offender the least (mildest means).⁽²⁾ [According to legal literature, the limits of the permitted self-help are exceeded when force is used even when official assistance could have intervened in time.](#) If, on the other hand, official help is not available in time (eg, because the police is not willing to evict the offenders), private force is permissible within the limits mentioned.⁽³⁾

In practice, the affected owner is usually not personally on site when an illegal occupation starts. In these cases, only the above-mentioned recovery right is available, which requires an immediate reaction by the owner. Accordingly, the owner must seek out official assistance without delay after having detected illegal occupation of their property. The acceptable reaction period depends on the circumstances of each individual case. Generally, a reaction may be considered "immediate" if it takes place on the same day or in the earlier part of the following day.

Criminal law

In practice, unlawful occupations unfortunately often last for a long period. Therefore, criminal consequences play an important role and should be enforced consistently. Ongoing violations must lead to increased penalties.

Unauthorised entry onto private property and unauthorised occupation of buildings constitute the offense of "trespassing" under the Swiss Criminal Code.⁽⁴⁾ The criminal offence of trespassing includes entry into:

- closed rooms of a building;
- a fenced-in place;
- a garden; and
- other places that are clearly demarcated against unauthorised entry.

Trespassers are punishable with a custodial sentence of up to three years or with a monetary penalty.

Unlike other criminal offences, trespassing is only prosecuted and punished upon request (criminal complaint) by the party that is disturbed or damaged by the illegal behaviour of the offender. Accordingly, the police will only examine a case and restore the lawful state if the affected owner has filed a criminal complaint against the occupiers.

In addition, and depending on the behaviour of an occupier, the affected owner may accuse the occupier of other criminal offenses, such as:

- damage to property;⁽⁵⁾
- theft;⁽⁶⁾

- unlawful abstraction of energy;⁽⁷⁾ and

- violation of environmental laws and regulations on fire and health protection.

Damage to property and the unlawful abstraction of energy are prosecuted only upon request. In contrast, the authorities must prosecute damages to property committed at a public gathering, as well as theft and violations of environmental laws and of regulations on fire and health protection ex officio. If there is an indication that such an offence has been committed, the authorities must investigate the matter ex officio when they gain knowledge of it (eg, from media reports or during a patrol ride). For these offences, the range of punishment extends to several years of custodial sentence and monetary penalties.

Obligations for authorities

The Swiss Criminal Procedure Code obliges criminal justice authorities to commence and conduct proceedings that fall within their jurisdiction where they are aware of or have grounds for suspecting that an offence has been committed.⁽⁸⁾ If a criminal offence is prosecuted only upon request by the party disturbed or damaged, the obligation to prosecute applies only once a criminal complaint has been filed.

The competent authorities are obliged to ensure compliance with the applicable laws, enforce criminal law and put an end to any criminal behaviour without delay. This principle applies to unlawful occupiers in the same way it applies to other offenders (eg, a speeding driver is immediately stopped from speeding when caught by the police).

Accordingly, when a homeowner calls the police for help, the police must, without delay, end an unauthorised occupation and evict the trespasser (if necessary, by using force) should they refuse to leave the property voluntarily. In addition, the police must report the offenders to the prosecutor.

The behaviour of some authorities unfortunately does not always follow these legal provisions. Instead, they believe that their action and support is only required if certain conditions are met that are neither stated in the applicable laws nor defined by case law or presented in legal literature. Rather, these conditions are only known and followed in practice, sometimes summarised in a leaflet or bulletin. This cannot justify any deviations from applicable laws and from the authorities' obligation to prosecute criminal offences.

For example, the City of Zurich has seen unauthorised and long-lasting occupations for years. [Nevertheless, the city policy refers to an information sheet](#) with the requirements for the eviction of occupied buildings by the police. Accordingly, the police are only willing to evict trespassers if a valid formal criminal complaint has been filed and if one of the following additional circumstances are met:

- The owner presents a legally binding demolition permit or a legally binding construction permit with the formal approval to start construction work. In addition, evidence must be provided for the immediate start of the demolition or construction work after the eviction of the building.
- The owner presents evidence of an intended lawful use of the property after the eviction, such as third-party contracts or comparable documents.
- The occupation poses a direct threat to the safety of individuals or to listed building parts or facilities (formal historic monumental care).

The information sheet also states that the eviction of an occupied property should be successful not only short-term, but in the long run. Therefore, it must be sufficiently clear that the property will be demolished or legally used immediately after the eviction.

Unfortunately, there is no legal basis for this reasoning. Neither the police nor the responsible authorities have a discretionary power in this regard. Rather, it is the legal mandate of the police to prevent crimes.⁽⁹⁾ In this case, this includes:

- stopping crimes that are ongoing;
- permanently enforcing the law after the eviction of a building;
- protecting the property of third parties against criminal acts; and
- avoiding the creation of legal vacuums for offenders.

In addition, the police and the responsible authorities have no competence to decide which uses of a building are accepted and which are not accepted. Leaving a house empty for an unlimited period is legal and doing so is at the free discretion of the owner.

Pending legislation

Based on a parliamentary motion, certain amendments to the law are under review. The aim is to improve the position for homeowners. In particular, the motion is set to bring the following changes:

- The reaction period to exercise the recovery right will be deleted or replaced with a clearer time specification.
- The position for owners will be strengthened in legal proceedings against occupiers.
- The effects on the authority and police practice will be clarified.

Comment

From a civil law perspective, the owner of an occupied property must refrain from using any force that is not justified by the circumstances and should, as a matter of priority, call in official assistance. From a criminal law perspective, trespassing and other criminal offenses committed by house occupiers must be prosecuted upon criminal complaint by the party that is disturbed or damaged. Certain offenses must even be prosecuted ex officio. In addition, authorities and the police are obliged to ensure compliance with the applicable laws, enforce criminal law, prevent crimes and put an end to any criminal behaviour without delay.

Against this background, the practice of certain authorities to require additional, non-statutory circumstances for the eviction of occupied properties is neither legally justified nor understandable. For this reason, it will be necessary for the legislator, and potentially voters, to intervene.

For further information on this topic please contact *Michael Lips* or *Larissa Rickenbacher* at *Pestalozzi Attorneys at Law* by telephone (+41 44 217 91 11) or email (michael.lips@pestalozzilaw.com or larissa.rickenbacher@pestalozzilaw.com). The *Pestalozzi Attorneys at Law* website can be accessed at www.pestalozzilaw.com.

Endnotes

(1) Article 926 of the Swiss Civil Code, SR 210.0.

(2) Wolfgang Ernst/Samuel Zogg in *Basel Commentary to article 926 ZGB* (edited by Thomas Geiser and Stephan Wolf), paragraphs 6d and 7.

(3) *Ibid.*

(4) Article 186 of the Swiss Criminal Code, SR 311.0.

(5) Article 144 of the Swiss Criminal Code, SR 311.0.

(6) Article 139 of the Swiss Criminal Code, SR 311.0.

(7) Article 142 of the Swiss Criminal Code, SR 311.0

(8) Article 7 of the Swiss Criminal Procedure Code, SR 312.0.

(9) Paragraph 3 Zurich Police Law, OS 550.1.