DOI 10.24147/2542-1514.2019.3(2).38-49

POWERS OF LOCAL GOVERNMENTS IN THE FIELD OF SECURITY OF SETTLEMENTS ON THE EXAMPLE OF FLIGHT PERMITS: MONITORING OF LEGISLATION AND LAW ENFORCEMENT PRACTICE

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Article info
Received –
2019 April 8
Accepted –
2019 May 20
Available online –
2019 September 12

Keywords
Safety, flight permits, small aircraft, local authorities, powers

The subject. The article analyzes the conflict of norms of the current legislation, the materials of law enforcement practice in terms of establishing the powers of local governments to issue permits for flights.

The purpose of the paper is to confirm or disprove hypothesis that the powers of local governments to issue permits for flights are not based on the law and are established only in by-laws.

The research was carried out with use of main scientific methods (analysis, induction and deduction), special (statistical) method as well as the method of interpretation of the legal acts.

The main results and scope of their application. Monitoring of legislation and law enforcement shows that local governments are more likely to be an additional barrier to business activity than a body with the necessary competence to make the appropriate decision. Local self-government bodies are empowered by a secondary normative act to issue a permit for certain actions in the airspace of the Russian Federation over populated areas. It is a question of exclusively state powers which were assigned to local governments by the will of the by-law.

A number of provisions of secondary legislation regulating the peculiarities of use of airspace of the Russian Federation does not have clarity and certainty. For example, it is not clear what kind of legislation should regulate skydiving (physical culture legislation or regulation of organization of flights); hot air ballooning (is it sphere of leisure activities or organization of flights). More precise legal regulation is needed for such cases.

One of the purposes of imposing the functions of flight permits on local governments is to ensure the security of the population, its life, health and safety of property. But local governments have almost no own security tools. The legislation on local self-government does not contain requirements for employees of local self-government bodies related to the availability of specialized knowledge, sufficient competence to assess the degree of risk or threat. The adoption of a significant number of municipal legal acts concerning flight permits is initiated by the transport prosecutor's office, which considers the relevant activities of local governments as a municipal service. Analysis of law enforcement practice shows its great diversity. Some courts decide that local governments have no right to regulate the issuance of flight permits. The most numerous are court decisions when the court compels local governments to adopt administrative regulations for the provision of the relevant municipal service concerning flight permits. A certain group of court cases consists of decisions taken by the court on the basis of refusal of the claim in connection with the voluntary issuance of flight permits.

Conclusions. It is shown that powers of local governments to issue permits for flights are not based on the law and are contained only in by-laws. The information possessed by the local self-government bodies can be transferred to the relevant state authorities for operational decision-making in the order of interdepartmental interaction. This power has no real impact on improving the security of residents of cities and other settlements.

* *This work was supported by the Russian Foundation for Basic* Research *[grant number 19-011-00752 «The city as a territory of security: human, society, power»].*

ISSN 2658-4050 (Online)

1. Introduction

Recently, there has been a significant increase in the activity of the transport Prosecutor's office, which seeks to ensure the legality of the organization of air flights over populated areas, the safety of life and health of the population, as well as of property of organizations. This is manifested in various forms, including through participation of representatives of the Prosecutor's office in the work of municipal councils, sending information letters, submissions [1; 2; 3].

For example, there was information on the website of the Volga transport Prosecutor's office at the end of April 2019 that in order to prevent offenses related to the illegal use of airspace, including over the settlements of the region, the transport Prosecutor presented to the participants of the Board Of the Association "Council of municipalities of the Penza region" for consideration the model project prepared by the Volga transport Prosecutor's office "Administrative regulations for the provision of municipal services "the Issuance of permits for aviation works, parachute jumps, demonstration flights of aircraft, flights of unmanned aerial vehicles, ascents of tethered balloons over the settlements of the municipality". On this same website there is information that an agreement was reached that the 24 municipal districts and one urban district of the Penza region will publish this act by May 1, 2019.

In April 2019, the local self-government bodies of the Vladimir and Ulyanovsk regions published information letters on the need to adopt administrative regulations; in March 2019, the heads of local self-government bodies of a number of districts of the Sverdlovsk region and the Republic of Bashkortostan received the appropriate representations.

The list of such examples can be continued. The reaction of the Prosecutor's office is to some extent connected with significant changes in public relations in the field of flight organization. This is manifested, for example, in the fact that:

- Mass media, other organizations and citizens more often seek to capture certain events significant for them or a wide range of persons, removing them from above (for example, procession of "Immortal regiment", sports events, day of the city, anniversary celebrations, etc.);

- aerial photography is increasingly being used to record various events or circumstances (for example, when conducting land control in some regions, drones are being launched that record the actual use of land; drones are increasingly being used by the Ministry of emergency situations to prevent fires, etc.).);

- balloons and other similar flying objects are used not only in the recognized centers of Aeronautics, but also in resorts as an additional attraction for vacationers;

- more and more private means of small aircraft, which need a platform for takeoff and landing within the village;

- more and more active use of air advertising structures – balloons, huge balloons or other objects tied in a fixed place (in law enforcement practice, questions began to arise: whether it is required in this case to obtain permission for flights or flight - this movement in the presence of such a mandatory element as "takeoff and landing"; whether these relations are regulated by advertising legislation or air legislation);

- the development of settlements, especially cities, has led to the need for development in the immediate vicinity of airports, which in some cases creates certain problems for the safe operation of the relevant equipment .

This list can be continued, but it is obvious that the organization of safe flights receives new content and requires some revision of the existing legal regulation.

2. The role of local governments in ensuring the safety of airspace use: the legislative regulation

The analysis of the norms of the current legislation allowed to establish the following. Part 1 of Article 67 of the Constitution of the Russian Federation States that the territory of the Russian Federation includes the territories of its subjects, internal waters and territorial sea, the airspace above them. According to point "b" of article 71 of the Constitution of the Russian Federation the territory of the Russian Federation is under authority of the Russian Federation. Thus, airspace is

ISSN 2542-1514 (Print)

the exclusive responsibility of the Russian Federation.

These rules are disclosed in more detail in article 1 of the Air code of the Russian Federation:

- The Russian Federation has full and exclusive sovereignty over the airspace of the Russian Federation;

- the airspace of the Russian Federation means the airspace over the territory of the Russian Federation, including the airspace over internal waters and the territorial sea.

It should be emphasized that the Constitution of the Russian Federation and the Air code of the Russian Federation refer to the exclusive sovereignty and exclusive rights of the Russian Federation. The exclusive right in this case should be considered as non-transferable, exercised only by the Federal public authorities. And this logic is quite consistently traced in the norms of the Air code of the Russian Federation [4, p. 116; 5, p. 27, 41].

So, according to part 2 of article 14 of the Air Code of the Russian Federation the organization of use of airspace is performed by authorized body in the field of use of airspace, bodies of the uniform system of the organization of air traffic, and also bodies of users of airspace - bodies of service of air traffic (management of flights) in the zones and areas established for them in the order determined by the Government of the Russian Federation. Russian Government resolution No. 901 of 28.08.2015 approved the Regulation on the unified air traffic management system of the Russian Federation, which States that the unified system is of strategic importance for the security of the state and ensuring the safety of airspace use.

It should be noted that the regulation and protection of human and civil rights and freedoms (paragraph "b" of article 71 of the Constitution of the Russian Federation), defense and security (paragraph "m" of article 71 of the Constitution of the Russian Federation) are also in the exclusive Federal jurisdiction.

Article 72 of the Air Code of the Russian Federation provides that the flight of an aircraft over populated areas shall be carried out at an altitude that, in the event of a malfunction of the aircraft, allows landing outside populated areas or at specially designated for this purpose take-off and landing sites within populated areas. Deviations from this flight rule shall be determined in accordance with the procedure established by the Government of the Russian Federation. It is necessary to pay special attention that it is a question of height of flights, about aircraft and about settlements. Deviations from these rules are regulated by the Decree of the Government of the Russian Federation of 11.03.2010 № 138 (ed. of 13.06.2018) "On approval of the Federal rules for the use of airspace of the Russian Federation" (hereinafter - the Resolution № 138).

Paragraph 49 of the RF Government Resolution No. 138 States that aviation operations, parachute jumps, demonstration flights of aircraft, flights of unmanned aerial vehicles, lifting of tethered balloons over populated areas, as well as landing (take-off) on sites located within the boundaries of populated areas, information about which is not published in the documents of air navigation information, are carried out if the users of the airspace have the permission of the relevant local government, and in the cities of Federal importance Moscow, St. Petersburg and Sevastopol - permissions of the relevant Executive authorities of the specified cities.

In other words, by-law local self-government bodies are empowered to issue permits for certain actions in the airspace of the Russian Federation over populated areas. In this regard, it is necessary to make a few explanations:

First, in articles 14, 15, 16, 16.2, 17 of the Federal law of 06.10.2003 № 131-FZ (ed. from 06.02.2009) "On the General principles of the organization of local self-government in the Russian Federation" (hereinafter – the Federal law № 131-FZ) there are no issues of local importance or powers to solve them related to this activity. Issues of local importance – the issues of direct support of the population of the municipality; it is obvious that the organization of flights to them little applies. At the same time, some authors identify some issues of local importance related to the use of airspace within the boundaries of the municipality [6, p. 25].

Moreover, certain principles of legal regulation of powers of local governments are

ISSN 2658-4050 (Online)

formulated in Article 18 of the Federal law No. 131-FZ. The construction contained in paragraph 49 of Regulation No. 138 is contrary to them. It is obvious that it is a question of the state powers which by the will of the subordinate act were assigned to local governments. This contradicts simultaneously two procedures provided for in articles 19 and 20 of Federal law No. 131-FZ (unilateral assignment of powers of state authorities is possible only on the basis of the law and together with money; voluntary exercise of state powers by local authorities is possible only if this right is granted by Federal law). Thus, the exercise of these powers is not delegated and cannot be taken voluntarily.

In this regard, it is impossible not to give explanations of the profile Committee of the State Duma, which are posted on its official website. "This permission does not constitute a permission to use the air space, ... is not an instrument for regulating the use of air space, but a means of ensuring the interests of the inhabitants of such locality."

All this makes it obvious that a number of regulations governing the use of the airspace of the Russian Federation does not have signs of clarity and certainty. For example, the scope of any legal regulation should include skydiving - physical culture or organization of flights; hot air ballooning – to leisure activities or organization of flights. For such cases, more precise legal regulation is needed.

Secondly, one of the purposes of imposing on local governments the functions of flight permits is to ensure the safety of the population, its life, health, safety of property. This extends to the situation associated with the fall of the aircraft object to the settlement [7, p.27]. In this regard, it should be recalled that the current legislation contains various mechanisms for compensation of harm, including in the implementation of activities that pose an increased risk [8; 9; 10].

Local governments have virtually no security instruments of their own. For example, when carrying out mass actions in settlements questions of safety of participants of action, the population are engaged in law-enforcement bodies [11; 12, p. 126].

Moreover, the legislation on local self-government does not contain requirements for employees of local self-government bodies related to the availability of specialized knowledge , sufficient competence to assess the degree of risk or threat. It is also the prerogative of state bodies. Thus, the RF Government decree of 18.11.2014 № 1215 (ed. from 15.03.2016) approved "Rules for the development and application of safety management systems of aircraft, as well as the collection and analysis of data on hazards and risks that pose a threat to the safety of civil aircraft, storage and exchange of these data", which States that the monitoring of risks – the state function.

Thirdly, attention should be paid to the nature of the decision taken by local authorities. The position of the relevant Committee of the State Duma that this permission is not a permission in the traditional sense has already been cited above.

In point 40.5 of the Federal aviation rules "the Organization of planning of use of airspace of the Russian Federation" approved by the Order of the Ministry of transport of Russia of 16.01.2012 No. 6 (edition. from 25.12.2018) it is stated that the permission and conditions for the use of airspace in the performance of aviation works and parachute jumps, as well as demonstration flights over populated areas are issued by the relevant operational bodies of the Unified system on the basis of the submitted flight plan of the aircraft, which must be submitted at the stage of pre-tactical planning of the use of airspace, as well as the permission of the relevant local government. Information on the permission of the local government in the form of a copy of the document is provided by the user of the airspace to the zone center of the Unified system, the regional center of the Unified system.

All this directly indicates the intermediate nature of the permit issued by local authorities.

Analysis of municipal legal acts shows that in order to obtain permission, applicants (natural or legal persons) must submit certain documents, the list of which is established by local authorities. In other words, local governments actually establish mandatory requirements, subject to which the applicant receives the coveted permission.

At the same time, municipal legal acts often

ISSN 2542-1514 (Print)

provide that this permission "is not a final, full-fledged permission" and the applicant with a permission obtained from local authorities must apply to public authorities, including the Centers of the Unified air traffic management system.

According to the method of fixing in the administrative regulations of the obligation to obtain the approval of public authorities to perform aviation works can be identified :

- administrative regulations indicating a separate approval procedure (Arkhangelsk, Yoshkar-Ola, Naberezhnye Chelny, Buzuluk, Arzamas, Vologda, Kuznetsk (Penza region), Zhigulevsk (Samara region), Arsky municipal district of the Republic of Tatarstan),

administrative regulations prescribing the creation of the Commission on consideration of applications for grant of permission for aerial works, composed of representatives of state authorities, approval of which is necessary to perform the aviation activities (Orenburg, Izhevsk, Votkinsk); in a few cases the composition of the Commission includes representatives from industry (functional) organs of the municipal administration (Rostov-on-don).

According to the ATP consultant Plus (regional issue) to date in the Federal districts have different attitudes to the need for the adoption of relevant municipal legal acts:

 PFD in 12 of the 14 subjects of the Russian Federation, outside the district (86 %) are administrative regulations, the total number – 31;

 UFD – in 4 of 6 subjects of the Russian Federation included in the district (67 %) there are administrative regulations, a total of 34;

 NWFD – in 6 of 11 subjects of the Russian Federation included in the district (55 %) there are administrative regulations, a total of 23;

 DFD – in 6 of 11 subjects of the Russian Federation included in the district (55 %) there are administrative regulations, a total of 13;

 SFD – 3 out of 8 subjects of the Russian Federation included in the district (38 %) have administrative regulations, a total of 5;

 CFD – 4 of the 18 subjects of the Russian Federation, outside the district (22 %) are administrative regulations, the total number is 18.

Thus, the largest number of municipal legal acts was adopted in the Volga Federal district; the three "leaders" include Sverdlovsk region (18 municipal legal acts), Tyumen region (13 municipal legal acts) and Ivanovo region (12 municipal legal acts).

Fourth, the adoption of a significant number of municipal legal acts is initiated by the transport Prosecutor's office, which considers the relevant activities of local governments as a municipal service. This situation raises some concerns. The matter is that according to article 2 of the Federal law of 27.07.2010 No. 210-FZ (ed. of 01.04.2009) "About the organization of providing the state and municipal services" the municipal service is performed only in the presence at local governments of powers:

- to address issues of local importance established in accordance with Federal law No. 131-FZ and the statutes of municipalities;

- within the rights of local governments to the solution of the questions which are not carried to questions of local value, the rights of local governments to participation in implementation of other state powers (not transferred to them according to article 19 of the specified Federal law) if this participation is provided by Federal laws;

- the rights of local governments to the solution of other questions which are not carried to competence of local governments of other municipalities, public authorities and not excluded from their competence by Federal laws and laws of subjects of the Russian Federation in case of adoption of municipal legal acts on implementation of such rights.

As shown above, the activities of local governments in issuing flight permits do not belong to any of these groups.

The above means that local governments are more likely to be an additional barrier to entrepreneurial activity than a body with the necessary competence to make the relevant decision. The knowledge of local authorities, may be in the order of interagency cooperation reported to the relevant government authorities for making operational decisions.

3. Court practice in cases on disputes on the resolution of the local authority for flights over

ISSN 2658-4050 (Online)

populated areas

Monitoring of judicial practice has revealed a small number of cases related to the issuance of local government permits for flights over populated areas. According to the ATP consultant, There are about 60 such decisions; these decisions can be divided into two large groups. The first group includes cases related to challenging the imposed administrative penalty (these cases will not be discussed in the future). The second group includes cases in which the courts investigate the completeness and legality of legal regulation carried out by local authorities. Most of these cases are initiated by the transport Prosecutor's office, less often by local authorities, which transfer their legal dispute with the Prosecutor's office to the court.

In some cases, the bodies of the transport Prosecutor's office compel the local self-government bodies of municipal districts to provide relevant services and adopt administrative regulations; in others, they expressly prohibit this by challenging the relevant decisions in court or by protesting against the decisions of local self-government bodies.

Analysis of law enforcement practice shows its great diversity. The following examples are illustrative.

1. Law enforcement authorities denied the local authorities in the implementation of the regulation for the issuance of permits to fly. One of the most significant court decisions is the Appeal ruling of the Sverdlovsk regional court of 31.10.2018 in case No. 33a-19184/2018. The case was initiated by the Sverdlovsk transport Prosecutor, who appealed to the court with an administrative claim to the Administration of the city of Kamensk-Uralsky on the recognition of illegal inaction on the failure to adopt administrative regulations for the provision of municipal services for the issuance of permits for aviation works, flights, etc. In the said decision of the regional court emphasizes that the court of first instance, recognizing illegal inaction of the local government on the failure to adopt a regulatory legal act, resolved the issue outside its competence. Since the Executive and judicial authorities are independent and have no right to interfere in the competence of each other, the court cannot oblige the Executive authority to carry out legal regulation, which consists in the adoption of a normative legal act. In this regard, the imposition of the obligation to adopt a regulatory legal act on the local government is an inappropriate way to restore the violated right under Chapter 22 of the Code of administrative procedure of the Russian Federation. The court has no right to oblige the local self-government body to draft, adopt, amend or Supplement any municipal legal act, as this is the exclusive prerogative of the local self-government body itself. Compulsion by the court of a local self-government body to develop a draft municipal legal act or to adopt a certain legal act would contradict the constitutional principles of separation of powers and independence of local self-government in the Russian Federation [13, p. 28]. It is known that adoption of regulations by local governments acts as an independent type of law-making activity, providing the independent decision by the population of municipality of questions of local value [14, p. 6; 15, p. 166]. The decision of the Sinarsky district court of the city of Kamensk-Uralsky of Sverdlovsk region of July 30, 2018 was cancelled, the proceedings were terminated.

This group of decisions can be attributed to the few court decisions in which the courts are investigating the question of the relationship of the powers of local governments to issue permits for flights with issues of local importance. Thus, the Appeal ruling of the Omsk regional court of 13.03.2009 in case No. 33a-1642/2019 the protest of the transport Prosecutor was declared illegal. In its decision, the court drew attention to the fact that acts regulating issues of local importance are adopted by local self-government bodies independently, based on their own understanding of the need for legal regulation of certain relations, without interference in their normative activities on the part of public authorities. The submission of the Prosecutor on the elimination of violations of the law shall be made in respect of the entity vested by the law with the authority to resolve issues in the relevant field. In addition, the court noted that the regulations do not specify the relevant municipality (municipal district or urban, rural settlement), the Executive and administrative body of which is

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authorized to regulate the procedure for issuing such permits. The court stressed that articles 14 - 16.2 of the Federal law № 131-FZ issues of issuing permits for flights over populated areas are not directly regulated. Meanwhile, neither the laws of the Omsk region, nor the statutes of the Omsk municipal district of the Omsk region and Ust-Zaostrovsky rural settlement of the Omsk municipal district of the Omsk region issues of local importance, including the regulation of the use of airspace in the performance of aviation works and parachute jumps, as well as demonstration flights over populated areas, are not distributed. Thus, there are sufficient legal grounds for imposing on the administration of the Ust-Zaostrovsky rural settlement of the Omsk municipal district, there are no obligations for the adoption of the legal and regulatory framework.

A number of court decisions examine the scope of actions taken by local self-government bodies; there are examples of the courts stating that the abuse of power and recognize illegal municipal legal acts. For example, in the Appeal decision of the Krasnodar regional court of 03.06.2014 in the case № 33-11822/2014, initiated by the transport Prosecutor's office, the question of the legality of the creation of an interdepartmental airport Commission on aviation security in the territory of the municipality of Dinskaya district (the Commission was created by the decision of the head of the municipality). The court's decision States that the Federal aviation service of Russia in cooperation with the Federal security service of the Russian Federation, the Ministry of internal Affairs of the Russian Federation, the Ministry of Defence of the Russian Federation, the Ministry of Foreign Affairs of the Russian Federation and the State customs Committee of the Russian Federation carry out measures to protect the activities of civil aviation from acts of unlawful interference.

There are examples of the fact that the Prosecutor's office responds to municipal legal acts adopted by the "wrong" municipal entity (legal regulation is carried out by the municipal district, which does not have its own settlements). For example, on the website of the southern transport Prosecutor's office of 18.03.2009 information that permission is authorized to give heads of the rural settlements which are the part of the area, but not regional administrations what are administrations of Bokovsky and Milyutinsky areas of the Rostov region is published. In this regard, Likhovskoy transport Prosecutor's office brought two protests on illegal legal acts by results of which consideration of the decision of administrations of Bokovskiy and Milyutinskiy districts of Rostov region cancelled. Such information is available in relation to some other municipal districts. It should be noted that if the local authorities declare such an argument in court, it is not always listened to . Moreover, the above cited examples of the fact that the transport Prosecutor's office in a number of subjects of the Russian Federation compel local governments of municipal districts to adopt the relevant municipal legal act. This once again illustrates the high degree of inconsistency of the norms of the current legislation, which is guarded by the Prosecutor's office.

2. A certain group of court cases consists of decisions taken by the court on the basis of refusal of the claim in connection with voluntary execution. In fact, local governments agree with the requirements of the Prosecutor's office and adopt administrative regulations. In addition, there are decisions in which local governments fully recognize the requirements of the Prosecutor's office and ask the court to consider the case without their participation.

3. The most numerous are court decisions in which the court compels local governments to adopt administrative regulations for the provision of the relevant municipal service. The local authorities involved in the proceedings use various justifications for the impossibility or lack of necessity of this, but the courts quite regularly reject their arguments. To justify their position, local authorities often state the following::

- local issues do not include activities related to the issuance of flight permits;

- The order of the Government of the Russian Federation of April 25, 2011 No. 729-p approved the list of services; in any of the spheres specified in it there is no such service as permission and conditions for use of air space; the last creates in practice additional problems connected with the

ISSN 2658-4050 (Online)

fact that this type of service cannot be brought in the uniform electronic form ;

- in the Resolution No. 138 the term "the corresponding local government body" is used - it is not clear about powers of what body there is a speech, however the Prosecutor's office forces local administration ;

- the permit is issued by public authorities, but not by local authorities ;

- nobody addressed to local administration with a question of use of air space therefore there was no need for adoption of such administrative regulations ;

In the decision of the Lomonosov district court of the city of Arkhangelsk dated 14.12.2018 in case No. 2-4127/2018~M-4172/18 investigated the possibility of exemption of the local administration from the payment of the Executive fee, which arose due to the failure of the three-month period established by the court, the administrative regulations (the amount of the Executive fee is 50 thousand rubles and is significant for the local budget). The administration has developed a draft administrative regulations for the provision of municipal services "Issuance of permits for aviation works, parachute jumps, demonstration flights of aircraft, flights of unmanned aerial vehicles, lifting tethered balloons over the territory of the municipality "City of Arkhangelsk", information about which is not published in the documents of aeronautical information". The draft administrative regulations were sent for approval with the structural units of the Administration, and then passed the procedure of independent examination. In addition, the project was to be coordinated with the Department of the Ministry of internal Affairs of the Russian Federation for the Arkhangelsk region, the Federal service of the national guard of the Russian Federation for the Arkhangelsk region, the Federal security service of the Russian Federation for the Arkhangelsk region, the Arkhangelsk interregional territorial air transport Department of the Federal air transport Agency, the Arkhangelsk transport Prosecutor's office. At the same time, only after the adoption of administrative regulations, it is possible to include a new municipal service in the Register of municipal services. The administration did not have time to carry out all the necessary approvals within the period set by the court. By the decision of Lomonosov district court of Arkhangelsk dated 14.12.2018 in case No. 2-4127/2018~M-4172/18 the administration was released from the penalty of the performance fee.

The case confirms once again the interim nature of the decision on issuance of permits for flights taken by local authorities, illustrates the location of the bodies of local self-government in system of public authorities taking decisions on the issuance of permits to fly.

4. Conclusion

The analysis of the existing normative legal acts and materials of law enforcement practice shows internal inconsistency and inconsistency. This means, in particular, the need to amend the existing legal regulation mechanism. The importance of this activity is due to the sharp increase in the number of used various aircraft objects, including unmanned.

ISSN 2542-1514 (Print)

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BIBLIOGRAPHIC DESCRIPTION

Shugrina E.S. Powers of local governments in the field of security of settlements on the example of flight permits: monitoring of legislation and law enforcement practice. *Pravoprimenenie = Law Enforcement Review*, 2019, vol. 3, no. 2, pp. 38–49. DOI: 10.24147/2542-1514.2019.3(2).38-49. (In Russ.).