



Polska Izba Nieruchomości Komercyjnych

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Legal flash

changes in Polish regulations in RE

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01 MATERIAL CHANGES TO THE ENVIRONMENTAL LAW AFFECTING THE INVESTMENT PROCESS

On 13 May 2021, new regulations came into force which enhance the role of environmental organizations in the investment process. These new regulations impose also an obligation to publish of the content of decisions issued during the investment process on the Public Information Bulletin's (Polish: Biuletyn Informacji Publicznej) website.

New regulations result of remarks made by the European Commission regarding the incorrect implementation by Poland of Directive 2011/92/EU of the European Parliament and of the Council 2011/92/UE of 13 December 2011 on the assessment of the effects on the environment of certain public and private projects. The aim of the Directive is to guarantee full access to the juridical system with respect to the investments that may significantly or potentially significantly affect the environment. The amendment reflects the EU legislation in this respect.

These new regulations stem from the amendment of the so-called "Environmental Law", i.e. the Act adopted on 3 October 2008 on providing information about the environment and environmental protection, public participation in environmental protection and on environmental impact assessment. The amendment provides significant changes, i. a. in the proceedings for issuing those environmental decisions (ED) which are required for the realization of investments that may significantly or potentially significantly affect the environment, and to the competences of the environmental organizations in the course of investment proceedings.

One of the most crucial amendments is the option to suspend enforceability of environmental decisions during different stages of the issuance proceedings. At present, any party to the proceedings (which may be the owner of an adjacent real property) may submit a request for suspension of enforceability of such an environmental decision to an

administrative body of second instance which hears an appeal from the environmental decision. The application must be adequately justified. In addition, suspension of enforceability can also be provided at further stage of the proceedings (i.e. in during court proceedings, when n complaints on the environmental decision submitted to the voivodeship administrative court, following a justified request of the complainant.

Due to such a suspension of enforceability of the environmental decision, proceedings for issuance of decisions in the development stage (building or water permit, for instance) that were issued based on the ED, will also be suspended. As a result, continuing proceedings for issuing of a building permit based on such an environmental decision that was challenged in the meantime, will not be possible, as it was provided under the recent provisions.

Based on the amendment, additional competences through the possibility of challenging the decisions issued based on the ED, were granted to environmental organizations. Such organizations, in invoking their statutory objectives, including environmental and nature conservation, will be authorized to lodge appeals or complaints to voivodeship administrative courts, to the extent that such a decision is not compliant with the environmental decision based upon which it was issued. This may result in the possibility of invalidation of the decision by the administrative court if such non-compliance with the environmental decision is proved.

In addition, a mandatory publication of decisions issued which are based on the ED in the Public Information Bulletin by the issuing authority was introduced. In accordance with the previous provisions, this obligation was limited solely to the publishing of information of an issued decision. At present, we will have an opportunity to review the content of decisions, which may significantly affect the environment (with a building permit, for instance) for a period of 14 days on Public Information Bulletin.

The abovementioned amendments may involve a higher risk of extending construction processes of investments that require prior issuing of the environmental permit should an application for suspension of enforceability of such a decision be lodged.

02

RETAIL SALES TAX IN 2021

Retail sales tax, also called the "commercial tax", entered into force in Poland on 1 January 2021. This tax was established based on the Act of 16 July 2016 on retail sales tax and awaited its introduction due to a court dispute between Poland and the European Commission, which concerned compliance of rules of its application. The dispute was finally settled by the judgement of the Court of Justice of the European Union on 16 March 2021, which ruled in favor of Poland.

Retail sales tax is imposed on retailers, i.e. natural and legal persons, civil partnership and any organisational unit without the status of a legal person engaged in retail sales. This tax is calculated on the revenues from the 'retail sales', referred to in the abovementioned act as the sale of goods to consumers, constituting part of the seller's business activity, based on a contract concluded either on the business premises or off-premises, carried out in the territory of the Republic of Poland. The tax is applicable also if the sale of goods is accompanied by rendering a service, which is not registered separately.

The obligation to pay the retail sale tax shall arise when the retailer's revenue in a given month exceeds the threshold of PLN 17 million and applies to the excess amount, earned from that moment until the end of the month, which constitutes the taxable amount.

The Act specified two rates of the retail sales tax, which are as follows:

- 0.8% of the tax base, from the excess of revenue above the threshold for taxation does not exceed PLN 170 million;
- 1.4% of the excess of revenue above the threshold for taxation exceeds PLN 170 million.

Retail sales taxpayers are required to, without prior notice from the relevant tax authority:

- submit tax returns, prepared in accordance with the template, to the head of the relevant tax office;
- calculate and deposit the tax to the account of the relevant tax office for monthly settlement periods,

by the 25th day of the month following the month for which the retail sales tax is due.

First payment of the retail sales tax this year was therefore made before 25 February 2021.

03

IRREVERSIBLE LEGAL EFFECTS OF BUILDING PERMITS

The prohibition to invalidate construction permits 5 years after their issuance, effective from September 19, 2020, was very well received by the market branch and was broadly commented on. The developers' enthusiasm was cooled by lawyers who pointed out that the inter temporary regulations of the amendment did not allow for a clear determination whether the prohibition is applicable the building permits issued before September 19, 2020.

Since the enactment of the amendment, several court judgments have been published that set the direction for the interpretation of the inter temporary provisions. The courts share the lawyers' doubts, but in the analyzed cases they found that the amendment to the Building Law was consistent with the position of the Constitutional Tribunal formulated in the judgment P 46/13 of 12 May 2015. It indicated that a significant lapse of time since the decision grossly violating the law has been issued, should exclude the admissibility of its annulment.

Despite clear statement of the Constitutional Tribunal, the legislator did not react to the verdict and did not enact an universal legal measure, that would prohibit to invalidate administrative decisions despite the significant lapse of time. In its judgment of February 20, 2019, the Supreme Administrative Court (II OSK 694/17) indicated that due to the legislator's lack of reaction to the judgment of the Constitutional Tribunal, it is "the court's responsibility" to judge the individual cases in compliance with constitutional principles. In connection with the above, the courts began to question the possibility of cancelling e.g. building permits, if a significant time has elapsed since their issuance. Although they have doubts as to whether the inter - temporary provisions of the amendment allow the application of the new Art. 37b of the Building Law to construction permits issued before September 19, 2020, they refer to the judgment of the Constitutional Tribunal of 2015 and indicate that the new regulation is a consequence of the implementation of this judgment.

Among the cases that fit the above trend, one should note the judgment of the Provincial Administrative Court in Warsaw of February 11, 2021 (VII Sa / Wa 1792/20). It concerned the building permit from 1990, pursuant to which the construction of a retail store was approved. The doubts concerned the investor's lack of the right to dispose of the land for construction purposes. The permit was issued for an entity that was only a co-owner of the property and did not manage to evidence that he had a consent to use the land for construction purposes from the other co-owners of the plot. The court did not allow the decision to be invalidated and stated in the judgment that "the lapse of time from the date of issuance of the challenged decision as to its validity to the initiation of proceedings for its invalidation, and therefore the time of its legally unchallenged existence in legal system (over 29 years) is significant to assess socio -economic impact of the decision". A similar argument was made by the Provincial Administrative Court in Warsaw, in its judgment of September 29, 2020 (VII SA 259/20).

It would be advisable for the legislator to correct the transitional provisions concerning the entry into force of Art. 37 b of the Construction Law. If, however, this does not happen, let us hope that the above-described trend will be maintained by the courts and strengthened with further positions.

04

EXTENSION OF THE LIMITATION ON TRADE IN AGRICULTURAL PROPERTIES OF THE STATE TREASURY

On 30 April 2021 the Act amending the Act of 16 April 2016 on suspension of sale of property from the Agricultural Property Stock of the State Treasury and amendment to certain acts came into force. This new regulation extends until 30 April 2026 the obligation to suspend sales of agricultural properties from the Agricultural Property Stock of the State Treasury (APSST). The earlier 5-year period of suspension was introduced on 30 April 2016, as a result of the expiry of the 12-year period limiting the possibility of purchasing agricultural properties by foreigners, which was implemented due to the Poland's accession to the European Union.

The Ministry of Agriculture and Rural Development has justified the necessity of introducing this new 5-year period of suspension by the necessity to inhibit the growth of property prices and the establishment of tenancy as the basic form of distribution of the agricultural properties from APSST. Suspension on trade also aims to prevent the purchase of the properties from APSST by the entities, which do not guarantee use of the purchased land for agricultural properties, in accordance with public interest.

The most significant assumptions of the amendment are as follows:

- extension of the suspension period for the sale of the properties from APSST for a further period of 5 years – until 30 April 2026;
- in the application submitted for consent of the Minister of Agriculture and Rural Development for the sale of a property, its part or shares in the co-ownership – covered by APSST – the Director of

the National Support Centre for Agriculture (Polish: Krajowy Ośrodek Wsparcia Rolnictwa) shall additionally evidence the socio- economic reasons justifying a sale;

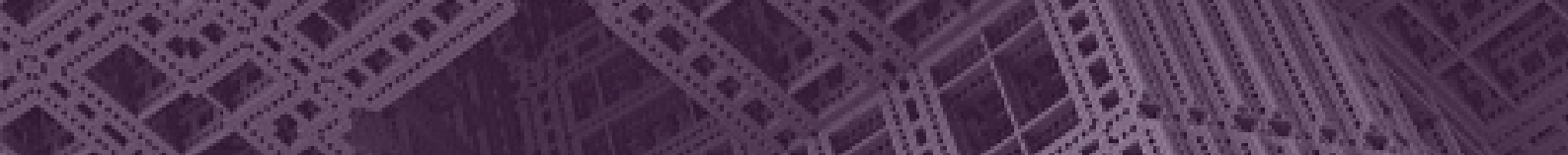
- the principle, under which suspension of sale of properties from APSST does not apply to so called "investment properties", i.e. inter alia such properties, which are designated for non-agricultural purposes in local master plans, municipal studies on conditions and spatial development directions and zoning decisions, in particular for technological parks, industrial parks, business and logistic centers, warehouses, transport investments, residential buildings, sport and recreation facilities, was maintained. In addition, for avoidance of the repetition of previous doubts, the amendment provides that this principle applies also to the sale of shares in co-ownership in such properties.

05

CHANGES IN TECHNICAL CONDITIONS AND LOWER ENERGY INTENSITY IN RESIDENTIAL BUILDINGS

On 1 January 2021 new provisions in the Minister of Infrastructure's regulations of 12 April 2002 regarding technical conditions which are to be fulfilled by types of buildings and their location came into force.

According to these new provisions, each single- and multi-family house built after 1 January 2021 **shall not exceed the specified minimum electricity consumption ratio (E_p), where E_p equals the total volume of energy which may be consumed on the premises for heating, ventilation, cooling, lighting and hot water preparation.** As of this year, the E_p ratio shall be 70 for a single-family



house and 65 for a multi-family house. New provisions thereby strengthened the recent requirements, effective as of 2017, when the Ep ratio was in both cases higher and amounted to 95 and 85 for single- and multi-family houses respectively.

Amendments shall also apply to the ratio of thermal transmittance (U) for outer walls, windows, balcony windows and doors. It allows the determination of how much heat is released to the outside through the building's walls from its interior. This ratio (U) was consequently decreased for these elements of the single- and multi-family houses, based on the new provisions.

The abovementioned changes are of crucial meaning for developers of single- and multi-family houses. They shall be binding for both investors applying for building permits based on building designs prepared after 1 January 2021, as well as for those for which such building designs were prepared based on the former regulations, due to introducing transitional provisions. In the latter case, building designs will need to be adapted to fulfill new energy efficiency requirements. This procedure applies also to those residential houses which will be extended and renovated after 1 January 2021.

Changes of the requirements concerning non-renewable energy consumed in the premises of single- and multi-family houses, will inevitably affect the costs of housing construction because of the necessity to use materials which fulfill new energy efficiency requirements applying to family housing.

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