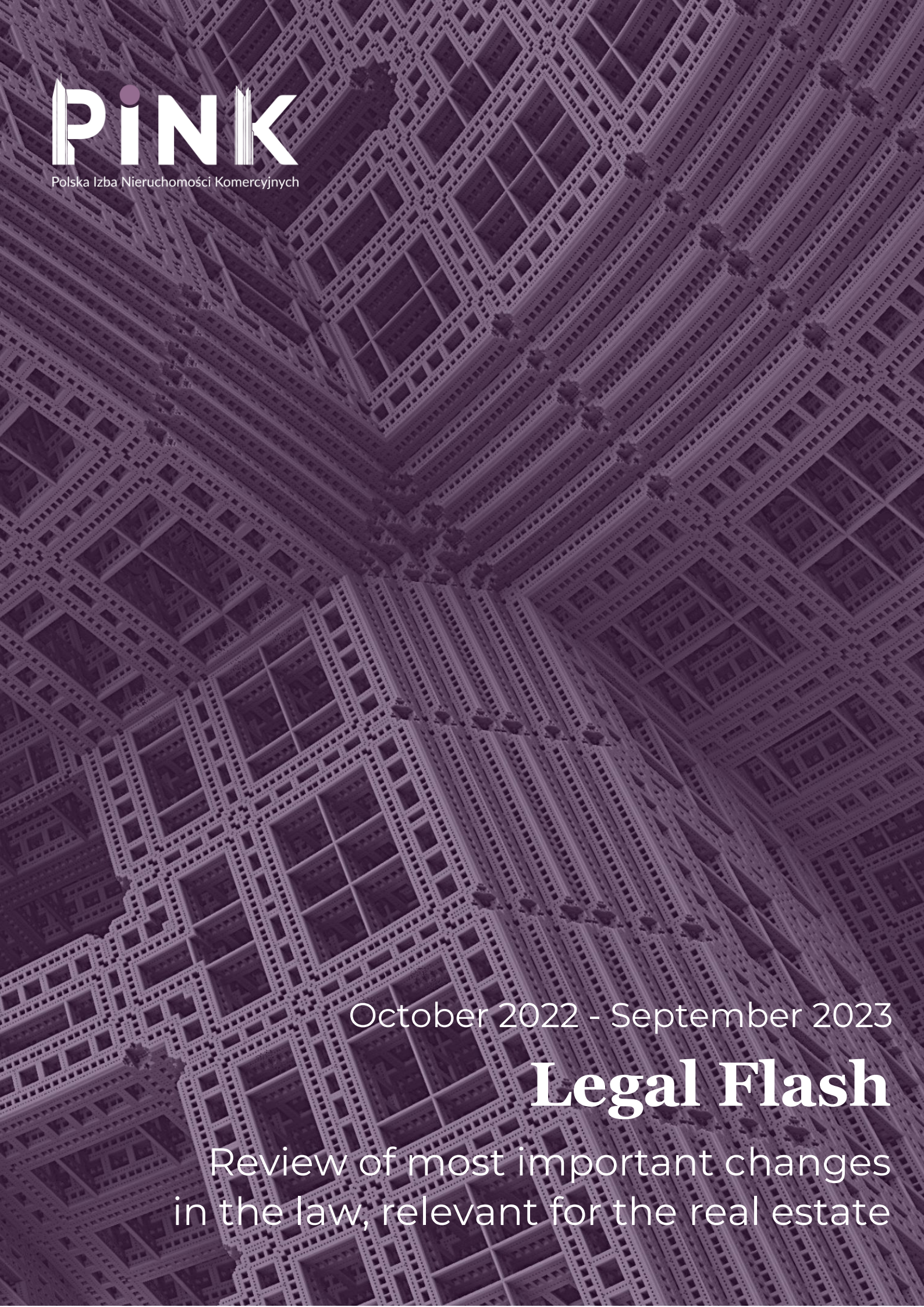

Polska Izba Nieruchomości Komercyjnych

October 2022 - September 2023

Legal Flash

Review of most important changes in the law, relevant for the real estate

Table of contents

01

THE OBLIGATION TO PROVIDE ENERGY PERFORMANCE CERTIFICATE

As of 28 April 2023, the owner shall provide an energy performance certificate to the purchasers of a building upon execution of a notarial deed transferring the title to the property and to the tenant upon entering into a lease agreement regarding real estate, premises or a part thereof. This obligation shall not apply to subleases.

Energy performance certificate is a document that indicates the energy demand related to energy use in the building for purposes such as heating, ventilation, water heating, cooling, and, for non-residential buildings, also lighting. The data included in this certificate enables the owner, tenant or user of the building to assess the annual energy consumption and the corresponding operating costs. The validity period of the certificate is ten years from the date of issuance.

The regulations stipulate a list of building objects that are exempt from the obligation to obtain a an energy performance certificate, namely those that meet the following criteria:

a) detached buildings with a usable area not exceeding 50 sqm;

b) residential buildings, used for habitation for a period not longer than four months per year;

c) buildings subject to protection under the provisions of the Old Monuments Law;

d) buildings designated for worship and religious activities;

e) industrial and economic buildings, without any energy-consuming installations, except for built-in lighting installations; and

f) farms with an EP indicator determining the annual calculated demand for non-renewable primary energy not higher than 50 kWh/(sqm per year).

The obligation to present an energy performance certificate should be fulfilled by the owner and/or the landlord when performing legal actions consisting in concluding a sales agreement (or another agreement transferring the ownership of the property) or concluding a lease contract of the property,

premises or their part. When concluding a sublease agreement, the tenant is not obliged to present the statement to the subtenant.

The energy performance certificate must cover the entire property when it is sold or leased as a whole. However, when only a premise is involved in the sale or lease, the statement must pertain to that specific part of the property. The act does not address whether the obligation also applies to special cases, such as leasing parking spaces in a garage in an office building. However, in our opinion such an obligation would be too far-reaching and in practice it would be very difficult to draw up an energy performance certificate for a selected parking space.

Under the Energy Performance of Buildings Act, it is the responsibility of the seller or landlord of a property to provide the purchaser or tenant with an energy performance certificate when entering into a sale or lease agreement. This requirement has been effective since 2015; before that, the Construction Law Act imposed a comparable duty. Currently, if the seller or landlord fails to comply with this requirement and the purchaser or tenant does not request compliance, it is possible to defer compliance and provide the statement at the conclusion of the next sale or lease agreement.

The obligation to present the energy performance certificate has been in force since 2015, although a penalty for failing to provide the statement in the form of a fine of up to PLN 5,000.00 was introduced on 28 April 2023.

Additionally, the owner must also supply essential information from the energy performance certificate in an/the announcement or advertisement of selling or leasing. The indicator of annual final energy demand is required if the statement was issued for the announcement (advertisement). The announcement or advertisement must show:

a) the indicators of annual useful energy, final energy, and non-renewable primary energy demand;

b) the renewable energy sources' percentage contribution to the annual final energy demand; and

c) the unit amount of CO2 emissions.

The above-mentioned obligation to provide relevant information in the announcement and advertisement has not been subject to any sanctions for its failure to perform or improperly perform so far.

02

CONVERSION OF PERPETUAL USUFRUCT INTO OWNERSHIP

On 31 August 2023, the Act of 26 May 2023 on the amendment of certain acts in relation to commune self-government, social housing, (real) property management and civil law transactions tax came into force. The amendment changed the provisions of the (Real) Property Management Act of 21 August 1997 regarding perpetual usufruct.

Claim for acquisition – conversion of perpetual usufruct into ownership

The amendment stipulates that perpetual usufructuaries may request the transfer of the ownership of the property held by them in perpetual usufruct (converting perpetual usufruct into ownership), subject to the claim being submitted on or before 31 August 2024. This right is excluded for perpetual usufructuaries in cases when:

a) the properties were given in perpetual usufruct after 31 December 1997; or

b) the perpetual usufructuary did not fulfil the obligation specified in the agreement on giving the land property in perpetual usufruct; or

c) the properties given in perpetual usufruct are located in the area of ports and marinas within the meaning of the Act of 20 December 1996 on Sea Ports and Harbours; or

d) if the land is used for running a family allotment garden within the meaning of the Act of 13 December 2013 on Family Allotment Gardens;

e) the property is undeveloped; or

f) there is a proceeding for the termination of the agreement on giving that property in perpetual usufruct.

In relation to land properties owned by **the State Treasury**, the price of the property is determined:

a) in the case of a one-off payment of the price – as **twenty times** the amount constituting the product of the existing percentage rate of the annual perpetual usufruct fee and the value of the land property determined on the date the sale agreement is concluded; and

b) in the case of instalment payments of the price – as **twenty-five times** the amount constituting the product of the existing percentage rate of

the annual perpetual usufruct fee and the value of the land property determined on the date the sale agreement is concluded.

Regarding properties owned by **local governments**, the price of the property is set at an amount no lower than **twenty times** the amount calculated by multiplying the existing percentage rate of the annual perpetual usufruct fee and the value of the land property determined on the date the sale agreement is concluded, but not higher than the value of the land property determined as at the date the sale agreement is concluded. The provisions do not expressly permit instalment payments for the conversion price for property belonging to local government.

The regulations do not provide for the possibility of transferring the obligation to pay the conversion fees in instalments to the acquirer of the property, which may significantly impede the exercise of this right with a view to the possible disposal of such property in the future. Moreover, depending on the operating fees stipulated in the lease agreements concluded by the perpetual usufructuary, the tenants may have to participate in the fee for the conversion within the operating fees settlement.

Voluntary conversion of perpetual usufruct into ownership

The new regulations introduce the possibility of converting the right of perpetual usufruct into ownership regardless of the mode described above, with the prior consent of the owner (the State Treasury or a local government) expressed in the appropriate form.

The perpetual usufructuary may acquire the property given in perpetual usufruct after ten years from and including the date the agreement is concluded on its transfer to perpetual usufruct. Additionally, the competent authorities (the voivode, the commune council, the regional assembly) can determine the rules for allocating land properties in perpetual usufruct for the sale and the detailed criteria for such sale.

The price for the conversion depends on whether the property is used for conducting economic activity. If it is not used for conducting economic activity, the price will be twenty times the annual fee, regarding the use of it for conducting economic activity, not lower than twenty times the annual fee and not higher than the value of the property.

03 CHANGES IN SPATIAL PLANNING AND DEVELOPMENT

On 24 August 2023, the Act of 7 July 2023 amending the Act on Spatial Planning and Land Development was announced. Most of the changes will enter into force on 24 September 2023. The aim of the amendment is to simplify the investment process and increase the effectiveness of spatial planning. One of the legislator's goals was also to guarantee investors stable investment conditions. The implementation of these objectives is to be ensured by new solutions, including:

a) introducing definitions of terms used in planning documents and clarifying ambiguous terms such as, for example, building height, building intensity, above-ground building intensity, floor area, share of building area, etc.;

b) replacing the study of conditions and directions of spatial development of the commune with a new planning tool – the general plan of the commune;

c) introducing a new form of local master plan – an integrated investment plan;

d) determining the validity period of the zoning decisions; and

e) introducing the Urban Register as an IT system.

General Plan of the Commune

The general plan of the commune will replace the study of conditions and directions of spatial development of the commune and, unlike the study of conditions and directions of spatial development of the commune, it will constitute a local law act. This means that not only local master plans, but also decisions on zoning conditions will be checked for compliance with it. The general plan is to have a concise form and a small number of provisions enabling their standardisation and comparison of content to analogous acts in other communes. Similar to the study it will contain provisions on the functions of areas allowed to be designated in lower-level documents, as well as framework provisions on the shaping of buildings and land development. In addition, it will include information on areas for which a decision on zoning decisions can be issued, while in relation to other areas (for which the possibility of issuing a zoning decisions has not been foreseen), issuing a zoning decisions will be inadmissible.

The general plan must be prepared for the entire area of the commune, except for closed areas. The general plan should be adopted on or before 1 January 2026. In the absence of such adoption by this date, it will not be possible to issue a zoning decision or adopt or amend a local master plan since compliance with the general plan will not be able to be verified.

The process of adopting or amending the general plan may proceed simultaneously with the amendment or adoption of a local master plan.

Integrated Investment Plan

A new planning tool is the integrated investment plan (IIP), which will be a special form of a local master plan adopted at the request of an investor. However, the investor will not have a claim to adopt an IIP.

The procedure for preparing an IIP is mostly consistent with the general principles of the procedure for preparing a local master plan, but it contains modifications of the provisions that guarantee its efficient conduct. The commune may adopt an IIP at the request of an investor, the entry into force of the IIP causes the loss of validity of the existing local master plans or their parts relating to the area covered by this IIP.

The determination of the conditions between the investor and the commune will take place during negotiations, which will end with the signing of an urban agreement. The commencement of negotiations is not binding for the commune, because until the urban agreement is concluded, the commune head, mayor may withdraw from the negotiations. Under the urban agreement, the investor undertakes to the commune to implement a complementary investment, moreover, the investor may undertake to: transfer property that is part of the subject of the main investment; cover all or part of the costs of implementing the complementary investment; and/or cover all or part of the costs incurred by the commune for adopting the IIP, including the costs of fulfilling the claims of the owners or perpetual usufructuaries.

The provisions do not regulate, similarly as in the case of investments for residential purposes, the maximum value of the owner's contribution for public purposes in connection with the IIP. If the IIP is repealed, amended or its invalidity is declared before the expiry of five years from and including the date it enters into force, the parties to the urban agreement may withdraw from the urban agreement within six months from and including the date the IIP is repealed, amended or whose invalidity is declared. Importantly, the parties to the urban agreement may be several investors who have submitted one request for adopting an IIP.

The zoning decision

The legislator has introduced restrictions on the implementation of investments based on zoning decisions.

Firstly, zoning decisions (after the adoption of the general plan) will only be issued for limited areas specified in the general plans. In addition, from and including 1 January 2026, zoning decisions will be issued for a fixed period of five years from and including the date the decision becomes final.

Apart from introducing the validity period, another significant change in the scope of zoning decisions is lack of the obligation to continue the function existing in the surroundings. This is related to the fact that the function of the development should result from the provisions of the general plan and will not be the subject of urban analysis. This change implies that investments that do not occur in the analysed area are allowed, as long as they are consistent with the functional profile of the planning zone designated for that area. Urban analysis will still cover the parameters related to the development to maintain the spatial order understood as the continuity of development with similar dimensions and location on the plot.

As a result of the amendment, the catalogue of conditions for issuing zoning decisions has been updated. Currently, the possibility of issuing such a decision is conditional on the site being located within a development supplementary area designated in the general plan. However, a catalogue of exceptions has been introduced from this rather rigorous condition, eg implementation of a change in land development other than the construction of a building, reconstruction, superstructure and extension of existing buildings, implementation of production investments located on areas designated for this purpose in old local plans that have lost their validity, as well as the location of RES investments, with the reservation that large RES installations can be located only on the basis of a local master plan. The amendment also specifies the guidelines for determining the analysed area. To limit the manipulation of the size, the analysed area is currently determined at a distance equal to three times the width of the front of the area, but not larger than 200m.

Urban Register

From and including 1 January 2026, the Urban Register will be introduced, in which information and data on spatial planning and development will be collected. The aim of the legislator was to create a reliable source of data and information, which is to increase the efficiency of spatial management, facilitate social participation, ensure transparency of planning procedures, and also, at least in theory, speed up the investment process. Data from the Register will be made available free of charge, publicly (except for personal

data) and by means of network services. The catalogue of documents made available includes, among others, decisions on building conditions (except for those issued for investments located on closed areas determined by the Minister of National Defence). Documents will be made available in the register immediately after their preparation.

04 REGULATION OF THE LEGAL STATUS OF SOME GENERAL ACCESS ROADS

On 2 August 2023, the President of the Republic of Poland signed the Act on special solutions concerning the regulation of the legal status of some general access roads. The aim of the Act is to enable communes to take over the ownership rights to property that had been under their management for at least 20 years on the date the Act entered into force and importantly, were used as roads, without the status of public roads, but generally accessible (with a hardened surface) – along which ordinary traffic of vehicles and pedestrians took place, constituting an element of the road network satisfying local needs. The general access road, referred to in the Act, has a similar function to public roads and connects with them.

According to the Act, to acquire a property used as roads, it will be necessary to obtain a decision on the acquisition of property, issued by the starost competent due to the location of the property, exercising the tasks of the government administration. The application for issuing such a decision is submitted to the starost at the request of the commune head (mayor). The deadline for submitting the application expires on 31 December 2035.

Under the new law, the owner of the property (or at least 2/3 of the owners of properties that provide access to no less than ten developed properties) can apply to the commune head with jurisdiction over the location of the property for a decision on the transfer of the property to the commune within six months of the property owners' application.

Properties occupied by a general access road, passing into the ownership of the commune, become a public road in the category of commune roads. For the commune, this means not only an increase in ownership (assets), but also the emergence of obligations as the road manager.

Additionally, in connection with the takeover of the road, the commune will be obliged to pay compensation. The amount of compensation for properties, perpetual usufruct, and limited property rights to (real) properties, which passed into the ownership of the commune, is determined by a written agreement between the commune and the former owner, perpetual usufructuary or person entitled from a limited property right to the (real) property. In the absence of an agreement on compensation within two months from and including the date when the decision on acquiring properties became final and binding, the starost issues a decision determining the compensation within 30 days from and including the date the proceedings are initiated.

In our opinion, the new law may lead to the regulation of the legal status of many access roads to investment areas and potentially enable investments in areas that were inaccessible due to the unregulated legal status of access roads.

05 AMENDMENT TO THE REGULATION ON PROJECTS POTENTIALLY HAVING SIGNIFICANT EFFECTS ON THE ENVIRONMENT

The Council of Ministers Regulation of 10 August 2023 modifies the Council of Ministers Regulation of 10 September 2019 on projects potentially having significant effects on the environment, which will come into force on 13 September 2023. The purpose of the modification is to reduce the necessity of obtaining an environmental decision for investments involving photovoltaic systems and car parks and garages. The former rules were too restrictive as they required the obtaining of an environmental decision also for projects that, due to their size and nature, did not have a significant effect on the environment. The current criteria for classifying a project are comparable to those in the legislation of Germany, Italy, the Czech Republic and Slovakia.

The former regulation grouped the construction of photovoltaic systems with industrial and warehouse development. The construction of photovoltaic panels has now been moved to a separate item and less stringent criteria have been established for it. The parameters remain unchanged compared to the former legal situation only for areas subject to forms of nature protection

or in the buffer zones of natural forms. However, in other areas, the classification parameter has increased by 100%, ie from one ha to two ha. Furthermore, the construction of photovoltaic systems located on the roofs and facades of buildings is no longer among the projects with potential environmental impact. According to the Council of Ministers, this change should result in an increase in the rate of development of this type of RES, which will positively affect the possibilities of achieving an appropriate level of energy produced from renewable sources in the country's overall energy balance.

The second amendment doubles the existing thresholds for garages and parking lots. The provision in its previous wording was considered too restrictive. As indicated in the justification for the draft regulation, in many situations the implementation of various types of developments, including, for example, residential estate, was subject to the obligation to obtain an environmental conditions decision solely due to meeting the qualification thresholds specified for garages and parking lots, and not those dedicated to a given type of development. The expected effect of the amendment is to limit unjustified administrative proceedings to focus on the control and supervision of the investment process of projects that may actually have a significant negative impact on the environment.

06

POTENTIAL AMENDMENT TO THE ACT OF 5 JULY 2018 ON FACILITATIONS IN THE PREPARATION AND IMPLEMENTATION OF HOUSING INVESTMENTS AND ACCOMPANYING INVESTMENTS

On 17 August 2023, the Sejm of the Republic of Poland adopted an amendment to the Act of 5 July 2018 on Facilitations in the Preparation and Implementation of Housing Investments and Accompanying Investments (Special Housing Decree).

The amendment extends the parity of service and commercial functions – it abolishes its lower limit (five percent). This means that service and commercial functions can be implemented under the Special Housing Decree only if they do not constitute more than 20 percent of the usable area of the flats.

Moreover, the amendment abolishes the requirement of at least one and a half times the number of parking spaces in relation to the number of flats for housing investments (also for housing investments in the area of urban development).

At the same time, the wording of the provision concerning the right of communes to determine local urban standards was changed. In the new wording, the provision states that the commune council may freely determine the number of parking spaces necessary for the service of the implemented housing investment.

Incidentally, it can be noted that the amendment modifies the provisions whose wording was changed relatively recently – the provisions entered into force on 12 May 2023.

The amended act was transferred to the Marshal of the Senate on 18 August 2023 and has not yet been considered by the Senate.

07

THE JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT OF 8 DECEMBER 2022, II OSK 3865/19

The Supreme Administrative Court in the judgment in question clarified the legal nature of the individual parts of the landscape park protection plans created on the basis of the Act of 16 April 2004 on Nature Protection (the Nature Protection Act).

The judgment was issued in connection with the refusal to issue a building permit, where the provisions of the resolution of the Regional Assembly establishing the protection plan for the landscape park were indicated as an obstacle to issuing the building permit.

The Supreme Administrative Court in the judgment pointed out that the protection plan for the landscape park is an act of local law, but only inthe parts indicated in the closed list from Art. 20(4a) of the Nature Protection Act. The provisions of the protection plans for landscape parks in the scope of arrangements relating to the studies of conditions and directions of spatial

development of communes and to spatial development plans do not constitute acts of local law. The above-mentioned parts of the protection plans require implementation into the legal order. Only then can they have legal effects and be binding when determining the conditions of development and when issuing a building permit.

The discussed judgment should be assessed positively – the Supreme Administrative Court takes the position that public administration bodies can require entities applying for determining the conditions of development or for a building permit, to comply with the conditions precisely indicated in the acts and generally applicable acts of local law, and not in other administrative acts.

Legal status as of September 11, 2023.

Prepared by:

ALLEN & OVERY

Zespół Nieruchomości i Budownictwa Allen & Overy, A. Pędzich sp.k.