

## Separate ownership right to a building – realty in 3D?

Polish legal order, as the legal systems of most other countries, is grounded in a principle that harks back to ancient times, that buildings and other immobile assets permanently affixed to land are all part of the real property, and thus, they are the property of the land owner (*superficies solo cedit*).

Of course, both Polish law, as well as other legal systems, knows exceptions to the above rule, which however does not undermine the existence of the rule or its primacy within the context of modern civil law regulations. As example, exceptions to the above rule permitted in Polish legislation include:

- Ownership right to buildings and structures conferred onto a perpetual usufructuary of land (Art. 235.1 of Polish Civil Code)
- Ownership right to installations used to transport, to and from, liquids, steam, gasses, electricity, and other similar installations, if they are part of an enterprise (Art. 49.1 of Polish Civil Code)
- Ownership right to a separate residential or non-residential dwelling (Art. 2.1 of the Dwelling Ownership Act of 24 June 1994).

Soon, however, another important exception to the above rule could appear in Polish legislation. This is being suggested by the guidelines being developed by the Ministry of Infrastructure to the Act on Separate Ownership Rights to Building Structures as well as the under-development bill itself. Given the preliminary nature of the legislative work, right now it is worthwhile to present only a certain sketch of the suggested solutions, without focusing on the specific assumptions underlying every solution, whose fate is today difficult to foresee.

The trigger for commencing work on guidelines for the Act on Separate Ownership Rights to Building Structures were problems encountered in the actual execution of investments in determining the legal status of buildings and structures build on or under land (tunnels, flyovers, overpasses, underground garages, metros, etc.) when the entity executing the investment was neither the owner nor the perpetual usufructuary of the

land encompassed by the investment. The problems were a byproduct of to-date two-dimensional approach to looking at real estate in Polish law. The Ministry of Infrastructure's bill is a response to the economic and business needs of creating, or perhaps rather recognising, a third dimension of real estate and the investments executed thereon.

The objective of the bill being prepared by the Ministry of Infrastructure is to make it possible to establish separate ownership rights to building structures executed, for example, over public roads (often encountered, for example in France, resting areas over motorways or the idea of building Museum of Independence over the *Lazienkowska Lane* in Warsaw) or over railway tracks. The implementation of such a solution would usher in two-fold benefits. On the one hand, the owner of the property would not be deprived of the right to use it, and at the same time could realize additional economic benefits. On the other hand, the investor would gain a strong legal title to the structure being erected and greater freedom in its management and administration, including the option to establish collateral thereon, which in turn would enable the investor to secure external financing for the investment.

According to the adopted guidelines, it would be possible to establish a separate ownership title to the building structure only when its execution would not exclude the possibility of the property being used by its owner or perpetual usufructuary. The separate ownership right to the building structure would not be linked to a share in the ownership or perpetual usufruct title to the real estate (as is the case with separate ownership title to a dwelling). The right of separate ownership to the building structure could be established for a charge or for free. A separate land and mortgage register would be maintained

for the separate ownership right to the building structure, which would list, for example, mortgages established on that right to secure the repayment of debt financing contracted to execute the investment.

The establishment of a right of separate ownership to a building structure would encompass a mixed procedure, combining administrative and civil law elements. At the request of the investor, the head of the county (*starosta*), would issue a promissory note in the form of a decision permitting the separation out of the building structure. Based on that note, the owner (or the perpetual usufructuary of the land, upon the consent of the owner) and the investor would execute an agreement to establish a right of separate ownership to the building structure. Rights under such an agreement could comprise the subject of a pledge, including a registered pledge. After the structure were commissioned for use, the head of the county, at the request of the investor, would issue a decision on the independence of the building structure and the parties would execute an agreement on its right of separate ownership to the structure. As of the moment of the entry of the right of separate ownership to the building structure in the land and mortgage register established for it (entry would be essential, and only upon its execution would the separate ownership right exist) and pledges would become transformed into mortgages on the separate ownership right to the building structure.

The guidelines to the bill on which the Ministry of Infrastructure is currently consulting experts, have been well received and though certain reservations have also been raised, including with respect to the issue of accounting for the limited nature of the existence of a building structure, which would comprise the subject of the separate ownership title, they do not nevertheless discount the positive reception of the offspring of the efforts of the Ministry of Infrastructure.

Given the preliminary stage of works on this new legal solution, it is difficult to fully and exhaustively assess its flaws and merits. These undoubtedly will be evaluated only once the regulation comes into effect and is practiced. Nonetheless, the Ministry of Infrastructure has done well in seeking new legal frameworks for executing investments which may prove to be an exceptionally effective catalyst for accelerating many investment processes, as well as increasing the private capital commitment to executing many public investments. Separate ownership right to a building structure may beco-

me an instrument for a material revival in cooperation and execution of investment as part of public-private partnerships and second, behind concessions for building works, instrument permitting private investors to fulfill their business interests within the framework of cooperation with entities operating in the public finance arena.

It is difficult today to foresee in what form these solutions will be adopted and whether they will be adopted at all (independently work on a draft of regulations which would create so-called right of building up as a new limited property right is underway by the Civil Law Codification Commission).

Solutions in this area without a doubt have been long awaited, yet no one should expect them to resolve all problems encountered today in real estate trade and in the execution of investments. They might nevertheless comprise a milestone in overcoming the existing difficulties.

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