

Right to use real property for building purposes

The issue of the right to use real property for building purposes is of fundamental importance from the perspective of the building process as well as the broader concept of the investment process. Despite the gravity of the institution on the border of civil law and administrative law, Construction Law of 7 July 1994 (hereinafter referred to as the “Law”) regulates it to an exceptionally limited extent, dedicating to it a definition in the dictionary contained in the Law and referring to the discussed institution in providing guidance on regulations relevant to other concepts.

In line with Art. 3.11 of the Law, whenever the Law uses the term “the right to use real property for building purposes”, it is referring to a legal title arising under the right of ownership, perpetual usufruct, administration, limited rights in property, or a contractual relation providing for rights to perform building works.

Pursuant to Art. 4 of the Law, any person can have the right to build-up real property as long as the person provides proof of his right to use the real property for building purposes, and as long as the person’s building plans are compliant with the relevant regulations.

Under the Law, an investor must submit a representation on the title under which he holds the right to use the real property for building purposes together with the building permit application (Art. 33.2.2 of the Law) and together with the notice of building works not requiring a building permit (Art. 30.2 of the Law).

Pursuant to Art. 32.4.2 of the Law, the submission of the representation, under the pain of penal liability, on the held right to use the real property for building purposes is a necessary prerequisite for the investor to be issued a building permit. Thus, on the contrary, the failure to submit such a representation comprises a barrier to the issuance of a building permit, and if a building permit is issued to an investor even though he does not submit such a representation, it may be regarded as a premise for a gross violation of law under Art. 156.1.2 of the Polish Code of Administrative Proceedings, meaning that the issued building permit is effectively rendered null and void.

Acting by virtue of the delegation contained in Art. 32.5 of the Law, the Minister of Infrastructure issued an Ordinance of 23 June 2003 on templates for: building permit application, representation on the held right to use the real property for building purposes, and building permit decision. Therefore, there is a prescribed form and wording for the representation on the held right to use the real property for building purposes, required under Art. 32.4.2 and Art. 30.2 of the Law. Such representations submitted in the course of proceedings to be issued a building permit or together with the submission of a notice of building works not requiring a building permit should be compliant with the templates provided in the abovementioned Ordinance.

Yet, the institution of the right to use real property for building purposes is a much more complex concept that could be interpreted under the provisions of the Law. As mentioned earlier, pursuant to the Law’s definition “the right to use the real property for building purposes” means a legal title conferred under the right of ownership, perpetual usufruct, administration, limited right in property, or a contractual relation providing for rights to perform building works.

In the above scope, one should look at the conjunction contained in the above provision, which refers to the legal title to a real property arising under a defined property right (ownership, perpetual usufruct, limited right in property) or from a defined contractual relation providing for rights to perform building works. This means that not every property right and not every contractual

relation establishes the right to use real property for building purposes under the Law, but only such property rights and such contractual relations which explicitly encompass rights to perform building works. This, if a title of ownership held by an investor does not encompass the right to perform building works, it should be presumed that the investor does not have the right to use the real property for building purposes and the investor cannot in compliance with law submit such the representation required under law. Meanwhile, if the investor nevertheless submits such a representation, he exposes himself to penal liability and the possibility of the reopening of proceedings for the issuance of building permit and, as a consequence, the annulment of the permit.

Thus, for the investor to be able to submit a representation in compliance with law, on the right to use real property for building purposes, the following two prerequisites must be jointly fulfilled:

- The investor must hold the legal title to real property under a property right or a contractual relation
- The above legal title must encompass the right to perform building works.

In Polish law, the catalogue of property rights is a closed catalogue, meaning that property rights can be established only by way of provisions entered into a statute; they cannot be established as part of the freedom of contract. At present, in addition to ownership and perpetual usufruct, property rights include the following limited rights in property: usufruct, easement, pledge, cooperative property right to a dwelling, and mortgage.

Of course, a mortgage as a limited property right established to secure a debt on real property and a pledge as a limited property right established to secure claims with movables and rights do not comprise titles of ownership under which one would be conferred the right to use real property for building purposes. Such a title can arise, and as a rule will arise, under title of ownership as the broadest and fullest right of property.

In the case of the right of ownership, restrictions on the right may arise only by virtue of spatial planning or zoning regulations, and from general or individual administrative acts.

In the case of the right of perpetual usufruct, the rights of the perpetual usufructuary will be determined by the manner the real property can be used, which should be defined in the legal act establishing the perpetual usufruct right or the substance of the legal action by way of which the real property

was ceded under perpetual usufruct. In the case of the right of perpetual usufruct, often the perpetual usufructuary's rights of use are restricted in the extent the real property can be used or can be built-up or spatially planned. Very often, there is a material difference between the intended by the usufructuary building process and the effective in this scope administrative law provisions and civil law perpetual usufruct regulations. As a consequence, the executed building works are in breach of the wording of the right of perpetual usufruct and can serve as grounds for its annulment by the State Treasury or local government authorities. Therefore, the perpetual usufructuary should be especially mindful of the wording of the held right of perpetual usufruct conferred onto him, and how it can be enforced.

Beyond the above-excluded mortgage and pledge, every remaining limited right in property can encompass in its wording the right to perform building works and, thus, usufruct, easements, and cooperative property right to a dwelling can all constitute a title to real property under which the entity conferred the title holds the right to perform building works. Yet, the right to perform building works is not systemically linked with the li-

imited rights in property and, for example, in the case of an easement of passage the entity with rights under the easement will not have the right to build a road, unless such a right is explicitly provided for in the agreement establishing the real easement. This is because systemically the construction and maintenance of installations necessary to perform the easement rests with the owner of the real property encumbered with the easement. Thus, this types of issues need to be considered within the context of specific cases and it is recommended that the right to perform building works is guaranteed under the agreement under which the limited right in property is established. At present, work is underway to implement into the Polish legal system another limited right in property in the form of the right to build-up/develop, whose very essence would encompass the right to build or use a defined building structure.

In the case of contractual relations (e.g. lease or rent), it is also necessary to ensure that the wording of the agreement provides for the right to perform defined building works. To note, a lease agreement in wording provided for in the Polish civil code authorizes the lessee only to perform small day-to-day re-

pairs and only to that extent would the lessee be able to say he holds the right to use the real property for building purposes, unless these rights are broadened in scope under the provisions of the lease agreement.

This article provides only a very general overview of an exceptionally complex institution of the right to use real property for building purposes. Given the exceptional importance of the institution, special attention should be paid to its complexity, while issues related to it should be subject to a detailed analysis on a case-by-case basis, in order to ensure a safe and sure-footed investment process founded on that institution, and then the safe and sure-footed use of the erected building structure.

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