

Changes to the jurisdiction of architectural and construction administrative bodies and building inspection bodies

On 27 December 2010 an ordinance of the Council of Ministers came into force regarding structures for which the body of first instance is the voivode (Journal of Laws of 2010, no. 235, item 1539). This ordinance was issued on the basis of the statutory delegation in Article 82 par. 4 of the Construction Law. This is the first time that the Council of Ministers has exercised its right to make significant extensions to the catalogue of construction works for which the body of first instance is the voivode.

Thus in addition to the structures and construction works listed in Article 82 par. 3, the voivode is now also the body of first instance in the matters listed in § 1 of the new ordinance. A comparison of the relevant regulations in the construction law and the ordinance reveal that since the ordinance came into force voivodes are now the architectural and construction administrative bodies of first instance for matters concerning: a) structures and construction works on sites in the technical zone of ports and sea harbours, internal marine waters, territorial seas and the exclusive economic zone, as well as in other areas designated for continuity of marine traffic and transport; b) primary hydraulic structures and construction works for damming, releasing, regulating and drainage, and canals and other structures for modelling and using waterways, including auxiliary structures; c) national and regional public roads as well as structures and equipment for the upkeep of those roads and continuity of road transport, and mains utilities in the road zone not related to exploitation of the road, and in respect of dual carriageways and motorways also structures and equipment connected with use of the road by road users, vehicles and consignments; d) structures and construction works on railway sites; e) civilian airports, including auxiliary structures and equipment; f) structures and construction works on closed-access sites; g) underground railways and construction equipment and mains utilities connected with

them if the need for their construction or alteration is due to the construction of or alterations to the underground railway; h) mains utilities on sites beyond national or regional road zones if the need for their construction or alteration is due to the construction of or alterations to those roads; i) engineering structures connected with roads and situated within a national or regional road zone but not related to the road; j) borough or district roads if the need for their construction or alteration is due to the construction of or alterations to a national or regional road; k) driveways, in the meaning of Article 4 pt 8 of the Act of 21 March 1985 on public roads (Journal of Laws of 2007 No. 19, item 115, as amended), off national or regional roads; l) transmission grids, in the sense of Article 3 pt 11a of the Act of 10 April 1997 – the electrical power law (Journal of Laws of 2006 No. 89, item 625, as amended); and m) long-distance distribution pipelines for transporting crude oil and derivative products.

One of the key changes implemented with this ordinance, in view of the frequency with which such structures are made, is the construction of driveways to national and regional roads. To date, construction of driveways to national and regional roads was not listed in the catalogue of construction projects entrusted to the voivode as the body of first instance. In practice this has been the source of fairly frequent doubts, which were ultimately resolved with two resolutions by the Supreme Administrative Court (NSA) dated

1 March 2006 (case no. II OW 94/05 and II OW 95/05), which found that in view of the definition of exit road in the act on public roads, driveways to a public road cannot be treated as part of a public road. Thus the NSA found the starosta (chief district official) to be the body of first instance for administrative architectural and construction matters regarding construction of all exit roads, thus also driveways to national or regional roads. Hence the entry into force of this new ordinance reverses the previously accepted principle, but it also removes all doubt regarding the bodies with jurisdiction in construction of driveways to national and regional roads.

The ordinance deals fairly comprehensively with performance of national and regional road projects, which often incorporate work other than road works. Such work, which is often vital where a road is being widened or altered, has largely been entrusted to the voivode. As such, there is no longer any doubt that a project to widen the intersection of a regional or national road with a local (borough or district) road, the body with jurisdiction for the whole project is the voivode. The solution implemented here removes the doubt that often arose in previous practice as to whether in investments of this type the investor should split them and obtain separate construction permits issued by different bodies, whose jurisdiction would be founded on the general principles in Article 82 par. 3 of the Construction Law. Though the NSA found in a case it was called upon to adjudicate (case no. II OW 80/07) that where there is no legal regulation regarding an investment in roads of different categories the voivode should be considered the body with jurisdiction to issue the construction permit for the whole project, the general principle was nevertheless formulated rather cautiously. The NSA ruled that this principle was applicable in a situation where by widening, a road of a lower category would become part of a road of a higher category. The ordinance removes these doubts in the area it regulates.

This extension of the jurisdiction of voivodes as architectural and construction administrative bodies of first instance means that it is to them that not only applications for construction permits but also notices of intent to perform work should be made. At the same time, the entry into force of the ordinance extends the authority of voivodship construction inspectors. Pursuant to Article 83 par. 3 of the Construction Law, the scope of the competencies of voivodship construction inspectors is a reflection of the competencies of the voivodes. Thus extension of the

competencies of the latter means that in matters entrusted to them, voivodship construction inspectors become the bodies of first instance.

The entry into force of the ordinance also extends the judicatory authority of the Chief Construction Inspector, who pursuant to Article 88a par. 1 pt 1 holds the function of body of higher instance in relation to both voivodes and voivodship construction inspectors.

The ordinance does not, however, resolve a number of doubts connected with the scope of competency of various bodies in situations where work is related to investments, various elements of which may be qualified as competencies of different bodies. The NSA's stance is that in view of the wording of Article 33 par. 1 of the Construction Law and the principle "one project – one construction permit", obtaining several construction permits

for the construction of one investment project is unauthorised (this does not apply to situations where the project comprises several structures, which meet criteria defined in the regulation cited). For instance, where an investor's project involves construction of a structure together with a driveway to a national road, the question remains as to the permissibility of splitting the project into two elements – the main investment and the driveway. Such a division probably does not meet the criteria set down in Article 33 par. 1 of the Construction Law, and hence obtaining two separate construction permits is excluded in this case. On the other hand the problem arises of establishing the body with jurisdiction to issue the decision. Thus the investor faces the dilemma of whether to apply for two separate construction permits for the one project and risk the charge of violation of Article 33 par. 1 of the Construction Law, or

to apply for one permit to the voivode or starosta and risk that permit being found invalid due to issue in violation of the regulations on jurisdiction.

The ordinance is a step in the right direction, but does not allay all existing doubts. Owing to the importance of the problem, supplementation of the statutory regulations on the jurisdiction of architectural and construction administrative bodies would seem essential.

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