

Right to build up a plot as an alternative to the right of perpetual usufruct

Work is currently underway at the Ministry of Justice on Bill Amending the Polish Civil Law and a number of other statutes (“Bill”). The Bill provides for the establishment of a new limited property right – in addition to the rights of usufruct, easement, pledge, cooperative ownership of a dwelling, and mortgage – namely, the right to build up a plot. The aim of this article is to provide an overview of select elements of the proposed legislative solutions.

The Bill represents a response to postulates to reform the right of perpetual usufruct, formulated by representatives of both doctrine and practice. Recognizing the needs of the real estate market as well as legislative problems, the decision was made not to do away, at least for now, with the right of perpetual usufruct but to create a new legal structure to exist alongside it. Yet, in the future the right to build up a plot might supersede the right of perpetual usufruct.

The right to build up a plot is not a novelty for either Polish legislation (it was in effect in the period between the two World Wars and also briefly after WWII after which it was superseded by the so-called temporary rights of property) nor European regulatory system under which it has been successfully implemented in many countries.

As the right of perpetual usufruct, the right to build up a plot confers rights to use other’s real property, yet not in as wide a scope as the right of perpetual usufruct. Pursuant to the Bill, it confers the right to encumber a real property with the right to erect or to use buildings or other structures already situated thereon or thereunder. Unlike in the case of the right of perpetual usufruct, which can be established on publicly owned land, the right to build up a plot can be established also on private land, which without a doubt will make it easier to execute some investments. It is also worthy to add that the right to build up a plot can also be established on land previously ceded under the right of perpetual usufruct. In such a case, it is established by the owner of the real property but only upon the consent of the holder of the right of perpetual usufruct. As a consequence, it will be possible to build up a fragment of a plot already ceded under the right of perpetual usufruct,

but which is not being developed by the perpetual usufructuary.

The agreement establishing the right to build up a plot should define the type of structure to be erected, the manner and scope of the intended use of the encumbered plot, and the duration of the right to build up the plot. There are certain concerns about the requirement that the agreement define the type of structure to be erected. It is difficult, at this stage, to foresee how much detail will have to be provided, yet we should hope that the information will not have to be overly detailed as to avoid a situation in which an overly explicitly defined type of building does not comply with the provisions of the local master plan amended after the conclusion of the agreement establishing the right to build up the plot. The parties to the agreement can state explicitly in the agreement, for example, that the existing or planned building or other structure will be the property of the owner of the plot as an integral part thereof, or the obligations of the party exercising the right to build up the plot to erect a defined building structure by a specific deadline. To be effective, the agreement establishing the right to build up a plot must be executed in the form of a notary deed. The right to build up is established at its entry in the Land and Mortgage Register maintained for that right. At the same time, the right should also be disclosed in the Land and Mortgage Register maintained for the plot. The right to build up a plot can be established for between 30 and 100 years; it can be extended through a contractual extension executed to the original agreement. Yet, unlike in the case of the right of perpetual usufruct, the Bill does not provide for the right to build up to entitle to claims to extend the right to build up a plot.

The right to build up a plot can be established for a charge or free-of-charge, with the charge being a single lump-sum payment or periodic payments.

The Bill also provides for a special way for the right to build up a plot to be conferred, that is, by way of tabular possession (pl: *zasiedzenie tabularne*), i.e. the Land and Mortgage Register can disclose a specific individual as the person enacting the right to build up a plot though that individual is not entitled to that right. In such a case, the right to build up a plot can be conferred onto that person as long as the plot is owned for ten years, provided that at the submission of the application for its entry in the Land and Mortgage Register the person disclosed in the Register was not in bad faith.

A big advantage of the right to build up a plot is the possibility of establishing several such rights for a single plot of land, thus making it possible to execute on one real property owned by a single person several investments by a number of investors, e.g. shopping centre, residential building, metro station. On the other hand, the right to build up a plot can be established as a joint property right, i.e. conferred across more than one plot, which would make it possible to execute thereon or thereunder a building or other structures which extend beyond the boundaries of a single plot, e.g. sewage system or high voltage lines.

The right to build up a plot is transferrable, and as such can be inherited. Moreover, the person enacting the right to build up can establish thereon limited property rights, such as an easement, a lease or a mortgage. Thus, the person can raise funds for the investment by establishing a security on the right to build up a plot in the form of a mortgage, as is possible in the case of the rights of ownership and of perpetual usufruct.

In principle, buildings and other structures erected on or under the encumbered plot or existing at the time of the establishment of the right to build up a plot are the property of the person entitled to build up the plot. Thus, the Bill has introduced an exception to the principle of accession (*superficies solo cedit*), like the one applicable to the right of perpetual usufruct. An important difference in the proposed regulations, relative to the existing provisions, is that the person entitled to build up the plot can use plant and equipment located on and under the plot surface. One should also note that the Bill permits the establishment of a separate title of ownership to a dwelling in a building erected in exercise of the right to build up a plot. Thanks to this

and the possibility of establishing the right to build up a plot ceded into perpetual usufruct, it will be possible to establish several various real estate rights on one piece of real property – perpetual usufruct, right to build up a plot and separate title of ownership to a dwelling.

According to the Bill, if the real property encumbered with the right to build up is partitioned into several plots, the right to build up would continue to apply jointly on the separate plots created through the partitioning. Yet, if the right's performance was limited to one or several plots, the owners of the remaining plots could ask to be released of the right to build up their plots.

The Bill also provides for contractual and statutory pre-emptive rights of purchase. The former is conferred on the owner of the property upon the fulfillment of terms and

conditions relating to the enactment of the pre-emptive right, defined in the agreement establishing the right to build up a plot. The latter is conferred on the owner if the person entitled to build up the property uses the plot in a manner clearly incompliant with its purpose, in particular, if in breach of the agreement he does not erect a building or erects contrary to the agreement's provisions.

Currently, the Bill is the subject of inter-ministry consultations at the Ministry of Justice. It seems to be a well thought out and comprehensive solution, which could be accepted and approved. The proposed right to build up a plot represents an instrument thanks to which it will be possible to leverage real estate in broader than to date scope, as it will be possible to establish concurrently several various rights on a single piece of

real estate, such as perpetual usufruct, several rights to build up, and right of ownership to a dwelling in buildings erected on the land. The passing into law such options will help to increase interest among real estate investors in land on which investment have to date been difficult; it will also make the investment process itself easier.

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