

Amendment permit a way to validate a construction permit?

Many investors encounter the “amendment permit”, an instrument which allows work to be resumed if alterations are made to the construction plans. Sometimes, however, investors decide to use it as a way of validating an original construction permit that has become defective.

The amendment permit (formally called a “decision on amendment of the construction permit”) is regulated by Article 36a of the Act of 7 July 1994 – the Construction Law (unified text: Journal of Laws of 2006, No. 156, item 1118 as amended), which provides that significant departures from an approved construction plan are only permissible if a amendment permit is obtained. An example of a significant departure from an approved construction plan might be a change in the location of the structure. Such departures therefore carry with them the obligation for the investor to obtain a amendment permit.

Sometimes, however, investors attempt to obtain a amendment permit as a way of validating an existing construction permit. Such situations occur when the original permit is defective. In fear of such a decision being found invalid, some investors decide to make symbolic changes to some of the parameters of the planned structure so as to meet the statutory criterion of a significant departure from the approved construction plans, which necessitates application for the issue of a amendment permit. The idea of obtaining a “new” (amendment) permit is intended as a way of ensuring that the investor can continue with the project without fear that the decision might be found invalid, as could occur in the case of the “original” permit, and at the same time retain the overall premises of the construction design.

This way of “validating” the construction permit is burdened with significant risk for the investor. This is because any challenge to the original permit can impact on the amendment permit. The nature of the amendment permit is the decisive issue in this matter. If we treat it as a decision in its own right, then the method of obtaining a new permit described above will be advantageous to the investor. If, however, we see the amendment

permit as closely connected with the “original” permit, then the risk of the “original” construction permit being found invalid will not be eliminated by obtaining a amendment permit.

In the majority of verdicts, administrative courts emphasise the autonomy of the amendment permit, and point out that proceedings concerning both the “original” and amendment permits may run concurrently. Consequently, both decisions co-exist: that concerning the construction permit (approving the construction plans) and that approving the amendment plans (see: verdict of the Voivodship Administrative Court [WSA] in Warsaw of 29.8.2007, file no. VII SA/Wa 703/07). For the investor, the fact that the two permits are not effectively the same document means that obtaining a amendment permit could potentially eliminate the risk related to any defects in the “original” construction permit.

However, it is important to stress the heterogeneity of judicature in this matter. The fact that the two decisions are related in terms of content and the law is stressed (see the verdict of the Supreme Administrative Court [NSA] of 6.6.2008, file no. II OSK 461/07). If this position is adopted, it forces the acceptance that invalidity proceedings conducted in respect of the first construction permit should also be initiated in respect of the decision regarding the amendment permit. Hence obtaining a amendment permit would not alter the investor’s situation, and the risk of the “original” permit being declared invalid would not be reduced (verdict of the WSA in Warsaw of 17.5.2007, file no. VII SA/Wa 2338/06).

In practice, administrative bodies support the position that the amendment and “original” permits are separate decisions, but in view of the overlap between at least some of the matters regulated by these decisions,

a challenge to the original decision may engender a challenge to the decision amending it regarding the construction permit. In practice the body challenging the “original” permit should at the same time also challenge or revoke the amendment permit. The extent to which the amendment permit may be altered, and the issue of whether it may be withdrawn from legal circulation, depends on the specific circumstances. It is possible to conceive of a situation in which the amendment permit differs from the “original” in elements that could later form the basis of a challenge and hence in the course of proceedings challenging the first construction permit there will be no need to challenge the amendment permit.

It is important to emphasise that the practice by investors of obtaining amendment permits solely to avert the risk of having a defective construction permit found invalid is burdened with significant uncertainty in terms of its effectiveness, as courts and administrative bodies vary in their stances on this matter. There is thus the risk of challenges to both decisions, including that to issue the investor with a amendment permit.

In addition it should be stressed that the judicature holds that a change to a decision to issue a construction permit pursuant to Article 36a paragraph 1 of the Act in question may not be employed as an alternative to a challenge to it via either of the extraordinary procedures serving to eliminate legal defects connected with the administrative proceeding or the decision itself (either the institution of resumption of proceedings or finding the decision invalid). The NSA verdict of 28.1.2003 (file no. IV SA 1597/01) indicates that the overturning of a decision pursuant to Article 36a of the Construction Law does not annul the defectiveness of that permit.

Nevertheless, there can be no doubt that in practice, situations in which investors take advantage of this regulation to validate their permit do take place. However, we reiterate that use of this procedure is not only ineffective but may even be found to be in violation of the law.

Dominik Kepiński
Kancelaria Adwokatów i Radców Prawnych
Miller Canfield, W.Babicki, A.Chelchowski
i Wspólnicy sp. k.
kepinski@pl.millercanfield.com