

Remedial proceeding concerning completed investment in case of elimination of a construction permit from legal existence

It can occur in the course of the investment process that a final construction permit pursuant to which an investment had been completed has been effectively eliminated from legal existence. In consequence, completed construction works have no basis in existing formal documentation anymore. In such case, appropriate construction supervision authority shall conduct remedial proceeding pursuant to Art. 51.7 of the Construction Law as of 7 July 1994 in order to make the building structure compliant with law.

First of all, it should be noticed that construction works performed pursuant to the final construction permit are not an instance of construction lawlessness, and, in consequence, the procedure provided by Art. 48 of the Construction Law should not apply. Remedial proceeding is conducted pursuant to Art. 51.7 of the Construction Law, according to which provisions of Art. 51.1.1, Art. 51.1.2 and Art. 51.3 of the Construction Law should be applied accordingly. The main responsibility of the construction supervision authority should be to gain approval for the completed construction works, which can be achieved by bringing the works to a condition compliant with law. In case of completed construction projects, a compliance with law should be understood as the state consistent with applicable provisions of the administrative law, including in particular the Construction Law, and the provisions of the local master plan.

Compliance of the completed construction works with law can be attained in two ways. First of all, the construction supervision authority can impose on the investor an obligation to perform specific actions or construction works in order to make the completed construction works compliant with law within an indicated timeframe pursuant to Art. 51.1.2 of the Construction Law. In practice, imposing of such obligation on the investor can result in, depending on the actual circumstances, an order to perform specific construction works or preparation of the post-realisation documentation

comprising the complete construction documentation and post-realization inventory. After the investor has fulfilled the obligation, the construction supervision authority shall issue a decision confirming its performance. However if in the course of the proceeding it is determined that completed construction works comprises a major departure from the approved construction design or any other terms and conditions of the granted construction permit, then the construction supervision authority imposes on the investor an obligation to prepare and present a substitute construction design and, if necessary, to perform specific actions or construction works in order to make the performed construction works compliant with law within the indicated time frame pursuant to Art. 51.1.3 of the Construction Law. Although the provision of Art. 51.7 of the Construction Law does not expressly provide for the possibility of applying the indicated provision in the remedial proceeding, admissibility of such ruling is accepted in the judicature of the Supreme Administrative Court. It should be noted that the discussed provision can be applied if a major departure from the approved construction design or any other terms and conditions of the granted construction permit is found to exist in the completed construction works. After the investor has fulfilled indicated obligation, the construction supervision authority shall issue a decision approving the substitute construction design.

Furthermore, in the event that the indicated provision is applied, the appropriate authority shall also issue a decision requiring the investor to obtain an occupancy permit.

The choice of the mode of the procedure will depend on the factual circumstances of the case determined by the construction supervision authority in the remedial proceeding. If the collected evidences prove that the completed construction works may not be brought to a state compliant with law, for instance due to obvious incompatibility of the completed investment with the provisions of the local master plan, or if the investor has not fulfilled any of the obligations imposed by the construction supervision authority, then the appropriate authority shall issue a decision ordering demolition of the structure or a part thereof, or to restore the structure to its former condition. It should be remembered that the circumstances indicated above can arise only as a last resort, when the investment cannot be made compliant with law by mean of the tools referred to above.

The issue related to the remedial proceeding mentioned above has major practical significance – it may happen relatively often that an investment had been already completed, but it has no basis in the existing formal documentation due to the fact that the construction permit had been eliminated from legal existence. The objective of the remedial proceeding should be, first of all, to create appropriate documentation for such investment – the choice of means leading to such result depends on the actual circumstances of the investment established through relevant proceeding. It should be noted that the remedial proceeding has a unique nature, as it does not apply to the legalisation of the construction works wilfully completed by the investor, but it concerns the construction works performed by the investor pursuant to a final construction permit, i.e. the investor acting with confidence in the appropriate public authority, what should be reflected in the decisions issued by the construction supervision authority.

*Krzysztof Kallaur,
Attorney at Law*

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