

Significant departure from approved construction design

Pursuant to Art. 36a of the Act of 7 July 1994 Building Law (Journal of Laws of 2016, item 290, as amended, hereinafter referred to as the Law), a significant departure from the approved construction design or other terms and conditions of a construction permit is allowed subject to obtaining a decision amending the building permit. Therefore, when assessing whether making changes during the construction process require the investor to seek a decision amending the building permit, it is crucial to decide whether the planned changes can be deemed a significant departure within the meaning of Art. 36a.

The Building Law does not define the set of significant changes in a conclusive manner. Pursuant to Art. 36a.5 of the Law, a minor departure from an approved construction permit design or from other terms and conditions of a building permit does not require a decision to amend the building permit and it is allowed unless it concerns: (a) a scope covered by a development plan of the plot of land or site, (b) specific parameters of a construction work: cubic capacity, covered area, height, length, width and the number of storeys, (c) the conditions necessary to ensure access to the facility for the disabled, (d) change of the intended use of that work or any of its parts, (e) conditions defined in the local zoning plan or in the decision on land use and development and, furthermore, it does not require any opinions, approvals, consents or other documents required by specific regulations. Concurrently, Art. 36a.6 of the Law stipulates that it is the task of the designer to classify the intended departure as significant or not significant.

It is recognised in both case law and jurisprudence that the regulations referred to above do not state precisely what a significant change is. However, it is assumed that the provisions of Art. 36a.5 can provide interpretative guidance as to what should be understood as a significant departure from the approved construction design.

The key reason why a departure from the approved construction design can be considered a non-significant change is when it is classified so by the designer. It is assumed that the designer should classify the change a non-significant departure taking into account the degree of departure and with a comprehensive and careful consideration of the factual circumstances of the matter, the project's nature and stipulations referred to in Art. 4, Art. 5 and Art. 9 of the Law. It is assumed that whether a change is classified as a significant departure does not only depend on the type of the intended departure but

also on the nature and scope of the planned undertaking (judgment of the Supreme Administrative Court of 28 November 2012, court docket II OSK 1375/11).

However, the designer may not decide that any of the changes referred to in Art. 36a.5 of the Law is non-significant. It is asserted that the provision include a set of significant departures from the approved construction design (judgment of the Supreme Administrative Court of 5 December 2007, court docket II OSK 1635/06).

However, the provisions of Art. 36a.5 of the Law do not allow for gradation in terms of departure from the approved construction design. Therefore, even minimum variation in such parameters as the structure's length, width, height, cubic capacity or a minor change in the position of networks marked in the land development design should not be treated by the designer as a non-significant departure in the view of Art. 36a.5 of the Law. As highlighted in jurisprudence, if the intention of the law making instances had been to allow for tolerance limits for the parameters referred to in Art. 36a.5 of the Law, it would have been stated explicitly therein. In this regards, authors refer to Par. 14.2 of the Minister of Regional Development and Construction's regulation of 2 April 2001 concerning the geodesic register of land utilities networks and units for harmonisation project documentation, which allows for departure from the approved construction design with respect to utilities networks. However, the Law does not provide any regulation in this regard supporting the view that even a minimum departure from the parameters referred to in Art. 36a.5 of the Law must be recognised as a significant change that requires a replacement construction permit.

The restrictive interpretation is mitigated by court judgments where it is highlighted that not every change concerning the structure's parameters referred to in Art. 36a.5 of the Law

is a significant departure. Administrative courts hold that it is admissible for the competent authority to assess the degree of departure from the construction design and determine whether the changes are significant and, for this reason, they require the design to be amended, or whether their scope and nature does not impede the project which has been partly finished (judgment of the Regional Administrative Court of Warsaw of 19 December 2014, court docket VII SA/Wa 1386/14). The courts hold that every instance of departure should be assessed by the authority conducting the proceedings. Whether a given departure is significant should be determined by all the relevant circumstances existing in a given case. The obligation of the competent authority is to carry out a careful analysis to determine whether the identified departure is material in the context of the case (cf. judgment of the Regional Administrative Court of Gliwice of 21 September 2016, court docket II SA/GI 562/16, judgment of the Regional Administrative Court of Gliwice of 13 July 2016, court docket II SA/GI 95/16, judgment of the Regional Administrative Court of Krakow of 11 December 2013, court docket II SA/Kr 1112/13, judgment of the Regional Administrative Court of Warsaw of 17 January 2013, court docket VII SA/Wa 2069/12). It is by all means clear that while assessing the significance of departure from the construction design, the competent authority should exercise due respect for reasonable rights of third parties existing in the impact zone of the work (judgment of the Supreme Administrative Court of 28 November 2012, court docket II OSK 1375/11).

For instance, while implementing the above rules, the courts did not think that either increasing the height of a gable end wall (judgment of the Regional Administrative Court of Warsaw of 10 March 2004, court docket IV SA 3274/2002) or increasing of the building's cubic capacity by building a larger dormer (judgment of the Regional Administrative Court of Warsaw of 17 January 2013, court docket VII SA/Wa 2069/12) was a significant departure just because it was within the rule of Art. 36a.5 of the Law.

Therefore, even a change to the key parameters of a building structure does not prevent the investor from continuing the construction work without having to obtain a replacement construction permit if, under specific conditions, the departure would be deemed non-significant.

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