

# Scope of permitted amendments to building permits

The objective of the article is to discuss the scope of permitted amendments to building permits. The provisions of Art. 36a of the Act of 7 July 1194 the Building Law (i.e. Official Journal of 2017 item 1332) stipulate that every major departure from an approved building permit design or from other conditions of a building permit is allowed only after a decision to amend the building permit has been obtained, to which the relevant provisions governing the issuance of building permits apply.

In practice, such changes usually concern the contents of the approved building permit design – a replacement design is submitted along with the request to amend the building permit. As a result, the decision amending the building permit is then referred to as a replacement building permit. The provisions referred to above specify what changes to the building permit or the conditions of the building permit are considered to be “major departure” and which are not within the meaning of the law, but it is up to the designer to classify the change. However, controversies have been raised by the fact that the law does not precisely regulate whether there is any limit of acceptable change to the building permit design, i.e. it is not clear how much a project subject to a replacement design can be modified in terms of location, parameters or use and differ from the project approved by virtue of the original building permit to be still executed on the basis of the amendment made to the original building permit without having to seek a new building permit. From the investor's point of view, answering this question is very often of paramount significance. In the case of a major change to the designed project, obtaining a replacement permit will be much quicker than obtaining a new building permit, which will usually involve, in addition to other formalities, having to have the previous permit revoked.

There are significant differences between the legal doctrine and jurisprudence in this regard. The judicial decisions of the Supreme Administrative Court and the Regional Administrative Court of Warsaw present practically the same view that a major departure from the building permit design, to which the provisions of Art. 36a of the Building Law pertain, may only apply to amendments to the structure approved by virtue of the building permit, not the construction of a completely different structure or structures, even if their use were similar or even

the same as the original structure. Therefore, the structure approved by the original building permit and the structure to which the planned departures refer must be the same. The identity of the structures must encompass such basic features of the structure as cubic capacity or location on the lot (cf.: the Supreme Administrative Court's decisions of 14 July 2004, OSK 594/04 and of 31 January 2008, II OSK 1924/06). The above thesis was developed in subsequent decisions which clarified that the contents and scope of the replacement design must have links to the original design, while the acceptable major departures that can be introduced by the replacement permit may not create a new project (structure) lacking the characteristic parameters and features typical for the project approved by way of the original building permit, even if the structure's use were to be similar or even the same (cf.: the Warsaw Regional Administrative Court's decisions of 22 November 2005, VII SA/Wa 600/05, of 8 February 2007, VII SA/Wa 2235/06, of 2 March 2010, VII SA/Wa 1756/09; of 1 December 2010, VII SA/Wa 1703/10; of 15 June 2011, VII SA/Wa 2478/10, of 15 March 2012, II OSK 2563/10). The view is justified by the claim that the procedure for amending the decision defined in Art. 36a of the Building Law may not be used to approve a project that is different from the originally planned project as in order to approve such a project it is more advisable to use a regular procedure for obtaining a “brand new” building permit since the amendment would be seen as the evasion of regulations governing the issuance of building permits. The view that the procedure stipulated in Art. 36a of the Building Law may not approve an amendment to the building permit that would result in establishing a different structure than the one defined in the original building permit, which is not identical to the originally planned structure, should be

considered an established and unchallenged practice in judicial decisions.

However, this view is not commonly accepted in the literature. The view corresponding to the quoted decisions is seen, for instance, in the commentary to the Building Law edited by Z. Niewiadomski and in selected articles on the subject. However, there are also well-argued contributions supporting the opposite view, which allow for approving departures from the original design, according to the procedure defined in Art. 36a of the Building Law, that modify the structure's identity, i.e. the typical parameters and features of structures approved in the original building permit (cf. for instance A. Ostrowska in *Prawo budowlane. Komentarz*. [Building law. Commentary] 3<sup>rd</sup> edition, WK 2016, edited by Andrzej Gliniecki; A. Kosicki in *Komentarz do Prawa budowlanego* [Commentary to the Building Law] edited by A. Plucinska-Filipowicz). To substantiate the thesis, it is argued that the Building Law does not explicitly state any restrictions on major departures from the approved building permit design, whether in terms of changing the structure's use, increasing its size or adding new structures, as such restrictions only follow from the conditions defined in the local zoning plan or in the decision on land use and development. It is further argued that given that the procedure of issuing a replacement permit is subject to the applicable provisions governing the issuance of a “regular” building permit, as a matter of fact, there is no risk that the investor would avoid compliance with the specific legal requirements adhered to when issuing a new building permit. Those who oppose the application of the structure's identity principle presented in judicial decisions also point to the fact that the very idea of identity is unlikely to be precisely defined as there are no clear-cut criteria as to how far-reaching changes to the design can be in order to result in having to classify the structure as different from the originally-approved structure, which creates the risk of arbitrary decisions on the part of administrative authorities. Moreover, it is also claimed that the objective behind replacement permits was to accelerate the investment process by making it possible for investors to make the necessary changes to the design while not having to deal with some of redundant formalities involved in a new building permit application procedure.

The authors of this article argue that more convincing is the view allowing radi-

cal amendments to the original design, even those which modify the structure's identity, as long as they are consistent with the property's planning purpose. Precluding amendments to the original design only on the basis of the legislator's presumed intention which, however, have not been reflected in any specific provision of the law should be considered a display of excessive formalism that does not deserve support.

Regardless of the existence of robust legal arguments supporting the claim that amendments to the building permit de-

sign modifying, in principle, its identity and other material parameters, e.g. from a residential multi-dwelling building to an office building of a different size, location on the plot, etc., should be allowed in accordance with the procedure defined in Art. 36a of the Building Law (i.e. replacement permit), every investor must bear in mind the risk that obtaining such permit will be ruled out or that even a permit that has already been obtained can be effectively questioned by other dissatisfied parties based on views expressed in judicial deci-

sions opposing the solutions in questions as referred to above.

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