

Legal opinion

Material deviation from an approved building plan: amended regulations.

The wide-ranging reform of Poland's construction laws that came into effect in September of last year (Act of 13 February 2020 amending the Construction Law and some other acts, Journal of Laws 2020, item 471) introduced, among other things, significant changes concerning material deviations from approved building plans.

Under the amended text of Article 36a, paragraph 1 of the Construction Law of 7 July 1994 (Journal of Laws 2020, item 1333, consolidated text with subsequent alterations, henceforth **Construction Law**), any material deviation from the plot development plan, site development plan, architectural and construction design, or other conditions of an approved building permit is only possible after requesting and obtaining an amendment to the building permit from the competent architectural and construction administration authority.

And in the case of certain works that do not require a building permit but which are notifiable, namely those referred to in Article 29, paragraph 1, items 1-4 of the Construction Law (construction of detached single-family houses, of electricity, water supply, sewage, heating or gas systems, of small detached single-storey transformer stations, and of buildings in restricted areas); Article 29, paragraph 3, item 1, letter (a) (redevelopment of external partitions and structural elements of single family-houses); and Article 29, paragraph 3, item 3, letter (d) (installation of advertising boards and structures), any material deviation from the plot development plan, site development plan, or architectural and construction design enclosed with a construction notice to

which no objections were raised by the competent architectural and construction administration authority is only possible after requesting and obtaining a building permit for the entire construction undertaking, or after submitting a replacement notice (Article 36a, paragraph 1a of the Construction Law).

Applying for an amendment to a building permit is governed by the same provisions that govern applying for a building permit. Submitting a replacement construction notice is governed by the same provisions that govern submitting a construction notice.

Under Article 36a, paragraph 6 of the Construction Law, it is the architect who makes the determination as to whether a planned deviation from the plot development plan, site development plan, architectural and construction design, or other conditions of an approved building permit is material or immaterial, based on rules set forth in the Construction Law.

An immaterial deviation does not require an amendment to the building permit, or a replacement construction notice. But the architect has to include information about such a deviation in the plot development plan, site development plan, or architectural and construction design. This information has to consist of a descriptive part and a graphical part.

And what about the rules on which the architect's determination is to be based? Before the legal change, the Construction Law indicated what kind of deviations did not qualify as material. Now it indicates what kind of deviations have to be qualified as material.

Thus, under Article 36a, paragraph 5, the following deviations from the plot development plan, site development plan, or architectural and construction design are material deviations: (i) changes in the plot development plan or site development plan that extend the impact area of the planned building beyond the land plot on which it is to be built; (ii) changes in the building's "characteristic parameters," namely: built-up surface – changes exceeding 5%; height, length or breadth – changes exceeding 2%; and the number of storeys (previously, the law merely stated that a deviation was immaterial

as long as the building's maximum allowed dimensions were not exceeded); (iii) changes in those components of the building that are required to ensure that it meets the needs of persons with disabilities (as defined by the Convention on the Rights of Persons with Disabilities adopted on 13 December 2006 in New York), including seniors; (iv) change of the intended use of the building or a part of it; (v) changes in the local spatial development plan or other local laws, or in the zoning conditions decision; (vi) changes that trigger the need to obtain, or amend, administrative decisions, permits, or arrangements with third parties that are required to obtain a building permit or to submit a construction notice about works of the kind referred to in Article 29, paragraph 1, items 1-4; Article 29, paragraph 3, item 1, letter (a); or Article 29, paragraph 3, item 3, letter (d) of the Construction Law; (vii) change of the source of heat or hot water – from a liquid fuel, gas, renewable energy source, or district heating network to a fossil fuel. (This latter criterion is totally new.)

The above criteria do not apply to technical equipment and small architecture, in the case of which the architect has full discretion in determining whether a deviation is a material one or not.

Also, the architect does not have to qualify the following deviations as material, provided that they are agreed upon with relevant third parties: (i) changes in fire protection systems, if approved by a fire protection expert; (ii) changes in the conditions of a permit issued by a competent monument conservation officer under regulations on the protection and care of monuments, if approved by the voivodship monument conservation officer; (iii) changes in hygienic and health conditions, if approved by the competent voivodship sanitary inspector.

The new regulations apply to building permits issued after the coming into force of the amended law. However, the new criteria for determining whether a deviation is a material one or not apply also in cases where the permit was issued earlier.

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