

# Legal opinion

## Deviation from technical building requirements

Under Article 5, paragraph 1 of the Construction Law of 7 July 1994 (consolidated text: Journal of Laws 2021, item 2351, henceforth "CL"), all construction projects must be designed and built in conformity with "technical building regulations," i.e. regulations issued by competent ministers that set out technical requirements for buildings, their location, and use. From a practical standpoint, the most important of these is the Minister of Infrastructure Regulation of 12 April 2002 on technical requirements for buildings and their location (Journal of Laws 2019, item 1065 with subsequent changes), which specifies detailed technical standards for buildings.

In principle, therefore, anything that the architect includes in the design of a project should conform to the requirements set forth in these regulations – both when it comes to the mode of construction and to use.

But there are situations in which the Construction Law permits deviation from technical requirements.

Under Article 9 paragraph 1 of CL, such deviation is permissible "in exceptionally justified cases". The use of this general wording means that it is up to the architectural and construction authority to determine, in each individual case, whether the circumstances are sufficiently exceptional as to justify granting a consent for deviation. The assumption is that officials will examine the facts of each case taking into account the nature of the requirements from which deviation is being sought. Among circumstances that administrative courts have said in their rulings officials should particularly consider are: the lay of the land plot in question, and the development status of the neighbouring properties.

An "exceptionally justified case" can be taken to exist when, due to certain circumstances, fulfilling the requirements set forth in technical building regulations is not possible, especially where those requirements effectively deprive an investor – who has a reasonable right to use a plot for building – of their right to build on that plot.

(If an investor is prevented from building only by local master plans, or by regulations other than technical building regulations, granting a consent for deviation is not allowed.)

Article 9 of CL also sets out instances when a consent for deviation must not be granted, namely if it might jeopardise human life or the security of property, or if it would cause a deterioration in health and sanitary conditions, in conditions of use, or in the state of the environment. Also, in the case of public buildings and multi-family residential buildings, the granting of a deviation must not result in restricted accessibility to persons with special needs, as defined in the Act of 19 July 2019 on ensuring accessibility to people with special needs. Furthermore, a consent for deviation cannot be granted as part of the procedure for legalising unauthorised structures.

The procedure to receive a consent for deviation from technical requirements is initiated by the investor submitting an application for deviation as part of proceedings aimed at issuance of building permit or amending building permit.

It is accepted too, to submit the application for deviation earlier, while applying for an outline planning permit, i.e. before the building permit procedure is initiated.

Where a proposed project's architectural and construction design does not conform to relevant technical requirements and the investor has not applied for deviation, the architectural and construction authority notifies the investor that they have to apply for deviation or face rejection of the building permit application. (The authority does not have the power to initiate the deviation procedure on its own, ex officio.)

Upon receipt of an application for deviation from an investor, the architectural and construction authority submits its own application to the relevant minister (i.e., the minister who established the regulations from which deviation is being sought) for authorisation to grant the consent for deviation. (Investors are not entitled to apply to the minister directly.)

The authority's application should contain the following: (i) description of the planned structure and, if necessary, the plot/site development plan, as well as, in cases where the deviation might affect the environment or neighbouring properties, also the plot/site development plans of these properties, including any existing and planned structures on them; (ii) the authority's opinion, including a detailed justification of the necessity of deviation; (iii) proposed substitute solutions; (iii) in the case of listed historic buildings, or other structures situated in areas subject to conservation protection – a positive opinion from the voivodship monument conservation officer about the deviation being sought; (v) in the case of deviation from fire safety regulations – an opinion from a fire safety expert, and permission from the voivodship fire service commissioner to use the substitute solutions; (vi) in the case of deviation from hygienic and health requirements – a positive opinion about the proposed solutions from the voivodship sanitary inspector.

Upon receipt of such an application, the minister takes a stance on whether to authorise the authority to grant the consent for deviation or not. Refusal to authorise means the authority cannot grant the consent for deviation to the investor. But if the minister authorises the authority to grant the consent for deviation, this does not prejudice the authority's potential decision on whether to grant it or not: the authority may grant it or refuse to do so.

A refusal cannot be appealed from separately: it can be used as a point of appeal against the principal decision (in the building permit procedure).

A positive decision, granting the sought deviation, paves the way for the issuance of a building permit that includes elements that deviate from technical building regulations (to the extent permitted by the decision).

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