Artur Kosicki[1]

Zmiana sposobu użytkowania obiektu lub jego części a ochrona interesów osób trzecich

DOI 10.5604/01.3001.0016.3043

Streszczenie:

Prawo budowlane wprowadza obowiązek użytkowania obiektu budowlanego w sposób zgodny z jego przeznaczeniem oraz wymaganiami ochrony środowiska. W przypadku jednak gdy chcemy zmienić jego przeznaczenie konieczne okazać się może dokonanie zgłoszenia zmiany sposobu użytkowania obiektu lub jego części właściwemu organowi administracji architektoniczno-budowlanej. Każda taka zmiana powiązana jest bowiem w jakimś stopniu ze zmianą parametrów technicznych, a zwłaszcza zmianą warunków użytkowania. W niniejszym artykule podejmuję problematykę ochrony interesów osób trzecich w przedmiocie zgłoszenia zmiany sposobu użytkowania obiektu budowlanego lub jego części, a także w przypadku samowolnej zmiany sposobu użytkowania obiektu budowlanego.

Słowa kluczowe: zmiana sposobu użytkowania, obiekt budowlany, ochrona interesów osób trzecich, zgłoszenie.

Change of use of a building facility or part of it and protection of third parties' interests

Abstract:

The Construction Law introduces the obligation to use a building facility in a manner consistent with its intended use and environmental protection requirements. However, if we want to change the intended use of a building facility or its part, it may be necessary to notify a change of use of the facility or its part to the competent authority of architecture and construction administration. Any such change is to some extent connected with a change of technical parameters, and in particular with a change of the conditions of use. In this paper I address the issue of protection of third parties' interests in the matter of notification of a change in use of a building facility or its part, and also in the case of an arbitrary, i.e. unauthorised, change in use of a building facility.

Keywords: change of use, building facility, protection of third parties' interests, notification

[1] Doktor nauk prawnych Artur Kosicki, Wydział Prawa Uniwersytet w Białymstoku, e-mail: dpi@arturkosicki. com.pl, ORCID-0000-0003-2363-7015, tel. 698 686 333.

Introduction

A change in the intended use of a building facility or its part is understood, in particular, as the commencement or abandonment of an activity that alters the conditions of: fire safety, flood safety, labour, health, hygiene and sanitary conditions, environmental protection, or the magnitude or distribution of loads, as well as the undertaking of activity classified as a project likely to have a significant impact on the environment within the meaning of the Act of 3 October 2008 on providing information on the environment and its protection, public participation in environmental protection and environmental impact assessments[2]. If a change in the use of a building facility or its part involves the performance of construction work that requires obtaining a building permit, then the issue on the merits of the case shall be resolved in the decision on the building permit in the manner provided for the issuance of that permit[3]. The procedure for making an effective notification of a change of use of a building facility can therefore only apply to such construction work that does not require a construction permit. On the other hand, in the case of construction works that are subject to notification, the change of the intended use of a building facility (or part of it) is carried out by way of a notification, and Article 30(2–3) of the Construction Law shall apply accordingly[4]. The purpose of this paper is to evaluate the legal regulations from the perspective of the effectiveness of the protection of the interests of third parties both in the case of a change in the intended use of a building facility or part of it, as well as in the case of an arbitrary change in use.

1. Change of use of a building facility or part of it

The legislator, in Article 71(1) of the Construction Law, does not enumerate all the cases it treats as a change in the use of a building facility or part of it, as evidenced by the use of the term “in particular”. This means that the types of “alterations” or activities that change certain conditions listed in this provision are listed only as examples[5]. Thus, in addition to the situations indicated in the above provision (the most common and typical ones), there may be other situations that can also qualify as a change in the intended use of a building facility. It can be concluded that the situation of the owner of a building facility who wants to change its use on the grounds of Article 71 of the Construction Law is unpredictable, since it is not the law, but the will of the competent authority that can determine that the owner’s behaviour will be considered in violation of Article 71(2) of the Construction Law.

[2] Zob.: art. 71 ust. 1 pkt 2 i 3 ustawy z dnia 7 lipca 1994 r. – Prawo budowlane (Dz. U. z 2021 r. poz. 2351, ze zm.), dalej: Prawo budowlane.
[3] Zob.: art. 71 ust. 6 pkt 1 Prawa budowlanego
[4] Zob.: art. 71 ust. 6 pkt 2 Prawa budowlanego.
[5] Por: wyrok NSA z 11 grudnia 2007 r., II OSK 1664/06, CBOSA.

According to the position expressed in the case-law of administrative courts, as well as in the literature on the subject, intensification of the current use of a building facility or part of it should also be considered a change when it is causing the effects listed in Article 71(1)(2) of the Construction Law[6]. This can occur, for example, by increasing the manufacturing or service activities previously performed at the facility, which may adversely affect, among other things, the health or hygiene and sanitary conditions for the surrounding area, or even interfere with the provisions of the local zoning plan[7]. There does not have to be a deterioration of these conditions. All that is sufficient is that there has been a change in them[8].

According to E. Janiszewska-Kuropatwa, a change in the use of a building facility or part of it mainly boils down to the need to determine whether and to what extent the commencement or abandonment of an activity associated with its use alters the requirements for the facility, mainly related to the safety of its continued, changed use. The cited author emphasizes that these requirements are set forth in Article 5 of the Construction Law and take into account the conditions listed in Article 71(1)(2) of that act in terms of fire safety, flood safety, labour, health, hygiene and sanitation, environmental protection or the magnitude or distribution of loads, indicating the necessary range of activities that should be carried out in connection with the change of use of a building facility or part of it, taking into account the necessary design work related, for example, to the alteration and adaptation of rooms in the building to the new needs. She adds that these studies require, among other things, prior verification of the strength of the structure of the facility and possible design of its reinforcements, making changes in the structural layout of the facility and perhaps also in its cubic volume, redesigning the utility systems in the building adapting it to the new function and providing new design solutions related to the changed demand for and supply of water, electricity, heat, and other utilities[9]. At the same time – both in theory and case-law – it is argued that it is only by determining the nature of these activities that the permissibility of the change in the use of the facility and the possible need to obtain an appropriate permit can be fully assessed[10].

A change in the use of a building facility or part of it should be preceded by filing a notification with the *starosta* (the head of the administrative district of *powiat*) or mayor of a

[6] Por.: wyrok NSA z 10 grudnia 1990 r., IV SA 602/90, ONSA 1991, nr 1, poz. 9; wyrok WSA w Lublinie z 27 kwietnia 2004 r., II SA/Lu 102/03, CBOSA; wyrok WSA w Warszawie z 29 czerwca 2005 r., VII SA/Wa 476/2005, LEX nr 179074; wyrok NSA z 8 lutego 2007 r., II OSK 306/06, CBOSA; wyrok WSA w Opolu z 27 września 2007 r., II SA/Op 288/07, LEX nr 376753; wyrok WSA w Warszawie z 2 grudnia 2009 r., VIII SA/Wa 440/09, Legalis; Z. Kostka, *Prawo budowlane. Komentarz*, Gdańsk 2005, s. 172.

[7] Por.: wyrok WSA w Opolu z 6 marca 2008 r., II SA/Op 489/07, CBOSA.

[8] Por.: wyrok WSA w Warszawie z 5 grudnia 2006 r., VII SA/Wa 1662/06, CBOSA; wyrok WSA w Opolu z 30 marca 2010 r., II SA/Op 385/09, CBOSA.

[9] Por.: E. Janiszewska-Kuropatwa, [w:] Z. Niewiadomski (red.), *Prawo budowlane, Komentarz*, Warszawa 2015, s. 658.

[10] Por.: S. Serafin, Zagadnienia techniczne w prawie budowlanym, Warszawa 2005, s. 210-211; wyrok NSA z 15 października 1998 r., IV SA 1876/96, CBOSA; wyrok NSA z 22 czerwca 2001 r., II SA/Kr 1430/98, „Palestra" 2002, nr 9-10, poz. 197.

town with the rights of a separate administrative district. The change may take place if, within 30 days from the date of delivery of the notification, the architectural and construction administration authority does not raise objections by way of a decision and no later than after 2 years from the delivery of the notification[11]. The notification must specify the existing and intended use of the building facility or part of it. It should be accompanied by:

1. a description and drawing specifying the location of the building facility in relation to the boundaries of the property and other building facilities existing or under construction on this and neighbouring properties, with the designation of the part of the building facility in which the change of use is intended;
2. a concise technical description, specifying the type and characteristics of the building facility and its design, along with technical and utility data, including the magnitude and distribution of loads, and, if necessary, technology-related data;
3. a statement that the applicant has the right to use the property for construction purposes;
4. a certificate or a copy of a certificate issued by the head of the municipality or the mayor or a town or city confirming the compliance of the intended use of the building facility with the provisions of the local spatial development (zoning) plan in force, or a decision on land development conditions or a copy thereof in the absence of a local spatial development plan in force;
5. in the case of a change of the intended use referred to in Article 71(1)(2) of the Construction Law – a technical expert's report prepared by a person with an unlimited construction license in the relevant specialty, or a copy of such report;
6. where needed – permits, arrangements and opinions required by separate regulations, in particular the decision on environmental conditions, in accordance with Article 72(3) of the Act of 3 October 2008 on providing information on the environment and its protection, public participation in environmental protection and environmental impact assessments, or copies of such permits, arrangements and opinions[12].

In the case of a change in the use of a building facility or part of it, involving the commencement or abandonment in the building facility or part of it of an activity that changes fire safety conditions, the above notification must be accompanied by an expert opinion of a fire safety expert[13].

The examination of a notification after it has been filed is carried out on the basis of the rules set forth in the Construction Law, so it must meet (albeit in a simplified manner) certain

[11] Zob.: art. 71 ust. 4 zdanie pierwsze Prawa budowlanego.
[12] Zob.: art. 71 ust. 2 pkt 1-6 Prawa budowlanego.
[13] Zob.: art. 71 ust. 2a Prawa budowlanego.

formal and substantive legal conditions for its effectiveness – similarly to an application for a construction permit – since the purpose of the authorities' action with regard to the notification is to determine whether the planned change in the intended use of the facility is in compliance with the law. It should be noted that the information relevant to the protection of the interests of third parties is primarily that contained in the documents referred to in the above paragraphs. For example, it is important to know whether and to what extent the investor has the right to use the property, the building or part of it for construction purposes, where the planned change of use is to take place, and what is the scope and type of the change, so that its impact on neighbouring properties can be determined, or an expert report be delivered on the impact of the change in the use of the facility on aspects such as the structure, hygienic and sanitary conditions, health conditions, or fire conditions of neighbouring facilities.

The case-law of the administrative courts has presented a view that the assessment of the change in the use of a facility should come down to determining whether and to what extent the commencement of a specific activity in a building will cause a change in the requirements placed on the facility relating to its nuisance and safety of use, which may affect neighbouring properties. At the same time, even preserving the same function of a facility does not determine the identity of the activities carried out there. Thus, a change in the intended use of a building facility or part of it – according to the view presented in these rulings – should be understood as any act or omission that changes the previous use of the facility and affects its purpose, technical and construction conditions, or the surrounding environment. This is because it may involve an activity that, irrespective of the change in the nature of the intended use of a building facility, leads to a change in the internal or external conditions and impacts resulting from the of use of that facility[14].

As can be seen from the provisions cited above, the structure of the concept of change of the intended use of a building facility is based on a list of situations that are considered a change in the use of a facility, and even these exemplary situations are also not straightforward. Hence, in the case-law of administrative courts[15], a view is expressed that when applying these provisions, it is necessary to take into account the purpose of the provisions concerning changes in the intended use of a building facility, since a literal reading of Article 71 does not fully answer the question of what changes in the use of a building facility are subject to administrative regulations. It is also noted that in interpreting Article 71(1) of the Construction Law, it should be considered that this provision is a regulation interfering with

[14] Por.: wyrok WSA w Olsztynie z 22 października 2009 r., II SA/Ol 779/09, Legalis; wyrok NSA z 13 stycznia 2011 r., II OSK 20/10, CBOSA; wyrok NSA z 29 listopada 2017 r., II OSK 282/17, CBOSA; wyrok WSA w Białymstoku z 28 grudnia 2018 r., II SA/Bk 623/18; wyrok NSA z 30 października 2019 r., II OSK 345/19, CBOSA.

[15] Por.: wyrok NSA z 13 maja 2014 r., II OSK 1532/13, wyrok NSA z 7 grudnia 2017 r., II OSK 2531/16, wyrok WSA w Warszawie z 13 listopada 2017 r., VII SA/Wa 1590/17, wyrok NSA z 16 lipca 2020 r., II OSK 737/20 – wszystkie CBOSA.

the right to property, that is a value subject to constitutional protection (Article 64 of the Polish Constitution). In turn, the rationale for restricting this constitutional right is to protect higher values, which, according to Article 5(1)[16] in conjunction with Article 5(2) of the Construction Law[17], are subject to protection during the design as well as construction of a building facility. According to these courts, the restriction of the freedom to change the intended use of a building facility by effectively accepting a notification, is aimed at protecting these values after the completion of its construction, when it is already in use while, when interpreting Article 71(2) of the Construction Law, it is necessary to balance the interests related to protecting the values indicated in Article 5(1) of this act with the interests of the owner of the building facility where the change of use has occurred. The referenced case law emphasizes that balancing these interests is necessary, especially in cases where it cannot be considered that a change in the use of a building facility or part of it can clearly threaten the values protected by the Construction Law[18].

2. Protection of third-party interests

According to the wording of Article 71(5)(1)–(3) of the Construction Law, the architectural and construction administrative authority is obliged to raise an objection if the planned change in the intended use of a building facility or part of it: requires the performance of construction works, covered by the obligation to obtain a building permit; violates the provisions of the

[16] Art. 5 ust. 1 Prawa budowlanego stanowi, że obiekt budowlany jako całość oraz jego poszczególne części, wraz ze związanymi z nim urządzeniami budowlanymi należy, biorąc pod uwagę przewidywany okres użytkowania, projektować i budować w sposób określony w przepisach, w tym techniczno-budowlanych, oraz zgodnie z zasadami wiedzy technicznej, zapewniając:
1) spełnienie podstawowych wymagań dotyczących obiektów budowlanych określonych w załączniku I do rozporządzenia Parlamentu Europejskiego i Rady (UE) Nr 305/2011 z dnia 9 marca 2011 r. ustanawiającego zharmonizowane warunki wprowadzania do obrotu wyrobów budowlanych i uchylającego dyrektywę Rady 89/106/ EWG (Dz. Urz. UE L 88 z 04.04.2011, str. 5, z późn. zm.), dotyczących: a) nośności i stateczności konstrukcji, b) bezpieczeństwa pożarowego, c) higieny, zdrowia i środowiska, d) bezpieczeństwa użytkowania i dostępności obiektów, e) ochrony przed hałasem, f) oszczędności energii i izolacyjności cieplnej, g) zrównoważonego wykorzystania
zasobów naturalnych;
2) warunki użytkowe zgodne z przeznaczeniem obiektu, w szczególności w zakresie:
a) zaopatrzenia w wodę i energię elektryczną oraz, odpowiednio do potrzeb, w energię cieplną i paliwa, przy założeniu efektywnego wykorzystania tych czynników,
b) usuwania ścieków, wody opadowej i odpadów;
2a) możliwość dostępu do usług telekomunikacyjnych, w szczególności w zakresie szerokopasmowego dostępu do Internetu;
3) możliwość utrzymania właściwego stanu technicznego;
4) niezbędne warunki do korzystania z obiektów użyteczności publicznej i mieszkaniowego budownictwa wielorodzinnego przez osoby niepełnosprawne, o których mowa w art. 1 Konwencji o prawach osób niepełnosprawnych, sporządzonej w Nowym Jorku dnia 13 grudnia 2006 r. (Dz. U. z 2012 r. poz. 1169 oraz z 2018 r. poz. 1217), w tym osoby starsze;
4a) minimalny udział lokali mieszkalnych dostępnych dla osób niepełnosprawnych, o których mowa w art. 1 Konwencji o prawach osób niepełnosprawnych, sporządzonej w Nowym Jorku dnia 13 grudnia 2006 r., w tym osób starszych w ogólnej liczbie lokali mieszkalnych w budynku wielorodzinnym;
5) warunki bezpieczeństwa i higieny pracy;
6) ochronę ludności, zgodnie z wymaganiami obrony cywilnej;
7) ochronę obiektów wpisanych do rejestru zabytków oraz obiektów objętych ochroną konserwatorską;
8) odpowiednie usytuowanie na działce budowlanej;
9) poszanowanie, występujących w obszarze oddziaływania obiektu, uzasadnionych interesów osób trzecich, w tym zapewnienie dostępu do drogi publicznej;
10) warunki bezpieczeństwa i ochrony zdrowia osób przebywających na terenie budowy.

[17] Zgodnie z art. 5 ust. 2 Prawa budowlanego obiekt budowlany należy użytkować w sposób zgodny z jego przeznaczeniem i wymaganiami ochrony środowiska oraz utrzymywać w należytym stanie technicznym i estetycznym, nie dopuszczając do nadmiernego pogorszenia jego właściwości użytkowych i sprawności technicznej, w szczególności w zakresie związanym z wymaganiami, o których mowa w art. 5 ust. 1 pkt 1–7.

[18] Por.: wyrok NSA z 13 maja 2014 r., II OSK 1532/13, wyrok NSA z 7 grudnia 2017 r., II OSK 2531/16, wyrok WSA w Warszawie z 13 listopada 2017 r., VII SA/Wa 1590/17, wyrok NSA z 16 lipca 2020 r., II OSK 737/20 – wszystkie CBOSA.

valid local spatial development (zoning) plan and other acts of local law or the decision on conditions of construction and land development, in the absence of a valid spatial development plan; may cause unacceptable threats to the safety of people or property, deterioration of the environment or impairment to preservation of historical monuments, deterioration of health and sanitary conditions; introduction, perpetuation or increase of restrictions or nuisances to neighbouring areas. According to the view expressed in a ruling of 25 February 2016 of the Supreme Administrative Court[19] , this means that in proceedings on changing the use of a building facility or part of it, it shall be examined how the change affects neighbouring properties. Indeed, in accordance with the above provision, if the change may result in the unacceptable introduction, perpetuation or increase of restrictions or nuisances to neighbouring areas, the competent authority shall object by means of a decision. In addition, such proceedings shall examine whether the change in the use of a building facility or part of it is in accordance with the provisions of the local zoning plan. This is because a notification of a change in the use of a building facility must be accompanied by a certificate from the head of the municipality or the mayor or president of the town, on the compliance of the intended use of the building facility with the provisions of the local zoning plan in force. According to the Court, these regulations are aiming, among other things, at protecting the interests of neighbouring property owners both against the impermissible change in the use of a building facility that would introduce, perpetuate or increase restrictions or nuisances affecting their properties, and against violating the provisions of the applicable local zoning plan, including those enacted to regulate the harmonious use of property in a specific area.

Thus, there is no doubt that proceedings concerning a planned change of the use of a building facility or part of it may concern the legal interest of neighbouring property owners and also may apply when such a change may affect these properties by creating or adversely changing restrictions and nuisances, as there are legal provisions (indicated above) protecting this interest. The validity of the of this conclusion is also supported by the content of the provisions of the Regulation of the Minister of Infrastructure of 12 April 2002 on the technical conditions to be met by buildings and their location. According to § 2(1), the provisions of the above regulation shall be applied to the design, construction and re-construction of, as well as to the change in the use of buildings and above- and below-ground structures fulfilling the utility functions of buildings, as well as to related construction equipment, subject to § 135(10) and § 207(2) of the above regulation. In turn, according to § 1 of that regulation, it establishes the technical conditions to which buildings and related equipment should conform, their location on a building plot and the development of plots of

[19] Wyrok NSA z 25 lutego 2016 r., II OSK 1591/14, CBOSA.

land intended for development, ensuring compliance with the requirements of Articles 5 and 6 of the Act of 7 July 1994 – Construction Law. That means that, when there is a change in the use of a building facility or part of it, one must also ensure that the requirements referred to in Article 5 of the Construction Law are met, i.e., among other things, "respect for the legitimate interests of third parties".

It should be noted that if it is necessary to supplement the application for a notification of a change in the use of a building facility or part of it, as in the case of a notification of construction works referred to in Article 30 of the Construction Law, the competent authority of architectural and construction administration shall impose on the notifier, by means of a decision, the obligation to supplement the missing documents within a specified period, and if they are not supplemented, it shall object by means of a decision[20]. Also, Article 30(6a) of the Construction Law[21] applies *mutatis mutandis* to objections.

In the case-law of administrative courts[22] and the doctrine[23], a view has been expressed, which I fully share, that in the proceedings concerning the change in the use of a building or part of it, as in the proceedings referred to in Article 30 of the aforementioned act, no third parties other than the notifier shall participate. It has been pointed out that the notification procedure for a change in the use of a building facility, as referred to in Article 71 of the Act of 7 July 1994 – the Construction Law, like the notification proceedings referred to in Article 30 of that act, ends with the expiration of the 30-day period referred to therein, calculated from the date of delivery of the notification to the authority, unless the authority raises an objection by way of an administrative decision before the expiration of that period. This means that it is exclusively the applicant (the entity that files the application) who is a party to the filing procedure, and that a case pending as a result of filing an application does not need to be concluded by taking a decision, except if the authority raises an objection within a certain period of time. It follows therefore, that in the proceedings concerning the notification of a change in the use of a facility or part of it, third parties cannot protect their interests on their own, since they do not participate in the examination of whether the notification is in conformance with the law.

In my opinion, the protection of third-party interests in this situation includes only the legal interests of third parties whose property is located in the vicinity of the facility where the planned change of use is to take place. The authority's task is only to indicate the reasons

[20] Zob.: art. 71 ust. 3 Prawa budowlanego.
[21] Por.: art. 71 ust. 4b Prawa budowlanego.
[22] Patrz: postanowienie NSA z 16 maja 2007 r., II OSK 529/07, wyrok WSA w Gorzowie Wielkopolskim z 3 grudnia 2008 r., II SAB/Go 24/08, wyrok WSA w Gorzowie Wielkopolskim z 15 września 2010 r., II SA/Go 491/10, postanowienie WSA w Łodzi z 16 marca 2012 r., II SAB/Łd 42/12 – CBOSA.
[23] Por.: M. Błażewski, *Zasada ochrony uzasadnionych interesów osób trzecich w procesie budowlanym*, Kraków 2014, s. 79; A. Despot-Mładanowicz, [w:] A. Gliniecki (red.), *Prawo budowlane. Komentarz*, Warszawa 2014, s. 622; K. Małysa-Sulińska, *Administracyjnoprawne aspekty inwestycji budowlanych*, Warszawa 2012, s. 274.

why it has come to the conclusion that a particular change in the use of a facility or part of it may result in the unacceptable introduction, perpetuation or increase of restrictions or nuisances to neighbouring properties. Therefore, what is at issue is a situation of a potential threat, which the authority, having regard to the changes covered by the notification, is obliged to prevent, as it may result in the unacceptable introduction, perpetuation or increase of restrictions or nuisances to the affected properties. At the same time, the regulation in question does not mean that, on the grounds of other administrative proceedings, other entities seeking protection for their rights from the authorities or challenging the legality of a change in the use of a facility or part of it, are deprived of any rights, as they may become parties to legalization proceedings initiated under Article 71a of the Construction Law. This provision regulates issues related to unauthorized construction (construction without a permit), involving a change in the use of a facility or part of it without the required notification or remedial proceedings under Articles 50–51 of the Construction Law, if the change in the use of a building facility with associated construction works occurred without the required construction permit[24]. No provision of this law, including in particular the content of Article 71 of the Construction Law, implies, in the notification procedure, any rights or obligations with respect to owners of properties adjacent to the property on which the facility or part of it covered by this notification is located. The protection of third-party interests in the situation of a planned change in the use a facility thus concerns the interests of any third party. In turn, the legislator's omission in the Construction Law's Article 5(2) of the protection of the legitimate interests of third parties at this stage of the construction process finds no justification in Articles 21(1) and 64, or in the right to a court arising under Article 45,, which guarantee the protection of property rights and therefore it violates Article 31(3) of the Constitution of the Republic of Poland, as it unreasonably restricts the essence of these rights and freedoms.

It follows from the above that in the case of notification of a change in the use of a facility or part of it, the level of legal protection of third parties who are not even duly notified of it, is significantly lower than in the situation of applying legal constructions oriented towards obtaining a decision of the authority in the form of an administrative decision. However, due to the legislator's use of complementary legal solutions to improve this protection, and the fact that the notification of a change in the use of a facility or part of it concerns projects of low complexity and negligible impact on the environment, it can be considered to be within the standards of the constitutional democratic principles and the rule of law. A third party who is dissatisfied due to the inability to access proceedings on the notification of a change in the use of a facility has the right to demand that the competent construction authorities apply to

[24] Szerzej na ten temat patrz: A. Kosicki, [w:] A. Plucińska-Filipowicz, M. Wierzbowski (red.), *Prawo budowlane. Komentarz*, Warszawa 2016, s. 689-690; podobnie: wyrok WSA w Gliwicach z 1 marca 2004 r., II SA/Ka 1813/02, CBOSA.

the case not only the measures provided for in Article 51 or Article 71a of the Construction Law, but also the provisions of Chapters 12 and 13 in Section II of the Administrative Procedure Code[25].

Notification of a change in the use of a facility or part of it after changes have been made to the facility is treated as notification of an arbitrary (unpermitted) change in the use of a building facility or part of it and does not have the legal effects[26] attributed to a lawful notification. This results in the application of policing powers by the competent construction supervision authority, as specified in Article 71a of the Construction Law. It should be emphasized that this provision will apply both in the case of making a change in the use of a building facility or part of it without the required notification to the competent public administration authority[27], and in the case of changing the use of a building facility or part of it despite the fact that an objection to such notification has been filed[28].

Thus, in the event of a change in the use of a building facility or part of it without the required notification, the construction supervision authority, by means of a decision, shall suspend this use and impose the obligation to submit within a specified period of time the documents referred to in Article 71(2) of the Construction Law[29]. According to a judgment of the Supreme Administrative Court of 8 February 2007, a prerequisite for the issuance of such a ruling is the prior determination, in an unambiguous and unquestionable manner, in the course of administrative proceedings, that there has been an arbitrary change in the use of a building facility or part of it. According to the court, however, in order to be able to make such a determination, it is first necessary to show the originally intended and permitted use of the facility and how it is currently being used. The SAC stresses that this should also be done on the basis of issued permits for a specific building facility or part of it and factual findings

[25] Należy pamiętać, że od 1 czerwca 2017 r. weryfikacja skuteczności prawnej milczącego załatwienia sprawy, w tym milczącej zgody, o której mowa w art. 122a § 2 pkt 2 ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego zwanej dalej „k.p.a." (tekst jedn. Dz. U. z 2022 r. poz. 2000, 2185) i której egzemplifikacją jest m.in. art. 71 ust. 2 Prawa budowlanego, odbywa się na zasadach określonych w art. 122g k.p.a. W mojej ocenie słabości tego rozwiązania, nie tylko w sprawach zgłoszeń budowlanych ma niwelować odpowiednie stosowanie przepisów rozdziału 12 i 13 w dziale II wymienionego kodeksu. Przepis art. 122g k.p.a. odsyła bowiem do stosowanych odpowiednio przepisów Kodeksu o wznowieniu postępowania (art. 145 i n.) oraz o uchyleniu, zmianie i stwierdzeniu nieważności decyzji (art. 154 i n.). Nie ulega wątpliwości, że instytucja milczącego załatwienia sprawy nie nadaje się do powszechnego stosowania do ogółu spraw administracyjnych, a możliwość jej zastosowania musi wynikać z przepisu szczególnego. Nie ulega też wątpliwości, że decydując o uregulowaniu na gruncie k.p.a. „Milczącego załatwienia sprawy", ustawodawca miał na względzie m.in. właśnie przepis art. 71 Prawa budowlanego. Wyraźnie na to wskazano w uzasadnieniu do rządowego projektu ustawy o zmianie ustawy Kodeks postępowania administracyjnego oraz niektórych innych ustaw (uzasadnienie do Rządowego projektu ustawy o zmianie ustawy – Kodeks postępowania administracyjnego oraz niektórych innych, Druk sejmowy nr 1183 z 28 grudnia 2016 r., https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1183). Milczące załatwienie sprawy, jako szczególny sposób jej rozstrzygnięcia, nie podlega zaskarżeniu na ogólnych zasadach k.p.a. ani w drodze skargi do sądu administracyjnego (niezmieniony katalog aktów, czynności i zaniechań podlegających kontroli sądów administracyjnych – art. 3 § 2 ustawy z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi, Dz. U. z 2022 r. poz. 329, 655, 1457, z 1855 zwana dalej: „p.p.s.a."). W tym przypadku nie mamy bowiem do czynienia z decyzją ani z innym aktem lub czynnością, która mogłaby stać się przedmiotem postępowania odwoławczego lub kontroli sądu administracyjnego. Moim zdaniem, na potrzeby weryfikacji legalności działania administracji, w tym implementowania wyniku sądowej kontroli milczącego załatwienia sprawy, a także ochrony interesów osób trzecich w m.in. sprawach milczącej zgody budowlanej, niezbędne było stworzenie możliwości niejako „reaktywowania" milcząco załatwionej sprawy przez jej ponowne rozpatrzenie i wydanie decyzji administracyjnej.

[26] Zob.: art. 71 ust. 7 Prawa budowlanego.

[27] Zob.: art. 71a ust. 1 Prawa budowlanego.

[28] Por.: A. Kosicki, [w:] *Prawo budowlane. Komentarz*…, s. 690

[29] Zob.: art. 71a ust. 1 Prawa budowlanego.

reflecting the actual use of the building facility (or part of it). In other words, the Court indicates that it is necessary to make a comparison between the original purpose of the facility and its current use, and then, in the situation of discrepancies in this regard, to make a subsumption, that is, to relate the established facts of the case to the hypothesis of the legal norm contained in Article 71(1)(2) of the Construction Law[30].

As in the case of other legalization proceedings, similarly in the situation of a change in the use of a building facility or part of it without the required notification to the competent public administration authorities, a change in the use of a facility or part of it despite objections to such notification, as well as a notification of a change in the use of a facility after the changes have been made, the protection of the interests of interested third parties is implemented in two ways. First and foremost, it is done by establishing appropriate regulations in the public interest, including third parties, aimed at bringing the aforementioned buildings erected without a permit to a lawful state, i.e., so that ultimately the building facility is used in a manner consistent with its intended use and environmental protection requirements, and maintained in a proper technical and aesthetic condition, not allowing excessive deterioration of its functional properties and technical efficiency, in particular within the extent related to the requirements referred to in Article 5(1)(1)–(7) of the Construction Law. This, for example, is the goal of the obligation introduced by the legislator for the perpetrator of the said unpermitted act to present a technical expert's report prepared by a person holding an unlimited construction license in the relevant specialty, or a description of the structure of the object, along with technical and utility data, including the magnitude and distribution of loads, and, if necessary, technological data. An unauthorized change of use of a building facility is sometimes carried out in building facilities that are structurally unsuitable for this (e.g., carrying out manufacturing activities with heavy production equipment in a residential building), which may endanger the safety of people, property and the environment, or may even lead to violations of the applicable rules of spatial zoning regulations. Such an unpermitted change in the use of a building facility may also cause a threat to the fire safety of the facility, and affect its sanitary, hygienic and health conditions (e.g., operating an accounting office in an apartment without a legally required change of use alters the extent of the threat to the fire safety of such a facility, and affects its sanitary, hygienic and health conditions[31]). Thus, these requirements are intended to verify that a building facility (or part of it) used contrary to its legal purpose actually meets all the requirements set forth in the Construction Law to continue to be used in such a manner. In doing so, this condition is achieved both when an order is issued to restore the legal use of the facility and when the existing condition is legalized. Bringing the said arbitrary re-development into compliance

[30] Por.: wyrok NSA z 8 lutego 2007 r. II OSK 306/06, CBOSA.
[31] Por.: wyrok WSA w Lublinie z 27 kwietnia 2004 r., II SA/Lu 102/03 CBOSA.

with the law shall therefore mean that the legitimate interests of third parties have been taken into account in the relevant proceedings.

The second way to protect the legitimate interests of third parties in proceedings to legalize an arbitrary change in the use of a building facility or part of it, without the required notification to the competent public administration body of the change of use, and or despite objections to such notification, as well as following the notification of the change in the use of the facility after the changes have been made, is to provide individual protection to these entities by allowing them to participate in these proceedings on the terms of a legitimate stakeholder. They shall be able to submit their comments and objections and, consequently, directly defend their interests. Of course, a completely separate issue is whether the allegations raised by these individuals are justified and legitimate in terms of the applicable laws.

As is accepted both in doctrine and case law – according to the general principle expressed in Chapter 6 of the Construction Law – the maintenance and use of building facilities is the responsibility of the owner and manager, so these entities, in principle, are responsible for the non-permitted change in the use of a building facility or part of it, and they are the addressees of all decisions in these proceedings[32]. In a judgment dated 3 December 2008, however, the VAC in Gorzów Wielkopolski[33] stated that in these proceedings the owner (perpetual usufructuary) of the neighbouring property may have the status of a party in addition to the entity that made the unpermitted act, in a situation where the non-permitted change in the use of the building facility or part of it affects the exercise of the property (perpetual usufruct) right by the affected entity. At the same time, as stipulated by Article 61 of the Construction Law, the owner or manager of a building facility is obliged to maintain and use the facility in accordance with the principles referred to in Article 5(2) of that act. According to the Court, this means, among other things, the obligation to use it for its intended purpose and to respect the legitimate interests of third parties that exist in the area of the impact of the facility. Still, there can be no doubt that the owner of a neighbouring property has a legal interest in the construction, but also in the use of a building facility, when, as a result of a non- permitted (unauthorized) change in the use of a building facility, the exercise of the property rights of the owner/possessor of adjacent property is restricted, which gives them the status of a party to administrative proceedings (Article 28 of the Administrative Procedure Code). Indeed, according to Article 140 of the Civil Code, which defines the content of the right of ownership, within the limits set by the laws and principles of

[32] Por.: wyrok WSA w Opolu z 9 grudnia 2008r., II SA/Op 216/08; wyrok WSA w Lublinie z 18 listopada 2015 r., II SA/Lu 564/15; wyrok NSA z 5 marca 2014 r., II OSK 2413/12 - CBOSA. Podobnie: A. Despot-Mładanowicz, [w:] pod red. A. Glinieckiego, Prawo budowlane…, s. 843.
[33] Wyrok WSA w Gorzowie Wielkopolskim z 3 grudnia 2008 r., II SAB/Go 24/08, CBOSA.

community life, the owner may, to the exclusion of others, use things in accordance with the social and economic purpose of their right. Thus, from Article 140 of the Civil Code results a legal interest for the owner of a neighbouring property to participate as a party to administrative proceedings in which a decision may be made that shapes the manner of use in such a way that it will affect the exercise of property rights by the owner of the neighbouring property. In the case resolved by the VAC in Gorzów Wielkopolski, it was beyond dispute that the applicant has the right of ownership of the neighbouring property, and the case file shows that the non-permitted change in the use of the building to a wood drying facility on the plot of the participants of the proceedings caused noise and smoke emissions, which affected the neighbouring property of the applicant entitling it to the status of a party to the administrative and, consequently, administrative court proceedings[34]. In addition, in a judgment dated 9 October 2019, the VAC in Gdańsk stated that the parties to the proceedings that were pursued by the construction supervision authorities under Article 71a of the Construction Law were all those entities whose legal interest or obligation within the meaning of Article 28 of the Administrative Procedure Code is affected by the proceedings. In particular, the owners of immediately adjacent properties generally have the attribute of a party within the meaning of Article 28 of the Administrative Procedure Code[35].

The case-law of administrative courts uniformly accepts that the assessment of the legal standing of a party in remedial proceedings concerning the aforementioned form of willful breach should be carried out on the basis of Article 28 of the Administrative Procedure Code, according to which a party is anyone whose legal interest or obligation is affected by the proceedings or who demands an action of the authority because of their legal interest or obligation, since Article 28(2) of the Construction Law is *lex specialis* to Article 28 of the Administrative Procedure Code and can be applied only in proceedings for a construction permit[36]. At the same time, on the basis of Article 28 of the Administrative Procedure Code, there is no doubt that the source of the legal interest referred to in this provision can also be grounded in the provisions of civil law[37], including in particular those relating to property rights, such as Article 140 and Article 144 of the Civil Code. This is confirmed by the case-law of the Supreme Administrative Court, which indicates that a legal interest in remedial

[34] Podobnie: wyrok WSA w Gorzowie Wielkopolskim z 15 września 2010 r., II SA/Go 491/10, CBOSA.
[35] Por.: wyrok WSA w Gdańsku z 9 października 2019 r., II SA/Gd 177/19, CBOSA.
[36] Por.: wyrok NSA z 21 maja 2015 r., II OSK 1863/13, CBOSA.
[37] Pogląd taki został zaprezentowany przez Barbarę Adamiak, która twierdzi, że choć o istnieniu interesu prawnego decydują normy materialnego prawa administracyjnego, to w pewnego rodzaju sprawach muszą być one interpretowane w związku np. z przepisami prawa cywilnego. Podobny pogląd wyrażana jest również w orzecznictwie sądowo administracyjnym Sądy uznają, że podstawą wyprowadzenia interesu prawnego w postępowaniu administracyjnym, obok norm materialnego prawa administracyjnego, mogą być przepisy kodeksu cywilnego, tylko w sytuacji gdy są z nimi powiązane. Samoistnie normy prawa cywilnego nie dają bowiem podstaw do wyprowadzenia interesu prawnego chronionego na drodze administracyjnej (B. Adamiak, *Glosa do wyroku NSA z 10 kwietnia 1997 r. (II SA/Wr 1013/96)*, OSP 1998, nr 7-8, poz. 131, s. 365; podobnie: S. Jędrzejewski, *Glosa do wyroku NSA z 24 stycznia 1996 r. (IV SA 744-745/94)*, OSP 1997, nr 4, poz. 82, s. 201).

proceedings may arise from the mere fact that the subject's property is located in the area of impact, which, as a rule, concerns neighbouring properties[38].

I fully share those views. Both in doctrine and case-law, it is accepted, in accordance with the general principle expressed in Chapter 6 of the Construction Law, that the maintenance and use of building facilities is the responsibility of the owner and manager, so it is these entities that, as a rule, are responsible for the arbitrary change of use of a building facility or part of it, and they are the addressees of all decisions in these proceedings. However, it cannot escape notice that the determination of the parties' attribute should be based on Article 28 of the Administrative Procedure Code, not on Article 28(2) of the Construction Law. At the same time, the existence of a legal interest, both in the situation of issuing an order to restore the legal use of a facility and legalizing the existing one, can be limited not only to the indication of a substantive provision of administrative law. In fact, Article 28 of the Administrative Procedure Code cannot, in a case of any non-permitted construction, constitute a legal norm in its own right for recognizing a third party as a party to such proceedings, and this is because the determination of legal interest, taking into account the given facts and nature of the case, can therefore only be made in connection with another substantive law norm, including civil law.

3. Closing thoughts

As I mentioned earlier, the legislator's omission in Article 5(2) of the Construction Law of the protection of the legitimate interests of third parties in proceedings both to change the use of a building facility and to alter it arbitrarily is not justified under Articles 21(1), 45 and 64, and thus violates Article 31(3) of the Polish Constitution, as it unreasonably restricts the essence of these rights and freedoms. In addition, there may also be potential risks to third parties during these stages of the construction process. Not only potential threats to these people may occur, but even real violations of their rights, requiring interference by the competent construction administration authority, and the ordinary courts do not seem competent to assess whether these are violations of the construction law, especially when the user of the building facility claims to maintain and use it in a condition consistent with the construction permit or notification obtained.

It should be noted that the protection of the interests of third parties both in the case of notification of a change in the use of a building facility or part of it and in the proceedings for an unpermitted change in its use is sufficient and in accordance with the principle of democratic principles and the rule of law and other provisions of the Polish Constitution, which I have indicated above. The purpose of both strains of the proceedings is to examine

[38] Por.: wyrok NSA z 23 października 2014 r., II OSK 923/13; wyrok NSA z 3 grudnia 2014 r., II OSK 1204/13; wyrok WSA w Poznaniu z 10 września 2015 r., IV SA/Po 362/15 – CBOSA.

the lawfulness of the investment and its compliance with the interests of those whose rights the investment may violate, and the effective acceptance of the notification or the issuance of a decision ending the case of an unpermitted change of use serves to protect constitutional values, including the freedoms and rights of others. Where necessary, the legislation also takes into account an active protection of the legal interests of third parties. This is because these entities have the right to be a party to the proceedings and to present and defend their case.

Literature

Akty prawne

1. Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz. U. Nr 78, poz. 483, ze zm.)
2. Ustawa z dnia 7 lipca 1994 r. - Prawo budowlane (Dz. U. z 2022 r. poz. 88, ze zm.).
3. Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny (Dz. U. z 2019 r. poz. 1145, ze zm.).
4. Ustawa z dnia 14 czerwca 1960 r. - Kodeks postępowania administracyjnego (Dz. U. z 2022 r. poz. 2000, ze zm.).
5. Ustawa z dnia 3 października 2008 r. o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko (Dz. U. z 2018 r. poz. 2081, ze zm.).
6. Rozporządzenie Ministra Infrastruktury z dnia 12 kwietnia 2002 r. w sprawie warunków technicznych, jakim powinny odpowiadać budynki i ich usytuowanie (Dz. U. z 2019 r. poz. 1065, ze zm.).

Orzecznictwo

1. Wyrok NSA z 10 grudnia 1990 r., IV SA 602/90, ONSA 1991, nr 1, poz. 9.
2. Wyrok NSA z 11 grudnia 2007 r., II OSK 1664/06, CBOSA.
3. Wyrok NSA z 8 lutego 2007 r., II OSK 306/06, CBOSA.
4. Wyrok NSA z 13 stycznia 2011 r., II OSK 20/10, CBOSA.
5. Wyrok NSA z 29 listopada 2017 r., II OSK 282/17, CBOSA.
6. Wyrok NSA z 30 października 2019 r., II OSK 345/19, CBOSA.
7. Wyrok NSA z 7 grudnia 2017 r., II OSK 2531/16, CBOSA.
8. Wyrok NSA z 16 lipca 2020 r., II OSK 737/20, CBOSA.
9. Wyrok NSA z 22 czerwca 2001 r., II SA/Kr 1430/98, Palestra 2002, nr 9-10, poz. 197.
10. Wyrok NSA z 15 października 1998 r., IV SA 1876/96, CBOSA.
11. Wyrok NSA z 13 maja 2014 r., II OSK 1532/13, CBOSA.
12. Wyrok NSA z 25 lutego 2016 r., II OSK 1591/14, CBOSA.
13. Wyrok NSA z 8 lutego 2007 r., II OSK 306/06, CBOSA.
14. Wyrok NSA z 5 marca 2014 r., II OSK 2413/12, CBOSA.
15. Wyrok NSA z 21 maja 2015 r., II OSK 1863/13, CBOSA.
16. Wyrok NSA z 23 października 2014 r., II OSK 923/13, CBOSA.

17. Wyrok NSA z 3 grudnia 2014 r., II OSK 1204/13, CBOSA.
18. Postanowienie NSA z 16 maja 2007 r., II OSK 529/07, CBOSA.
19. Wyrok WSA w Lublinie z 27 kwietnia 2004 r., II SA/Lu 102/03, CBOSA.
20. Wyrok WSA w Warszawie z 29 czerwca 2005 r., VII SA/Wa 476/2005, LEX nr 179074.
21. Wyrok WSA w Opolu z 27 września 2007 r., II SA/Op 288/07, LEX nr 376753.
22. Wyrok WSA Warszawa z 2 grudnia 2009 r., VIII SA/Wa 440/09, Legalis.
23. Wyrok WSA w Opolu z 6 marca 2008 r., II SA/Op 489/07, CBOSA.
24. Wyrok WSA w Warszawie z 5 grudnia 2006 r., VII SA/Wa 1662/06, CBOSA.
25. Wyrok WSA w Opolu z 30 marca 2010 r., II SA/Op 385/09, CBOSA.
26. Wyrok WSA w Olsztynie z 22 października 2009 r., II SA/Ol 779/09, Legalis.
27. Wyrok WSA w Białymstoku z 28 grudnia 2018 r., II SA/Bk 623/18, CBOSA.
28. Wyrok WSA w Warszawie z 13 listopada 2017 r., VII SA/Wa 1590/17, CBOSA.
29. Wyrok WSA w Gorzowie Wielkopolskim z 3 grudnia 2008 r., II SAB/Go 24/08, CBOSA.
30. Wyrok WSA w Gorzowie Wielkopolskim z 15 września 2010 r., II SA/Go 491/10, CBOSA.
31. Wyrok WSA w Opolu z 9 grudnia 2008r., II SA/Op 216/08, CBOSA.
32. Wyrok WSA w Lublinie z 18 listopada 2015 r., II SA/Lu 564/15, CBOSA.
33. Wyrok WSA w Lublinie z 27 kwietnia 2004 r., II SA/Lu 102/03 CBOSA.
34. Wyrok WSA w Gorzowie Wielkopolskim z 3 grudnia 2008 r., II SAB/Go 24/08, CBOSA.
35. Wyrok WSA w Gorzowie Wielkopolskim z 15 września 2010 r., II SA/Go 491/10, CBOSA.
36. Wyrok WSA w Gdańsku z 9 października 2019 r., II SA/Gd 177/19, CBOSA.
37. Wyrok WSA w Gliwicach z 1 marca 2004 r., II SA/Ka 1813/02, CBOSA.
38. Wyrok WSA w Poznaniu z 10 września 2015 r., IV SA/Po 362/15, CBOSA
39. Postanowienie WSA w Łodzi z 16 marca 2012 r., II SAB/Łd 42/12, CBOSA.

Druki zwarte i ciągłe:

1. Adamiak B., *Glosa do wyroku NSA z dnia 10 kwietnia 1997 r.*, II SA/Wr 1013/96, OSP 1998, nr 7-8, poz. 131.
2. Błażewski M., *Zasada ochrony uzasadnionych interesów osób trzecich w procesie budowlanym*, Kraków 2014.
3. Despot-Mładanowicz A., [w:] A. Gliniecki (red.), *Prawo budowlane. Komentarz*, Warszawa 2014.

4. Janiszewska-Kuropatwa E., [w:] Z. Niewiadomski (red.), *Prawo budowlane, Komentarz*, Warszawa 2015.
5. Jędrzejewski S., *Glosa do wyroku NSA z dnia 24 stycznia 1996 r., sygn. akt IV SA 744-745/94*, OSP 1997, nr 4, poz. 82, s. 201.
6. Kosicki A., [w:] A. Plucińska-Filipowicz, M. Wierzbowski (red.), *Prawo budowlane. Komentarz*, Warszawa 2016.
7. Kostka Z., *Prawo budowlane. Komentarz*, Gdańsk 2005.
8. Małysa-Sulińska K., *Administracyjnoprawne aspekty inwestycji budowlanych*, Warszawa 2012.
9. Serafin S., *Zagadnienia techniczne w prawie budowlany*m, Warszawa 2005.
10. Druk sejmowy nr 1183 z 28 grudnia 2016 r., https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1183 (dostęp: 25.12.2022).