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PROTECTION OF THIRD-PARTY INTERESTS IN PROCEEDINGS CONCERNING BUILDING STRUCTURE MAINTENANCE IN POLISH CONSTRUCTION LAW

Abstract

This publication addresses the issue of protection of the interests of third parties (neighbors) in proceedings concerning the maintenance and use of building structures under the Polish Construction Law. The outcome of such proceedings is of interest not only to the addressees of the decisions made, i.e. the owners or operators of building structures but also to third parties (neighbors) whose interests may be affected. Therefore, the paper presents an attempt to assess whether the interests of such persons are protected in proceedings concerning the use and maintenance of building structures and if so, what is the form of this protection, and what subjective and objective criteria determine the protection provided to third parties. In addition, the principles and legal provisions that make up this protection are presented, and as a result, it is determined whether they guarantee the implementation appropriate for the constitutional standards of a democratic law-abiding state.¹

¹ This publication is part of an unpublished doctoral dissertation entitled “Protection of third-party interests in Polish Construction Law”, defended at the Faculty of Law of the University of Białystok, Poland.

KEYWORDS

building structure, protection of third-party interests, construction works, use, maintenance

SŁOWA KLUCZOWE

obiekt budowlany, ochrona interesów osób trzecich, roboty budowlane, użytkowanie, utrzymanie

PRELIMINARY COMMENTS

Following Article 61(1) in conjunction with Article 5(2) of the Act of 7 July 1994 Construction Law,² the owner or manager of a building structure is obliged to maintain and use the structure in accordance with its purpose and environmental protection requirements, as well as maintain its proper technical and aesthetic condition, not allowing excessive deterioration of its functional properties and its operating condition, in particular, in the scope related to the requirements referred to in Article 5(1)(1-7) of the Construction Law. The same entities are obliged to ensure, by exercising due diligence, safe use of the building structure in the event of external factors affecting the structure, associated with human activity or forces of nature, which include lightning, seismic shocks, strong winds, intense precipitation, landslides, ice phenomena on rivers, seas, lakes and reservoirs, fires or floods, which cause damage to the building structure or an imminent threat of such damage, and one which may cause a threat to human life or health, the safety of property, or the environment.³ Therefore, it can be considered that the legislator has set limits within which building structures may be used and maintained without the obligation to obtain new administrative decisions.⁴

It has been accepted in the judgments of administrative courts that the term ‘maintenance of building structures’ must be understood as keeping such structures in good working order and an undeteriorated, sound condition according to their functions.⁵ On the other hand, the concept of ‘use of a building struc-

² Journal of Laws of 2022, item 88, as amended; hereinafter referred to as the Construction Law.

³ See: Article 61(2) of the Construction Law.

⁴ Cf.: A. Kosicki, (in:) M. Wierzbowski, A. Plucińska-Filipowicz (ed.), *Prawo budowlane. Komentarz [Construction Law. A commentary]*, Warsaw 2021, p. 839.

⁵ Cf.: Judgment of the Provincial Administrative Court in Wrocław of 19 November 2015, ref. II SA/Wr 494/15, CBOSA.

ture' is similar to the much broader civil-law concept of 'use of a thing'.⁶ The legislator also does not define the phrase "not allowing excessive deterioration of the functional properties and operating condition of a building structure". According to E. Janiszewska-Kuropatwa, it can be assumed that the relevant activities, carried out in this regard by the entities specified in Article 61(1 and 2) of the Construction Law and based on technical and construction standards and the principles of technical knowledge, should ensure the use of a building structure during the period provided for in the building design and during its construction, while meeting the requirements referred to in Article 5(1) of the Construction Law. These requirements are primarily concerned with ensuring structural and fire safety, adequate hygiene and health conditions, environmental protection, protection against noise and vibration, as well as energy conservation and adequate thermal insulation of partitions. They should be taken into account in the building design and during the construction of the building structure in a manner specified in the relevant standards, especially technical and construction standards, and in accordance with the principles of technical knowledge.⁷ Thus, in the case of failure to fulfill the obligations referred to in Article 61(1) in conjunction with Article 5(2) and Article 61(2) of the Construction Law, they are specifically legally defined in an administrative decision issued by the construction supervision authorities pursuant to Articles 66 to 68 of the Construction Law. The judgments of administrative courts also note the need to distinguish between cases where an inadequate technical condition of a building is related to the negligence of its owner where the owner can take action to correct the irregularities found, and cases where an inadequate technical condition of a building is the result of construction work carried out by another entity on a neighboring property.⁸

Depending on the situation, the legislator has assigned tasks and competencies to the construction administration bodies that are related to the supervision of building structures that pose a threat to the interests protected by the Construction Law. This is manifested in the ability of these authorities to issue decisions restricting or excluding the use of building structures and imposing specific obligations on owners or operators of building structures. This is because other events related to human action or forces of nature that determine the obligations set forth in this provision may take place. Therefore, depending on the facts of the case, one of the proceedings referred to in Articles 66 to 68 may be initiated, such

⁶ Cf.: Judgment of the Supreme Administrative Court of 14 December 2010, ref. II OSK 1914/09, CBOSA; Judgment of the Supreme Administrative Court of 24 November 2011, ref. II OSK 1668/10, CBOSA.

⁷ Cf.: E. Janiszewska-Kuropatwa, (in:) Z. Niewiadomski (ed.), *Prawo budowlane. Komentarz* [Construction Law. A commentary], Warsaw 2009, pp. 608-609.

⁸ Cf.: Judgment of the Supreme Administrative Court of November 14, 2014, ref. II OSK 2193/13; judgment of 13 February 2020, ref. II OSK 180/18 - CBOSA.

as an order for the elimination of irregularities found in a building structure during the process of its maintenance, an order to demolish an unused or unfinished building structure, or an order to vacate or take a building structure out of service. The outcome of these proceedings may be of interest to third parties (neighbors). At the same time, in the Construction Law doctrine, third parties are considered to be natural persons, legal entities, community organizations, and entities without legal personality that may or do suffer any restrictions in connection with or as a consequence of investment project activities.⁹

ELIMINATION OF IRREGULARITIES FOUND IN A BUILDING STRUCTURE

The first of the aforementioned proceedings concerns the imposition of an order by a competent construction supervision authority against the owner or operator of a building structure to eliminate the irregularities found. This order must specify a deadline for the fulfillment of this obligation and is issued if it is found that the building structure may endanger the life or health of people, or the safety of property or the environment, or is used in a manner that endangers the life or health of people, or the safety of property or the environment, or is in an inadequate technical condition, or its appearance uglifies the surroundings.¹⁰ The same authority orders, also by way of a decision, the elimination of the effects of any interferences or violations, or the restoration of the previous condition in the event of identification of interferences or violations of the requirements applicable to a building structure that are not justified by technical or use considerations, the nature of which prevents or significantly impedes its use for residential purposes, and such a decision is immediately enforceable and may be announced orally.¹¹ In the event of the occurrence of any of the prerequisites justifying the issuance of an order for the elimination of such effects, the authority is not so much entitled as it is obliged to issue an appropriate decision. In such cases, the interests of third parties may be affected by the impacts on their properties. Therefore, it is important to examine whether these interests are protected at this stage of the construction process and if so, what form the protection takes and whether it guarantees implementation that is appropriate for the standards of a democratic law-abiding state.

⁹ See: S. Jędrzejewski, *Proces budowlany zagadnienia administracyjno-prawne* [Construction process – administrative-law problems], Bydgoszcz 1995, pp. 37-38.

¹⁰ See: Article 66 (1) of the Construction Law.

¹¹ See: Article 66 (1a) of the Construction Law.

Sławomir Serafin expressed the view that the purpose of introducing this institution into the Construction Law system is that its application should result in ensuring the proper and safe technical condition of all building structures and their use in a manner that does not endanger the protected interests indicated in the law (therefore, the circumstances that lead to situations that meet the above prerequisites are irrelevant). The quoted author adds that it is irrelevant whether the competent construction supervision authority intervenes with respect to a building structure whose construction does not require a building permit decision or a notification.¹² The authority adjudicating the case has no right to investigate the causes of the building's inadequate technical condition, nor can it investigate who is responsible for the condition found. According to the SAC, the imposition of an obligation to eliminate the irregularities found can also in no way be linked to the reasons giving rise to the grounds for applying the order. The application of the order is also not affected, according to that Court, by whether and to what extent the addressee of the decision is guilty of the occurrence of the prerequisites obliging the competent construction supervision authority to initiate the proceedings and to end them with the issuance of an appropriate order.¹³

According to S. Serafin, the Construction Law also does not specify the content of a decision ordering the elimination of identified irregularities and, depending on the findings, the construction supervision authority may order, for example, the performance of appropriate construction works, the use of the building structure in accordance with its intended use, or equipping of the building structure with technical devices that reduce its nuisance to the surroundings.¹⁴ However, in a decision ordering the elimination of the irregularities found, the competent authority may prohibit the use of a building structure or a part thereof until the irregularities are eliminated, if it is found that it may endanger the life or health of people, or the safety of property or the environment, or is used in a manner that endangers the life or health of people, or the safety of property or the environment, or is in an inadequate technical condition. The decision to prohibit the use of a building structure is immediately enforceable and may be announced orally, if the first two prerequisites are found to be present.¹⁵

¹² Cf.: S. Serafin, *Zagadnienia techniczne w prawie budowlanym* [Technical issues in the construction law], Warsaw 2005, p. 205.

¹³ Cf.: Judgment of the Supreme Administrative Court of 2 December 2015, ref. II OSK 838/14, CBOSA.

¹⁴ Cf.: S. Serafin, *Zagadnienia techniczne...* [Technical issues...], pp. 204-205.

¹⁵ See: Article 66 (2) of the Construction Law.

According to the position presented in the case law¹⁶ and literature,¹⁷ the party in cases related to the supervision of building structures that pose a threat to the interests protected by this law can only be the owner or the operator of the building structure in relation to which the activities are carried out. The legitimate interests of third parties would not be protected in proceedings concerning the maintenance and use of a building structure, because by the Act of 27 March 2003 amending the Construction Law and certain other laws, the legislator changed the content of both Article 5 and Article 61 in such a way that the premise mandating the protection of the legitimate interests of such persons in this type of proceedings was excluded. Thus, any entity other than the owner or operator of the building structure for which the listed activities are carried out, as referred to in Article 66 of the Construction Law, would only have a factual interest in a specific resolution of the case, which, if these persons file a notice, is initiated *ex officio* and conducted without the participation of these persons as parties to the proceedings. At the same time, there is no obstacle for third parties, if they believe that there are irregularities related to the maintenance or use of a building structure located in their neighborhood, to seek protection under civil law.

Administrative courts accept that there may be exceptions to the above-mentioned rule for determining the set of parties to proceedings conducted under Article 66 of the Construction Law in specific, individual cases in situations where the proceedings for the elimination of identified irregularities of a building structure and the resulting obligations of the owner of the building structure affect the legal interests of other persons. In my opinion, this situation was most accurately presented by the Supreme Administrative Court in its judgment of 29 May 2019.¹⁸ In the opinion of that Court, it should be emphasized that the participation of third parties in proceedings that concern the maintenance and use of a building structure is of an exceptional nature, which may be the case when the building structure, due to its broadly defined inadequate technical condition, affects the exercise of

¹⁶ Cf.: Judgments of the Supreme Administrative Court of 4 July 2007, ref. II OSK 999/06, LEX No. 366267; of February 10, 2011, ref. II OSK 286/10, CBOSA; of 1 March 2012, ref. II OSK 2444/10, CBOSA; and of May 12, 2016, ref. II OSK 2111/14; judgment of the Provincial Administrative Court in Wrocław of 26 February 2009, ref. II SA/Wr 433/08, CBOSA; judgment of the Provincial Administrative Court in Cracow of 16 April 2010, ref. II SA/Kr 541/09; judgments of the Provincial Administrative Court in Wrocław of 16 July 2009, ref. II SA/Wr 173/09; and of 29 June 2009, ref. II SA/Wr 217/09; judgments of the Provincial Administrative Court in Warsaw of 18 May 2010, ref. VII SA/Wa 2337/09; of 18 March 2010, ref. VII SA/Wa 2382/09; and 12 January 2010, ref. VII SA/Wa 1165/09; and judgment of the Provincial Administrative Court in Gliwice of 8 October 2008, ref. II SA/Gl 297/08 - unpublished.

¹⁷ Cf.: Z. Kostka, *Prawo budowlane. Komentarz [Construction Law. A commentary]*, Gdańsk 2007, pp. 32-33.

¹⁸ Judgment of the Supreme Administrative Court of 29 May 2019, ref. II OSK 1257/18, CBOSA.

their property rights. However, the participation of third parties in such proceedings requires the demonstration of a legal interest within the meaning of Article 28 of the Code of Administrative Procedure and, therefore, must be derived from a provision of substantive law, i.e. a legal norm that provides the basis for establishing a right or obligation existing under administrative law. A legal interest is a personal, concrete, and currently legally protected interest that can be pursued on the basis of a specific provision and is directly related to the party's individually and legally protected situation. At the same time, the derivation of legal interest in administrative proceedings from the norms of substantive civil law is allowed only in the event of an existing link between the rights arising under civil law and the norms of substantive administrative law (including the Construction Law). This is because the mere possession of legal title to plots of land that are adjacent to a building structure in no way refers to a provision of universally binding substantive law, on the basis of which the action of the authority, in the form of an administrative decision imposing an order to eliminate identified irregularities, can be effectively demanded. According to the Supreme Administrative Court, to successfully derive the existence of a legal interest, it is therefore necessary to demonstrate a legal link between the situation of a given entity and a particular legal norm. The source of such a legal interest may be, in particular, the norms related to the ownership right (Article 140 *et seq.* of the Civil Code), if the person holding legal title to real estate adjacent to a building whose technical condition is questioned indicates a specific circumstance that causes harm to his or her individual interest and the legal provision that authorizes him or her to act. A similar view has also been presented in other judgments,¹⁹ as well as by A. Fronczak.²⁰ Of note is the view expressed by the Provincial Administrative Court in Gliwice in its judgment of 15 November 2012.²¹ The court held that the Construction Law does not define a party to the proceedings in proceedings held before construction supervision authorities either under Articles 48 to 51 of that law, or under Article 61 *et seq.*, as the legislator did

¹⁹ Cf.: Judgments of the Supreme Administrative Court of 11 July 2012, ref. II OSK 713/11; of 20 September 2013, ref. II OSK 986/12; and of 2 December 2015, ref. II OSK 720/14; judgment of the Provincial Administrative Court in Poznań of 26 January 2017, ref. IV SA/Po 631/16, CBOSA; judgment of the Supreme Administrative Court in Gorzów Wielkopolski of 19 December 2019, ref. II SA/Go 734/19; judgment of the Provincial Administrative in Cracow of 27 November 2019, ref. II SA/Kr 1087/19; and judgment of the Supreme Administrative Court of 28 May 2020, ref. II OSK 2517/19, CBOSA.

²⁰ Cf.: A. Fronczak, *Udział osób trzecich (sąsiadów) w postępowaniach z zakresu utrzymania obiektów budowlanych* [Participation of third parties (neighbors) in proceedings concerning the maintenance of building structures], "Kwartalnik Prawa Publicznego" 2015, No. 1, p. 81.

²¹ Cf.: Judgment of the Provincial Administrative Court in Gliwice of 15 November 2012, ref. II SA/Gl 922/12, CBOSA.

in the case regarding the issuance an occupancy permit (Article 59(7) of the Construction Law). Admittedly, both Article 52 and Article 61 of the Construction Law list the set of entities to whom injunctions arising from the requirements of the Construction Law should be addressed, but this does not mean that this is also the definition of a party to such proceedings. This conclusion is confirmed by the wording of Article 59 (7) of the Construction Law. According to the court, in other proceedings before construction supervision authorities, including proceedings concerning the maintenance and use of a building structure, the attribute of a party is regulated by the provision of Article 28 of the Code of Administrative Procedure, which refers to the category of legal interest.

In my opinion, it is not possible to support the position put forward in part of the case law that the change in the content of Article 5 (2) and Article 61 of the Construction Law, introduced by the Act of 27 March 2003 amending the Construction Law and amending certain other laws, justifies the assumption that entities other than the owner and operator are eliminated from the administrative proceedings conducted under Article 66 of that law (which is undoubtedly included in the part concerning the maintenance of building structures). Article 66 lacks an explicit regulation analogous to that found, for example, in Article 59 (7), which specifies that only the owner can be a party to proceedings concerning an occupancy permit. Also, the current provisions of Articles 5 (2) and 61 of the Construction Law do not authorize such a far-reaching interpretation, which even leads to the violation of Articles 21 (1) and 64 of the Polish Constitution, by allowing the imposition of obligations by way of a decision without ensuring the participation of third parties whose legal interests should be protected primarily by allowing them to participate in administrative proceedings. This is because it is difficult to accept situations where, if the competent construction supervision authority finds that an existing building structure may endanger the life or health of people, or the safety of property, or is used in a way that endangers the life or health of people, or the safety of property, or is in an inadequate technical condition, a 'third party' would not be able to assert his or her rights or obtain protection of his or her interests in such proceedings.

An analysis of the case law discussed above shows that in the aforementioned cases, the courts considered the impacts on neighboring properties consisting in, among other things, flooding, shading, penetration of excessive noise, vibration, and unpleasant odors, deprivation or restriction of the use of water, sewer systems, electricity, as well as heat, and even restriction of access to the property owned by such persons, as a legitimate interest of third parties to be protected. Only those impacts that have arisen or may arise in connection with the occurrence of the prerequisites referred to in Article 66 (1) and Article 66 (1a) of the Construction Law, and may hinder or prevent third parties from exercising their fundamental right – the right to property, are subject to protection. Therefore, it

can be concluded that these impacts were created during the construction process and are relevant to the Construction Law as a public law. In addition, according to W. Szwajdler, in the wording of Article 5 (2) of the Construction Law, the legislator admittedly used the phrase 'in particular', thereby not definitively excluding the obligation to take into account the requirement of Article 5(1)(9) of that law, although the lack of explicit reference to that standard while referring to Article 5(1)(1-7) causes unnecessary doubts in interpretation.²² On the other hand, according to A. Ostrowska, there is no rational explanation for respecting the interests of third parties only up to the stage of construction of the building, because after the completion of construction works, at the start of the use of the building and its maintenance, these people may also face potential hazards.²³ It should be noted that during the use of a building structure, not only potential hazards to third parties may arise, but even real violations of their rights that require interference by a construction supervision authority, and common courts of law do not seem competent to assess whether these are violations of the Construction Law, especially when the user of a building structure claims that he or she maintains and uses it in a condition consistent with the obtained building permit or notification.

The validity of the above statement is also evidenced by the wording of the provisions of the Regulation of the Minister of Interior and Administration of 16 August 1999 on the technical conditions of use of residential buildings.²⁴ Section 1 of that Regulation specifies the technical conditions for the use of residential buildings, together with their associated systems and technical equipment, hereinafter referred to as 'buildings'. On the other hand, section 2 (5 and 7) of the Regulation specifies conditions that are intended to ensure the possibility of rationalizing the consumption of water and energy media in accordance with the requirements of the users of the dwellings, but in a manner that does not violate the interests of third parties and does not cause deterioration of the functional and technical characteristics of the building and its related equipment (item 5), and the protection of the legitimate interests of third parties (item 7). This means that the legitimate interests of third parties must also be protected during the use of residential buildings. Therefore, this protection in the Construction Law also covers this stage of the construction process.

²² W. Szwajdler, *Ewolucja ochrony praw osób trzecich w procesie budowlanym* [Evolution of the protection of third party rights in the construction process], (in:) *Księga jubileuszowa Profesora Stanisława Jędrzejewskiego* [Professor Stanisław Jędrzejewski's anniversary book], H. Nowicki, W. Szwajdler (eds.), Toruń 2009, pp. 491-493.

²³ A. Ostrowska, *Pozwolenie na budowę* [Building permit], Warsaw 2009, p. 272.

²⁴ Journal of Laws of 1999, No. 74, item 836.

ORDER FOR DEMOLITION OF AN UNUSED OR UNFINISHED BUILDING STRUCTURE

Another type of proceeding concerns the issuance of a demolition order by the competent construction supervision authority for an unused or unfinished building. According to Article 67 (1) of the Construction Law, the authority orders the owner or operator to demolish a building structure and clean up the site if the unused or unfinished structure is unsuitable for repair, reconstruction, or finishing, at the same time specifying the deadlines for commencing and completing such works. This provision applies if the above conditions are met together. At the same time, the phrase “unsuitable for repair, reconstruction, or finishing” used by the legislator in this provision refers not only to the objective impossibility of repair, reconstruction, or finishing, but also to the absence of the owner’s intention to bring the building structure into compliance with the law. This means that before the competent construction supervision authority issues an order to demolish a particular building structure, it should conduct an investigation aimed at determining not only the technical condition of the building structure, but also whether and how its owner or operator intends to remedy the existing violations of the legal order in the construction sector.²⁵ This is because, in a situation where the owner or operator considers that he or she is able to carry out work that will result in a repair, reconstruction, or finishing of a building structure, there are no grounds for issuing a demolition order. According to the view that has been presented in the case law, instead of issuing a demolition order, the authority should issue a decision under Article 66 of the Construction Law specifying the type of works needed to be done and the deadline for their completion. Only if the owner or operator fails to fulfill these obligations, it is possible to issue the demolition order stipulated in Article 67(1) of the Construction Law,²⁶ which is aimed at eliminating the inadequate state of development in the specific area or, in essence, at bringing the area into compliance with the requirements of the public interest.²⁷

In the judgments of administrative courts, the view has emerged that a party to the proceedings conducted pursuant to Article 67 of the Construction Law should be the owner and operator, recognized in accordance with the wording of Article 28(2), of the building structure for which demolition is to be ordered, as well as the owners, perpetual usufructuaries, or operators of other real estate

²⁵ Cf.: Judgment of the Supreme Administrative Court of 8 April 2009, ref. II OSK 515/08, LEX No. 558403.

²⁶ Cf.: Judgments of the Provincial Administrative Court in Warsaw of 23 November 2004, ref. IV SA 2055/03, LEX No. 728412; and of 28 July 2005, ref. VII SA/Wa 1621/04, LEX No. 842398.

²⁷ Cf.: A. Kosicki, (in:) M. Wierzbowski (ed.), *Prawo budowlane...* [Construction Law...], *op. cit.*, p. 654.

located within the area of impact of that building structure.²⁸ The Supreme Administrative Court, in its judgment of 14 January 2011,²⁹ justified this view on the grounds that a decision issued under Article 67 concerns a demolition order, as do decisions issued under, among others, Articles 48(1), 49, and 51(1)(1) of that law. Therefore, when these decisions are issued, the set of parties to the proceedings should be evaluated similarly as in the case of issuance of a building permit decision (Article 28(2) of the Construction Law). If, on the other hand, the legislator wishes to limit the set of entities that should participate in the proceedings, it clearly indicates this in the relevant provision, as in the case of Article 59(7) of that law. This view has also gained approval in the literature on this subject.³⁰

A contrary view has also been presented in the case law. In its judgment of 29 November 2010,³¹ the Provincial Administrative Court in Warsaw stated that in Article 67(1) the legislator does not specify that only the owner or operator is a party to such proceedings. This provision only stipulates who is possibly required to carry out a demolition, which is not the same as an enumeration by the legislator of the set of entities that have the right to be parties to such proceedings. In the legal system, one can find examples of regulations in which the legislator tries to precisely define the characteristics of the entities who are entitled to the status of a party in certain proceedings; examples are Article 59(7) of the Construction Law and Article 63(5) of the Public Procurement Law. However, in such cases, the legislator consistently uses the phrase “the party is” in the standard.

In my opinion, however, this view was most accurately presented by the Provincial Administrative Court in Białystok in its judgment of 5 July 2018.³² The court concluded that in matters relating to the use and maintenance of a building structure that are covered by Chapter 6 of the Construction Law, the attribute of a party is, as a rule, vested in the entities obliged to maintain and use the building structure in a proper technical condition, i.e. its owner or operator. This is because these entities are the potential addressees of, among other things, a decision ordering the demolition of the building structure, issued under Article 67(1) of that law. However, due to the fact that the legal consequences of demolition may result in the emergence of certain burdens on other entities, e.g. the owners of the land adjacent to the building structure to be demolished, the outcome of such proceedings may sometimes affect their legal interests. Such a situation may arise, in particular, when there is a building on the neighboring property that

²⁸ Cf.: Judgment of the Supreme Administrative Court of 14 January 2011, ref. II OSK 1927/09, CBOSA.

²⁹ *Ibidem*.

³⁰ Cf.: H. Kisilowska, D. Sypniewski, *Prawo budowlane [Construction law]*, Warsaw 2012, p. 270.

³¹ Judgment of the Provincial Administrative Court in Warsaw of 29 November 2010, ref. VII SA/Wa 1711/10, CBOSA.

³² Judgment of the Provincial Administrative Court in Białystok of 5 July 2018, ref. II SA/Bk 896/17, CBOSA.

is in contact with the building to be demolished, or when such buildings share common structural components that determine the impact of one building on the technical condition of the other. In such situations, the legal interest of the owners of the neighboring property is justified by the fact that the legally protected property right to the neighboring property, having its source in Article 140 and Article 144 of the Civil Code, is directly threatened. The owner of a neighboring property may demonstrate in a particular case that an order to demolish a building structure has a direct impact on his or her legal sphere, with all the consequences thereof, and therefore his or her participation in such proceedings requires him or her to demonstrate a legal interest within the meaning of Article 28 of the Code of Administrative Procedure. Besides, as the Provincial Administrative Court in Białystok pointed out, the view that the owner (perpetual usufructuary) of the neighboring property may have a legal interest in such a case if the building structure in respect of which the proceedings are pending, due to its broadly defined inadequate technical condition, affects the exercise of his or her right of ownership or perpetual usufruct, has been presented in the case law in the past.³³ Such a view has also been presented in the literature on this subject.³⁴

In my opinion, the second view is correct. The aforementioned constitutional arguments in support of taking into account the interests of third parties in the proceedings in question, presented on the occasion of Article 66 of the Construction Law, remain valid. It would be difficult to accept situations where a third party would not be able to assert his or her rights or obtain protection of his or her interests in such proceedings if the competent construction supervision authority intends to order a demolition of an unused or unfinished building. Besides, Article 28 (2) of the Construction Law – which, as a special provision with respect to Article 28 of the Code of Administrative Procedure, may be applied only in the situation indicated therein, i.e. in proceedings for the issuance of a construction permit decision conducted under both ordinary and emergency procedures – also may not be applied in administrative proceedings conducted under Article 67 of the Construction Law. To the contrary, this provision does not apply in proceedings relating to the issuance of an order by the construction supervision authority

³³ Cf.: Judgment of the Provincial Administrative Court in Cracow of 16 April 2010, ref. II SA/Kr 541/09; judgment of the Supreme Administrative Court of 26 June 2012, ref. II OSK 516/11; judgment of the Provincial Administrative Court in Warsaw of 8 January 2013, ref. VII SA/Wa 1435/12; judgment of the Provincial Administrative Court in Warsaw of 25 October 2017, ref. VII Sa/Wa 2434/16; judgment of the Provincial Administrative Court in Poznań of 18 October 2018, ref. IV SA/Po 636/18 – all CBOSA.

³⁴ Cf.: K. Małysa-Sulińska, *Administracyjnoprawne aspekty inwestycji budowlanych* [Administrative-law aspects of building investment projects], Warsaw 2012, p. 265; A. Kosicki, (in:) M. Wierzbowski, A. Plucińska-Filipowicz (eds.), *Prawo budowlane...* [Construction Law...], p. 774.

to demolish an unused or unfinished building provided for by the aforementioned provisions of the Construction Law.³⁵

AN ORDER TO VACATE A BUILDING STRUCTURE OR TO TAKE IT OUT OF SERVICE

The legislator has also provided the construction supervision authorities with an instrument that allows them to respond in cases where they find the need to vacate the entire building intended for human habitation that is in immediate danger of collapse, or a part thereof. In such a situation, the competent construction supervision authority is obliged to order the owner or operator of the building, by way of a decision, on the basis of an inspection report, to vacate the entire building or a part thereof, or to exclude it from use, within a specified period, then to send such a decision to the entity obliged to provide substitute premises on the basis of separate regulations, and order to post a notice on the building about the danger to the safety of people or property and the prohibition to use it, and to provide *ad hoc* safeguards and eliminate the danger to the safety of people or property, with a specification of technically reasonable deadlines for their implementation.³⁶ At the same time, the phrase 'building intended for human habitation' means that this is a building whose use involves the presence of people in it, essentially regardless of the time they spend in it.

According to S. Serafin, the absolute prerequisite for issuing an order to vacate a building is the imminent threat of collapse of the building, and therefore the existence of a state of emergency in which the technical condition of the building may pose a danger to human life or health, or may lead to irreparable material damage. In addition, if the existence of such a condition is established on the basis of an earlier visual inspection, the construction supervision authority is not only authorized, but actually obliged to issue an order to vacate the building.³⁷ An essential part of the process of collection and evaluation of evidence preceding the issuance of such a decision is an inspection of the building that is in

³⁵ The above institution of an order to demolish an unused or unfinished building does not apply to buildings that are listed in the register of historic monuments (Article 67(2) of the Construction Law). However, with regard to building structures not included in such a list, but protected as historic monuments on the basis of the local zoning plan, a decision to demolish an unused or unfinished building structure may be issued only after prior consultation of that decision with the provincial conservation officer. The failure of the provincial conservation officer to express an opinion in this regard within 30 days is considered as lack of objection to that decision (Article 67(3 and 4) of the Construction Law).

³⁶ See: Art. 68 of the Construction Law.

³⁷ Cf.: S. Serafin, *Zagadnienia techniczne...* [Technical issues...], p. 207.

danger of collapse and the preparation of a report from this activity that reflects the actual condition of the building.³⁸

The literature on this subject presents the view that a party to the proceedings in cases regulated under Article 68 of the Construction Law is the owner or operator of the building.³⁹ However, the prevailing view in the case law is that the set of parties in these proceedings should be determined on the basis of Article 28 of the Code of Administrative Procedure. As recognized by the Provincial Administrative Court in Cracow in its judgment of 4 July 2018,⁴⁰ in proceedings concerning the imposition of obligations referred to in Article 68 of the Construction Law, the set of parties should be determined on the basis of Article 28 of the Code of Administrative Procedure in conjunction with Article 61 of that law. According to the latter provision, the owner or operator of a building structure is obliged to maintain and use the structure in accordance with the principles referred to in Article 5(2), i.e. a building structure should be used in a manner consistent with its intended use and environmental protection requirements and should be maintained in proper technical and aesthetic condition, not allowing excessive deterioration of its functional properties, as well as technical efficiency, in particular, in the scope related to the requirements referred to in Article 5(1)(1-7). According to the Provincial Administrative Court in Cracow, the addressee of a decision issued under Article 68(1) of the Construction Law is, therefore, the entity referred to in Article 28 of the Code of Administrative Procedure. In another judgment, the Supreme Administrative Court⁴¹ held that a tenant of premises is not a party to administrative proceedings when the proceedings relate to taking the premises in question out of service under Article 68. The court stated that the lease contract is an obligation agreement that regulates the relationship between the tenant and the owner or operator of the building, which does not cause any substantive-law effects that can, in accordance with Article 28 of the Code of Administrative Procedure, form a basis of the tenant's legal interest.⁴² I strongly believe that the latter opinion is correct. In my opinion, Article 66 of the Construction Law lacks an explicit regulation analogous to that found, for example, in Article 59(7) of that law, which specifies that only the owner can be a party to proceedings concerning an occupancy permit. It is also difficult to accept situations where, if the competent construction supervision authority finds it necessary to vacate the entire building intended for human habitation that is in immediate danger of collapse, or a part thereof, a 'third party' is not able to assert

³⁸ Cf.: Judgment of the Supreme Administrative Court in Łódź of 1 October 2002, ref. II SA/Ld 2390/98, CBOSA.

³⁹ Cf.: H. Kisilowska, D. Sypniewski, *op. cit.*, p. 271.

⁴⁰ Judgment of the Provincial Administrative in Cracow of 4 July 2018, ref. II SA/Kr 237/18.

⁴¹ Cf.: Judgment of the Supreme Administrative Court of 4 April 2003, ref. II SA 2627/01, LEX No. 1694097.

⁴² Similarly: Judgment of the Provincial Administrative Court in Warsaw of 30 October 2006, ref. VII SA/Wa 456/06, CBOSA.

his or her rights or obtain protection of its interests in such proceedings, as this would lead to a violation of Article 21 (1) and Article 64 of the Polish Constitution. In addition, in this case, the arguments supporting the view that it is Article 28 of the Code of Administrative Procedure that applies in proceedings conducted under Article 66 of the Construction Law also remain valid.

CONCLUSION

In the case of proceedings concerning the maintenance and use of building structures, the legislator has provided for the protection of the legitimate interests of third parties, which consists in their independent (individual) protection, exercised within the framework of specific administrative proceedings in which these parties can submit their comments and objections, thus directly defending their interests as a party to these proceedings. In addition, the attribute of a party in the abovementioned proceedings should be enjoyed not only by the owner or operator of a building structure, but also by persons who demonstrate that they have a legal interest in participating in such administrative proceedings (Article 28 of the Code of Administrative Procedure). At the same time, the ownership right can be a source of a legal interest under administrative law, but only if specific rights, limitations, or obligations of the owner, regulated by administrative law, are linked to the ownership right. Indeed, in proceedings concerning the maintenance and use of building structures, there is no need to exclude the provision of Article 28 of the Code of Administrative Procedure in a situation where the location or technical condition of the building structure that is the subject of such proceedings causes harm to the rights of third parties related to the real estate, which are protected by the provisions of Article 140 and Article 144 of the Civil Code.

It should be emphasized that the views expressed in the case law and literature cited in this publication, and indicated by me as right, are in accordance with the constitutional principle of a democratic law-abiding state and other provisions of the Constitution of the Republic of Poland presented above, because only they fully take into account the protection of the interests of third parties. Only in these cases do these persons have the right to review the case file, challenge the claims of the parties, and submit motions for evidence, i.e. they have a guarantee of full legal protection of their interests. This is because the purpose of the proceedings carried out pursuant to this procedure is to examine whether the location, technical condition, or appearance of the building structure that is the subject of such proceedings causes harm to the rights of third parties related to the real estate, and the issued decision serves to protect constitutional values, including, above all, the freedoms and rights of others. In other judgments I presented in this paper, third parties were not guaranteed full legal protection of their interests.

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