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DECISION ON LAND DEVELOPMENT CONDITIONS FOR A PHOTOVOLTAIC SYSTEM – A GENUINE INVESTMENT PROBLEM?

Abstract

The possibility of basing an investment on a decision on land development conditions has many legal and economic advantages. The decision confirms a specific condition related to the possibility of land development, enables the implementation of subsequent stages of the investment process, and finally, the implementation of the investment. Currently, only special regulations, e.g. in water law, protection of monuments, and protection of agricultural and forest land, constitute a legal barrier to the location of photovoltaic investments. Other restrictions are technical limitations, for example, the possibility of connecting to the power grid. The photovoltaic investments market in Poland is constantly growing.

KEYWORDS

decision on land development conditions, photovoltaic, solar energy, renewable energy, Poland

SŁOWA KLUCZOWE

decyzja o warunkach zabudowy, fotowoltaika, energia słoneczna, energia odnawialna, Polska

1. INTRODUCTION

Pro-ecological undertakings, the task of which is to produce energy from a renewable energy source, i.e. solar energy, are becoming an attractive form of generating electricity from renewable energy sources. Unlike fossil fuels such as coal, lignite, and oil, solar energy does not generate pollution into the air¹; it is readily available and free of charge². Photovoltaic systems are relatively low-impact on the surrounding neighbourhood and do not arouse public opposition.

The history of photovoltaic cells dates back to 1839 when the French physicist Alexandre Edmond Becquerel accidentally observed the photovoltaic effect³. Later, Albert Einstein, based on Max Planck's quantum theory, made a complete description of the photovoltaic effect in 1905, for which he was awarded the Nobel Prize in 1921. In 1941 Russell Ohl constructed the first silicon cell. Among the Polish scientists who have contributed to the development of photovoltaics, one should mention Jan Czochralski⁴.

Solar energy can be used in thermal solar collectors used mainly to prepare hot utility water and in photovoltaic cells that generate electricity⁵. Cell manufacturing technology uses various materials⁶, and the cells used in the testing phase are organic. Solar energy has a variety of applications. It can be used by households, for street lighting, or as a source of traffic lights power, in telecommunications for power transmission stations, in water pumps used for fertilising

¹ J. Peng, L. Lu, H. Yang, *Review on life cycle assessment of energy payback and greenhouse gas emission of solar photovoltaic systems*, "Renewable & Sustainable Energy Reviews" 2013, No 19, pp. 255–274.

² M. Hosenuzzaman [et al.], *Global prospects, progress, policies, and environmental impact of solar photovoltaic power generation*, "Renewable & Sustainable Energy Reviews" 2015, No 41, pp. 284–297.

³ B. Parida S. Iniyar, R. Goic, *A review of solar photovoltaic technologies*, "Renewable & Sustainable Energy Reviews" 2011, No 15, issue 3, p. 1625.

⁴ J. Bigorajski, *Rozwój fotowoltaiki i instrumenty wsparcia finansowego*, „Polska Energetyka Słoneczna” 2015, nr I–IV, p. 21.

⁵ Ł. Szałata, A. Siedlecka, C. Lejkowski, *Instalacje fotowoltaiczne jako przykład uzasadnionej ekonomicznie instalacji prosumenckiej*, „Ekonomia i Środowisko” 2016, nr 2(57), p. 191.

⁶ J. S. Lacerda, J. C. J. M. Van Den Bergh, *Diversity in solar photovoltaic energy: implications for innovation and policy*, "Renewable & Sustainable Energy Reviews" 2016, No 54, pp. 331–340.

arable lands, water desalination batteries, weather monitoring stations, as well as satellites or spacecraft.

The first photovoltaic system was built on the Vistula River in 2012, but the panels were not a very popular renewable energy source for the first few years⁷. Nowadays, there is a trend for this type of electricity generation in Poland. According to the Institute of Renewable Energy report, which has already published the seventh edition of the “Photovoltaic Market in Poland 2019” report, the capacity of micro photovoltaic systems is (as of February 2019) ca 350 MW. A significant part of photovoltaic microsystems (about 75% of the power) are systems with a capacity of up to 50 kW (in practice up to 10 kW) implemented by individual consumers, i.e. in practice investments by households. The remaining ones are microsystems in local authorities and enterprises with capacities of 10–50 kW. It is indicated that this is one of the best developing renewable energy sectors in Poland. The authors of the report estimate that in the whole of 2019, as much as 1.1 GW of new PV systems will be added, and the cumulative capacity of photovoltaic systems in Poland at the end of the year will amount to 1.5 GW⁸.

In addition, it should be emphasised that the Act of 20 May 2016, which entered into force on 15 July 2016, on investments in wind power plants has eliminated or significantly reduced the possibility of locating new wind power plants. On the other hand, from 2019, legal facilitations concerning the possibility of locating photovoltaic farms can be observed, which, from a practical point of view, is of colossal importance for potential investors.

The advantages of solar energy include, e.g. the low cost of operation and maintenance⁹ and no noise emission¹⁰. On the other hand, the disadvantages include, e.g. high initial cost and the need for a relatively large installation area¹¹.

In this study, we would like to focus only on a particular section related to the possibility of locating photovoltaic farms as a renewable energy source. It is worth looking at the legal conditions enabling the establishment of photovoltaic cells based on one of the planning instruments, i.e. the decision on land development conditions.

⁷ <https://energia.rp.pl/nowa-energia/17348-polska-stawia-na-panele-fotowoltaiczne> [DOA: 11.2.2019].

⁸ <https://www.ieo.pl/pl/projekty/raport-rynek-fotowoltaiki-w-polsce-2019> [DOA: 11.2.2019].

⁹ L. E. Chaar, L. A. Lamont, N. E. Zein, *Review of photovoltaic technologies*, “Renewable and Sustainable Energy Reviews” 2011, No 15, pp. 2165–2175.

¹⁰ J. Mundo-Hernández, B. C. Alonso, J. Hernández-Álvarez, B. Celis-Carrillo, *An overview of solar photovoltaic energy in Mexico and Germany*, “Renewable and Sustainable Energy Reviews” 2014, No 31, pp. 639–649.

¹¹ J. L. Silveira, C. E. Tuna, W. Q. Lamas, *The need of subsidy for the implementation of photovoltaic solar energy as supporting of decentralized electrical power generation in Brazil*, “Renewable and Sustainable Energy Reviews” 2013, No 20, pp. 133–141.

2. LEGAL CONDITIONS

The primary legal act regulating the issues of the possibility of locating photovoltaic cells is the Act on Spatial Planning and Development (SPDA)¹². This legal act is of fundamental importance at the initial stage of the investment process, i.e. at the moment when a potential investor decides where to locate a future investment.

Under Article 4(1) of SPDA, the determination of land use, the location of public purpose investments, and the specification of development methods and conditions of land development take place in the local spatial development plan. That means that the local spatial development plan is a fundamental planning act, and its role is also emphasised in the judicature, where “the role of the local plan as a normative act consistent with the legal determinant of administrative decisions issued in the investment process is emphasised. This act must contain specific and unambiguous provisions because otherwise, it will lose its predictive function, which is so important for the participants of the aforementioned process; the decisions of the bodies applying the law would become unpredictable and characterised by discretion”¹³. The drafting of acts of local law takes place under the so-called planning authority reserved for commune authorities¹⁴. It means that the commune, acting through its executive body (the head of the commune, the mayor, the president of the city) and legislative body (the commune or city council), has the right to pass a provision of generally binding law that will enable the location of photovoltaic systems. However, this issue is beyond the scope of interest of this study, as it is based on the same principle as wind farms, described in the chapter on the location of wind investments.

Apart from the above-mentioned form of location, there is also a possibility of locating photovoltaic investments outside the areas designated in local plans for such development. According to the Supreme Chamber of Control studies, in 2017, only about 30% of the area of Poland was covered by local spatial development plans¹⁵. In practice, this means that local spatial development acts do not cover a relatively large number of areas of Poland¹⁶. Areas with no local plans are

¹² The Act of 27 March 2003 on spatial planning and development, Journal of Laws Journal of Laws 2020, item 293, hereinafter referred to as SPDA.

¹³ The judgment of the Provincial Administrative Court in Kraków of 25 April 2019, II SA/Kr 179/19, CBOSA.

¹⁴ Z. Czarnik, *Istota i zakres władztwa planistycznego gminy*, „Administracja: Teoria, Dydaktyka, Praktyka” 2010, No 3(20), p. 5.

¹⁵ The Supreme Chamber of Control (NIK) on the system of managing the commune’s spatial development as a public property [NIK’s analysis], <https://www.nik.gov.pl/aktualnosci/nik-o-systemie-gospodarowania-przestrzeni-gmin.html>.

¹⁶ P. Śleszyński, A. Deręgowska, Ł. Kubiak, P. Sudra, B. Zielińska, *Analiza stanu i uwarunkowań prac planistycznych w gminach w 2017 r.*, Warszawa 2018, p. 21.

mainly rural areas (undeveloped), favouring the implementation of photovoltaic farms.

Location decisions are an alternative to local spatial development plans. According to the provision of Article 4(2) of SPDA, in the absence of a local spatial development plan, the determination of land development methods and conditions is made by way of a decision on land development and management conditions:

1) the location of a public purpose investment is determined by the decision on the location of a public purpose investment;

2) the manner of land development its conditions for other investments is determined by the land development conditions.

In practice, it raised doubts about which of the above decisions should be used as the basis for locating a photovoltaic investment. From a legal point of view, it would be much more advantageous to locate a photovoltaic investment based on a decision on the location of public investment. Such a decision, at first glance, benefits from many facilitations and is quicker to obtain.

In the absence of unambiguity of the legal regulations, unfortunately, the judicature voted negatively against this possibility, stating that “Article 6(2) of the Act on real estate management includes in public purposes only the construction and maintenance of equipment for the transmission of electricity, as well as other facilities and equipment necessary to use transmission equipment”. Therefore, it concerns devices used to transport (transmission) energy to deliver it to distribution networks or end-users connected to transmission networks. As emphasised by the Supreme Administrative Court, currently, only the construction and maintenance of cables and equipment strictly used for electricity transmission constitutes a public purpose *ex definitione*. In order to obtain the status of a public purpose investment, it is not enough to have a functional link between energy generating equipment and transport or transmission equipment, which is relatively easy to establish in the system of energy facilities and equipment. An opposing view in favour of including energy generating equipment in the public purpose investment because of its inseparable connection with elements serving the transmission of the generated energy would be contrary to the intention of the legislator who, in Article 6 of the Act on real estate management, established a closed catalogue of public purposes. However, it is considered that an enumerative and exhaustive provision, and not just an exemplary one, should be interpreted restrictively, and *a contrario* its broadening interpretation is unacceptable. Thus, the wording of Article 6(2) of the Act on real estate management does not permit the construction of energy-generating equipment to be classified as a public purpose investment¹⁷. This position is commonplace.

¹⁷ The judgment of the Supreme Administrative Court of 11 May 2011, II OSK 806/10, CBOSA.

Therefore, the investor is left with the necessity of obtaining a decision on land development conditions.

The binding legal regulations do not require the possession of a legal title to dispose of the real estate for construction purposes at this stage of the investment process. The advantage of the Polish law is the possibility of commencing investment planning without incurring potential costs related to the acquisition or, more broadly, obtaining a legal title to the real estate on which the future investment is to be located. The adopted solution is of considerable practical significance as it allows the planning of investment in several locations without implementing it. The above perfectly reflects the title of the Act – “on planning” but not on the execution of an investment. The decision on land development conditions does not confer any rights to the land and does not violate the property rights and rights of third parties.

3. THE PROCEDURE FOR OBTAINING THE DECISION ON LAND DEVELOPMENT CONDITIONS

3.1. THE INVESTOR

The procedure for deciding on land development conditions is initiated upon the investor's application submitted to the public administration authority¹⁸. As a rule, the body competent to issue a decision on land development conditions is the commune head, mayor, or president of the city competent for the property's location on which the investment is planned to be located.

The initiation of proceedings on the investor's initiative is of significant importance because the applicant has the exclusive right to shape the content of its demand included in the application to determine land development conditions¹⁹. That means that the investor determines the scope of the conducted proceedings, and the body competent to examine the case is bound by its scope.

The content of the submitted application determines the subject matter of proceedings. Therefore the body conducting the proceedings is not entitled to modify it *ex officio*. However, until the end of the proceedings, the investor himself may modify the application, resign from the planned investment, and withdraw the submitted application with a final decision on determining development conditions. In judicature, it is even argued that being bound by the application means

¹⁸ C. Kociński, *Postępowanie w sprawie ustalenia warunków zabudowy*, „Nowe Zeszyty Samorządowe” 2008, No 1, issue 3.

¹⁹ The judgment of the Provincial Administrative Court in Gdańsk of 1 April 2015, II SA/Gd 787/14, CBOSA.

that the public administration body should subject the intention described therein only to assessment from the point of view of relevant legal regulations²⁰.

According to the solution adopted in Poland, anyone can be an applicant. From the formal point of view, it does not matter whether it is a natural person, a legal person, or an organisational unit without legal personality, as long as it can be a subject of rights and obligations. The above provisions also have a significant meaning that the already obtained decision is not “rigidly” bound (permanently) with the entity that obtained it. It is possible to transfer the rights resulting from an already issued decision on land development conditions²¹. Under the provision of Article 63(5) of SPDA, the body which issued the decision on land development conditions is obliged, with the consent of the party for whom the decision was issued, to transfer the decision to another person if the latter accepts all the conditions included in the decision. The parties to the proceedings for the transfer of a decision are only the entities between which the decision is to be transferred. Therefore, it is up to the investor to decide whether he will carry out the investment process in its further stages or whether he will “dispose” of (transfer) rights resulting from the obtained decision on land development conditions.

3.2 FORMAL REQUIREMENTS OF THE APPLICATION

There is no doubt that the proceedings on the determination of land development conditions are typical administrative proceedings conducted based on the provisions of the general administrative procedure regulated in the provisions of the Code of Administrative Procedure²². The adopted solutions mean that in addition to the requirements of the CPA, the investor applying is obliged to meet the special conditions resulting from the Act on Planning and Special Development. The basic general requirements include the indication (identification) of the Investor, his address, and his signature under the application. The relatively most formally developed element of the application is the investor’s request, which, as mentioned above, determines the scope of the conducted proceedings.

In this respect, it is not sufficient to indicate that the investor’s objective is to obtain a decision authorising the location of photovoltaic cells or the construction of a photovoltaic farm. Unfortunately, because of the current regulation, the investor’s request is more formalised and requires the investor to clarify many

²⁰ The judgment of the Provincial Administrative Court in Białystok of 18 April 2019, II SA/Bk 729/18, CBOSA.

²¹ W. Jakimowicz, *Wybrane zagadnienia prawnomaterialne i prawnoprocesowe ustawy z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym (Dz.U z 2003 r. nr 80 poz. 717)*, „Causus” 2004, No 31, p. 30.

²² The Act of 14 June 1960. Code of Administrative Procedure, Journal of Laws of 2020, item 256.

detailed parameters concerning the future investment. Elements of the investor's request have been determined by the provision of Article 52(2) of SPDA.

Therefore, the application should contain elements concerning the area of the planned investment, which include defining the boundaries of the area covered by the application. The formal requirement is to present the areas on the official map, adopted for the state surveying and cartographic resource, covering the area which the application concerns and the area on which the investment will have an impact, in the scale of 1:500 or 1:1000, and relation to linear investments also in the scale 1:2000.

The second formal element in the scope of the request is the indication of the characteristics of the investment, which includes:

a) specification of the demand for water, energy and the manner of sewage disposal or treatment, as well as other needs within the scope of technical infrastructure and, if necessary, the manner of waste disposal,

b) specification of the planned land development method and characteristics of the land development, including the purpose and dimensions of the designed buildings and the area subject to redevelopment, presented in a descriptive and graphic form,

c) the specification of technical characteristics of the investment and the data characterising its effects on the environment.

The impact of the planned investment on the environment may be significant for practical reasons. In this respect, the development of photovoltaic systems may be qualified as a group of investment projects for which:

- there may be no need to obtain a decision on environmental conditions,
- it may be necessary to obtain a decision on environmental conditions, but there will be no need to carry out an environmental impact assessment, i.e. to prepare a report on the impact of the project on the environment and ensure the involvement of the public,
- it may be necessary to obtain a decision on environmental conditions, and the need to carry out an environmental impact assessment will be determined.

The criterion related to the impact of the planned investment on the environment, and thus the qualification of the planned development, is the development area of the planned project. As a rule, there is no need to obtain a decision on environmental conditions for photovoltaics with a development area of not less than 0.5 ha. in areas covered by forms of nature protection and 1 ha. in other areas. For other projects within the scope of the discussed investments, it is necessary to obtain a resolution concerning the environmental decision.

According to the official position of the General Director for Environmental Protection, the area of development for above-ground photovoltaics should be considered as the area of the projection of photovoltaic panels taking into account their gradient to the terrain, the area occupied by all kinds of accompanying

infrastructure (e.g. roads, parking lots, transformers, inverters), and other areas intended to be redeveloped as a result of the project implementation²³.

The above information, which is a part of the application, is also pointed out in the judicature, where it is explicitly emphasised that “since the locating authority must examine whether there is a requirement to include a decision on environmental conditions because of the environmental qualification of the project, it means that the data submitted by the investor must be sufficient to make such an assessment. The role of the authority is consequently to ensure that the decision to locate a public benefit investment is based on complete information from the investor, enabling the investment to be properly assessed in the context of its environmental qualification and impact”²⁴.

A lack of the requirements indicated in the investor’s application prevents the effective initiation of proceedings to issue a decision. The role of the authority conducting the procedure is to verify the completeness of the submitted application. Therefore, the authority is obliged to verify the submitted application and, in the absence thereof, request its completion.

As previously indicated, only a complete application allows for initiating an administrative procedure and its subsequent stages. From this point on, the time limit for the authority to issue a decision on establishing land development conditions also starts to run.

Initiation of proceedings also implies the obligation to notify parties to the ongoing proceedings other than the investor. As a rule, the parties to the proceedings for establishing land development conditions are the owners and perpetual usufructuaries of the properties on which the investment has an impact.

In this respect, one should agree with the position of the judicature, according to which “the recognition of the owner of a neighbouring property as a party to proceedings in a case concerning a decision on land development conditions cannot be reduced to merely verifying the occurrence of premises in the form of an immediate neighbourhood. It is also necessary to assess the possible impact of the planned investment on the rights of the neighbouring real estate owner (perpetual usufructuary). Therefore, the assessment of the admissibility of the building’s location to the neighbouring plot cannot be limited solely to the issue of determining whether there is an immediate neighbourhood but should cover the whole set of rights and obligations related to the spatial location of the building on the property located in the analysed area”²⁵.

²³ Letter from the General Director for Environmental Protection in a letter dated 25 August 2016 addressed to the Regional Directors for Environmental Protection, https://www.gdos.gov.pl/files/artykuly/5072/Realizacja_paneli_fotowoltaicznych_na_dachach_istniejacych_budynkow.pdf.

²⁴ The judgment of the Provincial Administrative Court in Gdańsk of 19 December 2018 r., II SA/Gd 476/18, CBOSA.

²⁵ The judgment of the Supreme Administrative Court of 26 September 2017, II OSK 110/16, CBOSA.

3.3. THE DRAFT DECISION

An essential part of the land development conditions procedure is the drafting of a future land development decision. According to Article 60(4) of SPDA, the drafting of a decision on the establishment of the location of a public purpose investment is entrusted to a person who has specific qualifications listed in Article 5 of SPDA, or to a person entered on the list of a professional self-governing chamber of architects who have the building rights to design without restrictions in architectural speciality or building rights to design and manage construction works without restrictions in the architectural speciality.

The essence of preparing a draft decision on land development conditions is to address the competent authorities with the proposal for a given decision²⁶. Although the above decision is issued by the executive body of the commune (the head of the commune, mayor, president of the city), there is no complete independence. In order to issue a decision, the main body is obliged to obtain a position in the form of an agreement with other “industry” public administration bodies. In this respect, the draft decision is subject to approval (agreement) by other authorities. The draft decision is drawn up based on analysis, the detailed scope determined by the provisions of the Regulation²⁷. The obligation to conduct the analysis rests with the public administration body that conducts the proceedings in the case. The analysis is prepared in order to determine the specific values of the future investment from its content. The preparation of the analysis is a specific way of determining the actual state of affairs, which is necessary for the proper determination of the parameters of the decision. In practice, incorrect analysis is one of the most frequent cases of an incorrect decision issued by a first-instance authority. Establishing the facts is subject to assessment in appeal proceedings and is also subject to control by an administrative court.

3.4. THE DECISION

The decision on land development conditions is declaratory²⁸. It means that it confirms a specific condition related to the possibility of land development, enables the implementation of subsequent stages of the investment process, and finally, the implementation of the investment. That is the information about what

²⁶ The judgment of the Supreme Administrative Court of 15 July 2016, II OSK 2824/14, CBOSA.

²⁷ Regulation of the Minister of Infrastructure of 26 August 2003 on the method of determining the requirements for new development and land development in the absence of a local spatial development plan, Journal of Laws No. 164, item 1588.

²⁸ W. Jakimowicz, *Wolność zabudowy w prawie administracyjnym*, Warszawa 2012, p. 217.

can be done in a given area, but it does not oblige the applicant to take any specific actions, except that such a decision allows him to apply for a building permit²⁹.

The legislator has introduced several requirements, the fulfilment of which results in the obligation to issue a favourable decision for the investor. That is a decision of a binding nature³⁰. Therefore, it must be issued if the conditions for its issuance are met.

Positive prerequisites for the decision have been included in the provision of Article 61(1) of SPDA, including:

- compliance with the principle of good neighbourliness, which means that at least one adjacent plot, accessible from the same public road, is developed in such a way that it is possible to determine the requirements for new development concerning the continuation of functions, parameters, features, and indicators of development and land development, including the size and architectural form of buildings, development lines, and the intensity of land use;
- access of the area of the planned investment to the public road;
- infrastructural considerations, i.e. the existence or planned development of the area sufficient for the construction project;
- lack of restrictions related to the need to obtain permission for changing the use of agricultural and forest land for non-agricultural and non-forest purposes or the area is covered by permission obtained when drawing up local plans, which have expired according to Article 67 of the Act on Spatial Planning;
- no conflict with different regulations.

In practice, the biggest problem in locating photovoltaic investments based on the decision on land development conditions was meeting the condition resulting from satisfying the requirement stemming from the so-called “good neighbourliness”, making it possible to determine the possibility of continuation of the development.

In judicature, two fundamental and simultaneously contradictory directions of interpretation appeared. The first one, which facilitated the location of photovoltaic cells, treated photovoltaic investments as technical infrastructure³¹. The second, more restrictive one, demanded that such investments be treated as

²⁹ The judgment of the Supreme Administrative Court of 7 May 2009, II OSK 731/08, CBOSA.

³⁰ J. Goździewicz-Biechońska, *Decyzja o warunkach zabudowy i zagospodarowania terenu, Cechy szczególne*, „Państwo i Prawo” 2002, z. 2, pp. 95–108.

³¹ The aforementioned view was represented in the following judgments of the Supreme Administrative Court: of 27 September 2017, II OSK 158/16, CBOSA, of 13 September 2017, II OSK 64/16, CBOSA; of 21 June 2017, II OSK 2637/15, CBOSA; of 20 December 2016, II OSK 798/15, CBOSA, of 12 January 2016, II OSK 1070/14, CBOSA of 4 February 2014, II OSK 2129/12, CBOSA, of 13 November 2012, II OSK 762/12, CBOSA; as well as in the judgments of the Provincial Administrative Court in Rzeszów of 27 March 2019, II SA/Rz 178/19, CBOSA, Provincial Administrative Court in Olsztyn of 30 January 2018, II SA/Ol 929/17, CBOSA; Provincial Administrative Court in Warsaw of 6 September 2017, IV SA/Wa 222/17, CBOSA.

production investments³². Adopting the second view limited significantly the possibility of locating photovoltaics in agricultural areas because, in practice, it was challenging to find good neighbourhoods constituting industrial areas.

This situation created uncertainty for investors because depending on the region of Poland, public administration bodies issuing decisions on land development conditions and administrative courts could adopt a liberal or restrictive interpretation of regulations depending on their attitude. The phenomenon was undesirable because it did not enable rational planning of investment processes.

The legislator reacted positively to the existing practice, changing the provisions employing the Act amending the Act on Renewable Energy Sources and certain other acts³³. The Act entered into force on 29 August 2019 and removed, in respect of renewable energy systems within the meaning of Article 2(13) of the Act of 20 February 2015 on Renewable Energy Sources³⁴, the need to meet the requirement of good neighbourliness and access to public roads. The concept of a renewable energy source system means a system that constitutes a separate set of devices for energy production described by technical and commercial data, in which energy is produced from renewable energy sources. The introduced change made it more accessible from the legal point of view to installing photovoltaic devices.

Also crucial for the investor is the time needed to settle the matter, i.e., the authority to issue a decision. Unfortunately, in this respect, the existing practice of the authorities is in contradiction with the binding legal norms.

The establishment of land development conditions is a remarkably complex matter. Consequently, according to the provision of Article 35 § 3 of the CAP, a particularly complicated case should be settled no later than within two months from the date the proceedings were instituted and in appeal proceedings – within one month from the date the appeal was received.

However, the above deadline is instructive, which means that it may be extended by the public administration body conducting the proceedings. Moreover, the time limit for settling the case does not include the time limits provided for in legal regulations for performing specific actions, periods of suspension of

³² The aforementioned view was represented in e.g. the following judgments of the Supreme Administrative Court: of 14 November 2018, II OSK 2758/16, CBOSA; of 22 January 2018, II OSK 794/16, CBOSA; as well as the judgments of: Provincial Administrative Court in Gorzów Wielkopolski of 13 March 2019, II SA/Go 63/19, CBOSA; Provincial Administrative Court in Łódź of 15 June 2018, II SA/Łd 245/18; Provincial Administrative Court in Łódź of 14 September 2018, II SA/Łd 458/18, CBOSA; Provincial Administrative Court in Gliwice, of 24 June 2016, II SA/Gl 248/16, CBOSA.

³³ The Act of 19 July 2019 amending the Act on renewable energy sources and certain other acts, Journal of Laws of 2019, item 1524.

³⁴ The Act of 20 February 2015 on renewable energy sources, Journal of Laws of 2021, item 610.

proceedings, duration of mediation, and periods of delays caused by the fault of a party or reasons beyond the control of the authority (Article 35 § 5 of the CAP).

On the other hand, the investor has the right to lodge a reminder in case of a delay if 1) the case has not been settled within the time limit specified in Article 35, or special regulations, or within the time limit specified by Article 36 § 1 (inactivity); 2) the proceedings are conducted longer than necessary to settle the case (delay). That does not mean, however, that exceeding the deadline for settling the case means that the decision is favourable.

4. IN WHAT AREAS IS IT POSSIBLE TO LOCATE PHOTOVOLTAIC INVESTMENTS; CAN THEY BE LOCATED ON AGRICULTURAL LANDS?

The strategic decision from the investor's point of view is to choose the area of the future investment. Currently, only special regulations, e.g. in water law, protection of monuments, and protection of agricultural and forest land, constitute a legal barrier to the location of photovoltaic investments. Other restrictions are technical limitations consisting in the existence of appropriate technical infrastructure related to, e.g. the possibility of connecting to the power grid.

Of course, in this case, it is not a problem to establish an internal renewable source of electricity with an installed capacity of up to 50 kW, the so-called microsystem. In principle, such installations can be located anywhere without the need for complicated administrative and legal procedures.

The current technology related to the implementation of photovoltaic investments means that photovoltaic farms require significant areas where they can be developed. From the economic point of view, these should be areas that are not suitable for development in any other way, e.g. through the implementation of commercial and residential investments or be used for agricultural purposes.

In the latter respect, particular attention should be paid to areas used for agricultural purposes. Areas for agricultural use are protected by the provisions of the particular act, which shows direct links with the possibility of developing a given plot of land. Special provisions concerning the protection of agricultural land are included in the Act on the protection of agricultural and forestry land³⁵. Legal solutions have been directed towards the respective protection of a specific category of agricultural land. Special protection has been granted to land of high utility from the point of view of agricultural production. The rule is that such land may be used in a non-agricultural character only based on the local

³⁵ The Act on the Protection of Agricultural and Forestry Land of 3 February 1995 (i.e. Journal of Laws of 2017, item 1161) hereinafter referred to PAFLA.

spatial development plan provisions. According to the provision of Article 7(1) of PAFLA (the Act on the protection of agricultural and forestry land), agricultural and forestry land is allocated for non-agricultural and non-forest purposes in a local spatial development plan drawn up following the procedure specified in the provisions on planning and spatial development upon the consent of public administration bodies. It should be noted that under the provision of Article 7(2), item 1 of PAFLA, the allocation of agricultural land constituting agricultural land of Classes I–III for non-agricultural and non-forest purposes requires the consent of the minister in charge of rural development³⁶.

The importance of the above-mentioned problem of protection of agricultural land of high utility class is indicated by the necessity to obtain the consent of the competent minister, i.e. the central body of public administration. The consent is obtained in the form of an administrative decision referred to in Article 104(1) of CAP³⁷, which is subject to the control of the administrative court.

Therefore, it should be stated that the use of agricultural land of Class I–III remains not only within the independent planning authority of the commune authorities but also depends on the consent of another authority. In fact, for the areas subject to protection in the aforementioned scope, the legislator has not provided for a procedure other than the one indicated above, and in particular, it is not possible to change the manner of using such areas by way of a decision on development and land development conditions³⁸.

The presented considerations lead to the conclusion that a potential investor starting to plan the location of a photovoltaic farm should avoid agricultural land of Class I–III and forest land if there are no provisions of the local spatial development plan permitting the implementation of such an investment in these areas. In practice, this means that the investor should exclude such areas if he intends to implement the planned investment in a relatively short period. The above is also essential from the economic point of view because the exclusion of high-class agricultural land may be related to the obligation to bear public levies related to the exclusion of land from production³⁹.

³⁶ Read more: K. Kaczmarek, *Konsekwencje zmian art. 7 ust. 2 pkt 1 ustawy o ochronie gruntów rolnych i leśnych dla działalności przedsiębiorstw energetycznych*, „Przegląd Prawa Ochrony Środowiska” 2016, No 3, pp. 29–50.

³⁷ The judgment of the Supreme Administrative Court of 31 August 2017, II OSK 3027/15, CBOSA, as well as the resolution of the Supreme Administrative Court of 29 November 2010, II OPS 1/10, CBOSA, judgment of the Supreme Administrative Court of 24 November 1999, II SA 995/99, CBOSA.

³⁸ The judgment of the Provincial Administrative Court in Łódź of 10 August 2017, II SA/Łd 368/17, CBOSA.

³⁹ T. Brzezicki, I. Fisz, *Należność i opłata roczna za wyłączenie z produkcji rolnej lub leśnej – wymiar i egzekucja*, „Casus” 2013, No 70, pp. 39–43.

5. CONCLUSIONS

The possibility of basing an investment on a decision on land development conditions has many legal and economic advantages. The economic conditions are those that come to the fore. Obtaining the decision itself does not require a legal title to dispose of the property for construction purposes, and the costs of obtaining such a decision amount to PLN 107 related to the amount of stamp duty and the need to obtain a relevant map from the surveying resource. Solar energy is free of charge, and the systems are relatively cheap to maintain, although their cost of purchase and installation is relatively high. However, there are currently programmes offering income tax reliefs or direct subsidies – based on the *Mój Prąd* (My Electricity) programme, PLN 5,000. The end of the programme was primarily scheduled for 20 December 2019.

Legal restrictions are in principle linked to specific protected areas, particularly agricultural ones, or specific provisions.

In principle, the only disadvantage related to the location of photovoltaic investments is the length of proceedings aimed at obtaining a decision on land development conditions. In particular, it is burdensome when the decision of the public administration body of the first instance is challenged by filing an appeal or is later appealed to the administrative court. In practice, it takes 4 to 6 months for a first instance body (the head of the commune, mayor, president of the city) to resolve a case because of formal requirements related to the proceedings.

Unfortunately, the date of issue of the discussed decision is a real problem for the investor. Photovoltaic investments are protested by parties to the proceedings other than the investor. It should be noted that the decision of the first instance authority is subject to appeal. The appeal body in cases concerning the scope of land development conditions is, as a rule, the local government appeal board. On the other hand, the decision of the local government appeal board may be appealed against the provincial administrative court, and the judgment of the court may be subject to a cassation appeal to the Supreme Administrative Court.

An extensive system of appeal measures means that, in practice, an investor may obtain a final decision after several years from the date of initiation of proceedings.

Currently, photovoltaics in Poland is a politically promoted renewable energy source. Given the stagnation in onshore wind energy and the lack of offshore energy, its popularity will grow. The *Energia Plus* programme is addressed to entrepreneurs, and its budget is as much as PLN 4 billion. It seems that in the future photovoltaic energy will be the largest source of renewable energy in Poland.

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