

Position on the application of the provision of art. 2 clause 1a of the Act of June 24, 1994 on the ownership of premises to separate residential premises in buildings constructed before the date of entry into force of this provision

On September 11, 2017, the Act of July 20, 2017 on the National Property Property Act entered into force, pursuant to which in art. 2 of the Act of June 24, 1994 on the ownership of premises, a change was made by adding paragraph 1a is added: *"Establishment of separate ownership of an independent dwelling takes place in accordance with the provisions of the local spatial development plan or the content of the decision on building and land development conditions, and in accordance with the building permit or effective notification, and in accordance with the occupancy permit. A separate real estate in a single-family residential building may consist of at most two independent residential premises. "* The transitional provision contained in art. 137 section 1 of the Act on the KZN, according to which *"For matters initiated and unfinished before the date of entry into force of the Act, the existing provisions shall apply."*

The reason for introducing the said change was to identify a legal gap in the provisions on the separation of residential premises, leading to the emergence of residential buildings inconsistent with the provisions of the local plan, decisions on building conditions or building permit and occupancy permit. In accordance with the provisions of art. 2 of the Act on the ownership of premises prior to the amendment, the starost, when issuing a certificate on the independence of the residential premises, examined only the technical properties of the premises (e.g. separation with permanent walls), without determining whether the separation of the premises is in accordance with the building acts or decisions taken at the planning stage. and construction. This led to the separation of residential premises in buildings completed as service buildings, or to the separation of many residential premises in buildings completed as single-family residential (i.e. in buildings that by definition consist of a maximum of two residential premises).

The jurisprudence of administrative courts over the years confirmed that the starosta is not bound by the local plan or building development decision, as well as the building permit (even though he was the authority granting this permit). An example of such ruling is the judgment of the Provincial Administrative Court in Krakow, which on January 31, 2014 r. in case II SA / Kr 1524/13, he indicated that 'The body issuing the certificate confirming the independence of the premises has no competence to examine whether, apart from the criteria referred to in art. 2 clause 2 of the LAW. the investment complies with the provisions of the local plan. " This jurisprudence led to a gap in the legal system, bypassing the provisions on spatial planning and building regulations, and the separation of residential premises, which is a necessary condition for their sale, in a manner contrary to the purpose of the property. The social consequence of this gap was the intensification of social conflicts, mainly in connection with the emergence in areas of quiet residential buildings disproportionate to this development multi-family investments, increasing the intensity of land use, even in terms of transport (no parking spaces). From the point of view of the safety of use of the object, the "transformation" of single-family buildings into multi-family buildings led to a situation in which they did not meet the technical standards for this type of development, causing danger to their users, associated with, for example, insufficient fire infrastructure.

In recent years, there has been a gradual change in the case-law in this case, e.g. the Provincial Administrative Court in Warsaw in its judgment of October 26, 2015 in case VII SA / Wa 854/15, indicated that "considerations of the coherence of the legal system require that when applying the provisions of the Act on Property premises regarding the separation of premises in a single-family house, the abovementioned statutory definition of such a house "- he therefore decided not to separate more than two residential premises in a single-family residential building.

The said discrepancy in the jurisprudence was the reason for including provisions in the Act on the National Real Estate Property Act binding the staroste with acts of spatial planning and building decisions when separating a dwelling. Already after the entry into force of the Act, the Supreme Administrative Court in its judgment of 26 September 2017 in case II OSK 92/16 confirmed the legitimacy of the second of the above-mentioned jurisprudence lines ordering the starost to take into account the findings of the local plan, decisions on building conditions and construction decisions in the process determining the independence of a dwelling.

This means that the problem of determining the planning or construction basis for buildings in use for several decades, preceding the issue of a certificate of independence of a residential premises, also existed before the entry into force of the Act on the National Real Estate Property, which only confirmed one of the lines of administrative court decisions in this respect.

The conclusion of the said amendments to the Act on the National Real Estate Property was aimed at strengthening the protection of the rights of apartment buyers, in particular the tenant renting an apartment from a housing operator,

on standard rent, because uncontrolled separation of further residential premises in the building could have a negative impact on preferential lease terms, as well as on the functioning of the entire investment.

In view of the recognition that the separation of a residential premises should take place in accordance with the provisions of acts or decisions issued at the stage of spatial planning (local plan, decision on building conditions and land development) and construction (building permit, occupancy permit, construction notification or change in use) current is the problem of admissibility and conditions for the separation of premises in the absence of the said decisions in the archives of the body or owner of the property. This means de facto undetermined legal and planning status of the building, which makes it impossible to carry out any further administrative actions against it (and this includes the act of separating a dwelling).

In this case, it becomes crucial to determine whether the separation of a dwelling is a change in the way the area is developed (within the meaning of the provisions on spatial planning and development) or a change in the use of the building or part thereof (within the meaning of the Construction Law). If so, then the person applying for the separation of a dwelling is obliged to obtain:

- 1) in the event of a change in the way the area is developed - decisions on development conditions, unless a local plan is in force;
- 2) in the event of a change in the use of the building or part of it - at least tacit consent to the notification of the change in use (and in the case where the change is related to the performance of works - building permit or tacit consent to the building notification).

It should be noted that the separation of a dwelling will constitute:

- 1) a change in the way the area is developed - in particular if as a result of it a non-residential building or a building with an undetermined legal and planning status, a dwelling is created or if it constitutes the separation of 3 residential premises in a building whose legal and planning status has been determined as a single-family building;
- 2) a change in the use of a building object or part thereof - if it meets the conditions specified in art. 71 section 1 of the Construction Law, i.e. if it constitutes an undertaking or omission in a building or part of its activity that changes the conditions: fire, flood, work, health, hygiene and sanitary, environmental protection or the size or arrangement of loads.

To sum up, it should be noted that the applicable legal regulations allow the separation of an independent residential premises in a building with an indefinite legal and planning status, however, this requires the confirmation of the possibility of such separation by obtaining appropriate decisions. Separation of a dwelling is not only a technical activity, but it has a significant impact on the planning and building conditions of use of a building - it should therefore be subject to public control. The experience to date in the application of the provisions on the independence of premises, including the problems described above associated with uncontrolled separation, confirm the need to strengthen this control. The staroste remains the entity responsible for issuing a lawful certificate - the new regulations have not transferred responsibility to notaries.

In addition, it should be noted that the Act on the National Property Property did not provide for issued certificates the effect of loss of power, therefore they can be used in trading as the basis for the transaction. The current provisions of the Act on the ownership of premises also do not provide for the temporary nature of the certificate.

The provision of art. 137 of the Act on the National Real Estate Property, indicating that the matters initiated and not completed before the date of entry into force of the Act apply the current provisions, should refer to matters regarding the issue of a certificate of independence of the premises - therefore applications for the issue of certificates submitted before the date of entry into force the life of the act is dealt with according to the previous legal status.