

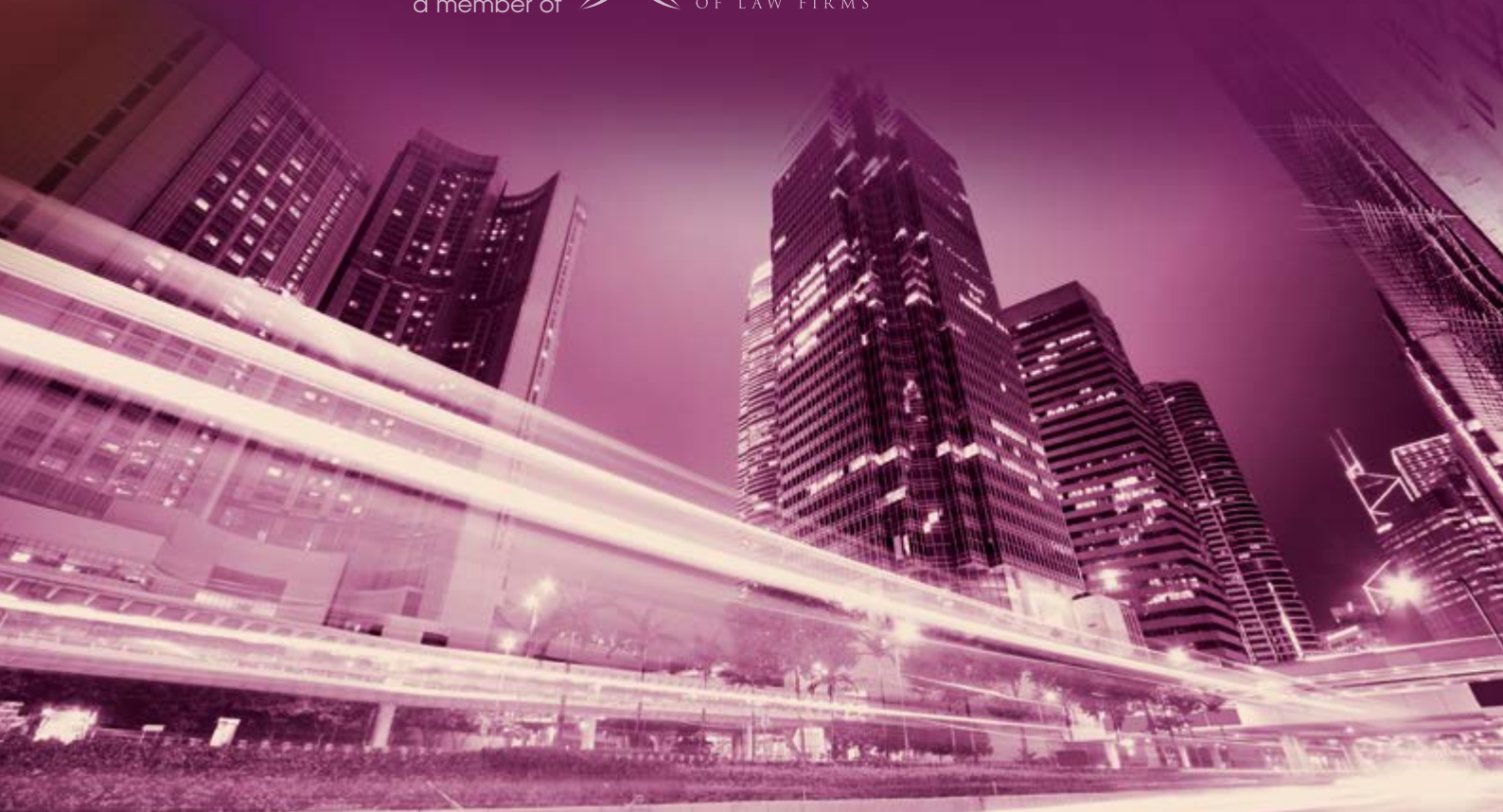
# REAL ESTATE LAW IN POLAND FOR FOREIGN INVESTORS

October 2015

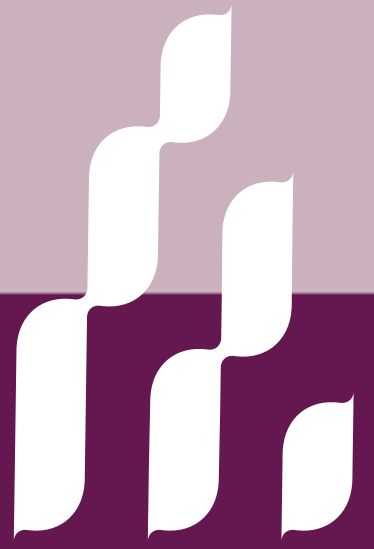


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# I. Doing business in Poland by foreign investors

## 1. General rules on conducting business by foreigners

In general, with accordance to the Economic Freedom Act of July 2, 2004 foreign persons (natural and legal) from the European Union (EU) and Member States of the European Free Trade Association (EFTA) belonging to the European Economic Area (EEA), as well as those from states not belonging to the European Economic Area (EEA), but who are entitled to establish and conduct business under treaties signed by these states with the European Union (EU) and its Member States, may establish and conduct business in Poland under the same rules as those applying to Polish citizens.

Foreign persons not listed above may establish and conduct business only in the form of a limited partnership (spółka komandytowa), limited joint stock partnership (spółka komandytowo-akcyjna), limited liability company (spółka z ograniczoną odpowiedzialnością) and joint stock company (spółka akcyjna).

## 2. Forms of conducting business by foreigners

With regards to the scope and aims of business activities, foreigners can:

- establish a branch office;
- establish a representative office;
- conduct business in the form of sole proprietorship (natural persons only);
- establish a Polish company/partnership.

### 2.1. Branch office

According to the Economic Freedom Act, foreign investors may establish branch offices in Poland. A branch office is a part of the foreign company that does not have its own legal personality, but conducts business in Poland. It is important to indicate that a branch office can only conduct these types of business activities which are conducted by the foreign business entity.

It should be noted that:

- a branch office may start doing business only after it is entered into the Polish National Court Register;
- a branch office must appoint a person in Poland who is authorized to represent the foreign business entity;
- the name of a branch office must include the name of the foreign entrepreneur in the language of the country where his registered office is located, together with the Polish translation of the entrepreneur's legal form and the phrase "oddział w Polsce" (branch in Poland);
- the branch office is obliged to notify the Polish Minister of Economy of any factual and legal changes (such as the winding-up of the foreign entrepreneur or forfeiture of his right to conduct business activities) within 14 days following the occurrence of such changes;
- a branch office is obliged to maintain separate accounts in the Polish language and in accordance to Polish accountancy regulations.



## 2.2. Representative office

Foreign entrepreneurs are allowed to establish representative offices in Poland. The activities of these offices are limited only to advertising and promotion of the foreign entrepreneur. The main difference between a representative office and a branch office is that the latter may conduct business activities (although only within the scope relevant to the foreign enterprise), while the former cannot. The representative office must be registered in the Register of Representative Offices, which is run by the Minister of Economy.

## 2.3. Sole proprietorship

This type of enterprise is established for the purpose of operating a small business by a private individual. It is registered in the Central Registration and Information on Business (CEIDG) run by the Minister of Economy.

## 2.4. Polish company or partnership

Apart from above listed forms of conducting business, the best solution for a foreign investor who plans to conduct business on a large scale is to establish a Polish company or partnership. The Polish Commercial Companies Code allows the following types of partnerships and companies to be established:

- registered partnership (spółka jawna)

A registered partnership is a personal partnership where every partner has unlimited liability for the partnership's debts. Despite the lack of legal personality, like all partnerships, a register partnership may act in its own name and on its own behalf when conducting business.



- professional partnership (spółka partnerska)

A professional partnership is a partnership established by natural persons for the purpose of working in a profession listed in the Commercial Companies Code (e.g. an attorney, a tax advisor, a doctor, etc.). This type of partnership is restricted only to natural persons who are authorized to practice in such professions.

- limited partnership (spółka komandytowa)

The main feature of a limited partnership is that at least one partner has unlimited liability for the partnership's debts, whereas other partners are only liable up to the sum specified in the partnership agreement.

- limited joint stock partnership (spółka komandytowo-akcyjna)

The main feature of a limited joint stock partnership is that at least one partner is fully liable for the partnership's debts, whereas at least one partner is a stockholder who is not liable for the partnership debts.

- limited liability company (spółka z ograniczoną odpowiedzialnością)

This type of company is a legal person, separate from its shareholders. It has capital created from shareholders' contributions. The shareholders are not liable for the company's debts.

- joint stock company (spółka akcyjna)

A joint stock company is a legal person, separate from its stockholders. It has capital created from stockholders' contributions. The stockholders are not liable for the company's debts. Conducting business in the form of such a company requires more formalities to be fulfilled than in the form of a limited liability company. A joint stock company can become a public company listed on a stock exchange.

### 3. Taxation in Poland

The taxation system in Poland is uniform and only small differences may appear in case of local taxes. As a rule, foreign companies and individuals pay the same taxes as Polish companies and citizens. However, the exceptions to this rule are business activities in which taxation is regulated by international treaties signed by Poland. These treaties regulate particularly the matter of double taxation avoidance.

The main taxes in Poland are:

- corporate income tax (CIT);
- personal income tax (PIT);
- value added tax (VAT);
- civil transaction tax (CTT).

All companies and sole proprietors intending to conduct business in Poland are given a tax identification number (Numer Identyfikacji Podatkowej – NIP) by a local Tax Office. There is an additional registration requirement for VAT payers.

Tax payers are responsible for their accounts and proper calculation and payment of tax.



## II. Real estate law basics

### 1. Title to real estate

There are several titles to property in the Polish Civil Code. The strongest is ownership (*własność*), followed by perpetual usufruct (*użytkowanie wieczyste*). Other titles to use property grant their beneficiaries considerably weaker rights and consist of limited real property rights (usufruct and easements/servitudes) and certain obligation rights (tenancy, lease, lending for use).

### 2. Ownership

Ownership is the title that grants the beneficiary the broadest scope of rights. Within the limits set by statutory law and the principles of community life, the owner may possess the real estate, use it, collect profits and other benefits from it, and dispose it.

Apart from a few exceptions, the owner may freely transfer his ownership to another person. Although the change of the real estate's ownership should be registered in the Land and Mortgage Register, the transfer of ownership becomes effective when an appropriate contract is signed between the owner and the acquirer in the form of a notarial deed. The notary fee for the notarial deed depends on the value of the transaction. The maximum notary fees are specified in the Ordinance on Maximum Notary Fees of June 28, 2004.

### 3. Perpetual usufruct

Land owned by the State Treasury and located within the administrative boundaries of cities and land owned by the State Treasury located outside these boundaries but included in the city's local zoning plan (a plan that sets the rules on development of an area) and allocated for performance of the tasks of its economy, as well as

land owned by units of local government or their associations, may be given for perpetual usufruct to natural and legal persons.

In order for perpetual usufruct to be granted, a contract in the form of a notarial deed must be signed between the State Treasury or a unit of local government and the acquirer, and then it has to be registered in the Land and Mortgage Register. Similarly to the transfer of ownership, a notary fee has to be paid for the notarial deed. The notary fee depends on the value of transaction. The maximum notary fees are specified in the Ordinance on Maximum Notary Fees of June 28, 2004.

Perpetual usufruct entitles its beneficiary to use the land for a period of 99 years. However, in exceptional cases, when the economic purpose of perpetual usufruct does not require the land to be handed over for such a long period, the land may be given for a shorter period, but no shorter than 40 years. In the last five years before the lapse of the period stipulated in the contract, the perpetual usufructuary may demand that the contract is extended for a further period of no less than 40 and no more than 99 years. The contract extending the period of perpetual usufruct must be concluded in the form of a notarial deed.

The contract granting the right of perpetual usufruct can oblige the perpetual usufructuary to erect buildings and other facilities on the land and specify work commencement and completion dates.

It should be noted that the relevant public authority can terminate the contract before the lapse of the perpetual usufruct's period if the land is used in a manner which is obviously contradictory to the purpose specified in the contract, particularly

if the usufructuary has failed to erect the buildings or facilities specified therein.

The buildings and other facilities erected on the land by the perpetual usufructuary become his property. The same applies to the buildings and other facilities which he has acquired under relevant regulations at the time the contract was concluded. When the contract expires, the relevant public authority becomes the owner of said buildings and other facilities, whereas the former perpetual usufructuary may demand payment for the buildings and facilities existing on the day the land was returned.

The perpetual usufructuary is obliged to pay an initial fee ranging from 15% to 25% of the land's value. Additionally, throughout the duration of his right he has to pay an annual fee ranging from 0.3% to 3% of the land's value. The annual fee varies depending on the manner the land is to be used. The annual fee can be changed if the value of the land or its factual use has changed.

The right of perpetual usufruct can be transferred. However, differently than in the case of transfer of ownership, the transfer of perpetual usufruct becomes effective only once it has been registered in the Land and Mortgage Register.

## **4. Lease and tenancy**

### **4.1. Basic information**

Lease (najem) and tenancy (dzierżawa) are two popular civil law contracts that give the right to use others' property.

There is no requirement for a foreigner to obtain a permit from a public authority if he wishes to become a lessee or a tenant.

### **4.2. Lease**

Under a lease contract the landlord, referred to also as the lessor, commits to hand over an object, e.g. a real estate, for a fixed or non-fixed term, and the lessee commits to pay him an agreed term in money or in performances of another type.

There is no statutory rent cap, so the parties are free to determine the rent's value in the contract. There are no statutory indexation provisions as well. Rent may be automatically adjusted during the lease time if the parties agree to implement such an indexation clause.

To secure the rent in which the lessee defaults for no longer than one year, the lessor has a statutory pledge on the lessee's movables that are located within the boundaries of the rented real estate, excluding these movables which cannot be the subject of attachment.

If the lessee defaults in paying the rent for longer than two full payment periods (usually two months), the lessor may terminate the lease without notice. In the case of the lease of premises, the landlord has to warn the tenant in writing and give him an additional one month period to pay the overdue rent before he can terminate the contract.

The lessee has no statutory right of renewal. If he continues to use the real estate after the contract expires, but with the landlord's consent, the contract is deemed, in the case of doubt, to have been extended for an indefinite period.

If a lease contract is concluded for a fixed term, it may be terminated only in situations specified in the contract. If the lease period is not fixed, either party can terminate the contract with the notice periods stipulated therein, and in their absence – with the statutory notice periods.

Any lease contract may be terminated by mutual consent of both parties.

In case of the lease of premises, the lessee may sublet it only with the landlord's consent (the landlord's consent is not required for a person towards whom the lessee has a maintenance obligation). Subletting other objects is permitted unless the contract prohibits it.

The landlord is obliged to maintain the rented object in a condition fit for the agreed use throughout the lease period. The lessee ought to make minor repairs connected with normal use of



the object. If the rented object has defects which limit its suitability for the agreed use, the lessee may demand an appropriate reduction in the rent for the duration of the defects.

The lessee should use the rented object in the manner specified in the contract, and if the contract does not set forth the manner of use – in a manner corresponding to the properties and the purpose of the object. Without the landlord's consent, the lessee cannot make changes to the object that will be against the contract or the purpose of the object.

If the lessee improved the rented object, the landlord may, unless the contract provides otherwise, at his discretion, either retain the improvements and pay the lessee a sum equal to their value in return, or demand that the lessee restores the rented object to its original condition.

A new owner of the rented property automatically becomes a party to an existing lease contract. The acquirer may, however, terminate the lease observing statutory notice periods.

There are special provisions with regard to the lease of residential premises. These provisions tend to give the lessee a greater range of protection than in other types of lease.

It should be noted that the Civil Code contains provisions on financial lease (leasing), which is a type of contract where the financing party commits to acquire an object from a specified transferor and to give it over to the user for use and collection of profits for a fixed term, and the user commits to pay the financing party a monetary remuneration in agreed installments equal at least to the price or the remuneration at which the financing party acquired the object. The parties may agree that after the expiry of the contract the user will be entitled to acquire the object from the financing party.

### 4.3. Tenancy

The main difference between lease and tenancy is that in the case of a tenancy contract the tenant is entitled not only to use the object, but also to collect the profits therefrom. Therefore, tenancy is more common in agriculture and industrial sectors.

In general, tenancy is governed by the same rules as lease, with only some differences. The provisions on lease apply accordingly to tenancy unless there are provisions directly regulating tenancy.

Similarly to the lease agreement, the tenant is obliged to pay the rent, but the parties may decide that the rent will constitute a fraction of the profits obtained by the tenant from the rented object.

The tenant has no statutory right of renewal.

Unless the tenancy contract provides otherwise, the tenancy of agricultural land can be terminated by either party with one year's notice at the end of the tenancy year, and any other tenancy contract may be terminated with six months' notice before the end of the tenancy year.

Just as in case of lease, there is no statutory rent cap applicable to tenancy and there are no statutory indexation provisions. Rent may be automatically adjusted throughout the period of the contract if the parties decide to implement an indexation clause.

If, due to circumstances for which the tenant is not liable and which do not concern it, normal revenues from the object are considerably decreased, the tenant may demand a reduction in the rent due for the given business period.

The tenant is obliged to carry out any repairs needed to keep the rented object in a non-deteriorated condition.

The tenant is allowed to use the object according to rules of proper management and cannot change the purpose of the object without the landlord's consent.

The tenant is not allowed to transfer the tenancy or to hand over the object for a free of charge use to a third party without the landlord's consent.

After the tenancy ends, the tenant is obliged, in the absence of an agreement to the contrary, to return the object in the condition that it should be according to the provisions on exercise of tenancy.

## 5. Land and Mortgage Register

Ownership and perpetual usufruct ought to be registered in the Land and Mortgage Register. It is a public register run by district courts, which record changes concerning the real estate's legal and factual status. The register is available to the general public and can be accessed directly in the courts or by internet at the following website: <http://ekw.ms.gov.pl>. Every single real estate has its own register. The register provides information on current and former owners and perpetual usufructuaries, mortgages and other limited real property rights, claims concerning the real estate, as well as the area of the plot and the buildings located on it. It should be noted that there are some properties which have not been entered to the Land and Mortgage Register yet, though they are a minority.

Therefore, before buying a real estate it is advisable to check its legal status in the register, especially whether the potential seller is revealed there as the owner, if the property is encumbered by any mortgages or other limited real property rights, and if there is any ongoing litigation regarding it.

It should be added that all rights registered in the Land and Mortgage Register are effective and take precedence over any unregistered rights or any right registered subsequently.

It is presumed that the legal status of a real estate revealed in the Land and Mortgage Register is correct, up-to-date and reflects its actual legal status. If there is any inconsistency between the legal status revealed in the register and the real estate's actual status, a person who acquires the ownership or another real property right by performing a legal act with the person duly entitled according to the register, acquires it effectively and is protected by the contents of the register (this rule is called the Land and Mortgage Registers' public credibility warranty – *rekojmia wiary publicznej ksiąg wieczystych*). There are several exceptions to the above rule, e.g. when the right is acquired free of charge or when the acquirer acts in bad faith. Moreover, the public credibility warranty is excluded if a real property is encumbered by virtue of the law, by life annuity, by an easement established by a decision of a relevant public authority, by a transmission easement, by an easement of necessary way or another easement established due to trespassing of boundaries during construction of a building or other facility.

Entries to the Land and Mortgage Register are subject to a court fee. The fees are specified in the Court Fees in Civil Cases Act of July 28, 2005. They are fixed and depend on the subject of request, e.g. the fee for entering ownership, perpetual usufruct or limited real property rights is 200 PLN.

There are no statutory publication requirements with regard to registration in the Land and Mortgage Register.

# III. Acquisition of real property

## 1. Basic rules

The contract for the transfer of ownership or the contract granting or transferring perpetual usufruct is governed principally by the Civil Code.

In order to be effective, a contract for the transfer of a real estate must be concluded in the form of a notarial deed. Therefore, participation of a public notary is essential. The transfer of ownership becomes effective when the contract is executed. Registration in the Land and Mortgage Register should be pursued, but it has declaratory effect only.

In the case of perpetual usufruct, a notarial deed is insufficient for the transfer, which becomes effective only upon registration in the Land and Mortgage Register.

Many contracts are concluded in two stages. Firstly, the parties sign a preliminary agreement, which specifies all the essential elements of the final contract, especially the price and time when the final contract ought to be concluded. When all the conditions stipulated in the preliminary agreement are met, the final contract is concluded. The preliminary agreement may give the right to demand the signing of the final contract to a single party or both parties (or more parties in case of multilateral agreements). However, if one party evades signing the final contract, the party entitled to the said demand may file a case and obtain a court order substituting the statement of intent of the other party (in order for the final contract to be executed), provided that the preliminary agreement was concluded in the form of a notarial deed. If the preliminary agreement

was signed in a normal written form or a written form with only the signatures authenticated by the notary, the beneficiary could only demand compensation for damages he suffered by counting on conclusion of the final contract.

In case of real estate owned by the State Treasury and units of local government, there are special regulations concerning the sale of said property. The general rule is that such property is sold by tender.

## 2. Acquisition of real estate by foreign investors

The matter of acquisition of land by foreigners is regulated by the Acquisition of Real Estate by Foreigners Act of March 24, 1920. The said act dating from 1920 has been heavily amended, especially due to Poland joining the European Union and the developing integration of European states.

The Act defines a foreigner as:

1. an individual who is not a Polish citizen;
2. a legal person with its principal place of business abroad;
3. a partnership of the above mentioned individuals or legal persons, which has no legal personality, has its principal place of business abroad and was established in compliance with applicable law of a relevant foreign state;
4. a legal person and a commercial partnership without legal personality with its principal place of business located in Poland, directly or indirectly controlled by the individuals and entities listed in points 1-3 above.

## 2.1. Foreigners from the European Economic Area Member States and Switzerland

Foreigners from the states of the European Economic Area (the European Union plus Norway, Iceland and Lichtenstein) and Switzerland do not need any permit to purchase real estate.

However, there are some exceptions to the above rule. In the case of farms and woodlands, a permit is required during the first 12 years from the date when Poland joined the European Union (that is until May 1, 2016). However, the permit is not required if the foreigner is a leaseholder over a defined period (7 years for the western regions of Poland and 3 years for the remainder).

## 2.2. Foreigners from other states

Foreigners from other countries require a permit in order to acquire real estate in Poland. The permit is an administrative decision granted by the Minister of Internal Affairs and Administration.

The permit must be obtained both to acquire ownership and the right of perpetual usufruct. The permit is also required when a foreigner intends to acquire shares in a company with its registered seat in Poland which is an owner or a perpetual usufructuary of a real estate, if as a result of such transaction the foreigner will take control of that company. Moreover, the permit is required when the said company is already controlled and the shares are to be bought by a foreigner who is not its shareholder or a stockholder.

There are certain situations when the permit is not required, e.g.:

- acquisition of autonomous living premises (an apartment) in the meaning of the Ownership of Premises Act of June 24, 1994;
- acquisition of a garage for the purpose of fulfilling living needs;
- acquisition of a real estate by a foreigner who has been living in Poland for more than 5 years after being granted the right of settlement or a permit for long-term residence for a European Communities resident;
- acquisition of a real estate by a foreigner who is a statutory heir of the deceased owner or perpetual usufructuary who owned the real estate for at least 5 years or had the right of perpetual usufruct for no less than 5 years;
- acquisition of real estate by a foreigner defined in section 2 point 4 of the brochure, for the statutory purposes of such entity, provided that the real estate is undeveloped and its overall area does not exceed 0.4 ha in urban areas;
- acquisition of a real estate by a foreign bank, provided that the bank's credit is secured by a mortgage encumbering the real estate and in the course of execution proceedings concerning the real estate an official public auction took place, but to no effect.

However, in the cases mentioned above a permit is nonetheless required if the land to be acquired is located in proximity to the border or is a farmland with an area of more than 1 ha.

It is possible for a foreigner to obtain a promise of being granted a permit. The promise is issued in the form of an administrative decision. It is valid for one year and during that period the Minister of Internal Affairs and Administration cannot deny granting the foreigner the permit if the foreigner applies for it.

# IV. Construction Law

## 1. Regulations on planning and development of land

The primary statutory law that regulates the matter of local spatial policy, planning and land development is the Planning and Development Act of March 27, 2003.

The way plots can be used is regulated by local zoning plans. Every municipality is obliged to adopt a study of a local zoning plan. The study is the basis for adoption of a proper local zoning act. The study does not constitute local law (and therefore is not binding upon non-public entities and individuals), but it binds the municipality's council when adopting a local zoning plan, which has to be consistent with the study. A local zoning plan is an act of local law and, as a result, it is effective also with regard to private parties. The adoption of the act requires a special procedure which involves announcements in press and potential involvement of the general public.

A local zoning act can be changed. Modifications to the act require the same procedure to be followed as adoption of the act.

The local zoning plan is a rich source of information for investors on the city's development policy as it contains data on existing infrastructure, future development, the purpose of every plot (agricultural, industrial, etc.), its determined manner of use, rules on environmental protection, areas under protection, areas where construction is prohibited, etc.

## 2. Building permit

The main statutory act concerning construction work is the Construction Law Act of July 7, 1994.

Pursuant to the above mentioned act, a building permit is generally required for construction to begin. Some construction works (especially construction of small objects) do not require a building permit, but only a notification of the relevant public authority. In these cases construction work can begin if the authority concerned does not issue a formal objection within 30 days from the date of obtaining the notification.

This permit can be issued only if the planned construction is in compliance with the local zoning plan as the plan determines whether a given investment can be pursued on a given plot.

When no local zoning plan has been adopted for a given area, the investor must obtain a separate administrative decision on the land's development conditions. This kind of decision neither creates rights to the property nor infringes upon the ownership or other rights of third parties. After obtaining the above mentioned decision, the investor can apply for a building permit. As the decision on the land's development conditions substitutes the local zoning act with regard to a particular investment, the planned construction must be consistent with it.

### **3. Environmental impact assessment**

If an investment may have a significant impact on the environment (and on the Nature 2000 areas), then a special procedure for environmental impact assessment has to be completed and a decision on environmental conditions has to be obtained before the investor can apply for a building permit.

The proceedings concerning the environmental impact assessment are regulated by the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment of October 3, 2008.

The said proceedings result in issuing a decision on environmental conditions which can impose certain duties on the investor in order to ensure that the environment is duly protected.

### **4. Construction works contract**

Construction works contract is regulated by the Civil Code. By such contract the contractor commits to construct a building object in accordance

with the design and technical know-how, and the investor commits to carry out the actions required by the relevant regulations to prepare the works, especially to hand over the construction site and to deliver the design, and to pay the agreed remuneration.

The parties set forth the scope of works that the contractor will perform personally or by subcontractors. It should be noted that the investor and the (general, main) contractor are jointly and severally liable for the payment of remuneration for the works performed by subcontractors.

A construction works contract should be stated in writing. However, contracts between the (general, main) contractor and subcontractors must be concluded in writing, otherwise they are void.

The investor should give the (general, main) contractor a guarantee of payment of the agreed remuneration in order to secure timely payment of the contractor's remuneration. The payment guarantee is a bank or insurance company's guarantee, a bank letter of credit or a bank suretyship given on the investor's instructions.



# V. Taxes

## 1. VAT, CTT

In general, the supply of real estate is taxed with VAT calculated on the basis of the land's or the building's value. The standard rate of VAT is 23%, but a preferential 8% rate applies to some transactions. Moreover, there are also some exemptions from the tax.

If a transaction is exempted from VAT, it is taxed with CTT at the rate of 2% of its value.

Transactions between parties who are not entrepreneurs are not taxed with VAT, but are subject to CTT. The basic CTT rate is 2% of the transaction's value.

## 2. Income tax

Income derived from selling real estate is generally subject to PIT – in case of tax payers who are natural persons, or CIT – in case of tax payers who are legal persons. The rate of the tax is 19%. However, in some cases there is no tax or a reduced tax rate shall apply.

## 3. Real estate tax

The real estate tax is a local tax. The rate of the tax is determined by the municipality's council and is binding only within the boundaries of the municipality. Therefore, the tax rates may differ across Poland, but they cannot be higher than the rates specified in Local Taxes and Fees Act of January 12, 1991.

The tax is paid in installments, annually.

The tax is paid by owners of lands and building objects, perpetual usufructuaries of land, and owner-like possessors (posiadacze samoistni) of lands and building objects. Some lands, buildings and other objects are granted tax exemption.

As the Polish tax system is complicated and is subject to many changes, it is advisable to make a comprehensive, in-depth legal analysis of any given situation in order to come up with an optimal tax solution for the parties concerned.

**The information herein does not constitute legal advice. Izabella Żyglicka and Partners Attorneys at Law & Legal Counsels Limited Partnership is not responsible for the reliability and accuracy of the information provided.**

**If you need legal advice on Polish real estate law please contact our Real Estate Law Department:**

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