



Aleksander Hetko

Associate Hogan & Hartson Warsaw

5 ISSUES TO TAKE INTO CONSIDERATION BEFORE PURCHASING AN APARTMENT IN POLAND

1. *Title to Land*

Upon purchasing an apartment you have to purchase also a title to the common areas in the building and a title to land on which the building stands. The title to land may be ownership or perpetual usufruct.

Perpetual usufruct is a strong property right established on public land and is freely transferable. It is usually established for 99 years subject to the possibility of prolongation for a minimum 40 years and maximum 99 following years.

Developers often build on land obtained in perpetual usufruct as, on the one side, it is also a preference of local authorities to give land into perpetual usufruct instead of selling ownership. On the other side, only a fee of 15-25% of the value of the land is charged up front for establishment of the perpetual usufruct and then 1% of the value annually instead of charging upfront 100% as in the case of ownership sale.

For the purchaser of an apartment the above advantage is not as relevant as usually the price he pays for the title to the plot is just a minor percentage of what is paid for the actual apartment. Naturally in the case of ownership it will be slightly higher but in the case of perpetual usufruct the purchaser must remember to pay afterwards his share of the annual fee by March 31 of each year for the entire period of perpetual usufruct.

When finally after 99 or 188 years the perpetual usufruct ends, the land is returned to its public owner together with the ownership of the apartments. The owner must reimburse the apartment's value to owners of apartments.

This brings us to the conclusion that from the point of view of a potential apartment owner it is better to own the land on which an apartment building is developed rather than own it in perpetual usufruct, although perpetual usufruct is widely applied especially in Warsaw and often may be the only option. It is also possible however that within some time a new law is passed which turns perpetual usufruct into ownership subject to some reduced payments for the expropriated public owner and the whole distinction between ownership and perpetual usufruct stops to be actual.

2. *Purchase Permits*

The general rule is that acquisition of real estate (whether in the form of ownership title or perpetual usufruct title) in Poland by foreigners requires a permit. Similarly, a permit is required for a foreigner to purchase shares in a Polish company that owns real estate or holds it in perpetual usufruct in Poland (this does not apply to public listed companies). For that purpose, foreigners are defined as foreign citizens, foreign-seated legal persons and Polish-seated legal persons controlled by the former two.

There is, however, a general exception – **no permit is necessary to buy apartments.**

As far as houses are concerned, a permit may be necessary. However, no permit is necessary for the purchase of houses by closed-end investment funds or open-end investment funds.

There are also some exceptions from those exceptions and there is a special liberated regime for foreign individuals actually living in Poland and contemplating the purchase a house, but even when it comes to the very issuance, permits are usually granted but naturally it creates additional costs and takes time. The permit procedure in case of houses may take from 2 to 4 months in more complicated cases (even though the statutory maximum is 2 months). Once a permit is issued, it is valid for two years and an acquisition should take place within that time. Refusals are rare and may be challenged in the administrative courts.

3. Zoning of Neighborhood

In order to avoid surprises you should check in a zoning plan before you purchase an apartment in a building in an undeveloped neighborhood, i.e. the zoning designation of the surrounding area. Anybody may enquire about the zoning designation of a plot of land by ordering an excerpt from the zoning plan.

However, in many major cities of Poland, including Warsaw, new zoning plans are still under preparation. Old ones expired in 2002 and 2003. That means that before issuing a building permit it is necessary to obtain a zoning permit. When issuing a zoning permit the so-called "good neighborhood" rule is applied. It means that allowed zoning has to fit in functionally and proportionally with the development on neighboring plots. That may mean that only similar buildings may be developed next to your building, but unfortunately this is not always the case.

4. Costs of Purchase and Taxes

Contracts regarding transfer of title to real estate must be in the form of a deed prepared by a notary. The notary shall charge approximately 0.5% of the transaction value as his fee. His obligation is to prepare the deed, check title to the object of sale and proper authorization of the developer to enter into the transaction.

If the transfer is preceded by a preliminary agreement, notaries usually agree that the above fee should be divided into two – half for the preliminary agreement and half for the final one – both in a form of a notarial deed.

Acquisition of title to the real estate requires also entry of the new owner or perpetual usufructuary into the perpetual book. Such entry is now charged approximately 1.5% of the transaction value but soon shall be charged only 200 PLN due to a new law passed recently. This law generally reduces all court fees.

Apart from the above, purchase of title to a new apartment as a general rule is also subject to VAT. It is 7% on the value of the apartment and 22% on the value of the land. There are some exceptions where a sale is exempt from VAT but is then subject to 2% civil law transaction tax (usually sales of non-new apartments by individuals).

As for the future, there are two possible scenarios. As of 2008 the current 7% VAT on apartments shall be increased to 22% or all basic tax rates (VAT, CIT and PIT) shall be established at 15%. Parliamentary elections will be held in the autumn of 2005 and the outcome shall determine whether there will be any serious tax reforms and when.

Real estate tax for possessing an apartment is still charged on generally applicable rates that vary from community to community up to a maximum of approximately 0.5 PLN per meter. Although there are plans to introduce a real estate tax based on the value of real estate, such solutions is not expected to be introduced soon.

Please remember that if you sell your apartment or house prior to the lapse of 5 years from the purchase, you must pay 10% income tax calculated on the sale price. However, as a general rule, no tax is payable if within 2 years from such sale you use the money to purchase another apartment or house.

5. Negotiating with the Developer in case of Purchasing Apartments under Construction

The best solution is naturally to buy ready apartments. However, often the most attractive apartments are sold before the building is finished or sometimes even before the start of construction.

Therefore, if you decide to purchase an apartment under construction, among others you should insist on concluding a preliminary agreement in the form of a notarial deed (not just regular written form as most developers usually offer). As mentioned above, it should not create any significant additional costs but does provide some level of protection. If you sign in a regular written form only, you may have problems enforcing the agreement and indemnification may remain your only option in case of a developer's default.

Before signing a preliminary agreement in notarial form, a developer will usually ask you to pay an advance as a kind of reservation fee. When negotiating with the developer try to specifically determine the delivery date and date of executing the final agreement. Upon failing to comply with these deadlines a developer should be obliged to pay contractual penalties that should be at least equal to statutory penalty interest calculated on sums paid by you in advance for each day of delay.

Please also note that the only way to avoid the risk of a developer's insolvency is to have a custody agreement with a bank, the money from which is disbursed to a developer when an apartment is delivered and the final agreement is ready for execution. That is why ask your developer whether this is an option and how much extra it would cost.

We hope the above information on selected legal issues will be useful to you and wish you a successful investment.
