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# **Preventing, counteracting, and combatting COVID-19, and the exclusion of the application of regulations on the protection of heritage assets**

## **Abstract**

The COVID-19 Act stipulates that for the design, construction, redevelopment, renovation, maintenance, and demolition of buildings, including changes to their mode of use, made in connection with counteracting COVID-19, the provisions of the Act of 23 July 2003 on the protection of, and care for, heritage assets are excluded. However, the possibility of carrying out these works on buildings entered in the register of heritage assets without the permission of the province conservator of heritage assets raises serious doubts in practice. At the same time, the adopted wording of the provision does not prejudice which works may benefit from this exemption.

**Key words:** heritage-assets protection, national heritage

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The threat of the spreading of the virus SARS-CoV-2 required the legislators to also adjust administrative regulations and procedures to the new tasks. Specific solutions facilitating measures to minimise the public-health hazard supplementary to the primary regulations included in particular in the Act of 5 December 2008 on the prevention and control of infections and infectious diseases in humans (Journal of Laws of 2019, item 1239, as amended), were introduced by way of the Act on the special arrangements for preventing, counteracting, and combatting COVID-19, other infectious diseases, and the crisis situations caused by them (Journal of Laws of 2020, item 374; hereinafter the COVID-19 Act, or the Act). It introduced, among other things, facilities associated with the design, construction, redevelopment, maintenance, and demolition of civil structures, including changes to their use related to counteracting COVID-19. The objective of this paper is to analyse the adopted legal solutions related to the exclusion of the application of heritage-asset protection regulations, and the related issues at the law-application stage.

In line with Article 12 (1) of the Act on COVID-19, other infectious diseases and crisis situations caused by them, the design, construction, redevelopment, renovation, maintenance, and demolition of civil structures, including changes to their use related to counteracting COVID-19, are not regulated by the provisions of the Construction Law<sup>1</sup>, the Act on spatial planning and management<sup>2</sup>, and spatial-planning documents referred to in the said Act, the Act on the protection of, and care for, heritage assets (hereinafter u.o.z.o.z.)<sup>3</sup>, and, when it is necessary to provide more facilities for the provision of healthcare services, also the regulations passed on the basis of Article 22 (3), (4) and (4a) of the Act on medical activities. In practice this means, i.a., the waiving of the necessity to obtain a building permit, to submit a pre-construction notification, or to obtain a construction project approval. In turn, the exclusion of the application of u.o.z.o.z. in relation to objects entered in the heritage-assets register resulted in the dispensing with the obligation to obtain a permit from the Province Heritage Conversation Officer for performing construction works, conservation works on a heritage asset (Article 36 (1) of u.o.z.o.z.), a change to the intended use of a heritage

1 Ustawa z dnia 7 lipca 1994 r. – Prawo budowlane, t.j., Dz.U. 2019, poz. 1186, z późn. zm.

2 Ustawa z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym, t.j., Dz.U. 2020, poz. 293, z późn. zm.

3 Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami, t.j., Dz.U. 2020, poz. 282.

asset entered in the register, or in the use of the heritage asset (Article 36 (9) of u.o.z.o.z.), and the arrangement specified in Article 39 (3) of the Construction Law, which stipulates that for civil structures and areas not included in the register of heritage assets and included in the commune register of heritage assets, a building permit, or demolition permit related to a civil structure, is issued by the architecture- and construction-administration body in consultation with the province conservator of heritage assets. At the same time, the Act introduces the obligation to immediately notify the architecture- and construction-administration body (i.e., as a rule, the District Governor) of the performance of construction works, and any change to the use of the civil structure or its part in relation to counteracting COVID-19 (Article 12 (2) of the COVID-19 Act). The notification should include 1) the type, range, and manner of performing the construction works, and the date of their commencement – in the case of construction works; 2) the previous and the intended use of the civil structure or its part – in the event of a change to its use (Article 12 (3) of the COVID-19 Act).

However, the Act does not provide for an obligation to notify the heritage-assets protection body on construction works on civil structures entered in the register of heritage assets. This problem is discussed in further detail in the subsequent part of this article.

If carrying out construction works as referred to in Article 12 (2) of the COVID-19 Act poses a threat to the life and health of persons, the architecture- and construction-administration body, as part of an immediately enforceable decision, immediately sets the requirements concerning the necessary protective provisions to be applied in such works (Article 12 (4) of the COVID-19 Act). The legislators also did not state clearly the need to implement the works in a way consistent with the conservation-protection rules in the greatest extent possible. In particular, there is no basis for specifying by way of a decision the requirements regarding works implementation so as not to lead to the destruction or damage of the heritage asset.

In the event of conducting construction works related to counteracting COVID-19, the launching of which, pursuant to the Act of 7 July 1994 – the Construction Law, requires the obtaining of planning permission, the investor is obliged to ensure the management of and supervision over the works by a person with building authorisations in the relevant specialisations referred to in Article 15a of the Act (Article 12 (5) of the COVID-19 Act). Also, the discussed provision does not take into consideration the needs related to heritage assets in this respect, failing to introduce, by analogy, an obligation

to conduct works on heritage assets included in the register by individuals with the appropriate qualifications and experience required in u.o.z.o.z.

Although there is no doubt that in this extraordinary situation public-interest needs may justify limitations on the fulfilment of other values, including those arising from the constitutional duty to protect national heritage, the regulations in this regard should ensure that these limitations are introduced only when absolutely necessary. The analysis of the mentioned provisions of the COVID-19 Act raises reasonable doubts in this respect. First of all, it should be stated that the legislators did not explain the notion of a project related to counteracting COVID-19, including only a general statement in Article 2 (2) of the said Act, added by way of the Act of 31 March 2020 (Journal of Laws of 2020, item 568), which entered into force on 31 March 2020, that whenever the Act mentions “counteracting COVID-19”, it should be understood as any measures related to eradicating the infection, preventing its spreading, prophylactics, and combatting its effects, including the socio-economic consequences of the diseases referred to in par. 1. It should be assumed that, for instance, such measures will include, e.g., the renovation of a hospital ward in order to adapt it to the requirements of an infectious-diseases ward. However, the legislator does not specify which measures may be undertaken with regard to counteracting COVID-19, leaving it to the decisions of executive bodies, in particular architecture- and construction-administration bodies, construction-supervision authorities, and heritage-assets protection bodies. However, heritage-assets protection bodies were not treated as being equal to architecture- and construction-administration bodies. This refers to the previously mentioned lack of obligation to notify heritage-assets protection bodies of construction works on civil structures entered in the heritage-assets registers, performed in relation to counteracting COVID-19; the provisions also do not include the possibility of imposing guidelines by heritage-assets protection bodies for the undertaken works, and their performance by persons with specific experience and qualifications.

The adopted structure of the regulations results in a situation in which in every case the appropriate architecture- and construction-administration bodies or heritage-assets protection bodies should verify, by launching an inspection procedure, whether the given construction works are related to counteracting COVID-19, at the same time verifying whether there are grounds for excluding the application of the Act of 7 July 1994 – the Construction Law, the Act of 27 March 2003 on spatial planning and management, and the spatial-planning documents referred to in the Act, the Act of 23 July

2003 on the protection of and care for heritage assets, and (where it is necessary to provide more facilities for the provision of healthcare services) the regulations passed on the basis of Article 22 (3), (4) and (4a) of the Act of 15 April 2011 on medical activities. It seems that the final assessment in the given circumstances will be affected, i.a., by the nature of the entity carrying out the project. The discussed regulations do not limit the range of entities referred to in Article 12 of the COVID-19 Act, which means in practice that these can be central- and local-government administration bodies, as well as legal and natural persons. The point of departure for the assessment of whether the given works are carried out in relation to counteracting COVID-19 should be establishing whether a given entity is competent to perform the tasks related to preventing, counteracting, and combatting COVID-19.

If responsible bodies find that the construction works cannot be considered as being performed in relation to counteracting COVID-19, the relevant provisions of Construction Law, and the Act on the protection of and care for heritage assets referring to the performance of works without the required consents and permits, shall apply. In other words, in the event of conducting construction works on a heritage asset entered in the register which are not considered to be related to counteracting COVID-19 by the competent body, the Province Heritage Conversation Officer will be obligated to apply conservation supervision applicable to the performance of works without the required permit. In particular, it will be entitled to issue a decision to discontinue the works pursuant to Article 43 of u.o.z.o.z. In any appeal against the decision, the entity carrying out the works will be able to raise the argument that the works were being performed in accordance with the legal regulations, i.e. that the works were subject to the exclusion referred to in Article 12 of the COVID-19 Act, which, however, does not impact on the immediate enforceability of such a decision. As a result, the entity assessing whether the given works are related to counteracting COVID-19 will be a second-instance authority, i.e. the Minister in charge of culture and national-heritage protection. As a consequence of the discontinuation of the works, the Province Heritage Conservation Officer will be able to issue one of the information orders referred to in Article 44 of u.o.z.o.z., i.e. to order the entity to restore the heritage asset to the previous state, or to clear the area, while specifying the time limit for these activities, or imposing a duty to obtain a permit from the Province Heritage Conversation Officer for the continuation of the discontinued research, works, or other activities regarding the heritage asset (the request for issuing such a permit should be filed within

7 days of the date of receiving the decision), or imposing a duty to take specific measures leading to the compliance of the performed research, works, or other activities regarding the heritage asset, with the scope and conditions specified in the permit, indicating the time limit for performing these activities, or prohibiting the performance of the discontinued activities. Furthermore, the Province Heritage Protection Officer, pursuant to Article 45 of u.o.z.o.z., will be authorised to issue a decision ordering the restoration of the heritage asset to the previous state, or the clearing of the area, while specifying the time limit for these activities, or obligating the responsible entity to restore the heritage asset to the best possible state in a specified manner, and within a specific time limit. The works will also be subject to administrative-liability provisions (Article 107 d of u.o.z.o.z.) and penal liability (Article 108 of u.o.z.o.z.). In particular, in terms of the first type of liability, the entity carrying out construction works in violation of Article 12 of the COVID-19 Act might be subject to an administrative fine of up to PLN 500,000.

To recapitulate, the solution adopted in Article 12 of the COVID Act should be viewed critically. The discussed regulation, on the one hand, does not provide entities actually performing tasks associated with preventing, counteracting, and combatting COVID-19 with certainty as to the exclusion of the application of construction law and heritage-assets protection law, and on the other, due to the vagueness of the terms used in the provision, and the lack of the obligation to notify heritage-assets protection bodies, creates scope for abuse, and for carrying out works destructive to heritage assets under the pretence of counteracting COVID-19. However, it is worth mentioning that in line with Article 36 of the aforesaid COVID-19 Act, Article 12 of the COVID-19 Act becomes invalid 180 days after entry into force. This means that the discussed regulations will cease to apply as of 4 September 2020. It cannot be ruled out, however, that in view of the risk of the second wave of coronavirus, and other challenges related to the development of other epidemics, in the future it might prove necessary to introduce restrictions on the application of u.o.z.o.z., due to the need for protecting human life and health. However, taking into consideration the comments made in this article, it should be expected that at the stage of drafting new regulations, conclusions will be drawn from the issues arising from the application of the COVID-19 Act. Any limitations on national heritage, which is an essential constitutional value, should be acceptable only in cases in which it is certain that they will lead to the outcomes intended by the legislators (the usefulness of the standard) and

are indispensable (necessary) to protect the public interest. Only regulations which meet the mentioned conditions will be able to be deemed justified in a democratic state of law.

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Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami, t.j., Dz.U. 2020, poz. 282.

## **Zapobieganie, przeciwdziałanie i zwalczanie COVID-19 a wyłączenie stosowania przepisów z zakresu ochrony zabytków**

### Streszczenie

Ustawa o COVID-19 stanowi, że do projektowania, budowy, przebudowy, remontu, konserwacji i rozbioru budynków, w tym zmian sposobu użytkowania, dokonywanych w związku z przeciwdziałaniem COVID-19, przepisy ustawy z dnia 23 lipca 2003 roku o ochronie zabytków i opiece nad zabytkami zostały wyłączone. Jednakże możliwość wykonywania tych prac i robót w obiektach wpisanych do rejestru zabytków bez zgody wojewódzkiego konserwatora zabytków budzi w praktyce poważne wątpliwości. Jednocześnie przyjęte brzmienie omawianych przepisów nie przesądza wyraźnie, które prace będą mogły korzystać ze wskazanego zwolnienia.

**Słowa kluczowe:** ochrona zabytków, dziedzictwo narodowe