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## The housing community in Polish law: methods of management of communal areas

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The Act of 24<sup>th</sup> June, 1994 on the ownership of premises<sup>1</sup> is the basic Polish legal act containing the regulation of housing communities. In accordance with Article 6 of the Act, all owners whose premises are parts of communal areas create a housing community. A housing community may acquire rights and incur obligations, sue and be sued. On this basis, it is assumed that a housing community is a “flawed” legal person, which means that it belongs to the third category of entities distinguished in Polish civil law<sup>2</sup>. The Supreme Court in its resolution of 21<sup>st</sup> December, 2007 decided that the housing community, acting within its legal capacity, may acquire rights and obligations to its own property<sup>3</sup>. Housing communities in Poland are not subject to registration; instead, they are subject to notification to the statistical office and to the tax office.

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<sup>1</sup> The Act of 24th June, 1994 on ownership of premises (Journal of Laws No. 2015, item 1892, as amended).

<sup>2</sup> M. Zięba, *Podmiotowość prawna wspólnot mieszkaniowych*, Warszawa 2016, pp. 355–357.

<sup>3</sup> Resolution of the SC (7) of 21st December, 2007, III CZP 65/07, “Orzecznictwo Sądu Najwyższego. Izba Cywilna” 2008 Nos. 7 and 8, item 69.

The Act clearly distinguishes private ownership of separate premises from ownership of communal areas, the latter ownership being included in compulsory co-ownership. A housing community is a structure set up to manage communal areas, but it does not become its owner, because each owner of premises owns a share in the ownership of communal areas. Polish law distinguishes between residential and commercial premises. Both categories of premises may occur in a housing community.

A specific feature of the Polish regulation is the distinction between “large” and “small” housing communities, on the basis of the criterion of the number of premises comprising the real property. If the premises consist of more than 7 units, then it is a “large” housing community.

## 1. Methods of management of communal areas

Polish legislator has given owners of premises considerable freedom in determining how communal areas are to be managed. Pursuant to Article 18 of the Act, contractual arrangements can be included in the agreement for the establishment of separate ownership of premises, or in an agreement entered into in the form of a notarial deed, or in a notarised resolution. If the method of management has not been specified in the aforementioned mode, the regulations specified in section 4 of the Act, which are mandatory in nature, shall apply absolutely. This means that owners of premises may not modify the methods of management of communal areas by an ordinary resolution.

It should be emphasized that Polish law does not require that a housing community adopt any regulations or statutes. Thus, many housing communities operate exclusively on the basis of the provisions of the Act.

It is therefore necessary to distinguish between two methods of management of communal areas by a housing community: contractual management and statutory management.

Contractual management may consist only in the entrusting of its exercise to a natural or legal person, or in contractual rules establishing the management of the real property.

Statutory management takes one of two forms, depending on whether the community is classified as a “small” or a “large” community.

## 2. Contractual management of communal areas

Pursuant to Article 18 of the Act, contractual arrangements can be included in the agreement for the establishment of separate ownership of premises, or in an agreement entered into in the form of a notarial deed, or in a notarised resolution. The management of communal areas may be entrusted to a natural person or to a legal person called a manager. A manager is not an obligatory body who, under Polish law, may be appointed only by an agreement of owners. Such an agreement may, but need not, define his/her remit. In the absence of such contractual provisions, the Act regulates the duties of a manager, which correspond to the range of competence of management of a housing community. The establishment of a manager (in functional terms) pursuant to Article 18 paragraph 1 of the Act excludes the possibility of the appointment of a management board as a body of the community<sup>4</sup>.

The act on ownership of premises does not formulate any substantive requirements for an agreement establishing the rules for the management of communal areas. For these reasons, it is stressed in the doctrine that the development of rules of contractual management has been entrusted to the owners of premises by the legislature, while maintaining their considerable freedom<sup>5</sup>. However, the freedom of owners in the development of contractual management is subject to certain restrictions under the Act on

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<sup>4</sup> Order of the SC of 14th September, 2005, III CZP 62/05, LEX No. 171751.

<sup>5</sup> R. Dzięczek, *Własność lokali. Komentarz. Wzory pozwów i wniosków sądowych*, Warszawa 2012, p. 226.

the ownership of premises. The activity of a housing community is based on two fundamental principles: the principle of the will of the owners of premises and the principle of judicial involvement<sup>6</sup>. Chapter 4 of the Act, which is devoted to the management of communal areas, expresses these principles in an indirect way, and also contains provisions aimed at protecting both the individual owners of premises and the community as a whole. The rules, which are ancillary and complementary to the two overarching principles, are mandatory rules (*iuris cogentis*) which cannot be excluded or modified by agreement<sup>7</sup>.

An agreement which specifies the principles of management of communal areas may introduce statutory rules provided for the management of “large” housing communities into a “small” housing community; a solution to the contrary is also theoretically possible. The right to determine the method of management of communal areas, as arises from Article 18 of the Act, means the granting to owners of premises of the right to regulate the rules of management of communal areas at their own discretion. Such an agreement may specify the powers of the assembly of owners of premises in a way different from that which arises from the Act: they can be wider or limited in relation to the regulatory model adopted in the Act.

Choosing a manager and entrusting him/her with the management of communal areas is the most commonly used option of an agreement changing the rules of management of communal areas. This takes place in new buildings built by developers, in the first notarial act in which the separate ownership of premises is established as well as a clause about entrusting the management of communal areas to a specified entity. The manager is not a community body, but an entity who is separate from the community and who carries out trust management<sup>8</sup>.

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<sup>6</sup> A. Turlej, w: R. Strzelczyk, A. Turlej, *Własność lokali. Komentarz*, Warszawa 2015, p. 483.

<sup>7</sup> R. Strzelczyk, A. Turlej, op.cit., p. 489.

<sup>8</sup> P. Skibiński, *Reprezentacja wspólnoty mieszkaniowej na gruncie ustawy o własności lokali*, „Przegląd Sądowy” 2007, No. 5, p. 90.

### 3. Statutory management of communal areas

Chapter 4 of the Act on the ownership of premises is entitled “The management of communal areas.” In the absence of an agreement modifying the statutory rules of management of any real property, the regulation of Chapter 4 is applicable.

If a property consists of more than 7 units, then it is obligatory to appoint a management board and further provisions of the Act on the ownership of premises shall be applicable. If there are 7 or fewer units, it is considered a “small” housing community, the provisions of the Polish Civil Code<sup>9</sup> and those of the Code of Civil Procedure<sup>10</sup> on co-ownership shall be applicable. This type of management is referred to as ownership, direct management<sup>11</sup> while where in the community there operates a management board, it is the indirect management (through bodies).

#### 3.1. Rules of management in a “large” housing community

##### 3.1.1. The bodies of a housing community

According to the statutory model, the bodies of a housing community include: the management board as an executive body, and the meeting of co-owners as a decision-making body<sup>12</sup>. Either an owner of premises or a person coming from outside of the group of owners may be appointed as a member of the management board;

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<sup>9</sup> C.C. – Civil Code, the Act of 23rd April, 1964, (i.e. Journal of Laws 2016, item 380, as amended).

<sup>10</sup> C.C.P. – Code of Civil Procedure, the Act of 17th November, 1964 (i.e. Journal of Laws 2016, item 1822, as amended).

<sup>11</sup> G. Bieniek, *Ustawa o własności lokali w praktyce*, Bydgoszcz 2010, p. 161.

<sup>12</sup> E. Gniewek, „Wspólnota mieszkaniowa” według ustawy o własności lokali, „Rejent” 1995, no. 1, p. 40.

no special qualifications to perform this function are required<sup>13</sup>. The number of board members is determined by the owners of the premises; the board may consist of one or more persons.

According to the statutory model, the only body authorised to represent a housing community is the management board, but the decision-making powers are divided between the board and the owners of the premises, as the resolution-passing body. In Article 22 the Act uses the terms: ordinary management activities and activities exceeding the scope of ordinary management. These terms have not been defined in the Act, just as they have no legal definition in the Civil Code.

### 3.1.2. Competence of the management board

The management board manages the affairs of the housing community and represents it externally, as well as in relations between the community and the individual owners of the premises. Thus, it enters into agreements and represents the community in Court, and its actions are the actions of the community itself<sup>14</sup>. It should be emphasized that the management board has the right to act independently within the range of ordinary management.

Any factual, legal, and procedural activities related to the maintenance of communal areas and its management are considered ordinary management. The doctrine states that these activities are associated with the normal functioning of a building and its maintenance, deriving benefits and income, making repairs and carrying out maintenance, as well as the broadly perceived protection of a common right in the form of conservation measures and with taking legal proceedings in respect of the protection of ownership and possession, eviction, and compensation<sup>15</sup>.

In matters of activities exceeding the scope of ordinary management, the Act requires that all owners pass a resolution expressing

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<sup>13</sup> Resolution of the SC of 16th February, 2012, III CZP 96/11, "Orzecznictwo Sądu Najwyższego. Izba Cywilna" 2012, Nos. 7 and 8, item 88.

<sup>14</sup> P. Skibiński, *op.cit.*, p. 88.

<sup>15</sup> R. Dzięczek, *op.cit.*, p. 197.

consent for the management to perform such activities. In some cases, an additional power of attorney by the owners is required in the form prescribed by law, which applies to entering into agreements for acts going beyond the scope of ordinary management.

### 3.1.3. Competence of premises owners

Owners of premises hold meetings once a year, at which they adopt resolutions regarding: the annual economic plan for the management of communal areas and the setting of fees to cover administrative costs, the adoption of the report of the management board and the granting to the board a vote of acceptance.

If necessary, an extraordinary meeting of owners should be held; Polish law also allows the possibility of adopting resolutions outside meetings. This mode, known as the individual collecting of votes, is in fact a form of written voting. Resolutions are taken by majority calculated according to the size of the share in the communal areas. Participation in a meeting or participating in voting is a right and not an obligation of the owner of premises.

The Act reserves the passing of resolutions to the competence of owners of premises in many cases belonging to different categories. First of all this concerns matters directly related to the management of communal areas, so a resolution is required to determine the remuneration of the management board or of the manager of communal areas, to adopt the annual business plan and the amount of fees to cover management costs, as well as to determine the scope and manner of keeping non-accounting records of the costs of management of communal areas, the advances paid to cover these costs, as well as other settlements for the benefit of the communal areas.

Another group of matters which belong to the activities exceeding the ordinary management of communal areas are those activities which affect communal areas, such as: a change in the use of part of communal areas, consent for upward extension or reconstruction of communal areas, for establishment of separate ownership of premises arising as a result of such upward extension or reconstruction, disposal of the premises, and a change in

the number of shares following the creation of separate ownership of the extended or reconstructed premises, division of communal areas, and consent to a change in the number of shares in the ownership of communal areas. A resolution is also required for the purchase of real property, and for bringing an action for a forced sale of premises against their owner who is in arrears with payments or otherwise violates the housing community relations. A resolution is also required if an owner of premises wants to divide his/her premises into two units, or combine two units into one, an act which is always also reflected in the communal areas.

So owners of premises have decision-making powers in important matters concerning the operation of their housing community, and also in matters involving acts regarding the disposal of communal areas. The Polish Act on ownership of premises does not insist on unanimous voting. The purpose of the Act on ownership of premises, as regards the management of communal areas is to protect the collective interest of the community. The provisions establishing the lack of requirement of unanimity of votes are an expression of the implementation of this principle in practice, because they make a decision possible even if some owners do not show interest in community affairs, or care only about their own affairs.

In the jurisprudence, a lawsuit brought by a housing community against a member of this community for the payment of a sum of money in respect of such member's encumbering costs to the community, has been acknowledged as a transaction which does not exceed the scope of ordinary activities, and so does not require the adoption of a resolution by the owners of the premises<sup>16</sup>.

### 3.2. The management of communal areas in a "small" housing community

In the case of "small" housing communities, in accordance with Article 19 of the Act, relevant regulations on co-ownership con-

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<sup>16</sup> Resolution of the SC of 18th October, 2013, III CZP 42/13, "Orzecznictwo Sądu Najwyższego. Izba Cywilna" 2014 v. 6, item 60.



tained in the Civil Code and the Code of Civil Procedure apply to the management of communal areas. This seemingly simple legislative solution, consisting in the referral to the appropriate application of the norms of the Civil Code, in practice raises a number of doubts and is a source of divergent interpretations in the doctrine.

Introducing such a solution, the legislator assumed that the functioning of a “small” housing community is based on principles similar to those on which co-ownership is based. A number of units amounting to seven or fewer means a small number of owners, so it was assumed that communication and taking joint decisions on the property would be easy. Therefore it was assumed that there was no need to formalise the principles of management of communal areas in a “small” housing community, as is the case in a “large” community, because management activities are better performed by co-owners themselves on the basis of direct agreements without formal procedures<sup>17</sup>.

Reference to the provisions of the Civil Code implies the application of Articles 199 to 209 of the Civil Code which relate to co-ownership of a common thing. The management of such a thing is exercised jointly by all the co-owners. Each co-owner is entitled to co-own a common thing and to use it only insofar as is compatible with co-ownership and the use of that thing by other co-owners. Each co-owner is obliged to cooperate in the management of a common thing, and in the case of ordinary management of a common thing, the consent of a majority of co-owners is required. The election of an executive or a managing body is not provided for; each owner can perform acts with an effect on the other co-owners. This is a design which is extremely prone to conflict, carrying the risk of two simultaneous activities on behalf of the co-owners which are entirely contradictory to each other.

With regard to operations exceeding the scope of ordinary management, the requirement of unanimity has been established. This regulation means that an objection from a single owner paralyses

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<sup>17</sup> J. Ignatowicz, *Komentarz do ustawy o własności lokali*, Warszawa 1995, p. 76.

effectively significant repairs in communal areas, makes it impossible to take out a loan for the purpose of repairs or investment, and any activities qualified as exceeding the scope of ordinary management. The Act provides for a legal action to obtain a permit to carry out these activities, which, however, involves a long-term procedure. The obligation to use the provisions of the Civil Code on a “small” housing community is sometimes assessed as a wrong legislative solution. Not only is the evaluation of the adopted regulation<sup>18</sup>, but also the manner of interpretation of the provisions of the Act is the subject of divergent opinions.

In its resolution of 7<sup>th</sup> October, 2009, the Supreme Court<sup>19</sup> found that the regulation of the management of a common thing contained in Articles 199 to 209 of the Civil Code is complete and does not contain references to other provisions, and it is sufficient for the executive management in a small housing community without the need to apply the principles set out in other specific regulations. Consequently, the Supreme Court stated that the provisions of the Act on the ownership of communal areas in a large housing community do not apply to this management. This view of the Supreme Court met with both approval in the doctrine<sup>20</sup> and with criticism<sup>21</sup>.

In statements affirming this view it was stressed that the distinction of two types of communities has a normative character, which implies the functioning of two models of management, which have a complex character. Critics emphasise the inadequacy of the regulation provided for the management of a common thing covered by compulsory co-ownership which is managed by a housing community, which is a legal entity separate from owners of premises. This stance should be regarded as accurate, especially since

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<sup>18</sup> E. Drozd, *Zarząd nieruchomością wspólną według ustawy o własności lokali*, „Rejent” 1995, no. 4, p. 23; J. Ignatowicz, op.cit., p. 77.

<sup>19</sup> Resolution of the Supreme Court of 7<sup>th</sup> October, 2009, III CZP 60/09, “Orzecznictwo Sądu Najwyższego. Izba Cywilna” 2010 No. 4, item 50.

<sup>20</sup> G. Bieniek, op.cit., pp. 162 to 163; B. Janiszewska, *Zarząd nieruchomością wspólną w tzw. małej wspólnocie mieszkaniowej a stosowanie art. 25 ustawy o własności lokali*, „Radca Prawny” 2010, No. 1, pp. 52–53.

<sup>21</sup> R. Strzeczyk, A. Turlej, op.cit., p. 627.

the conclusions stemming from the practice of the functioning of housing communities strongly suggest the enormity of problems caused by the application of this regulation.

## 4. Conclusions

The housing community has been appointed to the execution of management of communal areas, namely those parts of the property which are not included in separate premises. These are, therefore, the land, the roof of the building, façades, installations in the form of pipes and wiring, staircases, and equipment designed for common use. A housing community is required to maintain the real property in good condition and take care of it, as is associated with the obligation on its owners to incur expenses for the property. The housing community is a subject of the law which is separate from the owners of the premises; it appears in legal transactions independently of the owners.

As arises from the presented arguments, the residential community in Poland always has an ownership body in the form of a meeting (assembly) of all owners. Typically, in housing communities there operates a management board elected by the owners. Less frequently is it a manager appointed by an agreement, and sometimes – in “small” residential communities – there is no executive body. The rules of management of communal areas arise from the statutory regulation, but this may be fully or partially excluded by agreement of the owners. To establish the rules of management of communal areas in Polish residential communities it is necessary in each case to determine whether an agreement changing the rules of management of communal areas has been entered into, and if not, to determine whether the housing community question is “large” or “small”.

## STRESZCZENIE

### Wspólnota mieszkaniowa w prawie polskim – sposoby zarządu nieruchomością wspólną

Wspólnota mieszkaniowa należy do kategorii jednostek organizacyjnych niebędących osobami prawnymi, którym ustawa przyznaje zdolność prawną. Podstawowym celem funkcjonowania wspólnoty jest sprawowanie zarządu nieruchomością wspólną. Specyficzną cechą polskiej regulacji jest rozróżnienie „dużych” i „małych” wspólnot mieszkaniowych, na podstawie kryterium liczby lokali wchodzących w skład nieruchomości. Dla ustalenia zasad zarządu nieruchomością wspólną w polskiej wspólnotie mieszkaniowej konieczne jest każdorazowo ustalenie, czy została zawarta umowa zmieniająca zasady zarządu nieruchomością wspólną, a jeśli nie, ustalenie, czy mamy do czynienia z „dużą” czy z „małą” wspólnotą mieszkaniową.

**Słowa kluczowe:** wspólnota mieszkaniowa; zarząd nieruchomością wspólną

## SUMMARY

### The housing community in Polish law: methods of management of communal areas

A housing community belongs to organisational units which are not legal persons but have legal capacity. The fundamental purpose of housing community activities is the management of common property. A specific feature of the Polish regulation is the distinction between “large” and “small” housing communities, on the basis of the criterion of the number of premises comprising the real property. To establish the rules of management of communal areas in Polish residential communities it is necessary in each case to determine whether an agreement changing the rules of management of communal areas has been entered into, and if not, to determine whether the housing community in question is “large” or “small”.

**Keywords:** housing community; management of common property

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