

INFLUENCE OF INTERNATIONAL REGULATIONS ON SPATIAL PLANNING POWER IN POLAND – SEA AND MEDIATION

Agata Kosieradzka-Federczyk, Ph.D.

*Faculty of Christian Philosophy
Cardinal Stefan Wyszyński University
Warsaw, Poland
e-mail: a.federczyk@uksw.edu.pl – contact person*

Wojciech Federczyk, Ph.D.

*Faculty of Christian Philosophy
Cardinal Stefan Wyszyński University
Warsaw, Poland
e-mail: w.federczyk@uksw.edu.pl*

Abstract

Local planning power (autonomy) refers to the local planning rights constitutionally guaranteed to local authorities. The basis for planning autonomy is the constitutional right of municipal self-government. Apart from national law, local planning power is shaped by international regulation. The aim of the article is to analyze the influence of the SEA and mediation on local planning power. The basis for the analysis is the Polish legal system. The results of the SEA and associated public participation are not binding upon the local authority, they do play an important role in shaping the planning power enjoyed at local level. They cannot be seen as tools that limit power, but rather as sources of knowledge that allow a fully-conscious decision to be taken.

Key words: physical development, spatial planning power, SEA, mediation

Introduction

The issue of spatial management and related real-estate disposal has many aspects that must be taken into account. This is a matter of the architectural order, but not only in the aesthetic dimension. The environment has a direct impact on the quality of life and work of people. The development of space affects the value of a property, and, above all, may limit the owner's intentions, e.g. a factory cannot be built in the center of a residential area. Due to the increasing dimension of public administration activity, it also requires the use of space for public facilities like: schools, hospitals, sewage treatment plants and power plants. They are necessary for further economic or social development, but they should not distort spatial order. All the indicated aspects should be taken into account as public authorities create spatial policy.

Essential decisions regarding spatial order are made locally, at the level of the gmina in local physical development plans. The ability of the municipality to determine land development and the destination of particular properties for specific purposes is considered a manifestation of the planning authority of local authorities, as well as their independence where planning is concerned. They are concepts introduced in the Polish doctrine, but refer to concepts also developed in other countries. For example, in the German doctrine, the concept of planning authority "Planungshoheit" (NIEWIADOMSKI, 2003) is used.

Planning authority is linked to the constitutional regulation passing the implementation of some public tasks to the municipality – under Art. 15 of the Constitution of the Republic of Poland. The doctrine also indicates that planning authority is the municipality's right to carry out relevant procedure and adopt a local plan (CZARNIK, 2010). However, in accordance with Art. 6 of the Act of 23 March 2003 on spatial planning and development (Dz. U. of 2000, item 1073 with amendments), the local plan is one of the determinants of the content of the right of ownership of real estate covered by it. Planning authority means the ability to make decisions binding upon other entities, e.g. property owners, unilaterally; as well as the ability to enforce local plan provisions (BAKOWSKI, KASZUBOWSKI, 2012).

A local authority's planning authority does not mean overall independence in determining the content of the local plan. It is limited, not only by the norms of the 2003 Planning Act, but also by other legal acts that also restrict the use of real estate (LEOŃSKI, et al., 2012). *Gmina*-level freedom to define the content of a local plan has also received analysis in the jurisprudence of the Constitutional Tribunal (MAJCHRZAK, 2010).

Municipal competences in the field of spatial planning are also shaped by international regulations implemented in the Polish legal system in relation to the procedure for the adoption of a local plan, in the form of a strategic assessment of the impact of a local plan on the environment and resort to mediation as one of the forms of public participation.

What, therefore, is the relationship between international regulations and the planning authority at *gmina* level in Poland? Do the former limit the latter? If not, how do they shape the scope of this power? The analysis takes account of two aspects: the first concerns the integration of the strategic environmental impact assessment (SEA) into a planning process, which creates an obligation for the *gmina* to prepare an environmental impact statement, ensure public participation in the proceedings, take comments and proposals into account - which means not only a formal meeting to learn society's positions, but also consideration of them, and, if they are adequate - the introducing of changes to the draft plan being prepared. The second aspect is the formalization of public participation in the planning procedure, in addition to the public discussion provided by the 2003 Act, and the possibility of remarks on the draft local plan being submitted.

Procedure for adopting a local plan

The spatial planning system developed in Poland under the 2003 Act corresponds to the structure of public administration and is implemented on three basic levels: national, regional and local. The main instruments for creating spatial order are at the local-authority level (of the so-called *gmina*). They are supplemented by planning standards at the regional level (voivodeship), while issues important for the whole country are determined at the national level (GÓRSKI, 2017).

As indicated in the introduction, the local physical development plans are the typical acts dedicated to shape the spatial order. They may cover the entire municipality or a part. The plan determines the designation, the arrangement of the land and the land (Art. 4 par. 1 of the 2003 Act).

The decision about starting a local plan procedure is made by the local council specifying the scope of the future plan. The Mayor is then obliged to announce in the press and by announcement, as well as in a manner customarily adopted in a given town, reveal that preparation work on the plan has started. Also specified are the form, place and time of the submission of proposals relating to a plan, not shorter than 21 days from the day of announcement. Proposals are considered by the head of a *gmina* as its local plan is being drawn up.

Following preparation of the draft plan and the environmental impact statement, the local authority is to announce in the same way as before - at least 7 days prior to the date of exposition - that the draft plan has been completed. The draft plan and environmental impact statement are made available to the public for a period of 21 days (or longer), and after that time the local authority organizes a public discussion on the solutions adopted by it.

The announcement sets the deadline for submitting comments on the draft plan. It may not be shorter than 14 days from the end of the project's presentation period. The nature of the comments depends on the public. They may question planned solutions or propose their alternatives (NIEWIADOMSKI, 2016). The head of the *gmina* is not bound by the content of the remarks, but he must examine them within 21 days of the deadline for submission. In case of acceptance, relevant changes to the local plan design are necessary. If the remarks are not found reasonable, the local authority head shall submit them to the municipal council, together with the draft plan. The council will ultimately decide on these remarks.

Under the 2003 Act, the possibility of reservations and objections being submitted should remarks not be accepted was canceled. They were considered by the head of *gmina*, but not accepted by the council. The decision of the latter might be questioned before the administrative court. As a consequence, this was an instrument that postponed the final adoption of local plans (BAKOWSKI, 2004). Under binding law, a local plan can be appealed against to the administrative court, once it has been accepted. The failure to consider comments on a draft plan can be questioned in that way.

As a part of the planning procedure relating to the draft of a local plan, an SEA is carried out. The legal basis for this is in the Act of 3rd October 2008 on sharing information about the environment and its protection, public participation in environmental protection and environmental impact assessments (Dz. U. of 2017, item 1405). This Act assures the public participation in an SEA implemented as part of the planning procedure. However, it should be remembered that the comments made during an SEA could have a wider scope, as they may concern, not only the draft plan itself, but all environmental issues (FOGEL, 2014).

Strategic environmental impact assessment

An SEA is carried out in the process of a plan and program being adopted. The EIA relates to particular projects, while an SEA estimates the environmental effects of the entire plan. Chronologically, the EIA was applied earlier, though with time the attention turned to the necessity of estimating environmental effects of plans and programs. The need for better environmental protection led to the inclusion of impact assessment at the strategic planning level. The fact of the assessment only being carried out at project level, while general parameters, such as location, are decided upon at the planning stage, limited significantly any possibility of changes to a project being introduced, with the consequence that environmental protection (KOSIERADZKA, 2010).

SADLER & VERHEEM (1996) define the strategic assessment as a formalized, systematic and comprehensive process of identifying and evaluating, the status ensuring that the relevant issues are on a par with economic and social considerations.

The benefits that arise from proper application of the SEA are multidimensional: a high level of environmental protection is provided for, efficiency of development is raised, the capacity to adapt to climate change is increased, the prevention of costly mistakes is encouraged, governance is strengthened, and transboundary cooperation is facilitated.

Polish law makes SEA mandatory for all planning acts, i.e. local physical development plans, as well as spatial planning studies at *gmina* level, etc. With few exceptions, an SEA is necessary in the event of changes to plans already adopted.

The main features of the SEA have proved to be influenced greatly by international regulations. Although international law lacks a globally-applicable convention on SEA, mention can be made of the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, drawn up in Kiev on May 21, 2003, and applicable in Poland since 19 September 2011 (later known as the Kiev Protocol). This creates an international (32-party, 31 states mainly from Europe and the European Union) legal framework for carrying out an SEA in regard to plans and programs whose implementation may have a potentially significant impact on the environment, including health. The general obligation to carry out an SEA covered both sectoral programs (concerning agriculture, forestry, etc.) and spatial development plans or land-use plans that set the framework for future development consent for specific projects (as listed in Annexes I and II to the Protocol), and requiring an EIA under national legislation.

In relation to plans and programs defining the use of small areas at the local level (small modifications of already adopted plans and programs, respectively), the Kiev Protocol allows a country to decide whether it requires an SEA or not. Polish law also extended the obligation that an SEA should be carried out to include plans covering only a small area. This is due to specific national conditions: a local plan can cover only part of the area of a given *gmina*. Usually the latter in fact decides to adopt a plan for a part of the overall area, and often only for selected plots. In such cases, failure to respect the obligation to carry out an SEA could result in one being carried out exceptionally, and not as a typical element of the planning process, as it is currently. This would have a negative impact on environment, and thus on the entire planning process at local level.

The scope to be assessed as part of the SEA has been defined very broadly in the Protocol. It covers the impact on human health, flora, fauna, biodiversity, soil, climate, air, water, the landscape, natural areas, material assets, cultural heritage and interactions between these factors. Due to the preceding wording "any effect on the environment, including", it should be recognized that a study covers any impact on any element of the environment.

The Protocol requires inclusion, in the procedure for adoption of a plan, of: the conclusion of the environmental report: the conclusions of the environmental statement, the measures to prevent, reduce or mitigate the adverse effects identified in the environmental statement, and comments received from public. Although the Kiev Protocol, which is a binding instrument of international law, plays a fundamental role in shaping the planning authority enjoyed by a local authority, other documents cannot be ignored.

Particular attention should be devoted to the Voluntary Guidelines on Biodiversity-inclusive Impact Assessment, adopted during the eighth meeting in 2006 in Brazil. Although these are not binding, their impact on the planning authority at *gmina* level should be seen in view of the strong position that the Convention on Biological Diversity occupies among international environmental regulations. The Voluntary Guidelines underline the variety of possibilities across the world in which SEA is applied. It is for this reason that the focus is on biodiversity in the SEA, rather than procedural issues.

The main role of the SEA is to equip the decision-maker with knowledge of the possible impact on the environment of a plan. The unquestionable relationship between planning procedure and the SEA lies in the way that the latter is carried out as communal planning acts are being prepared, and therefore at the stage when planning power is exercised.

Public participation – mediation

One of the features of planning power is its democratic character, which should be recognized in the wide participation of citizens in the planning procedure (LEOŃSKI et. al., 2012). The question is whether the Act of 2003 ensures such real participation.

Elements of social participation are:

- the submission of proposals before the draft of a plan is prepared;
- participation in public discussion;
- the submission of comments on the draft plan.

The regulations in force do not impose any limits on the public who can take advantage of these forms of social participation. This means that everyone is entitled to participate. At the same time, however, the conclusions and comments are not binding on the decision-maker. Introducing spatial order naturally leads to conflicts of interest. There are many possible areas of such conflicts: public and individual interest, different private interests or competing public policy goals (WOŹNIAK, 2012).

Some claim that the procedure does not allow for the resolving of conflicts, but only for the choice of one option from among many, on how develop land. The solution adopted looks like social consultations, rather than public participation, which should involve cooperation and not only the expressing of opinions (HAŁADYJ, 2014).

On the other hand, public discussion may be limited to the presentation of different views, even without conclusions being reached. The Act of 2003 indicates only its public nature, while prohibiting restrictions on access to participation in the discussion. However, there are no regulations on how the discussion should be organized. The main effect of the discussion is a protocol that is not formally binding in the further procedure. Empirical research indicates that, in practice, discussions might be organized for the sole purpose of compliance with the statutory obligation, as opposed to as a debate on spatial order (DAMURSKI, 2014). This legal regulation is criticized as insufficient to ensure protection of a local community's interests.

It is therefore necessary to look for more effective methods of participation. One of them is mediation – i.e. proceedings with the participation of an impartial person, whose main aim is to resolve disputes arising during planning. Such a form of resolving disputes is *inter alia* indicated by the Council of Europe in its (2001) Recommendation 9. Under this, the widespread use of alternative means of resolving administrative disputes can allow these problems to be dealt with; and can bring administrative authorities closer to the public.

The necessity of mediation techniques being used by decision-makers has been noticed around the world for many years (FORESTER, 1987). Mediation with the participation of an independent person provides for a reduction of emotions in a conflict and, above all determines the parties in the conflict and the focus on their real expectations. Mediation is successful when parties reach a compromise. But even if the matter ends with a clarifying of doubts, this is important for the decision on the content of a local plan.

In Poland, mediation in spatial planning matters has not been introduced into the legal system, despite the fact that, in 2008-2010, during governmental work on amendments to the 2003 Act, mediation was foreseen as an obligatory method of resolving conflicts arising around comments to a draft local plan. However, it is possible to point to an example of mediation carried out in Gdańsk and allowing for a change in a draft in line with the expectations of the public as regards a conflict over the development of a city park (FEDERCZYK, 2013). However, it is necessary to use such procedure within the framework of the applicable planning procedure - as an extensive form of public discussion, especially when a particular project raises many emotions and conflicts. It must be remembered that the passing of a plan does not denote an end to conflict, as its introduction means changes in the space stakeholders must live in.

Conclusions

If the answers to the questions set out in the introduction do not raise any doubts, international regulations (on SEA) do influence the shape of *gmina's* planning power, though they do not limit it.

The relationship between planning power and international regulations (on SEA) should be seen as increasing the amount of knowledge held by a local authority preparing the draft of a local plan. Acquisition of new knowledge allows the authority to make a more informed decision regarding the adoption of the plan, or to make changes. This is because the result of an SEA does not bind an authority to the final decision it is to take.

The environmental statement prepared as part of the process of planning provides comprehensive information on the draft plan being prepared, the environmental condition to which it relates, the environmental objectives established at international, Community and national levels relevant to the plan

being drawn up, and the ways in which these objectives and other environmental problems were taken account of in the development of the plan.

Similarly, comments and applications submitted by the public allow the authority to get to learn of residents' opinions regarding the solutions proposed in the draft plan, while the body is not obliged to take them into account. Assessment is an important element of the process by which interests for the instruments in spatial management at local level are balanced, with relevant spatial data supplied to the entities active in spatial policy (FOGEL, 2011).

The non-binding nature of the results of the SEA and public participation does not mean that they are unnecessary or useless. Additional knowledge gained by the body in two aspects so important for environmental protection – integration of environmental issues into the planning system and strengthening public participation in matters related to environmental protection (both present so commonly in numerous international acts), represents an important aspect of the implementation of sustainable development.

Mediation allows arrangements that will be included in the local plan to be made. The necessity of these being taken into account by local authorities (the head and council) cannot be seen as a limitation of planning power. The *gmina* as an area administered by a local authority does nevertheless represent a community of residents, as Art. 166, para. 1 of Poland Constitution makes clear. There is more involved here than just the authorities. Mediation is one of the solutions that allows to for a minimizing of social conflicts and the development of spatial solutions acceptable to a local community; with maximum possible account being taken of the reconciling and pursuit of different interests.

While the results of the SEA and associated public participation are not binding upon the local authority, they do play an important role in shaping the planning power enjoyed at local level. They cannot be seen as tools that limits power, but rather as sources of knowledge that allow a fully-conscious decision to be taken.

References

- BAKOWSKI, T. 2004. *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz. (Commentary to the Act of 23 March 2003 on spatial planning and development)*. Kantor Wydawniczy Zakamycze, Kraków, p. 327.
- BAKOWSKI, T., KASZUBOWSKI, K. 2012. *Regulacje tak zwanych specustaw inwestycyjnych wobec samodzielności i władztwa planistycznego gminy*. In: Skrzydło-Niżnik I, (Editor) *Przestrzeń i nieruchomości jako przedmiot prawa administracyjnego: publiczne prawo rzeczowe. (Regulations of the so-called investment specializations against the independence and planning authority of gmina*. In: *Space and real estate as a subject of administrative law: public property law*). Wydawnictwo Prawnicze "LexisNexis", p. 263-276.
- CZARNIK, Z. 2010. *Istota i zakres władztwa planistycznego gminy (The essence and scope of the planning power of gmina)*. *Administracja: teoria, dydaktyka praktyka*, 3(20): 5- 30.
- CZARNIK, Z. 2017. *Ochrona interesów społeczności lokalnej i gminy w planowaniu przestrzennym*, In: Kmiecik Z. (Editor), *Partycypacja w postępowaniu administracyjnym. W kierunku uspołecznienia interesu prawnego (Protection of the interests of the local community and gmina in spatial planning*, In: *Participation in administrative proceedings. Towards socialization of the legal interest*). Wolters Kluwer, p. 169-192.
- DAMURSKI, Ł. 2014. *Dyskusja (nie)publiczna. Problem dostępności dokumentów planistycznych na poziomie gminy (Discussion (not) public. The problem of the availability of planning documents at the gmina level)*. *Samorząd Terytorialny*, 4: 38-50.
- FEDERCZYK, W. 2013. *Mediacja w procesie planowania przestrzennego w prawie polskim (Mediation in spatial planning in polish law)*. In: *Alternative methods of legal disputes resolving (ADR)*,. Lwów, p. 100-110.
- FOGEL, A. 2010. *Środowiskowe aspekty uprawnień społeczeństwa w sporządzaniu studiów uwarunkowań i planów miejscowych (Environmental aspects of the public's entitlements in the preparation of studies of conditions and local spatial plans)*. *Samorząd Terytorialny*, 5: 46-61.
- FOGEL, A. 2011. *Prawna ochrona przyrody w lokalnym planowaniu przestrzennym (Legal protection of nature in local spatial planning)*. Instytut Gospodarki Przestrzennej i Mieszkalnictwa, Warszawa, p. 225.
- FORESTER, J. 1987. *Planning in the Face of Conflict: Negotiation and Mediation Strategies in local Land Use Regulation*. *Journal of the American Planning Association*, 9: 443-446.
- GÓRSKI, M. 2017. *Strategie, plany i program (Strategies, plans and programs)*. In: (Editors) Hauser R., Niewiadomski Z., Wróbel A., *System prawa administracyjnego. Prawo administracyjne materialne (Administrative law system, material administrative law)*. Ch Beck ,Warszawa, p. 187-230.

- HAŁADYJ, A. 2014. *Konsultacje czy partycypacja? Refleksje terminologiczne w odniesieniu do udziału społeczeństwa w ochronie środowiska* (Consultation or participation? Terminological reflections regarding public participation in environmental protection). In: Dolnicki B. (Editor) *Partycypacja społeczna w samorządzie terytorialnym* (Social participation in local government). Lex a Wolters Kluwer business, Warszawa, p. 671-686.
- KOSIERADZKA, A. 2010. *Strategiczna ocena oddziaływania na środowisko planów i programów w prawie włoskim – porównanie rozwiązań przyjętych w prawie polskim (SEA impact of plans and programs in Italian law - a comparison of solutions adopted in Polish law)*. In: (Editors) Cieślak Z., Fogel A., *Wartości w planowaniu przestrzennym*. Instytut Gospodarki Przestrzennej i Mieszkalnictwa, Warszawa, p. 117-130.
- LEOŃSKI, Z., SZEWCZYK, M., KRUŚ, M. 2012. *Prawo zagospodarowania przestrzeni (The law of spatial development)*. Lex a Wolters Kluwer business, Warszawa, p. 59, 61.
- MAJCHRZAK, B. 2010. *Wartości w planowaniu przestrzennym w wybranych orzeczeniach Trybunału Konstytucyjnego (Values in spatial planning in selected rulings of the Constitutional Tribunal)*. In: (Editors) Cieślak Z., Fogel A., *Wartości w planowaniu przestrzennym*. Instytut Gospodarki Przestrzennej i Mieszkalnictwa, Warszawa, p. 51-64.
- NIEWIADOMSKI, Z. 2002. *Zagospodarowanie przestrzenne. Zarys systemu (Spatial planning. Outline of the system)*. Wydawnictwo Prawnicze LexisNexis, Warszawa, p. 178.
- NIEWIADOMSKI, Z. 2016. *Planowanie i zagospodarowanie przestrzenne. Komentarz (Spatial planning and development)*. Ch Beck, p. 667.
- SADLER, B., VERHEEM, R. 1996. *Strategic Environmental Assessment. Status, Challenges and Future Directions, Ministry of Housing, Spatial Planning and the Environment*. The Netherlands, and the International Study of Effectiveness of Environmental Assessment, p. 188.
- WOŹNIAK, M. 2012. *Rola mediacji w rozwiązywaniu konfliktów przestrzennych (Role of mediation in solving spatial conflicts)*. *ADR Arbitraż i Mediacje*, 2: 33-47.