

QUESTIONNAIRE

1) **Administrative consent procedure:**

Please give a short outline (no specific details) of the administrative consent procedure applying to project planning in your national legal order (procedural steps, time-limits, competent authorities, involvement of lobby groups and technical experts).

According to Polish legal order, the site planning management and civil engineering policy at the territory of municipality, including the adoption of local land development plans (which become local law), are the commune's own tasks. On the other hand, the site planning management in the voivodeship, including the adoption of voivodeship land development plans, is the task of the local government of voivodeship.

The adoption of a local land development plan should be preceded by a resolution taken by the municipality council on starting the works upon such plan. The mayor publishes the information on starting the works upon a plan, indicating the form, place and term (not shorter than 21 days since this notice) for submitting the proposals to the plan. He also informs in written the institutions and bodies competent for presenting their opinions and agreeing the plan about the resolution adopted. The mayor exposes the project to the public, together with a prognosis of its impact on environment, for a period of at least 21 days, notifying this at least 7 days in advance. In the same time he organizes a public discussion on the project.

All the parties mentioned in the questionnaire may take part in the procedure. In particular they can make observations and take part in discussions organized by the mayor. The proposals and remarks may concern both their own as well as the public legal interests.

Due to the lack of a sufficient highways network in Poland and because of a formalized and lengthy procedure of local development plans adoption, the legislator has introduced for a transitory period – since 25 May 2003 till 31 December 2007 – specific rules for siting and permitting national roads (this category includes highways).

These rules were set by the Law of 10 April 2003 on particular rules of preparing and implementing investments in the domain of national roads hereinafter called – the law or the special law (in force till 31 December 2007). The

specific law has been amended thrice and one should bear in mind that the amendment contained in the Law of 29 July 2005 on the alteration of some laws further to the amendments of tasks distribution and powers conferred upon the local administration comes into force on 1 January 2006.

The remarks presented below concern the legal situation in force since January 1st, 2006.

The quoted special law foresees three stages of highway building:

a/ stage I – elaboration of the motion on highway siting; the motion is prepared by the General Director of National Roads and Highways on the basis of the opinions of competent executive bodies of local self government, geodesic documentation, other competent bodies' opinions and decisions including the decision on environmental conditions of the project implementation.

b/ stage II – initiation of administrative procedure and delivery of the decision on highway siting,

c/ stage III – initiation of administrative procedure and delivery of the decision permitting highway construction.

The marshal of the voivodeship acts as the local administration body competent to initiate the procedure and to issue decision on the highway siting and decision permitting its construction.

The provisions of the Code of Administrative Procedure, hereinafter called "kpa", apply with regard to the provisions of special law on the highway siting and permitting procedures. In particular, the information on initiation of the procedure and of the decisions, issued during the stage I and III, are notified by the marshal of the voivodeship to concerned parties by way of announcements published in the offices of communes the highway will run through and in the local press. An appeal for the decision may be filed within 14 days since the publication of the announcement (notification) by the persons or parties concerned. Further on an eventual complaint to the administrative court may be filed within thirty days since the date of the notification (see the remarks made at point 3).

2) Public involvement:

a) Is there any public involvement and/or hearing of individually affected parties during the

administrative consent procedure ?

- b) If yes, at which stage(s) of the procedure and in which form ?
- c) Do affected parties lose their right to challenge the planning decision before the courts if they do not make use of this form of public involvement ?

The parties concerned may take part in the proceedings at the II and III stage only. The prosecutor, the ombudsman and social organizations are also entitled to take part in the proceedings (see the remarks on standing made at point 4).

Everybody, whose legal interest or obligation are involved in the procedure or anyone who requests a body's action because of his legal interest, is a party of an administrative procedure. A party in administrative procedure has a right to put forward motions, to comment upon all the evidence gathered in the case, as well as a possibility to challenge the administrative decisions and further on – lodging appeals before administrative courts.

If during administrative procedures the parties affected do not benefit sufficiently from their rights, the deciding body, i.e. the marshal of the voivodeship, having in mind the public interest and the just interest of citizens (the principle of objective truth), is obliged to undertake *ex officio* all the steps, necessary to clarify the facts of the case.

3) Judicial process:

Please give a short outline (no specific details) of the judicial process applying to project planning decisions (pre-trial proceedings, time-limits, competent courts, appeal, interlocutory injunctions).

During the first stage the General Director of National Roads and Highways – having obtained opinions of the competent local authorities – prepares the motion on the highway siting. The General Director of National Roads and Highways is not bound by the opinions obtained. The motion on the highway siting should particularly contain the geodesic documentation, together with the projects of real estates partition, an analysis of links with other public roads, determination of changes in the hitherto infrastructure of land development, opinions of the competent bodies, including the opinion of the voivodeship conservator of historical monuments, and the administrative decisions required by separate provisions, including the decision on environmental conditions of the project implementation

(within the meaning of the Environment Protection Act). The motion is lodged to the voivodeship marshal, who is the competent body to issue the decision settling the highway siting.

The second stage opens by announcements on the initiation of administrative procedure on highway siting, published by the marshal of the voivodeship. The announcements are published in the offices of communes the highway will run through and in the local press. The provisions of kpa apply with few exceptions for the special law provisions. The decision on the highway siting should be issued within three months since the day of motion lodging. Within this term all the parties concerned may present remarks, objections and proposals to the marshal of the voivodeship. The decision on highway siting should contain in particular: the requirements concerning the links of the road with other roads, the conditions resulting of environment protection needs, preservation of cultural assets and national defence needs, the requirements concerning fair rights of third parties and also the approval of the project of real estates partition. The decision on highway siting is notified in written to the proposer of the motion (General Director of National Roads and Highways) only, whereas other parties are notified by way of announcements published in the offices of the communes concerned and in the local press. The information on the decision indicates the place where the parties may become familiar with. The marshal of the voivodeship may vest the decision on highway siting with an order of immediate enforceability, if it is required by a social or economic interest.

The parties concerned may, within 14 days since the notification, lodge an appeal against the decision on highway siting addressed to the minister competent for the matters of construction, land development and housing (the Minister of Transport and Construction at present). The claim should be examined within 14 days. The decision delivered by the appeal authority is not notified to the parties but announced in the same way as the decisions of the marshal of the voivodeship.

The parties dissatisfied with the decision of the appeal authority (the minister) may, within 30 days since the date of notification, file an appeal to the voivodeship administrative court. The voivodeship administrative court should examine the complaint within two months since its receipt. The parties may contest the voivodeship administrative court decision submitting a cassation appeal before the Supreme Administrative Court.

During the third stage the marshal of the voivodeship makes announcements on initiation of administrative procedure on permitting highway construction. The announcements are published in the offices of communes concerned and in the local press. The decision on highway construction is delivered by the marshal of the voivodeship according to construction law and the special law provisions. The mode of lodging claims against the decision on highway construction, the terms and conditions of filing an appeal to the administrative court are the same as the means available against the decision on highway siting.

4) Standing:

- a) **Do all of the above-listed plaintiffs have standing before your national courts ?**
- b) **If not, which are the reasons for their exclusion ?**

Not all persons mentioned in the description have the standing. According to the Polish legal order the right of lodging claims before administrative courts belongs to any person having legal interest in it – prosecutor, ombudsman as well as the social organization within the scope of its statutory activity in cases where other persons are involved in, if this organization was taking part in the administrative proceedings (article 50 § 1 of the Law on proceedings before administrative courts). The possibility of lodging claims in public interest is excluded. The protection of public interest is a duty of deciding authority and can be the object of prosecutor's, ombudsman's or social organization's claim.

The following bodies are entitled to submit a complaint before an administrative court against the final decisions on the highway siting and on the highway construction:

- a) any party to administrative proceedings including the farmer whose grounds are going to be expropriated,
- b) national association for environment protection, within the scope of its statutory activity (if this association was taking part in the administrative proceedings)
- c) national association for environment protection from a neighbouring country fearing transboundary pollution,
- d) prosecutor,

e) ombudsman.

The following bodies are entitled to submit a complaint:

- 1) the inhabitant of the neighbouring residential area who has only a factual but not the legal interest (he fears unbearable noise), unless he benefits from the rights in property (ownership, perpetual usufruct) to the real estate directly adjacent to the highway and is able to prove a breach of substantive law (e.g. infringement of admissible noise standards),
- 2) the municipality – because the inconvenience and divergent project plans for its territory cannot be considered as an infringement of legal interest, unless the commune has the right of property upon the real estate the highway shall run through and in the same time proves that there will be a breach of its legal interest as a proprietor.
- 3) the supreme body of public administration, competent for environment matters (opposing the investment), because it has no capacity to appear in individual cases within the scope of public administration.

5) Scope of claims:

Are the above-listed plaintiffs only allowed to claim infringements of their individual rights (e.g. illegal expropriation of farmland, pollution of their private property) or may they claim infringements of public interests (e.g. adverse effects on the environment) or the unlawfulness of the planning decision in general (e.g. because of procedural deficiencies) as well ?

The administrative court is neither bound by the charges and demands of the complaint nor by the legal grounds referred to (article 134 § 1 of the Law on procedures before administrative courts). Therefore the court evaluates the legality of the whole decision contested, in spite of the fact that lodging of the complaint depends on the proving of the plaintiff's legal interest infringement. Thus the court does not confine itself to check noise standards maintenance. Additionally court examines, among other matters, the admissibility of court proceedings, the body's competence and meeting the conditions determined by the law.

However if the plaintiff can put forward the infringement of public interest, it will be efficient only in the case when the plaintiff proves the causality between the breach of public interest and his own legal interest. In other words – the plaintiff cannot invoke in his complaint a breach of public interest exclusively.

6) Scope of judicial review:

Do your courts review the lawfulness of a planning decision in every procedural and substantive respect or is the scope of judicial review restricted (e.g. to procedural aspects or clear and serious infringements of national or Community law) ?

The model of the judicial review of public administration activity adopted in Poland consists in checking the legality (conformity with law) of the act contested. It does not mean however a formal control only (checking of formal defaults) of administrative acts. Quite the contrary – even the so called administrative approval is submitted to judicial review because it can be abused. The court checks also whether the body has chosen the most advantageous conception in the concrete solution of the contested decision

Thus, one can talk about a detailed judicial review – both in a procedural and substantive aspect. The restriction of this review results in court examining only the legality of the contested decision. The questions like the fact and purpose of launching the highway construction, particular siting of the investment or its economic expediency stay outside the scope of such review.

7) EU environmental law:

Which decision will your court take, if

- a) the environmental impact assessment prescribed by Community law has not or not duly been carried out in connection with the project in question ?**
- b) the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of the EU-“Habitats Directive” but has not yet been transmitted to the Commission ?**
- c) the project adversely affects a natural habitat which has been transmitted to the Commission as being eligible for designation as a special area of conservation but which has not yet been placed on a Commission list ?**

(Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - Official Journal L 206, 22/07/1992 P. 0007 - 0050)

- d) the project adversely affects a birds sanctuary in the sense of the EU-“Birds Directive” ?**

(Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds - Official Journal L 103 , 25/04/1979 P. 0001 - 0018)

- e) the project is likely to exceed the limit values of the EU-“Ambient Air Directive” (esp. those**

for PM10/ particulate matter) ?

(Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air - Official Journal L 163, 29/06/1999 P. 0041 - 0060)

The said Community acts have been transposed to the Polish legal order by laws and by executory provisions based upon them. The transposition of the 79/409/EEC and 92/43/EEC Council Directives has been done by the Law of 16 April 2004 on the nature conservation, whereas the directive 1999/30/EC has been transposed by the Environment Protection Act of 27 April 2001. Independently of the fact of transposition, the need of an effective application of community law charges the courts and the bodies of public administration with the duty of control of the compatibility of national provisions with those of the directives.

The provisions in force in Poland oblige to avoid any action which might have a negative impact upon the environment. Therefore all the investment projects, plans and programs must take into consideration the principles of environment protection and sustainable development. The article 11 of Environment Protection Act stipulates outright that any decision issued with a breach of the provisions concerning environment protection is void. Therefore the implementation of all the investments and ventures which might have an important impact upon the environment are admissible exclusively after having obtained a decision on the environmental conditions of the project implementation, hereinafter called "the decision on the environmental conditions". For the Nature 2000 area the minister competent for the environment matters imposes, by means of a regulation, a plan of a protection elaborated for a period of 20 years, taking into consideration the ecological characteristics of natural habitats and species of plants and animals the protection of which an area has been designated for. The plan is prepared with the use of existing protection plans, established for national parks, nature reserves or landscape parks as well as forests management plans. Only the needs of preservation of natural habitats or plants or animals species may result in the change of the plan of protection. If the actions at the area of Nature 2000 have been undertaken without prior assessment of their impact upon environment, the voivode orders their immediate discontinuation and fixes a term for taking up steps necessary in order to restore the former state of the area.

Under the present legal status, if the assessment of impact of the planned venture

upon the environment has not been done or has been done not precisely enough, the court is obliged to abrogate the decision reviewed. Mandatory provisions have been infringed here and this excludes the possibility of maintaining such a decision in public legal relations. The lack of decision on environmental conditions makes the assessment of legality of the contested decision on highway siting fully impossible. The necessity of repealing of the decision on highway siting will also appear when the decision on environmental conditions would be done *ex post*, i.e. after the highway siting.

Regardless of the fact whether an area of conservation has or has not yet been transmitted to the Commission, this area should be taken into consideration when taking decision upon settling the highway siting. The very fact of its transmission is a formal action. The lack of it cannot lead to not considering the protection of the area it in the procedure of decision taking, since otherwise it would constitute a circumvention of law. The duty of taking the protected areas into consideration at all the investment projects and all the administrative proceedings results from the Law on nature conservation and The Environment Protection Act . This duty results as well from the local development plan, being an act of local law, in which the rules of environment protection and of conservation of nature and cultural landscape are obligatory determined (article 15 item 2 point 3 of the Law on planning and land development). The Law on nature conservation forbids the actions which may significantly worsen the state of natural habitats and plants and animals sanctuaries, as well as those which might have an important negative impact upon the species the area Nature 2000 has been designated for. This rule is applied appropriately to the projected areas Nature 2000, placed on the list of special habitats till the moment of approval or the refuse of approval of these areas by the Commission.

8) Consequences of deficiencies in decisions on land development projects

- 1. Are there - in your national legal order - any procedural and/or substantive deficiencies which regularly render a planning decision completely void ?**
- 2. For which kinds of rulings does your national legal order provide in this case (e.g. cassation of the planning decision or declaratory ruling establishing its nullity) ?**
- 3. For which kinds of rulings does your national legal order provide if the planning decision has only minor deficiencies/ is not completely void (e.g. modification of the planning**

decision by imposing additional requirements such as noise barriers, speed limits or reforestation) ?

4. Which rulings are likely to be given in the cases of the above-listed plaintiffs ?

The deficiencies committed by a body may concern both the factual situation (including the infringements of procedural provisions) as well as the violation of substantive law by its erroneous interpretation or improper application. The breach of procedural provisions and of substantive law will lead to revoking of contested decision if it has had or could have an influence on the case conclusion. The necessity of repealing the decision on highway siting, due to the lack of previous decision on environmental conditions, required by Polish law, is a classic example here. The same effect will be caused by the lack of opinions and arrangements, as well as by a situation where the body has failed to examine the whole evidence, including alternative solutions. When the court will acknowledge the necessity of considering the additional securing conditions, the matter cannot be dealt by the court itself – the judge is obliged to abrogate the contested decision (partly or totally), in order the body might consider these conditions during the repeated procedure.

Approving the claim the judge can take the following decisions:

a/ repeal, partly or totally, the contested decision if he is convinced of:

- an infringement of substantive law, having influence on the case result;
- an infringement of law justifying the reopening of proceedings or
- another breach of procedural provisions which might have an influence on the case result.

b/ declare the (partial or total) invalidity of the contested decision if he finds the essential defect in law (article 156 kpa).

Thus, further to the abrogation of the contested decision or to the declaration of its invalidity, the case will be an object of repeated procedure before the administrative body.

9) Remedy of deficiencies

May procedural or substantive deficiencies of the planning decision be remedied during the judicial process ? If yes, on which conditions ?

The system of judicial review of public administration action is based on the assumption that the administrative courts do not replace the bodies. By the same, the

administrative court – hearing the complaint – cannot change the contested administrative act nor modify it. It cannot for instance introduce noise limits, afforestation duty, etc. However it does not mean that the court has no influence on the future decision. One should remember that the assessment and the judicial guidelines for further proceedings bind the body which is obliged to comply with court's position during the repeated procedure.

Therefore the deficiencies found by the court cannot be “remedied” during the judicial review. The deficiencies shown by the court require a new examination done by the body, the new hearing of the case, therefore – the issue of a new decision.

Warsaw 23 November 2005