

LEGAL DETERMINANTS OF PARTICIPATION OF RESIDENTS OF A COMMUNE IN PROTECTION OF HISTORICAL MONUMENTS AND BUILDINGS

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Summary. Protection of historical monuments and buildings is a government's and local-government's task. Participation of local government units in its implementation is crucial. At the level of a basic local government unit, protection of historical monuments and buildings is carried out by means of the possibility of establishing a cultural park which is one of the forms of protection of historical monuments and buildings. The legislator determined the process of establishment of a cultural park in detail and vested the activities initiating this process in the commune council. At the same time, it adopted regulations enabling inclusion of stakeholders in the works on establishing a cultural park. This study aims to analyse legal solutions guaranteeing commune residents real participation in the process of establishing a cultural park. On this basis an attempt will be made to answer the question whether applicable regulations, in the investigated scope, encourage members of self-governing communities to get involved in public affairs or whether they refer to the model of a resolution-making procedure in which the legislator unilaterally imposes obligations on and grants powers to entities under the law.

Key words: commune, cultural park, participation, forms of protection of historical monuments and buildings

INTRODUCTION

Preservation of historical monuments and buildings is performed by public authorities, which in order to materialize it take measures specified in Art. 4 of the Act on the protection of historical monuments and buildings and on caring for historical monuments and buildings.¹ A significant share in the protection of historical monuments and buildings falls on local government units [Sługocki 2014, 157–72]. Art. 163 of the Polish Constitution² provides that local government performs public tasks not reserved by the Constitution or statutes to the organs of other public authorities. The constitutional legislator thus formulates the principle of presumption of competence for the local government. At the same time, the principle of presumption of competence of the commune for all local government tasks not reserved to other local government units may be deduced from Art. 164, sect. 3 of the Constitution. Regulations of local government organizational statu-

¹ Act of 23 July 2003 on the protection of historical monuments and buildings and caring for historical monuments and buildings, Journal of Laws of 2020, item 282 [henceforth cited as: HMBA].

² Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, No. 114, item 946.

tes³ that shape catalogues of public tasks carried out at individual levels of self-governing communities in principle include provisions on the protection of and caring for historical monuments and buildings. *In fine*, pursuant to Art. 7, sect. 1, point 9 CSGA, commune's own tasks related to meeting collective needs of a community include matters of protection of and caring for historical monuments and buildings. Powiat's tasks were enumerated in Art. 4, sect. 1 PSGA. They were entered into a closed catalogue which can be expanded by provisions of special acts. Tasks regarding the protection of and caring for historical monuments and buildings were not listed in this catalogue. In turn, at the level of a voivodship self-government, voivodship-nature tasks listed in Art. 14 VSGA are carried out, where those regarding protection of and caring for historical monuments and buildings were included.

The act on the protection of historical monuments and buildings and on caring for historical monuments and buildings is an act in which delimitation of tasks between individual levels of local government units was performed and competences of bodies of self-governing communities were specified. At the level of the commune protection of historical monuments and buildings and caring for them is realized by the possibility of creating cultural parks and drafting a commune programme for caring for historical monuments and buildings. Creating a cultural park is one of the forms of protection of historical monuments and buildings included in the framework of the catalogue formulated in Art. 7 HMBA. The organ competent to initiate measures focused on establishing a cultural park is the commune council. Provisions of Art. 16, sect. 1a HMBA ensure participation of stakeholders, including residents of local government units. It needs to be emphasized that the solutions allowing members of the self-governing community to participate in the works on establishing a cultural park were specified in the amending act of 24 April 2015.⁴ They fit in the trend of shaping the normative basis allowing residents of local government units to get involved in public affairs. Ensuring that members of a self-governing community have the possibility to participate in the course of settling its matters increases acceptance of these settlements. In effect, it encourages community members' trust in its public authorities. Legal scholars and commentators, referring to the development of the resolution-giving procedure in a commune, emphasize that formulating it in such a way where the legislator unilaterally imposes obligations on and grants rights to entities under the law should not be the target model. It is an anachronistic formula that is inadequate to contemporary models of the civic society, neither is it conducive to the possibilities of electronic mass communication [Kisiel 2012, 99].

³ Act of 8 March 1990 on commune self-government, Journal of Laws of 2019, item 506 [henceforth cited as: CSGA]; Act of 5 June 1998 on powiat self-government, Journal of Laws of 2019, item 511 [henceforth cited as: PSGA]; Act of 5 June 1998 on voivodship self-government, Journal of Laws of 2019, item 512 [henceforth cited as: VSGA].

⁴ Act of 24 April 2015 on amending certain acts due to reinforcing tools of landscape conservation, Journal of Laws, item 774.

1. INITIATING WORKS AIMING TO ESTABLISH A CULTURAL PARK

Pursuant to provisions of Art. 16, sect. 1 HMBA, the commune council, after requesting the opinion of the voivodship conservator-restorer, by resolution, may establish a cultural park in order to protect the cultural landscape and to maintain terrains of distinguishing landscape with historical immovable objects characteristic for the local construction and settlement tradition. The reason for establishing a cultural park is the need to protect the cultural landscape understood as space perceived by people, with elements of the natural environment and products of civilization, historically shaped as an effect of natural factors and human activity. This protection also includes non-material aspects in the form of an overall impression, the ambience of the place, its microclimate, comfort of the visit or travel. The essence of the resolution concerning a cultural park is not so much to maintain the construction and façade of individual buildings at an adequate level, but to create, i.a., by means of prohibitions and restrictions, conditions which optimally protect and at the same time expose the historically shaped space, and specifically the way it is perceived.⁵ The judicature presents a view according to which for the protection of the landscape it is not necessary for historical objects to be located on the immovable property covered by it. The cultural park presents cultural value as a specified whole.⁶ The literature points out that the cultural landscape should be treated as a separate, special category of immovable historical object and as such deserves due protection. Protecting it cannot be identified with preserving the surroundings of objects covered with conservation and restoration protection [Zalasińska 2010, 116].

It has been emphasized that initiating works which aim to establish a cultural park lies with the commune council. The legislator, authorizing the decision-making authorities to establish cultural parks, requires that it is verified whether the factual premises substantiating such measures in the area which is to be subject of this form of protection of historical monuments and buildings are met. These factual premises include, inter alia, the existence on a given area “of terrains with a distinguishing landscape that have historical immovable objects characteristic for the local construction and settlement tradition.” In order to obtain confirmation that these premises have been met facts need to be established concerning the features of the existing buildings and settlement network in terms of them preserving the local tradition [Szewczyk and Szewczyk 2014, 143–44]. A positive outcome of such findings results in the decision-making and control body issuing a resolution on beginning works on the establishment of a cultural park.

Even though the legislator in Art. 16 HMBA attributed the initiative in terms of establishing a cultural park to the commune council, it should be considered whether it could be carried out by residents of a given self-governing community.

⁵ Judgement of the Voivodship Administrative Court of 20 December 2017, IV SA/Wr 589/17, LEX no. 2428497.

⁶ Judgement of the Supreme Administrative Court of 4 April 2007, II OSK/7/07, LEX no. 334159.

Certainly the establishment of a cultural park is accompanied by a concern of certain social groups regarding meeting conservation, organizational and economic requirements. On the other hand, though, using this form of protection of historical monuments and buildings increases the chances of the commune's development by boosting attractiveness of a given region for tourism [Stanik 2008, 235]. For this reasons, members of a given self-governing community may be interested in establishing a cultural park and in effect putting forward a citizens' resolution-giving initiative. It is worth noting that the legal basis of the citizens' resolution-giving initiative was shaped by the Act of 11 January 2018 on amending certain acts in order to increase citizens' participation in the process of selecting, functioning and inspecting certain public bodies.⁷ It should be assumed that the resolution-giving initiative entails authorizing a given entity to put forward a draft resolution to the decision-making and control body or the executive body [Szewc and Szewc 1999, 58]. Pursuant to the provisions of Art. 41a, sect. 1 CSGA, a citizens' resolution-giving initiative may be brought by a group of commune residents who have the right to elect the decision-making body. The personal scope of the regulation thus covers all natural persons that have their place of residence on the area of a specific self-governing community [Szewc 2012, 34]. Members of a self-governing community, exercising their right to a resolution-giving initiative, are obliged to act in an organized manner. To this end they form a group of people supporting the initiative, the size of which depends on the number of residents of the commune. This group, at the commune level, must be composed of: at least 100 people in a commune with the population of no more than 5,000, at least 200 people in a commune with the population of no more than 20,000, at least 300 people in a commune with the population of more than 20,000 residents. The draft resolution support thresholds assumed by the legislator are too high in the smallest self-governing communities if the level of social involvement in local matters is taken into account [Marchaj 2018]. Therefore, forming groups of persons supporting the initiative to establish a cultural park may often prove to be a requirement impossible to meet.

The material scope of the citizens' resolution-giving initiative covers matters in the framework of tasks and competences of the commune's decision-making and control body. Therefore, a resolution on establishing a cultural park could fit in such a scope. However, one needs to point to the procedural aspect of pursuing the right to the citizens' resolution-giving initiative and of proceedings aiming to establish a cultural park. Pursuant to provisions of Art. 41a, sect. 3 CSGA, a draft resolution put forward as part of a citizens' resolution-giving initiative becomes subject of commune proceedings at the closest session after submitting the draft, though no later than after 3 months of submitting the draft. The established line of judicial decisions emphasizes that under the citizens' resolution-giving initia-

⁷ Act of 11 January 2018 on amending certain acts in order to increase citizens' participation in the process of selecting, functioning and inspecting certain public bodies, Journal of Laws, item 130.

tive members of self-governing communities have the right to draw up and submit a draft resolution which under the law, after meeting formal requirements, should be subject of proceedings and then be voted on by the decision-making body.⁸ Therefore, the subject of the resolution-giving initiative involves a draft resolution, thus a draft in a form that allows it to be appended to the agenda by the chairman of the decision-making body. Meanwhile, provisions of Art. 16 HMBA outline a sequence of measures taken in the course of works on establishing a cultural park. It includes: the commune council passing a resolution on launching works on establishing a cultural park, an announcement in local press and in a notice and also in a manner customary to a given place, specification of the form, place and time for submitting applications concerning the draft resolution on establishing a cultural park, the commune council passing a resolution on establishing the cultural park. Therefore, if the citizens' resolution-giving initiative is to be carried out by submitting a draft resolution in a form that can be debated on by the commune council, it is inexpedient to set the date for submitting applications to the draft resolution. In view of the above, simultaneous meeting of requirement resulting from Art. 16, sect. 1 HMBA and Art. 14a, sect. 3 CSGA is not possible.

2. SUBMITTING APPLICATIONS ON THE DRAFT RESOLUTION ON ESTABLISHING A CULTURAL PARK

It has already been pointed out that the commune council, implementing the instruction of Art. 16, sect. 1 HMBA, announces in local press and in a notice, as well as in a manner customary to a given place, the beginning of works on establishing a cultural park, specifying the form, place and time for submitting applications on the draft resolution on establishing a cultural park, not shorter than 21 days from the date of the announcement. Making the information about initiating works on establishing a cultural park public, apart from the informational value, is supposed to make it possible to include stakeholders in this process. It also serves the protection of the interests of members of self-governing communities. It is assumed in the established line of judicial and administrative decisions that a resolution on establishing a cultural park shapes the way the immovable property is used and enjoyed. This means that it shapes the manner of exercising the ownership right since use and enjoyment of a thing is one of the attributes of the ownership right. In this regard, the effects of a resolution on establishing a cultural park correspond to the effects of adopting a local land use and development plan. In view of the above, the legal interest which may be violated by the resolution on establishing a cultural park has its source in substantive law norms regulating rights *in rem*, including the right of ownership of immovable property. Violation of the legal interest by the resolution on establishing a cultural park may be

⁸ Supervisory decision no. NPII.4131.1.656.2018 of the Silesian Voivode of 14 December 2018, Official Journal of the Silesian Voivodship of 2018, item 8074.

invoked by persons who are entitled to rights *in rem* to the immovable property covered by the resolution, that is rights from the category of absolute rights which are effective towards all other entities.⁹

It needs to be noted that provisions of Art. 16, sect. 1 HMBA refer in their content to regulations included in Art. 11–12 of the act on land-use planning and development,¹⁰ which specify the sequence of activities undertaken in the course of the planning procedure. Thus, drawing on the views of legal scholars and commentators and the established line of judicial decisions that refer to this procedure may prove helpful in the interpretation of legal solutions concerning the establishment of a cultural park. Given the above, conclusions referred to in Art. 16, sect. 1 HMBA may be created in analogy to conclusions regulated in the Code of Administrative Procedure.¹¹ Both are expressions of citizens' initiative whose subject involves proposals and postulates for administration bodies to take up a specific action within their competence. The right to submit an application is correlated with the addressee's obligation to receive and respond to the citizens' initiative, but does not oblige to incorporate it [Bąkowski 2004, 68]. In view of personal limitations under Art. 16, sect. 1 HMBA, it needs to be believed that an application concerning a draft resolution on establishing a cultural park may be submitted by any stakeholder. A stakeholder means a natural person, a legal person, an organizational unit that does not have legal personality and a public authority. However, there is no basis to warrant that the entity submitting the application must be a member of a given self-governing community or have its registered office on its territory. The judiciary, against the background of solutions adopted in Art. 11, sect. 1 on land-use planning and development, expressed a stand according to which the right to submit applications is not based on the legal interest of applicants, neither do they gain a status of a party in these proceedings by doing so.¹² Therefore, it is not necessary for the entity bringing an application to the draft resolution on establishing a cultural park to have the legal title to the property located within the envisaged boundaries of the park.

In accordance with the instruction of Art. 16, sect. 1a HMBA, the commune council should specify the form, place and time for submitting applications. It is reasonable for the applications to be submitted in a written or electronic form since these allow keeping record of and examining the application [Filipowicz 2014, 115]. Those brought in a written form must be submitted in the seat of the commune office since petitioners will receive a confirmation of submitting the application. Whereas setting the time for submitting applications results in the fact

⁹ Judgement of the Voivodship Administrative Court of 26 April 2016, II SA/Kr 1427/15, LEX no. 2050178.

¹⁰ Act of 27 March 2003 on land-use planning and development, Journal of Laws of 2020, item 293 [henceforth cited as: LUPA].

¹¹ Act of 14 June 1960, the Code of Administrative Procedure, Journal of Laws of 2020, item 256 [henceforth cited as: CAP].

¹² Judgement of the Supreme Administrative Court of 4 September 2009, II OSK/1359/08, LEX no. 597220.

that the competent authority is not obliged to examine applications submitted to the project before or after the time specified in the announcement and notice. Violating the time for submitting applications results in them not being examined [Klat-Górska 2009, 38–52].

Regulations specifying the sequence of steps taken in the course of works on establishing a cultural park do not constitute the requirement of drawing up a list of submitted applications and examining them. The legislator's leaving these steps out in the proceedings with a draft resolution on establishing a cultural park does not encourage the commune residents' sense of influence on the content of the decision to be taken. Therefore, the need to submit proposals or postulates concerning the draft resolution by the interested parties in view of absence of any guarantee of their examination by the competent authority is made doubtful.

Given the above, involvement of members of self-governing communities in the process of establishment of a cultural park would require adopting a legal solution included in Art. 11, sect. 3 LUPA in terms of the obligation to examine the submitted applications. Therefore, it would be necessary to oblige the competent authority (pursuant to Art. 30, sect. 1 CSG preparation of a draft resolution is the task of the head of the commune, mayor or president of the city) to draw up a list of submitted applications. Then the content of applications should be analysed and the submitted postulates should be assessed substantively. Applications brought in to the draft resolution on establishing a cultural park would require examination in a form that guarantees the applicants and the supervisory authority the establishment of the manner of their examination. In view of the above it would be reasonable to examine them in a written form. It should be believed that the applications could be examined individually, then the head of the commune (mayor, president of the city) would issue a separate ordinance for each submitted application and the manner of examining an application would constitute the content of individual ordinances. However, joint examination of applications cannot be ruled out, which is supported by the argument of procedural economy [Sosnowski 2014, 910]. The established line of judicial and administrative decisions demonstrates that against the background of interpretation and application of Art. 11, sect. 1 and Art. 11, sect. 3 LUPA, examining applications for the study of conditions and directions of spatial planning of a commune, after previously announcing the launch of its preparation, may be expressed in a relevant ordinance of the commune's decision-making body.¹³

3. PASSING A RESOLUTION ON ESTABLISHING A CULTURAL PARK

Another stage of works on establishing a cultural park involves the decision-making and control body of the commune passing a resolution on establishing

¹³ Judgement of the Supreme Administrative Court of 15 February 2007, II OSK/1622/06, LEX no. 334791.

a cultural park. Pursuant to Art. 16, sect. 2 HMBA, the resolution specifies the name of the cultural park, its boundaries, protection as well as prohibitions and restrictions that may apply in the area of the cultural park or its part, but only those that were enumerated in Art. 17, sect. 1 HMBA.¹⁴ The absence of comprehensive regulation does not substantiate application of the nullity sanction since consequences of non-regulation require systemic assessment. In the absence of regulation excluding the application and achievement of the aim of the resolution on establishing a cultural park, it is reasonable to introduce a basis for the application of the nullity sanction.¹⁵ Failure to specify a plan for the protection of a cultural park in the resolution establishing such a park was qualified in the judicature as violation of Art. 16, sect. 2 HMBA. This violation, however, was not deemed essential in a degree that would require eliminating the resolution from legal trading. In the assessment of the voivodship administrative court, the obligation to indicate the manner of protection of the park may be carried out at a later date.¹⁶

Establishing a cultural park requires drawing up a plan of its protection. It is an obligation of the head of the commune (mayor, president of the city), resulting from Art. 16, sect. 3 HMBA, performed in agreement with the voivodship conservator-restorer. The agreement is done pursuant to Art. 106 CAP. It is binding and its absence excludes the possibility of adopting a protection plan. Then, the prepared protection plan requires approval of the commune council. It also needs to be emphasized that pursuant to the provisions of Art. 16, sect. 6 HMBA for areas on which a cultural park has been established, a local land-use plan is drafted mandatorily. This solution needs to be treated as *lex specialis* in relation to regulations included in the land-use planning and development act.

It needs to be remembered that a resolution of a commune council on establishing a cultural park may be appealed against at the administrative court pursuant to Art. 101 CSGA. The cited legal basis allows anybody whose legal interest or entitlement were violated by the resolution adopted by the commune body on the scope of public authority, to challenge the resolution at the administrative court. Anybody whose rights were violated has the *locus standi* to challenge the resolution. Thus, there must be a correlation between the sphere of the rights of the individual and the sphere of regulations resulting from the resolution that affect it. If as a result of the regulation laid down in the resolution the existing sphere of rights of the individual is limited, then violation of the legal interest in the meaning of Art. 101 CSGA needs to be concluded. The petitioner will therefore have the standing to take measures for procedural protection of their rights.¹⁷ The judi-

¹⁴ See Judgement of the Supreme Administrative Court of 7 December 2007, II OSK 1487/07, LEX no. 424539.

¹⁵ Judgement of the Supreme Administrative Court of 8 December 2015, II OSK 923/14, LEX no. 1995334.

¹⁶ Judgement of the Voivodship Administrative Court of 16 December 2013, IV SA/Wa 2197/13, LEX no. 1542947.

¹⁷ Judgement of the Voivodship Administrative Court in Wrocław of 20 December 2017, IV SA/Wr 589/17, LEX no. 2428497.

capture presents a stand according to which a resolution of a commune council on a cultural park may be effectively challenged at the administrative court by the owner of immovable property whose constitutional and statutory freedom of use and enjoyment of this property and of disposing of it was restricted as a result of the adoption of this resolution.¹⁸ By means of provisions of Art. 101, sect. 2 CSGA the possibility of filing a complaint at the court against the resolution on behalf of residents of the commune who expressed their written consent was ensured. A representative of the residents of the commune will become an attorney-in-fact acting on behalf and for its principals under a very narrow authorization [Matan 2016, 1247]. Granting a written consent for representation authorizes the holder of the power of attorney to file a complaint on behalf of persons who expressed this consent, though the established attorney-in-fact acts in essence on behalf of each of the petitioners individually [Daniel 2011, 67]. However, it needs to be emphasized that making it possible to bring a complaint before an administrative court on behalf of a specified group does not mean that it becomes an instrument guaranteeing the residents of the commune participation in establishment of a cultural park. The complaint is a measure serving to protect the stakeholders from the effects of the commune using its independence beyond the boundaries determined by the provisions of the law, to the detriment of rights of the individual in the sphere of public administration [Adamiak and Borkowski 1991, 38–45].

CONCLUSIONS

The obligation to protect historical monuments and buildings lies with government and self-government authorities. At the level of a basic local government unit it is primarily carried out by its decision-making and control organ with the participation of the executive organ and with collaboration with the voivodship conservator of historical monuments and buildings. Protection of historical monuments and buildings in the commune is possible by using one of the forms of this protection – establishing a cultural park. An analysis of legal solutions determining the process of establishing it aimed to determine the scope and forms of involvement of members of the self-governing community in this process. Residents may be interested in establishing it to boost the commune's tourist values, or they may oppose it due to the orders and restrictions established on the area of the park. Based on the conducted analysis a view emerges according to which members of a self-governing community were ensured participation in the works on establishing a cultural park at the minimum level. Regulations by virtue of which stakeholders were enabled to submit applications concerning the draft resolution on establishing a cultural park are an ostensible guarantee of influence

¹⁸ Judgement of the Voivodship Administrative Court in Cracow of 18 December 2007, III SA/Kr 569/07, LEX no. 368095.

over the content of the future resolution. Absence of a normatively specified obligation to examine applications and to inform about the manner of their examination does not encourage commune residents' involvement in public matters and does not serve raising acceptability of decisions made. Thus, it needs to be postulated that existing regulations that specify the course of works on establishing a cultural park should be supplemented with legal solutions that allow stakeholders to have real participation in them.

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PRAWNE UWARUNKOWANIA UDZIAŁU MIESZKAŃCÓW GMINY
W OCHRONIE ZABYTKÓW

Streszczenie. Ochrona zabytków jest zadaniem administracji rządowej i samorządowej. Udział jednostek samorządu terytorialnego w jego realizacji jest istotny. Na poziomie podstawowej jednostki samorządu terytorialnego ochrona zabytków urzeczywistniana jest poprzez możliwość tworzenia parku kulturowego, będącego jedną z form ochrony zabytków. Ustawodawca szczegółowo zdefiniował proces tworzenia parku kulturowego, a czynności inicjujące ten proces powierzył radzie gminy. Jednocześnie przyjął uregulowania umożliwiające włączenie się w prace nad utworzeniem parku kulturowego zainteresowanym podmiotom. Niniejsze opracowanie ma na celu analizę rozwiązań prawnych jako gwarantujących mieszkańcom gminy rzeczywisty udział w procesie tworzenia parku kulturowego. Na jej podstawie podjęta zostanie próba udzielenia odpowiedzi na pytanie, czy obowiązujące uregulowania, w badanym zakresie, stanowią zachętę dla członków wspólnot samorządowych do angażowania się w sprawy publiczne? Czy też nawiązują do modelu procedury uchwałodawczej, w którym prawodawca jednostronnie nakłada obowiązki i przyznaje uprawnienia podmiotom prawa?

Słowa kluczowe: gmina, park kulturowy, partycypacja, formy ochrony zabytków

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