

LEGAL ASPECTS OF THE BOROUGH'S USE OF THE LANDSCAPE-NATURE PROTECTED COMPLEX

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Summary. Under Art. 43 of the Act on Nature Conservation landscape-nature protected complexes are sections of a natural and cultural landscape which deserve protection because of their scenic or aesthetic value. As this provision points out they serve landscape conservation and may be employed unless the appropriate authority adopts other forms of nature conservation. Unfortunately, in practice, boroughs adopt resolutions establishing landscape-nature complexes in response to the demand of one of the parties to the conflict existing in a given territory, resulting from an investment implemented by an entrepreneur. It is precisely due to the collision of planned activities or economic undertakings with environmental goods, including protected natural assets, that it is necessary to develop and apply legal tools that would allow for the realisation of public rights to use the environment *inter alia* by ensuring active influence of entities having legal interest in the procedure of creation of landscape-nature protected complexes. Such a legal framework would enable potential sources of conflict to be minimised.

Key words: landscape-nature protected complex, sustainable development, nature conservation, environmental protection, public right to use environment

INTRODUCTION

To manage natural resources properly the legislature obligated public bodies to take rationing measures. Among many entities responsible for the implementation of this duty, the local authorities stand out, including the Voivodeship Marshall, the Starost and the Village Mayor (Mayor).¹ This is indicated by Art. 91, sect. 2b, 3 and 4 NCA. Following Art. 4 NCA public bodies including boroughs must not only take care of nature which is the national heritage and wealth but also provide legal, financial, and managerial frameworks necessary to foster nature conservation.

Borough main tasks include management of spatial order, real estate, local public transport, and public housing as well as environmental protection and nature conservation. They must be pursued in accordance with the principle of sustainable development. The provisions of the Borough Council² are further deve-

¹ Act of 16 April 2004 on Nature Conservation, Journal of Laws of 2020, item 55 as amended [henceforth cited as: NCA].

² Act of 8 March 1990 on Borough Council, Journal of Laws of 2020, item 713 as amended [henceforth cited as: BCA].

loped in other enactments such as the Act on Planning and Spatial³ and the Environmental Protection Law.⁴ Their provisions refer both directly and indirectly to the principle of sustainable development. Application of this rule in the areas which are crucial to the state's operation requires the performance of tasks and competencies by individual local authorities. At the local level pursuit of sustainable development involves weighing up competing interests which is evident in the content of the decisions of the local authorities. This calls for considering many factors, including environmental ones, to resolve local challenges arising precisely because of the environmental protection and nature conservation.

At the same time, it should be noted that nature can be protected *in situ*, i.e. in the place of its natural occurrence or *ex situ*, i.e. outside the place of its natural occurrence (e.g. in zoos or botanical gardens). Almost all forms of nature protection are regulated in the standards of NCA. This normative act regulates the following forms of nature conservation: national parks, nature reserves, landscape parks, nature parks, Natura 2000 sites, natural monuments, sites of scientific importance ("stanowiska dokumentacyjne"), ecological sites, landscape-nature protected complexes, protected species of plants, animals, and fungi. Each of them plays a separate role and serves different objectives within the Polish framework of nature conservation. Accordingly, they are distinguished by diverse conservation requirements and the scope of restrictions on land use in specific areas.

The above forms of nature conservation may be divided in at least into two categories – protected areas and object-oriented (individual) conservation. The former usually spans over vast territories and protect nature collectively – as a whole [Żarska 2011, 60]. First five of the aforementioned forms of nature conservation from national parks to Natura 2000 sites all belong to this class. The latter focuses on individual objects which are environmentally significant or their small concentrations including natural monuments, sites of scientific importance, ecological sites and landscape-nature protected complexes which are the subject of this analysis.

1. LANDSCAPE-NATURE PROTECTED COMPLEX – THE ESSENCE

Under Art. 43 NCA landscape-nature protected complexes are sections of a natural and cultural landscape which deserve protection because of their scenic or esthetic value. As this provision points out they serve landscape conservation and may be employed unless the appropriate authority adopts other forms of nature conservation.

³ Act of 27 March 2003 on Planning and Spatial, Journal of Laws of 2020, item 293 as amended [henceforth cited as: PA].

⁴ Act of 27 April 2001, the Environmental Protection Law, Journal of Laws of 2020, item 1219 as amended [henceforth cited as: EP].

The wording of the article is enough to conclude, rightly so, that a particular area may only be designated with one form of nature conservation. However, it does not bar future changes resulting in conversion to other forms of nature conservation.

The literature on the subject justifiably points out the far-reaching similarity of the landscape-nature protected complex to the landscape park, due to the akin requirements in establishing both forms of nature protection. From this point of view, the landscape-nature protected complex could be considered a 'mini' landscape park, where similar environmental values are protected, but in a smaller area, and for which there is no need to create an extensive structure demanded for a landscape park.

The exhaustive list of nature conservation forms specified in NCA is not accidental and its numbering, in principle, also matters. It is affirmed *inter alia* by the degree of complexity of their designation, conservation requirements, and possible limitation of rights that various entities normally enjoy. Case law also displays the statutory hierarchy of nature conservation forms. Landscape-nature protected complexes rank 9 among them which reflects their importance.⁵ Restrictions on the rights of the individuals may concern e.g. limitations of land use within the protected area. For instance, regarding the imposition of bans within the landscape-nature protected complex, the judiciary is of the opinion that had the legislature's intention been for the ban on development to apply within the area of a landscape-nature protected complex it would be explicitly mentioned in Art. 45, sect. 1 NCA, as is the case with other forms of nature conservation.⁶ It must therefore be considered that, in this case, the legislator deliberately abandoned such a ban. While this position must be accepted it should be pointed out that this form of nature protection is not always employed only to achieve its legal aim, but also to pursue other objectives, such as blocking investments. This is all the more important when the establishment of a landscape-nature protected complex, in the inertia of the bodies establishing it, is not aimed at nature protection at all, but only, for example, at making it impossible to obtain the documentation required by law to enable certain investments to begin.

At the same time, following the standards of the Constitution of the Republic of Poland of 1997,⁷ local authorities participate in exercising public authority and perform a significant part of their public tasks set out by the legislature, in its own name and on its own responsibility (Art. 16, sect. 2 of the Constitution). At the same time, the legislative tasks of the borough concerning nature protection inclu-

⁵ Justification of the judgement of the Supreme Administrative Court of 6 December 2019, II OSK 237/18, LEX no. 2777906.

⁶ *Ibid.*; judgement of the Supreme Administrative Court of 13 April 2010, II OSK 169/09, LEX no. 597346; judgement of the Supreme Administrative Court of 12 May 2011, II OSK 815/10, LEX no. 1081917, judgement of the Supreme Administrative Court of 17 December 2015, II OSK 993/14, LEX no. 2000059.

⁷ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, No. 114, item 946 [henceforth cited as: Constitution].

de the creation and abolition of some forms of nature protection. Pursuant to Art. 21, point 4 of the Act of 23 January 2009 amending certain acts⁸ in connection with changes in the organisation and division of public administration tasks in a voivodship, the wording of Art. 44, sect. 1 NCA was changed, i.e. the powers to establish local forms of nature protection such as: a natural monument, a documentation stand, ecological use and landscape-nature protected complex, were granted to the borough council.

Therefore, it follows from the current wording of Art. 44, sect. 1 NCA, that a landscape-nature protected complex is established by way of a resolution of the borough council. In the assessment of the nature of such a resolution, as an act of local law, the positions of the judiciary and the legal science have been expressed. They indicate that the resolution contains legal norms of general and abstract nature and is not addressed to an individually specified addressee. Moreover, the norms contained therein must be taken into account by the administrative authorities when issuing decisions on issues related to the development of the area covered by the resolution. This view must be fully endorsed⁹ [Królczyk 2011, 57–74; Trzcińska 2011; Gruszecki 2020]. Although Art. 87, sect. 2 and Art. 94 of the Constitution do not specify the features of a local law act, such a character of the act is undoubtedly indicated by the territorially limited scope of the resolution with regard to the establishment of a landscape-nature protected complex, no individually specified addressee, as well as its adoption based on and within the limits of the statutory authorisation.

Bearing in mind that this type of indicated resolution is classified as local law, the provisions contained therein must be taken into account by the administrative authorities when issuing decisions on the issues connected with the development of the area covered by the resolution, including decisions crucial, from the investments' the point of view, related to the construction process (in particular, decisions on environmental permit).

2. DEFICIENCIES IN THE PROCEDURE FOR ESTABLISHING A LANDSCAPE-NATURE PROTECTED COMPLEX

As indicated above, the recognition of the resolution in question as an act of local law, and therefore as a source of universally binding law, is connected with the fact that it must be issued based on and within the limits of statutory authorisations. Statutes should specify the rules and procedure for its issue (Art. 94 of the Constitution). Such statutes are in this case: NCA and BCA.

The provisions of NCA lack detailed guidelines on the process of adopting a landscape-nature protected complex. The whole procedure is basically limited to drafting a resolution which if accepted by the cooperating public body allows

⁸ Journal of Laws No. 92, item 753 as amended.

⁹ Judgement of the Supreme Administrative Court of 30 July 2010, II OSK 1053/10, LEX no. 694431.

the borough to adopt the resolution. Within this procedure, no framework has been installed for the interested parties including entrepreneurs to have any meaningful influence on the said resolution. An entity planning to make an investment on land that it owns but which is covered by the draft resolution on the establishment of a landscape-nature protected complex, cannot obtain information about the pending proceedings, even though the resolution may limit its rights in such a way that the planned investments will be impossible to realise. Furthermore, it should be noted that under the current legal regime it is required neither to carry out public consultations nor to obtain the consent of the property owners in order to establish this form of nature protection.

It only follows from the provisions of the NCA that the adoption of a resolution on the establishment of a landscape-nature protected complex follows the preparation of its draft (Art. 44, sect. 3a NCA). The act indicates such a requirement referring to the need to agree on the project with the regional director of environmental protection. In this case, the legislator used the form of agreement, which is not an opinion. This means that the lack of agreement makes it impossible to adopt a resolution both to establish and to abolish this form of nature protection.

It should therefore be assumed that the arrangement referred to in Art. 44, sect. 3a of the NCA is a necessary element which cannot be omitted within the considered procedure. It consists of the joint determination of the substance of a settlement by one authority with another agreeing authority and takes place in the preparatory phase of the authority's decision. The assessment is made of the legitimacy of the scope of the protective regime, the application of appropriate, adequate measures, as well as an indication of the reasons for lifting the protective regime. An agreement, as opposed to opinion, is a strong form of cooperation between the authorities [Chmielewski 2014, 28–39].

The provisions of the NCA also do not formalise how the competent regional director of environmental protection gives consent. The legal science indicates that it can take place in any form. It is only important that the position of this body should clearly indicate whether it accepts the draft resolution, and if not, what objections it raises [ibid.]. It should be noted, however, that the wording of Art. 44, sect. 3b NCA puts such a conclusion into question. It follows from the provisions contained therein that an agreement is made under Art. 106 of the Code of the Administrative Procedure,¹⁰ with the provision that failure to present a position within one month from the date of receipt of the draft resolution shall be deemed an agreement on the draft resolution. If the provision refers directly to Art. 106 CAP, which determines the mode of cooperation of the bodies, certain consequences result. First of all, the body handling the matter, when applying to another body to take a position, notifies the party thereof. Secondly, the authority

¹⁰ Act of 14 June 1960, the Code of Administrative Procedure, Journal of Laws of 2020, item 256 [henceforth cited as: CAP].

obliged to take a position may, if necessary, conduct an investigation. Thirdly, that authority takes a position by means of an actionable decision. NCA does not contain any exclusions as to the scope of application of Art. 106 CAP. If the legislator wanted to regulate this issue, it would do so, as is the case with the provisions of other legal acts in which the need for the authorities to cooperate was provided for. For instance, the content of Art. 53, sect. 5 PA (analogous to Art. 44, sect. 3 NCA) limits the right to lodge a complaint, which an investor is entitled to in the proceedings to issue a decision on the determination of the location of a public purpose investment. There are many differences between the above procedure, and one conducted under the NCA, and the fundamental one is that while the former results in an individual decision, the latter leads to a resolution constituting an act of local law.

It should be stressed, however, that although in Art. 43 NCA the legislator, described in a general way the features that a particular area should have in order to be considered an area of protected natural and cultural landscape (scenic or aesthetic), it did not precisely define the premises that would justify the creation of a landscape-nature protected complex.

Meanwhile, the resolution of the borough council establishing a landscape-nature protected complex which in fact decides on the development of the properties included in the complex is very similar in its effects to the resolution on the local development plan. However, the adoption of a local development plan is subject to the satisfaction of several procedural requirements. Meanwhile, the establishment of a landscape-nature protected complex is not subject to such requirements and thus, in principle, it is left to the authorities' full discretion. The lack of clear criteria for adopting such a resolution accompanied by no possibility of social control and participation in the entire procedure by entities directly concerned as provided for in CAP makes it impossible to duly consider the facts of the case while passing this act, and thus prevents the principle of sustainable development from being implemented in the procedure. The obligation to take the principle of sustainable development into account stems directly from Art. 5 of the Constitution. It should be stressed that since environmental protection has to be implemented in accordance with this principle, it would be groundless to assume that nature protection does not have to take this principle into account. However, the lack of active participation of all interested parties makes it impossible to present disputed interests in a given case, and thus makes it impossible to balance them before the adoption of this act of local law. This state of legal practise should be considered not only to be contrary to the implementation of the principle of sustainable development, but also to the exercise of at least the public right to use the environment by those legal entities whose constitutional rights or freedoms, such as the right of property and, accordingly, the freedom to conduct business, will be restricted in a way that is contrary to their will, precisely through the establishment of a landscape-nature protected complex.

Current practice shows that the “arrangement” referred to in Art. 44, sect. 3a NCA is usually only a formality. This is done by a regional director of environmental protection copying the content of the documents that the borough submitted. The reason for this is that the act lacks a precise definition of the subjects of protection in the form of species and natural habitats, as e.g. for Natura 2000 areas. The assessment of the impact on the Natura 2000 area is much more specific and objective. This enables the assessment to be carried out in a reliable manner and on a scientific basis. Moreover, this assessment is carried out during a special procedure, due to its complex nature.

Meanwhile, the practice should be that “agreement” should each time be preceded by an assessment (analysis) of the substantive aspects of the draft resolution on the establishment or abolition of this form of nature protection, such as the legitimacy of selecting the elements of nature to be covered by the protection regime, the application of appropriate and adequate measures or the indication of the reasons for the abolition of the protection regime (in whole or in part).

In the judgment of 30 July 2010 the Supreme Administrative Court ruled that it is precisely the scenic or aesthetic values that determine the creation of a landscape-nature protected complex, and if so, they must be properly documented in terms of legally protected natural values. Therefore, the detailed restrictions introduced for the established nature and landscape complex are intended to preserve the landscape characteristics, i.e. to achieve the goal that has been set as a priority for this landscape-nature protected complex.

The above position as regards the existence of visual or aesthetic qualities and proper documentation has been upheld by the judiciary in many subsequent decisions of administrative courts¹¹ and should be endorsed. However, the problem is the meaning of “proper documentation.” In practice, one can encounter a situation where such documentation is a laconic description lacking the author’s credentials and qualifications. Such documentation is the basis for the borough authorities to adopt a resolution on the establishment of the landscape-nature protected complex.

3. CONTROL OVER RESOLUTIONS ON THE ESTABLISHMENT OF LANDSCAPE-NATURE PROTECTED COMPLEXES

It is well-founded in the study of law that the control of the legality of local law acts takes place by way of supervision over the activities of local government units (Art. 171 of the Constitution), as well as in proceedings before administrative courts (Art. 184 of the Constitution). At the same time, in a limited way, control of local law, as a source of law included in the broader category of “normative

¹¹ Judgement of the Provincial Administrative Court in Warsaw of 13 June 2017, IV SA/Wa 2757/16, LEX no. 2325253 or judgement of the Supreme Administrative Court of 31 May 2016, II OSK 2308/14, LEX no. 2083482.

act,” is also exercised by the constitutional court, examining – with certain reservations – constitutional complaints, as well as legal questions submitted by the courts (Art. 79, sect 1 and Art. 193 of Constitution; see TK – SK 42/02). It is also assumed that an indirect consequence of the wording of Art. 178, sect. 1 of the Constitution is the possibility of incidental control of the legality of local law by the Supreme Court, common courts, administrative courts and military courts, and a refusal to apply it in a case pending before the court [Radziewicz 2019].

While recognising the legitimacy of such a specific catalogue of legal measures allowing the control of acts of local law, which include a resolution on the establishment of a landscape-nature protected complex, the following circumstance ought to be pointed out. Legal entities, including entrepreneurs, can “withdraw” from legal circulation a resolution unfavourable to them. One of them is to apply for the abolition of the indicated form of nature protection, pursuant to Art. 44, sect. 4 NCA. However, such a request would require justification and demonstration that e.g. the natural and landscape values, due to which this form of nature protection was established, were lost. Given that it would be up to the authority that established the particular landscape-nature protected complex to consider the application, its effectiveness should be considered illusory.

At the same time, it should be stressed that the resolution on the establishment of a landscape-nature protected complex is subject to control by the voivode, as he may invalidate it based on Art. 91 BCA, if he considers it to be illegal. Bearing in mind that there is a relatively short time – 30 days – to take such an action, it may happen that this period will expire, and the resolution will be valid.

In such a case, legal entities, including entrepreneurs, will at best appeal the resolution to the administrative court following Art. 101 BCA on the grounds that the resolution has infringed a legal interest or entitlement. The subject of the administrative court’s examination would be, among other things, to determine whether the planned investment contradicts the objectives for which landscape-nature protected complex was created, including whether it will violate the protected scenic and aesthetic values, but also whether such values exist in the given area at all.

The aforementioned legal measures and proceedings resulting from their use are, unfortunately, of a long-term nature and the validity of the resolution, even temporary, may effectively block the planned investment. It is important not to forget the economic factor which, as a matter of principle, determines the undertaking’s decision to make a specific investment.

FINAL REMARKS

Undoubtedly, in the light of the current legal framework, protection of the environment, including nature, is an obligation of public authorities (Art. 74, sect. 2 of the Constitution). Therefore, public authorities are to protect the environment, *inter alia*, by undertaking legislative actions, i.e. among others establi-

shing local law introducing restrictions on economic activity. However, this should take place in an adequate and proportional manner to potential threats to the environment, including nature. In fulfilling the above obligation, public authorities, including the municipal council, are supposed to reconcile the often opposing interests of the parties, including entrepreneurs, and thus weigh the constitutional values, i.e., for example, freedom of economic activity and environmental protection and nature conservation, or the right of property and environmental protection and nature conservation. These actions should result in balancing these values, because only such an approach of public authorities, including boroughs, allows the principle of sustainable development to be implemented. It should be borne in mind that none of the legal values indicated can be protected in an absolute way, but also cannot be restricted excessively. When assessing this limitation, Art. 31 of the Constitution should also be kept in mind. In the provisions of this article, the legislator directly defined the premises for the limitation of constitutional rights and freedoms, for the sake of environmental protection.

Unfortunately, still in practice, resolutions in the law on the establishment of the landscape-nature protected complex are adopted by boroughs as a response to the demand of one of the parties to the conflict existing in a given area, the source of which is an investment undertaken by an entrepreneur. Pressure from its opponents – a larger group of local inhabitants, is of more political significance than the voice of a single investor. Resolutions are therefore not always of a substantive nature. In such situations, the establishment of a landscape-nature protected complex as a form of nature protection is abused and employed for short-term political purposes.

It is precisely the collision of planned activities or economic undertakings with the protected environmental goods that makes it necessary to develop and apply tools that would allow for the exercise of public rights to use the environment, taking into account the active influence of entities with legal interest as part of the procedure of establishing landscape-nature protected complexes to minimize potential sources of conflicts related to the use of the environment by entrepreneurs. The problem is not solved by the use of the legal institutions indicated in the above-mentioned considerations that allow to control the resolutions adopted on the establishment of a landscape-nature protected complex. It is at least due to the circumstances indicated in the content of the above considerations.

At the same time, it should not be forgotten that such use of this form of nature conservation by boroughs contradicts with the goal envisaged by the legislator. This, in turn, results in achieving at least the opposite effect to entrepreneurs than the one expressed in the fact that they feel responsible for the state of the environment, including nature, as entities who have the right to use these legal goods and at the same time responsibility for their breach.

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ASPEKTY PRAWNE WYKORZYSTYWANIA PRZEZ GMINY ZESPOŁU
PRZYRODNICZO-KRAJOBRAZOWEGO

Streszczenie. Zespołami przyrodniczo-krajobrazowymi, w myśl normy art. 43 ustawy *o ochronie przyrody*, są fragmenty krajobrazu naturalnego i kulturowego zasługujące na ochronę ze względu na ich walory widokowe lub estetyczne. Jak wskazane zostało w treści tego przepisu zespoły te służą ochronie krajobrazu i mogą one być stosowane, o ile inne formy w danym przypadku nie zostaną przyjęte przez organ je ustanawiający. Niestety wciąż jeszcze w praktyce uchwały w prawie ustanowienia zespołu przyrodniczo-krajobrazowego podejmowane są przez gminy, jako odpowiedź na zapotrzebowanie jednej ze stron istniejącego na danym terenie konfliktu, którego źródłem jest inwestycja realizowana przez przedsiębiorcę. Właśnie z uwagi na kolizję planowanych działań lub przedsięwzięć gospodarczych z dobrami środowiskowymi, w tym przyrodniczymi objętymi ochroną, niezbędne jest wypracowanie i stosowanie narzędzi prawnych, które pozwalałyby na realizację publicznych praw podmiotowych do korzystania ze środowiska, również poprzez zapewnienie aktywnego wpływu podmiotów mających interes prawny w ramach procedury ustanawiania zespołów przyrodniczo-krajobrazowych. Taki stan prawny umożliwiłaby minimalizowanie potencjalnych źródeł konfliktów.

Słowa kluczowe: zespół przyrodniczo-krajobrazowy, zrównoważony rozwój, ochrona przyrody, publiczne prawo podmiotowe do korzystania ze środowisk

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