

Restricting the rights of construction process participants on the basis of pandemic legislation in Poland

Abstract: The subject matter of the article concerns the Special Act adopted for the purposes of counteracting the SARS-CoV-2 disease and its effects. In particular, the Special Act contains special rules for implementation of construction investments aimed at counteracting the epidemic. These regulations are far-reaching. Spatial planning, construction and conservation of monuments laws are not applicable as regards investments implemented pursuant to the Special Act. These specific rules seem to be justified by the need to protect the public interest and, in particular, the public health. However, the implementation of investments on the basis of these special rules is linked to the abolition of the legal rules protecting the rights of participants in the construction process. This article emphasizes the need for amending the Special Act and implementing legal tools, which will enable to assess whether an investment aims to combat the disease. In the current legal framework, the Special act creates the potential for abuse.

Keywords: Special Act on counteracting COVID-19, construction investment aimed at counteracting

1. Introduction

On 20 March 2020, the state of epidemic was introduced in the Republic of Poland due to SARS-CoV-2 infections. Direct legal basis for validity of the epidemic state is the Regulation of the Minister of Health of 20 March 2020 on announcing the state of epidemic in the territory of the Republic of Poland (Journal of Laws 2020, item 491) – “the Regulation”, which was adopted on the basis of Article 46 (2) and (4) of the Act of 5 December 2008 on the prevention and control of infections and infectious diseases in humans (Journal of Laws 2019 items 1239, 1495 and 2020 items 284, 322 and 374) – “the Act”. Article 46 (4) of the Act sets out health-related remedies, which may be introduced under the Regulation. It is a catalog of possible actions, the introduction of which is decided by the Minister of Health, depending on which of them will be effective in combating the epidemic. Their analysis proves that these are regular health protection do’s and don’ts, for instance: a temporary restriction on a particular mode of movement, temporary restriction or prohibition on the marketing and use of certain objects or food products, temporary restriction of the functioning of certain establishments or workplaces, prohibition of the organization of events and other public gatherings, obligation to introduce certain sanitary measures if their performance is related to the functioning of certain manufacturing, service, commercial or other facilities.

The aforementioned provisions do not allow the application of special legal solutions simplifying the conditions for conducting building projects to combat epidemic. However, the unprecedented scale of the challenges posed by the spread of the virus made it necessary to introduce some emergency legal framework in this

field¹. Consequently, the Act of 2 March 2020 on specific solutions for preventing and combating COVID-19, other infectious diseases and crisis-related emergencies (Journal of Laws of 2020, item 374) – “the Special Act” – was adopted. It contains a number of regulations on limiting the spread of the disease and mitigating its effects. Such regulations include those, which introduce special solutions regarding the construction process.

The rules introduced by the Special Act and their implications for the protection of human rights are set out below². Scientific results are based on a dogmatic approach. The Special Act has been in force for a few months now, so no jurisdiction of administrative courts, nor scientific studies are available at the moment. For obvious reasons, comparative or historical approach cannot be applied.

2. Provisions of the special act on construction process

The Special Act entered into force on 8 March 2020 but the provisions concerning the construction process were amended several times. Firstly, on 31 March 2020 by the Act of 31 March 2020 amending the Act on specific solutions for preventing and combating COVID-19, other infectious diseases and crisis-related

¹ The entry into force of these emergency provisions is related to the basic good, i.e. the protection of the well-being of the human person, more broadly on this subject vide: WOJTYŁA W. Dobro człowieka celem istnienia i funkcjonowania administracji publicznej – w perspektywie etyki personalistycznej, p.283; also: NAŁĘCZA. Bardziej człowiecze podejście – prawa człowieka w prawie gospodarczym na przykładzie unormowania dostępu do Internetu, p. 388.

² On respecting human rights as a determinant of good governance vide: GRZESZCZAK R. Good Governance – Koncepcja dobrych rządów w unijnym systemie wielopoziomowego rządzenia, p. 660.

emergencies and some other acts (Journal of Laws of 2020, item 568). Secondly, on 18 April 2020 by the Act of 16 April 2020 on specific support instruments concerning the spread of SARS-CoV-2 virus (Journal of Laws of 2020, item 695). Finally, on 24 June 2020 by the Act of 19 June 2020 on subsidies on bank loans granted to businesses affected by COVID-19 and simplified procedures for approval of arrangements proceedings following the occurrence of COVID-19 (Journal of Laws of 2020, item 1086).

According to Article 2 (1) of the Special Act, its provisions shall apply to infection and infectious diseases caused by the SARS-CoV-2 virus, hereinafter referred to as "COVID-19". The Special Act defines also the term "counteraction of COVID-19". Originally it was defined as "any activity associated with combating the disease, preventing it from spreading, prevention and combating the effects of the disease referred to in paragraph 1". Pursuant to the amendment of 31 March 2020, the definition was extended. In consequence, currently the definition refers to combating the socio-economic effects of COVID-19. The amendment sought to broaden the scope of Special Act with regard to actions related to the removal of the epidemic's effects. The explanatory memorandum to the amendment says: "Preventive measures taken by the public authorities to minimize the spread of COVID-19 include, inter alia, quarantine of persons who are in contact with infected persons, closure of facilities or the cancellation of events and mass events. This in turn can lead to a halt in production and the provision of services and, as a result, the financial difficulties of individual companies. The economic effects of the spread of COVID-19 are not only present in businesses whose facilities have been closed due to COVID-19 infection or quarantine of employees. They also concern companies exporting or importing goods to / from the regions of the world where there are obstacles to trade due to

the spread of COVID-19. The difficulties in international business relationships are manifold, also in the services sector. In addition, preventive measures taken to stop the spread of COVID-19 affect consumer behavior, particularly in sectors such as hotels, tourism, transport, entertainment and cultural services. From day to day, the number of orders is drastically reduced and those already taken are often interrupted in the course of their implementation. In view of the above, there was a need for specific solutions to counter the negative economic effects of the situation. (...) Taking account of the extension of the scope of the Special Act, it was necessary to clarify the concept of *counteraction of COVID-19* by indicating that it also covers activities concerning combating the socio-economic effects of the disease”³. This amendment has immense importance for the construction process since it enables to construct buildings on special conditions set out in the Special Act, even if such buildings are not directly related to counteracting the epidemic. The notion of “epidemic’s effects” can be understood broadly, for instance, not only as a condition in the infected people, but also as the economic crisis resulting from the introduction of the lockdown. In other words, a construction process conducted on special conditions does not need to be aimed directly at health protection (e.g. field hospital, quarantine center). An investment aimed to counter the economic effects of the disease would also be covered by the special regulations. This opens up a lot of room for interpretation, whose main goal is to implement investments impossible to carry out normally. Due to the fact that the standard rules of the construction process are used, inter alia, to protect human rights, the Special Act’s regulations raise doubts.

³ Print no. 299 of the Sejm of the Republic of Poland of the 9th term, <http://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=299> [accessed on 28 July 2020].

The rules introduced by the Special Act are far-reaching and even, one may say, subversive. In accordance with Article 12 (1) of the Special Act as regards design, construction, reconstruction, renovation, maintenance and demolition of buildings, including changes in their manner of use connected with counteraction of COVID-19, the provisions of the Act of 7 July 1994 – Construction Law (Journal of Laws of 2019, item 1186, as amended) – “the Construction Law”, the Act of 27 March 2003 on spatial planning and development (Journal of Laws of 2020 items 293 and 471) – “the Act on spatial planning and development” and planning acts referred to in this Act, and the Act of 23 July 2003 on the protection and care of monuments (Journal of Laws of 2020, item 282) – “the Act on the protection and care of monuments” shall not apply. This means that construction investments related to COVID-19 can be implemented regardless of the key regulations on investment process – i.e. the Construction Law, the Act on spatial planning and development and the Act on the protection and care of monuments. As a result, such investments can be carried out irrespective of the provisions of local zoning plan and, in the absence of a plan, without a decision on the development conditions or a decision on the location of a public purpose investment. As regards the Construction Law, it can be said that the Special Act lifts the obligation to carry out preventive check of the investment project⁴. The investor has no obligation to notify the intention to carry out the investment, nor is there any obligation to obtain a building permit. No need for applying these procedures means that the architectural and construction administration authority does not have tools to verify whether the planned investment complies

⁴ On preventive control of construction investment vide: KRUSÍ M. Postępowanie poprzedzające rozpoczęcie robót budowlanych, p. 471.

with the substantive requirements. Nonetheless, it is not a case of requirements imposed by the regulations, whose application is excluded by the Special Act, i.e. the Act on spatial planning and development or the Act on the protection and care of monuments. It is a matter of regulations relevant from the construction process's perspective, which are still in force – i.e. whose application has not been excluded. An example can be the Act of 16 April 2004 on nature protection (Journal of Laws of 2020, items 55, 471) – “the Act on nature protection”. Inapplicability of the Act on the protection and care of monuments results in the removal of the conservator of monuments' right to accept a building project, both in terms of its implementation and parameters. The wording of the aforementioned provision also gives rise to a claim that substantive requirements for investments are not applicable. The substantive regulation of the Construction Law is inapplicable⁵. The non-application of the rules determining the location of the investment may lead to a situation where a building is constructed for example contrary to the local zoning plan. This situation could be problematic if the object constructed in order to counteract COVID-19 would require a change in the manner in which it is used in the future. There would be a need for a regulation that is currently lacking, which would give rise to the legalization of the construction⁶.

Article 12 (2) of the Special Act, added on 31 March 2020, sets out the obligation to inform the architectural and construction administration authority about the conduct of construction works

⁵ As regards substantive requirements in the construction process see: BATTIS U. Öffentliches Baurecht und Raumordnungsrecht, p. 203.

⁶ CZŁOWIECZKOWSKA J. Legalizacja samowoli budowlanej a zmiany w prawie budowlanym i administracyjnym, p. 266. The author points out that frequent changes in the construction law introduce complications in legalizing investor actions.

and the change in the manner of use of a building or part thereof due to the counteraction of COVID-19. It does not require the notification to occur prior to the commencement of works and does not specify what is the effect of submitting the information. In particular, it must be pointed out that Article 12 (2) of the Special Act does not provide for any procedure in which the architectural and construction administration authority could question the legality of the investment implementation under the Special Act. In practice, it is conceivable that the architectural and construction administration authority would respond by questioning the investment's character, i.e. by arguing that it does not fulfill the conditions set out in Article 2 (2) of the Special Act. This means that a fundamental difficulty arises from the perspective of the protection of human rights since the definition of "counteraction of COVID-19" is so broad that a potential dispute can be controversial from viewpoint both of the investor and the its neighbors⁷, or more generally from the public interest perspective⁸. The architectural and construction administration authority, establishing that the investment is not aimed at counteracting COVID-19, may conclude that construction works have been started illegally. In such case, the construction supervision authority could intervene. On the basis of the general provisions, it can suspend the construction works and order that the building permit must to be obtained. In practice, the decision taken by the construction supervision authority would stop the application of the Special Act due to the presumption of legality of the decision issued by the public administration authority. Unless the investor obtained a confirmation of illegality of the

⁷ On the role of the building permit for the protection of the property rights of neighbors vide: MUCKEL S. OGOREK M. Öffentliches Baurecht, p. 195.

⁸ On public interest as one aspect of axiological aspects of the zoning law vide: SZEWCZYK M. Aksjologia prawa zagospodarowania przestrzenni, p. 523.

construction supervision authority's act, it would not be allowed to legally continue its project. It is only in administrative court where the investor could obtain such confirmation. Here comes another problem, namely the episodic nature of the Special Act. The special provisions concerning the construction process are in force until 4 September 2020. Moreover, the Special Act does not provide for any expedited procedures before administrative courts. Thus, it is highly probable that the court's verdict would be issued at a time when the provisions of the Special Act would no longer apply. It may be argued that the investor could continue to conduct the investment pursuant to the special rules, because the legality of its project was confirmed (bearing in mind scenario in which the administrative court repealed the construction supervision authority's decision). There may be a problem, however, that because of abolishing the state of epidemic, the investment would no longer meet the conditions set out in Article 2 (2) of the Special Act. This in fact means that the investor will not conduct it according to the special rules. Thus, we come to the conclusion that the construction supervision authority is able to block the construction process on the basis of the Special Act. In addition, it should be noted that the Special Act defines the scope of data, which the investor is required to provide to the architectural and construction administration authority. According to Article 12 (3) (1) and (2) of the Special Act, in case of construction works, the investor shall provide the architectural and construction administration authority with the information on type, scope and manner of carrying out construction works as well as their commencement date. In case of changing the manner in which the building (or its part) is used, the investor shall submit information about current and planned manner of use. The required scope of information is not extensive. In particular, the Special Act does not require the justification

proving that the investment aims to counteract COVID-19. However, such a requirement appears in Article 12b (2) (1) of the Special Act.

3. Human rights protection instruments

Protection of human rights in the implementation of construction investment concerns issues such as the protection of the property rights of the investor and neighboring properties, protection of health, environmental protection and security (construction safety issues)⁹. As regards the interest of the investor, standard rules of the construction process provide for the protection of its investment. A building permit may be considered as a *sui generis* insurance policy if it turns out that the investment does not comply with the law¹⁰. The State assumes responsibility for the building permit, warranting that if the investment carried out in accordance with the approved project was unlawful, the investor would not bear the cost of the defect. Ultimately, if the legalization of the investment proves to be impossible, the State shall be liable for compensation for the unlawful act, i.e. the building permit. For these reasons, any liberalization of the rules of the construction process can be linked with the issue of ensuring sufficient protection of human rights, for all participants in the process.

⁹ On human rights vide: QUINTAVALLA A., HEINE K. Priorities and human rights In: *International Journal of Human Rights*, p. 679-697; HENRI C. Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond, p. 811-816; CAVALLO G.J.A. The human right to a healthy environment public participation and *ius commune*, p. 41-66; ROST A. Wolność jednostki w Konstytucji RP, p. 124.

¹⁰ On the protective function of the building permit vide: STOLLMANN F., BEAUCAMP G. *Öffentliches Baurecht*, p. 12.

The general rules for the construction process are designed to protect various human rights. Their removal can give rise to substantial risks of violating those rights. Main risk relates to the fact that the Special Act eliminates the preventive control of the construction project. As has already been demonstrated, an essential instrument of protection is the possible intervention of a construction supervisory authority, which may block the investment not corresponding to the definition of “counteraction of COVID-19”. What has also been pointed out, however, is that this definition is very broad, which in itself is an important problem. The construction supervisory authority must prove that the investment does not aim to counter COVID-19 in order to intervene legally, which is a very difficult task. The construction supervisory authority has no legal ground to question project’s purpose on the basis of its description. Its actions may be highly discretionary¹¹. Moreover, the Special Act aims to counter the epidemic and protect human health (i.e. to protect overriding public interest), so the construction supervisory authority should intervene only in clear and non-questionable situations¹². Otherwise, the authority may be accused of obstructing the fight against the epidemic.

¹¹ ZIEMSKI K., JĘDRZEJCZAK M. Pojęcie dyskrecjonalności a pojęcie luzów decyzyjnych, p. 13; also: PRINC M. Dyskrecjonalność w działaniu administracji publicznej w świetle standardów dobrej administracji, p. 61. The author points out that, in the light of European standards of good administration, “there is currently no room for free, unfettered administrative recognition”.

¹² FURTAK M. Zdrowie publiczne, p. 275. The author points out that health is “treated by many as the most valuable in human existence” and the next sentence makes it clear that “it is the responsibility of the State that surrounds the care of its citizens”. On health as a great value also vide: KISIŁOWSKA H., ZIELIŃSKI G. Administracyjnoprawna ochrona rynku wyrobów medycznych – prawo, wartości, p. 116.

Article 12 of the Special Act regulates a number of issues concerning human rights protection. Article 12 (4) of the Special Act provides that if construction works pose a threat to human's health or life, architectural and construction administration authority shall immediately issue a decision, subject to immediate execution, which specifies requirements concerning safeguarding the conduct of works. On the other hand, in accordance with Article 12 (5) of the Special Act, conducting the construction works aimed to counteract COVID-19, which normally would be subject to obtaining building permit, requires that the investor provides for management and supervision of those works by a person who holds the construction qualifications in relevant areas referred to in Article 15a of the Construction Law. On this basis, two conclusions can be drawn. Firstly, the Special Act entitles the architectural and construction administration authority to impose on the investor the obligation to take specific measures to guarantee the safety of the investment. The decision of the authority is immediately enforceable, which means that in the event that the investor does not agree with it, it is not possible to continue the investment. Secondly, in case of investments normally subject to the requirement to obtain building permit, the Special Act requires the provision of construction management and supervision services by suitably qualified persons.

In reference to the above, it can be stated that when it comes to protection of human rights the Special Act is limited to ensuring the safe conduct of investment, whereas aspects related to spatial collisions are ignored. The Special Act does not require a verification of the location of the investment in accordance with the Act on spatial planning and development and the Act on the protection and care of monuments. The exception is the Act on nature protection and local laws adopted

on its basis – they are still valid. As a result, a construction project cannot contravene, for example, a resolution on a landscape park, which can introduce restrictions on the location of construction object.¹³

On this basis, it can be argued that the Special Act does not provide sufficient protection as regards the location of the investment. This is particularly dangerous from the point of view of protecting the interests of owners of neighboring properties. They are deprived of the possibility of protecting their rights under administrative law. They can only use civil law remedies such as, for instance so-called “negatory claim”. The issue of the application of civil law to protect the interests of the neighbors of the construction investment was the subject of Polish Constitutional Tribunal’s judgment of 20 April 2011, Kp 7/09. It followed the request made by the Polish president at the time, to examine the constitutionality of the provisions adopted by the Polish lower chamber (the Sejm), which lifted the obligation to obtain a building permit for all construction investments, namely the Act of 23 April 2009 amending the Construction Law and certain other laws. In that judgment, the Constitutional Tribunal held that it was precisely because of the protection of human rights and, in particular, the protection of the rights of neighbors of construction investments, it is necessary to maintain the administrative rules for preventive control of the construction projects. As part of these administrative procedures, the neighbors have an effective opportunity to protect their rights. In the judgment it was stated that: “According to the Constitutional Tribunal, the building permit, which has been shaped by many decades practice, is crucial to guaranteeing the proper

¹³ RAKOCZY B. Stanowienie aktów prawa miejscowego w zakresie form ochrony przyrody. Ocena de lege lata i postulaty de lege ferenda, p. 433.

protection of the property rights of third parties, which directly affects their safety and the public order. The owners of neighboring properties should be guaranteed the right to information about investments planned in their neighborhood. The conduct of a fair procedure in which the administrative authority can consult all relevant stakeholders is a guarantee of spatial order and respect for the ownership of owners of neighboring properties”¹⁴. In this context, the rules adopted under the Special Act can be regarded as a far-reaching regression in the protection of human rights.

4. Conclusions

in the context of the risks to the protection of public health associated with the Sars-CoV-2 epidemic, the introduction of specific regulations on construction investments can be considered reasonable. However, the provisions of the Special Act are very liberal. Investors were granted freedom to carry out construction investments aimed at countering the disease and its effects. The protection of the interests of the participants in the construction process, which is normally ensured by general legal rules, was outweighed by the need to counter the epidemic.

This appears to be in line with the cardinal rule of protection of human rights, i.e. the principle of proportionality¹⁵. According to Article 68 (4) of Constitution of the Republic of Poland, public authorities are required to combat epidemic diseases and to prevent adverse effects on health from environmental degradation. This provision can be considered as an *optimisation principle*

¹⁴ The judgment of Constitutional Tribunal, 20 April 2011 (Kp 7/09).

¹⁵ On principle of proportionality vide: MANSSEN G. Grundrechte, p. 61.

according to R. Alexy's theory¹⁶. The *optimisation principle*, in the Polish academic literature also referred to as *in-purpose principle*, is the one that obliges the public authority to act in a way that meets the expected state of affairs as far as possible. At the same time, it is the basis for weighing, i.e. finding a balance between implementation of other *optimisation principles*. In the present case, it can be considered that the very exceptional situation associated with the epidemic entitles the public authorities to introduce exceptional measures also as regards implementation of construction investments.

Nevertheless, the construction of the special rules cannot be regarded as correct. It seems that the lack of an instrument to verify whether the investment actually serves the purpose of counteracting COVID-19 is a fundamental lack of the Special Act. As a result, *de lege ferenda* it can be argued that an instrument to control the nature of the construction investment shall be introduced. It would be sufficient to obtain a confirmation from the State Sanitary Inspector that the investor's investment is aimed at counteracting COVID-19. This requirement would be excluded in case of investments conducted by the State and public bodies. Such a regulation would better justify the application of the special regulations in the context of weighing different principles and imposing restrictions on the protection of human rights.

¹⁶ Vide: ALEXY R. Fundamental rights and the principle of proportionality, p. 11-29; KAMIŃSKI M. Normy – zasady prawa administracyjnego i ich konkretyzacja, p. 59.

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