



LAND USE AND DEVELOPMENT

POLISH REGULATORY FRAMEWORK AND
DEMOCRATIC RULE OF LAW STANDARDS



SPRAWNE PAŃSTWO
PROGRAM *ERNST & YOUNG*

*Hubert Izdebski
Aleksander Nelicki
Igor Zachariasz*

LAND USE AND DEVELOPMENT

POLISH REGULATORY FRAMEWORK AND DEMOCRATIC RULE OF LAW STANDARDS

“... The fact that land cannot be created and is indispensable forbids leaving its use entirely to the opaque and uncontrollable play of free market forces and to the option of the individual; (...) a just order of law and society rather asserts and maintains the interests of the community concerning land to a far higher degree than for other property.”

FROM A RULING
OF THE FEDERAL CONSTITUTIONAL TRIBUNAL
OF THE FEDERAL REPUBLIC OF GERMANY

The growing chaos in the planning of Polish towns and villages; buildings being erected on land that is not equipped with utilities; the fact that for years now housing construction has not kept pace with demand; the lack of motorways and sports facilities; shopping centers being opened in places that are not fit for the purpose – these are just a few examples of the problems that the Polish planning system is having trouble addressing. The approaches taken in other countries shows that effective solutions can be found. A report has been drawn up as part of the Ernst & Young Better Government Programme entitled “Land Use and Development. Polish Regulatory Framework and Democratic Rule of Law Standards.” In the report, the authors, Professor Hubert Izdebski, Doctor Aleksander Nelicki and Doctor Igor Zachariasz, having carried out an analysis of the Polish, English and German systems, show the optimum shape that planning legislation should take and how best it should be applied.

I. EUROPEAN STANDARDS

Based on their analysis of the planning systems in England and Germany, the report’s authors have identified five standards for a democratic lawful state in this respect:

1. Only land that has already been developed is protected; all new spatial development requires the consent of the public authorities.
2. The public authority with the power to take decisions on urban planning in a given town or area is the local government authority, at the lowest level.
3. Whether or not a site can be developed depends on the condition of the infrastructure – providing utilities on a site is a public obligation (although it can be shifted to the private investor).
4. The local authority is responsible for preventing planning chaos and resolving conflicts centered on various alternative planning methods, by balancing public and private interests – through ensuring proper public participation in the process, and administrative and judicial control.
5. Control is exercised over spatial planning through a detailed specification of site development conditions. In certain situations, a departure from the plans is admissible and an investment being carried out on a site without plans is also admissible.

It was no accident that the authors chose England and Germany for their examination. The systems in both

these countries are regarded as being effective and well-established, and both countries have well-established lowest level local planning authorities; however, their actions as regards spatial planning depend on decisions taken by higher level public authorities. A planning document hierarchy exists in both systems – documents drawn up at a higher level and for wider areas are binding on plans drawn up by local authorities. At the same time, these are two very different regulatory systems, described frequently as being diametrically opposed: one is based on flexible solutions (England), and the other (Germany) provides assurance as to spatial planning.

II. THE POLISH SOLUTION

When formulating the above standards, the authors also assessed the Polish approach to legislation and the application of law at local level. They came across numerous shortcomings in the Polish system; however, a quick glance at our solutions shows that they do not appear to be so very different from the solutions adopted in more well-established systems. It could even be said that Poland is attempting to find a balance between the assurance given by the German system and the flexibility of the English system.

The main divergences between the Polish approach and the standards applied in well-established European systems are as follows:

1. Ownership rights to land are widely interpreted in Poland as the right to develop the land, which translates

in practice into a claim for spatial planning to be specified by way of an administrative decision.

2. There are significant differences between the documents that specify a municipality's planning policy (feasibility and planning studies, and specifically decisions on building conditions) and the standards adopted in English and German documents. This leads to spatial planning in Polish cities and towns being ruled to a great extent more by random decisions than by planned local authority actions.
3. There is no integration between spatial planning and investment planning, and because of the generality of the description of how a site will be provided with utilities and how this will be financed, this means that sites are not properly prepared for investments that are permitted in plans and by decisions.
4. Public participation in the planning process in Poland is of a formal nature and is based on agreement rather than on legal acts or planning documents, as it is in the English and German systems. Supervision of plan preparation has also a formal nature, as they do not enter in discussions on the merits.
5. Polish provisions on the admissibility of site usage designation are not well drafted. This is manifested by the absence of determinations regarding site usage and the admissibility of developing specific plots of land. There is also no requirement for reasons to be provided for the solutions adopted in local master plans.

III. PROPOSED CHANGES

The changes proposed by the authors of this report are aimed at increasing spatial planning efficiency by

strengthening the planning power of the municipalities and at the same time introducing mechanisms to ensure that state planning policy is followed. The authors also think that regulations should be introduced to integrate the entire spatial system, as this in turn will ensure good planning quality.

The report sets out these proposals, categorized as follows.

A. To strengthen the municipalities' planning power:

1. Legal provisions should be adapted to a constitutional understanding of the protection of the ownership right, in order to make it clear that only the existing planning status is protected (financial claims should only be justified by infringement in this respect).
2. Systemic solutions and provisions of law should force through the coordination of the actions of public entities as regards planning policy (in place of the current discretionary arrangements); it should be made clear that when giving an opinion on plans and documents, the public entity is carrying out a public task.
3. The municipality should be obliged to draw up a list of sites for compact development, and municipal councils should be given the opportunity to adopt resolutions constituting simplified local master plans. Designating a given plot of land for development should be contingent on the land having adequate utilities.
4. Public participation should be a reality, not merely a formal requirement. A mechanism should be introduced to encourage public debate on the draft of a plan, which should give several solution options.
5. Administrative and judicial control over the participation process itself should be ensured (special attention

should be paid to the supervision of applications that are rejected).

B. To ensure planning system integration:

1. The concept of decisions on site building and development conditions should be eliminated and replaced by local "mini" master plans drawn up for small sites.
2. Feasibility and development studies should become a real tool in municipal planning, and their determinations as regards infrastructure should be binding on all public authorities.
3. Existing specific provisions should be supplemented by general rules on the spatial structuring procedure (e.g. by a rule that the renovation and modernization of already developed sites takes priority over the development of empty sites).
4. A rule should be introduced under which the municipality, when adopting a local master plan, is obliged to provide utilities for any site covered by the plan.
5. One key requirement is for a rule to be introduced to the effect that plans should be drawn up specifically for land plots and should contain a reference to the designation of these plots. An obligation should also be introduced for justification of the adopted solutions to be attached to the local master plan.

Other acts should also be amended (besides the Spatial Planning Act, the Real Estate Management Act and the Construction Act) to facilitate the introduction of suitable planning tools for the tasks to be carried out by government administration, and to ensure that government plans correlate with voivodship master plans. The government administration, in order to carry out its mandatory tasks, needs widely applicable powers to influence local authorities. □

AUTHORS



HUBERT IRENEUSZ IZDEBSKI

Professor of law in the Faculty of Law and Administration at Warsaw University. He is also an attorney and legal adviser. During the 1990s he advised on legal matters in numerous organisations and in the Law Office of the Council of Ministers, on the reform of public administration and on the legal issues involved in the drafting of the National Development Plan for 2007-2013. He is an author and co-author of a dozen or so books and numerous legal studies at universities in France, Switzerland, Great Britain and the USA.



ALEKSANDER NELICKI

Doctor of psychology (Jagiellonian University in Krakow). He is deputy director of the office of the Union of Polish Metropolises in Warsaw. In 1993 he was a ministerial adviser in the Council of Ministers Office; in the years 1995-1998 he was deputy director of the Public Administration Reform Programme at the Institute of Public Affairs, and between 1998 and 2001 he was adviser to the minister of internal affairs and administration. He is an author of several publications on psychology and the reform of public administration in Poland.



IGOR ZACHARIASZ

Doctor of law (Warsaw University). He is currently deputy director of the Union of Polish Metropolises Office. Among his academic interests are issues connected with constitutional and administrative law. In 2000 he won a scholarship to the Max Planck Institute. In the years 1993-2000 he was involved in numerous research projects at the Urban Institute in Warsaw.



SPRAWNE PAŃSTWO
PROGRAM ERNST & YOUNG

Better Government Programme
Ernst & Young Poland
Rondo ONZ 1
00-124 Warszawa
www.bettergovernment.pl