Maciej DUTKIEWICZ

CONSTRUCTION PROCESS AND ADMINISTRATION PROCEDURES

Abstract

The concept of the right to good administration is presented in the paper. This right has been already established in European legal thought and is now regarded as one of the important points of reference in discussions devoted to the activities of public administration bodies and their relationship with the entity under consideration in both the substantive and procedural context. Until recently, it was understood as a general slogan indicating the desired direction of change in the organization and functioning of the modern state. A proposal to meet the thesis of the simplified and friendly administration is the European Code of Good Administrative Behaviour

INTRODUCTION

The construction process focuses items directly related to the design of buildings, their construction, as well as formal and legal actions whose primary purpose is to provide objects to being subject to the implementation of a secure and compliant with the intent to use, while meeting the requirements related to the operation of the object in physical and social space. As far as it is easier for investor and contractor to accept the technical requirements related to the object that must be met, whereas those that result from the spatial location and are related to the whole environment and infrastructure, they may seem superfluous. It is important at this point the role of the building administration, both this informational and, above all, its practical adaptation to the specific nature of the construction process.

1. NATIONAL AND EUROPEAN REGULATIONS

Administrative interference in the construction process is very broad.

Already at the stage of the design concept access to utilities - electricity, water, gas, and the possibility of sewage household, technological, rain water, etc. is analyzed. Manifestation of administrative action is the need for agreements with utilities providers of water supply, sewage, electricity or gas, with on the one hand, to ensure the ability to supply the object with the means necessary for the functioning, on the other to accommodate building to the demand for infrastructure capacity, thirdly, to provide conditions for the protection of the environment. It often happens that, for example building of a new factory is related to additional expenditures in infrastructure, construction of sewage treatment plants, pumping stations, etc.

By analyzing the construction process from the administrative and formal point of view one can say that the next stage of the process - construction project, is a kind of confrontation between the functional - utility investor expressed in the design solutions to real possibilities. To meet the requirements imposed by an administrative procedure construction project must have attached opinion of the experts: fire, safety and health. Solutions and proposals contained in the building project are approved in the construction permit issued by a competent authority. In the final stage of the investment the procedure of receiving facility along with infrastructure is done again by experts: fire, safety, sanitary, who submit the analysis of the conformity of the construction project with facility made with integrated technical solutions. At the end the authorized authority shall issue a permission to use. Description above shows that the whole investment process is carried out in close connection with the administrative procedure, that concerning a number of complex factors, should be extremely simple and friendly to the parties of building process. In the construction process there may be problems with the individualization of technical solutions meeting the requirements imposed by technical regulations, which do not cover all the cases that have a general character. Such cases require a deeper analysis also by the authorities, especially when the investment has impact on the environment, causing prolongation of the construction process and raising the associated costs [1],[2].

A proposal to meet the thesis of the simplified and friendly administration is the European Code of Good Administrative Behaviour adopted by the European Parliament 6 September 2001.

The concept of the right to good administration has been already established in European legal thought and is now regarded as one of the important points of reference in discussions devoted to the activities of public administration bodies and their relationship with the entity under consideration in both the substantive and procedural context. Until recently, it was understood as a general slogan indicating the desired direction of change in the organization and functioning of the modern state. With the adoption on 7 December 2000. Nice Charter of Fundamental Rights (Acts. Office. EU C 303, 14.12.2007, p. 1) in the directory specifying the rights, the right to good administration is listed.

According to Art. 41 of the Charter of Fundamental Rights, everyone has the right to have his case dealt with by the institutions and bodies of the European Union impartially, fairly and within a reasonable period of time. This right includes in particular: the right of every person to be heard before any individual measure which could have a negative impact on its position, the right of every person to have access to its official documentation, while respecting the legitimate reasons of confidentiality and professional and commercial secrecy and the duty of administration to submit reasons for the decision.

So understood requirements are supported with guarantees in the form of the right to apply for compensation for the damage caused by its institutions or officials of the Community resulting from the performance of their duties, in accordance with the general rules introduced by Member States' legislation and the rights of a written referral to the European Union institutions in one of the languages of the Treaties, as to obtain an answer in the same language. Furthermore, in accordance with Art. 43 of the Charter of Fundamental Rights, every citizen of the European Union, and any physical or legal person residing or having its registered office in a Member State has the right to present the Ombudsman of the Union cases of maladministration in the activities of Community institutions or bodies. According to Art. 47 of the Charter of Fundamental Rights fur-

ther guarantee of respect the right to good administration is the right to an effective remedy before a court and a fair trial.

The use of the Article. 41 of the Charter of Fundamental Rights of the phrase "this right shall include in particular" indicates that its creators called for the adoption of an open structure. Listed in that provision powers and duties are therefore an inherent part of the right to good administration, but they do not cover this right. The normative content of the various components of this law can be determined by analyzing the European law, including the period before the adoption of the Charter when referring directly to the notions of "good" or "proper administration", qualified them as intrinsic principles of Community law. The analysis of the case law shows the trend of the fact that the concept of good administration is increasingly connected not so much with the directives addressed to the administration but many of the rules govern the rights of individuals. This allows for consideration of the ensuing obligations in terms of the subjective right.

The intention of its creators the Charter of Fundamental Rights was to be not so much an act of shaping the new law as "codification" or confirming existing Community rules of an unwritten. Its value is therefore believed to be in the visibility of certain standards, which are equally the outcome of those principles closely related to the guarantees of the Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional traditions of the Member States.

The principles contained in Art. 41 of the Charter of Fundamental Rights found the development and concretization of the European Code of Good Administration, and in the act addressed to the Member States of the Council of Europe, ie. The recommendations of the Committee of Ministers of that of the CM / Rec (2007) 7 of 20 July 2007 - The right to good administration.

The first of these acts has all the characteristics of instructions addressed to the authorities, institutions and EU officials, the second - is a set of recommendations setting out minimum standards which should not be violated by the Member States of the Council of Europe. Council of Europe recommendations are addressed directly to the public authorities of these countries, creating political commitments of semi-imperative character.

2. CODE OF GOOD ADMINISTRATION

On the basis of these documents it can be stated that the right to good administration - both at EU and Council of Europe - is identified now with a team of legal principles relating to public administration activities, so consistent, clear and precise that they can be treated as universal criteria for assessing the correctness of solutions formed in the systems of the Member States. It also exposes the peculiar phenomenon of interference or interpenetration of the rules having admittedly common origin, but formally belonging to distinct regulatory orders - Community and the Council of Europe.
Recommendation is an act of ordering and uniting principles denominated in other enumerated in the introduction of the European soft-law instruments, taking into account in particular the provisions of: Resolution of the Committee of Ministers of the Council of Europe (77) 31 of 28 September 1977 on the protection of the individual against the actions (acts) of administrations, the recommendations of this Committee No. R (80) 2 of 11 March 1980 on the exercise of discretion by the authorities and the European Code of Good Administration. Raising the need to define a "fundamental right to good administration ", as well as to facilitate its effective performance in practice, in the introduction of recommendations, except for the aforementioned acts, reference is made to the rules of other recommendations of the Committee of Ministers of the Council of Europe. They included, among others, recommendations: No. R (81) 19 dated 25 November 1981 on access to information held by public bodies, No. R (84) 15 of 18 September 1984 concerning public accountability, No. R (87) 16 on 17 September 1987 on administrative proceedings affecting large numbers of people, No. R (91) 10 dated 9 September 1991 on the transfer to third parties of personal data held by public bodies, Rec. (2002) 2 of 21 February 2002 on access to official documents, Rec. (2003) 16 of 9 September 2003. on execution of administrative and judicial decisions in the field of administrative law and Rec. (2004) 20 dated 15 December 2004 on judicial control of acts administration.

In the introductory part there is also indicated that completing the prescriptions of recommendation 1615 (2003) of Parliamentary Assembly, during work on the draft of the act the authors were driven by the need to create "a single, coherent and consolidated model of code of good administration". There is also clearly awarded that promoting good administration is housed in standards of "rule of law and democracy." This compound is exposed in the directory of the general principles of good administration listed in Chapter I of the Annex to the recommendation. They have the character of both substantive and procedural, but from each of them there can be inferred more specific directives relating directly to the process of applying the law by public authorities. Given the fact that in the following two chapters of recommendations there are provided strictly procedural rules, the act is seen primarily as a set of standards of administration proceedings (Framework Code of Conduct).

In accordance with the rule of law, public authorities should act in accordance with the law. It is forbidden to take their arbitrary measures, even when use of discretionary powers (Art. 2 paragraph. 1). They must respect the rights of national, international and general principles of law governing their organization, functioning and activities, including the provisions relating to the powers and procedure (Art. 2 paragraph. 2-3). In accordance with Art. 2 paragraph. 4 of recommendation, making use of competences conferred on the public authorities is permissible only if it is warranted by the found facts and fastened to the applicable law, for the sole purpose that was determined [3].

The provisions of Art. 3 of recommendation of the Committee of Ministers ordered public authorities to respect the principle of equality. It has come down to the treatment of persons who are in the same situation in "the same manner", and also avoid any form of discrimination, eg. for reasons of gender, ethnic, religious beliefs or convictions [4]. Any departure from this rule should be "objectively justified".

According to Art. 4 of recommendation public authorities are obliged to respect the principle of impartiality. The duties of this principle mean objective action, justified only by relevant circumstances of the case. This excludes taking action by public authorities, which would bear the characteristics of bias. Officials, employed in them, have therefore to perform their duties impartially, regardless of their beliefs and interests. The idea of the independence rule, understood as freedom from the influence on the contents of the decision of other bodies or persons, developed into various structures of administrative procedural law, also outside Europe.

The principle of proportionality is defined in the recommendation of the Committee of Ministers, grown from the European tradition, holding tightly to the significance having in many countries expressed authorization in constitution. According to this principle, public authorities should apply measures interfering in the sphere of powers and interests of private persons only where necessary and to the extent necessary to achieve the objective - Art. 5 paragraph. 1-2. In exercising discretionary power, they have to take care of the

right balance between adverse consequences of decisions to the powers or interests of private persons the and the objectives of the action taken. The measures applied in no case can be excessive - Art. 5 paragraph. 3.

As it is apparent from the art. 5 paragraph. 3 of recommendation of the Committee of Ministers, compliance with the principle of proportionality is of particular importance in case of exercising discretion by the public authorities [5].

Section II of the Annex to recommendation No. R (80) 2 identifies six directives to reduce the clearance decision applicable to the recognition, placing among them the principle of repeated almost verbatim in Article. 5 paragraph. 3 recommendations of the Committee of Ministers. This means that where the law leaves the administration authority to select one of the many variants of the settlement, he is obliged to take into account the warrant of proportionality, together with other directives of correct operation, eg. the principles of expediency, equality and consistent application of general administrative guidelines [6],[7].

Formulating in Art. 6 paragraph. 1 of recommendations of the Committee of Ministers warrant of compliance by public authorities principles of legal certainty, the paragraph. 2 stipulated that a derogation from him, understood as the use of effective relating to the past is allowed only in "legally justified circumstances". The act banned from entering the sphere of rights acquired and eventually decided cases for reasons other than imposing necessity to act in the public interest - Art. 6 paragraph. 3. These rules are supplemented by an indication that in some cases, especially in case of imposing new duties, it is necessary to introduce a transitional or establish a reasonable period for the entry into force of a specific legal regulation (Art. 6, paragraph. 4 recommendation of the Committee of Ministers). In this perspective, the principle of legal certainty must be classified as protected both at the legislative authorities as well as exercise administrative jurisdiction, having a dimension of substantive and procedural. This second aspect should be assessed in relation to the universally acknowledged having anchored in the rank of Codex regulations of many countries, the principle of sustainability of final decisions.

In accordance with Art. 7 of recommendations of the Committee of Ministers the public authorities have an obligation to take action and fulfill their duties "within a reasonable time".

As defined in Art. 8 of recommendations of the Committee of Ministers principle of participation requires that beyond reasonable action in emergency cases, public authorities provide individuals, taking appropriate means, the opportunity to participate in the preparation and execution of decisions affecting their rights and interests.

With the provisions of Art. 9 recommendations of the Committee of Ministers follows the duty of protection of privacy by public authorities, in particular for handling with personal information. The persons covered by these data, should be provided access to and the ability to correct or delete inaccurate or redundant data.

The principle of transparency of public authorities (Art. 10 recommendations of the Committee of Ministers) sets out, referring to the obligation to inform individuals, by appropriate means, about activities and decisions, including the publication of official documents. The right of access to such documents may be limited by regulations regarding the protection of personal data and classified information.

CONCLUSIONS

Sustainable development of spatial areas, including architecture and urban development is the result of diagnostic the needs of the people and living organisms, and the possibility of meeting them in a given area and finds expression in spatial planning, which is the starting point of any building process. In addition to architectural and urban planning, an indispensable element is the proper management and administration of areas of micro and global, filling with the general principles of good administration: the rule of law, equality, impartiality, proportionality, legal certainty, making the administration action within a reasonable time, participation of the individual in the preparation and execution of decisions, respect for privacy and transparency in the administration. Counterparts of most of them can be traced in the provisions of our Constitution and prepared in 2008 by appointed by the Ombudsman team of authors, draft law - General provisions of administrative law. Some of these rules are also distinguished by statute expressly procedural law (the Code of Administrative Procedure and the Tax Code) or derived from a variety of regulations.

BIBLIOGRAPHY

1. Z. Kmieciak, Postępowanie administracyjne w świetle standardów europejskich, Warszawa 1997.
2. A. Redelbach, Natura praw człowieka. Strasburskie standardy ich ochrony, Toruń 2001.
3. K. Wójtowicz, Ochrona praw podstawowych w Unii Europejskiej
4. B. Banaszak, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wójtowicz, System ochrony praw człowieka, Kraków 2003
5. Europejska konwencja o ochronie człowieka i podstawowych wolności z 4 kwietnia 1950 r., Rzym, DzU 1993, nr 61, poz. 284.
6. M. Szydło, Prawo do dobrej administracji, „Studia Europejskie", 2004
7. M.Jaśkowski, Sądy wspólnotowe jako sądy administracyjne, „Kwartalnik Prawa Publicznego", nr 1/2001.

PROCES BUDOWLANY A PROCEDURY ADMINISTRACYJNE

Streszczenie

W artykule przedstawiono rozumienie prawa do dobrej administracji. Uprawnienie to jest już utrwalone w europejskiej myśli prawniczej i traktowane jest obecnie jako jeden z istotnych punktów odniesienia w dyskusjach poświęconych działalności organów administracji publicznej i ich relacjom z jednostką, rozpatrywanym zarówno w materialnoprawnym, jak i proceduralnym kontekście. Do niedawna było ono rozumiane jako ogólne hasło wskazujące pożądany kierunek zmian w organizacji i funkcjonowaniu współczesnego państwa. Pewną propozycją spełnienia tezy o administracji uproszczonej i przyjaznej jest Europejski Kodeks Dobrej Administracji.

Autor:
Dr inż. **Maciej Dutkiewicz** – Uniwersytet Technologiczno-Przyrodniczy w Bydgoszczy, Wydział Budownictwa, Architektury i Inżynierii Środowiska, Katedra Konstrukcji Budowlanych, e-mail: macdut@utp.edu.pl.