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ENVIRONMENTAL BARRIERS IN SPATIAL DEVELOPMENT: JUDICIAL AND ECONOMICAL PERSPECTIVE

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Abstract. The purpose of the paper is to determine the main environmental and natural reasons on the basis of which the entry into force of two key spatial policy tools is blocked: local spatial development plans and decisions on building development conditions. As part of the research objective, judgments, in which environmental protection authorities refused to accept a given act/decision, were distinguished and verified, which resulted in a complaint to the court by a dissatisfied user of the space. On this basis, an economic and legal perspective related to the relationship between environment and spatial management system was determined.

Key words: local development, nature protection forms, housing investments.
JEL code: R11, R58

Introduction

Environment and nature protection is one of the key issues related to the spatial management system. There is no doubt that without ensuring proper mechanisms (legal and economic, i.e. broadly related to public policy), it is impossible to conduct rational spatial policy. The purpose of this paper is to identify the main environmental and natural reasons, on the basis of which the entry into force of key spatial policy tools is blocked in the spatial management system. In this context, the focus was put on two key (effective at the implementation stage) spatial policy tools: local spatial development plans and building development decisions. If they cover (territorially) the forms of nature protection, they must be approved by the environmental protection authorities (regional environmental protection directors) when preparing them. Dissatisfied spatial users may challenge administrative courts to refuse such tools. The fact of referring the case to such courts indicates a very large spatial conflict and leads to the resolution of these conflicts to a lesser extent on the basis of environmental and natural arguments, and to a greater extent - formal and legal reasons.

As part of the research objective, the following items were separated from a group of several thousand judgments and analysed:

- all decisions of administrative courts regarding refusal by the environmental protection authorities to agree on local spatial development plans;
- decisions of administrative courts regarding refusals to agree on development conditions by environmental protection authorities.

A legal and economic analysis of these statements was performed, indicating first of all the key reasons for refusing to make arrangements and the final settlement of the case, giving conclusions of the analysis a more general character. An innovative element of the paper is the isolation and analysis of the indicated case-law theses (not comprehensively carried out in this way to date) and a combination of economic, legal and public policy perspectives in this context.

A research hypothesis was put forward: the procedure of environmental arrangements of draft planning acts is, on an individual scale, a real verification and determination of access to the environment as a public good.

Research results and discussion

Space and environment (both of these areas must be connected) are a public good. Therefore, it seems fully justified to adapt economic theories regarding public goods and principles of disposing

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of shared resources to the issues of the spatial management system, also in the institutional dimension (Ostrom E., 2013; Schumpeter J., 2005; Cowen T., 1998; Furuboth E., Pejovich S., 1974; Williamson O., 2000; Mc Cann B., Folta T., 2008; Krueger, 1991; Nowak M., 2017). It is the emphasis that environmental and natural values are limited on the one hand and, on the other hand, ensuring universal access (in various dimensions) to justify the role of environmental protection authorities in spatial policy. Excluding the environmental impact assessment procedure (analysed in other publications by Nowak M., 2014), this role boils down to agreeing on projects for spatial policy tools during their preparation. The condition for granting the competence to make the agreement is to include a specific spatial policy tool in the form of nature protection (Federczyk W., Fogel A., Kosieradzka-Federczyk A., 2015, Nowak M., Mickiewicz P., 2012). And it is at this stage that a conflict may occur. On the one hand, one can distinguish the investor perspective (boiling down to the development of specific buildings in a given area in general), while on the other, issues related to the protection of environment and nature (Zielinska A., 2013; Habuda A., 2013; Tomczak A., Sowa D., 2011). And it is precisely with these conflicts that the problem related to the access to public goods can best be seen. From an economic perspective, it can be assumed that the institution of agreeing on a draft planning act in the analysed area determines in detail in individual cases how access to the environment should look like. Adopting an economic perspective must, however, be subject to the reservation that the assessment of the legitimacy of access to the public good under the reconciliation procedure may not always be linked to the essence of the problem. Sometimes, it will come down to procedural issues that are sideways in this perspective.

There is no doubt that the environmental protection authorities focus not on the entire content of a given spatial policy tool, but only on those parts that may pose a threat to natural values. However, they do not take into account the conditions or economic aspects related to spatial policy. From an economic perspective, therefore, there is a noticeable problem related to the uniform economic verification of economic issues by various bodies involved in the spatial planning process. Some basis for them are acts establishing forms of nature protection, also containing certain restrictions on the use of space (Zimniewicz K., 2008). Environmental protection authorities first of all verify that the tools of spatial policy will not be in contradiction with these acts (Fogel A., 2011). This translates into the final content of spatial policy tools, which is reflected, for example, in specific restrictions contained in local spatial development plans, as well as in the absence of provisions authorizing specific buildings (in the case of decisions on building conditions, this is simply manifested in blocking these decisions). It seems important, as pointed out by P. Mickiewicz, to draw attention to issues related to space management, which can be perceived at various levels (regional or local). Certainly, the local (municipal) perspective seems to be the most important here. It is at this level that the widest possible impact on the development of specific areas and the restrictions associated with their use, including environmental restrictions, can be exerted (Mickiewicz, 2015). Analysis of the content of local spatial development plans in valuable natural areas leads to the conclusion that the prohibitions contained in these local plans are not excessively extensive (Nowak M., 2015). The optionality of local plans means that there is no systemic guarantee that all environmental (system-defined) guidelines will be implemented (Nowak M., 2013, Sleszynski P., Komornicki T., Solon J., Wieckowski M., 2012, Drzazga D., 2018). Also the research by R. Giedych concludes that there is a lack of full coherence between spatial planning and nature protection (Giedych R., 2018). Baran-Zglobicka also draws attention to the diagnostic weaknesses of the acts establishing nature forms themselves, which is also strongly felt at the planning stage (Baran-Zglobicka B., 2017). Therefore,

it seems even more important to verify the second group of cases, i.e. not only which elements from the environmental and natural perspective are included in the spatial policy tools, but also what elements of indicated tools are blocked from this perspective. On the other hand, it should be noted that there is a kind of dissonance between instruments of environmental protection and shaping the spatial policy. This can be expressed by provisions in decisions on environmental conditions for supra-local investments, which may affect (also negatively) the shaping of space in the commune, which may also force actions contrary to the spatial policy of the commune (Mickiewicz and Nowak 2018). The necessity to use the spatial policy tools, including environmental policy, based on the principles arising from the theory of regional development and economic development, and especially the aspect resulting from location rent, seems obvious.

Results

All cases, in which there was an advanced conflict between the spatial (investment) and environmental perspective, were analysed in detail. It was considered that degree of advancement of the conflict best reflects the fact of filing a complaint to the administrative court against decision of the regional director for environmental protection regarding refusal to agree on the project of the local spatial development plan or decision on building conditions. The decision serves the commune/applicant authorities (in the case of decisions on building conditions) a complaint to the General Director for Environmental Protection. However, the matter still remains within the scope of arrangements with nature protection authorities. It is only lodging a complaint against the last decision (maintaining the refusal to agree) to the administrative court that leads to the unequivocal conclusion that the conflict cannot be resolved in the basic procedure. Then it is necessary another entity to intervene - the court - and a broader reliance on legal regulations, less on a substantive assessment of environmental issues. Therefore, a comprehensive analysis of individual rulings seems to be very important in this context (and the analysis is not limited to the case-law alone, but the overall context of individual cases).

The focus was put on two key spatial policy tools: local spatial development plans and development decisions. As indicated above, they perform extremely different roles in the spatial management system itself. Nevertheless, environmental protection authorities (regional directors of environmental protection in the first place) have the right to verify the projects of these acts from an environmental perspective (the requirement is one: the area must be covered by the form of nature protection). If they do not like them - they can refuse to agree. The focus below is put on cases, in which environmental protection authorities have consistently maintained their position on refusals until the start of the administrative court case and, as a consequence, the verdicts have been decided by the courts. The focus was put on what these cases were, what the allegations of environmental authorities were specifically about, and how the above cases were judged by the courts. Based on the analysis of results, an attempt was made to express broader assessments in the context of the spatial policy - environmental and nature protection relation.

Table 1

Intervention of environmental protection bodies with draft local plans - jurisprudence perspective

Criteria	Total	Refusals	Agrees	Forms of nature protection
Number	18 administrative court cases (in the years 2010-2019)	11	7	Protected landscape areas, landscape parks, Natura 2000 areas
Scope	Moderate	Moderate	Insignificant	The broadest for protected landscape areas

Source: authors' study

Table 1 includes all matters related to the arrangements for projects of local spatial development plans, pending before administrative courts under the Act of 26 March 2003 on spatial planning and development. There are not many of them. Therefore, it can be pointed out that, for the most part, environmental protection bodies (either at the level of regional director for environmental protection or also at the level of General Director for Environmental Protection) are able to effectively impose their vision of developing forms of nature protection on their municipal authorities. In other words, it can be stated that environmental protection authorities are responsible for the development of these areas, which should also be perceived in economic terms (these bodies are entities that can limit the implementation of investments and strengthen the natural values protection of the area). However, it should be remembered that such an approach harms the interests of the investor, and the environmental protection authorities in their decisions are not guided by economic reasons.

However, judgments extracted from rulings competent in the case of the Provincial Administrative Court in Warsaw (in general, this court considered over 1700 cases concerning local spatial development plans in 2003-2019), allow verifying cases, in which spatial conflicts are so far-reaching that they had to exceed the competence of environmental protection authorities. Matters related to them concern two forms of nature protection - usually protected landscape areas and landscape parks. These two forms of nature protection, in terms of impact on the municipal spatial policy, can be assessed as similar. In this context, the Natura 2000 area is rarer.

It is also worth emphasizing that despite the uncommon practice of commune complaints to the courts for decisions of environmental protection bodies (which is indeed a factor that actually hampers such a complaint as an above-standard one from the perspective of ordinary practice), a significant part of these complaints is considered.

Table 2

Refusals and agreements of local spatial development plans

Situations related to refusals	1. Prohibition of elimination and destruction of tree stands 2. Buildings within a strip of 100 m from the coastline 3. Negative impact on the Natura 2000 area 4. Exceeding the forest function assigned to the area 5. Unacceptable replacement of agricultural use with services 6. The investment specified in the draft plan is contrary to the requirement of active protection of ecosystems.
Evaluation of the dominant direction	Environmental protection as a public good

Situations related to revocation of refusals	Exceeding the scope of nature protection acts, exceeding the competences (blocking land change for non-agricultural and non-forest purposes), procedural issues.
Evaluation of the dominant direction	Procedural issues

Source: authors' study

The substantive reasons for annulment or upholding of refusals to agree on draft local plans by administrative courts are presented in Table 2. On its basis, it can be indicated that they can be included in two main groups:

- exceeding the competence of the coordinating authority;
- other procedural issues.

While procedural errors of public administration bodies occur in all categories of proceedings, the cases, in which the coordinating authority exceeds the scope of its competence are particularly important. It usually means that the authority tries to influence on the content of the local plan to a greater extent than it results from the legal framework. The tendency, according to which the bodies agreeing the spatial policy acts try to broaden the scope of their competences, is common. It should also be added that, for the most part, this extension of competence is successful. Table 2 shows that the verification of the lack of consent for a change in the agricultural or forestry plan to a non-agricultural and non-forest purpose remains a border point in this respect. Other bodies and practices of environmental protection bodies are appointed to the above, the blocking of the above actions in several cases was unsuccessful (which does not change the fact that in independent cases, such practices are also implemented by administrative courts). This illustrates the wider problem. Environmental protection authorities, sensitive to the issues of uncontrolled development, are reluctant to look at new investments in protected areas. This is also confirmed in Table 2 by the description of cases, in which the administrative court upheld the refusal to agree on a draft plan. According to the authorities, the draft local plans in these situations exceeded the prohibitions regarding the forms of nature protection. Premises included in these bans (presented in Table 2) are assessed from a formal and legal perspective. However, this does not change the fact that general tendency of the spatial conflicts caused on this ground is that the commune authorities wanted to implement some form of development in the local area (usually, it was not about residential or commercial buildings), and the environmental protection authorities recognized that this does not fall within the scope of permissible bans. Generally, in the context of key problems of the spatial management system (especially uncontrolled suburbanization), this tendency should be assessed positively. On the other hand, from the investor's perspective, the lack of consent on the part of environmental protection authorities limits the development possibilities of the commune and negatively affects the possibility of attracting an investor. Environmental authorities are not guided by the economic calculation in their decisions and do not take into account the cost of lost opportunities. From this perspective, this approach should be considered negative.

Table 3

Intervention of environmental protection bodies in draft decisions on building conditions in 2017-2018 - jurisprudence perspective

Criteria	Total	Refusals	Agrees	Forms of nature protection
Number	35	29	6	Protected landscape areas, nature and landscape complexes, landscape parks, Natura 2000 areas
Scope	Essential	Essential	Insignificant	The broadest for protected landscape areas

Source: authors' study

It can also be emphasized that refusals to agree involve shaping access to the environment as a public good at this procedural stage. The reasons for refusal relate to individual cases in which such access was considered blocked by other cells (related to buildings). Situations, in which courts revoke refusals to agree are completely different. They have a dominant procedural dimension.

The subsequent stage of research concerned decisions on building conditions. This tool threatens to disintegrate the space to a much broader extent than local spatial development plans. Individual nature of these decisions means that development concepts associated with them are primarily based on the needs and private interests of individual investors. It is only at the stage of proceedings that such concepts are verified from different perspectives, including those related to forms of nature protection and protection of their environmental and natural values.

Table 3 analyses cases concerning refusals to agree draft housing development decisions by environmental protection authorities, which in 2017-2018 went to administrative courts. The procedure is similar to that regarding the reconciliation of draft local plans. Also in this case, spatial conflicts mostly end at the stage of taking a position by regional director for environmental protection or general director for environmental protection. However, in the present case, there is one significant difference: a complaint to the administrative court is lodged by the applicant regarding the issuance of a decision on development conditions (and not by municipal authorities, as in the case of local plans). Thus, there is definitely a more explicit spatial conflict and a clear collision of the individual interest with the public interest. Also for this reason, there are definitely more cases of this type in administrative courts. However, it is worth emphasizing that as part of final court decisions, there are far fewer judgments expressing consent to the investment (also in proportion) than in the case of local plans. From the perspective of the spatial management system, its problems and the need for broader protection of spatial values, this should be assessed as positive. It can be assumed that in recent years, the refusal to agree the decision on building conditions by the environmental protection authority is almost synonymous with the impossibility of implementing a specific investment. It is worth adding that the subject of the analysed decisions on building conditions were primarily (differently than in the case of local plans) residential, holiday and service buildings. Therefore, in this case, it was about wider development in valuable natural areas (apart from the forms of nature protection listed in Table 1, there are also nature and landscape complexes).

In the analysed context, it is also necessary to identify the main reasons (justifications) for maintaining in force both the refusals to repeal the provisions of environmental protection authorities, as well as the repeal of such decisions. Table 4 shows that courts indicated too broad understanding of some terms as a justification for questioning the positions of environmental protection bodies. It can again be added that many spatial conflicts boil down to a specific way of understanding the individual natural prohibitions. Terminological diversity is also an important problem. The way, in which specific bans are included in the acts on forms of nature protection, is not always fully coherent with the terminology proper in the conduct of spatial policy (the best example of which may be the phrase 'prohibition to change the land use'). However, general trend is that doubts are overwhelmingly resolved in favour of the environment and nature. This is also confirmed by the results contained in Tables 3 and 4.

Separate evaluation issues should be distinguished here. Among the reasons for refusing to make decisions (upheld by administrative courts), issues related to projects that may have significant impact on the environment and potential impact of investments on the Natura 2000 area occupy an important place. Here, however, one should remember the context of sustainable development,

which is based on three equally considered reasons: social, ecological and economic. Failure to consider all aspects, natural + social + economic, together should be considered as contrary to the principle of sustainable development.

Table 4

Refusals and agreements on building conditions

Evaluation of the dominant direction	1. Prohibition on changing the land use 2. Prohibition on implementing projects that may significantly affect the environment (6) 3. Prohibition of building new buildings within a 100-metre wide strip from water reservoirs (15) 4. Prohibition of destruction, damage or transformation of the area, prohibition of works that permanently distort the relief of the land (2) 5. Requirement to conduct an impact assessment on a Natura 2000 area
Evaluation of the dominant direction	Environmental protection as a public good
Situations related to revocation of refusals	1. Too broad understanding of the prohibition to change water relations 2. Too broad understanding of the ban on locating objects within a 100 m strip from the river banks, except for water facilities and facilities for rational farming, forestry or fishing 3. Too broadly understood prohibition on changing the land use.
Evaluation of the dominant direction	Protection of property rights

Source: authors' study

It should also be emphasized what is the percentage share of changes by the courts in the position of environmental protection authorities in all cases. In the case of cases concerning the local spatial development plans, this value is 38.89%, and in the case of proceedings regarding the determination of building conditions - 17.14%. However, these values must be assessed from the perspective of specifics of both proceedings, especially those regarding local plans and a much larger number of procedural reasons when questioning the positions of environmental protection authorities regarding the local plans.

In the analysed case, it can be said that the verification of the method and scope of access to the environment as a public good is even broader than at local plans. There is a dominant regulation of this access here. However, unlike the arrangements for draft local plans, the courts also emphasize a separate perspective related to the individual rights of property owners/investors. This applies to judgments revoking the refusal to agree.

Conclusions

The research shows that environmental protection bodies significantly affect the final shape of spatial development of nature protection forms. This should be assessed unambiguously positively, especially in the context of general inefficiency of the spatial management system in Poland and the lack of real protection of numerous land values related to spatial order. The above is confirmed by:

- relatively small (especially in the case of agreeing on draft local spatial development plans) number of cases pending at administrative courts;
- dominant tendency, according to which the majority of such cases ends with taking into account the position of environmental protection authorities.

These results should be evaluated positively. At the same time, it is worth emphasizing the key role of environmental protection authorities in creating the possibility of developing areas covered by forms of nature protection. This is done within the framework of acts prepared for specific forms of nature protection, but it is the environmental protection bodies that determine their actual interpretation (which is largely confirmed by court rulings). Particularly noteworthy is the fact that the questioning of a specific concept of the land use by a planning authority is the basis for admission with probability that borders with certainty that there will be no possibility of a given development in a given area. According to the authors, the above circumstance should definitely be more categorically than currently emphasized also in economic literature (in a context also related to the understanding of space as a public good). On the other hand, this scope of activities of environmental protection bodies has much smaller impact on other cases, in particular those of valuable natural and environmental conditions, which are not forms of nature protection. It is in these areas that particular threats to the environmental and natural values of spaces (e.g. in urban areas) should be identified.

In addition to positive assessments related to the role of environmental organs and their impact on spatial development, it should be noted that relying only on natural premises is not always right and may be associated with the negation of the idea of sustainable development, which presupposes balancing the argument between the social and economic aspects ecological, and thus not recognizing the cost of lost opportunities when making negative decisions. When referring to the research hypothesis, please indicate the following.

1) Environmental arrangements of draft spatial policy acts can be considered to be a real verification of access to the environment understood as a public good.
2) For the most part, this regulation ends at the judicial stage confirming the position of a public administration body consisting in broader protection of the environment (i.e. blocking a specific development option). From an economic perspective, this means limiting individual access to the environment at the expense of universal one (a different option would risk treating the environment as a club good, which in this perspective would only bring short-term benefits).
3) In the case of agreeing draft decisions on building conditions, however, there is a noticeable tendency in which the courts also focus on the interests of individual property owners. However, this scale is very limited. It should be recognized that this trend should not change significantly.

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