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Preliminary communication

THE RULE OF LAW IN SPATIAL PLANNING AND BUILDING

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ABSTRACT

As stated in the Venice Commission Report, the rule of law embraces several aspects, such as legality, legal certainty, prevention of abuse (misuse of powers), equality before the law and non-discrimination, and access to justice. Stability and consistency of law and legitimate expectations as a part of legal certainty are key factors in every democratic country. However, even for countries where democratic standards are highly developed, achievement of all aspects of the rule of law can be a challenge.

Areas such as spatial planning and building are very dynamic in their core. However, this should not be an obstacle for stable and long-term regulation. Western democracies are characterized by the long-lasting acts and other regulation in building and spatial planning. Croatia, however, has constant changes in the basic regulation covering mentioned areas. For example, in issuing a building permit, the procedure can be so long lasting that all the relevant regulation may change in the meantime. This affects the investor, the owner of the property and possibly infringes their constitutional rights. Since the issuing of a building permit is in the area of administrative law, the aim of this paper is to analyse which constitutional rights may be affected during frequent changes of basic regulation. The other aim is to research and analyse whether national bodies and courts protect constitutional guarantees in administrative proceedings, and if not, what are the reasons for such practice.

This paper is divided into five sections: background and regulatory framework, the rule of law in spatial planning and building, right to a fair trial, protection of property in administrative matters, and conclusion.

Methodology used in this paper is normative, comparative, teleological and deductive. The research includes relevant regulation and available domestic and case law of the European Court on Human Rights. Paper is based on domestic and international documentation issued by relevant bodies, such as European Commission Reports, Venice Commission Report, etc. Teleological method is used for interpretation of the regulation and deductive method for the conclusion. Teleological method is used also for recommendations regarding a better application of the principle of the rule of law.

Keywords: *administrative law, building, protection of property, rule of law, spatial planning*

1. BACKGROUND AND REGULATORY FRAMEWORK

All democratic states, institutions, as well as international organizations and European Union are directing their procedures in compliance with the rule of law. European Commission Report on the Rule of Law in its introduction refers to the basic values of the European Union, such as human rights, democracy, and the rule of law.[1] The rule of law is a *"bedrock of the Union's identity, and a core factor in Europe's political stability and economic prosperity"*.[2]

On the international level, the Venice Commission[3] established few criteria as a checklist for the compliance with the rule of law, and those are: legality, legal certainty, the prohibition of arbitrariness, access to justice, respect for human rights, non-discrimination and equality before the law.[4]

During the 1990-ies, Croatia established regulatory framework in physical planning and building. Since then, regulatory framework was changed several times[5] by enactment of new acts. Physical planning and building were in the period from 2007 to 2013 regulated in one single act. Since 2013, Croatia has normatively separated those areas by adoption of the Physical Planning Act as well as the Building Act (hereinafter: BA). All mentioned acts have one thing in common - they were amended more than once. On the 1st of January 2023, Croatia also adopted the

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1 European Commission Report on the Rule of Law, 2021, available at: [https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:52021DC0700&from=EN], Accessed on 3 April 2024.

2 European Commission Report on the Rule of Law, 2023, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023DC0800], Accessed on 3 April 2024. The 2023 Rule of Law report examines rule of law developments in Member States under four pillars: justice, anti-corruption, media freedom and pluralism, and broader institutional issues related to checks and balances.

3 European Commission for Democracy through Law (Venice Commission) is the Council of Europe's advisory body on constitutional matters. It provides legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. The Commission has 61 member states: 46 Council of Europe member states and 15 other non-European members. More on Venice Commission available at: [https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN], Accessed 5 April 2024.

4 Council of Europe, Parliamentary Assembly, Venice Commissions „Rule of Law Checklist", available at: [http://www.europeanrights.eu/public/atti/Resolution_2187_ENG.pdf], Accessed on 3 April 2024.

5 The first Physical Planning Act was enacted in 1994 (Official Gazette No. 30/1994, 68/1998, 35/1999, 61/2000, 32/2002, 100/2004). Next Physical Planning and Construction Act was adopted in 2007 (Official Gazette No. 76/2007, 38/2009, 55/2011, 90/2011, 50/2012, 55/2012). Current Physical Planning act was adopted in 2013 (Official Gazette, No. 153/13, 65/17, 114/18, 39/19, 98/19, 67/23). Current Building Act was adopted in 2013 (Official Gazette, No. 153/13, 20/17, 39/19, 125/19). It is important that those acts are legal basis for the by-laws in physical planning and building. By-laws were also changed. Overview of the adoption of physical planning and building regulatory framework see: Held, M.; Perkov, K., *Spatial Planning in the EU and Croatia under the Influence of COVID-19 Pandemic,* EU and Comparative Law Issues nd Challenges Series (Eclic) – Issue 6, Osijek, 2021, pp. 599-601.

Ordinance on Spatial Plans.[6] Ordinance on Spatial Plans introduces a new feature in spatial planning, whereby all spatial plans should be created in a so-called *ePlan* module. The aim of the mentioned module is "to facilitate, modernize, unify and digitalize the procedures for creating spatial plans in Croatia, to enable the establishment of platforms and digital infrastructure services to improve the provision of electronic public services, and to reduce the burden on citizens, business entities and investors".[7] Also, there is a new obligation for all local self-government units in Croatia, whereby they are obliged to register into the module and use it for the procedure of the adoption of spatial plans.[8]

Spatial plans in Croatia are not only strategic documents, but also the implementing regulations. The term 'implementing regulations' means that they are a basis for issuing of building permits, location permits, and other individual acts in spatial planning and building area.[9]

2. THE RULE OF LAW IN SPATIAL PLANNING AND BUILDING

In the relevant literature on the rule of law and spatial planning, authors from the common law jurisdictions examine whether the area of spatial planning should be regulated by law and in which way. In one paper, one of the basic research question was: "*in what ways law is indeed fundamental to the exercise of planning and what the rule of law might actually mean for those of us engaged in envisioning the future of our cities*".[10] In the context of this paper an important difference between documents on spatial planning in common law and continental jurisdictions may be emphasised: in continental legal systems, spatial plans are legal documents and they „*could be challenged at law in a way that British local plans could not be*."[11] Authors in continental jurisdictions examine how to achieve better regulation of the spatial planning and building due to its interdisciplinarity, vertical and horizontal compliance of norms.

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6 Ordinance on Spatial Plans, Official Gazette, No. 152/2023. The possibility for enactment of ordinance on Spatial Plans existed in Physical Plans since 2013 Article 56/3, Official Gazette, No. 153/13). It took 10 years for its enactment.

7 See more on the following website: [https://mpgi.gov.hr/UserDocsImages/17365], Accessed 8 April 2024.

8 Those plans are so called „the new generation spatial plans". See article 3 and 48 of the Ordinance on Spatial Plans.

9 According to Žagar, the most frequent act issued by local units is location permit (Žagar, A., *Zaštita prava vlasništva u postupcima provedbe prostornih planova*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, No. 1, 2018., p. 688. See also Article 114/2 of the Physical Planning Act).

10 Booth, P., *Planning and the Rule of Law*, Planning Theory and Practice, Vol. 17, No. 3,1-17, p. 1. Available at: [https://www.researchgate.net/publication/303596922_Planning_and_the_rule_of_law], Accessed 3 April 2024.

11 *Ibid.,* p. 2.

Although various aspects may be considered under the concept of the rule of law, they have one thing in common: "*belief that the rule of law is fundamental to ensuring that the rights of citizens are respected and that the good order of society as a whole is maintained.* "[12] In the common law jurisdictions flexibility prevails, while in continental legal systems much more attention is given to legal certainty. Of course, both flexibility and legal certainty is present to a degree in both groups of legal systems.[13]

In continental legal systems, spatial planning and building as interdisciplinary areas should be regulated by one basic law. In most European countries, spatial plans are established on three levels.[14] Although there is an exigence to comply with the requirements of the rule of law, one should bear in mind that it is impossible to regulate every situation in society.[15] Therefore, educated civil servants are of a great importance for the well-functioning of the whole physical planning system. Civil servants are implementing basic laws in the area of spatial planning and building. Since the procedures of the implementation of spatial plans are in the first place administrative procedures,[16] civil servants and officials working in local govern-

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12 *Ibid*., p. 4.

13 Buitelaar, E.; Sorel, N., *Between the rule of law and the quest for control: Legal certainty in the Dutch planning system*, Land Use Policy, Vol. 27, Iss. 3, July 2010, pp. 983-989.

14 In most European countries, there are three levels of spatial planning, state, regional, and local level (Nadin, V., *et. al.*, *Comparative Analysis of Territorial Governance and Spatial Planning Systems in Europe*, (COMPASS), final report, 2018, p. 17, [https://www.espon.eu/sites/default/files/attachments/1.%20COMPASS_Final_Report.pdf], Accessed 26 March 2024.
In certain European countries, acts regulating spatial plans have divided function – strategic or implementing. According to Physical Planning Act in Croatia, spatial plans comprise both functions. Božić suggests that spatial plans of state and regional level should have strategic function, while implementing function should be assigned to local spatial plans. Otherwise, regional plans regulate space in too much details, while local plans such as urbanist plans, are too general (Božić, N., *Dobar zakonodavni okvir preduvjet je održivog i uređenog prostora*, Mjera, Vol. 3, No. 4, p. 34-35).

15 For example, in the Republic of Croatia, there is a total of 555 units of local self-government, namely 428 municipalities and 127 cities and 20 units of regional self-government, i.e. counties. The city of Zagreb, as the capital of the Republic of Croatia, has the special status of a city and county, so all together there is a total of 576 units of local and regional self-government in the Republic of Croatia (data available at the official website of the Ministry of Justice and Administration of the Republic of Croatia: [https://mpu.gov.hr/o-ministarstvu/ustrojstvo/uprava-za-politicki-sustav-i-opcu-upravu/lokalna-i-podrucna-regionalna-samouprava/popis-zupanija-gradova-i-opcina/22319], Accessed 5 April 2024.
All local units are authorised for spatial and urban planning (Article 19 of the Local Self-government Act, Official Gazette, No 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15, 123/17, 98/19, 144/20, hereinafter: LSGA). However, only large cities have in its jurisdiction the issuing of building and location permits and other acts connected with building and implementation of the documents of the physical planning for the area of a county outside the area of a large city (Article 19a of the LSGA).

16 Physical planning is a part of administrative law that could affect property rights of the citizens. See in Žagar, A., *Zaštita prava vlasništva u postupcima provedbe prostornih planova*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 1, 2018, p. 688.

ment units, in sections entitled for physical planning and building, have to be educated in the area of the administrative law. They have to understand the basic rules in administrative procedure and other institutions of the administrative law, such as: the principle of legality, the rule of law, hierarchy of norms, etc. Additionally, it is desirable, and perhaps even necessary in the constantly evolving area of spatial planning and building, that civil servants have an additional education in the mentioned area.[17] They need to respect the constitution and relevant international legislation, such as European Convention on Human Rights (hereinafter: ECHR),[18] regardless of the fact if there is an exclusive provision in the Physical planning or building act to protect, for example, the right to a property in the administrative procedures or not.[19]

Analysis of the courts' practice shows that the disputes in the area of spatial planning and building are mostly focused on the protection of two basic rights – *a right to a fair trial* and on *the protection of property*. For the purpose of this paper, the analysis embraced the case law of the administrative courts, Constitutional Court of the Republic of Croatia, and case law of the European Court on Human Rights (hereinafter: ECtHR).

3. RIGHT TO A FAIR TRIAL

3.1. General Remarks on the Situation in Croatia

Building permit is an administrative act regulated in articles 106 – 127 of the Building Act. The principle of legality in spatial planning and building procedures is guaranteed in the administrative acts,[20] according to which it has to be delivered on basis of the law, other regulations and general (normative) by-laws.[21] According

[17] On the importance of the additional education of civil servants see in: Vukojičić Tomić, T.; Lopižić, I., *Usavršavanje službenika u Hrvatskoj i odabranim zemljama – novi trendovi*, in: Marčetić, G.; Vukojičić Tomić, T.; Lopižić, I. (eds.)., Normalizacija statusa javnih službenika- rješenje ili zamka? Zagreb: Institut za javnu upravu, 2019, pp. 69-100.

[18] European Convention on Human Rights, Offical Gazette – International Agreements, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 13/17.

[19] On professionalism in administration and other factors affecting level of quality of public servants see for example in: Koprić, I.; Marčetić. G., *Obrazovanje upravnog osoblja: iskustva i izazovi*, Hrvatska javna uprava, vol. 4, No. 3-4, 2002, pp. 515-566; Giljević, T., *Upravni kapacitet hrvatskih ministarstava: između profesionalizacije i politizacije,* Zagrebačka pravna revija, Vol. 4, No.1, 2015, pp. 207-229.

[20] Regarding the problem of legal interest in the procedures of issuing of building permits more in: Josipović, T., *Zaštita vlasništva u postupku izdavanja lokacijske dozvole i građevinske dozvole*. in: Galić, A. (ed.) Novosti u upravnom pravu i upravnosudskoj praksi, Organizator, 2022, pp. 105 - 111.

[21] Article 5/1 of the General Administrative Procedure Act, Official Gazette, No. 47/09, 110/21.

to the Building Act, illegal building exists when there is no final building permit, or at least a building permit with executive effect.[22,23]

The building permit is also an implementing act.[24] It is issued and based on spatial plans, which according to the provision of Article 58/1 of the Physical Planning Act (hereinafter: PPA), are secondary legal regulations. The spatial plans have to be in accordance with the PPA. Spatial plans contain a textual part, a graphic part, and an explanation, including the purpose of the space, the designation of a construction land and land on which construction is not permitted.[25]

Spatial plans in the Republic of Croatia, as in most European countries, are divided into three levels: state, regional and local. However, in Croatia there is also a large number different types of spatial plans at each individual level, and that distinguishes Croatia from most other European countries.[26] Large number of spatial plans at each individual level led to a particular regulations of this issue articles 61 and 123 of the PPA.

Furthermore, at the beginning of 2023, the Ordinance on Spatial Plans entered into the force,[27] and it was added into the range[28] of acts with which the implementing acts should comply. Although the question of complexity of the process of adopting spatial plans is beyond the scope of this paper, it is necessary, for the sake of an overall context, to note that the time dimension of the validity of spatial plans is also very important.[29] Time dimension arises especially when the issue of compliance of the building permit with the spatial plan is at stake. Case law dif-

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22 'Final' permit refers to the moment in the procedure when it becomes impossible to challenge the building permit with regular legal remedies (an appeal) in administrative procedure before a higher administrative body. (See article 13 of the GAPA). Building permit with executive effect can be challenged through an appeal before higher administrative body. It presents a legal basis for the administrative body for the execution of the obligation towards the party in the administrative procedure (Articles 133-139 of the GAPA).

23 Article 106/1 of the Building Act, Official Gazette, No. 153/13, 20/17, 39/19, 125/19 (hereinafter: BA).

24 See Article 114 of the Physical Planning Act, Official Gazette, No. 153/13, provisional translation in English available: [https://mpgi.gov.hr/UserDocsImages/dokumenti/Propisi/Physical_Planning_Act.pdf], Accessed on 26 March 2024.

25 Article 54 of the PPA.

26 See in: Krtalić, V., *Sustavi planiranja razvoja države, regionalnog i lokalnog planiranja - usporedba hrvatskoga i njemačkoga, odnosno bavarskoga sustava*, Hrvatski inženjerski savez, 2021, pp. 36-40.

27 Ordinance on Spatial plans, Official Gazette, No. 152/2023.

28 At this point it is difficult to talk only about the hierarchical structure of acts in the field of spatial planning and construction. This term seems more appropriate to express the range of acts with which the implementing acts should be harmonized.

29 Regarding time dimension of physical planning see more in: Elgendy, H., *Development and Implementation of Planning Information Systems in collaborative spatial planning processes*, Dissertation, 2003, pp. 34-35.

fered regarding the issue of whether the building permit should be in accordance with the spatial plan that was in force at the time of the application, or with the spatial plan that was valid at the time when the building permit was delivered to the party and began to produce legal effects. These doubts should be resolved by amendments to the PPA in Article 122/4. Analysis of time dimension and its effects towards the principle of the rule of law is discussed later in the paper.

3.1.1. Some Reasons for Long Lasting Procedures as a Violation of the Access to Justice

Long lasting procedures and uneven practice regarding the issuing of building permits represent an obstacle to the achievement of the principle of legality and the rule of law.[30] For example, problems in Croatia arise from the interpretation and determination of the moment for the beginning of the procedure for issuing a building permit: during inspection procedures[31] or during the procedures of the legalization of the buildings.[32] Other issues arose in practice as well.[33]

When implementing the procedure for issuing building permits, public bodies are obliged to comply with the GAPA. However, certain problems can arise due to the different interpretation of the Article 42 of the GAPA.[34] For example, the question can arise regarding the determination of the precise moment of beginning of the procedure for issuing a building permit - so the question is does administrative procedure begin on the day the proper request is submitted to the public body, or does it begin when the public body initiates the procedure.[35] If the exact moment

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30 Regarding the violation of the proper length of the proceedings for the issuing of building permits see, for example, the ECtHR Judgement *Hellborg v. Sweden*, application No. 47473/99, 2006, paragraphs 57-60.

31 For example, Decision of the Constitutional Court U-IIIA-2877/09 from the 23rd of May 2012, regarding a violation of the reasonable time guaranteed in the article 29/1 of the Constitution of the Republic of Croatia, Official Gazette, No. NN 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

32 For example, Decision of the Constitutional Court U-IIIA-1258/2017 from 27th June 2017.

33 The Constitutional Court of the Republic of Croatia changed its practice regarding the reasonable length of the administrative procedure in its Decision U-IIIA-4885/2005 from the 20th of June 2007. Before the mentioned decision, the Constitutional Court considered only the reasonableness of the duration of the court proceedings before the Administrative Court and did not take into account the duration of the previous administrative proceedings. Today, the duration of the administrative dispute should be taken into account together with the duration of the previous administrative procedure in the same administrative matter, since the length should be counted from the day when the "dispute" in the sense of Article 6, paragraph 1 of the Convention arose, meaning after the appeal to the second instance administrative body (see paragraph 4 of the U-IIIA-4885/2005 from the 20th of June 2007).

34 GAPA is a *lex generalis* in all administrative procedures, including the issuing of the building permit.

35 The question also arises in practice, regarding the question how a proper request looks like. According to the procedure described on the website of the Ministry of Physical Planning, Construction and State

is not correctly determined, problems associated with the calculation of many important deadlines may arise.

The GAPA unequivocally stipulates that the procedure is initiated at the moment of submission of the proper request to the public law body.[36] The process of issuing a building permit itself is a complex process since it includes the *eConference* module.[37] Through it, requirements related to the determination of special terms and conditions of connection are unified. Thereby the investors are released from the obligation to collect individual consents, and this entire procedure is performed by a public body. It should last a maximum of 15 or 30 days. Although the deadline for issuing a building permit is not prescribed by BA, according to the GAPA, it can last a maximum of 30 or 60 days.[38] The procedure for issuing a building permit should not last longer than 60 days from the date of submission of the proper request, regardless of way the request was sent, through the *ePermit* system, or as a classic paper request.[39]

Property (hereinafter: MPGI), following phases of the construction permit issuing procedure are prescribed, p. 71, [https://dozvola.mgipu.hr:9444/pdf/edozvola_upute.pdf], , Accessed: February 14, 2024.
I. Review of the regularity of the request - in this phase, it is confirmed whether the request is regular, meaning it fulfilled all conditions prescribed by the law.
II. Location conditions and inspection
III. eConference
IV. Assessment after the procedure
V. Administrative fee
VI. Issuing of the final act.

36 Article 40/2 of the GAPA.

37 The *eConference* is a module of the Information system of physical planning, regulated in articles 31, 32 and 33 of the PPA (herinafter: ISPU system, https://ispu.mgipu.hr/#/, accessed: 14 February 2024). More on the ISPU system and in general on digitalization in the spatial planning and building see in: Held, M., *Digitalization of procedures in spatial planning and construction law in Croatia,* EU and comparative law issues and challenges series, Digitalization and Green Transformation of the EU, Vol. 7, 2023. The *eConference* module was introduced by amendments to the Spatial Planning Act and the Construction Act from 2019, and through it, it is possible to submit, collect and process the documentation necessary for issuing building permits [https://mpgi.gov.hr/eu-sufinanciranja/ispu-i-razvoj-e-usluga/13752], Accessed 14 February 2024.

38 See Article 101 of the GAPA.

39 However, in practice, there are examples where public law bodies (despite explicit legal provisions) after the deadline for holding the *eConference* state that they did not give their consent, i.e. confirmation of the main project, which entails the illegality of the building permit. For example, in a survey conducted by the Croatian Chamber of Architects, it was stated that public law bodies do not respond to the eConference and do not respect the legal procedure (see the most common problems in the operation of the system 2, in: Architects' satisfaction with the ePermit system, survey research 2020, [https://www.arhitekti-hka.hr/files/file/pdf/2020/Zadovodstvo%20arhitekata%20sustavom%20e-dozvola.pdf], Accessed 14 February, 2024.

Here it is important to mention that in Croatia buildings could be legal even if there was no building permit. There is an *Ordinance on simple and other buildings and works*[40] which regulates which building does not have to have building permit, and a 'simple building' can be interpreted in many ways in practice. There is a doubt as to whether it is a building for which it is necessary to obtain a building permit, or whether it is a simple building that is regulated by the Ordinance, and whether it includes also a building in a reconstruction process.[41] For example, in a case that was conducted before the Administrative Court in Split, the court rejected the claimant's request for compensation for the costs of the dispute because she carried out a reconstruction for which a building act was not obtained.[42]

Most of the questions are about whether the construction of an object is included in those situations for which it is not necessary to obtain a building act. One decision of the Administrative Court in Split is illustrative in this regard, where the court rejected the plaintiff's claim that a building falls within the scope of the Ordinance on simple buildings and works,[43] and that it is not necessary to have a main project for it.[44]

3.2. Legal Certainty in Spatial Planning and Building

In Croatia, basic laws in spatial planning and building are changing frequently.[45] Spatial plans on the local level should change more often than basic law, and in that way they could protect legality and of the citizens' rights. It is obvious that law should respond to social changes.[46]

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40 Ordinance on simple and other buildings and works, Official Gazette, No. 112/17, 34/18, 36/19, 98/19, 31/20, 74/22, 155/23.

41 According to the Article 3, paragraph 1, point 28, 28. of the BA *the reconstruction* of a building is the performance of construction and other works on an existing building that affect the fulfilment of the basic requirements for that building or that change the compliance of that building with the location conditions in accordance with which it was built (extension, upgrading, removal of the external part of the building, performance of works to change the purpose of the building or technological process, etc.), i.e. performance of construction and other works on the ruins of the existing building.

42 Judgement of the Administrative Court in Split, 2 UsIgr-421/2020-7 from the 31st of May 2021.

43 Judgement of the Administrative Court in Split 5 UsIgr-511/15-6 from the 10th of February 2017.

44 Compare article 3 of the Ordinance which prescribes the possibility of construction without a building permit and the main project and Article 4, which prescribes the possibility of construction without a building permit, but in accordance with the main project.

45 See footnote 6 of this paper.

46 Rosidi, R.; Handayani, G. K. R.; Karjoko, L., *Legal Relationship and Social Changes and Their Impact on Legal Development*, Advances in Social Science, Education and Humanities Research, volume 2021, available at: [https://www.researchgate.net/publication/355464768_Legal_Relationship_and_Social_Changes_and_Their_Impact_on_Legal_Development/fulltext/61718c6d766c4a211c0868d3/Legal-Relationship-and-Social-Changes-and-Their-Impact-on-Legal-Development.pdf], Accessed 8 April 2024.

In practice, however, the situation is the other way around. Local plans are stable, and they do not follow requests of contemporary society, while basic laws are changing constantly. In some jurisdictions there is an obligation for the state to regulate maximum validity of plans on local level up to ten years.[47]

There is no such an obligation for local representative bodies in Croatia.[48] As a consequence, some extremely outdated local plans are completely out of touch with general demands of nowadays society, particular contemporary circumstances, and consequently with the request of principle of the legality. Of course, current structure of the system of local self-government is a problem in itself, especially when it comes to numerous local units on relatively small territory such as Croatia.[49]

Transparency of public administration is also relevant in this context. Adoption of spatial plans involves a special procedure which involves public discussion.[50] An additional problem is that there is a lot of spatial plans on the same level.[51] It is almost impossible to follow all those rules for those who are implementing spatial plans and issuing all kinds of permits. They have no other option, but to work according to the legal norm that is unresponsive to social changes and completely out of date in the context of the requests of nowadays society.

3.2.1. Stability and Foreseeability of the Law

The Venice Commission in the Report on Rule of Law on stability and consistency of law states that "Instability and inconsistency of legislation or executive action may affect a person's ability to plan his or her actions. However, stability is not an end in itself: law must also be capable of adaptation to changing circumstances. Law can be changed, but with public debate and notice, and without adversely affecting legitimate expectations. "[52]

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47 For example for see Netherlands see in: Buitelaar, E., Sorel, N., *Between the rule of law and the quest for control: Legal certainty in the Dutch planning system*, Land Use Policy, Volume 27, Issue 3, July 2010, pp. 983-989.

48 Local representative bodies are authorised for the adoption of local spatial plans. See Article 73 of the LSGA Local spatial plans are general acts (by-laws). (See Article 58 of the PPA). According to the article 12/3 of the Administrative Disputes Act (Official Gazette, no. 20/10, 143/12, 152/14, 94/16, 29/17, 110/21) High Administrative Court is entitled to control their legality.

49 Koprić, I., *Zašto i kakva reforma lokalne i regionalne samouprave,* Hrvatska i komparativna javna uprava – Croatian and Comparative Public Administration, Vol. 15, No. 4, 2015, pp. 993–998.

50 See article 94 of the PPA. On the public participation in the procedure of the adoption of spatial plan see more in: Staničić, F. *Sudjelovanje javnosti i pristup pravosuđu u procesima prostornog planiranja*, Zbornik radova Veleučilišta u Šibeniku, Vol. 11, No. 1-2, 2017, pp. 31-52.

51 Krtalić, V., *op.cit*, note 26, p. 40.

52 Venice Commission Report on the Rule of Law, p. 16.

Also, on foreseeability of the law it states: „ Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it ".[53]

In spatial planning and building, due to frequent changes of legislation and slow administration procedure, a time gap between the submission of the request of the building permit and its issuing occurs, which sometimes lasts for years. Therefore, citizens cannot be sure which spatial plan is relevant for issuing implementing acts such as building or location permit.

Nowadays, this issue is regulated in Physical planning Act in articles 114, 122 and 188.

In article 122/4 it is stated:

(4) The act for the implementation of the spatial plan is issued in accordance with the spatial plan valid on the date of submission of the application for its issuing, or in accordance with the spatial plan valid on the date of issuing of the act for the implementation of the spatial plan if the applicant so requests.

In article 188/3 it is stated:

(3) Exceptionally from paragraph 2 of this article, in procedures that are completed according to the provisions of the Spatial Planning and Construction Act ("Official Gazette", no. 76/07, 38/09, 55/11, 90/11, 50/12 and 55/12) Article 122, paragraph 4 of this Act applies.

Based on the research of the analysis of the Constitutional Court's case law, the previously mentioned time gap between the moment of the request and the moment of issuing of building permit still exists.

Citizens seek protection in cases regarding issuing of location permit[54] or building permit. In the case U-III-4588/2014 from the 13th of September 2017, an applicant requested an issuing of location permit before administrative bodies.

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53 Venice Commission Report on the Rule of Law, p. 15.

54 Issuing of location permit is in certain cases precondition for the issuing of the building permit. Previously, citizens were obliged to ask issuing of the location permit for each building. Exceptions were made only for few types of buildings in article 104 of the Act on Physical Planning and Building. There were two separated procedures prior the issuance of location permit. More on that topic in Josipović, 2022 and Žagar, 2018. In current PPA, location permit is regulated in article 125, for the certain types of interventions in the space.

Both levels of administrative bodies[55] denied it.[56] High Administrative Court accepted the complaint, but the State Attorney of the Republic of Croatia started the procedure before the Supreme Court of the Republic of the Croatia, based on the article 78 of the Administrative Disputes Act.[57] Supreme Court modified the High Administrative Court Judgment and denied the request of an applicant.[58]

The matter of the dispute was which spatial plan should be implemented[59] in certain circumstances, the plan which was valid at the moment of the request[60] or the plan which was in force at the time of the issuing of the location permit.[61] The request was submitted in 2006 while new spatial plan entered into the force in 2007. Constitutional Court in its decision U-III-4588/2014 from 13th of September 2017 repeated the guarantees of fair trial[62] which are applied also on the administrative dispute.[63] It affirmed that it is the role of the Constitutional Court to examine whether the whole procedure before administrative bodies and courts was conducted in a way that the right of a fair trial was guaranteed to an applicant.

In the settled case law of the Constitutional Court in the questions of the spatial planning and building, of relevance is the spatial planning act which was in force when the procedure ended, and the permit was issued or request was denied. This is also because new bylaws cannot be applied to circumstances which occurred prior to its entering into force.[64]

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55 On the first level, Administrative Department of Physical Planning of the Split-Dalmatian County, branch office in Trogir was entitled, and on the second level Ministry of the Environment Protection, Physical Planning and Building was entitled.

56 See paragraph 1 of the Decision U-III-4588/2014 from the 13th of September 2017 of the Constitutional Court.

57 The State Attorney, on the proposition of the parties, has a right to demand of the Supreme Court to request legality of the final judgements of the administrative courts on both levels (Article 78 of the Administrative Disputes Act). This extraordinary remedy and its more comprehensive regulation in the Articles 139 – 143 of the new Administrative Disputes Act will enter into the force on 1 of July 2024.

58 Paragraph 1 of the Decision U-III-4588/2014 from 13th of July 2017.

59 Spatial plans are implemented, among others, through building and location permit (Article 114/2 of the PPA).

60 Spatial plan from 2002.

61 Spatial plan from 2007.

62 See more on the fair trial in ECtHR practice in *Guide on Article 6 of the European Convention on Human Rights,* 2022, https://www.echr.coe.int/documents/d/echr/guide_Art_6_eng Guide, accessed on 5 April 2024.

63 The Constitutional Court refers to its Decision U-III-1001/2007 from the 7th of July 2010.

64 Decision U-III-4588/2014 from the 13th of September 2017, paragraph 12.

However, the Constitutional Court notices that regulation was changed in 2014, and that relevant spatial plan is the spatial planning act that was in force when the procedure before administrative bodies has started.[65]

4. PROTECTION OF PROPERTY IN ADMINISTRATIVE MATTERS

Spatial planning and building is an interdisciplinary area. It consists of various branches of law, in the first place administrative law and civil law.[66] Protection of property belongs to civil law, but it is also a constitutional guarantee, stipulated in the article 48/1 of the Constitution of the Republic of Croatia.[67] Such arrangement of the property protection gives citizens a right to examine the violation of the property protection before administrative bodies and administrative courts, as well as before ordinary civil courts.[68] ECHR guarantees both of the mentioned rights.[69]

4.1. Protocol 1 Article 1 of the European Convention on Human Rights

Protocol 1 Article 1 of the ECHR[70] consists of two paragraphs.[71] In this research focus is on the article 1 paragraph 2, where the state is entitled to intervene into a personal right to property if public interest to do so exists.[72] In the European Court on Human Rights (hereinafter: ECtHR) case law, special attention is given to the balance of public and private interest in cases when public authority in the

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65 Decision U-III-4588/2014 from the 13th of September 2017.

66 Nikišić, S.; Rajčić, D., *Uvod u građevinsko pravo*, Hrvatska Sveučilišna naklada, Zagreb, 2008.

67 Article 48/1 of the Constitution of the Republic of Croatia.

68 See in Ernst, H. *Posebno stvarnopravno uređenje za građevinska zemljišta*, in: Gavella, N. (ed.) Stvarno pravo – posebna stvarnopravna uređenja 2011, p. 93. See articles 26, 162, 166 and 167 of the Property Act,

69 Article 6 of the ECHR – right to a fair trial and article 1 of the Protocol 1 of the ECHR.

70 ECtHR connects legitimate expectations with the Protocol 1 - Article 1 of the ECHR (paragraph 7/4 of the Decision of the Constitutional Court, U-IIIB-1373/2009 from 7 July 2009, and paragraph 51 of the *Pine Valley* Developments ltd and others v. Ireland, application no. 12742/87).

71 1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties (Article 1 of the Protocol 1 of the ECHR).

72 While deciding whether there was a violation of Article 1 of the Protocol 1of the ECHR, Court had examined following questions: firstly, lawfulness and purpose of the interference and then proportionality of the interference (paragraphs 57-59 of the *Pine Valley Developments ltd and others v. Ireland*, application no. 12742/87).

procedure of spatial planning intervenes into the property rights. Even before ECtHR was established as a single body, it was giving a special attention to a balance of public and private interest.[73]

In connection with the spatial or 'land' planning,[74] European Court on Human Rights, ECtHR was deciding on violation of the Protocol 1 Article 1 of the ECHR in certain cases. General conclusion of the ECtHR on cases regarding Protocol 1 Article 1 in connection with urban and spatial planning was that state has wider margin of appreciation than in situations where only civil rights of the citizens are included.[75] That is in accordance with the prevailing relevance of the public interest in those cases. Another conclusion is that building on the one's land can be submitted to various building restrictions.

However, the ECtHR emphasized that the public authorities in cases concerning spatial planning and property rights have an important role in the preservation of the rule of law in a certain country. Their obligation is to comply with the judgments of the national courts.[76] If administrative bodies fail in this task, "the guarantees enjoyed under Article 6 by a litigant during the judicial phase of the proceedings are rendered devoid of purpose ".[77]

In certain cases, applications were declared inadmissible, even where absolute prohibition of building existed.[78] In some cases, the ECtHR declared objections on violation of the Protocol 1 Article 2 inadmissible, since applicants invoked violation on the Protocol too early, and when there were no legal presumptions in connection to the right to property which entitled them to do so.[79]

The ECtHR noticed: "difficulties in enacting a comprehensive legal framework in the area of urban planning constitute part of the process of transition from a

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73 For example (although not in the area of spatial planning and building, in case *AGOSI vs United Kingdom i*n paragraph 52 on application of the Protocol 1, ECtHR stated: „The Court must determine whether a fair balance has been struck between the general interest in this respect and the interest of the individual or individuals" Judgement *AGOSI vs United Kingdom*, application No. 9118/80, 1986).

74 See paragraph I. called 'Land Planning' in the Guide on Article 1 of Protocol No. 1 – Protection of property, p. 70.

75 Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights - Protection of property, p. 70, available at: [https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG], Accessed on 29 March 2024.

76 Paragraph 71 of the Judgement *Gorraiz Lizarraga and Others v Spain*, application No. 62543/00, 2004.

77 Paragraph 71 of the Judgement *Gorraiz Lizarraga and Others v Spain*, application No. 62543/00, 2004.

78 Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights - Protection of property, p. 70.

79 See paragraph 76 of the Decision *Gurdulić and Others vs Croatia*, application No. 5076/09, 2014, paragraph 68 of the Judgement *Štokalo v Croatia*, application no. 15233/05, 2008.

socialist legal order and its property regime to one **compatible with the rule of law**[80] and the market economy – a process which, by the very nature of things, is fraught with difficulties. However, these difficulties and the enormity of the tasks facing legislators having to deal with all the complex issues involved in such a transition do not exempt the Member States from the obligations stemming from the Convention or its Protocols".[81]

In cases of spatial planning and building, the ECtHR examines whether public bodies violated property rights. In a wider context, expropriation can be considered as a part of urban or spatial planning. For example, the state may have plans for some other use of certain land, in public interest, but contrary to its current use.[82] Of course, in such cases citizens have right to compensation.

In that context, ECtHR is following certain rules when deciding whether there was violation of the Protocol 1 Article 1 of the ECHR: "*As the Court has reiterated on a number of occasions, Article 1 of Protocol No. 1 contains three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest."*[83]

4.2. Protection of Property as a Constitutional Right in Administrative Dispute in Croatia

Importance of balancing between public and private interest is emphasised on the national level as well. In Croatia, Physical Planning Act contains the principle[84] of achieving and protection of public and individual interest.[85] According to the case

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80 Emphasized by the author.

81 Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights - Protection of property, p. 70. See for example Judgement *Schirmer v Poland*, application No. 68880/01, 2004.

82 See article 50 of the Constitution of the Republic of Croatia.

83 Judgement, *Scordino v. Italy*, application no. 36813/97, 2006, p. 78.

84 See article 7, p. 4. of the PPA. See also Article 6 of the GAPA.

85 Principle of achieving and protection of public and individual interest is in connection with the article 7, p. Article 11 of the PPA:
(1) In order to achieve the goals of spatial planning, competent state administration bodies, bodies and persons designated by special regulations and bodies of local and regional (regional) self-government units judge and coordinate with each other the public interest and individual interests that they must respect in the performance of spatial planning tasks, whereby individual interests must not harm the public interest.

law of the Constitutional Court of the Republic of Croatia, in accordance with the mentioned principle, the location and position of the building must be determined in such a way that, within the framework of valid spatial planning documentation, a fair balance is achieved between the requirements of the general interest of the community and the requirements for the protection of individual rights."[86]

When it comes to the area of spatial planning and building, namely annulment of the final building permit, it is important to mention the Decision of Constitutional Court of the Republic of Croatia U-IIIB-1373/2009 from the 7th of July 2009. Constitutional Court in this Decision provides guidelines for all administrative bodies and legal remedies in administrative procedures when legal certainty as a part of the rule of law is at stake: „ …there is also the necessity of respecting the rights that the parties have acquired after the administrative procedure in which an administrative act was adopted recognizing those rights. Respecting, or guaranteeing the realization of these rights, is an expression of the principle of legal certainty, as an integral part of the broader principle of the rule of law, and the basis of every democratic legal order."[87]

Josipović mentions "confrontation of the public and private interest is very often in spatial planning and building area, i.e. spatial planning interests are confronted to private rights and interests of landowners and holders of other rights on land".[88]

Before 2019, administrative bodies and administrative courts were not dealing, at least not in the most suitable way, with the protection of the property in the spatial planning and building. When citizens objected that right to a property was violated, administrative bodies and administrative courts were addressing citizens to seek protection before civil courts.[89] One of the possible reasons for such practice was interpretation of the regulation of some basic institutes and the view that certain institute does not have effect on a right of property.[90]

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(2) The public interest is protected by demarcating space for public purposes by applying appropriate spatial norms and spatial standards from other spaces, considering that all users, as far as possible, bear the burden of demarcation equally.

86 Paragraph 10.1 of the Ruling of the Constitutional Court U-I-1957/2019 from the 20th of October 2020.

87 Paragraph 11.3/3 of the Decision of Constitutional Court of the Republic of Croatia U-IIIB-1373/2009 from the 7th of July 2009.

88 Josipović, T., *Usklađenost javnog interesa i privatnih interesa u postupcima prostornog uređenja,* paper about to be published in a volume by the Croatian Academy of Sciences and Arts, 2024.

89 See also Josipović, T., *Usklađenost javnog interesa i privatnih interesa u postupcima prostornog uređenja,* paper in the procedure of publishment in Croatian Academy of Sciences and Arts, 2024.

90 *The decision on determining the building plot has no legal effects on ownership and other real rights on the real estate for which it was issued* (article 158/3 of the PPA, Official Gazette, No. 153/13, 65/17, 114/18, 39/19, 98/19, 67/23).

For example, article 107/2 of the BA regulates effects of building permit in this way:

Building permit does not have legal effects on the property[91] and other real rights on the real estate for which is issued, and it does not present legal basis for entrance into the possession of the real estate.

Since the Constitutional Court of the Republic of Croatia issued its decision U-III-5095/2017 on the 3rd of December 2019, the situation has changed. The Constitutional Court emphasized that arguments presented by the competent authorities disregarded Article 3 of the Constitution of the Republic of Croatia. Administrative bodies and administrative courts are obliged to examine whether there was violation of the constitutional right to property.

Even prior to 2019, the Constitutional Court established a test[92] which all courts and bodies involved in decisions on human rights should follow. The test includes a consideration of the following questions:

1. The competent authority/court should examine whether an asset in question falls within the reach of the protection of the guarantee of ownership rights prescribed in Article 48, paragraph 1 of the Constitution;
2. the competent authority/court should examine whether the interference with the guarantee of property rights is based on law;
3. The competent authority/court should examine whether the requested interference tends to achieve a legitimate goal;

Decision on legalisation does not have effects on property and other real rights on the building for which is issued and land where the building was built (article 32 of the Act on Legalization of the Illegal Buildings, Official Gazette, No. 86/12, 143/13, 65/17, 14/19).

91 Emphasized by the author.

92 The Constitution contains three separate rules related to the constitutional regulation of ownership:
- the first rule, in Article 48, Paragraph 1 of the Constitution, is of a general nature and prescribes the guarantee of ownership rights;
- the second rule, contained in Article 50, Paragraph 1 of the Constitution, governs confiscation or limitation of ownership, which will not be considered constitutionally impermissible if it is prescribed by law, if it is in the interest of the Republic of Croatia and if compensation for such confiscation or limited ownership is ensured and paid in the market value of confiscated or restricted assets;
- the third rule, contained in Article 50, Paragraph 2 of the Constitution, recognizes the legislator's authority to limit ownership rights (and entrepreneurial freedoms) by law in order to protect certain constitutional values or protected constitutional goods that the constitution maker considers so important that he subsumes them under state or general interests community (protection of interests and security of the Republic of Croatia, nature, human environment and people's health), without the obligation to pay any compensation (Decision of the Constitutional Court U-IIIB-1373/2009, Official Gazette, No. 89/09)

4. The competent authority/court should examine whether the goal being achieved is proportionate to the proposed interference.

The Constitutional Court concluded that administrative bodies and administrative courts, by not considering the relevance and importance of the raised complaint about the right of ownership of part of the disputed building plot, and due to the fact they rejected objection as unimportant for the matter in question, violated property right guaranteed by Article 48, paragraph 1 of the Constitution in connection with the right to a fair trial guaranteed by Article 29, paragraph 1 of the Constitution (the right to ownership in its procedural aspect).[93]

Violation of property was at stake also in other Constitutional Court's case law, where it concluded that there was no violation of property rights. For example, in the Decision U-III-3128/2019 from the 8th of December 2022, the applicant had a problem with the water runoff from the neighbouring land. In the procedure of issuing of building permit there were no irregularities. The administrative court stated that "when issuing a building permit, in accordance with the aforementioned provisions of the Act, it is determined whether the main project was created in accordance with the conditions for the implementation of interventions in the area". The High Administrative Court referred applicants to protect their right to property through the building inspection procedure. On the first sight, that is an understandable solution. However, it should be noted that applicants as the first neighbours of the land in question do not have a right to be a party in the procedure of building inspection. They can initiate procedure before the building inspection, but they do not have the position of a party in the administrative procedure.[94] This provision thus excludes, for example, the right to appeal, as well as other important procedural rights of the parties in the administrative procedure. However, applicants highlighted there was violation of their property.

In other words, obligation of the administrative bodies and administrative courts is to examine the objection of the constitutional right to property guaranteed in article 48/1.

5. CONCLUSION

The rule of law is emphasized in relevant documents at national, international level, and in the European Union as the highest value in every democratic society. The basic requirements of the principle of legality demand that laws are in ac-

[93] Decision of the Constitutional Court of the Republic of Croatia, U-III-5095//2017 on the 3rd of December 2019, paragraph 39.

[94] See article 105 of the State Inspectorate Act, Official Gazzete, no. 115/18, 117/21, 67/23, 155/23.

cordance with the constitution, and all other acts should be in accordance with the constitution and the law. Regulatory framework guarantees individual rights to the citizens. However, it could also impose certain restrictions which should be regulated by the law. This is particularly evident in spatial planning and building, as a discipline where public interest and private interest are confronted. The task of the public administrative bodies and administrative courts is to find a balance between public and private interest, in each individual case.

Research has shown that, in the area of spatial planning and building, ECtHR emphasizes the balance of public and private interest mostly in its case law regarding the Protocol 1 Article 1 of the ECHR. In those cases, applicants pointed out the violation of the property in procedures regarding land planning. ECtHR in the land planning area gives explanation that state authorities have greater margin of appreciation when land planning is at stake, in comparison to the cases in which courts decide on the violation on the right to property where there is no public interest included.

Based on the research, certain suggestions can be given for improvement and the greater achievement of the rule of law in Croatia. On the first place, administrative bodies should harmonize certain procedural questions such as the beginning of the procedure of the issuance of the building permit. In that way, a party in administrative procedure could be certain when procedure starts, which positively effects on the domestic and foreign investments in Croatia. Altogether will create the environment of legal certainty which is an aspect of the rule of law.

Another suggestion refers to foreseeability of the law through more stable spatial plans on state level. Various kind of experts should be included in the process of the preparation of spatial plans. Additional suggestion is to consider setting maximum time duration of local plans up to five or maximum ten years. In that way, state level spatial plans will be more stable, and investors will be able to plan in which moment they can ask for building permit without getting into the time gap of the validity of 'old' and 'new' local spatial plans.

Another important way of achieving the principle of the rule of law is education of civil servants. If there is an objection regarding the right to property, they should not ignore it. They have to be in touch with the constant changes of the evolutive rights of owners[95] in spatial planning and building, and to stay open for additional education in the area of administrative law and spatial planning. Civil servants should be open for new challenges such as digitalization and application of the artificial intelligence in spatial planning and building.

[95] See Guide on the Article 1 of Protocol No. 1of the ECHR.

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