

Record Card

File number	5178/2015/VOP
Area of law	Proceedings on removal of structures
Subject	proceedings on additional approval of a structure
Type of finding	Inquiry report – Section 18
Result of inquiry	Errors found
Relevant Czech legislation	500/2004 Coll., Section 36 (3), Section 38 (4), Section 71 (3) 183/2006 Coll., Section 168 (2)
Relevant EU legislation	
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Report on inquiry into the procedure of a construction authority in handling the request of Mr and Mrs A. to obtain a copy of structural assessment from the file

A – Subject of inquiry

The Public Defender of Rights was repeatedly approached by Mr and Mrs A., residing at XXXXXX (hereinafter the “Complainants”), with a request to inquire into the procedure of the Sokolov Municipal Authority, the Department of Construction and Land-Use Planning (hereinafter the construction authority), which allegedly prevented them from exercising their right to peruse the file. Specifically, they wish to obtain a copy of structural assessment – calculation (hereinafter the “structural assessment”) from the file in proceedings on additional approval of a structure – a concrete retaining wall having a size of 4.25 m x 21.70 m owned by their neighbour, in which they stand as parties to the proceedings. Although the Complainants in the position of parties to the proceedings have repeatedly demanded a copy of the structural assessment, their requests have not been satisfied to date. Not even their submissions to the Regional Authority of the Karlovy Vary Region, the Construction Authority Department (hereinafter the Regional Authority), have not led to any redress.

I took on this complaint based on authorisation granted to me by the Public Defender of Rights, Mgr. Anna Šabatová, Ph.D., because the Public Defender of Rights exercised the option under Section 2 (4) of the Public Defender of Rights [1] to transfer to me some areas of her competence, including the agenda regulated by the Construction Code.[2]

After evaluating the contents of the Complainants’ submission, provided by them in several steps, including selected documents on the procedure of the authorities

concerned, I decided to examine the matter and, to this end, initiate an inquiry pursuant to Section 14 of the Public Defender of Rights Act.

B – Findings of fact

In assessing the matter, I referred to the underlying documents and information provided to me by the Complainants. Having evaluated them as sufficient for assessment of the above matter at the time being, I did not request any additional documents from the construction authority and the Regional Authority during my inquiry. The following facts followed from the underlying documents obtained.

The Complainants repeatedly, *inter alia* through submissions dated 14 July 2015, 4 August 2015 and 17 August 2015, requested that the construction authority in Sokolov issue a copy of the structural assessment that had been submitted by the investor in the proceedings on additional approval of the structure (a concrete retaining wall with dimensions of 4.25 x 21.70 m) on 22 June 2015. The Complainants, as the investor's neighbours, are parties to said proceedings. Nevertheless, they did not succeed with this request; the construction authority allegedly advised them in this respect that they had failed to submit a written consent of the author of the structural assessment, and later, the construction authority allegedly argued that they would have an opportunity to provide a statement on the documents underlying the decision before the decision is issued, within the meaning of Section 36 (3) of the Code of Administrative Procedure.[3] The construction authority did not make a decision without delay on the Complainants' request. The Complainants disagreed with the procedure of the authority; they emphasised that the investor had been provided with a deadline for submitting additional underlying documents in the proceedings until 30 September 2015, and hence they considered that the "time before the decision is issued" had already occurred. To be able to provide an adequate statement, they needed sufficient time to become acquainted with the assessment, including evaluation by a competent party, if any (opposing assessment), as they themselves lacked expertise in the field of construction. The Complainants expressed their concern that the structural assessment was not impartial, which could be the reason why a copy of it had not been provided to them.

The Complainants repeatedly requested the construction authority to ensure remedy (amongst other things, they lodged a complaint against the procedure of the construction authority and complained also at the Regional Authority), but their request for obtaining a copy of the structural assessment remained unsuccessful. Since their complaints in this matter were not satisfied, they turned to the superior authority, i.e. the Regional Authority, with a "request to review the handling of our complaint by the Sokolov Municipal Authority".

C – Evaluation of the matter by the Deputy Public Defender of Rights

Under the Public Defender of Rights Act, I have a duty to work to defend persons against the conduct of authorities and other institutions listed in this Act where such conduct is at variance with the law or does not comply with the principles of a democratic State governed by the rule of law and good administration, as well as

against their inaction, thereby contributing to the defence of rights and freedoms. Therefore, in this section of the inquiry report, I will evaluate the procedure of the administrative authorities in the relevant matter to date in terms of compliance with the legal regulations and principles of good governance.

Within the context of her activities [4], the Public Defender of Rights has long called on administrative authorities to be as open as possible to requests for information, including information gathered in pending proceedings, so as to fulfil the principle of openness of public administration towards citizens, which the Public Defender of Rights requests administrative authorities to observe in their activities. The Public Defender of Rights believes that openness of authorities in contact with citizens and a forthcoming approach to citizens' requests for information (perusing files, including obtaining copies from files) results in clarification of any doubts as to whether the authority concerned handles the matter properly and in a qualified manner. Putting this principle into practice in pending administrative proceedings significantly contributes to clarification of the matter concerned and enhances citizens' confidence in correct decision-making by administrative authorities, which is one of the key principles of administrative procedure.

Therefore, the Defender has repeatedly drawn attention of construction authorities to the fact that Section 168 (2), the second sentence, of the Construction Code may not be applied formalistically. In other words, a state of affairs where issuing a copy of construction documentation is made conditional on the consent of the owner of the relevant structure or the documents' author is appropriate only where issuing the documents could interfere with the constitutionally guaranteed rights of the party whose consent is required. The Defender stated that limiting the copying of design documents (under Section 168 (2), the second sentence, of the Construction Code) as part of a file may not be absolute and may not be applied indiscriminately in all cases. The purpose of the complete limitation of copying in Section 168 of the Construction Code is unclear and should be refined through a constitutionally conforming interpretation. [5]

In my opinion, the rule contained in Section 168 (2) of the Construction Code can be applied only in accordance with constitutional principles, in such a way as to ensure its application in a specific case is not at variance with the right to due process, especially in pending administrative proceedings. [6]The right to due process includes the right to become fully acquainted with the documents underlying the proceedings, which under the applicable Code of Administrative Procedure includes obtaining copies of the file material (for a party to the relevant proceedings to whom a copy (or a part thereof) of the construction documentation has not been issued, it may be excessively difficult to provide a statement on the relevant structure).

It is the Defender's long standing opinion that parties to proceedings have the right to peruse files (within the meaning of Section 38 (4) of the Code of Administrative Procedure, this also comprises the right to obtain copies of the file from the administrative authority) during the entire proceedings. Thus, in my opinion, the fact that the Complainants as the parties to the proceedings in question will have an opportunity to provide their statement on the underlying documents for the decision within the meaning of Section 36 (3) of the Code of Administrative Procedure, is not a valid reason why the parties' right to peruse the file should be denied. It should

further be noted, in relation to the resolution of the administrative authority on refusing the right to peruse the file (obtaining a copy of the file), that this must be done without unnecessary delay (within the meaning of Section 71 (1) and (3) of the Code of Administrative Procedure, an authority usually has the duty to issue a decision without delay, and only if this is impossible, it must to do so within 30 days).

Under Art. 4 (4) of the Charter of Fundamental Rights and Freedoms [7], if any limitation is to be imposed on a fundamental right (right to due process, right to information) in a specific case, this may not be done without purpose, by simply referring to the text of the law, but exclusively for the purpose stipulated in law in respect of that limitation. In addition, the authority concerned must apply the proportionality principle (the proportionality test). This means deciding how far it is necessary to go in limiting the constitutional right in question in order to achieve the purpose of the limitation pursued by law. The Defender has earlier provided an example of a justified refusal to provide a copy in a situation of a serious threat to the ownership title or some other right of the owner of a structure, which is a legitimate concept e.g. in relation to copies of the structural layout of a bank (compromised security) or private home (threat to the right to privacy), but not where a neighbour concerned about shading requests copies of only the part of the design documents which concerns exclusively the outer dimensions and arrangement of the structure in question. The Defender also stated that e.g. protection of a designer's intellectual property rights may require application of Section 168 of the Construction Code in the event of design documents containing an innovative technical solution of a structure or its part, but not as regards the arrangement of the structure or its aesthetic design, because under the Copyright Act, an architectural work is deemed imitated only when actually constructed and not merely by copying the drawings.

In the relevant context, it is difficult to imagine how the rights of the designer or owner of the structure could be possibly prejudiced by obtaining a copy of the structural assessment of a concrete retaining wall with the dimensions of 4.25 m x 21.70 m and constructed without a proper construction permit at the boundary of the Complainants' plot of land. In my opinion, in the context described by the Complainants (illegal structure on the neighbouring property potentially infringing on their rights), the construction authority should have been all the more concerned to ensure a fair administrative procedure with a full observance of the Complainants' right to due process.

Finally, as an argument strongly supporting the parties' requests for obtaining copies of the underlying documents from the file in the pending administrative proceedings, I would like to refer to the case-law of administrative courts, namely judgment of the Municipal Court in Prague Ref. No. 5 A 241/2011 - 69 of 4 December 2013 (published as a judgment of fundamental "precedential" importance in the Collection of Rulings of the Supreme Administrative Court No. 5/2014, ruling No. 3018, accessible also at www.nssoud.cz), in which the court pronounced the following headnote on the matter: "Section 168 (2) of the 2006 Construction Code, which authorises a construction authority to provide an applicant with a copy of the documentation of a structure only with the consent of the documents' author or the owner of the relevant structure, does not apply to a party to pending construction proceedings (or land-use permit proceedings). The construction authority is obliged

to obtain a copy of the documentation for the party concerned in accordance with Section 38 (4) of the 2004 Code of Administrative Procedure.”

Having assessed the procedure of the Sokolov construction authority to date, I can only consider it as strongly formalistic and, ultimately (e.g. a copy of the structural assessment from the file being refused) as procedures which are at variance with the legal regulations and the principles of good governance.

D – Conclusions

Following the inquiry, I decided to issue an inquiry report structured pursuant to Section 18 (1) of the Public Defender of Rights Act, with the conclusion that I found the shortcomings in the procedure of the administrative authorities concerned, in particular the Sokolov Municipal Authority, which are described in the previous section of this Report.

Under Section 18 (1) of the Public Defender of Rights Act, I simultaneously requested that the mayor of Sokolov and the head of the Regional Authority of the Karlovy Vary Region provide their statements on the ascertained shortcomings within the statutory deadline of 30 days of delivery of the inquiry report. I am sending the inquiry report to the attention of the Complainants.

This inquiry report summarises my findings to date, which will form underlying documents for my final statements on the matter after obtaining the statements of the administrative authorities concerned.

JUDr. Stanislav Křeček, signed
Deputy of the Public Defender of Rights

Note

In response to the Report, the Regional Authority ordered the Sokolov construction authority, through decision Ref. No. 916/SÚ/15-3 of 4 December 2015, to provide a copy of the structural assessment. The Regional Authority also developed a methodology, which is available on its website, and called on the lower-instance construction authorities to follow these rules. The important conclusions of the Defender’s inquiry were incorporated into the Regional Authority’s guidelines. Therefore, the inquiry was closed – the relevant authorities ensured remedy.

[1] Act No. 349/1999 Coll., on the Public Defender of Rights, as amended

[2] See Act No. 183/2006 Coll., on land-use planning and the construction procedure, as amended (the Construction Code).

[3] Act No. 500/2004 Coll., on administrative proceedings, as amended (the Code of Administrative Procedure).

[4] See also the Annual Reports on the Activities of the Public Defender of Rights available at www.ochrance.cz

[5] See also the 2008 Annual Report, available on the website of the Public Defender of Rights: www.ochrance.cz, in the sections containing the reports on activities and reports for the Chamber of Deputies, and the 2008 Annual Report on the Activities of the Public Defender of Rights, pp. 83 and 114).

[6] However, in the Defender's opinion, even after closing the proceedings it is necessary to consistently consider whether application of the relevant provision of the Construction Code in the specific case is at variance with the constitutionally guaranteed right to information held by the public administration.

[7] Resolution of the Presidium of the Czech National Council No. 2/1993 Coll., promulgating the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic.