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Legal aspects of the public participation in the process of planning renewable energy in Poland

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1. Introduction

It should be emphasised that the Polish legislator, while ensuring public participation in the process of planning and implementing investments involving the construction of renewable energy sources (hereinafter also referred to as RES) systems, referred to the latest concepts of administrative proceedings. Comparative studies in the field of modern administrative procedures made it possible to distinguish their successive generations, which include: classic (decision making) administrative procedures, procedures for the issuance of general acts and procedures for the shaping and implementation of public policy.¹

¹ J. Barnes, *Towards a third generation of administrative procedures. Conference on Comparative Administrative Law April 29–30 2016*, <https://law>.

The third generation of administrative procedures is intended to produce an individual or general administrative act. It should be stressed, however, that these acts are not issued only on the basis of provisions of the Act, but may be the result of arrangements made during the proceedings.² The procedure serves the interests of all parties to the proceedings, and the basic condition for achieving this goal is their cooperation. An administrative act is the best solution to the matter, rather than the implementation of solutions previously established by the legislator.³

Taking into account national legal solutions, it can be assumed that the third generation of administrative procedures is used in areas such as spatial planning and management or environmental protection.⁴ Therefore, standards corresponding to the third generation of the administrative procedure can be found in the Act of 3 October 2008 on access to information on the environment and its protection, public participation in environmental protection and environmental impact assessment⁵ and the Act of 27 March 2003 on spatial planning and development.⁶ The regulations of both acts are applicable to the implementation of investments consisting in the construction of renewable energy systems; taking into account the environmental aspects of the investments in question, they ensure public participation in administrative proceedings.

yale.edu/sites/default/files/area/conference/compadmin/compadmin16_barnes_towards.pdf (access: 30.06.2021), pp. 2–3; cf. also Z. Kmiecik, *Zarys teorii postępowania administracyjnego*, Warszawa 2014, p. 53; A. Krawczyk, *Standardy współczesnej regulacji postępowania administracyjnego*, in: *Prawo procesowe administracyjne. System prawa administracyjnego*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2014, p. 49.

² Cf. J. Barnes, op.cit., pp. 3–4 and 12.

³ Ibidem, p. 4.

⁴ Ibidem, p. 51; as well as Z. Kmiecik, op.cit., pp. 53–54, and idem, *Idea procedur administracyjnych trzeciej generacji (na przykładzie postępowania w sprawach dofinansowania projektów w ramach programów operacyjnych)*, „Państwo i Prawo” 2015, No. 5, p. 7.

⁵ Journal of Laws of 2021, item 247, hereinafter referred to as: AIEP.

⁶ Journal of Laws of 2021, item 741, as amended, hereinafter referred to as: SPDA.

2. Participation of the local community in deciding on the location of investments related to renewable energy sources

In accordance with the provisions of AIEP, social participation in environmental protection includes two forms. The first is to ensure that everyone has the right to submit comments and motions in proceedings requiring public participation.⁷ “Comments” and “motions” are forms of action by which representatives of the public may express their views and encourage administrative bodies to engage in a specific type of action. It is assumed that “comments” are “observations”, “statements”, or “opinions” aimed at informing administrative bodies about the problems and views of the public. On the other hand, “motions” understood as “postulates” are intended to lead to the state of affairs desired by the applicants.⁸

Pursuant to Article 29 of AIEP, everyone has the right to submit comments and motions in proceedings requiring public participation. Therefore, any entity (natural person, legal person, or entity without legal personality), which, being under the authority of the Republic of Poland, enjoys the freedoms and rights specified in its law, has the right to submit comments or motions. Therefore, when assessing the legitimacy to submit comments or motions, the element of citizenship is abstracted.⁹ The notion of “proceedings requiring the participation of the society” has not been defined in the Act. However, it may be assumed that the right to submit comments and motions may only be exercised in administrative

⁷ Cf. B. Wierzbowski, B. Rakoczy, *Prawo ochrony środowiska. Zagadnienia podstawowe*, Warszawa 2015, p. 102.

⁸ Cf. D. Kościuk, in: *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, eds. T. Filipowicz, A. Plucińska-Filipowicz, M. Wierzbowski, Warszawa 2017, Legalis, commentary on article 29, Nb 1–3.

⁹ Cf. B. Opaliński, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, Warszawa 2016, p. 90; see: B. Draniewicz, *Uprawnienia organizacji ekologicznych w postępowaniach wymagających udziału społeczeństwa*, „Monitor Prawniczy” 2011, No. 1, p. 14.

proceedings for which the legislator explicitly provided for such a possibility.¹⁰ This means that public participation in proceedings should be expressly provided for in the provisions of substantive law.

The provisions of AIEP concerning the principles and mode of public participation are *lex generalis* in relation to those legal acts which, referring to a specific procedure, guarantee an element of public participation in it.

Taking into account the scope of the study in question, an example of a draft document in which public participation is required is the draft resolution prepared by a staroste to designate quiet areas in agglomerations or quiet areas outside agglomerations¹¹ or the External Operational and Rescue Plan (Article 265(6) EPL) prepared by the Provincial Commander of the State Fire Service, if the RES system is classified as a lower-risk facility within the meaning of Article 243 et seq. EPL). However, the decisions which are issued in connection with the implementation of an investment project involving the construction of a RES system should first of all include the proceedings aimed at issuing an integrated permit (Article 218 EPL).

Public participation is guaranteed both in individual cases decided by administrative decisions and in the process of drafting documents.

¹⁰ Cf. M. Nowak, B. Dąbrowski, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, Warszawa 2013, p. 58; B. Rakoczy, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, Warszawa 2010, p. 97.

¹¹ See: Article 118b(3) of the Act of 27 April 2001. Environmental Protection Law, Journal of Laws of 2020, item 1219, as amended, hereinafter referred to as: EPL.

2.1. Public participation in decision-making

Administrative bodies competent to issue decisions provide for the possibility of public participation as appropriate before these decisions are issued or amended (cf. Article 30 of AIEP). For this purpose, the authority in question shall, *ex officio* and without undue delay, make public information on the commencement of the EIA or on the cross-border environmental impact assessment procedure, if any. The authority also gives notice of the commencement of proceedings, the subject of the decision to be issued in the case, the authority competent to issue the decision, and the bodies competent to issue an opinion and make arrangements.

At the same time, the authority shall inform the public of the opportunity to submit comments and motions.¹² In the light of Article 37 of AIEP, the body competent to examine complaints and motions is the body conducting proceedings aimed at issuing decisions. This authority shall indicate the place and manner in which comments and motions are to be submitted. Comments and motions may be submitted in writing, orally in the minutes or by electronic means without the need for a qualified electronic signature (Article 34). Complaints and motions may be submitted within 30 days. This period shall begin to run on the day on which it is made public.¹³ Comments or motions submitted after the expiry of the period in question shall be left unprocessed.¹⁴

¹² Pursuant to Article 32 of AIEP, the provisions of Section VIII of the Act of 14 June 1960 – The Code of Administrative Procedure (Journal of Laws of 2021, item 735), hereinafter referred to as: CAP do not apply to comments and motions submitted within the framework of proceedings requiring public participation; the provisions of AIEP independently regulate the procedure for submitting and examining comments and motions.

¹³ Cf. the judgment of the Supreme Administrative Court of 4 November 2010, II OSK 1297/10, *Legalis* No. 293448.

¹⁴ It is pointed out that “this effect is considered from a formal point of view [...] but there is nothing to prevent the authority from becoming acquainted with it after the comments or motions have been submitted late and from sharing the arguments expressed therein”; see: M. Nowak, B. Dąbrowski, *op.cit.*, p. 6.

The authority competent to take the decision may hold an administrative hearing open to the public. If it is to be held, the authority shall communicate the date and place of the administrative hearing. The provision of Article 91 § 3 of CAP shall apply accordingly.

The authority shall also give notice of the means of accessing the necessary documentation on the case and of the place where it is made available for inspection. The necessary documentation in the case in question shall include the application for a decision with the required annexes, the decisions of the authority competent to take a decision required by law, and the positions of other authorities where positions are available within the time limit for the submission of comments and motions.

After the proceedings have been concluded, the authority competent to issue the decision shall publicly disclose information on the decision issued and on the possibilities of accessing its content. In the justification of the decision, regardless of the requirements under the provisions of the CAP, it shall provide information on the participation of the public in the proceedings and on the manner in which the comments and motions submitted in relation to the participation of the public were taken into account and to what extent they were considered (cf. Article 37 of AIEP). It should be emphasised that the processing of comments and motions submitted by the stakeholders does not imply the obligation to take them into account.¹⁵

2.2. Public participation in drafting documents

Where public participation is necessary for drawing up draft documents, the authority must also comply with the information requirement. Accordingly, it shall, *ex officio* and without delay, disclose to the public: information on the procedure on cross-border environmental impact, if any, the commencement of the prepara-

¹⁵ Judgment of the Supreme Administrative Court of 6 May 2014, II OSK 2615/12, *Legalis* No. 951894.

tion of the draft document and its subject matter, the possibilities of accessing the necessary documentation of the case and the place where it is made available for review. The necessary documentation of the case includes assumptions or a draft document and annexes as well as positions of other authorities as required by law, provided that these positions are available within the time limit for submitting comments and motions.

At the same time, the authority preparing the draft document shall communicate the opportunity to submit comments and motions, the manner and place for submitting comments and motions, and the authority competent to process comments and motions. The authority shall indicate the period within which comments and motions may be effectively submitted. This period should be at least 21 days from the date on which the information in question is made public. Comments or motions submitted after the expiry of the time limit set by the authority shall be left unprocessed (cf. Articles 39 and 41 of AIEP).

Comments and motions may be submitted in writing, orally in the minutes, or by electronic means without the need for a qualified electronic signature (cf. Article 40 of AIEP).

After considering comments and motions, the body preparing a draft document requiring public participation shall disclose to the public information on the adoption of the document and on the possibilities of accessing the content of the document and the justification containing information on public participation in the procedure and on the manner in which the comments and motions submitted in relation to public participation have been taken into account and to what extent they have been considered; the justification shall constitute an annex to the adopted document (cf. Articles 42 and 43 of the AIEF). In the case of projects for which the strategic environmental assessment is required, the adopted document is accompanied by a written summary containing a justification of the selection of the adopted document with respect to the considered alternative solutions, as well as information on how the findings of the environmental impact assessment were taken into account and to what extent the findings of the environmental impact assessment were considered; opinions of the competent

environmental protection and sanitary inspection authorities; comments and motions submitted; results of the cross-border environmental impact assessment procedure, if any; and finally, proposals concerning the methods and frequency of carrying out monitoring of the effects of the implementation of the document provisions. A body drawing up a draft document requiring public participation shall disclose to the public information on the adoption of the document and on the possibilities for accessing the content of the document itself, including its annexes.

2.3. Powers of environmental organisations

The second form of public participation is the possibility of participating in proceedings requiring the participation of environmental organisations. These organisations participate in the above-mentioned proceedings on the basis of the rights of a party.¹⁶

In the light of the provisions of Article 44(1) of AIEP, environmental organisations are organisations carrying out statutory activity in the field of environmental protection or nature protection.¹⁷ At the same time, in order for an environmental organisation to effectively declare its willingness to participate on the rights of a party in proceedings requiring public participation, it must have been carrying out such statutory activity for at least 12 months before the date of instituting such proceedings. The legislator has apparently recognised that the 12-month period of activity guarantees that the organisations participating in the proceedings will be environmental organisations that are genuinely engaged and

¹⁶ A. Haładyj, *Partycypacja społeczna w ochronie środowiska*, in: *Encyklopedia prawa administracyjnego*, eds. M. Domagała, A. Haładyj, S. Wrzosek, Warszawa 2010, p. 268.

¹⁷ It should be emphasised that in this case the provision of Article 31 § 4 of CAP is not applicable. Therefore, in those categories of matters in which the legislator provided for the possibility of public participation, only this group of social organizations may participate, which meets the requirements specified in Article 44 of AIEP – cf. judgment of the Provincial Administrative Court in Gliwice of 6 August 2018, II SA/Gl 341/18, Legalis No. 1819463.

experienced in the field of environmental and nature protection, and not entities established only in the event of ongoing proceedings concerning a specific investment project.¹⁸

An environmental organisation may register its participation only in the course of proceedings that require public participation. This means that it cannot do so either before or after the commencement of the proceedings.¹⁹

The environmental organisation retains the right to bring legal remedies appropriate for a given stage of the process, also in the event that it has not previously notified its accession to the proceedings. The environmental organisation has the right to appeal against the decision of the first instance authority even if it did not participate in the proceedings in the first instance.²⁰ Similarly, an environmental organisation may lodge a complaint against the final decision ending the proceedings, even if it did not participate in the proceedings preceding its issue.

The admission of an environmental organisation to the procedure does not require any particular form.²¹ However, the authority is obliged to examine whether the organisation meets the prerequisites specified in Article 44(1) of AIEP. If these prerequisites are not met, the authority will refuse to allow the organisation to participate in the proceedings by issuing a decision. The decision to deny the organisation the right to participate in the proceedings is subject to a complaints procedure (see Article 44(4) of AIEP).

¹⁸ Cf. judgment of the Supreme Administrative Court of 19 January 2018, II OSK 833/16, *Legalis* No. 1727953.

¹⁹ W. Jacyno, J. Rewkowska, in: *Ustawa o udostępnianiu*, commentary on Article 44, Nb 5.

²⁰ Lodging an appeal is equal to filing an application for participation in such proceedings. An environmental organisation participates in appeal proceedings on the rights of a party – Article 44(2) in fine.

²¹ Cf. judgment the Provincial Administrative Court in Wrocław of 27 May 2010, II SA/Wr 89/10, *Lex* No. 674622.

3. Public participation in the planning procedure

The location of RES energy generating equipment can be done in the study and in the local plan. The legislator has secured this possibility – in accordance with Article 10(2a) of SPDA, “if it is envisaged to delimit zones in the area of the commune in which equipment generating energy from renewable energy sources with a capacity exceeding 100 kW will be located, as well as their protection zones related to restrictions on development and land use; the study shall determine their location”, while “the local plan shall define, depending on the needs, the boundaries of the areas for the construction of equipment referred to in Article 10(2a) and the boundaries of their protection zones related to restrictions on development and land use and the occurrence of significant environmental impact of such equipment” (Article 15(3), item 3a of SPDA). Designation of areas for RES-related investments in the study is therefore not obligatory. However, the possibility of including this issue in the local plan depends on its earlier inclusion in the study.

3.1. The importance of social participation in the planning procedure

The participation of the social factor is an important element of the processes of planning the location of RES-related investments. The legislator provides for a number of tools in this respect, which at various stages enable the local community concerned, as well as unrelated entities or environmental organisations, to have their say. An important aspect is also the repeated signalling and informing about the community’s rights. It is not without significance that public participation, especially in such a complicated procedure as the planning procedure, would not be justified if the society was not aware of where, how, and when it could exercise its rights.²²

²² See: K. Rokicka-Murszewska, *Ogłaszanie „w sposób zwyczajowo przyję-*

A particular manifestation of ensuring the individual protection and transparency of the planning procedure is the information on the possibility of submitting motions to the study project (Article 11(1) of SPDA) or the local plan (Article 17(1) of SPDA), and/or of familiarising oneself with the project and participating in public discussion on the solutions adopted in the project (Article 11(7) of SPDA) and the draft local plan (Article 17(9) of SPDA), as well as making comments on the projects (Article 11(8) and Article 17(11) of SPDA respectively).²³

The authority developing a SEIA project shall ensure that the public is given the opportunity to participate, in accordance with the provisions of Chapters 1 and 3 of Chapter III of AIEP, in a strategic environmental assessment. The legislator in Article 54(3) of AIEP indicates that the rules for submitting comments and motions and for issuing opinions on draft local plans and studies have been specified in SPDA. As is indicated in the literature on the subject, "it raises doubts whether the activities consisting in announcing the commencement of the preparation of the planning act, its presentation, and the possibility of submitting comments may be conducted jointly for the planning act and the environmental impact forecast, or whether they must be separate activities".²⁴ However, it seems justified to support the view of Anna Brzezińska-Rawa, which indicates that the participation of the social factor in the planning procedure is independent of the participation of entities in making decisions on the basis of which the execution of projects affecting the environment is allowed.²⁵ Therefore, the possibilities

ty" i jego wpływ na ważność gminnych aktów planistycznych, in: *Źródła prawa w samorządzie terytorialnym*, ed. B. Dolnicki, Warszawa 2018, p. 596.

²³ Cf. K. Rokicka, *Udostępnianie dokumentów planistycznych gminy jako przejaw zasady jawności*, in: *Jawność w samorządzie terytorialnym*, ed. B. Dolnicki, Warszawa 2015, p. 613.

²⁴ Z. Niewiadomski (ed.), K. Jaroszyński, A. Szmyt, Ł. Złakowski, *Planowanie i zagospodarowanie przestrzenne. Komentarz*, Warszawa 2019, Legalis, commentary on Article 11, Nb 11.

²⁵ A. Brzezińska-Rawa, *Uwagi do projektu studium uwarunkowań i kierunków zagospodarowania przestrzennego*, in: *Partycypacja społeczna w samorządzie terytorialnym*, ed. B. Dolnicki, Warszawa 2014, p. 687.

of social participation in planning and spatial development should also be analysed.

3.2. Project motions

The first action of the executive body of a commune (the head of the commune, the mayor, or the president of the city) in the procedure for adopting a study and a local plan, after the commune council has adopted a resolution to proceed to the preparation of one of these documents, is to announce in the local press and by means of a public notice, as well as in a customary manner in a given locality, of the adoption of the said resolution, with simultaneous determination of the form, place, and deadline for the submission of motions, not less than 21 days from the date of the announcement. Submission of motions is in no way limited in terms of subjectivity. The entity submitting the motions does not have to demonstrate a legal interest,²⁶ nor does it acquire the status of a party within the meaning of Article 28 of CAP. This means that motions for the study project and the local plan can be submitted by anyone – the issues of citizenship, legal status, or connections with the body conducting the planning procedure are of no legal significance.

Jakub Henryk Szlachetko describes the nature of the motion as “relatively effective” – the authority in charge of the planning procedure must familiarise itself with the motion, but is not obliged to include its content in the project.²⁷ The legislator does not specify the legal form in which the motions should be considered by the executive body of the commune, or whether it should justify the reason for not considering them. Certainly, there are no grounds for assuming that the body’s decision is an administrative decision.²⁸

²⁶ Cf. the judgment of the Supreme Administrative Court of 4 September 2009, II OSK 1359/08, Lex No. 597220.

²⁷ J.H. Szlachetko, *Partycypacja społeczna w lokalnej polityce przestrzennej*, Warszawa 2017, p. 119.

²⁸ *Ibidem*.

Pursuant to Article 7 of SPDA, there is no right to lodge a complaint with an administrative court against the decision. However, there is no reason why the motions in the form of a regulation of the executive body of the commune should not be considered.²⁹ Therefore, it should be assumed that the authority may limit itself to drawing up a list of applications in the form of a table indicating whether they were accepted or rejected.³⁰

3.3. Participation in the public debate

The public debate, which takes place during the work on the study project and the local plan, is one of the obligatory instruments of social participation in Polish spatial planning. At the same time, it is a form of public participation that is very underestimated. Few people take part in it,³¹ although it seems to be a perfect arena for exchanging views on the changes proposed in the projects of proceeded with planning acts. As indicated by the Provincial Administrative Court in Białystok, in view of the fact that the SPDA does not contain a definition of public debate and does not provide for any specific formula for it, nor does it contain any rules for holding it, it should be recognised that the form of discussion depends on its organiser, i.e. the executive body of the commune.³² The head of the commune, the mayor, or the president of the city should organise a public debate during the period of submitting the draft

²⁹ The judgment of the Supreme Administrative Court of 15 February 2007, II OSK 1622/06, Lex No. 334791.

³⁰ The judgment of the Provincial Administrative Court in Kielce of 6 April 2010, II SA/Ke 268/09, Legalis No. 248078.

³¹ See: judgments of the Provincial Administrative Courts, in which it was clearly indicated that no one came to the public debate: judgment of the Provincial Administrative Court in Rzeszów of 14 June 2017, II SA/Rz 1745/16, Lex No. 2352615; judgment of the Provincial Administrative Court in Poznań of 7 February 2018, IV SA/Po 1164/17, Lex No. 2519006; judgment of the Provincial Administrative Court in Poznań of 5 April 2018, IV SA/Po 1240/17, Lex No. 2352615.

³² Judgment of the Provincial Administrative Court in Białystok of 18 February 2014, II SA/Bk 514/13, Legalis No. 952340.

study or draft local plan for public inspection, which lasts not less than 21 days. During this time the draft must also be published on the commune council's website.

Everyone is entitled to participate in the public debate – just as in the case of motions, the administrative and legal status of the entity is irrelevant. It may be either the owner of a property affected by a future local plan or study, or a random person who is not familiar with the subject of the discussion.³³ The latter situation is, however, considered undesirable for the potential planning effects; however, there is no possibility of prohibiting anyone from participating in the public discussion on the grounds of the SPDA. However, it should be attended by an urban planner who prepared the a local plan or study project, because only he or she will be able to defend the solutions proposed by him or her in a substantive and material way.³⁴

Pursuant to § 12(15) of the Regulation of the Minister of Infrastructure of 26 August 2003 on the required scope of the local spatial development plan project,³⁵ the execution of activities specified in Article 17 of SPDA shall be documented by drawing up a documentation of planning works, consisting, e.g., of the minutes of the public debate on the solutions adopted in the local spatial development plan project. In relation to the study, in turn, a regulation of the Minister of Infrastructure has been issued.³⁶ The models of both minutes are identical. They are a formal confirmation of the discussion and reflect its findings and effects.

³³ K. Rokicka, *Konstrukcja dyskusji publicznej nad rozwiązaniami przyjętymi w projekcie studium uwarunkowań i kierunków zagospodarowania przestrzennego oraz miejscowego planu zagospodarowania przestrzennego*, in: *Partycypacja społeczna w samorządzie terytorialnym*, ed. B. Dolnicki, Warszawa 2014, p. 600.

³⁴ Judgment of the National Board of Appeal of 7 July 2011, KIO 1346/11, Legalis No. 358435; K. Rokicka, *Konstrukcja dyskusji publicznej*, p. 601.

³⁵ Journal of Laws No. 164, item 1587.

³⁶ Regulation of the Minister of Infrastructure of 28 April 2004 on the scope of the draft study of conditions and directions for spatial development of the commune (Journal of Laws No. 118, item 1233).

Public debate in Poland definitely does not fulfil its role at the moment – we are far from Finland, where Internet communication tools are widely used – websites and private groups on Facebook, Internet forums, or Q&A forms on the websites of communes or cities.³⁷ In Poland, there is a lack of extensive initiatives in this respect, which would make it possible for people unable to participate in the planning procedure to take part in a standard meeting (e.g. the disabled, the elderly, people living far from the offices of commune offices). The most important aspect of the debate is its public character and general accessibility – the authority does not have to take into account the positions expressed during the discussion, so there is no need to introduce additional restrictions in this respect. It is also connected with a general reduction of the impact of discussions as a tool of participation in planning acts projects.

3.4. Submitting comments on projects

Comments on projects are a participatory tool with a legal formula similar to motions – their functions, legal structure, and effectiveness are analogous.³⁸ However, certain differences make it necessary to conduct a separate analysis of the instrument of comments.

When announcing a project for public review, the executive body of the commune is also obliged to indicate the date on which legal and natural persons and organizational units without legal personality may submit comments on the project of the study or the local plan. Demonstration or lack of legal interest is irrelevant. However, it is necessary to contest the findings of the draft act in the submitted comment (Article 18(1) of SPDA) and to submit it in writing, while the form equivalent to a written comment is submission by means of an electronic inbox with a qualified electronic

³⁷ K. Rokicka, *Konstrukcja dyskusji publicznej*, p. 609.

³⁸ J.H. Szlachetko, *op.cit.*, p. 120.

signature, a trusted signature, or a personal signature (which results directly from Article 18(3) of SPDA).

The period for submitting comments may not be shorter than 14 days from the end of the presentation period. It is of a material and legal nature, and exceeding it results in leaving the comments unrecognised.³⁹

After the comments have been submitted, the head of the commune head, the mayor, or the president of the city shall consider them within no more than 21 days from the date of expiry of the deadline for their submission. Then (this applies only to the local plan) it introduces changes to the project resulting from the consideration of comments and, to the extent necessary, it repeats the agreements. At the end of this part of the planning procedure, the executive body of the commune presents the draft local plan to the commune council together with a list of comments that have not been taken into account.

As in the case of motions, the legislator did not specify in what form the comments should be resolved. This is an action of a planning authority not taken in the form of a separate act (resolution, ordinance, decision, or provision), which is only an element of planning proceedings. For this reason, the consideration or disregard of a comment submitted to the draft study or local plan cannot be the subject of an appeal to the administrative court.⁴⁰ Comments on the project are made not in order to obtain the authority's reply, as this is rather a secondary issue, but to use it to modify the planning act under preparation.⁴¹

Both the study and the local plan are adopted by the commune council, which at the same time has to decide on the manner of processing the comments. The decision concerns only the comments which have not been taken into consideration by the executive body of the commune. The SPDA does not indicate how the

³⁹ The judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 13 October 2017, II SA/Go 816/17, Lex No. 2383377.

⁴⁰ Cf. the decision of the Provincial Administrative Court in Kraków of 16 July 2010, II SA/Kr 283/10, Legalis No. 1128766.

⁴¹ *Ibidem*.

comments are to be resolved by the commune council, but only that they are to be attached to the resolution on the adoption of the planning act. In principle, there is no doubt that the decision must be of a substantive nature,⁴² and the consequence of assessing the validity of the submitted comment is its acceptance or rejection (disregard). From the literal wording of Article 12(1) in initio and Article 20(1) in initio SPDA it follows that the decision should be made simultaneously with the adoption of the study. Adoption of a resolution on the study or local plan and at the same time – on the decision on the manner of consideration of comments is not the correct practice.⁴³ The resolution on the act should be preceded by individual decisions of the council on the consideration of individual comments.⁴⁴ If the council rejects a larger number of comments, it is also the safest solution to consider each comment individually – in a separate resolution.⁴⁵ This is particularly important in a situation where the submitted comments contain proposals for various planning solutions and the commune council recognises the need to consider at least one of them.⁴⁶

At the same time, it should be pointed out that the commune council, when deciding on the manner of consideration of comments, is not obliged in any way to take into account the position of those who submit comments in the study or the local plan. It should be pointed out that in a situation where the authorities act

⁴² Judgment of the Supreme Administrative Court of 20 April 2010, II OSK 337/10, *Legalis* No. 248693; judgment of the Provincial Administrative Court of Olsztyn of 5 April 2012, II SA/Ol 150/12, *Legalis* No. 468733.

⁴³ K. Rokicka, *Uchwały rady gminy w procedurze planistycznej – wybrane problemy*, „Samorząd Terytorialny” 2015, No. 11, p. 18.

⁴⁴ Cf. the judgments of the Provincial Administrative Court in Olsztyn: of 22 November 2011, II SA/Ol 827/11, *Legalis* No. 416400 and II SA/Ol 641/11, *Legalis* No. 416397; of 5 April 2012, II SA/Ol 150/12, *Legalis* No. 468733; cf. Z. Niewiadomski (ed.), K. Jaroszyński, A. Szmyt, Ł. Złakowski, *op.cit.*, commentary on Article 12, Nb 2.

⁴⁵ See: M.J. Nowak, *Procedura i skutki sporządzenia miejscowego planu zagospodarowania przestrzennego w gminie*, „Nieruchomości” 2012, No. 9, p. 18.

⁴⁶ The judgment of the Provincial Administrative Court in Wrocław of 28 March 2007, II SA/Wr 99/07, *Legalis* No. 108436; cf. K. Rokicka, *Uchwały rady gminy*, *passim*.

on the basis and within the framework of the applicable law, and the mere taking into account of the individual interest would be contrary to the public interest or to the highly regarded value protected by the legislator, they cannot be accused of unlawful actions even if they did not take into account the motions or comments submitted during the proceedings.⁴⁷

4. Final remarks

Moving away from coal-based energy and increasing the share of renewable energy sources in order to reduce greenhouse gas emissions and energy consumption is a complex and multi-faceted process. It forces legislators and executive bodies to take action that is not always socially acceptable. From this point of view, national legal regulations should be appreciated, which, referring to the latest concepts of administrative procedure, guarantee the public participation in the process of planning and implementation of renewable energy systems in order to consult environmental and social aspects.

SUMMARY

Legal aspects of the public participation in the process of planning renewable energy in Poland

The transition from coal-based to low-emission power generation is a process that represents a real challenge for Polish society. At the national level, this dispute reveals a fundamental ambivalence consisting in the attachment to coal-based power generation and the urgent need to decarbonise the energy sector. This opposition gives rise to a conflict of interests of social groups, some of which are in favour of further generation of energy from coal, while others support the development of the use of renewable energy sources. The policy for the development of the

⁴⁷ Judgment of the Provincial Administrative Court in Kraków of 4 April 2018, II SA/Kr 97/18, Lex No. 2483900.

energy sector in Poland seems to take this phenomenon into account by proposing an evolutionary model of diversification of energy sources and solutions aimed at neutralizing social tensions in this area.

Keywords: renewable energy; renewable energy sources; social aspects; public participation; conflict of interests of social groups

STRESZCZENIE

Uwarunkowania prawne udziału społeczeństwa w procesie planowania energii odnawialnej w Polsce

Przejście od energetyki węglowej do niskoemisyjnej to proces stanowiący prawdziwe wyzwanie dla polskiego społeczeństwa. Na poziomie krajowym w sporze tym widoczna jest zasadnicza ambiwalencja polegająca na przywiązaniu do energetyki węglowej i pilnej potrzebie dekarbonizacji energetyki. Te przeciwstawne postawy rodzą konflikt interesów grup społecznych, z których jedne opowiadają się za dalszym wytwarzaniem energii z węgla, a inne popierają rozwój wykorzystania odnawialnych źródeł energii. Polityka rozwoju sektora energetycznego w Polsce zdaje się uwzględniać to zjawisko, proponując ewolucyjny model dywersyfikacji źródeł energii oraz rozwiązania mające na celu neutralizację napięć społecznych w tym obszarze.

Słowa kluczowe: energia odnawialna; odnawialne źródła energii; aspekty społeczne; udział społeczny; konflikt interesów grup społecznych

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