

## Conflicts of interest and values in the construction process

Konflikty interesów i wartości w procesie budowlanym

Конфликты интересов и ценностей в процессе строительства

Конфлікти інтересів і цінностей в процесі будівництва

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**Summary:** The law is and should be connected to values which constitute its basis. The reference to values is also significant in Building Law, in which the legislator has regulated the issues of the construction process.

The subject of the article is the analysis of the values and interests underlying the construction process, indicating the possibility of conflicts in this regard, while the aim is to indicate ways to resolve these conflicts and to demonstrate the nature of the provisions of Building Law in this regard.

Based on the analysis of the provisions of Building Law, it should be noted that the catalogue of values subject to protection in the construction process is very wide. However, the will to ensure the safety of constructed and used buildings, and consequently the safety of people and property, shall be considered the most important value. Due to the fact that these values may collide in the construction process, their protection requires public administration authorities to weigh them from the point of view of protecting the interests of an individual and the public interest. The preventive nature of the provisions of Building Law is to aid this.

Unfortunately, the above does not result directly from the provisions of the Act of 7 July 1994 – Building Law, however it may be interpreted from the provisions of the Act, which the legal dogmatic method and the analysis of jurisprudence and literature, which the analysis of the title issue was based on, prove to be helpful with.

**Key words:** values, building law, construction process, development title, principle of proportionality

**Streszczenie:** Prawo jest i powinno być związane z wartościami, które są jego podstawą. Odwołanie do wartości jest istotne również w Prawie budowlanym, w którym ustawodawca uregulował zagadnienia procesu budowlanego.

Przedmiotem artykułu jest analiza wartości i interesów leżących u podstaw procesu budowlanego ze wskazaniem możliwości zaistnienia konfliktów w tym zakresie, natomiast celem jest wskazanie sposobów rozwiązania tych konfliktów oraz wykazanie charakteru przepisów Prawa budowlanego w tym obszarze.

Na podstawie analizy przepisów Prawa budowlanego należy stwierdzić, że katalog wartości podlegających ochronie w procesie budowlanym jest bardzo szeroki. Za najważniejszą wartość należy uznać chęć zapewnienia bezpieczeństwa realizowanych i użytkowanych obiektów budowlanych, a w konsekwencji bezpieczeństwo ludzi i mienia. Z uwagi na fakt, iż w procesie budowlanym może dojść do kolizji tych wartości, ich ochrona wymaga wagi ich przez organy administracji publicznej z punktu widzenia ochrony interesu jednostki i interesu publicznego. Pomoc ma w tym zakresie prewencyjny charakter przepisów Prawa budowlanego.

Powyższe nie wynika niestety wprost z przepisów ustawy z dnia 7 lipca 1994 r. – Prawo budowlane, lecz można to wyinterpretować z przepisów ustawy, w czym pomocna okazuje się metoda dogmatyczno-prawa oraz analiza orzecznictwa i literatury przedmiotu, na których oparte zostały rozważania nad tytułowym zagadnieniem.

**Słowa kluczowe:** wartości, prawo budowlane, proces budowlany, prawo zabudowy, zasada proporcjonalności

**Резюме:** Закон связан и должен быть связан с ценностями, которые лежат в его основе. Ссылка на ценности актуальна и в «Строительном праве», в котором законодатель урегулировал вопросы строительного процесса.

Предметом статьи является анализ ценностей и интересов, лежащих в основе строительного процесса, с указанием возможности возникновения конфликтов в этой связи, а целью – указать пути разрешения этих конфликтов и продемонстрировать характер положений закона «Строительное право» в этой области.

Исходя из анализа положений закона «Строительное право», следует сделать вывод, что перечень ценностей, подлежащих защите в процессе строительства, очень широк. Наиболее важной ценностью следует считать стремление обеспечить безопасность строящихся и эксплуатируемых строительных объектов, а следовательно, безопасность людей и имущества. Поскольку эти ценности могут быть противопоставлены друг другу в процессе строительства, их защита требует от органов публичной администрации взвешивать их с точки зрения защиты интересов личности и общественных интересов. Превентивный характер положений закона «Строительное право» призван оказать помощь в этом отношении.

К сожалению, вышесказанное не следует напрямую из положений закона от 7 июля 1994 года – «Строительное право», но его можно интерпретировать на основе положений Закона, в чем помогает догматико-правовой метод, а также анализ судебной практики и литературы по данному вопросу, на котором базировалось рассмотрение заглавного вопроса.

**Ключевые слова:** ценности, строительное законодательство, строительный процесс, право застройки, принцип пропорциональности

**Резюме:** Право є і має бути пов'язане з цінностями, що лежать в його основі. Посилання на цінності є важливим і в законі Будівельне право, в якому законодавець врегулював питання процесу будівництва.

Предметом статті є аналіз цінностей та інтересів, що лежать в основі процесу будівництва, вказуючи на можливість виникнення конфліктів у цій сфері. Метою статті є вказати шляхи вирішення цих конфліктів та продемонструвати характер положень закону Будівельне право в цій сфері.

Виходячи з аналізу положень закону Будівельне право слід констатувати, що каталог цінностей, які підлягають охороні в процесі будівництва, є дуже широкий. Найголовнішою цінністю є прагнення забезпечити безпеку побудованих і експлуатованих будівель, а отже, безпеку людей і майна. Через те, що ці цінності можуть зіткнутися в процесі будівництва, їх захист вимагає від органів державного управління зважувати їх з точки зору захисту інтересів особи та суспільних інтересів. Допомогти в цьому має превентивний характер положень закону Будівельне право.

На жаль, вищезазначене не впливає безпосередньо з положень Закону від 7 липня 1994 р. – Будівельне право, його можна тлумачити з положень Закону, для чого можна використовувати догматико-правовий метод, аналіз судової практики та літератури, на якому ґрунтувалися міркування щодо титульного питання.

**Ключові слова:** цінності, Будівельне право, процес будівництва, право забудови, принцип пропорційності

## Introduction

Values<sup>1</sup> constitute the subject of analysis of axiology<sup>2</sup> which is a branch of philosophy and its subject of interest is the concept of value, its role in human life and

<sup>1</sup> 'Value' is a feature of what is good in some respect or principles and beliefs that are the basis of ethical norms adopted in a given community, cf. L. Drabik, E. Sobol, *Słownik języka polskiego PWN*, vol. 2. P-Ż, Warszawa 2007, p. 448.

<sup>2</sup> From Gr. αξιός – worthy, valuable; λογος – science. Axiology is a branch of philosophy, the science of values, the general theory of values. It studies the nature of values as well as sources and mechanisms

the division of values in relation to specific branches of science. The search for and analysis of values is also very important for legal sciences in which values, that constitute the basis of the applicable law, are increasingly sought. The law is closely related to the values that underpin a given legal order which is why it is referred to as the ‘axiology of law.’<sup>3</sup>

As rightly emphasised by J. Zimmermann, legal norms should be embedded in values. He defines the axiological justification as a situation “in which it is argued that a given norm should be considered binding since what a given norm prescribes is worthy of approval and what it prohibits – worthy of disapproval.”<sup>4</sup> From the axiological point of view, the cited author divides values into three categories: 1) a set of norms or a set of postulates that introduce universal values, lying outside the law, into administrative law; 2) non-external values, i.e. values created by the law or the Constitution of the Republic of Poland; 3) values protected by a specific branch of law, i.e. special values, which the law is created for.<sup>5</sup>

Referring to the third one of the indicated categories of values, it is necessary to consider what are the axiological foundations of building law, which values lie at its source and how is the law supposed to protect them, meeting the requirements of both public and individual interests. Thus, the aim of the article is to analyse the catalogue of values subject to protection in the construction process, regulated by the provisions of Building Law,<sup>6</sup> and to indicate conflicts, that may arise in this

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of value creation in the systematising and postulated aspect; establishes standards and evaluation criteria as well as the hierarchy of values. It studies the ontic status of values, relations with other beings, the social functioning of values in a given historical era, community and culture, J. Zimmermann, *Wprowadzenie*, in: *Wartości w prawie administracyjnym*, ed. J. Zimmermann, Warszawa 2015, p. 11; I. Bogucka, in: *System Prawa Administracyjnego Procesowego*, vol. 1. *Zagadnienia ogólne*, ed. G. Łaszczycza, Warszawa 2017, p. 507.

<sup>3</sup> S. Fundowicz, *Aksjologia prawa administracyjnego*, in: *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego Zakopane 24–27 września 2006 r.*, ed. J. Zimmermann, Warszawa 2007, pp. 633 ff.; K. Chochowski, *Aksjologia w prawie administracyjnym*, in: *Aksjologia prawa administracyjnego*, vol. 1, ed. J. Zimmermann, Warszawa 2017, pp. 49–50. “The axiology of administrative law” is sometimes spoken of P. Wszolek, *Aksjologia prawa administracyjnego a jego differentia specifica*, in: *Wartości w prawie administracyjnym*, pp. 87–119; I. Niżnik-Dobosz, *Prawo administracyjne jako mechanizm realizacji wartości*, in: *Aksjologia prawa administracyjnego*, vol. 1, pp. 113–124.

<sup>4</sup> J. Zimmermann, *Aksjomaty prawa administracyjnego*, Warszawa 2013, p. 74.

<sup>5</sup> I repeat after: K. Kokocińska, *Funkcjonalność i dysfunkcjonalność przepisów publicznego prawa gospodarczego z perspektywy kryterium wartości (zagadnienia ogólne)*, in: *Dysfunkcje publicznego prawa gospodarczego*, eds. M. Zdyb, E. Kruk, G. Lubeńczuk, 2018 [Legalis database].

<sup>6</sup> Act of 7 July 1994 – Building Law, consolidated text: Journal of Laws 2021 item 2351 with subsequent amendments. The concept of a construction process has not been legally defined. The doctrine distinguishes between the construction process in a narrower sense, which means only the activities related to the design, construction, maintenance and demolition of buildings, to the extent regulated

regard, and ways to solve them. The thesis of the work is the statement that the relationship of interests – of an individual investor and the public interest emerging in the construction process, is not based on the opposite but is complementary. The legal dogmatic method is going to be applied in the work.

## 1. The concept of value and its types

It is hard to define a value. It was pointed out by W. Tatarkiewicz who wrote that what looks like a definition of a value is rather a replacement of a word with another word that means more or less the same or is a periphrasis.<sup>7</sup> Z. Ziemiński notes that “this word has several meanings and several dozen variants of meaning.”<sup>8</sup> For E. Wnuk-Lipiński values are a polysemic concept and the multiple meanings given to this concept are associated with various research goals and sometimes with a different theoretical perspective within which the category of value is used. He adds that whenever we use this term, we have the impression that we know what we are talking about and we do not feel the need to define it precisely.<sup>9</sup>

In principle it is assumed that value means what is important and valuable for an individual, a given group or the society, what is desirable and associated with positive memories or experiences. Values are treated as a separate kind of being – good in the ideal sense – to the point of attributing the idea of good to some real existence.<sup>10</sup> However, sometimes values are also ranked – from negative, through the zero value, to positive values.<sup>11</sup>

T. Giaro acknowledges that the constitutive features of a value include their longer duration, hence the phrase ‘enduring values.’<sup>12</sup> This position could be adopted but only if the catalogue of values was limited to those more valuable from the

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by the provisions of the Act of 7 July 1994 – Building Law, together with executive acts to this Act, and in a broader sense additionally including the provisions referring to spatial development in its scope. In the article I refer to the narrow understanding of the “construction process” regulated by the provisions of the Building Law.

<sup>7</sup> W. Tatarkiewicz, *O filozofii i sztuce*, Warszawa 1986, p. 70, I repeat after: M. Michalik, *Wartości a potrzeby*, in: *Byt i powinność, czyli status i funkcje wartości*, ed. A.L. Zachariasz, Rzeszów 2005, p. 150.

<sup>8</sup> Z. Ziemiński, *Zarys zagadnień etyki*, Poznań–Toruń 1994, p. 27.

<sup>9</sup> E. Wnuk-Lipiński, *Socjologia życia publicznego*, Warszawa 2008, p. 180; A. Żurawik, *Interes publiczny w prawie gospodarczym*, Warszawa 2013, p. 106.

<sup>10</sup> Z. Ziemiński, *Zarys zagadnień...*, pp. 27–28; A. Żurawik, *Interes publiczny...*, pp. 106–107.

<sup>11</sup> M. Pieniżek, *Etyka sytuacyjna prawnika*, Warszawa 2008, pp. 135–148.

<sup>12</sup> T. Giaro, *Wartości w języku prawnym i dyskursie prawniczym*, in: *Preambuła Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2009, p. 16.

social point of view. However, if we were to assume that “any object, thing, type of activity, mental construction or states of consciousness may become a value,”<sup>13</sup> then durability would not be a constitutive feature of value in every case and not all values must be constituted by tradition and the community. Some of them may be incidental and individual. However, it should be assumed that the more valuable a value is from the social point of view, the greater its durability and embedding in tradition. Assuming that each value has to meet the feature of durability would narrow their catalogue down which is why it seems that durability cannot constitute a defining feature of values.<sup>14</sup>

In this context, it is worth recalling the word of K. Pałecki, according to whom values are temporal in nature, i.e., they change over time. Therefore, we may talk about contemporary or past or even future values. The duration of an evaluative relationship also makes it possible to talk about transient, ‘permanent’ or even ‘eternally lasting’ values, although the belief in the existence of such timeless values, which remain to be values in every situation and everywhere, seems doubtful.<sup>15</sup>

There are also objective and subjective values. Aristotle, among others, emphasised the objectivity of values by acknowledging that values exist regardless of how people assess them, regardless of their tastes or interests. He referred to truth, beauty and justice as examples. In turn, the subjectivist concept was preferred by, for example, Protagoras.<sup>16</sup>

Values may be treated relatively or absolutely which especially refers to moral values. Relativism makes it possible to assume that various equal evaluation criteria, of certain states of affairs as good or bad, are admissible. In turn, absolutism assumes the existence of only one proper criterion for making such judgments.<sup>17</sup> Speaking of values in the context of the law, the following are distinguished: the value of law (e.g., clarity, non-contradiction), values in law (e.g., common good, equality, etc.) and values protected by the law. These values and their content can be decoded through interpretation.<sup>18</sup>

The concept of values-goals, according to which it is assumed that goals regulate human behaviour, give order and meaning to life, help people create and materialise the future and stimulate long-term activities, is also interesting. Sometimes the

<sup>13</sup> K. Pałecki, *Prawoznawstwo. Zarys wykładu. Prawo w porządku społecznym*, Warszawa 2003, p. 78.

<sup>14</sup> A. Żurawik, *Interes publiczny...*, p. 107.

<sup>15</sup> K. Pałecki, *Prawoznawstwo...*, p. 79.

<sup>16</sup> A. Żurawik, *Interes publiczny...*, pp. 107–108.

<sup>17</sup> T. Giaro, *Wartości w języku prawnym...*, pp. 14–16; A. Żurawik, *Interes publiczny...*, p. 108.

<sup>18</sup> A. Mituś, *Wartości-cele realizowane przez prawo administracyjne*, in: *Aksjologia prawa administracyjnego*, vol. 1, p. 105.

goal is also identified with the main value for a given action.<sup>19</sup> Goals determine the direction of human activities and are of a diverse nature since they concern various spheres of an individual's life.<sup>20</sup> Although, it cannot be assumed that every goal is a value and that every value must be a goal. However, most often values are also goals. Not only are they facilities of desire, but they also constitute the basis for making concrete efforts to achieve, protect or multiply them. They can be characterised as values-goals then. Accepting such assumptions, only those of the values that are also values-goals can be the basis for the rationalisation of norms. However, values that no one intends to achieve remain only to be declared values.<sup>21</sup> On these grounds, it may be assumed that the concept of values-goals is understood as only those values, for the implementation of which appropriate 'values' have been created or are in the process of being created.<sup>22</sup>

## 2. Catalogue of values and interests protected in Building Law

A strong reference to values can be found in Building Law, where in Article 5 the legislator indicates a very extensive catalogue of values protected by the provisions of this Act during the construction process. Even though the protection of these values does not result directly from the provisions of Building Law, it is primarily in the interest of the investor and in the public interest.

In principle, the construction process is intended to serve the investor who exercises the development title, resulting from Article 4 of Building Law, by means of conducting an investment. This right is a subjective right<sup>23</sup> of a libertarian nature.<sup>24</sup> Freedom of development,<sup>25</sup> being an element of the constitutional right of

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<sup>19</sup> Z. Załęski, *Psychologia zachowań celowych*, Warszawa 1991, pp. 10–11.

<sup>20</sup> T. Kotarbiński, *Traktat o dobrej robocie*, Warszawa 1965, p. 45.

<sup>21</sup> K. Pałęcki, *Prawoznawstwo...*, pp. 86–87; A. Żurawik, *Wykładnia w prawie gospodarczym*, 2021 [Legalis database].

<sup>22</sup> A. Mituś, *Wartości-cele realizowane...*, p. 106.

<sup>23</sup> Z. Niewiadomski, T. Asman, *Wolność budowlana jako prawo podmiotowe inwestora*, in: *Księga Jubileuszowa Profesora Stanisława Jędrzejewskiego*, eds. H. Nowicki, W. Szwajdler, Toruń 2009, pp. 559–575.

<sup>24</sup> Z. Leoński, *Zasada wolności budowlanej i jej administracyjnoprawne ograniczenia*, in: *Rola materialnego prawa administracyjnego a ochrona praw jednostki*, ed. Z. Leoński, Poznań 1998, p. 139; Z. Leoński, M. Szewczyk, *Zasady prawa budowlanego i zagospodarowania przestrzennego*, Bydgoszcz–Poznań 2002, pp. 49–52.

<sup>25</sup> More on the topic of the freedom of construction cf. W. Jakimowicz, *Wolność zabudowy w prawie administracyjnym*, Warszawa 2012.

ownership,<sup>26</sup> may be subject to certain restrictions but they can only be introduced in an act (cf. Article 31 § 3 of the Constitution). As a consequence of the above, the investor's freedom is limited by regulations. This is confirmed by the content of the cited Article 4 of Building Law which guarantees everyone the right to develop land property, if they can prove the right to dispose of the property for construction purposes. The second condition is the compliance of the construction project with the regulations.<sup>27</sup> The restriction of this freedom results primarily from the provisions of the Building Law Act, which introduces administrative regulation of the construction process. It does so through, among others, the obligation to obtain a building permit. However, it should be remembered that any act, introducing restrictions on this process, must be interpreted restrictively.<sup>28</sup>

Restrictions on the freedom of construction and freedom of use of an already completed building facility are intended to protect the values referred to in Article 5 which include, among others, safety of life, property and health,<sup>29</sup> safety of building facilities,<sup>30</sup> ensuring a high technical standard of the construction process and the building facility,<sup>31</sup> ensuring an appropriate standard of living and health of third parties,<sup>32</sup> ensuring architectural and spatial order,<sup>33</sup> ensuring compliance of

<sup>26</sup> T. Bąkowski, *O wolności budowlanej de lege lata i de lege ferenda*, Gdańskie Studia Prawnicze 2015, vol. 33, p. 65; A. Ostrowska, *Rozważania nad istnieniem i istotą wolności zabudowy – głos w dyskusji*, Annales Universitatis Mariae Curie-Skłodowska. Sectio G 2017, vol. 64, no. 1, p. 157.

<sup>27</sup> Cf. S. Zwolak, *Zasady prawa budowlanego*, Studia Prawnicze KUL 2016, no. 3, pp. 188–189.

<sup>28</sup> M. Masternak-Kubiak, *Znaczenie zasady proporcjonalności w procesie inwestycyjno-budowlanym*, in: *Aktualne wyzwania ochrony wolności i praw jednostki*, eds. M. Jabłoński, S. Jarosz-Żukowska, Wrocław 2014, p. 314.

<sup>29</sup> A building facility should be designed and constructed in accordance with the basic requirements referring to, among others: fire safety and safety of use and accessibility of facilities (Article 5 § 1 point 1 letter b and d of the Building Law); occupational health and safety conditions (Article 5 § 1 point 5 of the Building Law); civil protection in accordance with the requirements of civil defence (Article 5 § 1 point 6 of the Building Law); conditions of safety and health protection of persons at the construction site (Article 5 § 1 point 10 of the Building Law). Cf. S. Zwolak, *Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 2 lipca 2018 r. (II OSK 3285/17, LEX nr 2523637)*, Studia Iuridica Lublinensia 2019, vol. 28, no. 2, p. 211.

<sup>30</sup> Judgment of the Constitutional Tribunal of 22 September 2009, SK 3/08, Legalis no. 169901.

<sup>31</sup> A building facility should be designed and constructed in accordance with the principles of technical knowledge (Article 5 § 1 of the Building Law).

<sup>32</sup> In accordance with the above, efforts should be made to ensure the supply of water and electricity and heat and fuel as well as the disposal of sewage, rainwater and waste, where necessary (Article 5 § 1 point 2 of the Building Law); occupational health and safety conditions (Article 5 § 1 point 5 of the Building Law) and health and safety of persons at the construction site (Article 5 § 1 point 10 of the Building Law).

<sup>33</sup> Judgment of the Constitutional Tribunal of 20 April 2011, Kp 7/09, Legalis no. 316375 and S. Zwolak, *Wartości jako przedmiot ochrony policji budowlanej*, Studia Iuridica Lublinensia 2017, vol. 26, no. 3, p. 137.



the construction project with the local spatial development plan,<sup>34</sup> ensuring access to technology,<sup>35</sup> environmental protection,<sup>36</sup> protection of people with disabilities<sup>37</sup> and protection of monuments.<sup>38</sup>

Taking into account the purpose of the construction process which is the proper implementation and then use of building facilities, the safety of people and property should be considered the most important value protected in this process.<sup>39</sup> It is supposed to refer to building facilities<sup>40</sup> and people at the construction site<sup>41</sup> and in the building facility.<sup>42</sup> The indicated values are protected at every stage of the construction process which is confirmed by the content of Article 5 of Building Law which defines the so-called basic requirements for the preparation and implementation of the investment and the use of the building facility.<sup>43</sup>

The above indicates that the public interest, which is a conceptually open category, should also be taken into account in the construction process. The concept of 'public

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<sup>34</sup> Z. Leoński, *Zasada wolności budowlanej i jej administracyjnoprawne ograniczenia*, in: *Kierunki rozwoju prawa administracyjnego. Podstawowe zagadnienia prawa budowlanego i planowania przestrzennego. Dziesiąte Niemiecko-Polskie Kolokwium Prawników Administratywistów, Poznań 8–12 września 1997 roku: referaty i głosy w dyskusji*, ed. H. Bauer, Poznań 1999, p. 359.

<sup>35</sup> A building facility should be designed and constructed in a way that ensures access to telecommunications services, in particular within the extent of broad Internet access (Article 5 § 1 point 2a of the Building Law).

<sup>36</sup> A building facility should be designed and constructed taking into account the requirements concerning, among others: appropriate energy performance of a building and rationalisation of energy use (Article 5 § 1 point 1 letter f of the Building Law).

<sup>37</sup> A building facility should be designed and constructed with the aim of ensuring the necessary conditions for the use of public utility facilities and multifamily housing by people with disabilities, including the elderly (Article 5 § 1 point 4 of the Building Law).

<sup>38</sup> A building facility should be designed and constructed in accordance with the requirements referring to, among others: the protection of objects entered into the register of monuments and facilities under conservation protection (Article 5 § 1 point 7 of the Building Law). Cf. K. Zalańska, *Interes indywidualny a interes publiczny – konflikt wartości w prawnej ochronie zabytków*, *Ochrona Zabytków* 2008, no. 2, pp. 83–87 and M. Błażewski, *Zasada wolności budowlanej w procesie budowlanym. Studium administracyjnoprawne*, Wrocław 2016, p. 68.

<sup>39</sup> D. Sypniewski, *Bezpieczeństwo jako wartość podlegająca ochronie w procesie budowlanym*, in: *Aksjologia prawa administracyjnego*, vol. 2, ed. J. Zimmermann, Warszawa 2017, pp. 595 ff.

<sup>40</sup> The safety includes: safety of construction (Article 5 § 1 point 1 letter a and Article 59a § 2 point 3 of the Building Law), fire safety (Article 5 § 1 point 1 letter b and Article 59a § 2 point 3 and Article 71 § 1 point 2 of the Building Law), safety of use (Article 5 § 1 point 1 letter c of the Building Law), flood safety (Article 71 § 1 point 2 of the Building Law). Cf. M. Błażewski, *Ochrona wartości w procesie budowlanym*, in: *Wartości w prawie administracyjnym*, p. 308.

<sup>41</sup> The construction process should ensure health safety (Article 5 § 1 point 10, Article 18 § 1, Article 20 § 1 point 1aa and 22 point 3a–3b of the Building Law).

<sup>42</sup> The owner or manager of the building facility is obliged to ensure the protection of people's lives in the facility building used (Article 61 point 2 of the Building Law).

<sup>43</sup> Cf. Judgment of the Supreme Administrative Court of 12 June 2014, II OSK 89/13, LEX no. 1519434.



interest' as a general clause and an unspecified concept has been analysed many times both in literature<sup>44</sup> and jurisprudence.<sup>45</sup> It was then pointed out that the concept of public interest is a broad and vague concept. It undoubtedly covers the general interest and not individual interests only. It provides the opportunity to pursue the general interest but with respect for individual interests. The public interest is not the sum of individual members of the community, although it is related to it. It also does not reflect the interest of the state and its authorities.<sup>46</sup> It is a conceptual category independent of the type of entity that holds it. Therefore, the premise of the public interest requires respect for the values that are common to the entire society.<sup>47</sup>

In each case, the notion of public interest will be subject to individual evaluation. However, it is worth emphasising that the interpretation by public administration authorities of vague terms, providing room for interpretation, cannot be perceived by them as consent to their unrestricted interpretation. The rules, principles and values of a given branch of law, legal system as well as socially accepted non-legal rules constitute a reference point for determining the content of the concept of this interest in the individual dimension.<sup>48</sup> The control of determining the meaning of the public interest is important because its incorrect interpretation may limit the content of the individual interest.<sup>49</sup>

### 3. Resolving conflicts of interest and values in the construction process

Due to the conflicting interests in the construction process, their collision is inevitable. Thus, it is necessary to weigh them. Not only does the already indicated

<sup>44</sup> A. Wróbel, *Interes publiczny w postępowaniu administracyjnym*, in: *Administracja publiczna u progu XXI wieku. Prace dedykowane prof. zw. dr. hab. Janowi Szreniawskiemu z okazji Jubileuszu 45-lecia pracy naukowej*, Przemysł 2000, pp. 701–702; Judgment of the Constitutional Tribunal of 25 February 1999, K 23/98, Legalis no. 43185; A. Żurawik, *Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym*, Europejski Przegląd Sądowy 2012, no. 12, p. 25; A. Żurawik, „*Interes publiczny*”, „*interes społeczny*” i „*interes społecznie uzasadniony*”. *Próba dookreślenia pojęć*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2013, vol. 75, no. 2, pp. 57–70; A. Wilczyńska, *Interes publiczny w prawie stanowionym i orzecznictwie Trybunału Konstytucyjnego*, Przegląd Prawa Handlowego 2009, no. 6, pp. 50–51.

<sup>45</sup> Judgment of the Voivodeship Administrative Court in Wrocław of 11 May 2022, IV SA/Wr 15/22, Legalis no. 2694022.

<sup>46</sup> M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa 1986, pp. 35–36.

<sup>47</sup> Judgment of the Voivodeship Administrative Court in Olsztyn of 2 June 2022, I SA/Ol 204/22, Legalis no. 2702614.

<sup>48</sup> W. Sz wajdler, *Ochrona prawna interesu indywidualnego w procesie budowlanym*, Toruń 1993, p. 30.

<sup>49</sup> E. Modliński, *Pojęcie interesu publicznego w prawie administracyjnym*, Warszawa 1932, pp. 3–4.

interest of the investor and the public interest meet in this process, but also the interest of third parties which results from their rights to the property adjacent to the property of the investor.<sup>50</sup> Hence, the investor's implementation of the development title to his own real estate is to take into account not only the interest of the investor but also the public interest protected by the law and the interest of third parties which are not directly involved in the implementation of the investment. Their interest is expressed primarily in the need to provide them with the development title to their own real estate. It should be borne in mind that the implementation of the development title may have a negative impact on the possibility of using a real estate belonging to other entities.

Therefore, the construction process is about the protection of the individual and public interest which expresses the values related to the implementation of the construction project.<sup>51</sup> Consequently, the principle of freedom of construction is limited by the public interest<sup>52</sup> which has to be taken into account together with respecting individual interests that may be violated during the implementation of the investment.<sup>53</sup> In a state ruled by law there is a need to protect the interests of each of these groups. However, the regulation of mechanisms for legal protection of these interests is not an easy task<sup>54</sup> because the construction process is a complex set of organisational and legal activities aimed at implementing the land development title by means of the proper construction of a building facility while ensuring the protection of the rights of the property owner and the public interest.<sup>55</sup> The limits of these rights and interests result not only from the provisions of the Act – Building Law but also from the implementing acts to this Act.

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<sup>50</sup> W. Sz wajdler, *Zniesienie instytucji pozwolenia na budowę a prawo zabudowy nieruchomości gruntowych*, Toruń 2009, pp. 73–74.

<sup>51</sup> Z. Leoński, *Zasada wolności budowlanej i jej administracyjnoprawne ograniczenia*, in: *Kierunki rozwoju prawa administracyjnego...*, p. 359; K.A. Wąsowski, *Zakres praw autorskich autora projektu zamierzenia architektoniczno-urbanistycznego*, in: *Prawne aspekty procesu inwestycyjnego*, eds. M. Cherka, F. Elżanowski, K. Wąsowski, Warszawa 2009, p. 234; K. Małysa-Sulińska, *Administracyjnoprawne aspekty inwestycji budowlanych*, Warszawa 2012, p. 26.

<sup>52</sup> L. Bar, *Pozwolenie budowlane (jako instrument kształtowania stosunków społecznych)*, *Przegląd Ustawodawstwa Gospodarczego* 1969, no. 2, p. 54.

<sup>53</sup> T. Asman, J. Dessoulavy-Śliwiński, E. Janiszewska-Kuropatwa, K. Kucharski, A. Plucińska-Filipowicz, J. Siegień, *Prawo budowlane. Komentarz*, ed. Z. Niewiadomski, Warszawa 2011, p. 6; S. Zwołak, *Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 13 września 2016 r. (II OSK 3028/14) dotycząca uwzględnienia interesu właściciela obiektu budowlanego oraz wartości prawem chronionych w przypadku zmiany sposobu użytkowania obiektu*, *Studia Iuridica Lublinensia* 2018, vol. 27, no. 2, p. 181.

<sup>54</sup> K. Kucharski, *Ochrona prawna interesu indywidualnego w procesie inwestycyjno-budowlanych dróg publicznych w Polsce. Zagadnienia administracyjnoprawne*, 2020 [Legalis database].

<sup>55</sup> W. Piątek, in: *Prawo budowlane. Komentarz*, ed. A. Gliniecki, Warszawa 2012, p. 56.

Of course one cannot assume that the public interest always has to be opposed to the interests of individuals. However, one must be aware that there may be conflicts between these interests.<sup>56</sup>

The best solution to potential conflicts would, of course, be to indicate the priority of a specific interest in legal provisions which would oblige public administration authorities to determine this priority by means of interpretation of the law. However, a situation in which the authority applying the law, without a requirement included in an act, gives priority to one of the interests by means of *a priori* interpretation, especially when the public interest would always be privileged, is not acceptable.<sup>57</sup>

Another way of resolving conflicts in the construction process is the pursuit of public administration authorities to harmonise those interest which do not exist in the relationship of superiority and subordination. As emphasised by the Constitutional Tribunal, 'the public interest' did not take precedence over the interest of an individual. Despite the fact that the implementation of construction investments is a manifestation of the exercise of constitutional freedoms and rights, it remains under the supervision of the state guaranteeing the protection of the public interest and the rights of third parties. Therefore, it is necessary for the authorities, applying the law in the construction process, to weigh these interests each time.<sup>58</sup>

The necessity to take care of the establishment of the right proportions, between the protection of the public interest and the restriction of the private interests of property owners exercising their development title, results from the above. Interference with the right of ownership must be reasonably and appropriately proportionate to the objectives, which certain restrictions are introduced for.<sup>59</sup> However, if it turned out that the scale of interference with the right of ownership was not justified by the public interest or is disproportionate to it, it could be considered that we are dealing with an abuse of public authority.

Proper balancing of private and public interests is a guarantee of proportionality of limiting individual rights in order to implement the public interests.<sup>60</sup> The indicated restrictions may not undermine the development title to one's own real estate. Therefore, it is necessary to maintain the proportion of interference with the freedom of

<sup>56</sup> M. Wyrzykowski, *Pojęcie interesu...*, p. 50.

<sup>57</sup> M. Zdyb, *Prawny interes jednostki w sferze materialnego prawa administracyjnego*, Lublin 1991, pp. 240–244.

<sup>58</sup> Judgments of the Constitutional Tribunal of 8 October 2007, K 20/07, Legalis no. 87214 and of 26 November 2007, P 24/06, Legalis no. 88880.

<sup>59</sup> Judgment of the Supreme Administrative Court of 17 April 2018, II OSK 1410/16, Legalis no. 1772004.

<sup>60</sup> Judgment of the Voivodeship Administrative Court in Kraków of 30 June 2021, II SA/Kr 547/21, Legalis no. 2615343.

construction e.g. in terms of formal and legal requirements of the investor, so that its essence is not violated. These requirements are intended to protect the public interest and the interests of third parties defined in the construction process. Additional requirements, besides the need to protect the above-mentioned interest groups, should be considered a manifestation of excessive interference in the freedom of construction.

When determining the rules for implementation of investments, one should strive to appropriately balance conflicting values and constitutional principles. The principle of this weighing of interests result directly from the principle of proportionality expressed in Article 31 § 3 of the Constitution of the Republic of Poland. It results from the above that interference with the sphere of the right to real estate must remain in a reasonable and appropriate proportion to the indicated purposes.<sup>61</sup> At the same time, one should be guided by care for the proper and harmonious coexistence of the members of the community which includes both the protection of the interests of individuals and specific social goods, including public property.<sup>62</sup>

The freedom to implement a construction project is limited mainly by means of legal regulatory measures.<sup>63</sup> The primary measure limiting the principle of the freedom of construction is the obligation to obtain a building permit.<sup>64</sup> Another means of protecting the legal interest is the requirement to notify the intention to carry out construction works. It enables the architectural and construction administration authority to assess whether the construction project complies with the law and whether it does not violate the public interest.<sup>65</sup> The violation of legal provisions protecting the public interest, by means of notifying the intention to carry out construction or construction works, results in the authority's obligation to raise an objection by means of an administrative decision.<sup>66</sup> However, the indicated regulatory measures should not be perceived as diminishing the libertarian nature of the development title. This is only a manifestation of preventive regulation, of the execution of construction works, aimed at determining the compliance of a construction project with the provisions of the law, the public interest and the interests of third parties, by public administration authorities.<sup>67</sup>

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<sup>61</sup> Judgment of the Supreme Administrative Court of 4 January 2010, II OSK 1708/09, Legalis no. 222560.

<sup>62</sup> See Judgment of the Constitutional Tribunal of 12 January 1999, P 2/98, Legalis no. 43175.

<sup>63</sup> Z. Leoński, *Zasada wolności budowlanej i jej administracyjnoprawne ograniczenia*, in: *Kierunki rozwoju prawa administracyjnego...*, p. 359; Judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of 2 April 2008, II SA/Go 99/08, Legalis no. 157882.

<sup>64</sup> Judgment of the Voivodeship Administrative Court in Kraków of 30 April 2008, II SA/Kr 159/08, Legalis no. 161188.

<sup>65</sup> Judgment of the Supreme Administrative Court of 27 April 2007, II OSK 688/06, Legalis no. 110428.

<sup>66</sup> Judgment of the Supreme Administrative Court of 24 March 2009, II OSK 398/08, Legalis no. 220295.

<sup>67</sup> W. Szwałdler, *Ochrona prawna interesu...*, p. 117.

#### 4. Preventive nature of the provisions of Building Law

As stipulated by the legislator, the principle of freedom of construction may only be executed in a manner consistent with legal provisions.<sup>68</sup> In this way it is indicated that the protection of values resulting from the provisions of Building Law is of a preventive nature. The applicable regulations indicate which values are subject to protection and the manner in which it is to be executed as well as the authorities obliged to ensure the protection of these values in the construction process.

The entities responsible for ensuring the protection of the values protected in the construction process are primarily administrative authorities operating in the field of construction, i.e., architectural and construction administrative authorities and construction supervision authorities and participants in the construction process<sup>69</sup> as well as persons responsible for the proper use and maintenance of building facilities, i.e., the owner and the building facility manager.

Preventive protection of fundamental values is ensured at every stage of the construction process. The basic duties in this respect at the investment design stage are performed by the architectural and construction administration authorities which issue building permit decisions and accept the notification of the intention to carry out construction works.<sup>70</sup> Then, the leading role in this respect is played by the construction supervision authorities which supervise the proper implementation of the investment. The indicated authorities are obliged to supervise and control compliance with the provisions of the Act – Building Law.<sup>71</sup>

Other entities that ensure protection of the values regulated by Building Law are the participants of the construction process, i.e., the investor who is responsible for organising the construction process, taking into account the safety and health protection rules contained in the regulations, and persons performing independent technical functions in construction engineering, i.e., persons with appropriate knowledge confirmed by building qualifications.<sup>72</sup> The first person in this regard is

<sup>68</sup> *Prawo budowlane z umowami w działalności inwestycyjnej. Komentarz*, ed. H. Kisilowska, Warszawa 2008, p. 29.

<sup>69</sup> According to Article 17 of the Construction Law, the participants in the construction process are: the investor, the investor's supervision inspector, the designer and the construction manager or works manager.

<sup>70</sup> J. Smarż, *Pozwolenie na budowę jako wyraz troski o dobro wspólne*, in: *Służąc dobru wspólnemu*, eds. K. Kułak-Krzysiak, J. Parchomiuk, Lublin 2016, pp. 251–266 and J. Smarż, *Pozwolenie na budowę versus „zgłoszenie z projektem” w świetle obowiązujących przepisów*, in: *Nieruchomości – aktualne problemy prawne*, ed. J. Smarż, Radom 2016, pp. 134–147.

<sup>71</sup> Article 81 § 1 point 1 of the Building Law.

<sup>72</sup> J. Smarż, *Zmiana profesjonalnych uczestników procesu budowlanego w trakcie realizacji inwestycji*, *Buildownictwo i Prawo* 2018, no. 3, pp. 3–5 and eadem, *System nadawania uprawnień budowlanych oraz*

the designer who develops a construction design that meets the basic requirements of Article 5 of Building Law.<sup>73</sup>

The construction and works manager and possibly the investor's supervision inspector, if appointed, ensure compliance with the values protected by the provisions of Building Law at the investment implementation stage. These entities supervise the safety and health protection during construction works.

The last stage of the construction process is the stage of maintaining the building facility during which the owner and manager of the building facility are responsible for preventing the emergence of any threats to the values protected by the provisions of Building Law.<sup>74</sup> The basic method of preventive action of the indicated entities, within the framework of the maintenance of building facilities, is the obligation to carry out periodic inspections of the technical condition of the building facility. The conditions for proper maintenance of a building facility result primarily from Article 61 of Building Law which requires ensuring safe use of the facility, preventing the occurrence of a threat to human life and health, property safety or the environment. The obligation to conduct ongoing periodic inspections and repairs is one of the elements of preventing the emergence of a threat. Implementation of these obligations is subject to control by construction supervision authorities.

The freedom to maintain a building facility is limited by legal provisions which impose appropriate obligations on the owner or the manager. Their implementation is aimed at protecting: the life and health of people, safety of property and the environment, proper technical condition and aesthetic of the building facility.<sup>75</sup> The obligations of these entities result directly from the law or administrative decisions.

## Conclusion

The main purpose of the construction process, regulated by the provisions of the Act – Building Law, is the proper implementation of the investment project and then maintaining the building facility in the proper technical and aesthetic condition. This process, as it results from the analysis of the title issue, is subject to

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*nadzór nad wykonywaniem zawodu inżyniera jako wyraz troski o bezpieczeństwo publiczne*, in: *Aksjologia prawa administracyjnego*, vol. 2, pp. 619–629.

<sup>73</sup> Article 5 of the Building Law.

<sup>74</sup> Articles 61–72a of the Building Law.

<sup>75</sup> M. Błażewski, *Zasada wolności użytkowania obiektu budowlanego w procesie jego utrzymania*, *Folia Iuridica Universitatis Wratislaviensis* 2015, vol. 4, no. 1, p. 320.

significant restrictions resulting from the applicable regulations. They introduce, among others, restrictions on the possibility of undertaking construction works, the obligation to meet the basic requirements during design and construction as well as the maintenance of building facilities and requirements regarding the principles of organising the construction process.

The indicated restrictions have been introduced in order to protect values, the catalogue of which is very wide, although unfortunately it does not result directly from the content of the provisions of Building Law. It can only be interpreted from Article 5 of the Act. The safety of people and property is to be considered the primary value that is to be protected in the construction process.

The analysis of the provisions of Building Law leads to the conclusion that these restrictions are not only in the interest of the investor but also, and perhaps above all, in the public interest. It may seem that we are dealing with a conflict of these interests in this case, however in reality it cannot be assumed that the relationship of these interests is always based on the opposite. The implementation of the public interest brings benefit and ensures security for the investor himself as well. In the event of conflicts arising during the construction process, their resolution is the responsibility of public administration authorities that ensure compliance with the provisions of Building Law. Attention should also be paid to the preventive nature of the provisions of Building Law which are intended to eliminate potential conflicts.

*Translated by Monika Zielińska*

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