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Commercial operations of municipalities in housing development. On the conflict between self-reliance and serving people and sufficiency of law

Działalność gospodarcza gminy w zakresie budownictwa mieszkaniowego. O konflikcie między samodzielnością i służbie ludziom a legalnością

Хозяйственная деятельность гмины в сфере жилищного строительства. О конфликте между самостоятельностью и служением населению и законностью

Господарська діяльність громади в галузі житлового будівництва. Про конфлікт між незалежністю та служінням людям і законністю

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Summary: This article deals with the relationship between three specific problems. These problems include legal issues related to running a business by municipalities, activities of municipalities in housing construction and municipal housing programmes (MHPs) as a manifestation of the legal and organizational independence of municipalities. In order to obtain reliable results of research in this area, the author decided to analyse the applicable standards and regulations regarding these issues and the views of the doctrine. In both cases, he observed that there are no detailed legal regulations relating to this issue, and thus there is also no in-depth analysis of this problem in the doctrine of legal sciences. All this resulted in the formulation of two types of conclusions. The existing regulations were assessed with the indication of their significant shortcomings. Moreover, conclusions were formulated regarding changes that the legislator should introduce to the Polish legal system to aid municipalities in meeting the housing needs of local communities. This work uses the method of analysing the legal text and, to a limited extent, the dogmatic approach.

Key words: municipality, commercial operations, municipal economy, housing development, legitimacy of operations

Streszczenie: Artykuł jest poświęcony relacjom, jakie zachodzą w ramach trzech problemów szczególnych. Należą do nich: problemy prawne związane z prowadzeniem działalności gospodarczej przez gminy, działanie gmin w zakresie budownictwa mieszkaniowego oraz gminne programy mieszkaniowe jako przejaw samodzielności prawnej i organizacyjnej gmin. Aby otrzymać miarodajne wyniki prac badawczych, Autor przeanalizował obowiązujące normy i przepisy dotyczące tych kwestii oraz poglądy doktryny. W obydwu przypadkach zaobserwowano brak szczegółowych regulacji prawnych odnoszących się do tej problematyki, a co za tym idzie brak pogłębionej analizy tej problematyki w doktrynie nauk prawnych. To doprowadziło do sformułowania dwóch rodzajów wniosków. Oceniono regulacje obowiązujące, wskazując ich istotne mankamenty i braki, a także sformułowano wnioski w zakresie tego, jakie zmiany powinien wprowadzić do polskiego systemu prawnego ustawodawca, aby regulacje te ułatwiały funkcjonowanie gmin w zakresie zaspokajania potrzeb mieszkaniowych wspólnoty samorządowej.

Słowa kluczowe: gmina, działalność gospodarcza, gospodarka komunalna, budownictwo mieszkaniowe, legalność działania

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Резюме: Данная статья посвящена отношениям, возникающим в рамках трех конкретных проблем. К ним относятся: правовые проблемы ведения хозяйственной деятельности гминами, действия гмин в сфере жилищного строительства и муниципальные (гминные) жилищные программы как проявление правовой и организационной самостоятельности гмины. Для получения авторитетных результатов исследовательской работы, автор проанализировал существующие нормы и правила, касающиеся этих вопросов, а также воззрения доктрины. В обоих случаях было отмечено отсутствие детальных правовых норм, касающихся данного вопроса, и, соответственно, отсутствие глубокого анализа данной темы в доктрине юридических наук. Это привело к формулированию двух типов выводов. Была проведена оценка действующих регулирований с указанием их существенных недостатков и недоработок, а также сформулированы выводы о том, какие изменения должен внести законодатель в польскую правовую систему, чтобы эти регулирующие положения способствовали функционированию гмин в удовлетворении жилищных потребностей населения местного сообщества.

Ключевые слова: гмина, хозяйственная деятельность, коммунальное хозяйство, жилищное строительство, законность деятельности

Резюме: Стаття присвячена взаємозв'язкам, що виникають у межах трьох конкретних проблем. До них відносяться: правові проблеми, пов'язані з веденням господарської діяльності громадами, діяльність громад у сфері житлового будівництва та громадські житлові програми як прояв правової та організаційної самостійності громад. Для отримання достовірних результатів дослідження автор проаналізував чинні норми та нормативні акти щодо цих питань, а також доктрину. В обох випадках спостерігалася відсутність детального регулювання цього питання, а отже, відсутність поглибленого аналізу теми в доктрині правових наук. Це призвело до формулювання двох типів висновків. Було проведено оцінку існуючих нормативних актів, вказано на їх суттєві недоліки, а також сформульовано висновки щодо того, які зміни законодавець має внести до польської правової системи, щоб ці нормативні акти сприяли роботі гмін щодо задоволення житлових потреб громадської спільноти самоврядування.

Ключові слова: громада, господарська діяльність, міське господарство, житлове будівництво, законність дії

Introduction

The efficiency of operations of individual entities within the framework of public administration is a combination of several general factors, among which we should indicate the following basic components: explicitly specifying the entity performing operations, clearly describing the task to be completed and the implements to realize said task or transfer of appropriate financial and staff-organizational assets to be used to perform the task.

Among the plenitude of tasks which raise genuine concern, the ones related to satisfying housing needs emerge. The adopted model of operations divides these tasks between the government and the local self-governments. Furthermore, it should be indicated that the realization of such tasks involves various institutional and legal implements.

The aforementioned facts resulted in the ambiguity of the presented model of operations and said model lacking explicit statutory regulations, which would specify how a municipality, being one of the entities indicated by the legislator to satisfy

housing needs, should operate. Moreover, a question emerges of whether we are dealing here with commercial operations of municipalities or public-benefit activities. There are also significant factual issues related to such operations arising from the launch of investments in this area as well as the measures to be taken once residents live in such housing. This article aims to organize the legal issues related to running a business in the context of implementing municipal housing programmes (hereinafter: MHPs). This objective results from the fact that the Polish legislator has not yet fully regulated this issue. Therefore, municipalities must rely on partial regulations, which may lead to unintentional errors in implementing these programmes.

1. Satisfying housing needs as a task of municipalities

In the Polish legal system, a municipality is the basic organizational unit of local self-government. Therefore, in this case, we are dealing with a unit the closest to a citizen and, thus, one that performs all social tasks within the local reach that are not reserved by other branches of local self-government or state administration.[1] The above statement concerns the implementation of the constitutional principle of decentralization.[2]

The aforementioned fact results in the legislator bearing the obligation consisting of clearly specifying what tasks a given unit of local self-government will perform. A relevant list of such taks was stipulated in Article 7 of the Municipal Self-Government Act. The legislator clearly indicated that meeting a community's collective needs lies within a municipality's responsibilities and that these tasks cover, among others, the matters regarding municipal housing development.[3] Realization of these

1 Cf. Article 163 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dziennik Ustaw] 1997 no. 78, item 483 as amended, in relation to Article 6 (1) of the Act of 8 March 1990 on Municipal Self-Government, consolidated text: Journal of Laws 2023 item 40 as amended (hereinafter: MSGA).

2 The decentralization should be understood as "distributing administrative tasks (operations) among various organizations which are legal persons under public law," see S. Fundowicz, *Decentralizacja administracji publicznej w Polsce*, Lublin 2005, p. 28. These organizations are autonomous legal entities (churches and religious organizations, higher education institutions, the central bank), units of local self-government, units of special self-government or other decentralized entities (corporations governed by public law, publicly owned establishments or foundations governed by public law).

3 Cf. Article 7 (1) (7) of the MSGA.

tasks, their scope and the list of relevant implements are included in specific acts of substantive administrative law.

We should primarily refer to human needs in the search for the roots of satisfying housing needs. In reference to human needs and their hierarchy, psychology turns to Maslow's hierarchy of needs. Maslow described human needs by creating a pyramid of needs. This pyramid is founded on physiological needs, including food, shelter, clothes and procreation. Their character influences behaviour to the greatest degree – people work to meet these needs in the first place. For a person who has not satisfied their basic needs, all other needs disappear or are of secondary importance.[4]

Therefore, the need for shelter or housing is a basic need of human beings which determines their actions; only satisfying this basic need enables a person to consider higher needs, i.e. the need for safety, belonging and love, esteem or self-actualization. In our search for the legal sources to meet this need, we will have to explicitly refer to the axiological foundations for formulating the binding standards and legal provisions in this particular manner. Firstly, we should refer to the norms and precepts of the basic law. The Consitution clearly indicates that "Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen."[5]

The quoted rule is general in character. We should primarily notice that the Constitution's take on the issue is a result of the housing problems typical of our country, where such issues are far from being resolved. The social importance of these issues is so significant that they were reflected in the Constitution.[6] The above precept does not establish the right to housing and does not impart upon this right the nature of a legal right.[7] It does not formulate the strategic priorities of state policies, nor does it decide on the manner of implementation of said policies or oblige the state to guarantee housing to every citizen.[8] In this case, we are dealing with

4 A. Maslow, *Motywacja i osobowość*, Warszawa 2009, pp. 63–65.

5 Article 75 (1) of the Constitution of the Republic of Poland. When describing the issue, we must bear in mind that biological needs are necessary for survival, and psychological needs come into play once biological needs are satisfied. Gradation of needs is contractual. Nevertheless, we have to assume that basic needs are pursued until their satisfaction. Only after that will a human being work towards satisfying other needs using their talents and abilities. Meeting these needs is not contradictory. Here, we are dealing with mutual supplementation, which constitutes human development; for more information on the issue, see A. Maslow, *W stronę psychologii istnienia*, Poznań 2004, p. 39.

6 W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2007, p. 71.

7 Judgment of the Constitutional Tribunal of 29 September 2003, K 5/03, LEX no. 80985.

8 Cf. Judgment of the Constitutional Tribunal of 12 January 2000, P 11/98, LEX no. 39282; Judgment of the Constitutional Tribunal of 17 March 2008, K 32/05, LEX no. 358051 or Judgment of the Constitutional Tribunal of 17 December 2008, P 16/08, LEX no. 467442.

a programmatic norm which defines the state goals concerning housing policy; however, no exemplary measures to implement it are indicated. Within the framework of policies aimed to meet the housing needs of citizens, we should, in particular, indicate counteracting homelessness,[9] supporting the development of social housing consisting of erecting social/subsidized housing and adapting the existing buildings for this purpose as well as supporting the actions of citizens aimed at securing own housing.[10] The presented list should be perceived as the minimal obligations of the state (public authorities).[11]

The act of municipalities satisfying housing needs correlates with the obligations concerning "municipal housing development." These needs should be met twofold – through utilizing the existing housing infrastructure and new opportunities in this area through erecting new housing units to satisfy housing needs. Therefore, the measures concerning housing development will be one of the implements of meeting housing needs.

2. Municipal housing programmes as a form of satisfying housing needs

The legislator's statement that meeting housing needs is the task of public authorities in Article 75 (1) of the Constitution resulted in the invoked constitutional norm referring to not only the state and its bodies but to local self-governments.[12] Measures in this field may be implemented at the central or local level directly (e.g. tax credits) or indirectly (e.g. subsidies).[13]

This statement can be not only expanded but also defined more precisely by indicating that in line with Article 75 (1), the entities obliged to take action are not only the legislative bodies but also the bodies applying said law, including courts[14]

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9 Here we should refer to human dignity which can be severely damaged by homelessness as a social phenomenon, see M. Florczak-Wątor, *Obowiązek ochrony beneficjentów prawa do mieszkania jako „innego prawa majątkowego" w rozumieniu art. 64 ust. 1 i 2 Konstytucji RP*, Gdańskie Studia Prawnicze 2018, vol. 40, p. 174.

10 M. Florczak-Wątor, *Art. 75. Zaspokajanie potrzeb mieszkaniowych*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, 2nd ed., 2021 [LEX database].

11 Judgment of the Supreme Court of 8 September 2020, V CSK 532/18, LEX no. 3051766.

12 W. Sanetra, *Prawo do pracy, polityka zatrudnienia i polityka rynku pracy*, in: *System Prawa Pracy*, vol. 8. *Prawo rynku pracy*, ed. M. Włodarczyk, Warszawa 2018, p. 171.

13 M. Wierzbowski, *Prawo administracyjne*, Warszawa 2009, p. 372.

14 Such entities must operate within the framework laid down by regulations and the material and legal premises for resolving the issues projected in such regulations, e.g. in reference to adjudicating the

and administrative bodies (including local self-government units). These obligations may also be expanded to private entities such as housing cooperatives because they bear special legal status given their role in the realization of tasks indicated in Article 75 (1) and constitute "one of the forms of realization of the task consisting of satisfying housing needs of an individual,"[15] whereby the role of housing cooperatives is instrumental.[16] However, transferring these obligations in full to private persons[17] or realization of these tasks in violation of the existing ownership rights of housing cooperatives is unacceptable.[18]

The forms which can be described as hybrid are a solution which fits in with the implementation of the state policy in the discussed area; in the case of these forms, we are dealing with the participation of the Treasury, the National Real Estate Assets and local self-government units. Historical examples of such cooperation include social housing associations (SHAs), and a current example is social housing initiatives (SHIs).[19]

However, until now, municipal housing programmes were not comprehensively regulated at the statutory level, unlike, for instance, the municipal tasks concerning public roads[20] or the responsibilities regarding the education system.[21] In essence, the legislator provides no comments regarding this aspect. It appears that the causes for this state of affairs lie primarily in the incidentalness of such solutions, where only several municipalities in our country decided to launch such programmes simultaneously with providing other forms of housing support. Secondly, this may be due to the fact that MHPs would become a competition to the already existing programmes of the state administration or within the framework of SHAs (formerly) and SHIs (currently). Nevertheless, while rejecting the assumptions in this area, we may explicitly indicate that the lack of strict statutory standards requires a municipality to operate on the basis of the existing standards and regulations. This, in turn, results in expanding independence and self-governance of a municipality in this

right of the evicted tenant to social housing, see Resolution of the Supreme Court of 19 May 2000, III CZP 4/00, LEX no. 40098.

15 Cf. the aforementioned Judgment of the Constitutional Tribunal of 17 December 2008, P 16/08.

16 L. Garlicki, M. Derlatka, *Art. 75*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, ed. L. Garlicki, M. Zubik, 2nd ed., 2016 [LEX database].

17 Judgment of the Constitutional Tribunal of 10 October 2000, P 8/99, LEX no. 44406.

18 Judgment of the Constitutional Tribunal of 29 May 2001, K 5/01, LEX no. 48040.

19 This entity operates under Article 23–33 of the Act of 26 October 1995 on social forms of housing development, consolidated text: Journal of Laws 2023 item 790 as amended (hereinafter: SFHD Act).

20 Cf. Article 7 (1) (2) of the MSGA in relation to Article 7 of the Act of 21 March 1985 on national road network, consolidated text: Journal of Laws 2023 item 645.

21 Cf. Article 7 (1) (8) of the MSGA in relation to Article 8 (15) and Article 10 (1) of the Education Law Act of 14 December 2016, consolidated text: Journal of Laws 2023 item 900 as amended.

area but, simultaneously, may become a trap leading to acting without a legal basis, i.e. not meeting the legitimacy of operations.

These programmes may be implemented using two models: through the participation of a private entity (a developer) or by a municipality implementing the programme independently using its assets and means. In the first model, it is possible to use the know-how of a private operator who transfers some of the newly constructed residential units to the municipality to satisfy the housing needs of the local community in exchange for granted real estate, for instance.[22] Thus, it appears that the public-private partnership is an appropriate legal form for such operations.[23]

Implementation of MHPs by companies established for this purpose or existing ones[24] and not by the budgetary entities[25] or the municipalities themselves appears to be a proper solution.[26] A municipality transfers the risk related to the implementation of a programme,[27] particularly the financial risk, to a subordinate yet financially self-sufficient entity concerning obligations for which the municipality is liable only up to the value of the transferred assets instead of being liable without limitations as the case would be if a budgetary entity or municipality implemented an MHP directly.

The analysis of MHPs enables us to ascertain that municipalities carry out these programmes as independent operations. The lack of dedicated acts results in municipalities developing these programmes independently. These programmes target the residents of municipalities and persons interested in changing their place of residence and moving to a given municipality. Thus, an attractive form of financing is being introduced under which the deposit payments made by programme participants are used by the entity implementing the programme to cover the financial

22 A situation in which the newly developed residential units (or the residential units transferred by the founding municipality), frequently located in commercially desirable areas, are rented on a commercial basis, and the funds collected in such manner are allotted towards statutory activities, i.e. "housing development, renovation and modernization of facilities destined for satisfying housing needs," is a different example, see U. Legierska, *Działania gminy na rzecz zaspokojenia potrzeb mieszkaniowych jej członków*, in: *Prawne problemy samorządu terytorialnego z perspektywy 25-lecia jego funkcjonowania*, eds. B. Jaworska-Dębska, R. Budzisz, Warszawa 2016, p. 229.

23 The Act of 19 December 2008 on public-private partnership, consolidated text: Journal of Laws 2023 item 30 as amended.

24 Cf. Article 9 (1) of the Municipal Economy Act of 20 December 1996, consolidated text: Journal of Laws 2021 item 679 (hereinafter: MEA).

25 Cf. Article 2 of the MEA.

26 For more information on the forms of engaging in municipal economy, see W. Gonet, *Uwagi o formach prowadzenia gospodarki komunalnej*, Samorząd Terytorialny 2008, no. 7–8, p. 65.

27 It appears that the indicated risk concerns financial, organizational, technical and legal issues.

obligations in this area. These issues should be governed in detail by appropriate regulations for allotting residential units under an MHP. This solution should not be combined with renting premises, which are a part of the housing composition of municipal resources.[28]

3. Engaging in commercial operations concerning municipal housing programmes

In reference to the Constitution, we should indicate that local self-government units carry out public tasks not reserved by other public authorities under relevant acts or legislation.[29] The legislator simultaneously decided that the broadest possible range of activities of these units is tied to the operations of municipalities which perform all public tasks not reserved by other units of local self-government.[30] Under such conditions, we are dealing with a reflection of the principle of subsidiarity expressed in the preamble to the Constitution, stating that public tasks should be performed at the lowest level and their legal and organizational transfer should be effected solely to improve organizational and technical capabilities of their performance.[31] The principle of subsidiarity should lead to the greatest possible reinforcement of the competences of local self-government.

Realization of the statutory tasks of a municipality consistent with the principle of subsidiarity is reflected in the statement that a unit is obliged to engage in commercial operations related to the implementation of the tasks pertaining to meeting the collective needs of its residents.[32] The catalogue of these tasks is indicated in Article 7 (1) of the MSGA, which presents the exemplary list of a municipality's

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28 Supervising authority's Resolution of the Podlasie Governor of 26 October 2020, NK-II.4131.110.2020. BG, LEX no. 3233922.

29 Article 163 of the Constitution of the Republic of Poland.

30 Article 164 (3) of the Constitution of the Republic of Poland.

31 Cf. M. Małecka-Łyszczek, *Zasada subsydiarności jako zasada ogólna prawa administracyjnego*, in: *Jednostka w demokratycznym państwie prawa*, ed. J. Filipek, Bielsko-Biała 2003, p. 368; I. Lipowicz, *Samorząd terytorialny XXI wieku*, Warszawa 2019, p. 141; D. Milczarek, *Subsydiarność – próba balansu*, in: *Subsydiarność*, ed. D. Milczarek, Warszawa 1998, p. 319.

32 A public matter should be understood as "any activity of public authorities (and their bodies), persons performing public functions and self-governments as well as certain activities of other persons and organizational units which are related to implementing public tasks and managing public assets understood as public funds within the meaning of regulations on public funds," see H. Izdebski, *Samorząd terytorialny. Podstawy ustroju i działalności*, Warszawa 2004, p. 209.

responsibilities,[33] including municipal housing development and, thus MHPs. In the case of the indicated area, we should also bear in mind that the operations of a municipality consist of both realizations of public tasks and activities extending beyond said tasks, i.e. commercial operations.[34]

When assessing whether a given type of operation of a municipality consists only of performing public tasks or is a commercial operation, we should individually consider each case. A guide of sorts in this regard is the statement that "if a municipality performs public tasks (public administration tasks) for the benefit of the general populace using legal means of an authoritative nature appropriate for a state authority, the municipality performing said tasks acts as a public authority body and does not engage in commercial operations."[35] Furthermore, under Article 9 (2) of the MSGA, a municipality or other municipal legal person may engage in commercial operations exceeding the scope of public utility tasks only in the cases stipulated in the MSGA. The aforementioned is supplemented by the assertion that the public utility tasks[36] are own tasks of a municipality carried out to continuously satisfy the collective needs of the population on an ongoing basis by rendering commonly available services.

In light of the above facts, it appears that the operations of municipalities concerning local housing programmes do not fall under public-benefit activities but under commercial operations. This is potentially confirmed by an allusion to the MEA, according to which a municipality can engage in commercial operations, e.g. using a limited liability company to carry out MHPs which are in each instance realized by municipal companies, existing or specially established for this purpose in the area of public-benefit activities.[37] The statement that Article 9 (2) of the MSGA stipulates that, in principle, a municipality implements its tasks under commercial operations,[38] provided that its tasks can be an object of commercial and non-commercial activity and the commercial operations of a municipality

33 Ruling of the Voivodeship Administrative Court in Gliwice of 30 March 2020, III SA/Gl 1102/19, LEX no. 3015326.

34 Ruling of the Voivodeship Administrative Court in Gorzów Wielkopolski of 30 October 2019, I SA/Go 589/19, LEX no. 2742557.

35 Ruling of the Voivodeship Administrative Court in Warszawa of 21 April 2021, IV SA/Wa 2661/20, LEX no. 3184738.

36 Article 9 (4) of the MSGA.

37 For more on this form, see G. Kozieł, *Forms of Commercial Companies and Partnerships Designed for Municipal Services Management by the Commune in Polish Law: The Legislation as It Stands (de lege lata) and as It Should Stand (de lege ferenda)*, Lex Localis 2020, vol. 18, no. 4, pp. 675–689.

38 Ruling of the Administrative Court in Szczecin of 26 March 2019, I AGa 215/18, LEX no. 2668198.

cannot exceed realizing public-benefit tasks unless stipulated otherwise elsewhere,[39] reinforces this thesis. We should also bear in mind that "engaging in commercial operations cannot obstruct and hinder public goals and cannot excessively occupy a municipality; the fact that specific public tasks entrusted to a municipality are related to developing and establishing conditions for commercial operations conducted by other entities is also not without significance."[40]

Adopting the assumption that MHPs are commercial operations, we must juxtapose said assumption with the features of commercial operations indicated in Article 3 of the Act of 6 March 2018 – Entrepreneurs Law.[41] These features are the manner of organization, operating to generate income, acting in own interest and continuity.

In the case of the first feature, we can be certain that the condition regarding the manner of organization is met. It is understood as "using particular material components (e.g. real assets or moveable assets) or intangible components (e.g. know-how, reputation, rights to intangible assets) which are functionally and economically combined by a given person into a single arranged system enabling participation in the global economy."[42] However, we must note that the remark that a municipality is not, in principle, a commercial entrepreneur but may be considered an entrepreneur if it engages in commercial operations in a manner described hereinabove[43] does not apply under such circumstances because MHPs are implemented by municipal companies, not directly by municipalities. Therefore, once again, it appears that this issue should be explicitly connected to the invoked article of the Entrepreneurs Law in a separate act to resolve any emerging dubitations.

Another feature of commercial operations is the fact that they are intended to produce economic gain. In this case, the goal of generating profit,[44] even if a given type of operation is not always objectively profitable,[45] is crucial. We should bear in mind that the opposite of a gainful activity is a non-gainful activity, i.e. the

39 Ruling of the Administrative Court in Warszawa of 29 September 2020, I ACa 350/20, LEX no. 3113190.

40 Ruling of the Voivodeship Administrative Court in Olsztyn of 8 September 2011, I SA/Ol 458/11, LEX no. 966077.

41 Consolidated text: Journal of Laws 2023 item 221 as amended (hereinafter: ELaw).

42 A. Kruszewski, *Przepisy ogólne*, in: *Prawo przedsiębiorców. Komentarz*, ed. A. Pietrzak, Warszawa 2019, p. 49.

43 Cf. Ruling of the Court of Appeal in Poznań of 2 February 2022, III AUa 938/20, LEX no. 3330083, in line with the qualities indicated in ELaw.

44 By profit, we mean the profits generated by this activity and not coming from other sources such as social insurance, see Ruling of the Court of Appeal in Lublin of 16 February 2021, III AUa 1116/20, LEX no. 3305900.

45 Ruling of the Court of Appeal in Warszawa of 9 November 2020, III AUa 2020, LEX no. 3115004.

activity whose goal is not generating profit, even if some unintentional profit can be generated when engaging in such activity.[46] In analysing the MHPs in terms of indicated features of commercial operations, we come across a problem. Realizing these programmes is not commercial activity primarily aimed at generating profit. Financial analyses of this issue are not available[47] or are incomplete at the time of realization of municipal housing programmes. However, it must be noted that an MHP is an investment to satisfy the housing needs of residents – it is not a strictly gainful activity. It also appears that this issue should be regulated, provided that the indicated activity will generate profit solely to fund said activity,[48] e.g. creating the opportunity for launching further investments, covering the ongoing expenditures (including salaries of employees) or its other elements. Therefore, this minimal profit should compensate for the ongoing activity, and this type of operation should not burden a municipality or company performing said activity.

The next characteristic of commercial operations is acting in own name. However, this phrasing should not be equated with personal activities because there are no counterindications to using other entities under commercial operations.[49] Therefore, a particular municipality serves as an implementer of a given programme, and a municipal company is a tool to implement a given programme. Also, in this case, the condition indicated as essential for considering certain activities as commercial is fulfilled.

The last indicated feature of commercial operations is their continuity. This aspect also presents certain issues. It must be once again emphasized that the essence of MHPs consists not only of erecting specific buildings and releasing them for use by residents; we are tackling a much more complex and time-consuming process. The following statement seems to sum up the issue adequately: "conducting commercial operations may also consist of performing actions aimed at developing and materializing economic actions forming a specific type of operations such as searching for customers, posting commercials advertising of the operation or

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46 Ruling of the Voivodeship Administrative Court in Poznań of 7 April 2021, I SA/Po 201/21, LEX no. 3176419.

47 The sole components frequently pertain to the contribution in kind to operations of such company, i.e. the real property handed over for investment, costs of loan or financial contributions of programme participants.

48 Cf. Article 24 (2) of SFHD Act, which stipulates that profits generated by SHIs cannot be shared among partners or members and are utilized in full to cover the costs of statutory activities of these entities.

49 A. Powałowski, *Wykonywanie działalności gospodarczej we własnym imieniu*, Gdańskie Studia Prawnicze 2016, vol. 36, p. 360.

settling the related affairs."[50] Therefore, the implementation of an MHP is more expansive: the investment begins with a municipality commissioning a municipal company to implement the programme, i.e. to launch the investment and concludes with the contractual maturity date or transfer of the ownership rights from the municipal company to the programme participant after the period strictly defined in regulations. It appears that owing to such premises, this type of operations/activity becomes rather permanent and stable, not limited to one-time, occasional or sporadic projects,[51] which simply erecting and releasing a building for residential use would be. Furthermore, selecting the form of a commercial partnership or company is correct and proper due to the involvement of capital of a partner or partners and becoming liable only up to the contribution amount.[52]

Under such circumstances, it should be underlined that the ascertainment pertaining to assessing whether we are or are not dealing with commercial operations is a factual ascertainment. Only then should we relate these operations with specific legal qualifications while simultaneously bearing in mind that commercial operations are legally-defined circumstances which must be assessed based on particular factual conditions bearing or not bearing hallmarks of such operations.[53]

It should be underlined that we are considering the complexity of the municipality's status as an entrepreneur. For the purpose of this study, it has been assumed, somewhat directly, that these conditions are met and thus the titular claim regarding a municipality being engaged in commercial operations. These operations should be defined more precisely as the municipality's commercial operations resulting from the activities of a corporation of public law; this statement is deeply rooted in judicial decisions.[54] It should be underscored that in describing the permissible extent of the municipality's commercial operations, we should primarily consider the goal of the municipality's operations resulting from the constitutional order.[55] Realizing certain constitutional objectives specified at the statutory level is impossible without assuming the role of an entrepreneur and, therefore, without engaging in commercial operations.

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50 Ruling of the Court of Appeal in Lublin of 27 January 2021, III AUa 933/19, LEX no. 3126688.

51 Ruling of the Voivodeship Administrative Court in Poznań of 8 April 2021, I SA/Po 229/21, LEX no. 3172268.

52 A. Wojtkowiak, *Spółki prawa handlowego jako przedsiębiorcy wykonujący działalność o charakterze użyteczności publicznej*, Przegląd Prawa Publicznego 2013, no. 1, p. 8.

53 Ruling of the Court of Appeal in Lublin of 21 April 2021, III AUa 15/21, LEX no. 3184339.

54 Cf. Resolution of the Supreme Court of 30 November 1992, III CZP 134/92, LEX no. 3850 or Resolution of the Supreme Court of 9 March 1993, III CZP 156/92, LEX no. 3892.

55 Resolution of the Supreme Court of 14 March 1995, III CZP 6/95, LEX no. 4169.

It appears necessary to designate an impassable border in the indicated area concerning what a municipality can do under applicable legal provisions and what a municipality cannot do due to the binding norms and regulations despite the prohibited operations being similar to the usual activities of municipalities. Thus, it appears that one such type of operation related to housing development in a municipality is the activity of a municipality (and its subordinate units, i.e. municipal companies) in the capacity of a developer. Permissible operations of municipal companies that implement MHPs cannot consist of strictly property development operations, i.e. such entities cannot erect housing units and sell them on the market. Operations of this type, i.e. the activity in the public law field, cannot have hallmarks of commercial operations, which can contribute to disturbing free competition.[56] Whether such operations would disturb and affect free competition or not should be decided case by case. Still, we can indicate without greater doubt that if such types of operations were carried out under the currently existing legal state by a municipal company, certain elements could be distinguished according to which such operations disturb processes of the free market.

Therefore, in light of the above facts, we must once again demand that the issue of operations involving the implementation of municipal housing programmes be addressed in detail in the normative regulatory solutions. The indicated act leaves room for activity in the capacity of a developer; such activity should be regulated precisely, especially in terms of operations which could limit, hinder or obstruct free competition. Furthermore, we should advocate for the profits generated by such operations to be assigned solely towards the activity related to the implementation of MHPs or towards operations in other areas related to satisfying the housing needs of municipality residents.

Conclusions

The presented issues are immensely complex. The limited nature of the study resulting from the editorial requirements prevented us from indicating all specific problems related to this subject. However, it must be emphasized that the operations involving housing development, as exemplified by municipal housing programmes, fits in with the notions of self-reliance of a municipality and commercial operations conducted by this type of entity. This self-reliance is largely due

56 Judgment of the Court of Justice of 29 October 2015, C 174/14, LEX no. 1817703.

to the lack of an appropriate act addressing these issues. Municipalities carrying out the aforementioned tasks operate in a peculiar void that must be dealt with by the municipalities. Lack of a clear framework under which these entities should operate results in municipalities functioning somewhat outside the general norms and legal regulations. This fact, in turn, results in the illegitimacy of operations. Serving people, residents of a given local community, through satisfying housing needs proceeds autonomously, through frequently copying incorrect operational patterns of other municipalities. Therefore, it appears appropriate to advocate for adopting a separate act regulating these issues (as an independent act or within the framework of other regulations). From a psychological point of view, it could serve as a stimulus for more daring operations of Polish municipalities.

The following specific conclusions can be formulated based on this study. Firstly, legal and organizational measures to meet housing needs in the Republic of Poland are ineffective. The tools created for this purpose offer many solutions, but their ad hoc nature and lack of continuity lead to unsatisfactory results. Secondly, although measures at the national level are ineffective and the created instruments do not work, the legislator does not help municipalities in this respect by creating regulations that municipalities could implement. On the one hand, in this case, we see the legal and organizational independence of municipalities. On the other hand, there is a vacuum, the lack of an act dedicated to municipalities. It can even be said that the government administration does not treat local governments as partners who can help implement these tasks but sees them as competition. Thirdly, municipalities, acting without dedicated tools in this area, must create legal and organizational solutions on their own. This, in turn, means that they rarely decide to act in this area, especially since it involves high financial costs. Therefore, it is necessary to clearly indicate the need for a legislative act to fill the existing vacuum.

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