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*MARIA CURIE-SKŁODOWSKA UNIVERSITY IN LUBLIN
**PROVINCIAL ADMINISTRATIVE COURT IN LUBLIN

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Commentary on the Judgement of the Supreme Administrative Court of 20 June 2018 (II OSK 3084/17)

Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 20 czerwca 2018 r. (II OSK 3084/17)

Adjudicating Panel of the Court:
Judge Wojciech Mazur (President of the Panel)
Judge Barbara Adamiak
Judge Kazimierz Bandarzewski (Rapporteur)

On 13 March 2014, the Lublin City Council, acting pursuant to Art. 40(2) point 4 and Art. 41(1) of the Local Government Act of 8 March 1990[1] (LGA),

[1] Journal of Laws of 2013, item 594, as amended.

adopted resolution No. 1017/XXXIX/2014 on the introduction of the Regulations for the Use of the Saxon Garden in Lublin[2]. The Regulations are attached to the resolution. The purpose of introducing the Regulations is to determine up-to-date forms of use of the Garden, taking into account its historical value (§ 2). In § 5 of the Annex No. 1 of the Regulations, a provision was introduced, according to which dogs are not allowed in the area of the Saxon Garden in Lublin, with the exception of guide dogs.

This provision was contested before the Regional Administrative Court in Lublin.

By judgement of 18 July 2017 (file no. II SA/Lu 548/17), the Court dismissed the application.

After hearing the cassation appeal, the Supreme Administrative Court repealed the judgement of the court of first instance and declared § 5 of the Annex No. 1 invalid (the judgement of 20 June 2018, file no. II OSK 3084/17).

By repealing the judgement of the court of first instance and declaring the challenged provision of the local law invalid, the Supreme Administrative Court pointed to the following argumentation.

First of all, the interpretation of Art. 40(2) point 4 LGA and Art. 4(2) point 6 of the Act of 13 September 1996 on Maintaining Cleanliness and Order in Communes[3] (MCOC) is incorrect. Only this last provision constitutes a statutory delegation for the commune authorities to approve the regulations for maintaining cleanliness and order in the commune, defining the duties of persons keeping domestic animals in a manner that protects against "a threat or a nuisance to people and against pollution of areas for shared use, e.g. city parks".

The Supreme Administrative Court has also stated that the concept adopted in the Provincial Court's judgement leads to a contradiction in the legal system, because it is based on the unacceptable assumption that the same matter can be regulated based on different legal bases, and thus the concept downplays the effect of adopting a solution such as internal inconsistency of the legal system. According to the Supreme Administrative Court, only Art. 4(2) point 6 MCOC is a normative model for the revision of the contested act.

Secondly, by introducing a general ban on letting dogs in public places, such as a park, the council violated the powers specified in Art. 4(2) point 6 MCOC.

Thirdly, the adoption of such a general ban leads to a violation of the freedom of movement and presence of dog owners in a given place and goes beyond the matter indicated in Art. 4(2) point 6 MCOC and in the other provisions of this Act, which serves other purposes.

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[2] Official Journal of the Lubelskie Voivodeship of 2014, item 1444.

[3] Journal of Laws of 2013, item 1399, as amended.

Fourthly, the challenged provision of the contested act violates the principle of equality before the law (Art. 32 of the Constitution[4]), due to the diversity of residents' rights, including as a result of the worsening legal situation of dog owners in relation to owners of other companion animals.

Fifthly, in order to achieve the objectives set out in the challenged resolution, it would be sufficient to provide for orders for specific handling of animals and to establish special separated and fenced zones in the park for visiting dog owners with their animals.

However, the Supreme Administrative Court found unjustified the arguments regarding the violation of constitutionally protected values, namely human freedom and freedom of movement on the territory of Poland, including the freedom to choose residence and stay, as well as arguments regarding the use by the first instance court another criterion of judicial review of the contested act than legality.

It should be considered a wrong position of the Supreme Administrative Court that only Art. 4(2) point 6 MCOC could be the basis for adopting a local law, specifying the rules and procedure for using a communal public facility, including the duties of persons keeping domestic animals, in a manner ensuring adequate protection of this facility and its users.

Undoubtedly, citizens have the right to use communal facilities, including city parks. This right is not absolute, however, because values protected by them must be balanced with other values for which the commune can, and sometimes is obliged to, enact the regulations referred to in Art. 40(2) point 4 LGA. The essence of this act of local law is to supplement the system of national law by introducing legal solutions that take into account the specific attributes of such a facility or device that is a part of communal property. The concern for its protection is therefore expressed – from this point of view – in finding a legal formula that fulfils the legal system with norms shaping – to a certain degree autonomously – the legal status of a communal facility or public device. Therefore, it is necessary to ensure – on the one hand – the widest possible access to it, and – on the other hand, preserve not only its substance, but also a specific reputation resulting from the public purpose of its use. Taking into account this specific feature of a communal facility or device requires an optimal balance of colliding values, so as not to prevent the use of this facility and at the same time ensure its required protection. This leads to the conclusion that the right to use a public facility (device) – in this case a city park – should be balanced with the obligation to keep it in the right condition.

[4] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483.

For this purpose, the law equips the commune with an appropriate instrument, namely the establishment – by way of a resolution of the commune council – of the regulations on the use of public facilities. The provision of Art. 40(2) point 4 LGA argues that the introduction of these regulations is not subject to any additional conditions, other than the fulfilment of the rules of the applicable legal system, both in terms of the procedure for its adoption and the substantive content. It is therefore incomprehensible that the Supreme Administrative Court adopted, without in-depth reflection in this respect, the assumption of excluding the possibility of applying this provision in view of the inclusion in another legislative act of a delegation for the commune council to adopt regulations for maintaining cleanliness and order in the commune. First of all, such a statement is irrational, because it leads to a specific derogation – by way of a wrongly applied inferential rule – of a significant part of the unambiguously formulated legal norm. The content of both discussed provisions does not give a reasonable basis to conclude that Art. 4(2) point 6 MCOC is a special norm in relation to Art. 40(2) point 4 LGA, as understood in the rule of *lex specialis derogat legi generali*.

On the contrary, the laying down in the regulations adopted on the basis of Art. 40(2) point 4 LGA of "rules and procedure" for using a precisely defined public facility, in other manner than the commune council did in relation to other such facilities (devices) in the regulations for maintaining cleanliness and order in the commune, is a special rule that rules out the application of the relevant provision of the latter regulations. The cleanliness and order regulations are of a general nature[5] in the sense that it is mandatory to specify the requirements for maintaining cleanliness and order in the real estate located throughout the commune, including issues regarding containers for municipal waste collection, frequency and method of disposal of municipal waste and liquid waste, requirements under the regional waste management plan, obligations related to keeping pets and farm animals as well as rodent control (Art. 4(2) MCOC). However, the resolution adopted under Art. 40(2) point 4 LGA is a structural and organizational act regarding a substantially specified public facility (device).

In addition, the scope of the statutory authorization contained in both provisions is different. Undoubtedly, it is different to determine how to use a specific communal facility (device) from the definition of the principles of maintaining cleanliness and order throughout the commune, concerning, among other things, broadly understood duties of owners of pets and farm animals, regardless of whether it is about the use of public facilities (facilities) or any other places in the public space in the commune by them. This evidences the existence of a clear

[5] W. Radecki, *Utrzymanie czystości i porządku w gminach. Komentarz*, wyd. 4, Warszawa 2014, p. 137 ff.

and unambiguous boundary between the rules on maintaining cleanliness and order throughout the commune, as regulated in the generally applicable laws of the whole country and in the regulations referred to in Art. 4 MCOC and the local law act referred to in Art. 40(2) point 4 LGA enacted to secure the proper use of communal property.

In the judgement commented herein, it was assumed that the commune authority had abused its law-making powers, thereby violating the principle of proportionality and equality before the law. The arguments presented by the Supreme Administrative Court to support this thesis are not convincing. The commune council has the exclusive power to determine the rules of using communal public facilities – provided that it operates under and within statutes. Such a broadly defined right of the commune in the sphere of management of public facilities determines the scope of supervision and judicial review of resolutions adopted in this regard. The assessment of the legality of restricting the use of a municipal facility in the most far-reaching form, i.e. prohibition, requires referring to the principles expressed in the Constitution of the Republic of Poland or interpreted from it. These norms are – on the one hand – a primary benchmark in the process of assessing whether the commune has not crossed the limits of the law-making discretion (these norms are the first legal boundary that bodies may not exceed by exercising their powers), and – on the other hand – they set the boundaries to be not exceeded by supervisory bodies and courts during the review of legality of the commune's law-making acts.

Considering the constitutional principle of autonomy of the commune, which is the basic form of decentralization of public authority and, as a consequence of this principle, the limiting of judicial review over the commune's activity to the criterion of legality only[6], it should be noted that supervisory bodies and courts could find abuse of the law-making discretion by a commune body only where this had been convincingly, unquestionably demonstrated. The court cannot decide, being guided by subjective conviction as to the correctness of certain solutions of the challenged resolution, for the commune authorities on how to use a communal public facility. The court must not do this also when it shares the subjective assessment on the resolution presented by the complainant.

[6] D. Dąbek, *W kierunku kodeksu samorządu terytorialnego – planowane zmiany*, [in:] *Sprawne państwo. Systemowe zmiany w funkcjonowaniu polskiego samorządu terytorialnego*, red. M. Ćwiklicki, Kraków 2015, pp. 67–80; N. Fox, A. Ozimek, *Sądowa kontrola konstytucyjności aktów prawa miejscowego – wyłom w systemie czy egzemplifikacja konkretnej kontroli konstytucyjności w polskim porządku prawnym?*, „Zeszyty Naukowe Towarzystwa Doktorantów UJ – Nauki Społeczne" 2017, nr 2(17), pp. 49–69; K. Sikora, *Istota i charakter prawny aktów prawa miejscowego w zakresie ich sądowoadministracyjnej kontroli*, Lublin 2017.

In other words, it is not the court's task to decide whether it would be more appropriate to allow walking dogs in the park if on the leash and with muzzles on. This would mean an unacceptable interference of the court into the law-making powers of the commune body, which – having a wide range of discretionary powers – has more than one solution to apply to the matter. The body is required to consider all of them, choose one of them and then rationally substantiate it. The court is not competent to judge whether the choice made by the body was "the best possible one". Its responsibility is only to assess whether this choice falls within the law. Therefore, when assessing the legality of the prohibition to walk dogs in the park, it is not possible to refer to other possible – "more lenient" – solutions, in the complainant's opinion.

Establishing rules for the use of a public facility involves, by its very nature, the imposition of general behaviour patterns for people frequenting the site, which inevitably leads to a restriction of the freedom of behaviour of these people. This restriction may take the form of a prohibition of a particular behaviour, including a ban on entering a public facility, unless it is an arbitrary deprivation of the right to use the common good. By imposing such a ban, the commune body is obliged to take into account all competing goods, values and interests, to balance them, and – finally – rationally, convincingly substantiate, why one was given an advantage over another[7]. In the case of a ban being the subject of a court decision in the case in question, these interests are – on the one hand – the possibility of allowing dogs to a city park and their stay there, and on the other – the right of members of the local community and other people (e.g. visitors) to undisturbed use of the park and protection of the park's assets. It should be emphasized that for introducing the ban on access to a facility, such as a city park, there must be exceptional, special circumstances. In other words, in order for this prohibition to be considered lawful, the process of confronting competing goods must result in the superiority of certain rights, freedoms and values over the right of dog owners to move with dogs in a city park.

When defining the method of using a communal public facility or device, one cannot disregard, as already indicated above, specific conditions, and thus also the advantages of such a facility or device. The Saxon Garden in Lublin was founded in 1837 as the "summer salon of Lublin". This city park has been listed in the municipal register of monuments of the city of Lublin and in the register of monuments of the Lubelskie Voivodeship under No. A/847. According to the designers' assumptions, the Garden has become accessible to people with limited mobility. The park's revitalization process, lasting several years, has devoured

[7] J. Zimmermann, *Aksjomaty prawa administracyjnego*, Warszawa 2013, pp. 220 – 234.

almost PLN 13 million[8]. The municipal park regulations approved by the resolution of the commune council, contested in the discussed case, referred directly to this issue in its preamble, where the city's unique historical and cultural values were emphasized, justifying strengthened protection, not provided for in the case of the other city parks. This issue was also taken into account by the Regional Administrative Court in Lublin, and it is of great importance from the point of view of protecting the values of this object. The Saxon Garden has a unique character and as such is subject to special protection, which cannot be limited only to keeping it clean. This park, like any other cultural heritage site, must be preserved in the unchanged and undamaged state for future generations as well. It is obvious that the area should be used in such a way as to ensure that it is used up or destroyed as little as possible. As a consequence, what the Supreme Administrative Court did not consider at all, when assessing the legality of the ban on walking dogs in the historic city park, it should be remembered that this site can be the subject of both recreational use by the residents of the commune, as well as a tourist attraction. Therefore, even the adopted rules of using other public facilities cannot be universally applied to such a site. This means that even if in the majority of city parks, which do not have a historical character, allowing dogs, kept on a leash and with muzzles on, is considered acceptable as such, it cannot be considered a desirable model of behaviour in a park constituting a historical monument.

The task of the administrative court is to assess whether the solution adopted by the commune council does not violate higher-level norms and values, resulting from the Constitution and statutes. In our opinion, these comments lead to the conclusion that the ban on dogs (except for assistance dogs) in a historic city park should be considered a proportional restriction of the freedoms and rights of persons using this particular public facility. The commune body should take into account the interests of all park users and organize such a way of using the facility in order to reconcile the interests of both persons resting in such a facility, including those caring for little children and the elderly, as well as tourists.

What is more, the provision of Art. 50(1) LGA implies an obligation for persons involved in the management of municipal property, to exercise special care in the performance of the management, in accordance with the purpose of this property and the obligation to protect the components of this property. Special care regarding the protection of communal property should be, first of all, understood as the necessity of undertaking conservative actions. While the private owner can decide whether to protect his property, special care in the protection

[8] https://lublin.eu/gfx/lublin/userfiles/_public/lublin_w_ue/multimedia/ogrod_saski_folder.pdf [access: 7.02.2019].

of public property should be understood as an obligation to undertake any actions aimed at protecting the property. There is no doubt that ensuring proper protection of a historic city park requires the introduction of special rules for using it. This is all the more important because – as pointed out by the Regional Administrative Court in Lublin – this site, due to its special historical and natural assets, has been revitalized with considerable public expenditure.

Contrary to the position of the Supreme Administrative Court, the introduction of a ban on dogs at the Saxon Park does not violate the constitutional principle of equality before the law[9]. This principle, in the broadest approach, consists in the fact that all legal entities (addressees of legal norms), characterized by a given significant feature equally, are to be treated equally. The principle of equality regarding the rights and freedoms of citizens means a prohibition of setting discriminatory regulations[10], provided that the addressees of a legal norm are characterized by equally specific features. In the judgment of the Constitutional Tribunal of 26 April 1995 (file ref. No. K 11/94)[11], it was found that an unequal treatment of similar entities is prohibited, which, however, does not preclude unequal treatment of entities that are not similar.

In the opinion of the Supreme Administrative Court, the violation of the challenged legal norm of the principle of equality consists in the unauthorized differentiation between dog owners and owners of other animals, which are not covered by the ban on letting them in the park. Meanwhile, the feature that is equally characteristic of the addressees of this norm is the possession of a dog – an animal, which by nature requires regular walking outdoors, and while in the downtown area – also at public places. Therefore, violation of the principle of equality could only be true if the ban on entering the park concerned, for example, certain breeds of dogs. There is no way to find the similarity between the situation of dog owners and other animal owners in the context of their use of the city park. No ban on dogs in a park in the centre of a large city would mean dozens or even hundreds of dogs per day in the park. However, animals other than dogs are not walked in parks in our geographical latitude, and if, this happens incidentally it concerns small animals, such as cats or domestic cavy, which due to their small numbers in the park, and also their size and features, are not able to compromise the peace and safety of people staying in the park, nor the historical and natural values of this place.

[9] The judgement of the Constitutional Court of 13 September 1990, file ref. No. U 4/90, OTK 1990, item 10.

[10] The judgement of the Constitutional Court of 9 March 1988, file ref. No. U 7/87, OTK 1988, item 1.

[11] OTK 1995, no. 1, item 12.

Finally, the Supreme Administrative Court did not pay any attention to the issue raised in the grounds for the ruling of the Regional Administrative Court in Lublin, namely the lack of universally sought-after pattern of behaviour associated with the cleaning of waste left by these animals. This issue may be important for assessing the legality of the prohibition in question. Although it is not disputed that the removal of dog waste should be the responsibility of every carer, as it shows respect for other people and animals, many people still do not consider it necessary. Therefore, the Regional Administrative Court in Lublin, assessed as unreal the expectation that the owners of dogs in the discussed historic park will behave differently. It should be noted that it takes a very long time to perpetuate this type of positive behaviour pattern. Internalizing such a norm of conduct requires, after all, not only acknowledging it socially and morally desirable and awareness of the threat of appropriate sanction for not complying with it, but also overcoming the previous undesirable habits.

Summing up, it should be stated that the ruling commented herein tackles a significant problem related to the functioning of local government. However, the solution adopted by the Supreme Administrative Court to resolve this issue does not merit acceptance, because it overlooks the specificity of an act of local law issued by the commune council on the basis of Art. 40(2) point 4 LGA.

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Abstract: On 13 March 2014, the Lublin City Council, acting pursuant to Art. 40(2) point 4 and Art. 41(1) of the Local Government Act of 8 March 1990 (LGA), adopted resolution No. 1017/XXXIX/2014 on the introduction of the Regulations for the Use of the Saxon Garden in Lublin. The Regulations are attached to the resolution. The purpose of introducing the Regulations is to determine up-to-date forms

of use of the Garden, taking into account its historical value (§ 2). In § 5 of the Annex No. 1 of the Regulations, a provision was introduced, according to which dogs are not allowed in the area of the Saxon Garden in Lublin, with the exception of guide dogs. In the judgement commented herein the Supreme Administrative Court declared § 5 of the Annex No. 1 invalid. The commentary contains arguments against the court's position.

Keywords: Saxon Garden in Lublin; cleanliness and order in the commune; ban on letting dogs in public places, local law; right to use communal facilities

Streszczenie: Rada Miasta Lublin, działając na podstawie art. 40 ust. 2 pkt 4 i art. 41 ust. 1 ustawy z dnia 8 marca 1990 r. o samorządzie gminnym, podjęła w dniu 13 marca 2014 r. uchwałę nr 1017/XXXIX/2014 w sprawie wprowadzenia Regulaminu korzystania z Ogrodu Saskiego w Lublinie. Załącznikiem do uchwały jest regulamin korzystania z Ogrodu Saskiego w Lublinie, a celem jego wprowadzenia było określenie współczesnych form użytkowania obiektu, z uwzględnieniem jego historycznej wartości (§ 2). W § 5 załącznika nr 1 regulaminu wprowadzono przepis, zgodnie z którym na teren Ogrodu Saskiego w Lublinie nie można wprowadzać psów z wyjątkiem psów przewodników. Wyrokiem z dnia 20 czerwca 2018 r. (II OSK 3084/17), wydanym po rozpoznaniu skargi kasacyjnej od wyroku sądu pierwszej instancji, Naczelny Sąd Administracyjny uchylił wyrok sądu pierwszej instancji i stwierdził nieważność § 5 załącznika nr 1 regulaminu. Glosa zawiera argumenty przeciwko stanowisku sądu drugiej instancji.

Słowa kluczowe: Ogród Saski w Lublinie; czystość i porządek w gminie; zakaz wprowadzania psów do miejsc publicznych; prawo miejscowe; prawo do użytkowania obiektów publicznych