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Jerzy Stelmasiak
Maria Curie-Skłodowska University in Lublin, Poland
ORCID: 0000-0002-1397-3595
jerzy.stelmasiak@umcs.pl

Selected Issues of Animal Protection in the Light of the Judicial Decisions of the Supreme Administrative Court

Wybrane zagadnienia ochrony zwierząt w świetle orzecznictwa Naczelnego Sądu Administracyjnego

ABSTRACT

The article analyses and assesses the line of judicial decisions of the Supreme Administrative Court regarding a temporary seizure of an animal from its owner or guardian following a breach of the obligation to treat it humanely. The article also analyses the legal status that social organisations, the statutory aim of which is the protection of animals, has in administrative proceedings. Next, the author presents the characteristics of resolutions of municipal councils on the municipal programme of care for homeless animals and prevention of animal homelessness, which in the court judicial decisions are classified as local legal enactment. Finally, the article presents the line of judicial decisions concerning the relation between a resolution introducing a by-law on maintaining cleanliness and order in a municipality and the requirements of animal protection set out in the Act of 21 August 1997 on the protection of animals.

Keywords: protection of animals; temporary seizure of an animal from its owner or guardian; municipal programme of care for homeless animals; judicial decisions of the Supreme Administrative Council; local legal enactment

CORRESPONDENCE ADDRESS: Jerzy Stelmasiak, Prof. Dr. habil., Full Professor, Maria Curie-Skłodowska University (Lublin), Faculty of Law and Administration, Institute of Law, Plac Marii Curie-Skłodowskiej 5, 20-031 Lublin, Poland.

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INTRODUCTION

The issue of legal protection of animals and related administrative liability is most frequently addressed in judicial decisions of administrative courts in the context of the obligation to treat animals humanely. This obligation is connected with the necessity to take into account the needs of an animal, including providing it with necessary care and protection, pursuant to Article 5 in conjunction with Article 4 (2) of the Act of 21 August 1997 on the protection of animals.[1] In particular, the subject of the judicial decisions of the Supreme Administrative Court are cases concerning abuse of animals within the meaning of Article 6 (1a) APA, which results in a temporary seizure of an animal from its owner or guardian within the meaning of Article 7 (1) or Article 7 (3) APA. The subject of many judicial decisions of administrative courts was also a controversial issue in judicial decisions and legal scholarship, i.e. the status of a social organisation as a party to administrative proceedings in the light of Article 28 of the Act of 14 June 1960 – Code of Administrative Procedure.[2] This concerns proceeding which ends with a decision – issued on the basis of Article 7 (3) APA – on a temporary seizure of an animal from its owner or guardian in urgent cases, i.e. a threat to a health or life of an animal. This, of course, applies only to a social organisation whose statutory objective is the protection of animals. Hence, the resolution of seven judges of the Supreme Administrative Court of 24 February 2020[3] was necessary to unambiguously resolve this disputed issue.

Another group of cases concerned municipal programmes for the care of homeless animals and prevention of animal homelessness, which are adopted by municipal councils pursuant to Article 11 (1) in conjunction with Article 11a APA. In addition, the objective scope of resolutions issued by municipal (town) councils on the rules and for maintaining cleanliness and order in municipalities, in the part concerning animal protection and taking into account the requirements of the Animal Protection Act, has also been subjected to review by the administrative courts.

A TEMPORARY SEIZURE OF AN ANIMAL

The analysis of the judicial decisions of the Supreme Administrative Courts in cases concerning a temporary seizure of an animal allows us to distinguish three groups of cases. Firstly, in the judgement of 6 August 2019,[4] the Court held that in

[1] Journal of Laws 2020, item 638, as amended, hereinafter: APA.

[2] Journal of Laws 2020, item 256, as amended, hereinafter: CAP.

[3] II OPS 2/19 ONSAiWSA 2020, no. 4, p. 44 and LEX no. 2783835.

[4] II OSK 1797/18, LEX no. 2722922. See P. Janiak, *Czasowe odebranie zwierzęcia w trybie administracyjnym – podstawowe zagadnienia*, "Casus" 2019, no. 92, p. 45.

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the case of a temporary seizure of an animal, the factual state must first be precisely established in the light of Article 7, Article 77 § 1, Article 107 § 1, and Article 75 § 1 CAP. This concerns determining whether the conditions of Article 6 (2) APA as regards abuse by the owner or guardian of an animal caused by inflicting or knowingly allowing to inflict pain or suffering on the animal occurred. Furthermore, the Court rightly stated that a decision issued on the basis of Article 7 (3) APA is of the so-called "consequent" nature, as it is issued after the animal in question has been previously taken away, and thus has a qualified nature with respect to the condition of Article 7 (1) APA. A decision issued on this legal basis is immediately enforceable (Article 7 (2) APA), but must still be delivered to the obliged addressee. In this case, the Court emphasised that the animals were taken away even before the entry into force of the decision of the first instance authority, issued on the basis of Article 7 (1) APA. This means that the first instance authority competent in this case should rule on the basis of Article 7 (3) APA. There are also no grounds for the appellate authority to issue the so-called cassation decision pursuant to Article 138 § 2 CAP as the established factual state in this respect does not raise any doubts.

Also in the judgement of 28 November 2019,[5] the Supreme Administrative Court held that if farm animals were kept in conditions that endangered their health or even their lives, there are grounds for temporary removal under Article 7 (3) APA. This is because it is a case of urgency as provided for in this provision. This means that in such a case, a police officer, a municipal guard or even an authorised representative of a social organisation, if its statutory objective is the protection of animals, seizes such an animal. Furthermore, he or she immediately notifies the competent authority, i.e. the head of the municipal district or the mayor of the town/city, in order to issue a decision on the seizure of such an animal and its transfer to an entity that has given its consent (Article 7 (1b) APA). This means that Article 7 (1c) APA on the transfer of an animal to another entity due to the lack of consent of the entity involved was not applicable. Pursuant to Article 7 (4) APA, the costs of transport, as well as the costs of maintenance and, if necessary, medical treatment, are charged to the current owner or guardian of the animal. In the light of Article 7 (1) (2) APA, a farm animal may be handed over to an agricultural farm indicated by a competent authority, subject, of course, to the consent of a given entity, i.e. an entity which runs such an agricultural farm (Article 7 (1b) APA).

In the judgement of 15 January 2019,[6] the Supreme Administrative Court correctly held that if the facts of a given case raise no doubts, the appellate authority, i.e. the Local Government Court of Appeals, may issue a cassation decision pursuant to Article 138 § 2 CAP. This is permissible if it unequivocally concludes, when

[5] II OSK 2852/18, LEX no. 2778246.

[6] II OSK 656/18, LEX no. 2612961. See M. Rudy, *Dlaczego potrzebujemy nowej ustawy o humanitarnej ochronie zwierząt?*, "Przegląd Prawa i Administracji" 2017, no. 108, p. 84 ff.

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annulling the decision of the first instance authority issued pursuant to Article 7 (1) APA, that in this case the so-called intervention procedure of seizing dog pursuant to Article 7 (3) APA should apply. This is evidenced by all the established factual circumstances concerning leaving the dog unattended and without necessary food and chaining it as a form of abuse. This means that there is a statutory condition of urgency for the temporary seizure of this animal from its previous owner or guardian because of a threat to its health or even its life. Therefore, the *ratio legis* of the provision of Article 7 (3) APA is related to the above-mentioned condition in terms of humane treatment of animals within the meaning of Article 4 (2) APA, and not as a thing, taking into account the factual state which occurred on the day of a temporary seizure of an animal.[7]

In the judgement of 26 June 2019,[8] the Supreme Administrative Court correctly interpreted Article 7 (1c) in conjunction with Article 7(1b) APA. According to this interpretation each time an entity is selected to perform proper care of a given animal (in this case, a calf), what should be taken into account if the criterion of proper provision of such care, and in particular its humane treatment and ensuring proper living conditions in the light of Article 4 (2) and (15) in conjunction with Article 5 APA.

Also noteworthy is the judgement of the Supreme Administrative Court of 17 April 2019[9] on the withdrawal of a permit to conduct activity in the field of protection of homeless animals and running a shelter for them. In the Court's opinion, from the interpretation of Article 7 (1) (3) and (4) of the Act of 13 September 1996 on maintaining cleanliness and order in municipalities,[10] it follows that the entity using the above-mentioned permit may only infringe the conditions unambiguously set out in the operative part of such a decision. This means that it is not possible for such an entity to infringe the prohibition on carrying out a given activity on the territory of other municipalities, if such a prohibition has not been introduced in the content of the permit and, of course, if such activity is carried out on the basis of contracts concluded in the required manner. In addition, in the light of § 5 (1) and § 5 (2) (4) of the Regulation of the Minister of Internal Affairs and Administration of 26 August 1998 on the principles and conditions for the catching of homeless animals,[11] the head of a municipality (mayor) concludes a contract to carry out the

[7] See judgement of the Supreme Administrative Court of 21 April 2020, II OSK 965/19, LEX no. 3034309; B. Rakoczy, *Kompetencje organów gminy*, [in:] *Ochrona środowiska w praktyce gminy*, Warszawa 2020, pp. 202–207; judgement of the Supreme Administrative Court of 22 June 2020, II OSK 118/2, LEX no. 3052088; J. Miłkowska, *Humanitarna ochrona zwierząt*, [in:] *Prawo ochrony środowiska*, ed. M. Górski, Warszawa 2009, pp. 586–592.

[8] II OSK 1553/18, LEX no. 3059802.

[9] II OSK 1855/18, LEX no. 2676633.

[10] Journal of Laws 2017, item 1289, as amended.

[11] Journal of Laws 1998, no. 116, item 753, as amended.

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catching of homeless animals with an entity running a shelter. Furthermore, the Act on maintaining cleanliness and order in municipalities as well as the Animal Protection Act and the Act of 11 March 2004 on animal health protection and combating infectious animal diseases,[12] do not impose an obligation to have a shelter for homeless animals in each municipality. However, pursuant to Article 11a (4) in conjunction with Article 11 (2) APA, a municipality as a local government unit may entrust the performance of the above-mentioned task to an entity running a shelter for homeless animals by concluding a relevant contract.

The resolution of seven judges of the Supreme Administrative Court of 24 February 2020, mentioned above, is also worth emphasising. The Court held therein that a social organisation whose statutory aim is the protection of animals, in administrative proceedings ending with the issuance of a decision under Article 7 (3) APA, if its authorised representative took away an animal and notified the head of the municipality (mayor of a town/city) of this factual act, has the status of a party – in the light of Article 28 CAP.[13] In particular, the Court correctly held that the legal status of such entities as a police officer, a municipal guard or an authorised representative of a social organisation whose statutory aim is the protection of animals differs depending on whether we are dealing with a situation described in Article 7 (3) or Article 7 (1a) APA. The legislator in Article 7 (1a) uses the term "information" (in Polish: *informacja*) and in Article 7 (3) "notification" (in Polish: *zawiadomienie*). However, linguistic interpretation prohibits the use of synonymous interpretation and different phrases used in the same normative act in order to give them identical meaning.[14] This means that the information referred to in Article 7 (1a) is in fact a notification of a suspicion that an animal abuse offence has been committed. Article 7 (3) APA introduces an obligation to seize an animal, without a decision under Article 7 (1a) having been issued yet, if an urgent situation occurs and the life or health of an animal is at risk. The notification on a seizure of an animal aims at issuing a decision which, in practice, already confirms a seizure of a given animal.[15]

In addition, the status of a party to proceedings conducted on the basis of Article 7 (3) in conjunction with Article 7 (1) APA allows the entity that took the animal to file an appeal and then a complaint with the Voivodeship Administrative Court.[16] This is important insofar as such an entity could also have borne costs connected with a temporary seizure of an animal, such as the cost of transport, the cost of

[12] Journal of Laws 2018, item 1967, as amended.

[13] Cf. W. Radecki, *Ustawy o ochronie zwierząt. Komentarz*, Warszawa 2015, p. 85; P. Janiak, *op. cit.*, p. 47.

[14] Cf. L. Morawski, *Zasady wykładni prawa*, Toruń 2006, pp. 103–104.

[15] Cf. P. Korzeniowski, *W sprawie modelu odpowiedzialności administracyjnej w ochronie środowiska*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2016, no. 5, pp. 36–51.

[16] Cf. K. Kuszlewicz, *Prawa zwierząt. Praktyczny przewodnik*, Warszawa 2019, pp. 222–223.

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keeping animal and the cost of treatment. Therefore, such a social organisation exercises its substantive legal rights if it has a legal interest that is individual, specific, objectively verifiable and current.[17] However, if the head of the municipality (mayor of the town/city) fails to issue a decision to seize an animal on the basis of Article 7 (1) APA, the action of an entity as regards the temporary seizure of the animal should be deemed unlawful and infringing upon someone else's property. For this reason, the entity referred to in Article 7 (3) APA should also have a legal interest, and not only a factual interest, in order for the first instance authority to confirm that the temporary seizure of the animal by that entity did not violate the provisions of the Animal Protection Act. The legal interest of a social organisation allows it to defend itself against an allegation of acting unlawfully as regards a temporary seizure of an animal, especially in urgent cases where there was a threat to the health or life of an animal.[18]

THE PROGRAMME FOR CARE OF HOMELESS ANIMALS AND THE PREVENTION OF ANIMAL HOMELESSNESS

As a preliminary remark, it should be emphasised that the programme of care for homeless animals and the prevention of homelessness is adopted by municipalities not later than on 31 March of a given calendar year pursuant to Article 11a (1) APA. A municipality as a local government unit ensures its implementation and financing from its budget. Therefore, in the judgement of 10 June 2020[19] the Supreme Administrative Court correctly held that since a municipality concludes a contract with an entity running an animal shelter in order to perform its own task and is obliged to verify such an entity, it should also be entitled to carry out periodic inspections in the shelter, in accordance with the adopted programme. Of course, such inspection cannot replace professional supervision and control statutorily reserved for the competent bodies of the Veterinary Inspection.

In the judgement of 17 April 2019,[20] the Supreme Administrative Court correctly held that the analysed programme adopted by the municipality council is a local legal enactment within the meaning of Article 94 of the Constitution of the

[17] Cf. B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017, p. 230 ff.

[18] Cf. E. Szewczyk, *Administrative Procedure for Temporary Removal of an Animal from the Custody of Its Owner or Guardian*, [in:] *Legal Protection of Animals*, eds. E. Kruk, G. Lubeńczuk, H. Spasowska-Czarny, Lublin 2020, pp. 114–117.

[19] II OSK 3967/19, LEX no. 3071985.

[20] II OSK 1503/17, LEX no. 2707516.

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Republic of Poland of 2 April 1997.[21] This is because apart from individual and specific norms it also contains norms of a general and abstract nature.[22]

Failure to publish a local legal enactment, in the light of Article 88 (1) of the Constitution in conjunction with Article 42 of the Act of 8 March 1990 on municipal self-government[23] in the procedure set out in the Act of 20 July 2000 on publication of normative acts and certain other legal acts,[24] means that such normative act has not entered into force. It follows that the failure to publish such a resolution constitutes a material breach of the law and, consequently, constitutes grounds for declaring it invalid in its entirety.[25] In the judgement of 24 September 2019,[26] the Supreme Administrative Court held that this type of programme, in the light of Article 11a (1) APA, must obligatorily establish the amount of financial resources that are allocated for its implementation, as well as the manner of spending such resources, which is borne by a municipality, in accordance with Article 11a (5) APA, as this is a *iuris cogentis* norm. The lack of such a provision in the text of the resolution or the breach of delegation of legislative powers in this respect, which occurred in this case, led the Court to hold that § 16 of the programme was invalid as it breached statutory guidelines for local legal enactments, which, however, does not mean that the remaining part of the local legal enactment is defective.

RESOLUTION OF A MUNICIPAL COUNCIL ON THE RULES OF MAINTAINING CLEANLINESS AND ORDER IN THE MUNICIPALITY

Noteworthy in this respect is the judgement of the Supreme Administrative Court of 12 January 2021.[27] In this judgement, the Court rightly held that § 10 (1) and (4) of the by-law, imposing an obligation on dog owners to walk their dogs on a leash and with a muzzle, only in designated places, appropriately marked and subject to direct control over their behaviour, breaches the power-conferring norm

[21] Journal of Laws 1997, no. 78, item 483, as amended, hereinafter: the Constitution. English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.08.2021].

[22] Cf. J. Bobrowicz, *Kwalifikacja aktu normatywnego jako aktu prawa miejscowego na przykładzie uchwały w sprawie program opieki nad zwierzętami bezdomnymi i zapobiegania bezdomności zwierząt*, "Administracja. Teoria, Dydaktyka, Praktyka" 2012, no. 4.

[23] Journal of Laws 2016, item 446. See D. Dąbek, *Prawo miejscowe*, Warszawa 2007, pp. 118–123, 229–240.

[24] Journal of Laws 2017, item 1523.

[25] Judgement of the Supreme Administrative Court of 23 April 2020, II OSK 1699/19, LEX no. 3030676.

[26] II OSK 2350/18, LEX no. 2727043.

[27] III OSK 1137/21, LEX no. 3107413. See B. Rakoczy, *Ograniczenie praw i wolności jednostki ze względu na ochronę środowiska w Konstytucji Rzeczypospolitej Polskiej*, Toruń 2006, p. 7 ff.

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set out in Article 4 (2) (6) of the Act of 13 September 1996 on maintaining cleanliness and order in municipalities. Obligations in this respect have been regulated primarily by the Animal Protection Act.[28] The provision of Article 4 (2) (6) of the Act on maintaining cleanliness and order in municipalities authorises the municipal council to introduce in a by-law, which is a local legal enactment, unambiguous and precise obligations imposed on owners or guardians of pets for protection against dangers and nuisance caused by such animals. However, the introduction of a general requirement to walk dogs only on a leash and to muzzle them, without taking account of their characteristics or other reasons such as illness, may even sometimes have inhumane consequences for them. Furthermore, its introduction should also take into account the principle of proportionality in the light of Article 31 (3) of the Constitution.[29] The provisions of the by-law may not be more restrictive than the statutory obligations, including Article 77 of the Code of Petty Offences.[30] Limitations of liberty, human rights and rights of citizens should have a statutory basis. Therefore, on the one hand, protection should be provided, e.g., against dangerous dogs, which are aggressive and should always be kept on a leash and muzzled. On the other hand, a different approach should be taken to dogs which, because of their weight and size, can be kept on a leash without any problem.

For these reasons, a municipal council, pursuant to the delegation of powers under Article 4 (2) (6) of the Act on maintaining cleanliness and order in municipalities, is only authorised to set out the obligations of persons owning domestic animals. It is not, however, authorised to establish general objectives and demands in this respect, especially those going beyond the obligations imposed by the Animal Protection Act with respect to proper care of an animal and proper living conditions (Article 4 (15) and (17) APA).

CONCLUSION

The discussion above makes it possible to formulate a thesis that judicial decisions of the Supreme Administrative Court play an important role in shaping correct interpretations of the norms of substantive administrative law regulating animal protection. Moreover, although it is only the so-called informal source of administrative law, in practice it influences the way in which such cases are resolved by

[28] Cf. P. Janiak, *op. cit*., pp. 45–49.

[29] Cf. H. Izdebski, *Zasada proporcjonalności a władza dyskrecjonalna administracji publicznej w świetle polskiego orzecznictwa sądowego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2010, no. 2, pp. 9–24; M. Korycka-Zirk, *Teorie zasad prawa a zasada proporcjonalności*, Warszawa 2012.

[30] Act of 20 May 1971 – Code of Petty Offences (Journal of Laws 2019, item 821, as amended).

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competent public administration bodies,[31] as well as by voivodeship administrative courts. Moreover, the administrative liability of the perpetrator of inhumane treatment of animals is independent of any potential criminal liability and the *ne bis in idem* principle does not apply. The position set out in the resolution of seven judges of the Supreme Administrative Court of 24 February 2020 should be considered correct. It grants a social organisation whose statutory objective is the protection of animals, the status of a party under Article 28 CAP in administrative proceedings that end with the issuance of a decision on a temporary seizure of an animal under Article 7 (3) APA. Also the position of the Supreme Administrative Court, which recognises the resolution of a municipal council adopted on the municipality programme for the care of homeless animals and prevention of animal homelessness as a local legal enactment, in the light of Article 94 of the Constitution, is in my opinion correct. It should also be stressed that the protection of animals is also carried out within the framework of the protection of the natural environment, in the light of Article 2 (1) (1) and Article 2 (2) (4) in conjunction with Article 5 (20) and Article 60 of the Act of 16 April 2004 on the protection of nature[32] and thus also concerns saving animal species threatened with extinction. Therefore, for example, after filing a complaint with a Voivodeship Administrative Court, the decision of the General Director of Environmental Protection issued pursuant to Article 60 (3) NPA on the establishment of protection zones for refugia, breeding sites and regular animal residence places is subject to review on the basis of the findings of fact in a given area made by the competent authority in accordance with Article 77 § 1 CAP. This is subject to judicial review, e.g., in the judgement of the Supreme Administrative Court of 25 September 2019.[33] In addition, in the light of Article 60 (1) NPA, the competent authorities for nature protection, in order to save endangered animal species under species protection, should relocate them to other places and, of course, seek to eliminate the causes of their endangerment. In turn, on the territory of such a special area, the prohibitions listed in Article 60 (6) NPA may not be violated without the permission of the regional director of environmental protection. They concern in particular the ban on third persons (except for the owner and persons involved in animal species protection), cutting down trees or bushes, making changes in hydrographic conditions, construction work and introducing devices or installations. Moreover, the rulings of the Supreme

[31] D. Dąbek, *Prawo sędziowskie w polskim prawie administracyjnym*, Warszawa 2010, pp. 549–555, 567–585; L. Leszczyński, *Open Axiology in Judicial Interpretation of Law and Possible Misuse of Discretion*, "Studia Iuridica Lublinensia" 2020, vol. 29(3), pp. 39–54.

[32] Journal of Laws 2020, item 55, as amended, hereinafter: NPA; J. Chmielewski, *Pojęcie nadrzędnego interesu publicznego w prawie administracyjnym*, Warszawa 2015, p. 211; M. Zdyb, *Spatial Planning as an Instrument of Influencing the Protection of Natural Resources and Real Estate Management*, "Studia Iuridica Lublinensia" 2020, vol. 29(1), pp. 229–242.

[33] II OSK 2079/18, LEX no. 2724646.

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Administrative Court rightly emphasise that in such a special area many legal regimes may overlap in the form of prohibitions resulting from the establishment of, e.g., a national park and landscape park or a protected landscape area, as well as a Natura 2000 area.[34] This is why in such a situation rulings of administrative courts play such an important role in resolving conflicts arising for this reason in the relationship between: public interest in protecting animals and other elements of the natural environment and individual interests of animal owners or real estate owners. These conflicts should be resolved taking into account the principle of proportionality (Article 31 (3) of the Constitution) and the principle of adequacy (Article 7a and 7b CAP).[35]

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[34] A. Niewiadomski, *Protection of the Biosphere in Natura 2000 Sites*, "Studia Iuridica Lublinensia" 2020, vol. 29(2), pp. 151–161.

[35] M. Woźniak, *Interes publiczny i interes indywidualny w planowaniu i zagospodarowaniu przestrzennym*, Opole 2018, pp. 383–404.

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ABSTRAKT

W artykule poddano analizie i ocenie linię orzecznictwa Naczelnego Sądu Administracyjnego w zakresie czasowego odebrania właścicielowi lub opiekunowi zwierzęcia w następstwie naruszenia obowiązku jego humanitarnego traktowania. Ponadto poddano analizie status prawny organizacji społecznej, której celem statutowym jest ochrona zwierząt, jaki posiada ona w postępowaniu administracyjnym. Następnie przedstawiono specyfikę uchwały rady gminy w przedmiocie gminnego programu opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt, która w orzecznictwie sądowym klasyfikowana jest jako akt prawa miejscowego. W zakończeniu przedstawiono linię orzecznictwa dotyczącą relacji między uchwałą wprowadzającą regulamin utrzymania czystości i porządku w gminie a wymaganiami ochrony zwierząt określonymi w ustawie z dnia 21 sierpnia 1997 r. o ochronie zwierząt.

Słowa kluczowe: ochrona zwierząt; czasowe odebranie właścicielowi lub opiekunowi zwierzęcia; gminny program opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt; orzecznictwo Naczelnego Sądu Administracyjnego; akt prawa miejscowego