DOI: 10.24425/academiaPAS.2022.143437

ICEDMOCHA/SHUTTERSTOCK.COM

Space and the Law

Different social and professional groups have different perspectives on space and spatial planning, which is in turn reflected in their differing understanding of the law and differing approach to regulations that shape the spatial order

Maciej J. Nowak

West Pomeranian University of Technology in Szczecin

Defining the role of the law in the context of shaping space and urban planning is a difficult task. Diverse approaches clash when individual laws are interpreted (and also when the role of such laws is defined). Lawyers look at the various issues one way, urban planners differently, and specialists in environmental, natural, or cultural heritage differently again. It should be emphasized that they all also participate in different ways in the process of interpreting planning regulations. Their use of different specialized languages in this regard makes spatial planning a kind of Tower of Babel. And it does not stop there: even greater terminological discrepancies, related to the ways of understanding certain concepts, can be found between the systems of countries similar to one another.

Our own backyard

In the Polish legal order, the local, municipal (*gmina*) level of spatial planning is the most important. It is the municipal authorities that are most responsible for shaping the space in which we live. They have at their disposal three directly related legal instruments:

- the municipality's "Study of the Conditions and Directions for Spatial Development,"
- its "Local Land-Use Plans," if any,
- any and all administrative decisions issued with respect to zoning and land use.

The "Study of the Conditions and Directions for Spatial Development" is a mandatory document for each and every municipality in Poland, which sets forth the overall concept for spatial development there. It is not a binding act for investors or property owners, but it serves as an important point of reference when drawing up Local Plans, as the latter cannot contradict it. Local Plans, in turn, are universally binding acts. The inclusion of certain restrictions (including prohibitions on development) in a Local Plan therefore makes them binding for everyone within the given area. In principle, however, there is no obligation to enact a Local Plan. Whether such a plan is enacted for all or part of a municipality depends on the subjective will of the specific municipal authorities. An enacted Local Plan should specify, among other things, the permitted land uses, the lines that demarcate areas of different uses, as well as the principles for development and land use.

In the numerous areas where no such Local Plan has not been adopted, decisions on land development and zoning essentially serve as its counterpart. These are administrative decisions issued by the municipality executives (mayors, etc.) at the request of investors. Each decision applies to a specific site and a specific development concept. Various decisions can be issued with respect to a single site. The issuance of a decision for investments that do not constitute the realization of a public purpose is subject to several statutory conditions. One of them stipulates that a decision may be positive if at least one neighboring plot is developed in a functionally and technically similar way to the planned investment.

These solutions, stemming from Poland's Act of 27 March 2003 on Spatial Planning and Development, have become subject to numerous (often perfectly valid) criticisms. They are conducive to the further deepening of the existing spatial chaos. Of course, not only the legal measures are to blame, as the problem is much broader. Nevertheless, the law is also very much at fault. As for the above-mentioned legal solutions, their shortcomings consist in:

- a failure to ensure the real importance of Studies of the Conditions and Directions for Spatial Development – despite the obligation to adopt these Studies, these documents very often do not play a significant role in how municipalities develop,
- the potential for Local Plans to bypass areas of particular importance from a spatial planning perspective,
- the lack of precision in the criteria for issuing development-related decisions. This causes decisions in many areas to become the dominant instrument, which actually contributes to the lack of viable planning in Poland.

Disadvantages

Such an opinion should, of course, be justified with some examples. The ones given below reflect not only the above-mentioned flaws in the regulations, but also terminological discrepancies and dilemmas regarding approaches to spatial planning objectives. These examples were drawn together for the purpose of this paper, but nevertheless result from the present author's own observations and practical experience.

The first example concerns the provisions of a spatial development plan enacted in an area close to the sea. In principle, the plan introduced a ban on development, but indicated that this ban did not apply to "lookout towers," without clarifying what specifically was meant by this term. The property owner, however, wanted to develop a residential project there with a view of the sea. So his planner came up with an idea: a certain kind of "lookout tower" would be built, in which one could live peacefully and which would actually constitute a residential facility. At the

Maciej J. Nowak, PhD, DSc

is an Associate Professor and head of the Department of Real Estate at the Faculty of Economics of the West Pomeranian University of Technology in Szczecin. A legal advisor, member of the Presidium of the PAS Committee for Spatial Economy and Regional Planning, and head of the Committee's "Task Force on Legal and Urban Planning Issues." His research work focuses on the role of law in the spatial management system, comparing features of spatial planning systems in different countries, as well as the climate- and health-related challenges of spatial policies.

maciej.nowak@zut.edu.pl

YASONYA/SHUTTERSTOCK.COM

Canal in Amsterdam (Netherlands), houses on the Amstel River

stage of reviewing the building permit request (during which the conformity of the project with the zoning plan is evaluated), a problem arose in how this proposal should be assessed. The authority responsible for issuing the decision knew that the application was abusive, but did not know how to challenge it from a formal perspective. It turned the application down, albeit without good justification. The owner appealed against the refusal to a higher authority: the voivode (province governor). The voivode came up with an original idea: the object listed in the application was not a "lookout tower," because it would be too low to be considered such a tower. At the same time, the authority did not stipulate precisely how many meters in height an object has to be in order to be properly considered a tower…

The second example actually involves numerous, diverse cases. As indicated above, one of the prerequisites for issuing a zoning decision is establishing that at least one neighboring plot has been developed in a similar way to the planned development. In practice, this should be understood more broadly – that it should somehow fit within the function of the broader area in question. Otherwise, for instance, a small neighborhood store could never be built in a residential area (just because there has so far never been such a store in that local neighborhood). Often in such occasions, however, those drafting a permit application search for a plot of land that has indeed been developed similarly to the developer's intended project. Particularly in rural areas, this often takes the form of greatly expanding the "study area" so as to forcefully include to a particular plot of land that fits the bill.

The last example concerns issues related to the realm of historic preservation. Local zoning plans also contain provisions aimed at protecting monuments and cultural heritage. This is also why, before such plans are enacted, their content has to be agreed with province-level conservationists responsible for the protection of historical monuments. Such conservators often impose stipulations, insisting that within a particular area, any later investment should also require their consent. Plans including such pro-

DAVID BOKUCHAVA/SHUTTERSTOCK.COM

Slums along a fetid canal (Khlong Toei) full of mud and garbage in Khlong Toei district, Bangkok, Thailand, 25 September 2018

visions are then often challenged in the courts. From a substantive perspective, perhaps such "cultural" verification of planned investments would indeed be useful, but the problem is that the inclusion of such guidelines in a Local Plan exceeds their permitted statutory scope.

The above examples illustrate the idea that terminological discrepancies or uncertainty about what purpose the law should actually serve in the sphere of spatial planning translate into concrete practical problems. Lawyers in the field of urban planning and representatives of other professions and disciplines remain excessively wrapped up in their own "bubbles," which makes it difficult to develop a rational response to the problems.

The law

Against this backdrop, the dilemmas regarding the role of law in urban planning are much more plainly evident. Many important research questions can be raised. How specifically should the law be linked to the goals of spatial policy? How should the law protect spatial order? How should the law ensure optimal participation of diverse, interdisciplinary perspectives in spatial planning? How detailed (at the various levels) should legal solutions related to spatial planning be, so as not to sanction chaotic development on the one hand, but not to block development on the other? What should be the optimal legal formula for land use plans? What should be the role of the courts in spatial planning?

All of the issues identified are being addressed by the Committee for Spatial Economy and Regional Planning of the Polish Academy of Sciences, in particular by the "Task Force on Legal and Urban Planning Issues" established in April 2021 (operating in affiliation with the PAS Committee). The team brings together lawyers and urban planners representing various scientific centers (with significant practical experience). Its role is to conduct a debate as broadly as possible, bringing together seemingly disparate perspectives in urban planning and providing answers to the questions indicated above, as far as possible. ■

Further reading:

Nowak M. (ed.), *Rola prawa w systemie gospodarki przestrzennej* [The role of law in the spatial management system], 2022.

Nowak M., Śleszyński P., Legutko-Kobus P., *Spatial Planning in Poland: Law, Property Market and Planning Practice*, 2022.