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## Constitutional judgment 3-3-1-41-06

### JUDGMENT OF THE GENERAL ASSEMBLY OF THE SUPREME COURT

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| <b>No. of the case</b>                    | 3-3-1-41-06  |
| <b>Date of judgment</b>                   | 3 December 2007  |
| <b>Composition of court</b>               | Chairman Märt Rask and members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Hannes Kiris, Indrek Koolmeister, Ants Kull, Lea Laarmaa, Julia Laffranque, Jaak Luik, Priit Pikamäe, Jüri Põld and Harri Salmann. |
| <b>Court Case</b>                         | Action of Sten Liebert for annulment of the Tallinn City Government order no 1799-k of 15 September 2004.  |
| <b>Disputed judgment</b>                  | Judgment of Tallinn Circuit Court of 20 February 2006 in administrative matter no 3-04-332.  |
| <b>Ground proceeding in Supreme Court</b> | <b>for the</b> Appeal in cassation of Sten Liebert against the judgment of Tallinn Circuit Court of 20 February 2006 in administrative matter no 3-04-332.   |
| <b>Type of proceeding</b>                 | Written proceeding.  |

**1. To declare that the Tallinn City Council regulation no 17 of 27 June 1996, entitled “Establishment of the minimum size of building plots in Nõmme”, which was in force from 27 June 1996 until 28 October 2004, was unconstitutional.**

**2. To allow the appeal in cassation of Sten Liebert and to annul the judgment of Tallinn Circuit Court of 20 February 2006 in administrative matter no 3 04 332 and the judgment of the Tallinn Administrative Court in administrative matter no 3 2370/2004.**

## **DECISION**

**3. To render a new judgment, whereby the Supreme Court allows the appeal of Sten Liebert, annuls the Tallinn City Government order no 1799-k of 15 September 2004, and requires that the Tallinn City Government review the application of Sten Liebert.**

**4. To order that the Tallinn City Government pay the legal costs of 15 055 kroons for the benefit of S. Liebert.**

**5. To refund the security.**

## **FACTS AND COURSE OF PROCEEDING**

**1.** A registered immovable of 1659 square metres, located at 57 Põllu street, Tallinn, was in common ownership of Sten Liebert and Ervin Liebert. On 2 May 2003, in civil case no 2/19-1591/03 the Tallinn City Court terminated the common ownership and divided the registered immovable into two. Pursuant to the city court judgment a registered immovable of 847 m<sup>2</sup> remained in the sole ownership of Sten Liebert, and the registered immovable of 812 m<sup>2</sup> remained in the sole ownership of Ervin Liebert.

**2.** On 29 May 2003 S. Liebert filed an application with the Tallinn Sustainable Development and Planning Board to initiate the preparation of a detailed plan for dividing the registered immovable at 57 Põllu street, Tallinn, into residential plots, and for the determination of the building rights of the plots created.

**3.** On 13 December 2003, by its letter no UP-1-16/6121, the Tallinn City Government notified him that it did not consider it right to initiate the preparation of the detailed plan of the registered immovable located at 57 Põllu street, and that it terminated the proceeding for the initiation of the preparation of the detailed plan. Sten Liebert contested the activities of the Tallinn City Government in the administrative court. On 1 July 2004, in administrative matter no 3-847/04, the Tallinn Administrative Court declared the activities of the Tallinn City Government upon resolving the application of the complainant unlawful, and required the Tallinn City Government to process the application of Sten Liebert in conformity with the valid law and in compliance with the opinions expressed in the court judgment.

**4.** On 15 September 2004 the Tallinn City Government issued order no 1799-k “Refusal to initiate the preparation of detailed plan for registered immovable at 57 Põllu street”, by which it refused to initiate the preparation of a detailed plan, applied for by Sten Liebert. It appears from the explanatory letter to the draft of the order, appended to the order, that the City Government refused to initiate the preparation of the detailed plan, because it was not approved by the Tallinn Cultural Goods Board, because as a result of the plan the plots smaller than the minimum size established for small residential buildings in the Nõmme city district by regulation no 17 of the Tallinn City Council of 27 June 1996 would have been created. This, in turn, would compromise the cultural and environmental value of Nõmme district.

**5.** S. Liebert filed an action with the Tallinn Administrative Court, applying for the annulment of the Tallinn City Government order no 1799-k of 15 September 2004.

**6.** On 10 December 2004 the Tallinn Administrative Court satisfied the action of Sten Liebert, annulled the Tallinn City Government order no 1799-k of 15 September 2004, and issued a precept to the Tallinn City Government to review the application of S. Liebert in compliance with the circumstances established in the judgment.

The reasoning of the judgment pointed out the following:

- 1) The opinions of the Tallinn Cultural Goods Board concerning the initiation of preparation of detailed plans are not binding on the City Government;
- 2) Pursuant to the general plan of Tallinn city the construction of small residential buildings in Nõmme city district is not excluded, only it has to be weighed in each case; the division of plots by detailed plans is not in conflict with the definition of built-up area of cultural and environmental value, if this does not damage the established and uniform area of settlement meeting determined criteria. In the present case there are no laws justifying the restriction of the right of ownership;
- 3) The Tallinn City Council regulation no 17 of 27 June 1996 is in conflict with the Planning Act (hereinafter “the PA”), with the Law of Property Act (hereinafter “the LPA”), with the first sentence of § 3 of the Constitution and the first sentence of § 154 of the Constitution in their conjunction, as well as with § 32 of the Constitution, pursuant to which restrictions on the free possession, use and disposition of property shall be provided by law. The court shall not initiate a constitutional review proceeding, because the annulment of the contested administrative act is conditioned also by other circumstances.

**7.** Both, the Tallinn City Government and the Tallinn Cultural Goods Board filed appeals against the judgment of the Tallinn Administrative court, applying for the annulment of the administrative court judgment and for rendering of a new judgment, dismissing the action of S. Liebert.

**8.** On 20 February 2006, in administrative matter no 3-04-332, the Tallinn Circuit Court satisfied the appeals of the Tallinn City Government and the Tallinn Cultural Goods Board. The circuit court annulled the judgment of the Tallinn Administrative Court and rendered a new judgment, dismissing the action of S. Liebert.

According to the reasoning of the judgment the administrative court had violated the procedural rules and had wrongly applied the substantive law. The circuit court justified its conclusions as follows:

- 1) the fact that the city court considered it possible to divide the plot of land into physical shares does not give rise to the obligation of the city to initiate the preparation of a detailed plan. The owner’s right to have a registered immovable divided, established in § 54 of the LPA, is restricted by norms of public law, especially by the Planning Act;
- 2) upon issuing its order the Tallinn City Government has complied with the requirements arising from the Tallinn Administrative Court judgment no 3-847/04 of 1 July 2004;
- 3) the court can not consent to the allegations of the complainant and of the administrative court that the City Government decision was arbitrary, not reasoned and did not take into account all the facts relevant to the matter. The contested order meets the requirements for format and content of administrative legislation, and the City Government has exercised its discretion lawfully. The matters of fact, justifications and legal basis for issuing the order have been set out in the explanatory letter, appended to the order. It was ascertained during the court proceeding that the City Government employees have inspected the registered immovable at its location and that the City Government had been sufficiently informed for taking the discretionary decision upon issuing the order;
- 4) the order was issued not only on the basis of the City Council regulation of 27 June 1996 and the opinion of the Cultural Goods Board. The initiation of the preparation of the detailed plan was refused in public

interests, with the aim of preservation of the historically established cultural and environmental environment of Nõmme. The approval of the Cultural Goods Board is a procedural act within administrative proceeding, and the administrative court was correct when stating that the City Government may from its opinion taking into account the opinion of the Cultural Goods Board, but it is free to decide whether and to what extent to share the opinions of the latter,

5) the allegations of the complainant do not show unequal treatment. The majority of the small plots had been established before the general plan of Tallinn was adopted.

**9.** S. Liebert filed an appeal in cassation against the Tallinn Circuit Court judgment, applying for the annulment of the Tallinn Circuit Court judgment of 20 February 2006, and for the upholding of the Tallinn Administrative Court judgment of 10 December 2004 in administrative matter no 3-2379/2004.

**10.** The Administrative Law Chamber of the Supreme Court transferred the case to the general assembly of the Supreme Court by its ruling no 3-3-1-41-06 of 3 May 2007, so that the general assembly could form an opinion on the conformity of the Tallinn City Council regulation no 17 of 27 June 1996 with § 32 of the Constitution, pursuant to which restrictions on the free possession, use and disposition of property shall be provided by law, and could review the conformity of the regulation with the norms of the Planning Act and the Building Act (hereinafter “the BA”) delegating authority.

The Administrative Law Chamber was of the opinion that a local government can impose the restrictions in public law, infringing upon fundamental rights, for the protection of areas of cultural and environmental value, only in the cases and pursuant to the procedure provided by law, especially in the planning proceeding. The application of the restriction included in the Tallinn City Council regulation no 17 of 27 June 1996 was not in conformity with the limits of the norm delegating authority established in § 5 of the PA and in § 19(4) of the BA, valid at the time of processing the application of Sten Liebert.

## **JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING**

**11.** S. Liebert, appellant in cassation, sets out the following arguments to justify the appeal in cassation:

1) it does not appear from the judgment of the city court, which procedural rules the administrative court had violated;

2) the circuit court has fundamentally breached § 442(8) of the Code of Civil Procedure by failing to analyse the allegations of the appellant in cassation, submitted in response to appeal, concerning the unconstitutionality of the Tallinn City Council regulation no 17 of 27 June 1996, whereas the court applied the referred regulation;

3) the court was wrong to regard the contested administrative legislation lawful. It can be wrongly concluded on the basis of the circuit court judgment that it is already before the drafting of a plan is initiated that the circumstances and interests related to the aim of the plan are ascertained, and that it is already in the very early stage of the procedure that the prospective of the plan applied for can be predicted;

4) the refusal of the Cultural Goods Board to give its approval, declared unlawful by court, can not serve as a ground for a lawful administrative legislation. Proceeding from the Tallinn Administrative Court judgment in case no 3-847/04 the Tallinn City Government should have observed the opinions set out in the judgment. Thus, the circuit court could not use the unlawful opinion of the Cultural Goods Board to substantiate its judgment;

5) the order is not motivated; the Tallinn City Government has considered merely the size of the new plots, created upon the division of the plot, as a factor compromising the cultural and environmental value;

6) the legislation serving as the basis for the order is in conflict with the laws and the Constitution. The Tallinn City Council has issued its regulation of 27 June 1996 and has started to restrict the rights of the

appellant in cassation without a legal basis;

7) upon issuing the order the right of discretion was violated.

**12.** The respondent – the Tallinn City Government – is of the opinion that the Tallinn City Council regulation no 17 of 27 June 1996, entitled “Establishment of the minimum size of building plots in Nõmme”, is in conformity with the Constitution.

Pursuant to § 154(1) of the Constitution the local governments, which shall operate independently pursuant to law, shall resolve and manage all local issues. It proceeds from the earlier jurisprudence of the Constitutional Review Chamber of the Supreme Court that a local government is allowed to regulate local issues without a norm delegating relevant authority, yet the legislation of a local government must not be in conflict with the Constitution or the laws. The Tallinn City Council regulation no 17 of 27 June 1996 is not in conflict with the Constitution or the laws. As organisation of planning is, according to the Planning Act, within the competence of local governments, the local governments are entitled to decide whether to regulate the initiation of preparation of detailed plans by legislation of general or specific application. The contested regulation does not exclude discretion upon planning. §§ 4(2) and 10(5) of the Planning Act entitle the local governments to establish different requirements to detailed plans, including the minimum size of plots. The Chancellor of Justice has expressed the opinion that the Tallinn City Council regulation no 37 of 21 August 1997, establishing the minimum size of plots of small residential houses in the city district of Pirita, was not in conflict with the Constitution or the laws.

**13.** The Tallinn Cultural Goods Board, involved in proceedings as a third party, is of the opinion that the Tallinn City Council regulation no 17 of 27 June 1996 is in conformity with the Constitution. Neither is there a conflict between the Tallinn City Council regulation and the Planning Act and the Building Act.

§ 154(1) of the Constitution enables local governments to issue legislation for the regulation of local issues and to do it without a norm delegating authority. In the present case there is no dispute that the Tallinn City Council regulation was issued for the regulation of a local issue.

The Tallinn City Council regulation no 17 of 27 June 1996 is also in conformity with § 32 of the Constitution to the extent that the latter establishes that restrictions on the right to freely possess, use and dispose of one's property shall be provided by law, because the regulation is in conformity with the norms delegating authority of the Planning and Building Act (hereinafter “the PBA”), which was in force until 31 December 2002, as well as of the Planning Act and the Building Act, which entered into force on 1 January 2003.

Pursuant to § 9(2)1) of the Planning and Building Act and § 9(2)1) of the PA the areas being planned are divided into plots by a detailed plan. It proceeds from the first sentence of § 3(2) and from § 10(5) of the PBA and from §§ 4(2) and 10(5) of the PA, that it is within the competence of local governments to initiate and administer the preparation of detailed plans. Through the referred provisions the legislator has enabled local governments to establish requirements to detailed plans, including the minimum size of plots. It is for a local government to decide whether to regulate these issues by regulation of general or specific application.

What was provided for in § 5 of the Planning Act and in § 19(4) of the BA, did not exclude the remaining in force of the Tallinn City Council regulation no 17 of 27 June 1996.

**14.** The Chancellor of Justice is of the opinion that the Tallinn City Council regulation no 17 of 27 June 1996 was in conflict with §§ 32(2), § 3(1) and § 154(1) of the Constitution.

The Chancellor of Justice is of the opinion that from the point of view of the protection of the rights of Sten Liebert it is important that besides the Tallinn City Council regulation no 17 of 27 June 1996, also the Tallinn City Council regulation no 36 of 28 October 2004 “Building regulation of city district of Nõmme”, by which the former regulation has been replaced by now, be regarded as relevant.

The Tallinn City Council regulation no 17 of 27 June 1996 infringes upon the right of a person to build on his or her land, thus the right to freely use his or her property, included in § 32 of the Constitution.

The regulation is unconstitutional in the formal sense, as it violates the requirement, arising from the first sentence of § 3(1) and from § 154(1) of the Constitution, that the legislation of a local government shall be in conformity with and be based on the laws.

Imposition of restrictions on the establishment of building rights by a building regulation is in conflict with §§ 2(3), 9(2)1 and 2), and 8(7) of the PA in their conjunction, as well as with §§ 8(3)3 and 6), and 1(2) of the PA.

Also, the contested regulation is in conflict with the norms delegating authority included in § 5(1) of the PA and in § 19(4) of the BA, which entitle a local government to establish, by a building regulation, the general principles and requirements for planning and building. The referred norms delegating authority are worded too generally to allow for the imposition of concrete restrictions on the use of property.

According to the jurisprudence of the Administrative Law Chamber of the Supreme Court a general plan has an important role in the determination of land use provisions and conditions of construction. If a local government wishes to impose general restrictions on the size of plots, it must be done by a general plan, which is to be adopted through an open planning procedure. The procedural requirements for a local government regulation and for a plan are different and they have different legal force.

The valid building regulation of the city district of Nõmme is in formal conflict with the Constitution due to the same considerations as the Tallinn City Council regulation no 17 of 27 June 1996.

Having analysed, through the Constitution-conforming interpretation, the substantive constitutionality of the restriction on the right of ownership, imposed by the contested regulation, the Chancellor of Justice came to the conclusion that the establishment of the minimum size of plots in Nõmme was constitutional in the substantive sense.

The Chancellor of Justice requests that the Supreme Court consider the postponement of entering into force of its judgment in the case it decides to declare the Tallinn City Council regulation no 36 of 28 October 2004 relevant and unconstitutional, to give the local government time to conduct the procedure for establishment of a general plan.

**15.** The Minister of Justice is of the opinion that clause 1 of the Tallinn City Council regulation no 17 of 27 June 1996 was – during the entire period of its validity – in conflict with the first sentence of § 3(1), with § 13(2) and § 32(2) of the Constitution in their conjunction, to the extent that these require that the restrictions on the free possession, use and disposition of property shall be provided by law. The Minister of Justice argues also that § 5(1) of the PA and § 19(4) of the BA are in conflict with § 3(1), the first sentence of § 11 and with § 32(2) of the Constitution in their conjunction, and that the court should declare these provisions unconstitutional and invalid.

The establishment of the minimum size of plots restricts the possibilities of the use of property. Pursuant to the first sentence of § 3(1) and § 32(2) of the Constitution the right of ownership may be restricted only by law. Consequently, the imposition of restrictions on the use of property can not be merely a local issue for the regulation of which norms delegating authority are not necessary. Restrictions on the possession and use of property must be provided by law or pursuant to procedure provided by law.

§§ 2(1), 3(2) and 9 of the PBA are not appropriate norms delegating authority for the establishment of minimum size of plots by a building regulation, because these provisions regulate the establishment of a detailed plan and the general principles of planning. § 3(2)5) of the Planning and Building Act, entitling a local government to establish the building regulation for a rural municipality or a city, is too generally worded to allow the establishment of minimum size of plots. Consequently, until the termination of the

validity of the Planning and Building Act, the contested regulation lacked a legal basis.

§ 46(3) of the PA, which entered into force on 1 January 2003, provides that the building regulations of a rural municipality or city established on the basis of the Planning and Building Act shall remain in force after the entry into force of the Planning Act and the Building Act in so far as they are not contrary to the provisions of these Acts concerning building regulations. The Minister of Justice is of the opinion that the contested regulation can be regarded as a building regulation by its content. § 5(1) of the Planning Act and § 19(4)4) of the Building Act, which could have served as a legal basis for the contested regulation, do not establish the frames for restricting the right of ownership, and are therefore in conflict with §§ 3(1), 11(1) and 32(2) of the Constitution.

As the provisions of the Building Act and the Planning Act, which could have been regarded as norms delegating the authority to restrict the right of ownership, are in conflict with the Constitution, there is no constitutional legal basis for the restriction of the right of ownership by the regulation. Thus, the contested regulation was in conflict with §§ 3(1), 13(2) and 32(2) of the Constitution even after the entry into force of the Building Act and the Planning Act.

## **CONTESTED LEGISLATION OF GENERAL APPLICATION**

**16.** The Tallinn City Council regulation no 17, “Establishment of the minimum size of building plots in Nõmme”, reads as follows:

“On the basis of the proposal of the Nõmme Administrative Council of 14 February 1995 and pursuant to § 2(1), § 3(2) and § 9 of the Planning and Building Act, the Tallinn City Council decides the following:

1. To establish the minimum size of 1200 m<sup>2</sup> for plots in the detailed plans of small residential houses in city district of Nõmme; by way of exception (upon division of plots) 900 m<sup>2</sup>, which must be approved in advance by the Nõmme Administrative Council.”

## **OPINION OF THE GENERAL ASSEMBLY**

**17.** First, the general assembly shall examine which are the relevant norms for the adjudication of the appeal of Sten Liebert (I) and shall thereafter form an opinion on the constitutionality of these norms (II). Subsequently, the general assembly shall adjudicate the appeal in cassation of S. Liebert (III).

### **I.**

**18.** Within concrete norm control the court can consider relevant only such norms that are of significant importance for the adjudication of the case.

The Administrative Law Chamber of the Supreme Court was of the opinion that for the adjudication of the case of S. Liebert the Tallinn City Council regulation no 17, “Establishment of the minimum size of building plots in Nõmme” (hereinafter “contested regulation”), was relevant. The Chancellor of Justice and the Minister of Justice were of the opinion that from the point of view of adjudicating the dispute between S. Liebert and the Tallinn City Government, in addition to the referred regulation also the Tallinn City Council regulation no 26 of 28 October 2004, “Building regulation of city district of Nõmme”, and § 5(1) of the Planning Act and § 19(4)4) of the Building Act were of significant importance.

As the dispute between S. Liebert and the Tallinn City Government started because on 15 September 2004, by its order no 1799-k, the Tallinn City Government refused to initiate the preparation of a detailed plan, which S. Liebert had applied for, and the referred order was based on the Tallinn City Council regulation no 17 of 27 June 1996, valid at that time, the relevant legislation, determining the resolution of the dispute which is the basis of the present court case, is the Tallinn City Council regulation no 17 of 27 June 1996.

The general assembly of the Supreme Court does not consider it possible to declare provisions, to which the Chancellor of Justice and the Minister of Justice made subsidiary reference, relevant, and to review the constitutionality of these provisions. That is why the general assembly shall confine itself to the analysis of the constitutionality of the contested regulation.

## II.

**19.** In the ruling on the transfer of the case to the general assembly the Administrative Law Chamber of the Supreme Court argued that the general assembly should form an opinion on the conformity of the contested regulation with § 32 of the Constitution to the extent that it provides that restrictions on the free possession, use and disposition of property shall be provided by law, and that the general assembly should also review the conformity of the regulation to the norms delegating authority included in the Planning Act and Building Act.

**20.** The general assembly agrees that the refusal to initiate the preparation of a detailed plan for the division of the registered immovable located in Põllu street, Tallinn, constitutes a restriction on Sten Liebert's freedom to use and dispose of his property, and the general assembly shall analyse whether the contested regulation of the Tallinn City Council, which conditioned the refusal to initiate the preparation of the detailed plan, is in conformity with § 32(2) of the Constitution.

**21.** Pursuant to § 32(2) of the Constitution everyone has the right to freely possess, use, and dispose of his or her property, and restrictions on ownership shall be provided by law.

The requirement that restrictions be provided by law derives from the principles of rule of law and democracy, and it means that in regard to issues concerning fundamental rights all decisions essential from the point of view of exercise of fundamental rights must be taken by the legislator. The aim of the constitutional provisions concerning competence and formal requirements is to guarantee the observance of the basic constitutional principles (legal clarity, legal certainty, separation and balance of powers) and effective protection of fundamental rights.

**22.** In its earlier judgments the Supreme Court has repeatedly pointed out the principle that pursuant to the first sentence of § 3(1) and § 11 of the Constitution the restrictions on fundamental rights and freedoms may be imposed only by legislation having the force of law (*see the General Assembly of the Supreme Court judgment of 11 October 2001 in case no 3-4-1-7-01, and the Constitutional Review Chamber of the Supreme Court judgments of 12 January 1994 in cases III-4/A-1/94, and III-4/A-2/94, and of 24 December 2002 in case no 3-4-1-10-02*).

The general assembly is of the opinion that although the restrictions of fundamental rights of certain intensity may be imposed only by laws in the formal sense, the principle is not an absolute one. It proceeds from the spirit and the letter of the Constitution that less intensive restrictions of fundamental rights may also be imposed by a regulation, on the basis of an authority-delegating norm which is precise, clear and proportional to the intensity of the restriction.

The restrictions on the right of ownership may be imposed only by formal laws or on the basis of a norm delegating authority, meeting the referred requirements, included in the law, and restrictions may not be imposed by local government's legislation of general application. The purpose of this requirement is to ensure that the restrictions on the right of ownership are established on the basis of the same criteria throughout the territory of the state. It would go against the principle of equal treatment and uniformity if the protection of the right of ownership were unequally guaranteed in different regions of the state.

The Supreme Court does not exclude the possibility that in the present case the establishment of restrictions on the right of ownership by a regulation, with the aim of taking into account local peculiarities and on the basis of clear and sufficiently specified norm delegating authority, could be constitutional.



**23.** Next, the general assembly shall control whether the contested City Government regulation, restricting S. Liebert's freedom to use his property, is based on a clear and sufficiently specified norm delegating authority, included in an Act.

The preamble of the contested regulation of the Tallinn City Council states that the regulation is based on §§ 2(1), 3(2) and 9 of the PBA.

**24.** The general assembly is of the opinion that the provisions of the Planning and Building Act, valid at the time of issue of the contested regulation, to which reference is made in the preamble of the regulation, did not contain a norm delegating authority to establish the minimum size of plots of small residential houses on the whole or on the part of the territory of a local government unit.

§ 2(1) of the Planning and Building Act provided as follows: "The construction of new buildings, additions to existing buildings, division of land into plots and alterations to boundaries of existing plots in cities and other high density areas are only permitted on the basis of detailed plans adopted by local governments (mandatory plans for high density areas)." § 3(2) of the same Act provided that the administration of planning, design and construction in the territory of a local government was within the competence of the local government. Pursuant to that provision the local government was to ensure the preparation of plans which are the basis for land use and construction; ensure, as a prerequisite for adoption of a plan, the consideration and concordance of the interests of all interested persons; ensure adherence to and implementation of adopted plans; arrange for construction supervision; and adopt the building regulation for the city or rural municipality. § 9 of the Planning and Building Act provided that the size of plots was to be determined by a detailed plan.

Neither was the legal basis for the contested regulation of the Tallinn City Council created by § 19(4)4) of the Building Act or § 5(1) of the Planning Act, replacing the Planning And Building Act which had become invalid.

**25.** As the Tallinn City Government argues that the contested regulation was based on the competence of a local government to independently resolve all local issues without norms delegating authority, it is necessary to answer the question of whether the right of the Tallinn City Council to restrict the right of ownership without a relevant norm delegating authority could arise from § 154(1) of the Constitution.

**26.** Pursuant to § 154(1) of the Constitution all local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law.

§ 6(1) of the Local Government Organisation Act enumerates physical planning as one of the issues that a local government must organise on its territory. It proceeds from the hierarchy of plans and from the principle of gapless protection of fundamental rights, required by the Constitution, that the power to plan is within the shared competence of the state and of local governments. The division of state and local government functions upon the exercise of shared competences is determined by the principle of subsidiarity, which in Estonian legal order originates from Article 4(3) of the European Charter of Local Self-Government, ratified by the Riigikogu, and reading as follows: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy." Consequently, a concrete function is fulfilled by the level of power which in the concrete situation is in the best position to do it.

The general assembly is of the opinion that even if the establishment of the size of plots of residential buildings is regarded as a local issue, a local government can not do this by a regulation without the existence of a relevant norm delegating authority. This is so because the establishment of minimum size of plots of residential buildings infringes upon the fundamental right of ownership, established in § 32 of the Constitution.

**27.** The court points out that pursuant to the Constitution the principle of legality is binding on a local government unit upon the management of local issues as well as national issues assigned to it, and therefore the activities of a local government, infringing upon fundamental rights, must always have a legal basis.

The general assembly is of the opinion that there is no legal basis for the infringement of the fundamental right of ownership, because the contested regulation of the Tallinn City Government was issued without the existence of a proper norm delegating authority. That is why at the time of refusal to initiate the preparation of the detailed plan requested by Sten Liebert and the refusal to divide the registered immovable located in Põllu street, Tallinn, the contested regulation was – in the formal sense in conflict with the first sentence of § 3(1) and with the second sentence of § 32(2) of the Constitution.

Having ascertained the formal unconstitutionality of the contested regulation of the Tallinn City Council, the general assembly does not consider it necessary to analyse the proportionality of the restriction imposed on the right of ownership.

**28.** As the Tallinn City Council regulation of 27 June 1996, “Establishment of the minimum size of building plots in Nõmme”, has been declared invalid by now, the general assembly declares that the regulation was unconstitutional during the period of its validity, i.e. from 27 June 1996 until 28 October 2004.

### **III.**

**29.** Next, the general assembly shall adjudicate the appeal in cassation of S. Liebert.

**30.** The Tallinn Circuit Court found that the order of the Tallinn City Government by which the City Council refused to initiate the preparation of the detailed plan applied for by S. Liebert was not based only on the Tallinn City Council regulation of 27 June 1996, and that the order was justified in the protection of public interest, i.e. the protection of the area of cultural and environmental value.

It appears from the materials of the case that on 15 September 2004 the Tallinn City Government issued order no 1799-k, “Refusal to initiate the preparation of detailed plan for registered immovable at 57 Põllu street”, by which it refused to initiate the preparation of a detailed plan, applied for by Sten Liebert. It appears from the explanatory letter to the draft of the order, appended to the order, that the City Government refused to initiate the preparation of the detailed plan, because it was not approved by the Tallinn Cultural Goods Board, because as a result of the plan the plots smaller than the minimum size established for small residential buildings in the Nõmme city district by regulation no 17 of the Tallinn City Council of 27 June 1996 would have been created. This, in turn, would compromise the cultural and environmental value of Nõmme district.

**31.** The Supreme Court is of the opinion that the allegation of the circuit court that the contested order of the Tallinn City Government was not based solely on the Tallinn City Council regulation no 17 of 27 June 1996, is not of decisive importance for the adjudication of the case. The City Government’s legislation of specific application, including the order on refusal to initiate the preparation of the detailed plan applied for by S. Liebert, must nevertheless have been in conformity with the City Council’s legislation of general application, at the time of issue thereof. As the order under dispute fell within the sphere of regulation of the Tallinn City Council regulation no 17 of 27 June 1996, the City Government had the obligation to take it into account upon issuing the order. It appears from the explanatory letter to the order that this is exactly what the City Government had done.

**32.** As the Tallinn City Government order no 1799-k of 15 September 2004 was based on the Tallinn City Council regulation no 17 of 27 June 1996, entitled “Establishment of the minimum size of building plots in Nõmme”, which was in conflict with the Constitution, the order amounts to unlawful administrative legislation of specific application.

**33.** The general assembly does not agree with the statement of reasons of the Tallinn Administrative Court judgment of 10 December 2004. The administrative court found that the contested regulation was unconstitutional, but failed to initiate a constitutional review proceeding. The administrative court annulled the order of the Tallinn City Government on the basis that this was not in conformity with relevant laws. The general assembly is of the opinion that irrespective of the conflict with the laws the administrative court should have reviewed the constitutionality of the regulation and should have initiated a constitutional review proceeding.

The general assembly allows the appeal in cassation of Sten Liebert, and annuls the judgment of the Tallinn Circuit Court of 20 February 2006 in administrative case no 3 04 332 and the judgment of the Tallinn Administrative Court of 10 December 2004 in administrative case no 3 2370/2004. The general assembly renders a new judgment in the administrative case, whereby it allows the appeal of Sten Liebert for the above reasons, annuls the Tallinn City Government order no 1799-k of 15 September 2004, and requires that the Tallinn City Government review the application of Sten Liebert.

**34.** On the basis of § 90(2) of the Code of Administrative Court Procedure (hereinafter “the CACP”) the general assembly refunds the security to S. Liebert and on the basis of § 92(1) and § 93(2) of the CACP the general assembly orders that the Tallinn City Government pay the legal costs of 15 055 kroons for the benefit of S. Liebert.

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