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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case	3-4-1-9-06
Date of judgment	16 January 2007
Composition of court	Chairman Märt Rask, members Hannes Kiris, Indrek Koolmeister, Ants Kull and Villu Kõve
Court Case	Petition of Jõhvi Rural Municipality Council to review the constitutionality of § 13 of the Building Act
Hearing	Written proceeding
Decision	To dismiss the petition of Jõhvi Rural Municipality Council.

FACTS AND COURSE OF PROCEEDING

1. On 15 May 2002 the Riigikogu passed the Building Act (hereinafter “BA”), § 13 of which provides that local governments shall undertake to organise the building of public roads, public green zones, external lighting and rainwater pipes on the basis of a detailed plan up to the boundary of a land unit specified in a building permit, unless the local government in question and the person requesting the preparation of the detailed plan or the applicant for the building permit agree otherwise.
2. By its resolution No 82 of 24 August 2006 Jõhvi Rural Municipality Council requests that the Supreme Court review the constitutionality of § 13 of the BA arguing that the referred provision violates the right of a local government to independently resolve and manage local issues.

The Supreme Court received the petition of Jõhvi Rural Municipality Council on 29 August 2006.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING

3. Jõhvi Rural Municipality Council is of the opinion that § 13 of the BA makes local governments dependent on real estate developers and imposes on local governments unforeseeable financial obligations that go beyond the development plan. The real estate developers are not willing to enter into agreements with local governments concerning the building of the facilities referred to in § 13 of the BA. At the same time, pursuant to the Planning Act, a local government has no right to refuse the initiation of the preparation of a detailed plan due to the lack of financial means. As a result a situation may arise wherein a local government must ensure the building of public roads, public green zones, external lighting and rainwater

pipes on the basis of a detailed plan up to the boundary of a land unit specified in a building permit, without having sufficient finances for that. This obligation to ensure violates the right of a local government to independently resolve and manage local issues.

In the supplementary opinion submitted to the Supreme Court Jõhvi Rural Municipality Council explains that so far the rural municipality has not incurred the expenses arising from § 13 of the BA, but the developers wish to start using suburban registered immovables and do not concede to enter into agreements with the rural municipality concerning the building of public roads and utility networks. Jõhvi Rural Municipality runs short of finances for these.

Jõhvi Rural Municipality Council is of the opinion that if an agreement is not reached with a developer, the consequences may be the following: the developer or the owner of a plot will build the facilities referred to in § 13 of the BA itself and later demand that the rural municipality compensate for the cost; or the developer will not build the facilities and the owners of the plots will demand that the rural municipality build these; or that the rural municipality will not initiate the preparation of or adopt a detailed plan because an agreement is not reached and the developer or the plot-owners shall dispute this in court, because the failure to conclude an agreement is not a sufficient ground for refusal.

4. The Riigikogu sees no conflict between § 13 of the BA and the Constitution.

The guarantee of local government as an institution protects the local governments against the interference of the legislator into the local governments' duties, the guarantee also requires that the local governments have sufficient leeway upon the performance of their duties.

The function arising from § 13 of the Building Act is a local issue, the resolution of which has been imposed on local governments due to a compelling public interest. The planning power, guaranteed to local governments by the law, ensures sufficient levers and necessary discretion for the local governments, enabling them flexibly and on a case-to-case basis to reach an agreement with each developer concerning financing of building of public roads, public green zones, external lighting and rainwater pipes.

5. The Minister of Justice is of the opinion that § 13 of the BA is constitutional.

The independence of a local government upon discharging its duties lies in the right to freely decide whether, when and how to act. The Constitution allows for the restriction of local governments' right of self-management only on the basis of law.

The building of public amenities and utility networks and public green zones relates to the communal life of the members of a local community and a local government can manage the issues and it is expedient that it do so. Thus, the obligation included in § 13 of the BA in its essence amounts to a function within the competence of a local government for the purposes of § 6(3)1) of the Local Government Organisation Act (hereinafter "LGOA"). The obligation established in § 13 of the BA is conditionally mandatory, because a local government is exempted from the obligation if it reaches an agreement.

§ 154(1) of the Constitution enables the state, if there is a justified need, to restrict by law the competence of local governments to independently resolve local issues. In § 13 of the BA the legislator has stipulated that the building of certain facilities shall be the mandatory function of local governments and has given guidelines for the discharge of the function. Such a restriction must serve a sufficiently weighty aim, it must be suitable for the achievement of the aim and as lenient as possible, so as to leave the local governments as much independence as possible. The Minister of Justice is of the opinion that the restriction imposed with the aim of guaranteeing an ordered and undisturbed communal life is both suitable and necessary. Furthermore, the restriction is not excessively burdensome for the local governments, as in conjunction with the rules on initiating and preparing detailed plans established in the Planning Act (hereinafter "PA"), § 13 of the BA enables local governments to perform the function in a flexible manner or to exempt themselves from the obligation by entering into agreements. It would be necessary in the interests of the proportionality

of the restriction that the state incur this function, fully or partially, or that it provide state funding, if § 13 of the BA established an absolute – not a conditional – obligation.

The local governments have wide discretion upon initiating the preparation of plans. When considering whether to initiate the preparation of a plan a local government must also consider its possibilities to fulfil, on the planning area, the obligations arising from § 13 of the BA: if a local government lacks resources for the fulfilment of these duties and it does not reach an agreement with the person interested in the preparation of a detailed plan concerning the discharge of the duties in some other way, the local government unit may refuse to initiate the preparation of a plan.

6. The Minister of Regional Affairs is of the opinion that § 13 of the BA is not in conflict with § 154 of the Constitution. § 13 of the BA must be read in conjunction with other Acts regulating the sphere, primarily with the Local Government Organisation Act, the Planning Act and the Administrative Procedure Act. Initiating the preparation of a plan is a discretionary decision, thus, a local government must, in the initial phase, think through the issues related to the implementation of a detailed plan, including the issue of whether it will be able to build the facilities prescribed by the plan or whether these should be built by the person interested in the preparation of the detailed plan. If a local government has no means for the building of the facilities prescribed by the detailed plan and the person interested in the preparation of the plan does not consent to organise and finance the building thereof, a local government has the possibility to refuse to initiate the preparation of a detailed plan.

The aim of § 13 of the BA is to guarantee that the building plots to be occupied be supplied with and connected with infrastructures in a timely manner. The provision leaves local governments the freedom to decide whether it will construct the relevant infrastructures itself or agree with the person interested in the preparation of the detailed plan about the construction thereof.

7. The Association of Municipalities of Estonia is of the opinion that § 13 of the BA is unconstitutional. As the relation between § 13 of the BA and the Planning Act and the Local Government Organisation Act is ambiguous and it is not clear what the local governments' duty to ensure, established in it, actually means, the provision is one lacking legal clarity. If the duty to ensure, established in § 13 of the BA, is absolute upon reaching an agreement with the person interested in initiation of preparation of a detailed plan, this may amount to an infringement of financial guarantees of local governments included in § 157 of the Constitution.

8. The Association of Estonian Cities supports the petition of Jõhvi Rural Municipality Council. § 13 of the BA was introduced into the draft of the Act without having consulted the local governments and it needs to be amended. The provision should be introduced into the Planning Act and be worded as an obligation of a local government and the developer of the detailed planning area to enter into an agreement about the conditions, procedure and terms of building the roads and utility networks stipulated in the detailed plan and about the rights and obligations of superficiaries.

§ 10(6) of the Planning Act does not make it possible to come into an agreement with the person interested in preparation of a detailed plan about the construction of the facilities enumerated in § 13 of the BA and the bearing of relevant costs.

9. The Chancellor of Justice is of the opinion that § 13 of the BA is constitutional.

§ 13 of the BA supplements and specifies the list of local issues established in § 6 of the LGOA. As in the case of such local government functions a local government is only free to decide how and not whether to fulfil these, the making of the function of a local government a mandatory obligation amounts to an infringement of the guarantee of local governments.

One of the important aims of a local government is the creation of a sound physical and social environment for the local inhabitants in the form of things in public use necessary for daily life. It is in the public interest

that the new development areas have roads and necessary communications, that they provide public services and amenities and conditions for safe traffic, that the integral development, environmental protection and safety of inhabitants be guaranteed.

The restriction of the local governments' guarantee, imposed by § 13 of the BA, is suitable for the achievement of the referred aim. As it is most expedient to ensure this aim at the local government level, the restriction is both necessary and in compliance with the principle of subsidiarity arising from Article 4(3) of the European Charter of Local Self-Government. Bearing in mind that § 10(5) of the Planning Act leaves a local government a wide margin of appreciation in deciding whether or not to initiate the preparation of a detailed plan, and that § 13 of the BA can serve as a basis for refusal to initiate the preparation of a detailed plan if no agreement about the construction of infrastructures is reached, the local governments have been left a considerable power of decision. Furthermore, the Building Act imposes no restrictions on how to guarantee the construction of facilities in public use. Thus, the restriction of the guarantee of local governments, imposed by § 13 of the BA, is reasonable and justified.

10. The Minister of Economic Affairs and Communications is of the opinion that § 13 of the BA is not unconstitutional.

The duty established in § 13 of the BA to guarantee the building of public roads, public green zones, external lighting and rainwater pipes on the basis of a detailed plan up to the boundary of a land unit specified in a building permit is the function of a local government, unless it has otherwise been agreed with the person applying for the preparation of a detailed plan or for a building permit. On the basis of the Planning Act the local governments have wide discretion upon initiating the preparation and adoption of detailed plans. The Building Act sets no time limits during which a local government must ensure the construction of public roads and infrastructures. § 37(7) of the Local Government Organisation Act enables a local government unit to annually review the development plan and supplement it with amendments concerning e.g. the construction of public roads.

The road management budget of a local government is made up of tax revenue, allocations from budget equalization fund, funds allocated from the state budget pursuant to the Roads Act and single allocations from the state budget.

§ 13 of the Building Act is not in conflict with the principle of local government autonomy and does not impose unambiguous financial obligations on local governments.

THE CONTESTED NORM

11. § 13 of the Building Act establishes the following:

“§ 13. Building of roads, utility networks and utility works

Local governments shall undertake to organise the building of public roads, public green zones, external lighting and rainwater pipes on the basis of a detailed plan up to the boundary of a land unit specified in a building permit, unless the local government in question and the person requesting the preparation of the detailed plan or the applicant for the building permit agree otherwise.”

OPINION OF THE CHAMBER

12. First of all, the Constitutional Review Chamber considers it necessary to examine the admissibility of the petition of Jõhvi Rural Municipality Council and the nature of the obligation for the local governments arising from § 13 of the Building Act (I). Thereafter, the Chamber shall form an opinion on whether the referred norm violates the right of a local government to independently resolve and manage local issues, established in § 154(1) of the Constitution (II).

I.

13. Jõhvi Rural Municipality Council is requesting that the Supreme Court review the constitutionality of § 13 of the BA alleging that it violates the right of local governments to independently resolve and manage local issues.

14. Pursuant to § 7 of the Constitutional Review Court Procedure Act (hereinafter “CRCPA”) a local government council has the right to petition the Supreme Court that it declare a valid Act or a provision thereof invalid if it is in conflict with the constitutional guarantees of local governments.

15. It appears from the petition of Jõhvi Rural Municipality Council that so far Jõhvi Rural Municipality has had no disputes related to the implementation of § 13 of the BA. Thus, Jõhvi Rural Municipality Council is availing itself of the possibility, arising from § 7 of the CRCPA, to initiate an abstract norm control in the Supreme Court.

16. In order to decide whether the petition of Jõhvi Rural Municipality Council is admissible, it has to be ascertained whether the petition was submitted for the protection of constitutional guarantees of local governments and whether an infringement of the constitutional guarantees of local governments is possible in the case of the contested provision.

17. Jõhvi Rural Municipality Council has raised the issue of a violation of the autonomy of local government, that is of one of the constitutional guarantees of local governments, established in § 154(1) of the Constitution. Thus, the first condition is satisfied.

18. In order to determine whether § 13 of the BA restricts the right of self-management of local governments it has to be ascertained whether the building of public roads and public green zones and external lighting and rainwater pipes up to the boundary of a land unit specified in a building permit constitute local issues.

19. § 6(1) of the Local Government Organisation Act quotes as the functions of a local government the supply of water and sewerage, the provision of public services and amenities, physical planning and the maintenance of rural municipality roads and city streets unless such functions are assigned by law to other persons.

The building of public green zones, external lighting and rainwater pipes can, consequently, be regarded as local government functions, if the functions have not been assigned by law to other persons, yet the obligation to build public roads does not directly derive from § 6(1) of the LGOA. At the same time § 6(3) of the LGOA establishes that local governments resolve and organise local issues which are assigned to them by other Acts or which are not assigned by law to other persons for resolution and organisation.

20. The Constitutional Review Chamber is of the opinion that the obligation deriving from § 13 of the BA to ensure the building of public roads, public green zones, external lighting and rainwater pipes on the basis of a detailed plan up to the boundary of a land unit specified in a building permit is essentially a function within the competence of local governments for the purposes of § 6(3)1) of the LGOA. Thus, the infringement of the local governments’ right of self-management is possible and the petition of Jõhvi Rural Municipality Council is admissible for the purposes of § 7 of the CRCPA.

II.

21. Next, the Chamber shall analyse whether the restriction on the local governments’ right of self-management, imposed by § 13 of the BA, is in conformity with § 154(1) of the Constitution.

22. § 154(1) of the Constitution establishes that all local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law. This provision gives rise to the local governments’ right of self-management. The essence of the right of self-management lies in the local governments’ right to exercise discretion upon taking decisions and making choices when resolving and managing local issues.

By enacting § 13 of the BA, which puts an obligation on local governments to ensure the building of public roads and related infrastructures either itself or pursuant to an agreement concluded with the person requesting the preparation of the detailed plan or the applicant for the building permit, the legislator has restricted the local governments' right to exercise discretion upon taking decisions and making choices.

23. The local governments' right of self-management is not unlimited. § 154(1) of the Constitution prescribes that local governments shall operate independently pursuant to law. Thus, the legislator is allowed to put restrictions on the local governments' right to self-management. Nevertheless, not every restriction imposed by law on local governments' right to self-management is constitutional. To guarantee the preservation of the essence of the local governments' right of self-determination the restrictions imposed thereon must be proportional, that is suitable and necessary for the achievement of the aim of the restriction, and proportional in the narrow sense.

24. The opinion of the Riigikogu, submitted to the Supreme Court in the course of the proceeding of the present matter, states that the organisation of the local issues enumerated in § 13 of the BA was made obligatory for local governments due to a compelling public interest, leaving, at the same time, at the disposal of local governments sufficient levers within their planning power and necessary discretionary power for the flexible management of relevant local issues. The Constitutional Review Chamber agrees that § 13 of the BA may have been enacted because of a compelling public interest. The existence of such a compelling public interest is further supported by the fact that a similar provision had existed in § 47 of the former Planning and Building Act.

25. The Chancellor of Justice is of the opinion that the aim of the restriction on the local governments' right of self-management, imposed by § 13 of the Building Act, is the creation of a sound physical and social environment for the local inhabitants in the form of things in public use necessary for daily life, in order to guarantee the integral development, environmental protection and safety of inhabitants in the local governments' territories.

26. The Chamber is of the opinion that the aim of the restriction on the local governments' right of self-management, referred to by the Chancellor of Justice, constitutes a compelling public interest that the legislator may have had in mind when enacting § 13 of the BA.

27. Next, the Chamber shall form an opinion on whether the restriction imposed on the local governments' right of self-management is proportional to the chosen aim.

28. The Chamber is of the opinion that by putting an obligation on local governments to ensure the building of public roads, public green zones, external lighting and rainwater pipes on the basis of a detailed plan up to the boundary of a land unit specified in a building permit, the legislator has chosen a means suitable for the achievement of the referred aim, because the means is aimed, among other things, at guaranteeing the integral development of regions, environmental protection and safety of inhabitants.

29. Equally, the restriction is necessary for the protection of the referred public good, as the Chamber holds that it would not be possible to achieve comparable protection and do it equally well if it were done by other persons or by other means. It is the local governments who are in the best position for managing the referred local issues (either independently or by agreement of interested persons), thus, the principle of subsidiarity, arising from Article 4(3) of the European Charter of Local Self-Government, has also been observed.

30. Furthermore, the Chamber considers the restriction to be proportional in the narrow sense, as the local governments have been given room for discretion upon fulfilling the obligation to ensure, stipulated in § 13 of the BA.

31. The duty to ensure, established in § 13 of the BA, resembles the duty to ensure, which was included in § 47 of the former Planning and Building Act, with reference to which the Administrative Law Chamber has pointed out that the duty is fulfilled when the construction of roads and utility networks on the basis of a

detailed plan is completed. The duty can also be fulfilled through entering into and carrying out agreements about the construction of roads and utility networks entered into with the applicant for the building permit or other persons (see judgment of the Administrative Law Chamber of the Supreme Court of 29 October 2004 in matter No 3-3-1-35-04 – RT III 2004, 28, 304, § 11).

32. The duty to ensure the building of facilities on the basis of a detailed plan, established in § 13 of the BA, emerges only after the adoption of a detailed plan and/or issue of a building permit. In principle, a local government can avoid the referred duty by refusing to adopt a detailed plan or issue a building permit. Pursuant to § 10(5) and § 24(3)5) of the Planning Act it is the local government who decides on the initiation of the preparation and adoption of a detailed plan. As a rule, both the initiation of the preparation and the adoption of a detailed plan are procedural acts and the local governments have considerable discretionary power when deciding on the performance of the acts (see e.g. judgment of the Administrative Law Chamber of the Supreme Court of 10 October 2002 in matter No 3-3-1-42-02 – RT III 2002, 25, 284, § 9).

The decision on the refusal to initiate the preparation of a detailed plan, as well as the decision on the refusal to issue a building permit are – pursuant to § 43(2) of the Administrative Procedure Act – administrative acts, which must be issued taking into account the principles of sound administration, including the obligation of an administrative authority to guarantee the procedural rights of applicants and comply with the requirements relating to the content and form of administrative acts. As the administrative act issued upon refusal to initiate the preparation of a detailed plan is one issued on the basis of discretion, a local government must, when deciding on the initiation of the preparation and adoption of a detailed plan, on a case-to-case basis, consider the influence of its decision – taken in public interest – on other persons' fundamental rights and interests, whether the infringements of the related rights are proportional and whether a decision meets the requirements of equal treatment.

Also, when issuing or refusing to issue a building permit a local government must act pursuant to the discretion established by law and within that discretion thoroughly consider the interests and rights of all relevant persons and see to it that the restrictions of fundamental rights (right of ownership, freedom of movement, freedom of enterprise and other relevant fundamental rights) arising from its decisions be proportional and in conformity with the principle of equal treatment.

33. For the purposes of § 13 of the BA the local governments' duty to ensure also means that a local government must find the finances necessary for the building, on the basis of a detailed plan, of roads and utility networks. The financing can be organised by agreement with the developers, yet the failure to conclude an agreement does not exempt the local government from the duty to ensure.

It appears from the letter of the Minister of Economic Affairs and Communications, addressed to the Supreme Court, that local government units receive finances for the building of roads in the form of tax revenue, allocations from budget equalization fund, funds allocated from the state budget pursuant to the Roads Act and single allocations from the state budget. Thus, the state has created a mechanism that can be used, among other things, for the fulfilment of the obligations arising from § 13 of the BA.

34. In the matter under discussion Jõhvi Rural Municipality has not refused to initiate a detailed plan or to issue a building permit due to the lack of finances and the Chamber is exercising an abstract review of the constitutionality of § 13 of the BA. This is why the Chamber can not form an opinion on whether the refusal to initiate the preparation of a detailed plan or to issue a building permit due to the lack of financial resources and the subsequent failure to build local roads and utility networks could result in the unconstitutionality of § 13 of the BA.

35. Pursuant to § 37(1) of the Local Government Organisation Act a rural municipality or city shall have a development plan. For the purposes of the Act, a development plan is a document which defines the objectives of the long-term and short-term development of a local government and envisages the possibilities for the implementation of these objectives and which, in a balanced manner, takes into account the long-term directions in and needs for the development of the economic, social, cultural and natural environment and on

the basis of which the development of different fields of life is integrated and coordinated.

Pursuant to § 37(3) of the LGOA a valid development plan shall, during any budgetary year, include not less than three coming budgetary years. If a rural municipality or city has long-term financial obligations or financial obligations are planned for a longer period, the development plan shall be prepared for such period as regards the part concerning the specified financial obligations.

The Chamber is of the opinion that local governments can, in a balanced manner and step by step, plan the possibilities of implementation of short-term and long-term development needs, including the possibilities of implementing detailed plans. Also, a financial system that is stable and previously agreed upon helps the local government units to draw up long-term development plans and to implement these effectively. Thus, the local governments have been left room for discretion upon fulfilling the duty to ensure stipulated in § 13 of the BA.

36. On the basis of the aforesaid the Constitutional Review Chamber finds that § 13 of the BA is in conformity with § 154(1) of the Constitution and dismisses the petition of Jõhvi Rural Municipality Council.

Märt Rask, Hannes Kiris, Indrek Koolmeister, Ants Kull, Villu Kõve

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