Joanna Smarż[1]

Legal problems in the field of implementation of the area of impact on the terrains of neighbouring properties in the light of recent legal developments

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Abstract:

Determining the area of influence of the object on the area of neighbouring properties, in accordance with art 3 point 20 of the Building Law Act, causes many problems. The concept of this area, despite the legal changes made in 2015 and 2020, is still imprecise and may be subject to various assessments not only by the designer and the architectural and construction administration authority, but also by administrative courts. All the more so because in the phrase of „impact zone of the building" the term „development" (in the meaning of arrangement of the plot) has been changed to „development" (in the meaning of housing development), and both terms are used interchangeably in the jurisprudence.
Each time, the purpose of the amendment was to narrow down the interpretation of restrictions related to the execution of construction works, and not, as previously assumed, also to the method of development, which was not related to the implementation of the investment, but referred to e.g., noise, smell, obscuring objects, restricting access to the road public. The consequence of the amendment to the above-mentioned regulation was also to limit the number of entities participating in the procedure for issuing a building permit.
The impact zone of the building is determined on the basis of generally applicable regulations, which may introduce restrictions related to this building on the buildup of the area. As a consequence of the above, this zone is determined individually in a specific case. The catalogue of regulations constituting a reference point for determining the impact zone of the building on neighbouring properties is not strictly defined, which also causes practical problems. Therefore, it is worth considering the definition of the impact zone of the building again, specifying, for example, the catalogue of regulations that the authority should take into account when assessing the impact of the object on neighbouring properties. Specifying such a catalogue would certainly dispel any doubts that arise in this scope.

Key words: impact zone of the building, the Building Law Act, neighbouring real estate, building permit, real estate development

[1] Dr hab. Joanna Smarż, prof. UTH, Wydział Prawa i Administracji, Katedra Prawa Administracyjnego i Nauki Administracji, Uniwersytet Technologiczno-Humanistyczny im. Kazimierza Pułaskiego w Radomiu - ORCID: https:// orcid.org/0000-0002-2450-8162.

1. Introduction

By virtue of the Act Amending the Construction Law and Certain Other Acts of 27 March 2003, Article 3 (20) [2] was added to the Construction Law[3] of 7 July 1994 which defined the term of "work impact zone". This term was at that time construed as area demarcated around a work pursuant to separate provisions which introduced the work-related restrictions on the land arrangement. The intention behind incorporating this provision into the Construction Law was also to limit the number of entities involved in the building permit procedure. Accordingly, the sole parties to the procedure became the investor and the owners. perpetual usufructuaries or the real estate managers located in the area of the work impact[4].

By virtue of the Act to Amend the Construction Law and Certain Other Acts of 20 February 2015[5], the pertinent provision was specified in that restrictions "on the land arrangement, including the development of housing on the land" were the case. The amendment expanded the previous definition, by including the phrase "including development of housing". In turn, by virtue of the Act to Amend the Construction Law and Certain Other Acts of 13 February 2020[6] the pertinent provision was reworded in that the restrictions only concerned "the development of housing on the land".

Seemingly a minor alteration, it was crucial in practise for the determination of the parties to the building permit procedure. The legislature's view was this change meant to accelerate this procedure and make it more efficient. Regrettably, this never happened.

This article aims to analyse Article 3 (2) of the Construction Law and the common law, and to prove on that basis that the legislature has failed to meet its objective while the amendment in place severely impacts the limitation of parties' involvement in the procedure, thus generating consequent legal issues.

In this article, legal dogmatic and legal historic methods were employed as far as necessary to demonstrate the character of changes to the definition analysed and the pre-existing interpretation dilemmas.

2. Grounds for change of the definition of "work impact zone" of 2020

[2] Dz.U. Nr 80, poz. 718.

[3] Dz.U. z 2021 r. poz. 1333, ze zm.

[4] Por. art. 28 ust. 2 Prawa budowlanego oraz wyrok WSA w Krakowie z 10 lipca 2017 r., II SA/Kr 605/17, Legalis nr 1690163.

[5] Dz.U. z 2015 r. poz. 443.

[6] Dz.U. z 2020 r. poz. 471.

In the explanatory statement to the amendment of 2020, it was emphasised that the term of change in land arrangement was interpreted too broadly versus the original idea. It was commonly understood that such a change not only involved construction of a work (which entailed construction works), but it could also be referred to a number of other changes unrelated to construction or construction works. Meanwhile, the Construction Law should only deal with such land arrangement which pertains to work, that is, which only bears on "development of housing", and avoid using unrelated terms. However, due to the term "arrangement" used in the provision, the decisions of administrative courts interpreted the work impact zone too broadly, hence it was necessary to amend the provision in question[7].

In presenting grounds for their decision, the drafters referred, inter alia, to the ruling of Provincial Administrative Court in Łódź (WSA)[8] in which the court stated that "restrictions on land arrangement" must not be reduced to sole "restrictions on the development of housing" on the land. Consequently, no analysis should be made of Article 28 (2) of the Construction Law (which defines the parties to building permit procedure) within such incorrectly (too narrowly) defined a scope. As WSA found, the following is confirmed by the legal definition of "work impact zone" in the wording in which "restrictions on the development of housing" were only among examples of "restrictions on land arrangement". The meaning of the term is undeniably broader than the mere "restrictions on the development of housing". Manifestations of such an impact in land arrangement include noise, vibrations, electrical interference, air pollution, water or soil contamination, or deprivation of or restriction on the use of water, water sewage, heat and electricity, means of communication[9].

The drafters noted that it becomes challenging to determine the work impact zone on account of its various interpretations in the common law. As ruled out by various court panels, this term refers to disparate values and vaguely defined impact such as vibrations, pollution/contamination, including immission the boundaries of which cannot be clearly demarcated by the designers or architecture and building administration authorities. As the work impact zone provides grounds to identify parties to the building permit procedure, this term must be unambiguous. Hence, it was found necessary to

[7] Por. art. 28 ust. 2 Prawa budowlanego oraz wyrok WSA w Krakowie z 10 lipca 2017 r., II SA/Kr 605/17, Legalis nr 1690163.

[8] Por. art. 28 ust. 2 Prawa budowlanego oraz wyrok WSA w Krakowie z 10 lipca 2017 r., II SA/Kr 605/17, Legalis nr 1690163.

[9] Analogicznie orzekł także WSA w Poznaniu w wyroku z 21 lutego 2018 r. IV SA/Po 1234/17, Legalis nr 1759141 oraz NSA w wyroku z 17 maja 2021, r. II OSK 2346/18, Legalis nr 2588874 wydanym po zmianie art. 3 pkt 20.

specify the definition of the work impact zone so as to align it with the subject matter of the Construction Law[10].

Accordingly, it was decided to retain only the term “development of housing” in Article 3 (20), thus ruling that in this way the restrictions on development of housing are clear to determine and they only pertain to such impact on the property which prevents or impedes the construction works (including the construction of a work) due to inconsistency with technical and building provisions and other special provisions which expressly impose requirements on the development of housing, in particular the distance of construction work from other facilities[11].

It should therefore be assumed that, as the drafters intended, the work impact zone is an area for which the work imposes restrictions on construction of other work on account of the provisions relating to the development of housing rather than because the work causes any subjective nuisance[12]. Thus, area affected by restrictions on arrangement other than development of housing will not be covered by work impact zone[13].

3. Scope of application of the Code of Administrative Procedure in identifying parties to building permit procedure

As already stated, determining the work impact area does affect the identification of parties to building permit procedure. Under Article 28 (2) of the Construction Law, the parties include (in addition to the investor) owners, perpetual usufructuaries and management of real estate located in the work impact zone. This provision is *lex specialis* for Article 28 of the Code of Administrative Procedure under which everyone is a party to whose legal interest or obligation the procedure pertains or whoever demands that the authorities act in respect of their legal interest or obligation.

However, it does not mean that Article 28 of the Code of Administrative Procedure will not apply for the building permit procedure; it will apply, albeit to a limited degree. The provisions are so related that the term “party” in administrative procedure referred to in Article 28 of the Code of Administrative Procedure has been narrowed down only to the actors it names[14]. It follows that

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[10] D. Sypniewski, *Prawo budowane. Komentarz*, Lex el. 2022, komentarz do art. 3.

[11] K. Szocik, *Najważniejsze zmiany Prawa budowlanego objęte ZmPrBud2020*, [w:] D. Kafar, *Prawo budowlane 2020 – proces inwestycyjny po zmianach*, Legalis el. 2020.

[12] J. Kobyliński, *Nowa definicja „obszaru oddziaływania obiektu” a krąg stron postępowania w sprawie o wydanie pozwolenia na budowę po 19.9.2020 r.,* „Nieruchomości” 2021, nr 3.

[13] K. Młynkiewicz, *Czekają nas zmiany w ustawie – Prawo budowlane, cz. II,* „Nieruchomości” 2020, nr 4.

[14] A. Plucińska-Filipowicz, M. Wierzbowski (red.), *Prawo budowlane. Komentarz aktualizowany*, Lex el. 2019, komentarz do art. 28 Prawa budowlanego oraz P. Gołaszewski, [w:] R. Hauser (red.), *Kodeks*

Article 28 of the Code of Administrative Procedure is only applied as an auxiliary resource in deciding whether there is or there is no legal interest of the persons named in Article 28 (2) of the Construction Law. The foregoing necessitates the Construction Law provision being interpreted restrictively.

In other words, Article 28 of the Code of Administrative Procedure gives its meaning to the term "party" used in Article 28 (2) of the Construction Law with the latter provision narrowing the meaning down to the persons it names, as the procedure pertains to the persons' legal interest or obligation[15]. It is, however, problematic to find whether a given actor has a legal interest in the procedure (it is down to the definition of work impact zone which has been controversial from the start).

4. Principles for demarcating the work impact zone

In spite of Article 3 (20) of the Construction Law being amended again, the definition of the "work impact zone" is still imprecise and produces divergent interpretations. It is because, this provision does not define the work impact zone explicitly, but only by reference to numerous legal provisions the exhaustive list of which has not been defined, which causes significant difficulties in practise.

Even with the pertinent provision being amended, the common law still assumes that in the absence of the legislature clearly identifying the regulations governing the demarcation of area around the work, it should be assumed that the separate regulations referred to in Article 3(20) of the Construction Law represent the totality of the generally binding normative acts which introduce certain restrictions[16] or impediments to the arrangement, but also to the existing exploitation of the area[17]. As the adjudicating panels point out, it is impossible in the current legal environment to identify an exhaustive list of provisions which the architectural and building authority should consider in identifying parties to the procedure. Accordingly, in demarcating impact of the area on neighbouring property, the authority should at all times take into account the function, form

postępowania administracyjnego. Komentarz, Legalis el. 2020, komentarz do art. 28 oraz wyrok NSA z 23 marca 2022 r., II OSK 975/21, Legalis nr 2679770.

[15] Wyrok NSA z 12 maja 2022 r., II OSK 1106/19, Legalis nr 2702874.

[16] Pod pojęciem ograniczenia możliwości zagospodarowania działki sąsiedniej należy rozumieć również utrudnienia w możliwości użytkowania jej zgodnie z przeznaczeniem – wyrok NSA z 21 września 2022 r., II OSK 2407/19, Legalis nr 2755310.

[17] Wyrok WSA w Łodzi z 21 października 2021 r., II SA/*Łd* 261/21, Legalis nr 2633553; wyrok WSA w Białymstoku z 16 marca 2021 r., II SA/Bk 91/21, Legalis nr 2561477; wyrok NSA z 15 kwietnia 2021 r., II OSK 3110/20, Legalis nr 2627010.

and structure of the work under construction and its other characteristics, as well as how the land around the project is arranged[18].

Property remaining in the work impact zone is to be construed as specific norms of substantive law being breached from which a given entity derives their legal interest as a party to administrative procedure. And it is not only about the norms of administrative substantive law, rather the norms of other branches of law, too[19].

Restrictions originating otherwise than from laws do not allow to consider a given entity as a party to a building permit procedure. The regulation in question aims to prejudge that a contemplated construction project can only be effectively challenged when a legal interest exists to an extent the project is in conflict with a legitimate interest under a specific legal provision[20]. There must be therefore specific legal provisions in place producing rights or responsibilities related to land arrangement the obedience of which may be compromised amid an investor's application.

At the same time, it should be noted that the potentiality element must lend itself to objective testing[21]. It follows, it is not enough for an owner of property neighbouring with the property on which the project is to be carried out to believe they have a legal interest which authorises their involvement as a party to building permit administrative procedure[22]. Such properties neighbouring will not suffice, either, as they may not as well be automatically be affected by the work impact zone[23].

What is more, the intention behind the process aiming to demarcate the work impact area is not only to demonstrate adverse impact of the project on the neighbouring properties, but it is also about the likelihood of causing adverse impact of the project on the area around the investor's plot in relation to the contemplated construction project[24]. It is because, as the common law shows, the work impact zone is also area where the project-related nuisance is within the norms defined by legal provisions[25]. Work impact zone is therefore the criterion to establish whether a property is within an area to be somehow

[18] Wyrok WSA w Gliwicach z 18 lutego 2020 r., II SA/Gl 1338/19, Legalis nr 2391970.

[19] Wyrok NSA z 27 lipca 2022 r., II OSK 1857/19, Legalis nr 2745193.

[20] Wyrok NSA z dnia 21 kwietnia 2021 r., II OSK 2117/18, Legalis nr 2589287 oraz K. Szocik, *Obszar oddziaływania obiektu,* D. Kafar, J. Kornecki, K. Sielicki, M. Stachal, K. Szocik, *Prawo budowlane 2021 – nowe zasady realizacji inwestycji,* Legalis el./2021.

[21] Wyrok WSA w Gdańsku z 24 marca 2021 r., II SA/Gd 587/20, Legalis nr 2565630.

[22] Wyrok NSA z dnia 14 lipca 2022 r., II OSK 2043/19, Legalis nr 2761324.

[23] Wyrok WSA w Olsztynie z 25 maja 2021 r., II SA/Ol 270/21, Legalis nr 2588643.

[24] Wyrok WSA w Białymstoku z 9 stycznia 2020 r., II SA/Bk 752/20, Legalis nr 2539173; wyrok NSA z 21 kwietnia 2021 r., II OSK 1010/18, Legalis nr 2514419.

[25] Wyrok NSA z 10 sierpnia 2021 r., II OSK 3181/18, Legalis nr 2614793.

affected by the new project, and thus, whether there are grounds to claim there is legal interest of third persons which may be involved in building permit administrative procedure[26]. It is only the persons whose right is restricted on account of a work being constructed that can become the parties to building permit procedure for the work[27].

In conclusion, it should be assumed, in my view, that for an owner, a perpetual usufructuary or real estate manager to be considered party to a building permit procedure, it is necessary to find whether their property is located within an area demarcated (under specific generally applicable provisions) around the construction work being contemplated and whether the provisions introduce the work-related restrictions on the development of housing in the area. Even if the properties do not immediately neighbour each other, it does not automatically imply absence of the party's attribute. It is because, the work impact zone may also encompass areas which are more distant, yet within the reach of the planned project's impact. This reach must account for the project's nature and the area arrangement as conditioned by the project[28].

5. Work impact zone defining issues

In my view, numerous legal issues arise amid the work impact zone definition under analysis. However, the main issue is to narrow down the circle of parties to building permit procedure. The circle may only be reduced to such owners, perpetual usufructuaries or managers of real estate neighbouring with the contemplated project who are capable of demonstrating the project will thwart their plans to develop (in terms of housing) their own plot. It is because the work impact zone has been solely narrowed down to the area demarcated around the work pursuant to separate provisions which introduce the work-related restrictions on the development of housing on this area, and not only its broadly understood arrangement as has been the case to date.

The legitimacy of such excessive restricting the circle of parties to the procedure should be challenged as they do not safeguard the interests of third parties with an interest in the outcome of the case. In my opinion, the pertaining amendment may drive up the number of civil law cases. It is because, if the owners of properties neighbouring the planned project may not be able to administratively block a project capable of generating nuisance, the odds are,

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[26] A. Kosicki, *Pojęcie „obszaru oddziaływania obiektu" w ustawie – Prawo budowlane*, Dodatek do NIERUCHOMOŚCI 2011, nr 6.

[27] Wyrok WSA w Białymstoku z 9 stycznia 2020 r., II SA/Bk 763/19, Legalis nr 2279864; wyrok NSA z 21 kwietnia 2021 r., II OSK 1687/18, Legalis nr 2597383.

[28] Wyrok WSA w Białymstoku z 16 marca 2021 r., II SA/Bk 89/21, Legalis nr 2556396.

civil law claims may ensue after the work has been constructed[29]. The legitimacy of such a solution may be challenged if only with respect to the principles of respect for the legitimate interest of third parties (Article 5 (5)(1)(9) of the Construction Law), including owners and perpetual usufructuaries of properties neighbouring with the investor's plot[30]. It is because, as the common law has it, the obligation to respect the legitimate interest of third parties refers not only to entities having the attribute of a party (as construed by Article 28 (2) of the Construction Law), much as in both the cases the legal interest must concern real estate within the work impact zone[31].

It follows, the definition of work impact area matters not only for the application of Article 28 (2) of the Construction Law, but also for Article 5 of the said act which introduces fundamental requirements on the design, construction and maintenance of construction works. Accordingly, construction works, both as a whole and their single parts, along with their associated construction machinery, should be designed and built (allowing for their expected lifetime) in a way that provides for, inter alia, health and safety of persons exploiting the works. In addition, the legislature requires that fire safety, safety of use and accessibility of the facilities, noise protection, the "appropriate location" of the facility together with the associated construction machinery on the building plot must be ensured, which involves the application of technical and building regulations and taking into account the principles of technical knowledge. In practise, this will primarily bear on the location of the building plot versus the neighbouring properties and the existence of special local conditions, such as the topography, presence of water reservoirs, etc., as well as respect for the legitimate interests of third parties in the affected area, including access to the public road[32].

Article 5 of the Construction Law provides that this provision aims to protect the most numerous possible group of persons coming into contact with a construction work (not only on design and construction stage, but also work exploitation). Accordingly, my view is that the suspicion of an impact the contemplated project has on the neighbouring properties should be understood broadly (not necessarily does it also have to imply "development of housing"). Indeed, if there is any impact such as noise, odour, obscuration of facilities, restriction of access to the public road of a given project, on neighbouring properties, then their owners, perpetual usufructuaries or managers are parties

[29] A. Wilk, *Pojęcie „obszaru oddziaływania obiektu" po nowelizacji PrBud z dnia 13.2.2020 r.,* „Nieruchomości" 2020, nr 11.

[30] Wyrok NSA z 26 stycznia 2021 r., II OSK 1985/18, Legalis nr 2574337.

[31] Wyrok NSA z 15 listopada 2007 r., II OSK 1526/06, Legalis nr 104743 oraz A. Ostrowska, *Komentarz do art. 28 Prawa budowlanego,* [w:] A. Garlicki (red.), *Prawo budowane. Komentarz*, Warszawa 2012, s. 183.

[32] Z. Niewiadomski (red.), *Prawo budowlane. Komentarz,* Legalis el. 2021, komentarz do art. 5.

to the building permit procedure. The "impact" may indeed be a nuisance to the surrounding area regardless of whether it causes restrictions on "development of housing" or merely threatens to cause such nuisance. In this context, it is not relevant whether the legislature uses the phrase "arrangement" or "development of housing". What is relevant is whether this "impact" actually occurs, and in which area[33].

In my opinion, another problem is that the legislature replaced one vaguely defined phrase "arrangement", with another vaguely defined phrase, i.e. the term "development of housing". The two terms do not have a legal definition and are often used interchangeably in case law (not only before the 2020 amendment, but also after its entry into force[34]).

The issues referred to above are not the only ones we encounter while defining the “work impact zone". Pursuant to the legal norms decoded from the provisions, the authority still has to "demarcate the area around the work". This activity can also pose significant difficulties. Due to the varying degree of detail of the "separate provisions", the authority may not have sufficient data to demarcate this area. In addition, demarcation of the area around the work is facts-based, which may be conducive to such demarcation being much more difficult than determining the “neighbouring properties”, i.e., those which border on the property on which the project is being planned[35].

Another very important issue concerns referral to “separate provisions” which, according to the new wording, should be construed to mean only the technical conditions to which buildings and their location should conform, since only these provisions relate directly to development of housing. Meanwhile, the common law and the legal scholars[36] have a broader understanding of such a list of provisions, incorporating there any and all provisions of generally applicable law (including local law) which impose any restrictions on the development of housing on land on account of another work being constructed in the vicinity[37]. It follows that, at present, what decides on a given entity being admitted to a building permit procedure as a party is also the plot arrangement restrictions. It is not only about the impact of the planned project on

[33] Wyrok NSA w Warszawie z 20 stycznia 2020 r., II OSK 754/18, Legalis nr 2393730; J. Kobyliński, *Nowa definicja „obszaru oddziaływania obiektu” a krąg stron postępowania w sprawie o wydanie pozwolenia na budowę po 19.9.2020 r.,* „Nieruchomości” 2021, nr 3.

[34] Wyrok WSA w Szczecinie z 22 lutego 2018 r., II SA/Sz 1467/17, Legalis nr 1759303; wyrok NSA z 21 stycznia 2021 r., II OSK 2819/20, Legalis nr 2532306; wyrok WSA w Olsztynie z 25 maja 2021 r., II SA/Ol 270/21, Legalis nr 2588643.

[35] Z. Niewiadomski (red.), *Prawo budowlane. Komentarz*, Legalis el. 2021, komentarz do art. 3.

[36] Por. M. Wierzbowski (red.), *Prawo budowlane. Komentarz aktualizowany*, Lex el. 2022, komentarz do art. 3.

[37] Wyrok WSA w Krakowie z 30 marca 2021 r., II SA/Kr 25/21, Legalis nr 2597647.

neighbouring properties per se, but the resulting restrictions on exploiting the property in a certain way.

6. Summary

Analysis of the pertinent issue leads to a conclusion that by amending Article 3 (20) of the Construction Law, the legislature has failed to accomplish its intended facilitation of the work impact zone demarcation procedure. Due to the amendment, however, the circle of parties to a building permit procedure has significantly narrowed.

In addition, the amended concept of "work impact facility" is still controversial, and the terms "development of housing" and "arrangement" are constantly used interchangeably in case law. It also remains unclear which provisions should be regarded as separate provisions for the authority to rely on in assessing the work impact zone. Meanwhile, whether the zone is correctly demarcated will be a prerequisite for correctly determining parties to the building permit procedure. In turn, correct naming of the parties to the procedure determines its lawfulness. On account of incorrect naming of the parties, including the failure to recognise a certain person as a party, resumption of the procedure may be claimed.

Therefore, it is worth reconsidering the definition of the work impact zone by specifying, for example, the list of regulations that the authority should take into account in assessing the impact of the work on neighbouring properties. Such a list, once defined, would certainly allay any surrounding doubts while facilitating the definition of parties to the procedure.

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20. Wyrok WSA w Białymstoku z 9 stycznia 2020 r., II SA/Bk 763/19, Legalis nr 2279864.
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22. Wyrok WSA w Gliwicach z 2 grudnia 2020 r., II SA/Gl 752/20, Legalis nr 2539173.
23. Wyrok WSA w Białymstoku z 16 marca 2021 r., II SA/Bk 89/21, Legalis nr 2556396.
24. Wyrok WSA w Białymstoku z 16 marca 2021 r., II SA/Bk 91/21, Legalis nr 2561477.
25. Wyrok WSA w Krakowie z 30 marca 2021 r., II SA/Kr 25/21, Legalis nr 2597647.
26. Wyrok WSA w Gdańsku z 24 marca 2021 r., II SA/Gd 587/20, Legalis nr 2565630.
27. Wyrok WSA w Olsztynie z 25 maja 2021 r., II SA/Ol 270/21, Legalis nr 2588643.
28. Wyrok WSA w Łodzi z 21 października 2021 r., II SA/Łd 261/21, Legalis nr 2633553.

Inne:

Uzasadnienie do rządowego projektu ustawy o zmianie ustawy – Prawo budowlane oraz niektórych innych ustaw (Druk nr 121).