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Andrej PRELOVŠEK

Certain lost opportunities of the new laws

1. Introduction

1.1 Two laws

Two new laws have been passed in Slovenia: The Law on spatial management – LSM and the Law on building – LB (Official bulletin, No. 110/02).

They can be discussed as composites of contextual topics and we contemplate, how they are tied together mutually and with other laws.

We can delve into their intricacies, complicated processes or particularities of articles. Most of the professional public has been involved with detailed reading, a kind of »exegesis of holy scripts«. We can establish where contents are cyclical, how discretionary reading can enable survival (as always) etc. However, we can also establish that in institutes, companies and municipalities our profession is concentrating on the question, what did the legislator »think« or »want«, with this or that article. If we paid a visit to the legislator (national assembly) we could ascertain, that thinking is nor their predominant task, since their professional expertise is insufficient. Nevertheless they are responsible, since they have absolute power over all the laws and are the last and most powerful in the decision making procedure. Thinking is the job of the law's compiler – the department, where they can narrate, how an article »happened«, which person intervened, made a request and forthwith forgot about the whole package, whereby something remained and something was lost.

Truly our laws, and not just the two at hand, are like Stalingrad after the battle: the most important articles clearly show passages of interests storming through front lines; between the lines the history of interest battles can be read. Anybody literate enough and knowing something about the matter can experience real archaeological pleasure.

1.2 The speaker' s position

Some will consider the name of this chapter strange – the speaker' s position. It is however very suitable to begin with a self-reflective question about the speaker' s, author of this article' s position.

From 1998 to 2001 I took active part in the preparation of LSM. After some staff changes at the Department of environment, physical planning and energy, the working external group of experts wasn' t asked to participate anymore. Afterwards massive changes were introduced to the proposal (bill), thus only some remnants of the starting proposal can be discerned.

I am still aware of the concepts and issues dealt with in that period and can describe, what didn' t reach fruition in the now adopted laws. Some of the blame is possibly on myself, but that is not the issue of this article.

The topics are, which issues in the laws deserve criticism and require adjustments, independently of individual responsibility. Therefore these issues are not the rationale of an attack, but a call for professional debate to clarify, what should be amended in the laws.

1.3 Limiting the discussion

At this point we are dealing with both laws, however only from the standpoint of spatial management, urbanism and particular development and not from the aspect of inspectorates, building products, construction safety, European directives etc.

Emphasis is on the system, i.e.:
- What was lost, left out, but should have been included in the laws.
- We are dealing only with issues that could have been resolved within the possible cognition of the recently involved writers. Hereby I am implying the time and events at the department between 1998 and 2001, which I witnessed and was a part of.
- Therefore I am dealing only with matters that were left out, withdrawn at the last moment or made invalid – paralysed.

2. Critique

2.1 The concept of deregulation

The political demand present at the time of final preparation of the law was »deregulation« of the still valid system, which would enable faster investment flows. At the time the governmental ABM (anti-bureaucracy measures) action began.

However a »mistaken direction« was taken, instead of proclaiming certain steps in the procedure non-compulsory, they were simply scrapped. A parallel action could be the removal of five stairs in a staircase between two floors. There are certainly less steps to climb, but the distance remains the same and the venture becomes more risky. Experts in the field know that the problem doesn' t lie in the number of stairs, but their height. Of course one shouldn' t forget that the young and agile can skip one or two easily.

A friend of mine described this mistake in recognising »the deregulation doctrine« with the following proposal: »The best idea would be, to scrap the building permit; when a building is completed all the concordant bodies have to meet anyway for the (so-called) technical review. They know the laws, just as the designer and builder do. The building would therefore be approved anyway«.

Location information

One of the first uncovered mistakes in the law is the role of the so-called »location information«. Immediately after the laws were passed queues of citizens formed in front of the authority' s offices demanding »location information«. This is a list of legal stipulations drawn from planning acts. No more, no less. Citizens and their engineers (designers) alone have to risk the path ahead – buying the land, obtaining plans and approvals.
In other comparable countries, such as Italy, Austria or Hungary, investors can obtain »prior provisions« on demand.
The contents of issued location information are useless for practical assurance (with less risk) granted to a builder or his engineer (designer).

Investors risks
An investor wishes to invest in a larger building, which would provide employment for more than ten people in a municipality with a valid municipal planning order or other planning document. In short this could be an extremely desired type of FDI - Foreign Direct Investment.
If the investor is wise, he/she will try to obtain assurance from the responsible authority that such development is possible, whereby he/she would spend some 400.000 EUR, even before purchasing the land or commissioning the project. Our authorities cannot provide such assurance. It can nevertheless be obtained for sites in neighbouring or nearby countries: Austria, Germany, Italy, Poland or Hungary. There, upon demand, such »prior provisions« can be granted.
The investor, even if he/she does have the desire and covers all expenses, cannot obtain assurance from the »lowest« valid planning document clearly proving that such development (shown on a sketch) is possible.
If this segment of the dialogue between the private and public sector was withdrawn, then the most normal part of the private-public contact was withdrawn and the investor is subject to unreasonable risk. Hypothetically purchasing land can cost 300.000 EUR, the commissioned construction project could cost another 100.000 EUR, whereupon such a project could be seen as administratively impossible.
Hereby the motto of deregulation has caused damaging consequences.
All competing regions and states therefore have the advantage over Slovenia as a place for safe investment.

Compulsory ownership
Proof of ownership is demanded by the BL for less demanding and demanding buildings, simple buildings are exempt from the provision. However most disputes between neighbours emerge from the latter and there will be even more of them, since no building permits will be required. Sometimes there won' t even be any litigation, since the primary owner of property (e.g. the public sector) is inattentive and litigation can start only much later.

The profession is under-utilised
Two chambers of designers and engineers were defined in BL. However such professional organisation hasn' t been put to adequate use in general physical planning and management. It is normal for a state to grant these chambers authority to keep registers and issue licenses, thus a controlled professional population is created, in which irregularities can be amended. The idea is to substantially relieve national authorities.
In Italy (region Friuli-Julia) »simple« buildings are managed in this manner: the registered engineer, member of the chamber, signs the project, thus confirming that it complies to all regulations, upon which an official only checks the stamp, thus making the project legal (noted) immediately.

Confusion of mandates and licenses
The present Slovenian chamber of engineers will divide into two new ones: the new Chamber of engineers (CE) and the Chamber for architecture and space (CAS). The division itself is organised rather well, aligned to predictions for the transitory period. CE will include registered engineers and CAS will include registered experts and experts with licences. However when stipulating registration and licenses an astounding and technically insolvable confusion ensued.
It is unclear what the rationale is, who forms which section, why demands are in certain places lax and tight in others. It is a typical example of hyper-normativism.
If the subject would be acts, documents, where one can turn the other way, everything would be fine. The problem is that it involves living people working in an unfriendly service market, all of which have clients – their market.
Apparently nobody will force the issue, but if an interest group' s existence will be endangered, constitutional litigation could ensue.

2.2 Planning acts

Descriptions of contents of planning acts weren't checked
In these Summer months (May, June 2003) by-laws are being prepared by the Department of environment, physical planning and energy, concerning contents and procedures for various planning acts. The department is adamant in very precisely attending to their contents following various stipulations proscribed in the laws. However many of them weren' t well thought out. If our practise would recognize these provisions as necessary aspects, which should be respected in acts, then it would be easier, but the problem is that every, even the smallest detail is usually seen as »sacred« and the name of the stipulation is then given to the chapter (contents) of a particular act. The better approach would have been to prepare a test model, pattern for each particular act, thus solving most of the conflicts.

Municipal planning order – one or more
Until recently municipalities were covered with planning acts known as »Spatial planning conditions«. In the future they will be covered with so-called »Municipal spatial orders«. Probably the job will be done with several documents, several spatial orders, since it is impossible (confronting cumulative resistance) to adopt one extremely precise document for the whole municipality, which could be the legal basis for issuing permits. Even the so-called »urbanistic orders« from the law adopted in 1967, were immediately made »plural«. However, now we have the synthagm »municipal spatial order« (uniform document for the whole municipality), while before we had »spatial planning conditions« prepared for particular parts of a municipality (article 25, former law).

Urbanistic and landscape layouts shouldn't be formal acts
Similar to the till recently valid law (1984), within the new one, two legal acts are included in the »municipal strategy«: the »urbanistic concept« and »landscape concept«. This is a legally unsustainable system of »babuschka dolls«.
Especially in the urbanistic sense this is a conceptual mistake. Any settlement, which has a utility, i.e. sewerage, is a kind of linked system, which demands decisions »where what will be«.
The distinction between settlements with or without »urbanistic layouts« is senseless, since the intensity of professional endeavour in settlements is linear: in Ljubljana massive, in Domžale somewhat less, in conurbations much more, and with simple regulatory measures in distant villages
The urbanistic and landscape layouts should therefore be relieved off legal rigidity and defined as (compulsory) expert guidelines, since their rationale is in structuring (if not even designing) rather than normativism.

Separation of settlements from the countryside, settlements from the landscape
We know that in reality there are no such distinctions. Simi-

larly there are no distinctions between »cities« and »other settlements«. If somebody had joined in the debate some seventy years ago, the critique would be: »Market places, like Mengeš, have been left out«. It will never be clear, where Ljubljana ends (urbs) and the countryside village begins. These distinctions are ideological and institutional. Various departments and financial foundations are established on such differentiation, just as university study courses etc. are. This is not a Slovenian speciality.

Nevertheless, the law shouldn' t widen the gap between such distinctions. The law has also introduced somewhat forceful synthagmas, such as »landscape development«, which create tensions amongst nature conservationists, who see them as interference in their field of expertise.

Mistakes in location plans

Location plans (LP) are envisaged as »temporary« legal acts, which have the power of introducing certain forced »planning measures«, e.g. expropriation. The measure is needed for sewerage, roads and paths and particular areas, making it impossible to draw out areas where a certain LP will be enforced in a planning document of higher order.
Article 63 nevertheless stipulates that LPs have to be integrated in municipal planning orders beforehand, a mistake, which will hopefully be adequately remedied (removed) in the by-laws.

2.3 Motivation, aspiration, profit

Planning gain

Planning or delineating areas, whereby the lines represent limits of various land uses, is a method of determining profits. Those that remain outside »development areas« don' t gain anything. Those within the limits have the value of their properties increased tenfold. When I tried to push forward serious resolution of the conflict the department' s response was passive, the excuse being: »It will be handled by the Finance department and it' s tax on property markets«.
In the relationship between planning and financial consequences the law and the planning profession as such offer numerous poorly thought out doctrines. The stories in the frame explicate some of them.

The approaching property tax

Presently the media are dealing with the tax reform and new property tax. During finalisation of the LPP the department often stated that financial (de)stimulation of rational spatial allocation would be solved by taxation. Today one can state that the department is not actively involved in the preparation of the new property tax.
They say that the property tax won' t be high, not much higher than the present »levy for using building land«.
Fine so far.
However, one has to answer the questions:

- Why are you taxing my property and not my diamonds in the safe?
- Because it can be kept on record?
- Because you are enforcing some planning policy?
- Do you want to enforce a planning policy?
- Why are you then taxing my house?
- The plot, space or land' s surface is a limited commodity, houses are building products, these can be limitless.
- Therefore building plots should mainly be taxed (the limited commodity).
- At the end of the day tax collectors will impose taxes. They will probably lack sensibility for rational land use, especially if the responsible department offers nothing.

The conjunction between new development – rehabilitation (management) of the existing

In interviews with landscape architects published in daily newspapers (Dnevnik 24. 05. 03 and 31. 05. 03) we read about their regret that there are never adequate funds for developing urban and suburban parks comparable to those for buildings.
In Slovenia the idea of »linked« investment hasn' t seen fruition, which is in effect an instrument for redirecting planning gain into public interest. Of course municipalities should enforce it, but the legal backing and provision should be stated in the law.
The system is known in Germany. It was enabled with the new building law 1998 (BauGB).
The instrument is known as *Abwägung der Bodenversieglung* (»balancing – compensation for land enclosure«) defined in the new paragraph 1a. This legal possibility was utilised by some municipalities, e.g. Munich, with the system Sozialgerechte Bodennutzung (social equity land use instrument).

story 1

A very influential person wants to build a house on the city' s edge overlooking the natural setting. By using his/her influence after buying the plot, the land is proclaimed a building plot and the house is built.
His/her intention is not to sell. However profit was created as soon as the Municipal Council declared the land suitable for building.

story 2

Where is the »ratio legis« (goal of legal provisions) of now valid laws, stating that if a house is sold less than two years after purchase, the transaction will be heavily taxed. Somebody from our profession told me that the goal is to prevent speculation. When I asked, what is speculation, there was no answer. Why is buying and selling houses essentially something bad?

story 3

The Department of finance (tax collectors) is generally interested in raising sales taxes, because it is easiest to collect them upon transaction.
A high sales tax functions as a sales obstacle. By obstructing sales, the allocation of properties to those users that could make immediate use of them is prevented.
Just as the »sales tax« (substituted by the value added tax some five years ago) prevented economic flows, even the »sales tax« on property transactions will be counter productive, or de-stimulating for rational land use.

story 4

The law in Germany states that with re-parcelling the municipality can obtain 10-20 % of all lands from the re-parcelling fund. This implies at least partial taking of planning gain, i.e. the added value that was created by executing the operation: adoption of plan + re-parcelling. In Slovenia, LSM in the chapter dealing with re-parcelling doesn' t provide automatic obtainment of land into ownership of the municipality.

A quote from the mentioned instrument:
»Principles of the social equity land use instrument. The principles predict that private landowners, who have profited from the newly established development possibilities, partially repay the costs endured by the municipality because of the endeavour. They include roads, utilities, open and green surfaces, kindergartens and also partial financing of social apartments (homes)«.

2.4 Initiative is the motor of spatial management

Private initiative in planning is still not recognized
With the BL the investor, landowner is again raised to »saint-hood«, which is acceptable but somewhat conservative.
In the LSM, similar to the old law, planning acts are produced on the basis of higher-ranking acts following almost automatic initiative of the state or local communities. Only location plans allow exceptions, whereby the »initiator« is introduced, i.e. somebody with articulated interest, who then finances production of the act.
In other municipal acts the role of initiative should be strengthened and in fact, brought closer to real life. Today everything happens upon initiative, a fact, which should be recognised as positive reality. The initiator has material interest to change the municipal plan, therefore acting as compulsory financier (at least partially) of changes and amendments to the plan, after which part of the planning gain would also be levied to benefit the public coffer.

Conditional contractual spatial programming
If most of the arguments I presented in the article reflect the opinions of the profession' s majority the next one is probably somewhat challenging. I do hope however that elaborate discussions can bring differing attitudes closer.
The method of work (respect for initiative), as described earlier, demands a shift from physical planning to programming of spatial changes. The public sector has to prepare offers for the private sector, which are based on criterion selection »if ... then«. Planning initiative has to be registered and its' realisation monitored up to the building permit. The developer follows one' s interest from the plan to the permit and the public sector (municipal planning department) should do likewise. In this way, in an equitable way, public gains could be netted, either in money or infrastructure development (see Sozialgerechte Bodennutzung elsewhere in article).
The rudiments of these ideas can still be traced in LSM (i.e. article 53), but other instruments haven' t been stipulated in the law. This demanding principle would require established »realisation monitoring« of initiatives through the presently ripped steps in the planning process. For example, it would be unthinkable for an investor that the municipality adopts a planning order, which enables expansion of building lands, but doesn' t adopt a location plan, which specifies execution.

2.5 Complications, poor communication

LSM begins with rather »awkward« definitions (article 2). Sometimes these definitions only confuse understanding of otherwise common Slovenian words (i.e. settlement). Definitions of expressions that aren' t used later shouldn' t be stated (i.e. urban planning and landscape planning are not mentioned in the laws at all).

When these definitions were put in the laws, the fashionable thing to do was to put as many in the opening articles. There are truly many definitions in the LB, but some however remain a mystery. The main mystery in LB emerged, when the writers retraced their steps from the »spatial intervention« that should include all developments, which a community wants to control, to »building« and »building permit«. In-filling, gravelling, excavating and other similar »prior building« activities therefore aren' t the subject of this law. The modern Finnish law does however deal with »non-building« activities.

In both laws there are »statements with performance mistakes«. For easier understanding (after all readers of this article aren't mainly linguists or lawyers) I will mention one of them (LB, article 2, point 6):
»The building permit is a written order by which the responsible authority after establishing that the intended building complies to implementation physical planning acts, that its' built or reconstructed parts will comply to essential demands and that the intended building will not infringe on rights of third persons or public interest, allows such building and prescribes concrete conditions, which should be respected in construction«.

What is wrong with such a sentence? The building permit is a written order, with which the responsible authority allows building. Even if facts weren't properly established, it is still a building permit. The correct procedure of checking and issuing is determined in the procedural part of the law.

Example of a twist in LSM is article 21:
The national act derogates the municipal act (paragraph 3)
The strategic act derogates the implementation act (paragraph 4)
Does a national location plan therefore derogate the Municipal strategy of spatial development?

The laws were written without simultaneous writing of explanations, notes, which would explain the »*ratio legis*« (intent, goal, as said by lawyers) of particular articles. Thus their real interpretation in by-laws and practise will be difficult.

2.6 Relations to architecture, environmental orderliness

The Netherlands, Finland and some other countries have adopted documents named »architectural policy«. Responsible »spatial (planning) departments« adopted them, but in Slovenia something like that is presently unthinkable.

How to promote quality in architecture, or in other words: higher quality and spatial identity. In Slovenia, the two mentioned laws proscribe whatever happens in Slovenia' s territory. BL did introduce the possibility of using competitions as a system, which is a genuine progress. However the advantage of such legal provisions can be suppressed with a by-law that can limit the process.

There are no other solutions for promoting and controlling quality in design.

A problem is also the doctrine found in both laws, whereby the investor or initiator first applies for guidelines or the location information. The first methodologically correct step in the procedure would be a first draft (sketch) submitted by the investor – initiator stating one' s intentions. This is the rationale behind the concept of »prior provision«, sincerely

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missed in BL. Even in LSM a prior dialogue should be established (articles 27 and 29), i.e. »first sketch – proposal, followed by guidelines issued by the responsible authority«.

3. Conclusion

The laws on spatial management and building have caused numerous problems, un-proportionately many in view of progress. In the article I described »lost opportunities«, »lost themes«. The intent of the article is not to determine responsibility. I personally participated in parts of the process. However I am not arguing about, who could have added, stopped or even destroyed something. I have listed some themes, which should, in my opinion, be contemplated by the whole profession. There are still many traditional views about spatial management and especially physical planning. Above all more professional discussions should be started so that we could be ready to help in repairing some parts of the laws.

Andrej Prelovšek, M.Sc., architect, Panprostor, d.o.o., Ljubljana
E-mail: andrej.prelovsek@guest.arnes.si

Andrej POGAČNIK

The new spatial *ordnung*

So we have it: the new legal code. During the last years, almost a decade, we almost got accustomed to professional arguments, endless submission of remarks and suggestions to the drafts of the Law on spatial management (LSM) and Building Law (BL). Amongst planners such non-acceptance of planning laws became a normal condition and excuse for numerous professional issues. However a surprise ensued. Kopač (the Minister for environment, planning and energy, ed.) and his team suddenly speeded up, overtook critics of the drafts, bypassed fruitless procedures and managed to get the laws passed before January 1st 2003. Soon a stream of drafts of by-laws, regulations, ordinances and guidelines followed.

We can in principal ascertain that the two laws are »up-to-date« and pro-European. Their references were taken from the German law (Bundesgesetzbuch, 1990), but also Austrian and Italian (Cocchi, 1998), Danish, English, Finnish and Croatian laws, as well as European Union guidelines (EU Compendium, 1997)[1].

They are however extremely bulky – LSM has 191 and BL 239 articles. Alongside all the by-laws, which will be adopted soon, and all departmental laws, which directly influence procedures and implementation, substantial legal and planning knowledge will be needed for comprehensive mastering. The quantity of such experts in Slovenia is and will be inadequate. Detailed regulations concerning organisational structuring of the Chamber of architects and planners or expropriation procedures could probably be included in another Law (similar to the Baugesetzbuch). Let' s nevertheless review the advantages and above all deficiencies of the professional contents of both laws.

The Strategy of national spatial development (By-law on the strategy' s contents, April 2003 and Strategy, April 2003) has become an exceptionally modest document. Why? Where are the times when Slovenia' s plans were drawn in the scale 1:250000, with very detailed spatial analyses and which produced the concept of primary land use based on natural qualities at an acceptable level, even by present standards! The new Strategy is a diluted concoction of very lax concepts, presented in the scale 1:1000000. It should however include contents characteristic for a regional plan, after all the country' s size can compare to a Central-European region. A »National regional plan« would provide substantially concrete initiatives for plans of Slovenian regions, which should »*from bottom up*« also integrate the initiatives of their component municipalities.

The regional concept (why not regional plan?) of spatial development is surely a welcome document (By-law on the regional concept' s contents, 2002). Its' main purpose is to position national infrastructures and limit protected areas stretching across municipal boundaries and the national border (By-law proposal, 2002). However, will municipalities voluntarily join into rational planning, functional, urban, technical and natural regions? The examples of the »strange« Lower Posavje region and the local-patriotic enthusiasm for the too small Karinthian region are more than eloquent.

With our »urbanistic concept« we are again stuck halfway to the developed world. Why not speak about the urbanistic plan (even general urbanistic plan or master plan) or a municipal plan as it is known in the developed countries, with clearly defined content of urban development? This is a plan that would emphasise the autonomy of cities (Dimitrovska-Andrews, 1994), their specificity and independence from municipal, regional, even national strategies. The same applies to »landscape concepts«. Why aren' t they simply called landscape plans, whose main tasks are landscape design, landscape maintenance and protection of the natural environment?

The idea behind spatial order – »*ordnung*«, is flawless. The National spatial order determines and positions (or at least reserves place for) important national buildings, especially infrastructure (Proposal of order, 2003). With the order the state would, in a subsidiary sense, regulate all the contents, which small, understaffed or uninterested municipalities couldn' t or wouldn' t, especially the range of plot sizes, built-up ratio and use, possibilities for parallel or temporary uses, methods of respecting regional typology, methods of dealing with exceptional landscapes, areas with preserved high quality architectural identity etc. The National order should define compulsory utilities, methods of involvement in urban development corridors, typical Slovenian suburbs, urbanised countryside etc. In short, general and common contents of municipal orders should be included in the national order. In this way municipalities wouldn' t have to keep reinventing gunpowder or adjusting professional principles to a »mayor' s urbanism«. So far so good, but we are afraid of ensuing over-normativism. The first draft of the by-law (By-law on the national spatial order, 2003), containing nineteen articles, stipulates production of: »basic tasks«, »detailed rules« and »measures and conditions ...«. Who will be able to comply to all these orders with sensible contents that will ensure enough creative freedom and respect for constant changes in the physical environment?

The Municipal strategy and spatial order – as stipulated in the law and by-law proposal – hold water (also Geršak Pod-