Appeals in procedures for obtaining a construction permit and a certificate of occupancy

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Content

A scientific paper

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APPEALS IN PROCEDURES FOR OBTAINING A CONSTRUCTION PERMIT AND A CERTIFICATE OF OCCUPANCY

ABSTRACT

According to the European Commission, the construction industry is a very important part of the overall economy of the European Union. In the EU territory, this sector provides 18 million jobs and contributes to about 9% of the Union's GDP. Accordingly, in order to facilitate the earliest possible start of construction without undue delays, it is important to make the procedure for obtaining a construction permit and an occupancy certificate as efficient as possible. Effective oversight mechanisms also contribute towards this objective. This paper aims to analyse effectiveness and efficiency of the oversight mechanism of appeals as an ordinary remedy specifically in the special administrative procedures for obtaining a construction permit and an occupancy certificate in the Republic of Croatia.
For the purpose of a scientific approach to the researched subject, this paper employs analysis and synthesis as well as inductive and deductive research methods for the theoretical part of the paper. A portion of the results of an empirical research conducted in development of the author's doctoral thesis is also analysed for the purposes of the paper and the analysis employs descriptive statistical methods. In order to gather relevant information for the purposes of the paper, secondary data was requested from the Ministry of Construction and Physical Planning of the Republic of Croatia through an information access request submitted by the author in compliance with provisions of the Right to Access Information Act. In the paper logical and teleological interpretation methods are used. An analysis of overall research results, within concluding considerations, offers recommendations for improvements of the system intended to render future appeals in the procedure for obtaining a construction permit and an occupancy certificate a more effective and more efficient remedy.

Keywords: *appeal, construction permit, occupancy certificate, administrative proceedings.*

1. Introduction

Since their dawn, humans build, tear down, and rebuild to shape their natural environment to their liking. Construction means design development, execution of buildings (under Article 1(1)(10) of the Construction Act (Official Gazette No 153/13, 20/17, 39/19, and 125/19) construction is execution of civil and other works (site preparation, earthworks, structural, installation, and finishing works, placing of construction products, plant or equipment) to build a new structure, or rebuild, maintain or remove an existing one) and professional supervision of construction which must pose no danger to life and limb, environment, nature, other structures and property, or stability of surrounding soil (Radujković & Izetbegović & Nahod, 2008, 8). It is therefore one of fundamental activities in every economy and the society because it requires considerable material assets, provides income for many employees in the sector and

mutually complementary activities while changing the natural environment and affecting the quality of human living. The construction industry is an important part of the overall economy of the European Union. In the EU, this sector directly employs 18 million and generates about 9% of its GDP. It also accounts for Euro 800 billion worth of indirectly related products sourced from other industrial sectors. Therefore, the European Commission aims to help this sector become competitive, efficient, and sustainable. To sustain this industry's significance for economic growth and development, it is important to achieve consistent conduct of administrative procedures for obtaining of construction permits and occupancy certificates through consistent application of all principles by competent administrative bodies. This paper particularly focuses on effective conduct of appeals by the Competent Ministry of Physical Planning, Construction and State Assets (hereinafter the Competent Ministry) as the second-instance body.

This paper aims to test effectiveness of appeal proceedings in the process of issuing of construction permits and occupancy certificates and to examine if the desired improved effectiveness in resolution of appeals in the administrative proceedings has been achieved by the Competent Ministry as the second-instance body. Namely it is pointed out in explanations of provisions of the Final draft of the General Administrative Procedure Act (hereinafter the GAPA) that the provisions are designed to urge the second-instance bodies to decide on merits of the case following appeals in administrative matters – which was rarely done in the past. Since the procedures to obtain construction permits and occupancy certificates are special administrative proceedings, the following affirmative hypothesis is put forward in compliance with the above aim of efficiency: The number of second-instance decisions by the Competent Ministry on merits following appeals against decisions on construction permits or occupancy certificates is greater than the number of cases in which it grants the appeals, revokes the permits or certificates in part or in full or remits the cases to the first instance. Accuracy of the hypothesis and its theoretical basis will be tested using results of empirical research conducted by the author of the paper for the purposes of her doctoral thesis and information provided by the Competent Ministry under information access requests submitted in November 2019 and September 2020.

Construction permits and occupancy certificates are products of special administrative proceedings regulated by special substantive law – the Construction Act (Official Gazette No. 153/13, 20/17, 39/19, and 125/19). It is worth reminding that administrative bodies conduct administrative proceedings where they unilaterally and authoritatively decide on specific rights, obligations, or legal interests of persons in administrative matters. Accordingly, a decision in administrative proceedings stems from interplay of the GAPA and the substantive law (the Construction Act in this instance), other rules and decisions, and the facts to produce a decision referred to in compliance with the GAPA or special legislation. According to the Construction Act, decisions regulating construction and use of a structure are referred to as construction permits and the occupancy certificates, respectively. Since they are generated by application of the GAPA rules, efficiency of the GAPA rules should also be viewed through the lens of issuing of construction permits and occupancy certificates.

2. The right to lodge an appeal as an effective remedy in administrative proceedings

In this part of the paper, the right to appeal is analysed with regard to international, EU and national sources of law that guarantee the same right in the context of the effectiveness/working of this remedy. Namely, according to the Croatian Language Portal, "effective" means fruit bearing, fruitful, working, efficient (Croatian Language Portal,

http://hjp.znanje.hr/index.php?show=search_by_id&id=f19iWhR9) so these words will be treated and interpreted in this paper as synonyms and it is important to point out that the above words are also treated as synonyms in normative documents and case-law examined below. The case law of the Constitutional Court of the Republic of Croatia and the European Court of Human Rights is analysed in an appropriate manner and with regard to relevant examples.
The right to appeal is enshrined in the Croatian legal system as a constitutional right (Constitution of the Republic of Croatia, Official Gazette no. 85/10 – consolidated text, 05/14, Article 18) representing an instrument of protection against infringements of rights of parties by first-instance courts or other public law bodies. This right may only be excluded exceptionally under individual acts if other forms of legal protection are provided. (Đanić Čeko, Kovač, 2020) This nearly absolute right is a part of the Croatian legal tradition, also enshrined in Article 13(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ((European) Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette – International Treaties, no. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10 - hereinafter the Convention) guaranteeing the right to an effective remedy in cases of violation of Convention rights and liberties before a national state authority. It is foreseen, as an effective remedy, by the basic substantive and procedural legislation in the field of administration in Croatia. The need for appeal and effective legal safeguards within administrative procedures is also foreseen by normative acts on administrative procedures taken at the level of EU institutions and offices.

As noted above, the right to lodge an appeal is a part of Croatian administrative tradition. This is particularly apparent in the fact that the right to lodge an appeal in administrative proceedings was regulated by the 1930 General Administrative Procedure Act of the Kingdom of Yugoslavia (in turn based on the 1925 General Administrative Procedure Act of the Republic of Austria), and the 1956 General Administrative Procedure Act enacted by the socialist Yugoslavia and adopted by Croatia in its consolidated version in 1986. The latter was adopted and amended by the Republic of Croatia in 1991 and 1996, respectively. (Koprić, 2011, Medvedović, 1995, Medvedović, 2003, Medvedović, 2006, Medvedović, 2010, Đerđa, 2010, Krbek, 1962, Babac, 1998, Borković, 2002) Ultimately, the right to lodge an appeal is also regulated by provisions of the most recent General Administrative Procedure Act representing the fundamental procedural legislation applicable to administrative matters which took effect on 1 January 2010 (Official Gazette 47/09). Article 12(1) and Articles 105 through 121 of the Act regulate the right to lodge an appeal and set out requirements and methods of enforcement of this right. The GAPA thus prescribes the principle of decision-making at two instances, enforced through the right to lodge an appeal as one of the basic and constitutional rights of citizens. (Turčić, 2010) In addition to being an inseparable part of the Croatian legal tradition, this paper ties the right to lodge an appeal to the principle of efficiency as a fundamental principle of the GAPA in all stages of administrative proceedings – including appeal proceedings.

Article 13(1) of the Convention also guarantees the right to an effective remedy before domestic bodies even in cases of violations of Convention rights and freedoms by persons acting in an official capacity. *Causa* for this emphasis on "effectiveness" pertains to the parties' right to use the remedy and to enjoy effective legal protection before public law bodies and in all procedures entered by the parties to protect their Convention rights and freedoms – and the domestic legal system is required to provide this effective protection. Accordingly, in several judgments rendered by the European Court of Human Rights concerning administrative procedures before domestic bodies in the Republic of Croatia, the court has pointed to the need for availability of remedies and their efficacy. In *Vajagić v. Croatia* of 20 July 2006 (European Court of Human

Rights judgment of 20 July 2006, *Vajagić v. Croatia*, no. 30431/03, § 53) concerning a case of an expropriation procedure, the court found, *inter alia*, that Article 13 of the Convention guarantees availability, at the national level, of the a remedy necessary for enjoyment of the substance of Convention freedoms and rights regardless of the form it is provided in the domestic legal order, referring to an earlier judgment in *Kudła v. Poland* of 26 October 2000. (European Court of Human Rights judgment of 26 October 2000, *Kudła v. Poland*, no. 30210/96, § 157) The above judgment therefore guarantees availability of the type of remedy essential for enforcement of the substance of the Convention rights and freedoms at the national level in any form which might be provided in the domestic legal system. Effects of Article 13 therefore require provision a domestic remedy addressing the substance of the complaint and affording appropriate protection under the Convention. In *Božić v. Croatia* judgment of 29 June 2006 (European Court of Human Rights judgment of 29 June 2006, *Božić v. Croatia*, no. 22457/02, §§ 32 and 45), concerning proceedings to recognise the right to family pension and in *Štokalo and Others v. Croatia* judgment of 16 October 2008 (European Court of Human Rights judgment of 16 October 2008, *Štokalo and Others v. Croatia*, no. 15233/05, § 65) concerning restoration of or compensation for nationalised property, the European Court of Human Rights determined the requirement of effectiveness of the remedy which shall only be effective if it is capable of covering all stages of proceedings (therefore also including appeal proceedings) indicated in the complaint taking into consideration their overall duration. In those cases, disputes involved, *inter alia,* duration of the proceedings and administrative silence.
Decisions of the Constitutional Court of the Republic of Croatia relying on Article 18 of the Constitution also support the position that the right to lodge an appeal is a right safeguarded by the Constitution. In addition to the above *causae*, the following judgments of the Constitutional Court of the Republic of Croatia particularly pointed out the requirement to facilitate enforcement of the right to lodge an effective appeal and an effective remedy in conduct of administrative proceedings. In its decision U-III/4621/2007 of 23 April 2008, the Constitutional Court quashed a judgment rendered by the Administrative Court of the Republic of Croatia and a decision of the Security and Intelligence Agency of the Republic of Croatia and remitted the case to new proceedings. The Constitutional Court determined, *inter alia*, that there were "… omissions of such nature that they may not be deemed acceptable from the standpoint of constitutional law and protection of the applicant's constitutional right to an effective remedy enshrined in Article 18(1) of the Constitution…" in administrative proceedings instituted in response to an impugned decision on transfer of the complainant (due to needs of the service, as an official of the Security and Intelligence Agency of the Republic of Croatia to the Ministry of Finance). Furthermore, in its decision U-III/1187/2006 of 24 March 2009, the Constitutional Court quashed an Administrative Court judgment, a decision of the Ministry of Finance, and a decision of the Finance Minister while remitting the case to the Ministry of Finance for new proceedings (the Ministry of Finance dismissed an appeal lodged by the complainant against the Finance Minister's decision to remove her from the position of the head of the Customs Offence Proceedings Department) finding, *inter alia*, "… that there were omissions in the proceedings concerning the impugned decisions of the Ministry of Finance of the Republic of Croatia in response to the complainant's administrative action and that the nature of the omissions is such that they cannot be deemed acceptable in light of the complainant's constitutional right to an effective remedy guaranteed under Article 18(1) of the Constitution…". Thus, the Constitutional Court confirmed the obligatory nature of an effective remedy in protection of citizens' subjective rights through its case-law.

Legislature has defined *effectiveness* as a term applied to administration through applicable regulations. Article 2 of the State Administration System Act (Official Gazette 66/19) states that the purpose of the state administration system lies in lawful, purposeful, effective, and

efficient discharge of state administration tasks defined in Article 3(1). Furthermore, the GAPA views the principle of effectiveness in the framework of Article 10 and the basic provisions of this act jointly with the principle of economy defining the principle by emphasising that administrative matters are conducted as simply as possible and promptly, but without affecting determination of facts and circumstances pertinent to the administrative matter. In accordance with the above, the legislature regulates importance of effective conduct of the state administration itself through the above basic substantive and procedural legislation, particularly by applying the principle of efficacy to all stages of administrative proceedings. Therefore, appeals and all activities of appeal proceedings must be prompt and as simple as possible regardless of the type of administrative proceedings. A part of the empirical research results taken for the purposes of this paper and data provided by the Competent Ministry will be used to test if this holds true.

Appeal as an effective remedy should also be considered from the point of view of EU-level administrative procedures and sources of law regulating them. Even though administrative procedural rules are not identified and codified in the EU law (Đerđa & Jerčinović, 2020, 87–88, Vitez Pandžić, 2018, 259), this does not mean they do not exist. The administrative procedural rules are dispersed through various sources of the EU law and therefore exceedingly difficult to apply. However, the existing sources of law regulate the need for effective legal protection and the general right to an effective legal remedy, and several sources of the EU law regulating the matter will be pointed out in this part of the paper.

Article 19 of the Treaty of the European Union on the structure of the Court of Justice of the European Union, a part of the primary EU law, (Official Journal of the European Union, 26.10.2012, EN) , states: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." and this certainly encompasses all administrative areas including administrative procedures therein. Another primary source of law regulating the administrative procedure is the Charter of Fundamental Rights of the European Union (Official Journal of the European Union, 26.10.2012, EN) specifically as the right to good administration. Another Charter right associated with administrative procedures is the right to an effective remedy set out in Article 47. (Đerđa, 2012, 118)

Furthermore, since all EU Member States are also member states of the Council of Europe, acts of this body are applied across the EU territory and are thus binding for the Member States and EU bodies and institutions. The Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities' sets administrative procedural rules and its Article 5 requires indication of remedies and time-limits for their use in administrative acts violating the rights, liberties or interests of a particular individual (Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, https://rm.coe.int/16804dec56). In 2007, the Council of Europe adopted the Recommendation CM/Rec (2007)7 of the Committee of Ministers to member states on good administration and its Article 13 foresees remedies against decisions of public authorities or lack thereof.

The general legal principles are deemed a significant source of EU law. It is deemed impossible to foresee every legal situation at the level of this international organisation and the Court of Justice of the European Union is authorised to create legal rules in its case-law derived from the EU law and Member States' legal systems. Legal rules created in this manner be the basis for conduct of administrative proceedings. Thus, Case C-72/12 *Gemeinde Altrip, Gebrüder Hört GbR, Willi Schneider v. Land Rheinland-Pfalz* judgment reaffirms the principle of the right to a remedy.

European Ombudsman's European Code of Good Administrative Behaviour should also be touched upon here (European Ombudsman, 2005). It has been adopted by the European Parliament in a resolution of 6 September 2001. (Đerđa & Jerčinović, 2020, 94–95) This Code details what the right to good administration referred to in Article 41 of the Charter of Fundamental Rights means in practice. The right to good administration is developed through principles and Article 19 sets out that the (EU) institutions must provide the right to appeal to parties whose requests or subjective rights are adversely affected by indicating the nature of the remedy, the body deciding on the appeal and applicable time-limits. This article also sets out the possibility of judicial protection before the Court of Justice and the right to submit a complaint to the European Ombudsman referred to in Articles 230 and 195 of the Treaty Establishing the European Community and Articles 263 and 228 of the Treaty on Functioning of the European Union (Official Journal of the European Union, 7.6.2016 HR, 216 C C 202/1). The above therefore ensures effective legal protection primarily regulating ordinary path of legal protection using appeals.

All above sources determine the need to regulate ordinary legal protection, but omit details thereof, leaving them to be provided in each individual case where a party's subjective rights are decided upon. In response to years of significant efforts to establish unified administrative procedural rules at the EU level (especially by the European Parliament and the Council) regarding operation of EU agencies, institutions, bodies, and offices, a regulation for an open, efficient, and independent European Union administration was drafted. It was proposed within the framework of the resolution of 9 June 2016 for an open, efficient, and independent European Union administration. (European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration, https://www.europarl.europa.eu/doceo/document/TA-8-2016-0279_EN.html). However, the Commission has not yet put forward any legislative initiative regarding the above regulation even though the European Parliament's 2018 Impact Assessment of possible action at EU level for an open, efficient and independent EU administration presented conclusions favouring adoption of the above regulation. (Đerđa, Jerčinović, 2020, 97) Article 20 of the draft regulation sets out the right to administrative review in somewhat greater detail than the normative acts noted above. The method of enforcement of this right is laid down as well as the need to indicate time-limit for review in the administrative act itself even though the above time-limit is not regulated by this article, leaving it to individual areas and cases. As confirmed by its title, this article does not use the word "appeal", but considering the normative determination specifying that parties may seek review of administrative acts adversely affecting their rights and interests by submitting a request to the hierarchical superior authority (devolved action) and alternatively to the same authority which adopted the act, it is clear that the administrative review has the character of ordinary legal protection i.e., an appeal in administrative proceedings.

Protection of citizens' subjective rights after adoption of an administrative act is therefore reflected in ordinary legal recourse consisting of an appeal which must be effective to fulfil its purpose. The above is a part of the Croatian legal tradition and applicable normative regulations of the Republic of Croatia. The same is therefore reflected in the case-law of the European Court of Human Rights and the Constitutional Court of the Republic of Croatia as well as the existing EU-level administrative procedural rules.

3. Remonstrative and devolved powers following an appeal

Appeal is the only ordinary remedy against decisions in administrative matters. It is a procedural remedy allowing a party to institute a procedure before a second-instance body to

review lawfulness and regularity of a first-instance decision affecting their rights and obligations (Borković, 2002, 458, Đerđa, 2010, 240).

Krbek points out that appeals as ordinary remedies against administrative acts differ from informal acts (petitions) because the appellant is entitled to a formal decision on the request and the ordinary remedy must comply with specific legal requirements while a petition may be lodged informally at any time. (Krbek, 1962, 97) Accordingly, an appeal is a submission in compliance with provisions of the applicable GAPA and it must contain all elements found in any other submission as well as an indication of the impugned decision, the name of the body which adopted the decision and the reason for dissatisfaction with the decision. (Đerđa, 2010, 248) Even though appeals do not have to have statements of reasons, it is important to point out that well-presented facts and legal reasons for the appeal certainly contribute to success in appeal proceedings. Nonetheless, statements of reasons are required in cases where new facts and evidence are presented in appeals allowing the appellant to explain why they did not use them in the first-instance proceedings and what prevented them from being aware of such facts and evidence. In analysis of contents of appeals, it is impossible not to think about grounds for the appeals. Even though other pieces of procedural legislation specify grounds for appeals against individual acts (e.g., judgments) within appropriate legal protection proceedings, no grounds for appeal are specified for administrative proceedings i.e., for the GAPA (Official Gazette no. 47/09). However, considering the reasons for failings of an administrative act (Krišković et al., 2003, 60), material and non-material errors in administrative acts (Ivančević, 1983, 342) and grounds to challenge decisions in appeal proceedings (Đerđa, 2010, 246), by consistently analysing provisions of the GAPA, legal theory finds five groups of reasons allowing appeals to challenge decisions: (1) The administrative act/decision is adopted by a body which is not competent for the subject-matter; (2) The first-instance decision violated procedural rules affecting resolution of the administrative matter; (3) The facts are incorrectly or only partially determined or correctly and fully determined facts were used do draw an incorrect conclusion; (4) Substantive law was incorrectly applied; and (5) The aim or the purpose entails unlawfulness or there was an error in application of a discretionary assessment. (Borković, 2002, 73-77)

Regardless of the reason for an appeal, according to the GAPA (Official Gazette no. 47/09), the appeal must be submitted within 15 days following delivery of the decision to the party, although it is possible to prescribe a longer time-limit through special substantive legislation. If there are multiple parties to the proceedings, the 15-day time-limit applies to each party individually depending on the date of delivery to the party. The party may address an appeal to the second-instance body as indicated in the instruction on remedies included in the decision and submit it to the first-instance body which adopted the administrative decision. As noted in the introduction, the decisions regulating construction and use of a structure are “permits” and “certificates” and Article 96(2) of the GAPA (Official Gazette no. 47/09) allows introduction of such special terms. Construction permits and occupancy certificates for specific structures are issued by the ministry competent for construction affairs (currently the Ministry of Physical Planning, Construction and State Assets) in special administrative proceedings under Article 99 of the Construction Act (Official Gazette no. 153/13, 20/17, 39/19, and 125/19), an administrative body of a major city, the City of Zagreb, and counties competent for construction affairs. Therefore, appeals are submitted precisely to the above bodies, except if the Competent Ministry issued the permit or certificate. In the latter case, the decision may not be appealed, but an administrative dispute may be instituted. Appeals against corresponding permits or certificates are addressed to the Competent Ministry and submitted to the competent administrative body of the major city, the City of Zagreb, or the county if the above bodies have

rendered the first-instance decision. Since the Construction Act (Official Gazette no. 153/13, 20/17, 39/19, and 125/19) foresees no special time-limit for submission of appeals, the GAPA-imposed time-limit of 15 days following delivery of the corresponding permit or certificate to the party applies. According to provisions of Article 115(1) of the Construction Act (Official Gazette no. 153/13, 20/17, 39/19, and 125/19) "parties to the proceedings for issuing of construction permits are developers, owners of the real property referred to in the construction permit and holders of other property rights related to the same or to real property adjacent to the real property referred to in the construction permit" while Article 138 of the same act states that "parties in the proceedings for issuing of occupancy permits are developers and owners of the structure who instituted the proceedings to obtain the occupancy certificate". Each of the above parties may appeal the corresponding permit or certificate. The applicable Construction Act does not specifically distinguish procedural remonstrative powers of the above authorities regarding appeals and therefore, according to the GAPA, when the administrative body receives an appeal against a construction permit or an occupancy certificate, an official will first assess its formal elements to determine if it is timely and allowed, i.e. if it was submitted by an authorised person or a party to the proceedings or a party entitled to participate in the proceedings who was denied that right. If the official cannot determine if the appellant is entitled to be a party to the proceedings, the appeal and the corresponding case file are forwarded to the Competent Ministry for further processing. If the appeal complies with the above formal requirements, it is forwarded to other parties for their observations if multiple parties were involved in the proceedings, and appropriate time-limit for appeal will be provided to them. After consideration of the appeal allegations, the official may determine them well-founded and he or she will appropriately update facts of the case, obtain required documents, perform required procedural actions and replace the impugned permit or certificate if necessary unless it affects third parties' rights. There are three cases in which the first-instance administrative body submits the construction permit or occupancy certificate with the case file to the Competent Ministry for adjudication:

- It is impossible to assess if a person is a party to the proceedings.
- It has assessed that the first-instance proceedings to issue the construction permit or occupancy permit are lawfully and properly concluded.
- It has assessed that issuing of a new construction permit or occupancy certificate in compliance with grounds for the appeal would infringe upon the rights of third parties.

When the Competent Ministry receives an appeal and the case file (except in cases of appeals against administrative silence when there is no case file) as the second-instance body, it will also examine if the appeal against the construction permit or the occupancy certificate is timely and submitted by an authorised person. Upon fulfilment of the three formal requirements (otherwise, a decision is adopted to reject the appeal), the official of the Competent Ministry examines lawfulness and purposefulness of the impugned permit or certificate while confining the examination to the appeal allegations, but not the reasons for the appeal because the competence and grounds for voiding of decisions are examined *ex officio*. (Đerđa, 2010) If the applicant points to incomplete or incorrect determination of facts in the first-instance proceedings, the official of the Competent Ministry determines the facts according to the case file and the general design in proceedings to obtain a construction permit or according to technical inspection of the structure in cases of obtaining of an occupancy certificate, but they will also determine facts not determined in the first-instance proceedings either independently or through the first-instance body. By application of Articles 115 through 117 of the GAPA (Official Gazette no. 47/09), the Competent Ministry may dismiss the appeal (in cases where the first-instance proceedings were properly completed and the permit or certificate is lawful or when there are defects, but none which would lead to a different permit or certificate or where

the permit or certificate issued through the first-instance proceedings is lawful for reasons not stated therein) or grant the appeal and partially or fully revoke or modify the permit or certificate. In consistent application of the above provisions of the GAPA, the Competent Ministry shall void the decision and issue a construction permit or an occupancy certificate if it determines that facts were incorrectly or incompletely ascertained in the first-instance proceedings, or that the first-instance proceedings did not take into account procedural rules affecting issuing of the permit or the certificate, or that the operative part thereof is unclear or contradictory with the statement or reasons, or that regulations the permit or the certificate rely upon were incorrectly applied. Under Article 117(2) of the GAPA, the second-instance body sets decisions aside and remits cases to the first-instance body only when direct resolution is necessary considering the nature of the administrative matter. Article 103 of the existing Construction Act details the above provisions further by specifying that the lower-instance body is required to comply with the Competent Ministry's decision on appeal and defines unjustified non-compliance of officials as a severe breach of official duty. However, the final draft of the proposed General Administrative Procedure Act (Final draft of the proposed General Administrative Procedure Act, https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/075903/PZE_168.pdf) sets out, in explanation of its provisions, that second-instance bodies have rarely decided on merits of administrative matters following appeals, leading to prolonged administrative procedures, and that it is deemed that the solution proposed in paragraphs 1 and 2 of Article 117 would increase efficiency of the proceedings. In their paper offering an analysis of the provisions of the final draft of the proposed General Administrative Procedure Act, Đerđa and Pičuljan (Đerđa & Pičuljan, 2009, 279) stated the following on remedies: "it is assumed that direct resolution of administrative matters by second-instance bodies would provide parties with more expedient enforcement of rights and prevent repeated remittance of the same administrative matter to the first-instance body." Fulfilment of the legislature's intention to increase efficiency in relation to resolution of appeals by the second-instance bodies will be examined in the part of the paper examining the results of the empirical research and information provided by the Competent Ministry on processing of the appeals against construction permits and occupancy certificates in a four-year period.

Provisions of Article 117(2) whereby the second-instance body sets decisions aside and remits cases to the first-instance body only when its direct involvement is necessary considering the nature of the administrative matter should also be reviewed at this point. Specifically, it concerns the question of the nature of the administrative matter in the proceedings to obtain construction permits and occupancy certificates. Namely, the issue of the nature of the matter stems from an unspecific explanation and numerous discussions. Viewed either as an argument or as a source of law, it is impossible to provide any satisfactory definition of that term. The *nature of a matter*, as a term, has origins in Roman philosophy and jurisprudence (Cicero, Lucretius), and it is taken over by the *Digest* and the Christian law doctrine (Thomas Aquinas) and later by Montesquieu and Savigny. (Vrban, 2003, 351) Vrban points out that the "argument of the nature of the matter, used also as a source of law, relies therefore on a presumed sense or generally accepted meaning of manifestations subject to legal regulation". Rajko defines the nature of the matter as a "set of ethical, experiential, and practical imperatives acting as a source of law rationally supplementing, perfecting, supplanting, or correcting legal regulations". (Rajko, 2008, 25) Miličić relates the nature of the matter to specific value contents relying on actual societal relations and classifies it as a substantive source of law containing in itself numerous options of actual values/non-values. (Miličić, 2008, 83) Proceedings for issuing of construction permits and occupancy certificates are procedures naturally related to real property, so when the second-instance body sets a permit or certificate aside and remits the case to the first-instance because of necessity considering the nature of the matter, it may be deemed

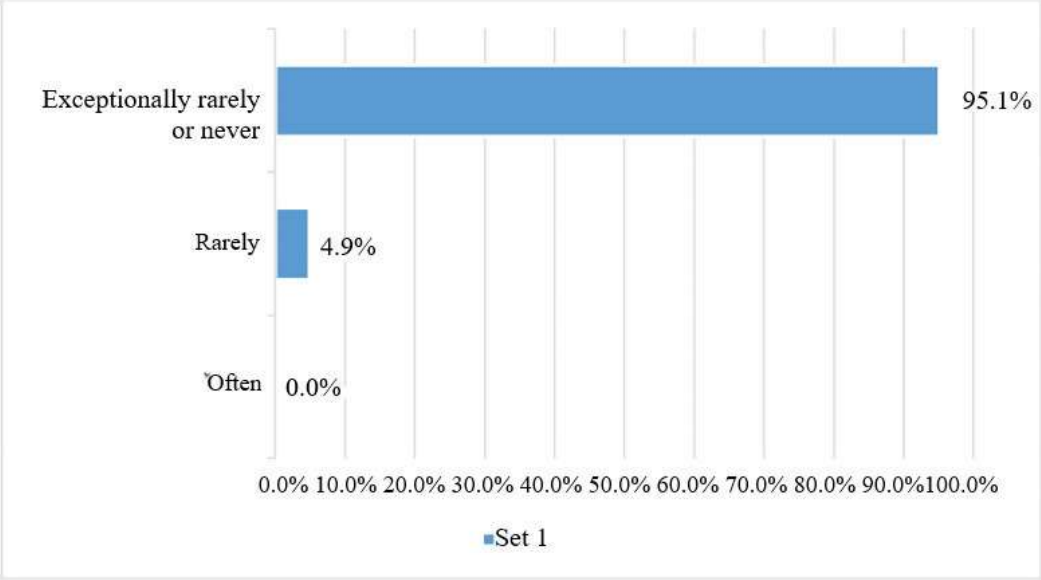
worthwhile to resort to this argument specifically when certain defects in the procedure are related to the real property thus requiring determination of actual state of the matter *in situ* making repeated adjudication of the case by the first-instance body more effective and more economical. In other cases, there is nothing to prevent the Competent Ministry to decide on the merits following an appeal. The following chapter will provide an indication, using data of the Competent Ministry, of the share of cases remitted to the first-instance body following appeals and the share of the appeals resulting in a decision on merits of the case.

4. Empirical research methodology and analysis of results

As indicated in the introduction, this paper aims to examine effectiveness of appeal proceedings in the process of issuing of construction permits and occupancy certificates. In this paper, a part of results of the empirical research conducted by the author of this paper for the purposes of her doctoral thesis is analysed along with data received from the Ministry of Physical Planning, Construction and State Assets (previously the Ministry of Construction and Physical Planning) in response to information access requests submitted in November 2019 and September 2020. The empirical research was conducted using survey questionnaires designed to test hypotheses of the author's doctoral thesis aimed at determination of shortcomings in regulations and procedures used to obtain construction permits and occupancy certificates. The research was conducted on two groups of respondents. The first group of respondents consisted of selected competent county and city administration departments of local and regional self-government units and their branch offices issuing construction permits and occupancy certificates, while the second group consisted of members of the Croatian Chamber of Architects. The survey questionnaire was administered on-line (Google Drive), and two types of questionnaires were prepared and delivered to the two sets of respondents by e-mail. The sample included 116 competent county and city administrative departments of local and regional self-government units and their branch offices, and 1000 members of the Croatian Chamber of Architects. Ultimately, the responses were received from 41 competent offices (35.35% response rate) and 104 architects (10.4% response rate). Such response rates are deemed appropriate. Graphical representation of the data and an analysis of obtained percentages are presented in relevant sections of the results. The research was conducted from November 2016 to January 2017.

Chart 1 represents the data obtained through the responses provided by the first group of respondents. In those cases, heads of the competent county or city administrative departments of the local and regional self-government units or heads of their branch offices responded to the survey questionnaire. They were asked, *inter alia*, how often the then Ministry of Construction and Physical Planning decided following appeals and revocation of construction permits or occupancy certificates issued by competent county and city administrative departments and their branch offices by issuing a new permit or certificate without remitting the case to the competent county or city administrative department or their branch office for new proceedings (using its legal authority). The responses shown in the Chart 1 indicate that this hardly ever happens.

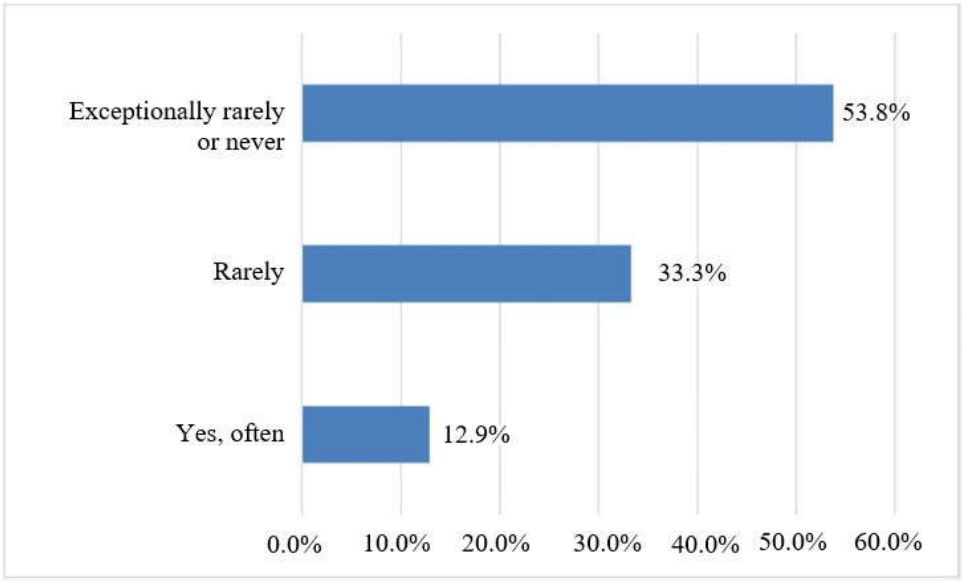
Chart 1: Issuing of permits and certificates by the Ministry of Construction and Physical Planning following an appeal without remitting the case to the first-instance body



Source: Data processed by the author according to the results of the empirical research

Furthermore, Chart 2 represents the data obtained considering the responses provided by the second group of respondents. In those cases, the architects were asked to indicate how often the then Ministry of Construction and Physical Planning decided on appeals they lodged in relation to construction permits or occupancy certificates on behalf of developers, or those lodged by the developers themselves, by issuing a new permit or certificate without remitting the case to the administrative body which rendered the first-instance decision (using its legal authority). Judging from the data shown in Chart 2, this happens rarely or exceptionally rarely.

Chart 2: Issuing of a permit or certificate without remitting the case to the first-instance body



Source: Data processed by the author according to the results of the empirical research

Considering thus obtained data, the following question was asked: If the legislative intention was, according to Articles 117(1) and 117(2), to increase effectiveness of the appeal proceedings by obtaining second-instance body decisions on merits in cases where the first-

instance decisions (permits or certificates) are set aside by the second-instance bodies and the cases are remitted to the first-instance bodies with an indication of further course of action only when necessary, what led to this kind of results received from the two groups of those respondents regarding these special administrative proceedings? Are these special administrative proceedings perhaps different from other administrative proceedings considering the possibility of adjudication on appeals by the second-instance body? To further test the data, an information access request was submitted to the Ministry to glean insight into decisions rendered in response to appeals related to construction permits and occupancy certificates from 1 January 2016 to 31 December 2019 – in a period spanning the time of performance of the empirical research and a subsequent period. Information on actions of the Competent Ministry is shown in the following Table.

Table 1: Actions of the Competent Ministry in response to appeals lodged in relation to construction permits and occupancy certificates in the period from 01.01.2016 to 31.12.2019

Type of action	Construction permits	Occupancy certificates
Appeal rejected	13	3
Appeal dismissed	1001	290
Decision set aside (the case remitted for repeated proceedings)	659	263
Decision set aside, Article 117(1) of the GAPA	34	10
TOTAL	**1707**	**566**

Source: Ministry of Physical Planning, Construction and State Assets

In the observed four-year period, out of 1707 appeals related to construction permits, 59.40% of the appeals are rejected or dismissed. Likewise, out of 566 appeals received in relation to occupancy certificates, 51.77% are rejected or dismissed. Accordingly, in cases of dismissal of appeals against construction permits or occupancy certificates, it may be concluded that the first-instance bodies acted lawfully in a significant number of cases, complying with procedural and substantive rules, and correctly determining facts. On the other hand, the decisions were set aside in 40.60% of cases involving construction permits and 48.23% of cases involving occupancy certificates pointing to adoption of decisions (issuing of permits or certificates) contrary to provisions of the law or using incorrectly determined facts. Testing of the hypothesis set out in this paper requires a review of data concerning the number of cases where construction permits or occupancy certificates were revoked on appeal and the Competent Ministry rendered second-instance decisions – permits or certificates – deciding on merits of the cases. An analysis of the total number of cases where a construction permit was set aside reveals that the Ministry decided on merits in just 4.91% of the cases. It rendered decisions on merits in mere 3.66% of the cases where occupancy certificates were set aside. In other cases, construction permits, and occupancy certificates were partially or entirely revoked, and the cases remitted to first-instance bodies for repeated proceedings. Considering the intention expressed in the Final draft of the GAPA as the basic procedural law governing administrative procedures in the Republic of Croatia and its application on appeal proceedings before second-instance bodies where it aimed to prevent repeated remittance of the same administrative matter to the first-instance body and thus achieving an increased efficiency of the proceedings, it cannot be deemed that the intention was fulfilled in the framework of these special administrative proceedings. The share of cases where decisions on merits were rendered in appeal proceedings

instituted in the process of obtaining of construction permits or occupancy certificates cannot support a conclusion that this course of action was efficient.

5. Conclusion

The method of enforcement of legal protection in administrative proceedings instituted by means of appeals lodged with second-instance bodies is determined by the GAPA (Official Gazette no. 47/09) and somewhat modified compared to the previous legislation with the aim of protection of the subjective rights of citizens. The need for effective enforcement of citizens' rights in administrative proceedings instituted by means of appeals has been argued for at the level of protection of the right within the framework of the case-law of the European Court of Human Rights and the case-law of the Constitutional Court of the Republic of Croatia as well as conduct of administrative proceedings in the Republic of Croatia and within institutions of the European Union. The GAPA relates effectiveness of actions in all stages of the administrative proceedings including remonstrative and devolved powers following an appeal. The same is particularly recognised in the framework of devolved powers of second-instance bodies in appeal proceedings. Importance of efficacy in this stage of appeal proceedings is pointed out within the framework of the Final draft of the GAPA seeking to avoid affecting the subjective rights of citizens by delays of enforcement brought about by implementation of provisions of the old GAPA.

Nonetheless, in the first phase of the research, it was determined that both groups of the respondents indicated that the Competent Ministry exceptionally rarely or never decides on such administrative matters itself (by issuing new permits or certificates) without remitting the case to the first-instance bodies for new proceedings after revocation of construction permits and occupancy certificates. In the second stage of the research, after an analysis of data provided by the Competent Ministry, it was determined that there were decisions on merits rendered in only 4.91% of appeal proceedings related to construction permits and in 3.66% of appeal proceedings related to occupancy certificates after the second-instance body had set aside relevant first-instance decisions. Such low numbers of cases involving decisions on merits in the appeal proceedings conducted by the Competent Ministry are not indicators of the desired efficient conduct set out in the explanation of provisions of the Final draft of the GAPA. Furthermore, even though these are special administrative proceedings, the applicable Construction Act does not detail any devolved powers of the Competent Ministry regarding the appeals and the provisions of the GAPA are fully enforced in this area. Therefore, the explanation of intentions of the Final draft of the GAPA regarding efficacy of appeal proceedings are pertinent to these special administrative proceedings as well. In compliance with all the above, the hypothesis set out in the introduction of this paper is disproved because the research results demonstrated that the Competent Ministry, as the second-instance body, in most cases renders no decisions on merits of these administrative matters. In most cases, it grants appeals, revokes permits or certificates in full or in part, and remits the cases to first-instance bodies instead.

It is to be concluded that the provisions of the GAPA concerning the devolved powers of the second-instance bodies in appeal proceedings afford appropriate level of protection to all parties to the proceedings while also providing them efficacy of conduct of the proceedings. In accordance with the above, it is deemed necessary to additionally examine cases where the Competent Ministry decides on appeals against construction permits and occupancy certificates and revokes them to ensure that the Ministry decides on such administrative matters on its own and issues a new permit or certificate whenever it is not necessary to remit the case to the first-instance body. It is fair to say that the Competent Ministry and the relevant minister must be the drivers of the above improvements, providing incentive to such enhanced administrative

practice through instruments at their disposal – ultimately leading to effective protection of the subjective rights of parties to the administrative proceedings.

REFERENCES

Babac, B. (1998): ***Upravno postupovno pravo – odabrana poglavlja***, Faculty of Law, J. J. Strossmayer University of Osijek, Osijek

Borković, I. (2002): ***Upravno pravo***, Narodne novine, Zagreb

Đanić Čeko, A., Kovač, P. (2020): ***Comparative Analysis of an Administrative Appeal in Croatian, Slovenian, and EU Law,*** in: EU and Comparative Law Issues and Challenges Series (ECLIC), vol.4, no. 4, pp. 1065–1096.

Đerđa, D., Pičuljan, Z. (2009): ***Novo hrvatsko opće upravnopostupovno pravo,*** *Collected papers of the Law Faculty of the University of Rijeka*, (1991), vol. 30, no. 1, pp. 245–290

Đerđa, D. (2010): ***Opći upravni postupak u Republici Hrvatskoj***, Inženjerski biro d.d., Zagreb

Đerđa, D. (2012): ***Pravila upravnog postupka u europskom pravu***, Collected papers of the Law Faculty of the University of Rijeka, vol. 33, no. 1, pp. 109–144

Đerđa, D., Jerčinović, A. (2020): ***Upravni postupak u pravu Europske unije: kodifikacijski izazovi***, Collected papers of the Law Faculty of the University of Split, year. 57, 1/2020, 85–126

European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration, https://www.europarl.europa.eu/doceo/document/TA-8-2016-0279_EN.html, (accessed 10 February 2021)

Hrvatski jezični portal (Croatian Language Portal), http://hjp.znanje.hr/index.php?show=search_by_id&id=f19iWhR9, (accessed 18 February 2021)

Final draft of the General Administrative Procedure Act, https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/075903/PZE_168.pdf (accessed 1 February 2021)

Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette – International Treaties no. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, and 2/10

Koprić, I. (2011): ***Zakon o općem upravnom postupku i tehnološko unaprjeđenje uprave***, in: Collection of Papers, Faculty of Law, Niš, vol. LVII, (2011), special issue dedicated to Slavoljub Popović, pp. 43–75

Krbek, I. (1962): ***Pravo jugoslavenske javne uprave, III knjiga funkcioniranje i upravni spor,*** Birotehnički izdavački zavod, Izdavačko-knjižarsko poduzeće, Zagreb

Medvedović, D. (1995): ***Zakon o općem upravnom postupku i Zakon o upravnim sporovima (autorski pročišćeni tekstovi)***, Narodne novine, Zagreb

Medvedović, D. (2003): ***Pravno uređeni upravni postupci-pretpostavka moderne uprave***, in Modernizacija hrvatske uprave, ed. Ivan Koprić, Suvremena javna uprava, Zagreb, pp. 381–394

Medvedović, D. (2006): ***Glavni smjerovi modernizacije općeg upravnog postupka***, in Reforma upravnog sudstva i upravnog postupanja, ed. Jakša Barbić, Croatian Academy of Sciences and Arts, Zagreb, pp. 37–57.

Medvedović, D. (2010): ***Bitne razlike novog Zakona o općem upravnom postupku prema prijašnjem Zakonu o općem upravnom postupku***, in Primjena Zakona o općem upravnom postupku, ed. Davorka Foretić, Jerko Slovinić, Novi informator, Zagreb, pp. 19–65

Miličić, V. (2008): ***Opća teorija prava i države***, dr.sc. Vjekoslav Miličić, full professor, Zagreb

Decision of the Constitutional Court of the Republic of Croatia U-III/4621/2007 of 23.04.2008

Decision of the Constitutional Court of the Republic of Croatia U-III/1187/2006 of 24.03.2009.

Charter of Fundamental Rights of the European Union, Official Journal of the European Union, 26.10.2012, EN, C 326/391

Judgment of the Court in Case C-72/12, Gemeinde Altrip, Gebrüder Hört GbR, Willi Schneider v. Land Rheinland-Pfalz, ***2013***., http://eur-lex.europa.eu/legal-content/HR/TXT/?qid=1470497657059&uri=CELEX:62012CJ0072, (accessed 8 February 2021)

Judgment of the European Court of Human Rights of 29 June 2006, *Božić v. Croatia*, no. 22457/02

Judgment of the European Court of Human Rights of 26 October 2000, *Kudła v. Poland*, no. 30210/96

Judgment of the European Court of Human Rights of 16 October 2008, *Štokalo and Others v. Croatia,* no. 15233/05

Judgment of the European Court of Human Rights of 20 July 2006, *Vajagić v. Croatia*, no. 30431/03

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, 7.6.2016 HR, 216 C C 202/1

Radujković, M-, Izetbegović, J., Nahod, M.-M. (2008): ***Osnove graditeljske regulative*,** University of Zagreb, Faculty of Civil Engineering, Zagreb

Rajko, A. (2008): ***O prirodi stvari***, Pravo i porezi, vol. XVII, no. 7, pp. 24–31

Recommendation CM/Rec (2007)7 of the Committee of Ministers to member States on good administration, https://rm.coe.int/16807096b9, (accessed 12 February 2021)

Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, Council of Europe, Committee of Ministers, adopted by the Committee of Ministers on 28 September 1977, https://rm.coe.int/16804dec56, (accessed 10 February 2021)

The European Ombudsman (2005): The European Code of Good Administrative Behaviour, European Communities, Luxembourg

Constitution of the Republic of Croatia, Official Gazette no. 85/10 – consolidated text, 05/14

Vitez Pandžić, M. (2018): ***Reguliranje upravnog postupanja u pravu Europske unije,*** in: Conference Proceedings: 8th International Conference Development of Public Administration, College of Applied Sciences "Lavoslav Ružička" in Vukovar, 19–20 April 2018, Vukovar, Croatia

Vrban, D. (2003): ***Država i pravo***, Golden marketing, Zagreb

General Administrative Procedure Act, Official Gazette no. 47/09

State Administration System Act, Official Gazette no. 66/19