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Discretion of Interests in Planning Procedure: Legal Protection and Abuse of Discretion

1. General

Plans are part of the definition of administrative discretion and form a special type of discretion called planning discretion.^{*1} This is characterised by the great amount of freedom enjoyed by an administration in the preparation and adoption of relevant plans. In general it is not based on conditionally formulated laws, regulations or administrative provisions, but instead upon planning law, where relevant objectives and principles of balancing various interests are laid down with a view of reaching the final goal. In order to ensure the attainment of relevant objectives, an administrative body can use its discretion with regard to a whole catalogue of choices. That specific character of planning discretion was also underlined by the Chamber of the Supreme Court, which has pointed out that planning procedure is characterised by a wide discretion space.^{*2}

Preparation and adoption of spatial plans is regulated in Estonia by the Planning Act^{*3} (PA), which entered into force on 1 January 2003. The Act lays down the types of plans as follows:

- 1) a national spatial plan, which is prepared with the aim of defining the prospective development of the territory of the state and the settlement systems located therein in a generalised and strategic manner;
- 2) a county plan, which is prepared with the aim of defining the prospective development of the territory of a county in a generalised manner and determining the conditions for the development of settlement systems and the location of the principal infrastructure facilities;
- 3) a comprehensive plan, which is prepared with the aim of determining the general directions of, and conditions for, the development of the territory of a rural municipality or city, and of setting out the bases for the preparation of detailed plans for areas and in the cases where detailed plan-

¹ K. Merusk. *Administratsiooni diskretsioon ja selle kohtulik kontroll* (Discretion of an Administration and Judicial Control). Tallinn 1997, p. 95 (in Estonian).

² Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03. – *Riigi Teataja* (State Gazette) III 2003, 31, 317 (in Estonian).

³ *Planeerimisseadus*. – *Riigi Teataja* (State Gazette) I 2002, 99, 579; 2006, 14, 112 (in Estonian).

ning is mandatory, and for the establishment of land use provisions and building provisions for areas where detailed planning is not mandatory;

- 4) a detailed plan, which is prepared with the aim of establishing land use provisions and building provisions for cities and towns and for other areas and in other cases where detailed planning is mandatory.

People have the most direct contact with detailed plans; hence the following discussion is mainly about detailed planning.

2. Constitutional basis of local government's planning rights

Pursuant to § 154 (1) of the Constitution, all local issues are resolved and managed by local governments, which operate independently pursuant to law. This provision endows local governments with universal powers ("all local issues"), independence, and the sole responsibility for the resolution and management of issues ("resolved and managed [...] independently"), as well as the legal basis for operations ("operate [...] pursuant to law").⁴ Establishment of land use provisions and building provisions on the territory of a local government is certainly a local issue. Hence, the Constitution has endowed local governments with the freedom to design plans, which, however, cannot be absolute, as a local government can operate only within the law. At the same time, the limitations placed on local governments cannot reduce the freedom to design plans to zero. The relevant limitations must be proportional, leaving sufficient discretion space for the local government.

3. Limitations under substantive law

The restrictions under substantive law lie first and foremost in the Constitution. The discretionary space is opened here for the administration by the limitation clauses of different fundamental rights, also laying down at the same time its legal restrictions and relevance to substantive law. Section 11 of the Constitution allows restriction, i.e. invasion, of fundamental rights under three conditions:

- 1) rights and freedoms may be restricted only "in accordance with the Constitution";
- 2) restrictions must be "necessary in a democratic society";
- 3) restrictions shall not "distort the nature of the rights and freedoms restricted".⁵

The following fundamental rights are especially relevant to the planning procedure: the right to free self-realisation (Constitution § 19), the right to the protection of health (Constitution § 28), the right to engage in enterprise (Constitution § 31) and the right of ownership (Constitution § 32). For example § 31 of the PA allows for the expropriation of an immovable in order to implement an adopted comprehensive or detailed plan. Pursuant to § 30 of the same Act, at the request of the owner of an immovable or a part thereof located in an existing built-up area, the local government is required to purchase the immovable for immediate and fair compensation, if an adopted detailed plan or comprehensive plan prescribes use of the immovable or a part thereof for public purposes, or significantly restricts the current use of the immovable, or renders its current use impossible.

Relevant also is § 5 (the natural wealth and resources of Estonia are national riches which must be used economically) and § 53 (everyone has a duty to preserve the human and natural environment) of the Constitution.

Restrictions pursuant to substantive law also arise from the PA and specific laws. In preparation and adoption of plans, the local governments must be guided by the objectives and discretion principles provided in the PA. The PA sets forth the general aim of a detailed plan — land use provisions and building provisions for cities and towns (§ 2 (4)) and gives the list of specific objectives, which includes 16 positions (§ 9 (2)). The issue of how legally binding the objectives are has also been pointed out by the Chamber of the Supreme Court, who has taken the position that if the aim of initiation of the plan is unlawful, then this serves as a basis for contesting that initiation. The court doubted that the objective of the initiation of the plan — the

⁴ R. Narits, H. Schneider, L. Madise, K. Merusk et al. *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (Republic of Estonia Constitution. Commented Edition). Tallinn 2002, p. 642 (in Estonian).

⁵ R. Alexy. *Põhiõigused Eesti põhiseaduses* (Fundamental Rights in the Republic of Estonia Constitution). – *Juridica* eriväljaanne 2001, p. 35 (in Estonian).

municipalisation of the land — could be unlawful, since the land in question cannot, in principle, be municipalized.⁶ The given example is rather an exception than a rule, since aims of plans are provided quite loosely in the Act, and as a rule local governments do not deviate therefrom.

The PA deals with the principles of planning quite tersely. Planning activities are public, pursuant to § 3 (1) of the Act (principles of planning). Public disclosure is mandatory in order to ensure the involvement of all interested persons and the timely provision of information to such persons, and to enable such persons to defend their interests in the process of planning. It is not so much a principle of discretion, as a principle of procedure. Certain very general principles of discretion can be found in § 1 (3) of the Act, where the definition of spatial planning is given — spatial planning (hereinafter planning) is democratic and functional long-term planning for spatial development, which co-ordinates and integrates the development plans of various fields and which, in a balanced manner, takes into account the long-term directions in, and needs for, the development of the economic, social, cultural and natural environments.

Since the PA does not expressly make a provision for discretion of interests, then the Supreme Court has pointed out in its decisions the need to apply the discretion principles provided in the Administrative Procedure Act to the discretion of interests, even if the PA, as a specific law, contains no relevant reference to the Administrative Procedure Act.⁷ Pursuant to § 4 (2) of the Administrative Procedure Act⁸, discretion shall be exercised in accordance within the limits of authorisation, the purpose of discretion and the general principles of justice, taking into account relevant facts and considering legitimate interests.

Under substantive law, special laws and higher level plans with which the detailed plans must comply with, are also relevant. Limits under substantive law leave sufficient discretionary space to the local municipality.

4. Limits under procedural law

Planning procedure is an open procedure where disclosure is mandatory for an administration in order to ensure the participation of interested parties, timely information, and the possibility to protect one's interests in the course of the preparation of a plan.

Anyone may make a proposal for initiation of the preparation of a plan (PA § 10 (1)), the local government initiates and prepares a detailed plan. The PA allows for the transfer of the preparation of the plan, on a basis of a contract, to a person interested in the preparation thereof, except for areas under nature conservation or heritage conservation or in cases where the detailed plan is not prepared in compliance with the adopted comprehensive plan, or in cities divided into city districts, with the comprehensive plan adopted for the respective city district (PA § 10 (6)). Transferring the preparation of the plan to an interested person in private law allows, on one hand, to significantly conserve the local government's financial resources and thereby decrease the burden on the budget. On the other hand, the real estate developer's cogent personal interest is thereby already coded into the aim of the preparation of the detailed plan, which does not necessarily coincide with the interest of others or the public. In addition to the right to make a proposal for initiation of the preparation of a detailed plan, the PA also provides for several other rights of the interested persons, which are legally binding for a local government. The following are the most important:

- 1) The right to be informed. Which includes the local government's obligation to inform the public of any proposed comprehensive planning and detailed planning at least once a year in a relevant newspaper (PA § 11 (1)). The same is also applicable in regard to the initiation of the plan, where the public must be informed in a newspaper about the initiation of the plan, as well as provided information on the size and location of the planning area, and communicated the objectives of the initiated planning (PA § 12 (1)). Persons whose subjective rights the proposed detailed plan may prejudice are under special protection. For example, if it is known upon the initiation of the detailed planning that the initiated detailed planning may bring about a need to transfer immovables or parts thereof, the local government shall, by way of registered letter, inform the owners of the relevant immovables of the initiation of the preparation of a detailed plan, within two weeks, as of the date on which the decision to initiate planning is made (PA § 12 (4)). The local government must also inform the residents of the public display of the plan (PA § 18 (6) and (7)) and of the public discussion regarding the detailed plan, if written proposals or objections concerning the detailed plan were received during the public display thereof (PA § 21 (1) and 2)).
- 2) The right to participate. Residents and owners of immovables located in the area, as well as other interested persons, must be involved in the preparation of comprehensive and detailed plans (PA

⁶ Administrative Law Chamber of the Supreme Court decision 3-3-1-44-05. – Riigi Teataja (State Gazette) III 2005, 33, 332 (in Estonian).

⁷ Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

⁸ Haldusmenetluse seadus. – Riigi Teataja (State Gazette) I 2001, 58, 354; 2005, 39, 308 (in Estonian).

§ 16 (1)). The need to organise public discussions to publicise the initial detailed planning outline and the draft plans must be determined by the local government. At least one public discussion must be organised if the detailed plan is prepared for an area under heritage or nature conservation, a region of significant urban development potential, or an area concerning which a corresponding proposal was made in the course of processing the plan (PA § 16 (3)).

- 3) The right to be heard. The Supreme Court has expressed its position in this regard that due to the peculiarity — the wide discretionary space — of planning decisions, the timely participation and hearing of a person has a bigger role in the planning procedure in comparison with regular administrative procedure.⁹ After the decision to adopt the plan, the local government must organise a public display of the plan, in the course of which everyone has the right to present proposals and objections concerning the plan (PA § 20 (1)). If written proposals and objections concerning the detailed plan have been received during the course of the public display, then the local government must organise a public discussion regarding a detailed plan within one month after the end of the public display (PA § 21 (1)). Information about the outcome of the public display and public discussion must be published in a relevant newspaper (PA § 21 (4)).
- 4) The right to review documents. During the time the plan is on public display, all interested persons must have access to all material and information related to the plan in the possession of the local government administering preparation of the plan (PA § 18 (8)).
- 5) Justification of the adoption of the plan. The PA does not expressly provide for the obligation to justify the decision. The relevant obligation arises from the Administrative Procedure Act, which sets forth that an administrative act must be justified in writing (APA § 56 (1)) and the reasoning for the issue of an administrative act issued on the basis of the right of discretion must set out the considerations from which the administrative authority has proceeded upon issue of the administrative act (APA § 56 (3)). The Supreme Court has provided in this regard that lack of motivation makes it impossible for the interested parties who participate in the planning procedure, to check the rationality behind the refusal to take the proposals into consideration and contest the motives thereof.¹⁰ The Supreme Court has, *inter alia*, found that the justification of an administrative act must convince the court that the administrative authority has taken all significant facts and interests into consideration when realising its discretion, and that the discretion has been rational.¹¹

The Supreme Court has repeatedly underlined the special significance of procedural and formal requirements in planning procedure.¹²

5. Discretion of interests

According to the nature of planning discretion, the discretion of interests is an obligation of the administration; this has also been underlined by the Supreme Court¹³, who pointed out that in case of a conflict of interests, the interests of all parties must be weighed in the course of the procedure in order to reach the most optimal solution and, if possible, take them into account.¹⁴ Very different and contradicting interests compete in the planning procedure; both private interests as well as public. Among private interests not only do subjective public rights have to be weighed, but also all those interests, which are not objectively of little importance and worth protecting.

5.1. Discretion of interests as a communication problem

The aim of a planning procedure is to ensure that all interested parties are involved in the proceedings and their interests are taken into account. This, in turn, requires substantial communication with the aim of convincing the different parties and to reach mutual understanding. This ensures, first, the detection of interests and facts worth weighing and, second, enables the reaching of optimal interests acceptable to all parties, which considerably facilitates the making of discretionary decisions and enables the preclusion of future litigation.

⁹ Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02. – Riigi Teataja (State Gazette) III 2002, 7, 61 (in Estonian).

¹⁰ Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

¹¹ Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02. – Riigi Teataja (State Gazette) III 2002, 25, 284 (in Estonian).

¹² Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9); Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

¹³ Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02. – Riigi Teataja (State Gazette) III 2002, 30, 330 (in Estonian).

¹⁴ Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9).

An administration can consider relevant interests, if those are known to it or made known to it by interested parties. In this regard the Supreme Court has pointed out that if the existing information is not sufficient to make a lawful and just discretionary decision, then the local government must gather more information to make a decision by involving the preparer of the plan and also, if need be, other relevant persons. This problem is especially relevant in connection with environmental impact. When environmental interests have been weighed, then the Supreme Court has, regardless of whether the law has explicitly required the initiation of an environmental impact assessment, taken the position that if insufficient information is available about environmental impact, then it is feasible to initiate an environmental impact assessment.^{*15}

In order for the administration to take the persons' interests into consideration, weigh them and thereby find optimal solutions, the person must motivate its interests, i.e. present arguments to protect his or her position, showing, if possible, the negative outcome of the invasion of interests. In this connection the Supreme Court has explicitly noted that **all justified interests** must be taken into consideration in the course of planning.^{*16} The readiness of a person for flexible solutions is also important here. Mere objections and lack of willingness to communicate do not ensure that the person's interests are taken into account. The Supreme Court has pointed out in this regard that in the course of hearing a plan, for example, unwillingness or failure of any party in the procedure to reach an agreement should not be decisive in finding a positive solution.^{*17}

On the other hand, effective communication also presupposes that the answers given by the administration in response to the proposals made by the persons in the course of the planning procedure must also be motivated. Only then is a discussion possible and a rational solution can be found. Case law shows that in many cases court proceedings have been initiated namely because local governments do not give motivated responses to proposals made or motivate the decisions of adopting plans. The Supreme Court has thus found in several decisions that lack of motivation impedes interested parties from participating in the planning procedure to control the rationality of not considering a proposal, arguing with the motivation of not considering a proposal or working up public discussion about the solution for the plan.^{*18}

It is also important to note in this regard that the proposals and objections arising from different interests need not be in accordance with the objective of the initiated plan. Also, the Supreme Court has noted that the idea of the right to make proposals lies primarily in the fact that persons should have the possibility to defend their private or public interests, which may contradict the objectives of the initiators of the plan.^{*19}

5.2. Discretion of interests as a value judgement problem

In discretion, one of the key issues is to determine the weight of one or another interest. The planning procedure gives no preference to any one interest, this has also been underlined by the Supreme Court, who has pointed out that one aim of a planning procedure is to solve disputes related to plans and reach a balanced solution, taking into account persons' interests as well as public interest^{*20}; and a local government must take all material circumstances and interests into account and weigh them rationally.^{*21} The request for discretion arising from the planning procedure does not include substantial elements and assumes value judgements, which are not connected with the request for discretion.^{*22} Above all, it is important to establish the weight of a relevant interest in comparison with competing protection worthy interests, the possible negative outcome of the invasion of the relevant interests could have, and the reasons of justification. Value judgements are the basis of determination of the weight of one or another interest, as well as of the relative weight of the reasons justifying the invasion.^{*23} Making a lawful discretion decision presupposes such optimisation of different interests that would ensure attainment of the objective of the plan. The possibility of a situation where the protection worthy interests contradicting the objective of the plan have, by value judgement, more weight than the interests arising out of the aim of the plan (private or public interests) and the weight of the reasons justifying their invasion is relatively small, then the plan may remain unadopted as a result of the relevant discretion. The Supreme Court has found that a local municipality has no obligation

¹⁵ Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11); Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

¹⁶ Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

¹⁷ Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

¹⁸ Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2); Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11).

¹⁹ Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

²⁰ Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

²¹ Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

²² R. Alexy (Note 5), p. 40.

²³ R. Zippelius. *Juristische Methodenlehre*. 5. Aufl. München: 1990, pp. 54–55.

to adopt initiated and prepared plans at any cost, the detailed plan stage may result in failure to adopt the plan.^{*24} This may primarily occur when the negative outcome of accompanying the adoption of the plan may outweigh its possible positive results (the principle of proportionality).

Society and public opinion have started to value pristine living environments to a greater extent, which means that the protection and sustainable use of built-up areas, parks, green areas, landscapes, individual elements thereof, and natural biotic communities, has to be ensured. This does not always coincide with the local and pragmatic interests of local governments, though. Case law shows that local governments sometimes base their decisions on such interests as the development of entrepreneurship, creation of new jobs, cost saving etc., overlooking, at the same time, environmental protection and heritage protection interests. A vivid example is the so-called Jämejala case, where a rural municipality council preferred the construction of a prison facility, partly at the expense of an old park rich in species, presuming that such a solution would bring about the creation of new jobs and business to local companies. In court, the rural municipality took the position that the area covered by the detailed plan included only 20% of the forest stand, which was in fact called a park, and that the park would not be destroyed and the effects of construction could be compensated for. In weighing that case, the Supreme Court added another value, i.e. the value of the environment as is. Namely, the court found that in addition to the number of trees that would be cut down or preserved, the change of environment as a whole after the construction of the prison in the park had to be taken into account. A prison means walls, a security zone, monitoring devices, and the constant risk of emergency situations. Those phenomena cannot possibly be harmonised with the environment of a park — a natural environment that allows for peace and relaxation.^{*25} In several of its decisions, the Supreme Court has placed more emphasis on environmental protection interests than on other interests.^{*26} The Supreme Court has also considered the protection of historically environmentally valuable objects to be a prevalent interest.^{*27}

Yet, the Supreme Court has not taken the said value judgements as absolute, but as related to specific circumstances. The Supreme Court took, in one of its decisions, the position that the public interest in ensuring the operation of a district heating system may be more important, and outweighs the efficiency and environmental sustainability of single gas boiler plants.^{*28}

The European Union dimension has influenced, and will continue to influence, the shaping of value judgements, especially with regard to environmental protection related interests. It may be forecasted that developments in the European Union will add security policy and common energy policy related interests.

6. Protection of interests in court

6.1. Scope of court protection and judicial control

To also ensure the protection of one's rights and interests when the local government has not taken his or her interests into account, the PA provides the possibility to file an action with a court. It is worth mentioning here that § 26 (1) of the PA provides that every person, who finds that decision to adopt the plan was unlawful, has the right to file an action with the court, regardless of whether that decision violates his or her subjective public rights or restricts his or her freedoms. The person may, thus, also file an action with the court in the case of public interests, for example in the interests of environmental protection. This is an exceptional regulation in the Estonian legal order; as a rule, the right to complain presumes presence of subjective public right.

Judicial control over administrative discretion decisions, especially with regard to plans, is limited. The Supreme Court has thus emphasized that the court does not reevaluate the political expediency of discretion decisions, but merely controls whether the making of discretion decisions did not involve procedural or formal mistakes, which might have substantially influenced the decision, whether the discretion decision is in accordance with laws, regulations or administrative provisions and general principles of the law, whether the decision is lawfully justified and not beyond the limits of discretion, and that no other abuse of discretion is present.^{*29}

²⁴ Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9); Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11).

²⁵ Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

²⁶ Administrative Law Chamber of the Supreme Court decision 3-3-1-31-03. – Riigi Teataja (State Gazette) III 2003, 18, 167; Administrative Law Chamber of the Supreme Court decision 3-3-1-13-04. – Riigi Teataja (State Gazette) III 2004, 11, 30; Administrative Law Chamber of the Supreme Court decision 3-3-1-88-04. – Riigi Teataja (State Gazette) III 2005, 10, 90 (in Estonian).

²⁷ Administrative Law Chamber of the Supreme Court decision 3-3-1-42-03 (Note 11).

²⁸ Administrative Law Chamber of the Supreme Court decision 3-3-1-84-04. – Riigi Teataja (State Gazette) III 2005, 8, 75 (in Estonian).

²⁹ Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9).

The Supreme Court has also pointed out the fact that the court must control the lawfulness of discretion based on the motivation of an administrative act (decision to adopt a plan). The motivation of an administrative act must also convince the court that the administrative authority has, in the course of discretion, taken into consideration all important circumstances and interests, and that discretion has been rational.^{*30} The Supreme Court has presumed that a decision to adopt a plan should at least include a summary analysis regarding positive and negative influences arising from implementation of the plan.^{*31} Regarding the scope of court intervention in discretion decisions — the Supreme Court has taken the position that the court may also intervene in exercising discretion when the decision falls within the limits of discretion, but the rationality of the decision is questionable^{*32}, and the complainant has the right to request, above all else, the control of fair discretion of lawful benefits.^{*33} It can thus be said that according to the right to complain, persons have the right to ask the court to control the rationale behind discretion of different interests, and the court also controls the lawfulness of discretion based on its value judgements.

The significant difference between complaints submitted in protection of subjective public rights and the so-called populist complaints lies in the fact that in case of the first the person may also request provisional legal protection (e.g., suspend implementation of the plan), and in case of the latter this is not possible. Pursuant to § 12¹ (2) of the Code of Administrative Court Procedure^{*34}, an administrative court may issue a ruling on the provisional protection of **the rights** of a person filing an action in all stages of proceedings at the reasoned request **of the person filing the action** or on its own initiative, if the execution otherwise of a court judgment is impracticable or impossible.

6.2. Discretional errors

The following discretional errors may be identified pursuant to case law:

- 1) Failure to use discretion. That discretional error has been pointed out in several Supreme Court decisions. The court has thus noted that violation of discretion rules may also consist of the failure to use discretion. For example, in the case of apartment association Tiiru Tosin v. Keila city council, the city council refused to adopt the detailed plan on the grounds of it being in contradiction with good morals and practices. The court found in the case that the violation of good morals and practices for the local government had been the lack of neighbours' approval.^{*35}
- 2) Certain interests and circumstances have not been considered in discretion which should have been considered in the preparation and discretion of the plan. If a local government has not considered, and has completely ignored the proposals or objections submitted in the course of the planning procedure, then that is a discretional error or a so-called discretion deficit. The Supreme Court has pointed out in that regard that a discretion error is present especially when an administrative authority has overlooked an important aspect.^{*36}
- 3) Interests of certain people are undervalued in discretion. For example, if the council of a local municipality refuses to adopt a prepared detailed plan, which has been financed by a person governed by private law, and in the adoption of which that person has an interest, with the reason being that other persons categorically disagree with it, then that is a **valuation error**. The interests of the person who prepared the plan have, in that case, been disregarded. The Supreme Court has pointed out, in this regard, that in the decision of adoption of a plan, the expenses that the public authority itself has made with regard to the legislative proceeding of the plan, as well as those made by the source of financing, also have to be considered, and for example one party's unwillingness or inability to reach an agreement should not hinder reaching a positive outcome in the proceedings of the plan. Yet, the Supreme Court has pointed out that preparation of a plan, incurring expenses in the course of a planning procedure and adoption of an initial detailed plan do not unequivocally mean that the plan would be adopted in the form it in which it was initiated. What is important here is that contradicting interests be fairly weighed.^{*37}

³⁰ Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11); Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

³¹ Administrative Law Chamber of the Supreme Court decision 3-3-1-28-04. – Riigi Teataja (State Gazette) III 2004, 17, 204 (in Estonian).

³² Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

³³ Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9).

³⁴ Halduskohtumenetluse seadustik. – Riigi Teataja (State Gazette) I 1999, 96, 846; 2005, 39, 308 (in Estonian).

³⁵ Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

³⁶ Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11).

³⁷ Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

- 4) Balancing of public interests has incurred in the manner that, without an objective basis, certain interests outweigh others by an disproportionately large margin. Discretion has been disproportionate. The Supreme Court found, in the case of a complaint against the decision of the Pärsti rural municipality council, with regard to the repealing of a detailed plan, that the council had attached too much weight to the social and economic influences accompanying the construction of a prison in comparison with the environmental impact. The Supreme Court has pointed out that it sees no grounds, based on the given material, why it should be namely the rural municipality who benefits from the damage to the environment, which is a public legal right, when it is feasible to build the prison complex somewhere else in Estonia, without damaging the environment to such an extent.^{*38}
- 5) Irrelevant interests and circumstances have been weighed. The Supreme Court has, for example, found that no relevance can be attached regarding the expenses incurred in preparation of the building design of the planned building. The initiator of the plan can reduce unnecessary expenses, if it first studies the actual chances of adoption of the plan and does not take unjust risks in connection with damages to important legal benefits.^{*39}

7. Conclusions

Planning discretion is characterised by an administration's great degree of freedom in the preparation and adoption of relevant plans. It is based on planning laws programmed on final outcome, which provide relevant objectives and principles for weighing different principles.

The starting point for determining the limits of planning discretion under substantive law is the Constitution. Limitation clauses for different fundamental rights open discretion space for administrations here, simultaneously determining its legal limits and how binding it is under substantive law.

Planning procedure is an open procedure where disclosure is mandatory for an administration in order to ensure the participation of interested parties, their timely informing and the possibility to protect one's interests in the course of preparing the plan.

Based on the nature of planning discretion, the discretion of interests is an obligation of an administration; it is a so-called request for discretion. Rational discretion of interests requires effective communication with the aim of convincing different parties and reaching common understanding. Effective communication ensures first the detection of interests and facts worth weighing, and enables the reaching of an optimisation of interests acceptable to all parties, which considerably facilitates the discretionary decision and enables the preclusion of future litigation.

Discretion of interests is primarily a value judgement problem. The request for discretion arising from planning procedure does not contain substantial elements and presumes value judgements with regard to the weight of interests, invasion of possible negative outcome, as well as an invasion in terms of justified reasons.

Court protection of persons concerned with the planning procedure is comparatively wide. Subsection 26 (1) of the PA gives the right to file an action with the court to every person who finds that the decision to adopt a plan has been unlawful, regardless of whether that decision violates his or her subjective public rights, or restricts his or her freedoms. This is an exceptional regulation in the Estonian legal order.

Judicial control over planning discretion is limited. Courts do not reevaluate political expediency of discretion decisions, but merely control whether making discretion decisions did not include procedural or formal errors, which might have substantially influenced the decision, whether the discretion decision is in accordance with laws, regulations or administrative provisions and general principles of law, and general principles of justice, whether the decision is lawfully justified and not beyond the limits of discretion, and no other abuse of discretion is present. The court has also intervened in discretion when the rationality of the decision has been questionable, which primarily means that the court also controls lawfulness of discretion based on its own value judgements.

Based on case law, the main discretionary errors are failure to use discretion, a lack of discretion, valuation errors, disproportionate discretion and discretion of irrelevant interests.

³⁸ Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

³⁹ *Ibid.*