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## **The Right to Participate in the Consultations on the Participatory Budget in the Light of Legislation and the Case Law of Administrative Courts in Poland<sup>1</sup>**

### **ABSTRACT**

In the practice of the Polish local and regional government, participatory budgeting has been used since 2011, and was the first one introduced in Sopot. It is a form of consultation with residents on the allocation of a portion of the budgetary expenses of a unit of the local or regional government, most often a city. This is a special type of procedure in which residents participate in the creation of the budget of a city (municipality), thereby jointly determining the distribution of a certain pool of public funds. In the first years of the application of participatory budgeting in Poland, a very general legal authorization was used to allow consultations with residents. It was only after several years of grassroots use of participatory budgeting that it was regulated in the Polish legal system in the Act of January 11, 2018 amending certain

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acts. Since then, it has become a mandatory form of public consultation in cities with district rights. The procedure for participatory budgeting in municipalities is generally regulated in Article 5a of the Act on the commune-level local government. The application of participatory budgeting in Poland has resulted in an extensive case law of administrative courts, hence the purpose of this paper is to determine the group of those entitled to participate in public consultations on participatory budgeting in light of the law and the case law of administrative courts. Using the dogmatic-legal method enabled a positive evaluation of the adopted research hypothesis that the provisions of local law that designate the group of entities entitled to participate in participatory budgeting procedure is restrictive compared to the provisions of the applicable statute.

**Key words:** participatory budgeting, case law, resident, Poland

## 1. Introduction

In the area of the public sector management, a new extension of the New Public Management reforms that consist in transferring methods and techniques used in the private sector to the public sector<sup>2</sup> is governance, which means “processes and structures of decision-making and public policy management that constructively engage people across the boundaries of public agencies, levels of government, and/or the public, private, and civic spheres to achieve a public goal that could not otherwise be achieved.”<sup>3</sup> The most common instrument of governance worldwide is participatory budgeting.

Its conceptualization and the first implementation was done in the Brazilian city of Porto Alegre in 1989. Then, after years of military dictatorship, the left-wing Popular Alliance coalition, in which the Workers’ Party played a significant role, took power in the city. The electoral success of the coalition was possible thanks to the grassroots support of numerous associations cooperating in the Union of Neighborhood Associations of Porto Alegre (Portuguese: *União das Associações dos Moradores de Porto Alegre*, in short *UAMPA*) and led the central authorities to agree to conduct public consultations in 1990. Their essence was conversations between decision-makers and residents about determining the directions of urban investments<sup>4</sup>. In order to carry out consultations, the city of

<sup>2</sup> U.K. Zawadzka-Pąk, *Budżet zadaniowy w jednostkach sektora finansów publicznych*, Gdańsk 2013, p. 18.

<sup>3</sup> K. Emerson, T. Nabatchi, S. Balogh, *An Integrative Framework for Collaborative Governance*, “The Journal of Public Administration Research and Theory” 2012, no. 1, p. 2.

<sup>4</sup> A. Krasnowolski, *Budżety obywatelskie (partycypacyjne). Historia instytucji i jej funkcjonowanie w polskich samorządach*, Warszawa 2020, p. 5.

Porto Alegre was divided into 16 districts and smaller neighbourhoods, where the implementation of the previous budget and the most important assumptions of the future one were discussed.

The election of delegates to district meetings was an important moment of the meetings. The proposals with the highest scores were selected for implementation. It is worth adding that in addition to the district meetings, there were thematic groups. They brought together representatives of all districts and were devoted to discussions on key areas for residents, i.e. housing issues, organization of education and health care.<sup>5</sup> Under the influence of Porto Alegre's experience, the concept of participatory budgeting began to spread to other cities in Brazil, where at the end of 2005, approximately 250 municipalities had experience in implementing participatory budgeting.<sup>6</sup>

Literature reports that Poland is a country where participatory budgeting will result in the greatest development of all the countries of Central and Eastern Europe.<sup>7</sup> In the practice of the Polish local and regional government, participatory budgeting has been used since 2011, and was at first introduced in Sopot. It is a form of consultation with residents on the allocation of a portion of the budgetary expenses of a unit of the local or regional government (LRGU), most often a city. This is a special type of procedure in which residents participate in the creation of the budget of a city (municipality), thereby jointly determining the distribution of a certain pool of public funds.<sup>8</sup> It is a year-long decision-making process by which residents negotiate among themselves and with the local government, and then vote on the distribution of the municipality's budget.<sup>9</sup>

In the first years of the application of participatory budgeting in Poland, a very general legal authorization was used to allow consultations with residents. It was only after several years of grassroots use of participatory budgeting that it was regulated in the Polish legal system in the Act of January 11, 2018 amending certain acts in order to increase the participation of citizens in the process of selection, functioning, and control of some public bodies.<sup>10</sup> Under that Act,

<sup>5</sup> D. Sześciło, *Uwarunkowania prawne budżetu partycypacyjnego w Polsce*, „Finanse Komunalne” 2012, no. 12, p. 15-23.

<sup>6</sup> B. Wampler, *Participatory Budgeting in Brazil: Contestation, Cooperation, and Accountability*, Pennsylvania State University Press 2007, p. 6.

<sup>7</sup> Y. Sintomer, C. Herzberg, A. Röcke, *Participatory budgeting in Europe: potentials and challenges*, “The International Journal of Urban and Regional Research” 2008, no. 1, p. 23.

<sup>8</sup> W. Kębliński, *Budżet partycypacyjny. Krótka instrukcja obsługi*, Warszawa 2013, p. 8.

<sup>9</sup> B. Wampler, *When does participatory democracy deepen the quality of democracy*, “Comparative Politics” 2008, no. 1, p. 63.

<sup>10</sup> The Act of January 11, 2018 Amending Certain Acts in Order to Increase the Participation of Citizens in the Process of Electing, Functioning, and Controlling Certain Public Bodies (The Journal of Laws of 2018, item 130).

provisions for participatory budgeting were introduced into three acts on the local and regional government. In the Act of March 8, 1990 on the commune-level local government,<sup>11</sup> Article 5a was added; in the Act of June 5, 1998 on powiat-level (district-level) local government,<sup>12</sup> Article 3d was added; and in the Act of June 5, 1998 on the voivodeship-level (province-level) regional government<sup>13</sup>, Article 10a was added. Despite the legal regulation of participatory budgeting at three levels of the local and regional government, it is by far the most widely used in communes and municipalities.<sup>14</sup> Therefore, the analyses conducted in this paper will focus on laws applicable to communes and municipalities.

The consequence of the application of participatory budgeting in Poland is an extensive case law of administrative courts. The purpose of this paper is to determine the group of those entitled to participate in public consultations on participatory budgeting in the light of the law and the case law of administrative courts. According to the adopted research hypothesis, the provisions of local law that designate the group of entities entitled to participate in participatory budgeting procedure is restrictive compared to the provisions of the applicable statute. The role of the case law of administrative courts is to bring local laws into conformity with statutory provisions. The dogmatic-legal method was chosen as the research method to determine the content of the applicable law, as well as its analysis, interpretation, and exegesis.<sup>15</sup>

## 2. Statutory regulation of the participatory budget

As mentioned above, the statutory regulation of participatory budgeting in communes and municipalities is now found in the amended Article 5a of the ACLLG. Public consultations conducted pursuant to Article 5a “are opinion-forming and non-binding in nature. Unlike local referendums, they are not used to resolve public issues, but to organize the decision-making process in a way that allows the decision-makers to hear the opinions of third parties during the process. In this sense, the consultation process is always subsidiary to the primary activity of the bodies that work out the decisions.”<sup>16</sup>

<sup>11</sup> The Act of March 8, 1990 on Commune-Level Local Government (consolidated text: the Journal of Laws of 2022, item 559, as amended), hereinafter referred to as ACLLG.

<sup>12</sup> The Act of June 5, 1998 on Powiat-Level (District-Level) Local Government (the Journal of Laws of 2022, item 1526).

<sup>13</sup> The Act of June 5, 1998 on the Voivodeship-Level (Province-Level) Regional Government (consolidated text: the Journal of Laws of 2022, item 547, as amended).

<sup>14</sup> U.K. Zawadzka-Pak, *Ochrona dobra wspólnego poprzez budżet partycypacyjny (obywatelski). Studium aksjologiczno-prawne*, Białystok 2019, p. 103.

<sup>15</sup> K. Opalek, *Problemy metodologiczne nauki prawa*, Warszawa 1962, p. 61.

<sup>16</sup> A. Matan, [in:] ed. B. Dolnicki, *Ustawa o samorządzie gminnym. Komentarz*, 3rd edition, Warszawa 2021, p. 154.

Pursuant to Article 5a (1) of the ACLLG, in the cases provided for by the Act and in other matters important to a municipality, consultations may be held with the residents of the municipality in its territory. Paragraph 2 of the aforementioned article stipulates that the principles and procedure for conducting consultations with the residents of a municipality are determined by a resolution of the municipal council, while the subject matter scope of the resolution regarding participatory budgeting is established separately in paragraph 7. Paragraph 3 of the provision under review indicates that participatory budgeting is a special form of public consultation. Subsequently, paragraph 4 specifies that in the framework of participatory budgeting, residents decide annually by direct vote on a portion of the municipal budget expenditures. Tasks selected as part of participatory budgeting are included in the budget resolution of the municipality. The municipal council, in the course of work on the draft budget resolution, may not remove or substantially change the tasks selected as part of the participatory budgeting. As a result of the introduction of paragraph 5, in municipalities that are cities with the rights of a district, the establishment of participatory budgeting is mandatory, except that the value of the participatory budget is equal to at least 0.5% of the municipality's expenditures included in the last submitted report on the implementation of the budget. As a result, participatory budgeting is now mandatory in all 66 cities with the rights of a district. Paragraph 6 of the law under discussion stipulates that funds spent as part of a participatory budget may be divided into pools covering the entire municipality and its parts, or quota categories of projects covering the entire area of the municipality or its parts. Consequently, in practice, city-wide and district (neighborhood) fund pools are separated. Paragraph 7 of Article 5a stipulates the minimum scope of the municipal council's resolution on the requirements to be met by a draft participatory budget, which includes: the formal requirements to be met by the submitted projects; the required number of signatures of residents supporting each project, which may not be greater than 0.1% of the residents of the area covered by the participatory budgeting pool in which the project is submitted; the rules for evaluating the submitted projects as to their legality, technical feasibility, their compliance with formal requirements, and the procedure for appealing against a decision not to allow a project to be voted on; and the rules for holding the vote, determining the results, and making them public, taking into account that the voting rules must ensure equality and directness of the vote.

### 3. The Legal nature of a resolution on consultations in the form of participatory budgeting

Pursuant to the provisions of Article 5a (1) of the ACLLG, the decision-making body of a local government has discretionary competence in deciding how to regulate the principles and procedures for conducting consultations with residents. In view of the above, the decision-making body may pass:

- a single resolution, on the basis of which all consultations with residents will be carried out in the LRGU; or
- a resolution defining the rules of and elements of the procedure for consultations with residents common to all consultations, which will be supplemented by regulations of separate resolutions containing the rules of and elements of the mode specific only to specific consultations; or
- separate resolutions establishing the rules of and procedures for carrying out each consultation.

The choice of the method of regulation of consultations with residents does not affect the legal nature of any of the above resolutions, as each of them exhibits the same quality. Each of the above-mentioned methods specifies the rules and procedures for conducting consultations with the residents of the municipality, which is intended to enable these residents to express their opinions on the subject of the consultation. The residents are the addressees of the resolution, which is general and abstract in nature, and which indicates how each of the municipality's residents should behave. These elements qualify any resolution that defines the rules and procedures for consultations with residents as an act of the local law.<sup>17</sup> Even though, as emphasized by the Voivodeship (Provincial) Administrative Court in Gliwice in its judgment of October 14, 2015, "there is no statutory definition of 'an act of the local law,' there is no doubt that only regulations having the nature of legal norms can be considered the local law"<sup>18</sup>; therefore, for the qualification of a given act as an act of the local law, the nature of legal norms and the fact that they shape the legal situation of the addressees by these norms are decisive.<sup>19</sup> As the Supreme Administrative Court stressed in one of its judgments, "the qualification of a given act as an act of the general law must be carried out taking into account its substantive and formal features. The mere fact of adoption of a resolution by a decision-making body of a unit of local or regional government does not warrant the inference

<sup>17</sup> J. Wilk, *Powszechnie obowiązująca moc prawna uchwały określającej zasady i tryb konsultacji z mieszkańcami. Glosa do wyroku NSA z dnia 20 marca 2012 r.*, I OSK 2299/11, LEX/el. 2013.

<sup>18</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of October 14, 2015, file no. I SA/Gl 787/15, LEX no. 1926301.

<sup>19</sup> The Judgment of the Voivodeship Administrative Court in Olsztyn of July 11, 2013, file no. II SA/Ol 518/13, LEX no. 1343114.

that this is an act of the local law. All the more so because resolutions of units of the local or regional government are often of a mixed nature and contain provisions that are both universally binding and internal norms.”<sup>20</sup> According to the position of the Voivodeship Administrative Court in Wrocław, expressed in its judgment of September 16, 2015, “only the nature of legal norms and the shaping of the legal situation of the addressees by these norms have a decisive significance for the qualification of a given act as an act of the local law. In other words, if a law-making act (a resolution of a municipal council), contains at least one norm of conduct of a general and abstract nature, it is an act of local law.”<sup>21</sup> A similar position was expressed by the Voivodeship Administrative Court in Gliwice in its judgment of January 14, 2014, which emphasized that “a resolution on determining the principles and procedures for conducting social consultations related to the preparation of the municipal budget is an act of the local law, as it contains norms of a general (and not internal) and abstract nature, addressed to entities external to the municipality, and furthermore contains regulations of a normative nature, defining those entitled to participate in the consultations.”<sup>22</sup> According to the position expressed by the administrative courts, these resolutions regulate in a general and abstract manner the rights of entities external to the municipality,<sup>23</sup> an unspecified number of residents of the municipality,<sup>24</sup> and, in addition, by defining the entities entitled to participate in the consultations, contain regulations of a normative nature.<sup>25</sup>

When evaluating the legal nature of resolutions defining the rules and procedures for conducting consultations with residents issued on the basis of the statutory delegation under Article 5a (2) of the ACLLG, one should agree with the position expressed in the case law of administrative courts. These resolutions have the nature of acts of local law, and consequently, in accordance with Article 13 (2) of the Act on promulgation of normative acts and certain other legal acts, they are subject to publication in the voivodeship official gazette. The above was confirmed by the Supreme Administrative Court in its judgment

<sup>20</sup> The Judgment of the SAC of April 5, 2002, file no. I SA 2160/01, LEX no. 81765.

<sup>21</sup> The Judgment of the Voivodeship Administrative Court in Wrocław of September 16, 2015, file no. III SA/Wr 474/15, LEX no. 1815808; Judgment of the Voivodeship Administrative Court in Wrocław of April 29, 2011, file no. III SA/Wr 20/11, LEX no. 1112683.

<sup>22</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of January 14, 2014, file no. I SA/GI 1291/13, LEX no. 1529502.

<sup>23</sup> The Judgment of the Voivodeship Administrative Court in Opole of June 6, 2018, file no. II SA/Op 109/18, LEX no. 2514050.

<sup>24</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of November 18, 2019, file no. III SA/GI 832/19, LEX no. 2865883.

<sup>25</sup> The Judgment of the Voivodeship Administrative Court in Wrocław of September 16, 2015, file no. III SA/Wr 474/15, LEX no. 1815808; the Judgment of the Voivodeship Administrative Court in Opole of May 15, 2018, file no. III SA/Op 63/18, LEX no. 2502340.

of December 16, 2016, which stated that any resolution defining the rules and procedures for conducting consultations with residents or containing them is subject to publication in the voivodeship official gazette.<sup>26</sup> In addition, as noted by the Supreme Administrative Court in an earlier judgment, publication of such a resolution in the voivodeship official gazette is required, as failure to promulgate acts of the local law is a material violation of the law that makes the resolution invalid. Unpublished normative acts do not enter into force, so they are not binding on the entities to which they were addressed.<sup>27</sup> In addition, it is clear from Article 88 (1 and 2) of the Polish Constitution that the condition for an act of local the law to come into force is its proper promulgation<sup>28</sup>. Thus, as emphasized by the Voivodeship Administrative Court in Poznań in its judgment of July 7, 2021, an obligatory condition for a generally binding normative act to enter into force is its publication in the official gazette.<sup>29</sup>

#### **4. Residents of the municipality as entities entitled to participate in public consultations on participatory budgeting**

As mentioned above, it is clear from Article 5a (1 and 2) of the ACLLG that consultations are conducted with residents. The legislator has not left any possibility for decision-making bodies to reduce the group of subjects entitled to participate in consultations, and unlike the local laws, the case law of administrative courts is uniform on this issue.

Pursuant to Article 7 of the Polish Constitution, public authorities act within the limits and on the basis of law. This means that every action of an authority, including of a decision-making body of an LRGU, must be supported by the applicable laws. According to Article 94 of the Constitution, acts of local law passed by the local government bodies are adopted on the basis and within the limits of the authorizations specified in a statute. As noted by the Voivodeship Administrative Court in Opole in its judgment of June 14, 2018, “in exercising the legislative powers contained in the statutory authorization, these bodies are obliged to act strictly within the limits of that authorization.”<sup>30</sup>

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<sup>26</sup> The Judgment of the Supreme Administrative Court of December 16, 2016, file no. II OSK 3156/18, LEX no. 2799400.

<sup>27</sup> The Judgment of the Supreme Administrative Court of November 3, 2010, file no. II I OSK 1213/10, LEX no. 744957.

<sup>28</sup> The Judgment of the Voivodeship Administrative Court in Kielce of April 13, 2017, file no. II SA/Ke 38/17, LEX no. 2289689.

<sup>29</sup> The Judgment of the Voivodeship Administrative Court in Poznań of July 7, 2021, file no. II SA/Po 148/21, LEX no. 3198495.

<sup>30</sup> The Judgment of the Voivodeship Administrative Court in Opole of June 6, 2018, file no. II SA/Op 109/18, LEX no. 2514050.



In its judgment of September 13, 2019, the Supreme Administrative Court stated that “the resolution-passing body is bound by the competence norm contained in the statute, and this norm does not in any case allow to determine the group of entities entitled to participate in consultations. In other words, it does not allow the introduction of any condition, differentiation of residents of the municipality, which would limit their rights to take part in the consultations referred to in Article 5a of the ACLLG (...). The group of persons entitled to participate in public consultations was defined by the legislature itself. In Article 5a (1 and 2) of the ACLLG, the legislature decided that those entitled to participate in consultations are the residents of the municipality. This norm does not contain any restrictions, nor does it refer to other acts of law.”<sup>31</sup> As stated by the Voivodeship Administrative Court in Opole in its judgment of May 17, 2018, “it is therefore not permitted to specify in a resolution of a municipal council the group of persons entitled to take part in consultations.”<sup>32</sup> Also, the Voivodeship Administrative Court in Opole, in its judgment of June 14, 2018, stated that the decision-making body of an LRGU does not have the authority to deprive anyone of the right to express an opinion as part of participation in public consultations.<sup>33</sup>

As the Voivodeship Administrative Court in Opole clarified in its judgment of April 17, 2018, “Article 5a (2) of the ACLLG constitutes an authorization for the municipal council to determine by resolution only the principles and procedures for conducting consultations with residents, while any provisions going beyond these issues should be considered to have been taken in excess of the statutory authorization and, consequently, to constitute a material violation of the law.”<sup>34</sup> Similarly, the Voivodeship Administrative Court in Gliwice, in its judgment of August 18, 2016, stated that the “authorization to determine the principles and procedures for carrying out consultations,” as provided for in the cited provision, “does not include the determination of the group of entities entitled to participate in the consultations.”<sup>35</sup> Also, the Voivodeship Administrative Court in Wrocław, in its judgment of September 16, 2015, noted that the statutory delegation arising from Article 5a (2) of the ACLLG authorizes the city council

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<sup>31</sup> The Judgment of the Supreme Administrative Court of September 13, 2019, file no. I GSK 1324/18, LEX no. 2725262.

<sup>32</sup> The Judgment of the Voivodeship Administrative Court in Opole of May 17, 2018, file no. II SA/Op 108/18, LEX no. 2503800.

<sup>33</sup> The Judgment of the Voivodeship Administrative Court in Opole of June 6, 2018, file no. II SA/Op 109/18, LEX no. 2514050.

<sup>34</sup> The Judgment of the Voivodeship Administrative Court in Opole of April 17, 2018, file no. II SA/Op 64/18, LEX no. 2483810; Judgment of the Voivodeship Administrative Court in Opole of May 17, 2018, file no. II SA/Op 108/18, LEX no. 2503800.

<sup>35</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of August 18, 2016, file no. IV SA/Gl 540/16, LEX no. 2120823.

only to determine the principles and procedures for carrying out consultations. “This refers only to the definition of the consultation procedure, that is, the description of how these consultations are to be carried out, taking into account the applicable regulations of higher-level acts. The rules and procedures for carrying out consultations do not include the definition of the subjective rights determining the right of an individual to participate in consultations.”<sup>36</sup>

Let us clarify that “principles should be understood as norms containing the rules governing the institution of consultation, the foundations of the functioning of consultations in the municipality, while the term procedure is associated with the manner of consultation proceedings and the procedure that makes the consultation process possible.”<sup>37</sup> The case law of administrative courts indicate that in a resolution issued under the authorization set forth in Article 5a (2) of the ACLLG, the municipal council is obliged to determine, among other things, “who initiates the consultations, the manner and form of the consultations, the time and place of their conduct, the rules for determining the results, and the manner of communicating the results to the local community.”<sup>38</sup>

The Voivodeship Administrative Court in Wrocław, in its judgment of August 30, 2016, stated that “one cannot agree with the position that the possibility to limit the participation of residents in consultations can be derived from the distinction, contained in Article 5a of the ACLLG, of the competence of the municipal council to determine the rules and the procedure, whereby the *rules* would also include the determination of the group of persons entitled to vote (the adopted mode of consultation).” Instead, the court took the position that “the principles and procedures of consultation do not include the determination of subjective rights that determine an individual’s right to participate in consultations, in particular when, in the light of Article 32 (1) of the Constitution, everyone is equal before the law and everyone has the right to equal treatment by public authorities, and according to Article 31 (3) of the Constitution, a restriction on the exercise of constitutional rights and freedoms may be established only in a statute.”<sup>39</sup>

As reminded by the Voivodeship Administrative Court in Rzeszów in its judgment of February 5, 2019, “in accordance with Article 1 (1) of the ACLLG, the residents of a municipality form a self-governing community by law and

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<sup>36</sup> The Judgment of the Voivodeship Administrative Court in Wrocław of September 16, 2015, file no. III SA/Wr 474/15, LEX no. 1815808.

<sup>37</sup> The Judgment of the Voivodeship Administrative Court in Opole of April 17, 2018, file no. II SA/Op 64/18, LEX no. 2483810.

<sup>38</sup> The Judgment of the Voivodeship Administrative Court in Wrocław of August 30, 2016, file no. III SA/Wr 777/16, LEX no. 2268222; Judgment of the Voivodeship Administrative Court in Gliwice of November 18, 2019, file no. III SA/Gl 832/19, LEX no. 2865883.

<sup>39</sup> The Judgment of the Voivodeship Administrative Court in Wrocław of August 30, 2016, file no. III SA/Wr 777/16, LEX no. 2268222.

a municipality should be understood as a self-governing community and the relevant territory (par. 2). The above means that in the provision on public consultations (Article 5a of the ACLLG), the legislature indicated the group of residents of the municipality forming a self-governing community by law (Article 16 (1) of the Constitution, Article 1 (1) of the ACLLG), and therefore referred only to the condition of residence, but did not introduce additional criteria for the participation of residents in public consultations, nor did it authorize the municipal council to undertake lawmaking measures in this regard.<sup>40</sup> The Voivodeship Administrative Court in Wrocław, in its judgment of August 30, 2016, shared the position that “the municipal council does not have the authority to deprive anyone of the right to express an opinion as part of participation in public consultations, as referred to in Article 5a of the ACLLG.”<sup>41</sup>

The Voivodeship Administrative Court in Opole, in its judgment of June 13, 2006, stated that “a purposive interpretation indicates the need to identify the concept of a *municipality resident* with the concept of a *person permanently residing* in that municipality. Since in principle, the place of residence depends on the intention, that is, on the will of a particular person, and the nature of residence is also determined by the factual circumstances indicating the actual intention, then people who meet the listed prerequisites are residents of the municipality, and no other criteria should determine the recognition of a person as a resident of the municipality.”<sup>42</sup>

In the aforementioned judgment of September 13, 2019, the Supreme Administrative Court provided an example by stating that “a resident is therefore also a natural person who does not have full legal capacity, who does not hold Polish citizenship, and who is deprived of public rights. This means that people who, for example, have limited legal capacity (people who are over 13 years old, partially incapacitated), are foreigners, or have been deprived of public rights, have the status of residents and can participate in public consultations.”<sup>43</sup> Thus, as emphasized by the Voivodeship Administrative Court in Opole in its judgment of May 15, 2018, “the fact of deprivation of public rights, electoral rights, or incapacitation of a resident of a municipality is not tantamount to the deprivation of the right to participate in consultations.”<sup>44</sup>

<sup>40</sup> The Judgment of the Voivodeship Administrative Court in Rzeszów of February 5, 2019, file no. II SA/Rz 1192/18, LEX no. 2647133.

<sup>41</sup> The Judgment of the Voivodeship Administrative Court in Wrocław of August 30, 2016, file no. III SA/Wr 777/16, LEX no. 2268222.

<sup>42</sup> The Judgment of the Voivodeship Administrative Court in Opole of June 13, 2006, file no. II SA/Op 213/06, LEX no. 475242.

<sup>43</sup> The Judgment of the Supreme Administrative Court of September 13, 2019, file no. I GSK 1324/18, LEX no. 2725262.

<sup>44</sup> The Judgment of the Voivodeship Administrative Court in Opole of May 15, 2018, file no. III SA/Op 63/18, LEX no. 2502340.

## 5. Rationale for participating in citizen budgeting consultations

### 5.1. Age

In accordance with the position of administrative courts cited in Section 4, the group of persons entitled to participate in public consultations in the form of participatory budgeting was defined by the legislature itself, which decided that those entitled to consultations are the residents of municipalities. Consequently, it is not legitimate to impose restrictions on the age of the participants in the participatory budgeting procedure. Such a solution could be observed in practice, when municipalities conditioned participation in consultations on turning 15,<sup>45</sup> 16<sup>46</sup>, or 18<sup>47</sup> years of age.

In the case law of administrative courts, there is a view that the possibility of referring to the age criterion in the provisions of resolutions of decision-making bodies of LRGUs relating to the designation of entities having the right to take the initiative to submit applications in the municipality and those entitled to vote cannot be derived from the authorization contained in Article 5a (2) of the ACLLG. The use of the prerequisite of being of a certain age means not only that the decision-making body of an LRGU goes beyond the sphere of the powers granted to it, and thus violates Article 5a (2) of the of the ACLLG, but also encroaches on the matter constitutionally reserved to the legislature, which violates the basic principle of public bodies acting on the basis and within the limits of the law (Article 7 of the Polish Constitution<sup>48</sup>).<sup>49</sup>

Consequently, on March 8, 2016, the Voivodeship Administrative Court in Gliwice<sup>50</sup> found it unauthorized to reduce the group of persons entitled to participate in consultations in the form of participatory budgeting to those who are 15 years of age or older. The same was done by the Voivodeship Administrative Court in Bydgoszcz in its judgment of December 7, 2021,<sup>51</sup> the Voivodeship Administrative Court in Opole in its judgment of June 14, 2018,<sup>52</sup>

45 Cf.: The Resolution of the Pszczyna City Council of August 20, 2015, no. XI11/117/15, on Determining the Principles and Procedures for Conducting Public Consultations Related to the Preparation of the Pszczyna Participatory Budget in 2016.

46 Cf.: The Resolution of the Council of the City of Bydgoszcz of December 19, 2018, no. V/43/18, on the Principles of the "Bydgoszcz participatory budget" Program.

47 Cf.: The Ordinance of August 11, 2017 Concerning Kazimierz Dolny's Participatory Budget for 2018.

48 The Act of April 2, 1997, Constitution of the Republic of Poland (Journal of Laws of 1997, no. 78, item 483, as amended), hereinafter referred to as Constitution of the Republic of Poland.

49 The Judgment of the Voivodeship Administrative Court in Bydgoszcz of December 7, 2021, file no. II SA/Bd 930/21, LEX no. 3326037.

50 The Judgment of the Voivodeship Administrative Court in Gliwice of March 8, 2016, file no. IV SA/Gl 1129/15, LEX no. 2017370.

51 The Judgment of the Voivodeship Administrative Court in Bydgoszcz of December 7, 2021, file no. II SA/Bd 930/21, LEX no. 3326037.

52 The Judgment of the Voivodeship Administrative Court in Opole of June 6, 2018, file no. II SA/Op 109/18, LEX no. 2514050.

and the Voivodeship Administrative Court in Opole in its judgment of May 17, 2018<sup>53</sup> with regard to the introduction of a restriction on the submission of projects and participation in voting in relation to persons who have turned 16, and by the Voivodeship Administrative Court in Wrocław in its judgment of August 30, 2016<sup>54</sup> in relation to persons who have turned 18.

However, it should be noted, as pointed out by the Voivodeship Administrative Court in Gliwice in its judgment of May 12, 2021, that the date of birth obtained in the voting process can “provide important information to city authorities, such as which projects are relevant to which age group. Data on the date of birth or age may be required for voting on participatory budget projects, provided that there are no provisions in the resolutions of the decision-making bodies of the local government that would exclude anyone on the basis of age.”<sup>55</sup>

## 5.2. The Place of residence and registration

It should be assumed, as stated by the Voivodeship Administrative Court in Gliwice in its judgment of May 12, 2021, that “the elements that make it possible to determine who is a resident of a municipality and who is not, are the first and last name, as inalienable human rights directly relating to his or her physical and mental integrity and individuality, capable of unambiguously identifying a person, as well as the address of the person at which he or she is staying with the intention of permanent residence.”<sup>56</sup> However, the data on the date of birth of people submitting projects for participatory budgeting, people supporting a project, and people voting are not used to verify residence. Such data as the date of birth and age are not necessary to determine whether a person is a resident of a particular municipality.<sup>57</sup>

The provisions of the ACLLG do not define the term “resident,” so it is reasonable to refer in this regard to the provisions of the Civil Code.<sup>58</sup> According to Article 25 of the Civil Code, the place of residence of a natural person is the place where that person stays with the intention of permanent residence.

As noted by the Voivodeship Administrative Court in Poznań in its judgment of February 14, 2020, when assessing whether a person is a resident

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53 The Judgment of the Voivodeship Administrative Court in Opole of May 17, 2018, file no. II SA/Op 108/18, LEX no. 2503800.

54 The Judgment of the Voivodeship Administrative Court in Wrocław of August 30, 2016, file no. III SA/Wr 777/16, LEX no. 2268222.

55 The Judgment of the Voivodeship Administrative Court in Gliwice of May 12, 2021, file no. III SA/Gl 154/21, LEX no. 3181625.

56 Ibidem.

57 Ibidem.

58 The Act of April 23, 1964 - Civil Code (consolidated text: Journal of Laws of 2022, item 1360), hereinafter referred to as CC.

of a locality or not, “both the fact of the physical presence in a locality (*corpus*) and the will to stay there (*animus*) are important. The will to stay in a particular place is a subjective concept. It must entail that the place has become the center of an individual’s daily life, where his or her life plans are concentrated. A specific place does not lose the attribute of the place of residence as a result of moving away from it for a longer or shorter period of time, provided that the person does not lose the real connection with the place. (...) The fulfillment of a single condition, which consists in mere physical residence, but without the intention of permanent residence, even if the residence lasted for a longer period of time (for example, in connection with work or study in another locality), does not determine a place of residence within the meaning of Article 25 of the Civil Code. Accordingly, the possibility to participate in public consultations is granted only to persons residing in the territory of the Republic of Poland with the intention of permanent residence.”<sup>59</sup> As the Voivodeship Administrative Court in Gliwice clarified in its judgment of May 12, 2021, “the assumption of a person’s residence in a certain locality is not determined by the locality in which the individual is registered, but by the locality in which he or she stays with the intention of permanent residence. (...) Thus, the introduction of the criterion of registration as a resident for voting on projects contradicts the applicable laws.”<sup>60</sup>

The Voivodeship Administrative Court in Poznań, in its judgment of May 5, 2022,<sup>61</sup> addressed the issue of differentiating requirements depending on whether someone is registered as a resident or not in a given municipality. The court considered a resolution of a city council, in which additional requirements were imposed on a certain group of residents. The fulfilment of these conditions resulted in the possibility of active participation in the process of voting on projects in the participatory budget. Specifically, it stated that “a resident who is not registered for permanent or temporary residence in the city may vote only after contacting the Citizens’ Budget coordinator or another person designated by the President and submitting a declaration of residence in the city.” The explanatory memorandum for the resolution explained the intent of that provision. It was pointed out that in view of the fact that Article 5a of the ACLLG grants the right to vote in the participatory budgeting process to any resident, and not only to persons registered as residents, and taking into account the fact that the city does not have a register of residents (there is only a register of registered

<sup>59</sup> The Judgment of the Voivodeship Administrative Court in Poznań of February 14, 2020, file no. IV SA/Po 934/19, LEX no. 3015121.

<sup>60</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of May 12, 2021, file no. III SA/Gl 154/21, LEX no. 3181625.

<sup>61</sup> The Judgment of the Voivodeship Administrative Court in Poznań of May 5, 2022, file no. III SA/Po 1728/21, LEX no. 3356977.

persons) it is reasonable to introduce into this resolution the regulations on the possibility of voting by persons who are residents but are not registered.”<sup>62</sup> The Voivodeship Administrative Court in Poznań stated that “the City Council, in the procedure for voting on projects in the City’s so-called participatory budget, differentiated the legal situation of residents depending on whether the residents are registered (for permanent or temporary residence) or are not registered. In fact, additional requirements were imposed on voters not registered as residents, their right to vote was conditioned, and imposed the obligation to contact the Citizens’ Budget coordinator or another person appointed by the President before voting and to submit a declaration of residence in the city. (...) The Failure of a resident not registered for permanent or temporary residence in the city to meet these conditions excludes him or her from participating in voting on projects submitted for the participatory budget.”<sup>63</sup> Thus, the Voivodeship Administrative Court in Poznań stated that these rules “go beyond the statutory delegation contained in Article 5a (2) in conjunction with sec. 7 (4) of the ACLLG, because by imposing additional conditions on residents not registered in the City, to enable them to participate in the vote, impermissibly limits the access of this group of residents of the municipality to participation in consultations on the participatory budget.”<sup>64</sup>

### **5.3. The Universal Electronic System for Registration of the Population number**

Pursuant to Article 15 (2) of the Act on population registration<sup>65</sup>, the Universal Electronic System for Registration of the Population (PESEL) number is an eleven-digit numeric symbol that uniquely identifies an individual, with the first six digits indicating the date of birth (year, month, day), the next four digits indicating the serial number and gender of the person, and the last digit being a check digit used for computer control of the correctness of the assigned registration number.

The case law on the need to provide the PESEL number when voting on a participatory budget projects is inconsistent.

The Voivodeship Administrative Court in Gliwice, in its judgment of August 18, 2016,<sup>66</sup> stated that the obligation to indicate the PESEL number in the consultation procedure over a participatory budget in the application

<sup>62</sup> Ibidem.

<sup>63</sup> Ibidem.

<sup>64</sup> Ibidem.

<sup>65</sup> The Act of September 24, 2010 on Population Registration (consolidated text: the Journal of Laws, no. 1022, item 1191), hereinafter referred to as “The Act on population registration.”

<sup>66</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of August 18, 2016, file no. IV SA/GI 540/16, LEX no. 2120823.

form for project proposals or in the list of support for the project, goes beyond the scope of the authorization granted in Article 5a (2) of the ACLLG. That number does not include data on the place of residence, and only this information is relevant in determining whether a person on the list is a resident of a municipality. The Voivodeship Administrative Court in Opole, too, in its verdict of May 17, 2018, stated that the city council, by requiring that the residents' application (questionnaire) include a PESEL number, goes beyond the scope of the authorization granted to that body by the provision of Article 5a (2) of the ACLLG.<sup>67</sup> A similar position was expressed by the Voivodeship Administrative Court in Gliwice in a later judgment of July 18, 2019, in which it stated that "one should share the assessment made in the contested supervisory ruling that the content of the contested resolution in terms of the requirement to indicate registration as a resident in the municipality goes beyond the scope of authorization under Article 5a (2) in conjunction with sec. 7 of the ACLLG, and the effect of limiting the access of residents of the municipality to participation in public consultations also extends to the obligation to indicate their PESEL number and telephone number in the consultation procedure, when casting a vote in electronic form."<sup>68</sup> In the same judgment, the Voivodeship Administrative Court in Gliwice also referred to the principle of adequacy under Article 5 (1) (c) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.<sup>69</sup> This principle involves the obligation to collect only such personal data that are in fact necessary for the handling of the case, which in the present situation should be limited to verification of the condition of residence in the municipality.<sup>70</sup> While it is true that the court shared the view that the use of the PESEL number is important from the point of view of the need to avoid abuse, in particular in the case of voting via an online form and of the resulting obligation of the municipality to maintain the principle of direct voting, in the opinion of the court, the view that the challenged regulations do not violate the provision of Article 5a (7) of the ACLLG should not be approved.

<sup>67</sup> The Judgment of the Voivodeship Administrative Court in Opole of May 17, 2018, file no. II SA/Op 108/18, LEX no. 2503800.

<sup>68</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of November 18, 2019, file no. III SA/Gl 832/19, LEX no. 2865883.

<sup>69</sup> The Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data. OJ EU L no. 119.

<sup>70</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of November 18, 2019, file no. III SA/Gl 832/19, LEX no. 2865883.



The Voivodeship Administrative Court in Rzeszów, too, in its judgment of February 5, 2019, stated that requiring a PESEL number is “an unauthorized creation by the authority of additional criteria, not provided for by a statute, which do not actually serve to determine the resident of the municipality, but constitutes a limitation of the group of residents of the municipality to persons who have a PESEL number, because it omits cases in which a resident of the municipality does not have such a code.”<sup>71</sup>

The requirement to provide the PESEL number, or, for example, the last four digits of that number, as in the case considered in the judgment of the Voivodeship Administrative Court in Poznań of February 14, 2020, “makes it impossible for people who, for various reasons, have not received it (e.g., foreigners, as well as children of Polish citizens born abroad, including those with only a temporary passport and no Polish birth certificate) to take part in the consultation.”<sup>72</sup>

A similar position in an analogous case, in which the requirement to provide the PESEL number also applied only to electronic voting, and not to traditional voting, was expressed by the Voivodeship Administrative Court in Rzeszów in its judgment of August 28, 2019.<sup>73</sup> In the legal grounds of the judgment, the Court stated that “from the statutory authorization to pass rules and procedures for conducting consultations with the residents of a municipality, one cannot derive the competence of the municipal council to limit the group of persons entitled to participate in public consultations by establishing the obligation to indicate the PESEL number in the electronic voting form. The allegations of the complaint, which demonstrated that the requirement to provide the PESEL number was based on the need to verify whether the resident voted only one time, and also did not apply to the possibility of voting *in genere*, but only in electronic form, could not be accepted. The obligation to implement an additional information requirement for residents of a municipality, i.e., to provide the PESEL number, as part of the establishment of the rules for voting on individual projects that are candidates for inclusion in the participatory budget (Article 5a (2 and 7) of the ACLLG) for the sole reason that a resident does not vote traditionally – by casting a vote on paper – but electronically, is in itself contrary to the principle of equality. The voting method a resident chooses

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<sup>71</sup> The Judgment of the Voivodeship Administrative Court in Rzeszów of February 5, 2019, file no. II SA/Rz 1192/18, LEX no. 2647133; cf.: The Judgment of the Voivodeship Administrative Court in Bydgoszcz of December 14, 2021, file no. II SA/Bd 931/21, LEX no. 3326015; The Judgment of the Voivodeship Administrative Court in Opole of May 15, 2018, file no. III SA/Op 63/18, LEX no. 2502340.

<sup>72</sup> The Judgment of the Voivodeship Administrative Court in Poznań of February 14, 2020, file no. IV SA/Po 934/19, LEX no. 3015121.

<sup>73</sup> The Judgment of the Voivodeship Administrative Court in Rzeszów of August 28, 2019, file no. II SA/Rz 683/19, LEX no. 2723104.

must not affect the scope of the data that makes it possible to verify whether he or she is a resident of the municipality. Providing one's first and last name along with one's place of residence in an electronic system that allows electronic voting should be considered sufficient both to verify that the voter is a resident of the municipality and to verify that the voter is voting for the first time.<sup>74</sup>

On the other hand, a different position was presented by the Voivodeship Administrative Court in Gliwice in its judgment of May 12, 2021<sup>75</sup> by citing the purpose of assigning a PESEL number under Article 15 (2) and Article 46 (1) of the Act on population registration, which allows data from the PESEL register and residents' registers to be made available to the public administration bodies to the extent necessary to carry out their statutory tasks. According to the court, "since, according to the statutory definition, the PESEL number allows for the unambiguous identification of a person, and the implementation of a participatory budget is a statutory task in cities with the rights of a district (Article 5a (5) of the ACLLG), the use of the PESEL number in the voting process, to ensure the directness and equality of the vote (voting in person and only once) is consistent with the purpose for which it was introduced and is carried out in a manner consistent with the law. It happens that children have the same first names as their parents and live at the same address, and then the PESEL number is necessary to identify the person; otherwise, there may be errors, as a result of which residents are deprived of the possibility to participate in voting for tasks in the participatory budget, and thus their rights may be violated."<sup>76</sup> In addition, in the court's opinion, there is no contraindication to requiring the PESEL number to confirm identity in the case of electronic voting, provided, however, that voting in the form of a traditional ballot is allowed. This is due to the fact that in participatory budgeting there are two purposes of processing personal data: to verify the condition of residence in the municipality and to verify the equality and directness of the vote. As substantiated by the Voivodeship Administrative Court in Gliwice in its judgment of May 12, 2021, "voting by electronic means has been conditioned by the need to provide the PESEL number and the telephone number not to verify whether a person is a resident of the City, but to confirm the identity of the person voting by electronic means, as well as *de facto* to confirm his or her legal capacity. This is because the PESEL number is the registration number of an individual, and there is no basis for requiring a qualified electronic signature or the use of a trusted profile" when casting one's vote electronically. As the Voivodeship Administrative Court in Gliwice further argued, "the local government unit, when analyzing the scope

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74 Ibidem.

75 The Judgment of the Voivodeship Administrative Court in Gliwice of May 12, 2021, file no. III SA/Gl 154/21, LEX no. 3181625.

76 Ibidem.

of the processed personal data in terms of the purpose of the processing, took into account the principle of adequacy of personal data, as evidenced by the fact that in the case of traditional (paper) voting taking place at a polling station operated by an employee, it did not consider the processing of personal data, i.e. the PESEL number and telephone number, as necessary, because it is possible to ensure equality and directness of the voting by showing the employee an identity document and signing the voter list. On the other hand, in the case of electronic voting, the inability to process the PESEL number and telephone number would result in the inability to verify voters in terms of their direct and equal voting.”<sup>77</sup> The Voivodeship Administrative Court in Gliwice also added that “the fact that voting on the participatory budget can be held in two forms gives each eligible person the opportunity to choose the method that is most convenient for him or her, so it serves the purpose for which the whole procedure is conducted. (...) The provision in question does not discriminate against anyone, because everyone can choose the way in which he or she will cast his or her vote (which is not possible, for example, in elections held only at polling stations). If a person is a resident of the City, but is not registered in it, he or she will only be deprived of the ability to choose the electronic voting method, but not of the right to participate in the voting in general, since paper voting is not restricted in any way, including by the obligation to be a registered resident in the municipality.”<sup>78</sup> Since the PESEL number is “unique, specific to only one person, it serves to identify voters and verify whether a person has already voted, in a situation where there are several people with the same first and last name. Thus, the reason for requiring the PESEL number is to ensure equality and directness of voting, so that every resident can cast a vote and can do so only once.”<sup>79 80</sup>

#### **5.4. Mobile phone number**

Some cities in which electronic voting is held, in addition to traditional voting with ballots, imposed the requirement to provide one’s mobile phone number. In the light of the case law of administrative courts, this obligation does not limit the right of a resident to participate in a vote on a participatory budget. This requirement serves to ensure equality and directness of voting. Providing a phone number to which a message is sent with an individual code confirming the casting of a vote is “a security measure within the electronic

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<sup>77</sup> Ibidem.

<sup>78</sup> Ibidem.

<sup>79</sup> Ibidem.

<sup>80</sup> Ibidem.

system, without which fraud and falsification of the vote results could occur. Without an individual code, a person with access to a database with PESEL numbers could commit fraud and falsify the results (...). This is a safeguard that functions only within an electronic system. This is because the code is entered automatically in the system and this information is not further processed or used.”<sup>81</sup>

The requirement to provide a mobile phone number, according to the Voivodeship Administrative Court in Gliwice expressed in its judgment of May 12, 2021 “does not discriminate against or exclude anyone from the possibility to vote, as those who do not want to disclose them or do not have a cell phone have the ability to vote in the traditional way, in which their provision is not required.”<sup>82</sup> The situation would be different if voting on participatory budget projects took place only electronically. Participation in the consultation would then depend on having a mobile phone. Such a situation, however, has not been the subject of adjudication by administrative courts.

### **5.5. Active voting rights**

In some municipalities, the ability to participate in consultations in the form of participatory budgeting has been conditioned by having active voting rights. However, as the Voivodeship Administrative Court in Gliwice concluded in its judgment of August 18, 2016, by introducing active voting rights as a requirement in the provisions of a resolution on consultations in the form of participatory budgeting relating to the designation of the persons entitled to vote, a reference is made to the criteria that cannot be derived from the authorization contained in Article 5a (2) of the ACLLG. “This, in turn, means that the Municipal Council – by using the condition of having active electoral rights – not only went beyond the sphere of the authority granted to it, and thus violated Article 5a (2), but most importantly entered as a matter that is constitutionally reserved to the legislature, which infringes upon the basic principle of public bodies acting on the basis and within the limits of law (Article 7 of the Polish Constitution).” As noted by the Voivodeship Administrative Court in Gliwice in its judgment of November 18, 2019<sup>83</sup> the ACLLG does not refer to the Act of January 5, 2011 – Electoral Code<sup>84</sup> and, consequently, the determination of whether a person – a resident has active voting rights is not covered by the provisions of the ACLLG.

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<sup>81</sup> Ibidem.

<sup>82</sup> Ibidem.

<sup>83</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of August 18, 2016, file no. IV SA/GI 540/16, LEX no. 2120823.

<sup>84</sup> The Act of January 5, 2011 – Electoral Code (consolidated text: the Journal of Laws of 2022, item 1277).

## 5.6. The Status of a city councilor

In the light of the case law of the administrative courts, the exclusion of councilors from the possibility of submitting projects in participatory budgeting is legal, while as residents they are able to participate in the vote. Considering the allegation of the illegality of such a solution, in its judgment of January 14, 2014, the Voivodeship Administrative Court in Gliwice concluded that depriving city councilors of the possibility to propose tasks for a participatory budget is not tantamount to depriving them as residents of the right to participate in consultations. Councilors can participate in consultations by casting their vote for specific task proposals. On the other hand, the Voivodeship Administrative Court in Gliwice agreed with the Municipality's position that "the exclusion of councilors from the group of persons authorized to submit task proposals is a rational and consistent measure to the extent that, as results from the assumptions of these public consultations, they are to be conducted jointly by the President and councilors. Consequently, City Council councilors participate personally as members of teams working on the participatory budget. Therefore, the construction adopted in the contested resolution, following in a certain way the provisions of the Code of Administrative Procedure<sup>85</sup> regarding the exclusion of the body and an employee of the body, is a mechanism that eliminates situations that could raise doubts about the impartiality of the members of the teams verifying task proposals."<sup>86</sup>

The position of the Voivodeship Administrative Court was concurred with the position of the Supreme Administrative Court, which stated in its judgment of May 29, 2015, that "since the municipal council, and therefore the councilors, adopt the municipal budget, which means that they determine the tasks that will be paid for from the municipal budget. The same councilors cannot propose public tasks to be paid for from a separate part of the budget referred to as participatory budget. Indeed, it can be assumed that the essence of the participatory budget is that proposals for tasks to be paid for from the part of the budget referred to as participatory budget will be submitted by people from outside the council. The exclusion of councilors concerns to the submission of proposals for public tasks, not to their subsequent consultation with residents and evaluation."<sup>87</sup>

<sup>85</sup> The Act of 14 June 1960 – Code of Administrative Procedure (the Journal of Laws of 2021, item 735, as amended).

<sup>86</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of January 14, 2014, file no. I SA/Gl 1291/13, LEX no. 1529502.

<sup>87</sup> The Judgment of the Supreme Administrative Court of May 29, 2015, file no. II GSK 942/14, LEX no. 1982688.

### 5.7. Non-governmental organizations

In the light of the case law of administrative courts, non-governmental organizations may not so much participate in social consultations, i.e. vote for projects, as submit, on an equal footing with residents, proposals for tasks for the participatory budget. In the opinion of the Voivodeship Administrative Court in Gliwice expressed in its judgment of January 14, 2014, non-governmental organizations may be “entitled only to submit proposals (projects) for public tasks, which will then be evaluated by residents who will participate in public consultations by voting.”<sup>88</sup> The Voivodeship Administrative Court did not agree with the argumentation of the supervisory authority, which stated in the course of examining the legality of the council’s resolution in question, that it was contrary to the provisions of Article 5a (2) of the ACLLG. According to the supervisory authority, the wording of this provision precluded “the possibility of granting to non-governmental organizations the right to participate in consultations. The authority noted that the referenced act stipulates that consultations are carried out with the residents of a municipality. The introduction in the resolution of a provision that in any way expands the group of persons entitled to participate in consultations defined by the legislature constitutes a significant violation of Article 5a (2) of the act, in that it goes beyond the scope of the competence norm expressed in that article. It is clear from the cited article that the only criterion for participation in consultations is the fact of being a resident of a municipality. A resolution on this matter may not concern any entities other than the residents of the municipality.”<sup>89</sup>

The cited position of the Voivodeship Administrative Court was upheld by the Supreme Administrative Court, which stated in its judgment of May 29, 2015 that “the provision that non-governmental organizations may also submit proposals for public tasks, as these are proposals that will then be evaluated by residents in the course of public consultations by voting, does not constitute an exceedance of the statutory authorization provided for Article 5a (2) of the ACLLG.”<sup>90</sup>

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<sup>88</sup> The Judgment of the Voivodeship Administrative Court in Gliwice of January 14, 2014, file no. I SA/Gl 1291/13, LEX no. 1529502.

<sup>89</sup> Ibidem.

<sup>90</sup> The Judgment of the Supreme Administrative Court of May 29, 2015, file no. II GSK 942/14, LEX no. 1982688.

## 6. Conclusions

The analysis of the legislation and case law of administrative courts presented in this paper in terms of the determination of the group of persons entitled to participate in public consultations as part of participatory budgeting proves that the provisions of the local law are restrictive compared to the statutory regulation. Therefore, resolutions issued on the basis of Article 5a of the ACLLG have repeatedly been the subject of adjudication by administrative courts, whose role is to bring local laws into compliance with statutory provisions. The extensive case law of administrative courts on the use of participatory budgeting leads to the following conclusions:

- firstly, public consultations carried out on the basis of Article 5a of the ACLLG, of which the participatory budget is a special form, have an opinion-forming and non-binding nature, since they do not serve to decide on public issues, but to organize the decision-making process in such a way as to allow the decision-maker to learn in its course the opinions of third parties;
- secondly, when assessing the legal nature of resolutions establishing the rules and procedures for conducting consultations with residents, issued on the basis of the statutory delegation under Article 5a (2) of the ACLLG, it should be clearly stated that they are acts of local law;
- thirdly, the statutory delegation under Article 5a (2) of the ACLLG authorizes the decision-making body of a municipality only to determine the principles, which should be understood as norms containing the rules governing the institution of consultations, the foundations of the functioning of consultations in a municipality, and the procedure for carrying out consultations, which involves the method of the consultation proceedings and the procedure enabling the consultation process;
- fourthly, it is clear from Article 5a (1 and 2) that public consultations on a participatory budget are conducted with residents. Thus, the legislature did not leave any possibility to the decision-making bodies of LRGUs to reduce the subjective scope of the persons entitled to participate in consultations, and in contrast to local laws, the case law of administrative courts is uniform on this issue. The resolution-passing body of an LRGU is bound by the competence norm contained in the statute, and this norm does not in any case allow to determine the group of entities entitled to participate in consultations. Thus, the introduction in resolutions of conditions for differentiation between residents of a municipality that would restrict their rights to take part in public consultations is unacceptable;
- fifthly, the group of persons entitled to participate in social consultations in the form of participatory budgeting has been repeatedly reduced by

the decision-making bodies of LRGUs, as indicated by the extensive case law of administrative courts. The prerequisites for participation in the consultations included that the participants had reached a certain age. The case law demonstrates the opinion that the possibility to apply the criterion of age to the persons taking part in consultations goes not only beyond the scope of the powers granted to the decision-making bodies of LRGUs, but also enter into the matter constitutionally reserved to the legislature, which violates the basic principle of public bodies acting on the basis and within the limits of law. Similarly, this principle is contradicted by making the ability to participate in consultations in the form of participatory budgeting conditional on having active voting rights. The fact of deprivation of public rights, voting rights, or incapacitation of a resident of a municipality also must not deprive a resident of the right to participate in consultations. The criteria in conflict with the law that administrative courts have pointed out in their rulings include the obligation to be a registered resident when voting on projects. According to the administrative courts, granting the rights of a resident is conditioned by the first and last name, as inalienable human rights, and by the address of the person where he or she stays with the intention of permanent residence. In contrast, verification of residence cannot be carried out on the basis of the date of birth of those participating in consultations, nor by the obligation to have a PESEL number. Although the case law of the administrative courts is not unanimous on the issue of the obligation to have a PESEL number, it should be accepted as correct that requiring a PESEL number is an unauthorized creation of the decision-making body of additional criteria that are not provided for by the statute, which do not in fact serve to determine whether a person is a resident of the municipality, and constitutes a limitation of the group of residents of the municipality to persons who have this number, as it omits cases in which a resident of the municipality does not have such a number.



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#### SUMMARY

### **The Right to Participate in the Consultations on the Participatory Budget in the Light of the Legislation and the Case Law of Administrative Courts in Poland**

The analysis of the legislation and case law of administrative courts presented in this paper made it possible to determine the group of persons entitled to participate in public consultations on participatory budgets. An analysis of the local laws leads to the conclusion that the resolution-passing bodies of LRGUs, when designating the group of persons entitled to participate in the public consultation procedure, have repeatedly reduced it in relation to the statutory regulation, thus significantly violating Article 5a of the Act on the commune-level local government. The extensive case law of administrative courts on the application of participatory budgeting proves that

it follows from the statutory delegation under Article 5a (1 and 2) of the Act on the commune-level local government that public consultations on a participatory budget are conducted with residents. Thus, the legislature did not leave any possibility to the decision-making bodies of LRGUs to reduce the subjective scope of the persons entitled to participate in the consultations, and in contrast to the local laws, the case law of administrative courts is uniform on this issue. The resolution-passing body of a unit of the local government is bound by the competence norm contained in the statute, and this norm does not in any case allow to determine the group of entities entitled to participate in the consultations. Thus, the introduction in resolutions of the conditions for differentiation between residents of a municipality that would restrict their rights to take part in public consultations is unacceptable. According to administrative courts, granting the rights of a resident is conditioned by the first and last name as inalienable human rights, and by the address of the person where he or she stays with the intention of permanent residence. The application of the criterion of age to the persons taking part in consultations, the requirement to have active voting rights, the requirement to be a registered resident, and the requirement to have a PESEL number goes not only beyond the scope of the powers granted to the decision-making bodies of LRGUs, but also enter into the matter constitutionally reserved to the legislature, which violates the basic principle of public bodies acting on the basis and within the limits of law.