

## DECISION-MAKING OF THE MUNICIPAL COUNCIL FROM THE ASPECT OF EXPRESSION OF CITIZENS OF THE MUNICIPALITY AND THE CONTENT OF THE ADOPTED DECISION

\*KATEŘINA ŠVARCOVÁ

Masaryk University in Brno, Faculty of Law,  
Veveří 70, 611 80 Brno, Czech Republic,  
email: "348684@mail.muni.cz"

Projekt specifického výzkumu Masarykovy university na rok 2015 – "Uplatňování zásady předběžné opatrnosti a ochrana zdravých životních podmínek", ID 45223.

**Abstract:** Municipalities represent the foundations of public administration in the Czech Republic, entrusted with an utterly irreplaceable role at the community level. They play this role thanks to charged competencies in wide-ranging areas of life by means of municipal bodies. The author focuses on certain problematic contemporary aspects of the decision-making process of a municipality - specifically the municipal council. Problematic aspects that the law has never efficiently regulated mainly include the requirement for professional knowledge of council members when making decisions on relevant questions, i.e. an erudite approach to decision-making, and the possibility of the citizen to engage into the decision-making process of a municipal council.

**Keywords:** municipality, municipal council, municipal decision-making process, knowledge of content of decisions, expression of citizens

### 1 Decision-making of the municipal council

Municipalities represent the foundations of public administration in the Czech Republic, which are entrusted with an utterly irreplaceable role at the community level. They play this role thanks to charged competencies in wide-ranging areas of life by means of municipal bodies - especially the municipal council, whereas decision-making processes occur in the municipal council through its elected council members. **The principle of local self-government** appears in this very decision-making of the municipal council. Its foundations lie at the constitutional level, specifically in Article 8 of Act No. 1/1993 Coll., the Constitution of the Czech Republic, as amended, where self-government of territorial self-governing units is explicitly guaranteed. Territorial self-government is further defined in Chapter VII of the Constitution (Article 99–105), relating to which in regards to decision-making of the municipal council is Act No. 128/2000 Coll., on Municipalities (hereinafter the "Municipal Order"). The subject of research or analysis of this area generally involves typical process aspects of the council's decision-making process, designated as conditions for adopting decisions by the council (concerning e.g. determining conditions for meetings of the council as a congenial body [frequency and location of meeting, method of convening, method of leading and the course of the meeting, a control aspect in the form of minutes of the meeting], as well as determining conditions for adopting decisions [quorum for adopting decisions, familiarization with materials of the decision at hand]). The following analysis selectively observes two chosen aspects of the decision-making process of the municipal council, in which violation and functional inefficiency occur in the municipality's established system of the decision-making. The author believes that the selected problems pose the greatest threats for the future in questions of local self-government. This concerns the possibility of citizens to engage in the decision-making process of the council and express their opinions, or influence questions towards which the council will devote efforts, and the importance of the content and sufficiently erudite knowledge of questions or decisions, which council members adopt through their approval. If the municipality is to execute its tasks conscientiously and duly (thus with fulfillment of legal provisions concerning care of the municipality itself), then not only should they be, but they must be, elected council members who are educated and responsible, because they decide on the municipality's future development.

#### A) Course of the meeting of the municipal council focusing on expression of its citizens

The meeting of the municipal council must be public (Sec 93(3) of the Act on Municipalities [Municipal Order] - hereinafter

"MO"). Thanks to this public principle, the right of the citizen of the municipality having reached the age of 18 is exercised to **express** at the municipal council meeting, in accordance with the rules of procedure, his **opinion on discussed matters**. This right is anchored in the provisions of Sec 16(2)(c) MO. It is apparent that the cited provisions represent the legal performance of a constitutionally anchored right under Article 21(1) of Act No. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms (hereinafter "CFRF") **to take part in the administration of public matters**. If a citizen of the municipality were to believe that a breach occurred in his possibility of expressing an opinion towards matters under discussion by the council<sup>1</sup>, or it became limited, the situation should be judged and interpreted in a manner preserving the meaning of this legal performance of a constitutional right, thus in principle **"to the benefit" of the citizen of the municipality**. The MO does not specify further by what manner the citizen is to enforce this right, or how to exercise and implement it. It is therefore being offered for the council's rules of procedure<sup>2</sup> to include an amendment in this sense into selected details, but this is not a statutory requirement. Despite this, by interpretation of Sec 16(2)(c) MO, one may conclude that the council is obliged to enable the citizen of the municipality adequate and effective exercising of this right, and that the law calls for one of the most convenient forms - modifying the rules of procedure, where according to the ruling of the Regional Court in Ústí nad Labem of 03.05.2007, case no. 15 Ca 196/2006-35: "Through their rules of procedure, regions cannot limit the right of citizens to express themselves regarding negotiated matters, to which they are recognized by Act No. 129/2000 Coll., on Regions (Sec 12(2)(b)). Citizens of the region may thus express their positions at meetings of the council, which relate to the matter at hand." Conditions determined by the rules of procedure should "guide" execution of this right in a reasonable manner, but they cannot factually preclude it (e.g. it is not possible to limit the length of a citizen expressing him or herself to just 30 seconds). However, if this question is not regulated by the rules of procedure, nothing prevents the citizen from exercising his or her right to expression.

It is possible to regard as minimum the following requirements, which the municipal council and its rules of procedure must respect in order to prevent breach or unacceptable limitation of the right of the citizen<sup>3</sup>. MO speaks of **expressing oneself on the discussed matter**. The citizen of the municipality must thus be given the opportunity to express himself on the matter currently under discussion. The citizen must therefore be provided this before the relative resolution is adopted. The citizen should have the opportunity to express his opinion during discussion of every point, e.g. during a discussion on the point in question after the debate of council members and prior to adopting the resolution. A frequent mistake playing out in councils of Czech municipalities is the very situation where point no. 1 of the program presents opinions of citizens regarding matters under discussion, whereas in no further phase of the meeting is it possible any longer for the citizen to express an opinion (so the citizen is but an observer). Meanwhile, matters from the proposed agenda were not discussed yet, and the obvious ones only from the planned meeting agenda. Such a procedure of the council is thus not only runs counter to the law, but is also unconstitutional. In defense of the municipal council however, it is appropriate to add that it is the obligation of the citizen of the municipality to speak to the discussed matter, i.e. only to the point of the meeting currently under discussion. If a citizen of the municipality expresses opinions on matters that are

<sup>1</sup> This generally concerns any point of the provisions of Sec 16(2) MO.

<sup>2</sup> Provisions of Sec 96 MO.

<sup>3</sup> Breach of the right of a citizen to express opinions on negotiated points on the part of the municipal council is breach of the lawfully determined obligation and as such, it constitutes interference within the meaning of Sec 82 APC (Act No. 150/2002 Coll., Administrative Procedure Code, as amended), against which a citizen can defend himself by filing an action in administrative justice, or it is possible here to exercise supervisory activities under MO, see the ruling of the Regional Court in Ústí nad Labem of 03 May 2007, case no. 15 Ca 196/2006-35.

not the subject of the given point of negotiation, this is not exercising of the right under Sec 16(2)(c) MO, and would constitute a reason to strike the citizen's comments from the record.<sup>4</sup>

Regarding citizens of a municipality expressing opinions during an ongoing meeting, it is necessary to point out the following resolution, which relates to the provisions of Sec 94 MO - possibilities **to submit proposals for inclusion on the meeting agenda**. According to the ruling of the Regional Court in Ústí nad Labem of 21.06.2006, case no. 15 Ca 105/2005-55: "*In the interest of completeness however, the court finds it necessary to mention regarding the right to submit proposals for inclusion in the agenda of a municipal council meeting that Sec 94 MO explicitly and completely regulates this issue... Thus, according to the legislation, citizens of a municipality are not afforded the right to submit their own proposals directly for including a certain matter for discussion into the agenda of discussed matters during the course of a meeting of the defendant... The citizen of a municipality of course does have the right under the provisions of Sec 16(2)(f) MO to request discussion of a certain matter within the independent competence of the municipal board or council, whereas upon fulfilling certain conditions, this matter must be discussed within 60 days or by no later than 90 days. If a citizen of a municipality exercises his right during the council meeting, he must respect the framework of his rights afforded to him by MO and the rules of procedure of the given council. In no case however is it possible to confuse these provisions – of Sec 16(2)(f) with those of Sec 94(2) MO. The court fully identifies with the defendant's opinion that if the plaintiff wants to discuss his matter with the defendant, whereas he does not utilize the possibility of proposing it by means of exhaustively named entities in the provisions of Sec 94(1) MO on the agenda of the meeting, he can submit his request for discussing a certain question during the council meeting within the framework of the point of the program "Discussion" reserved for these initiatives of citizens. There is also the similar ruling of the Regional Court in Ústí nad Labem of 31.05.2006, case no. 15 Ca 36/2006-35, or the ruling of the Supreme Administrative Court of 05.09.2007, case no. 3 Aps 7/2006-103.*"<sup>5</sup>

The rules of procedure could thus regulate **procedural questions**, such as the method of giving the floor, engaging in the discussion, the order of speakers, limiting the length of appearances of each citizen of a municipality to an individual point, when this period must be sufficient so that such citizen could even exercise his right, entitlement of the chairperson to take the floor away from a citizen of the municipality if he does not speak to the discussed matter or exceeds the determined time limit. In conclusion, it is appropriate to add that if the rules of procedure in no way regulate exercising the right under Sec 16(2)(c) MO, this does not constitute its inconsistency with the law. That is because the right of a citizen of a municipality exists directly from the law, and can be implemented also without its detailed "performance" in the rules of procedure.<sup>6</sup> **However, the author holds the opinion that regulation in the rules of procedure is more than adequate for the possible procedural steps in this question at a council meeting to be sufficiently transparent and with predetermined rules created in writing.**

<sup>4</sup> Opinion of the Oversight and Control Department of Public Administration of the Ministry of the Interior No. 3/2008. The right of a citizen to express opinions on matters discussed at a meeting of the municipal council. [online] P. 1-4.

<sup>5</sup> In the legal opinion of the Supreme Administrative Court, a citizen of a municipality is not an authorized entity to be entitled under Sec 94(1) MO to submit proposals for inclusion in the agenda of a prepared council meeting. According to the same provision, only council members, the municipal board and committees have this right. Therefore, the citizen of a municipality may turn to an authorized person under Sec 94(1) MO with his proposal. The other option is to speak in the debate before voting on the program of the council meeting and present his proposal here, or to speak in the part of the council meeting reserved for initiatives of citizens. If one of the persons present is entitled to submit proposals under Sec 94(1) MO, the request raised by the complainant could be proposed for inclusion in the meeting agenda. However, the Supreme Administrative Court stresses that it is not the obligation of the council to accept such a raised proposal, since the council itself decides on inclusion of proposals raised during the council meeting in the meeting agenda.

<sup>6</sup> Opinion of the Oversight and Control Department of Public Administration of the Ministry of the Interior No. 3/2008. Op. cit., p. 1-4.

## B) Knowledge of content of an adopted decision

Now attention shifts to focus on what the author believes to be one of the pressing problems of today's self-government - knowledge of the content of an adopted decision, or knowledge of all materials that lead a specific council member to decide. High relevance is found in so-called **expectation of awareness of the council of a negotiated matter**. MO never explicitly regulates the obligation of council members at the meeting to study the submitted materials and know about what they are voting on at the given moment. MO definitely does not impose an obligation on council members to ascertain all potential pluses and minuses of decisions on specific aims. **However, the author believes that though we cannot find such legislation clearly and explicitly anchored, it does exist here (though in a relatively vague form). It is possible however to arrive at it through interpretation.** If we approach an interpretation of the provisions of MO by means of a teleological (targeted) method, interested in the sense and purpose of the legal standard in question with regard to the scheme and focus of the entire legal regulation containing it, one may then conclude that such requirements for council member arise from the following provisions.

This mainly concerns the provisions of Sec 2(2) MO, according to which the municipality attends to the general development of its territory and the needs of its citizens, and also protects the public interest in the fulfillment of its tasks. Furthermore, according to the provisions of Sec 35(2) MO, in its independent competence within its territorial district, the municipality cares in accordance with local conditions and customs for fostering conditions for developing social care and for satisfying the needs of its citizens. This mainly concerns satisfying the need for housing, protection and development of health, transportation and transport links, the need for information, upbringing and education, overall cultural development and protection of public order. In accordance with Sec 38(1) MO, the municipality's property must be used purposefully and economically in accordance with its interests and tasks ensuing from its competence as laid down by law. The municipality is obliged to care for preserving and developing its property. According to Sec 69 MO, the municipal council member promises loyalty to the Czech Republic, he promises at his honor and conscious that he will execute his function conscientiously, in the interest of the municipality and its citizens, and abide by the Constitution and laws of the Czech Republic. The municipal council member executes his mandate personally and in accordance with his promise, and is meanwhile not restricted by any orders. Or finally, under Sec 83(1) MO, where the council member has the obligation "*...to promote the interest of citizens of the municipality and act and behave in such a manner that the reputation of his office is not compromised.*"

It is clear from all these relatively vague proclamations of obligations of council member that if, as a part of the decision-making process, he is to decide and take into account all of the aforementioned criteria (care in accordance with local conditions, customs, purposeful and economic use of municipal property, conscientious execution of his office, etc.), he must know not only about what he is deciding, as this is a fundamental prerequisite, but must also expend the effort to understand the given issue and decide truly based on his best knowledge and conscience, i.e. an erudite approach. A fundamental problem of the MO however is the fact that the council member is not legally sanctioned for failure to uphold the mentioned provisions. Only political sanctioning may factor in, appearing in the next voting period.

Also applied for decision-making of the municipal council are the provisions of Sec 2 to 8 of Act No. 500/2004 Coll., Code of Administrative Procedure (hereinafter "CAP"), which regulate the **fundamental principles of administrative bodies**. The municipal council may decide **only based on the reliably ascertained status of a matter** (this obligation arises from the provisions of Sec 3 CAP). Here other principles also apply such as the principle of legality, the principle of proper

administration, efficiency and transparency of decision-making processes in public administration, etc. The opinion of J. Vedral also supports the binding nature of CAP also for municipal council members.<sup>7</sup>

From the aspect of knowledge of council members on materials about which they are deciding, another relevant question is the adequacy of the term during which council members were provided access to such materials in relation to the complexity of the matter up for voting. The author believes that in this case, it is possible at least by way of example to use case law relating to the adequacy of the term for expression on materials for deciding within administrative proceedings. This term must be **determined in adequate measure regarding the complexity and scope of materials**, see the ruling of the Supreme Administrative Court of 31. 8. 2004, case no. 6 A 143/2001-151: *"regarding the adequacy of inadequacy of the stated term, one may judge especially from the scope of material to which the participant in the proceedings is to express himself, from its complexity, from the professional level, from consequences that arise for those participating in proceedings or society, as well as from the entire duration of the proceedings. In the given case, this concerned extensive material on a high professional level with meaningful impacts on the environment, whereas proceedings took place even several months after expiration of the term for council members to express themselves. Upon summarizing these facts, the conclusion also arises that the eight-day term for expressions is unreasonably short, and does not enable true exercising of the right to express oneself regarding all materials."* There is a similar ruling of the Supreme Administrative Court of 25 October 2006, case no. 5 As 49/2005 – 129. **One may see the analogy between the relevance of a. the effort of the participant of administrative proceedings to express himself so that the proceedings end in favor of his interests, and b. the effort of council members to decide in favor of the municipality's interests.** So if council members do not obtain materials well enough in advance (in light of the complexity of the given issue), one may also consider such a procedure to be factual elimination of the content of the provisions of MO, leading council members to be accountable for their decisions. Since the Czech legal system stipulates a representative mandate of the council member and not an imperative one (bound to instructions and orders), relevance is all the more placed on the conscientious approach of council members.

In terms of the question of the awareness of a council member of the matter up for voting, the following two approaches can essentially be distinguished. One is that the council member himself is not interested in becoming familiar with the materials, though they are available to him in time. The second is the situation where the council member himself is not afforded the chance to become familiar with the materials. The second approach is clear e.g. in zoning, where the council approves a zoning plan in its independent competence (even its individual stages, e.g. upon deciding on acquiring a zoning plan, approving the submission, instructions for elaborating the zoning plan, etc.). In the finding of the Constitutional Court of 13.03.2007 under file no. I. ÚS 101/05: *"Approving land use planning documentation is in essence a decision of the municipal council (Sec 84(2)(b) MO) in independent competence on matters affiliated with transferred independent competence. That is because land use planning documentation is the result of a process ongoing in transferred competence of the municipality, and it is only approved within their independent competence."* Act No. 183/2006 Coll., on Spatial Planning and Building Code, as amended (hereinafter "PCBCA"), imposes the obligation of the municipal council to verify if the draft zoning plan happens to run contrary to development policy and land use planning documentation published by the region, to opinions of involved bodies or as the result of conflict resolution, or to the opinion of

the regional authority under Sec 50 PCBCA. The municipal council is responsible for the content of the published zoning plan and procedure upon its publishing with the legal system in general.<sup>8</sup> It is the council itself that must responsibly assess the draft decision on objections prepared by the acquirer prior to the actual publishing of the land use plan under Sec 53(1) PCBCA, and to render decisions on these objections. If changes are substantial especially in this complicated issue of land use planning, emphasis is placed all the more on awareness and knowledge of the issue about which council members are deciding. Council members must be capable of becoming duly familiar with the materials so that they could responsibly decide on them under the provisions of Sec 54 PCBCA. An important outcome of case law in this matter (in terms of decision-making of the municipality or the approach of the council member in relation to land use planning) is the ruling of the Regional Court in Brno of 09 September 2014 under case no. 63 A 3/2014-137, by which the court found actively legitimate to submit a proposal to repeal the change of the Land Use Plan of the City of Brno a petitioner - a member of the municipal council, whose right as council member to take part in modifications to the land use plan was curtailed by the actions of an opponent for the very problematic reasons defined above.

## 2 Conclusion

Decision-making processes, or decisions at the municipal level - specifically of the municipal council, are an important expression in implementing the right to self-government. The aim of this paper was to analyze two problematic aspects of decision-making of the council, which the author believes represent a threat on into the future for the efficiency and function of local self-government, namely in regard to the sense and purpose of legal provisions. The most serious problem in the functioning of decision-making of the council is especially **the inability to legally enforce a series of obligations entrusted to council members and the municipality itself.** The only sanction is **political accountability**, which however is not a sufficiently motivating element for performance of self-government with due fulfillment of the meaning and purpose of the law. In the author's opinion, a key problem today is that oftentimes council members do not even know what they are voting on, they make no effort to ascertain the necessary technical information or it is just not provided to them. This fact is not yet resolved to a satisfactory result even by the decision-making efforts of the courts. Another problem is the question of citizens expressing themselves at the meeting of the council regarding discussed matters, where they are not given the floor at all, or only sporadically with rather limited time. In conclusion, it is appropriate to point out that if local self-government is to fulfill the tasks entrusted to it, the behavior of council members should exhibit a responsible, i.e. erudite approach that strives to make the best possible decision in the interest of the municipality. Meanwhile, it is necessary in today's times to perceive the interest of the municipality not only from an economic standpoint, but on the contrary, from the standpoint of the wider social context, in relation to ensuring a favorable environment for citizens of the municipality. And this final fact unfortunately remains rather forgotten. It would therefore be appropriate to provide motivational factors for the municipal council, which would contribute to a complex understanding of the problems of life of the municipality that must be resolved every day.

## Literature:

1. Hegenbart, Sakař, Koukalová, Machačková, Machata, Mikule, Víchová. *Building Act* 1st edition Publish house C. H. Beck. Prague 2008. In: Beck-online [online legal information system]. [Cit 11.03.2015].
2. Vedral j., Odbor legislativy Ministerstva vnitra. *New Code of Administrative Procedure* (Scope of powers in terms of

<sup>7</sup>

JUDr. Josef Vedral, Ph.D., Legislation Department of the Ministry of the Interior. New Code of Administrative Procedure (Scope of competence in terms of territorial self-governing bodies). Public administration journal. Public administration online. [online] Published: 11. 11. 2005. [Cit 11.03.2015].

<sup>8</sup> Miroslav Hegenbart, Bedřich Sakař, Václava Koukalová, Jana Machačková, Pavel Machata, Vladimír Mikule, Jitka Víchová. *Building Act* 1st edition Prague 2008. In: Beck-online [online legal information system]. Publish house C. H. Beck. [Cit 12.03.2015] Page. 130-131.

territorial self-governing bodies). Public administration journal. Public administration online. [online] Published: 11. 11. 2005. [Cit 11.03.2015].

3. Švarcová, Kateřina. *Process Aspects of Decision-making of the Municipal Council*. Paper. Brno Faculty of Law, Masaryk University, 2014. 23 pages.

4. Opinion of the Oversight and Control Department of Public Administration of the Ministry of the Interior No. 3/2008. *The right of a citizen to express opinions on matters discussed at a meeting of the municipal council*. [online] S. 1-4.

5. Ruling of the Regional Court in Ústí nad Labem of 03.05.2007, case no. 15 Ca 196/2006-35.

6. Resolution of the Regional Court in Ústí nad Labem of 21.06.2006, case no. 15 Ca 105/2005-55.

7. Decision of the Regional Court in Ústí nad Labem of 31.05.2006, case no. 15 Ca 36/2006-35.

8. Decision of the Supreme Administrative Court of 05.09.2007, case no. 3 Aps 7/2006-103.

9. Ruling of the Supreme Administrative Court of 31.08.2004, case no. 6 A 143/2001-151.

10. Ruling of the Supreme Administrative Court of 25.10.2006 case no. 5 As 49/2005 – 129.

11. Finding of the Constitutional Court of 13. 3. 2007 under file no. I. ÚS 101/05.

12. Ruling of the Regional Court in Brno of 09.09.2014, case no. 63 A 3/2014-137.

**Primary Paper Section: A**

**Secondary Paper Section: AG**