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Commercial Property - Germany

Obligation to grant local community consent by way of substitution

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Background

Case

Comment

The Federal Court of Justice has ruled that building permit authorities are obliged to grant local community consent in building permit proceedings if such consent has been refused unlawfully.

Background

In building permit proceedings, the building authority reaches its decision by entering into a mutual agreement with the local community. Local community consent may be refused only for planning law reasons, which are defined in detail in Section 36 of the Building Code. Section 36(2) of the code stipulates that the responsible authorities are authorised to grant consent by way of substitution. In Bavaria, Article 67 of the Bavarian Building Regulations defines the circumstances in which the building permit authority can grant local community consent by way of substitution. The provisions are designed as 'discretionary regulations'. According to Article 67(1) of the regulations, there is no legal entitlement to the award of local community consent by way of substitution.

Problems arise if the building authority and the local community administrator are not one and the same entity. The background to this federal state regulation involved liability considerations. If local community consent is unlawfully withheld and the building permit is subsequently refused, it was claimed that damages for the loss suffered by the principal should be paid not only by Bavaria as the legal entity responsible for the district administrations, but also by the relevant local communities. The Federal Court of Justice has now rejected this claim.⁽¹⁾

Case

In a case on the question of public liability in which the principal claimed damages from the local community because of a delay in the award of the building permit, the Federal Court of Justice rejected any entitlement to liability damages. In view of the provision in the federal state regulations which states that the building authority must obtain the consent of the local community, but is authorised to grant this consent by way of substitution, local community consent is merely an internal affair within the administration. If such consent is unlawfully withheld by the local community, the building permit authority has a legal obligation to grant consent by way of substitution. Therefore, the legal entity responsible for the building authority is the only agency which can bear public liability.

This position is remarkable since the federal state legislation explicitly states that there is no legal entitlement (of the principal) for local community consent to be granted by way of substitution. Here, the Federal Court of Justice stated that even though the party wishing to build does not have a specific legal entitlement to this consent, if the building permit were to be refused in the case at hand, this would violate the party's legal rights, which are protected by the German

Constitution. It considered that the principal has a constitutional entitlement to be granted building permit by the building authority. The court stated that this right cannot be called into question by provisions of federal state law. Thus, because of the unchanged power and obligation of the building permit authority to grant local community consent by way of substitution, Article 67(1) of the Bavarian Building Regulations has no effect on the question of liability.

The result is the liability of the legal entity responsible for the building authority.

Comment

The ruling is fundamentally positive. In public liability cases, it provides certainty about the party against which to take action. More important is the clearly stated obligation for the building authority – generally the district administration office – to grant local community consent by way of substitution. In practice, local communities often unlawfully refuse to grant local community consent. This is partly because local community building offices and building committees have insufficient resources or expertise. However, part of the reason is also the tendency to block unpopular building projects. Thus, the grounds given for rejection often fall outside the remit of the local community. Nevertheless, district administrations have often shied away from granting consent by way of substitution in order to avoid straining relationships with local communities. The only remaining remedy for the principal in such circumstances is the long and arduous process of taking action in the administrative courts. Furthermore, losses arising from the ensuing delays must be claimed in civil courts.

The fact that the district administration offices are now obliged to provide the unlawfully withheld consent by way of substitution is certainly welcome from the principal's point of view. It remains to be seen whether this ruling will have the desired effect in administrative practice.

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Endnotes

⁽¹⁾ Decision III ZR 29/10, September 16 2010.

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