

POSITION STATEMENT

Position statement issued by the Parliamentary Commissioner for Future Generations concerning the complaint filed on the noise making operative procedures of the SPAR shop in Napfény street in the 9th district of Budapest.

I. The complaint

1. The Parliamentary Commissioner for Civil Rights was delivered a submission on the 31st of July. The submission, which was later directed to the Parliamentary Commissioner for Future Generations in October, 2008 , contained a complaint against the noise load resulting from the operation of the food shop of the József Attila residential area in Ferencváros making the life of inhabitants residing in the vicinity unbearable.

Based on the submission, suspicion rose about the infringement of the right to a healthy environment. As a result, an investigation was started as per the authorization given in article (1) of the paragraph 16. of the Act No LIX of 1993 on the Parliamentary Commissioner for Civil Rights.

II. Substantiation of competence and necessity of the procedure

2. **According to paragraph 18.§. and article (2) of paragraph 70/D.§. of the Constitution**, the Republic of Hungary acknowledges and enforces everybody's right to a healthy environment. The right to physical and spiritual wellbeing at the highest possible level is, among others, accomplished through the protection of the built and natural environment.
3. **According to article (1) of paragraph 27/B.§. of the Act No LIX of 1993 on the Parliamentary Commissioner for Civil Rights, it is the duty of the Parliamentary Commissioner for Future Generations** to monitor, evaluate and control the enforcement of legal dispositions aiming at sustaining and improving the environment and nature (hereafter together: environment). Furthermore, it is his duty to investigate or to have investigated all irregularities became known to him, as well as to endorse general or specialized dispositions for these irregularities to be mediated.

III. Facts

4. Based on the documents provided by the complainant and those procured from the local government of the 9th district, we confirmed the state of affairs to be as follows:

There is a food shop of SPAR in operation in the József Attila residential area of the 9th district of Budapest. The shop is closely encircled by 4 storey houses. On the 30th of March 1998, SPAR Magyarország Ltd was granted permission of operation in 10 Napfény street of the 9th district of Budapest of the food store of business n. 1112 and the flower and horticultural shop of business n. 1606. The present sales area is of 877 m²

floorspace. The storage areas stretch on 287 m² floorspace. The building of the shop housing the SPAR food store (formerly known as „közért”) has been erected more than four decades ago with a unit providing the basic purveyance of local residents. The opening hours of the shop are from 6:30am till 8pm between Monday and Friday, from 6:30am till 5pm on Saturday and from 8am till 1pm on Sunday.

The noise resulting from the load of goods of the shop, as well as from the operation of cooling engines has been penetrating into nearby apartments and upsetting residents of the area for more than 10 years. In the Autumn of 2007, residents requested the managers of SPAR in form of an Independence Declaration to mitigate annoying noises resulting from the operation of the shop. After a short period of improvement, the noise was back to an unbearable level again. Contrary to former pledges of the management of SPAR, in the Summer of 2008 they decided to enlarge the shop, stop warehousing and use up the space thus gained as part of the shopping area. According to the residents, this would result in them having to tolerate an increased volume of the noise of the truck traffic due the expanded goods loading and logistics. They filed their complaint to the local government of Ferencváros. According to their statement, the local government failed to dispose on the merits. In the meantime there has been a building control authority procedure instituted at the first instance authority, too, due to the reconstruction works of the food shop. However, the supervising authority cancelled the decree on permission to build due to violation of the applicable law and ordered the first instance building control authority to initiate a new procedure.

A/. On the noise complaint and its assessment

5. In the Autumn of 2007, residents requested managers of SPAR to mitigate annoying noises resulting from the operation of the shop in form of an Independence Declaration. In October 2007, the management of SPAR pledged to mitigate and shorten timeframes of logistics related activities (such as traffic of trucks, goods loading, noisy technologies) which was the main source of noise complaints.

The complainant delivered a letter of complaint objecting the intolerable level of noise noticeable in the surroundings to the environmental protection representative of the local government of Ferencváros on the 20th of July, 2008. The complaint described also a missing availability for residents to file noise complaints to the local government in a timely manner, which made proof of disturbance difficult. Furthermore, the complainant requested that the local government representative apprised the complainant on what form the complaints should have in order for it to be dealt with on the merits and what amendments the complainants could count on.

The complainant delivered a letter to the notary of the local government of Ferencváros containing his remarks related to the enforcement of the decree 9/2008 (III.7.) on noise control of the local government of Ferencváros on the 24th of July, 2008. The complainant advised the notary that as the time limitations specified in the noise decree were not being controlled, exceeding the limits specified had no corrective consequences. He further requested that the notary gave his statement on the noise pollution and the planned reconstruction works of the SPAR shop as well as on the adherence to the local decree on noise control.

In his reply of the 1st November 2008, the district notary underlined that residents of the protected environment had to forbear noise emissions of construction works staying within specified limit values. During the construction, the district notary wished to

control the adherence to the local decree on noise control by ordering a continuous monitoring of works on the weekends. This would be done by representatives of the building control authority and the environmental protection representatives of the Mayor's Office.

6. Based on the submission filed on the 20th of July, 2008, the environmental protection representative of the local government of Ferencváros carried out a revisionary noise level measurement at the apartment of the complainant on the 13th of November, 2008 as defined by the regulations of the local decree on noise control and the joint decree n. 8/2002. (III.22.) of the Ministry of Environment Protection and the Ministry of Health on the establishment of the limit values of noise and vibration load.. As of the minutes made available to us, no violation of limit values had been measurable in the apartment of the submission filer at the time of the assessment (in between 6:45 and 7:45 on the 11th of November, 2008).
7. Noise damage is a collection of terms. There could be different types of damages occurring depending on noise levels:
 - the sound pressure above 30-60 dB induces psychological side effects, behavioural changes are expected to happen, effects of annoyance are noticeable. Directly experienced disturbing influences affect the ability to perform, intellectual work and recreation in a detrimental way.
 - in case of sound pressures in between 60-80 dB the organs and organic systems controlled by the vegetative nervous system alter. A typical reaction is the tapering of the capillaries of the skin and the mucous membrane. Researches made with residential involvement show that a night-time noise level in between 60-70 dB results in high blood pressure, gastric ulcer, diabetes presenting more frequently, diminishing capacity of the salivary glands and the obstruction of the secretion of the gastric juice which leads to digestive anomalies.
 - noises above 80db sound pressure may, in addition to the previous effects, cause permanent damage of the hearing organs. Also, enduring strong environmental noises anticipate and exacerbate hearing loss. Damaging noise increases the level of stimulation of the nervous system based on which noise is to be considered a stress implying fact. (Source: Dr. habil Ákos Simon CSs: Environmental Protection. Electronic memorandum BMF BGK GBI 2006).
8. On the 28th of November, 2008, the local government led an assessment on the premises of the SPAR shop concerning regulations of goods loading. According to the statement of the shop's manager, goods were loaded from Monday to Friday in between 6:15am and 3pm and occasionally at 6pm and at 8pm as well. On Saturday and Sunday only bread and bakery goods were delivered in between 6:15am and 7am.
9. In November 2008, the Regional Public Administration Office of Central Transdanubia raised a point on legal adherence and deemed the decree of the local government of Ferencváros on noise control to be unlawful. According to the Office, the syndicate of delegates neglected the rules specified in paragraph (1) of article 48.§.of the General Rules of Environmental Protection Act n. LIII. of year 1995. and defined environmental protection related rules on construction and demolition works with greater limitations than it would have been allowed by the basic regulation (see decree 34/2008 (IV.3.) of the Constitutional Court). By virtue of this, only the general assembly of the government of the capital is entitled to set environmental protection related regulations limiting to a greater extent than it is set by the decree n. 8/2002. (III.22.) of the Ministry of

Environment Protection and the Ministry of Health on the establishment of the limit values of noise and vibration load. Consequently, the district syndicate of delegates put its own decree in abeyance with effect from the 31st of December, 2009.

10. According to the information given on our request by the notary, there was no property protection procedure initiated related to the case, the notary was not delivered a petition on that. Due to the complaints rooting in circumstances that have existed for several years now, a court procedure lies as of right.

B/. About the building control authority related procedure of the shop

11. On the 23rd of April, 2008 there was a building control authority procedure instituted with respect to the SPAR shop. By reason of the reconstruction of the shop, the proceedings had to decide on the following:

- reorganization of the Napfény street portal of the one-storied building hosting the food shop, including, among other things, the shift of the shoppers' main entrance with approximately 11 meters;
- roof insulation;
- advertisements;
- modernization of the building's operation equipments of the roof and the erection of a noise insulation wall around them;
- general modernization and renovation of the exterior and interior of the shop;
- downsizing of the floorspace of the storage areas;
- downsizing of the number of commercial entrances, including that at the neighbouring residential building in Napfény street 6., which should be shifted approximately 10 meter farther from this building.

12. The decree n. 9/2008 (III.07.) of the local government of Ferencváros disposed of the prohibition of construction and demolition works in between 8pm and 7am on weekends. In the order notifying about the permission for construction, the owner was advised on prohibitions specified in the decree and the liability to observe them. In the interest of the adherence to the dispositions, the notary ordered a continuous control of construction works on the weekends which would be fulfilled by the representatives of the building control authority and the environmental protection representatives of the local government.

13. During the building control procedure, the building control authority petitioned the locally competent environmental protection authority acting as consulting authority. The consulting authority's conditions of admission n. KTVF: 38843-1/2008 were notified on in the decree on permission for construction n. Kp/20599/18/2008/VIII. Due to the appeal of the complainant, the decree on the permission for construction has been cancelled by the Regional Public Administration Office of Central Transdanubia by reason of it having been found to be unlawful. The first instance building control authority was ordered to initiate a new procedure. The new procedure related to the permission for construction is pending as of now; however, according to the notary's view based on the passive attitude of the owner, they might give up on their intention to reconstruct and the shop might operate in the same way and form as it has been doing up till now.

IV. Legal assessment, evaluation

14. Complaints originating in the operation (goods loading, noise emanating cooling equipments) and the reconstruction of the food shop can be looked upon both as a question of public administration (noise control) and civil rights (property protection).

A/. Administration of the noise complaints occurring during the operation of the food shop

A/a. The noise complaint as a question of public administration

15. The facts section state that based on the submission filed on the 20th of July, 2008, the environmental protection representative of the local government of Ferencváros carried out a revisionary noise level measurement at the apartment of the complainant on the 13th of November, 2008 as per the regulations of the local decree on noise control and the joint decree n. 8/2002. (III.22.) of the Ministry of Environment Protection and the Ministry of Health on the establishment of the limit values of noise and vibration load. As of the minutes made available to us, no violation of limit values was measurable in the apartment of the submission filer at the time of the assessment (in between 6:45 and 7:45 on the 11th of November, 2008). Values measured: 60-65dB on the street, 55-60dB on the balcony, 30-35dB in the bedroom.

As per the article (1) of paragraph 3.§. of the government decree n. 284/2007 (X.29) on certain rules on the protection against environmental noise and vibration, it is prohibited to cause dangerous environmental noise and vibration in the protected environment. The sub-article ja) of the article j) of the paragraph 2.§. defines dangerous environmental noise as being such environmental noise that exceeds the accepted limit of noise pollution (hereafter: noise load) or that of noise emission defined by a separate law.

As under the section a) of article (1) of paragraph 4.§. of the government decree n. 8/2002 (III.22) of the Ministry of Environment Protection and the Ministry of Health on the establishment of the limit values of noise and vibration load, in case of noise resulting from servicing facilities, **the limit value of noise load** in the environment to be protected from noise should be observed **1,5 m above the floor lever of single storeys, generally within 2 m distance from windows and doors** to be found in the external walls constituting the facade of the building to be protected from external noise and are boundary to areas where the inside noise load should not exceed 45 dB. According to the annex n. 1. of the decree, the limit value of noise resulting from servicing facilities in protected areas of residential surroundings of large urban areas is **55 dB** in between 6am and 10pm.

We state that the execution of the „revisionary noise level measurement” does not comply with the provisions set by the joint decree n. 8/2002 (III.22) of the Ministry of Environment Protection and the Ministry of Health on the establishment of the limit values of noise and vibration load. As per the measured values, we can safely suppose that the limit values have been significantly exceeded.

16. The authority is liable to proceed in matters of related competency pertinent to the sphere of authority thereof pursuant to as defined in article (1) of paragraph 20.§. of the Act on the general rules on the procedures and services of the public administration authorities. The client is entitled to institute the municipal procedure in either verbal or written form, except as otherwise specifically defined by law. A substantial element of the submission is that the client be sufficiently specific about his appeal concerning the authority.

In the submissions filed to the notary, the complainant did not exactly declare what kind of procedure he wished to have instituted. However, we have to state that this was not part of his liabilities either. The article (5) of paragraph 34.§. of the Act on the general rules on the procedures and services of the public administration authorities declares that „submissions should be evaluated based on their content, even if that is not compliant with the terms used by the client”. In pursuance of this, the law requires that the submission-filer be able to be considered as the client of the procedure. The submission should be evaluated based on the content lying therein [(1), 71.§. of the Act on the general rules on the procedures and services of the public administration authorities].

We declare that based on the documents provided to us, there was no decree compiled on the merits (one that closes the case) after the examination of the noise complaint. Consequently, the complainant was not entitled to make use of an opportunity for legal remedy.

A/b. Noise as a question of civil liability

17. By evaluating the noises being able to be heard in the apartment of the complainant we have to declare that limit values have no deciding force with relation to the civil code. **Property infringement can be realized by a behaviour that is deemed to be annoying in a given legal relationship even without exceeding limit values.** The civil code dissolves possible legal disputes by commonly aligning interests to one another and to the general requirements of society. The notary is not liable to have a noise level measurement done during a property infringement procedure. That may only promote a well founded decision.
18. „In general, we can state that the infringement of public administration rules with respect to environmental protection is always considered by the court during disputes vindicating civil rights. Based on this, the fact of annoyance is established as being valid either in property protection and neighbourhood law disputes. Consequently, the special demands of the civil code as opposed to the decrees of public administration present themselves only if the parties adhere to the permission. In this case, the fact that a behaviour abides to the public administration given permission during a civil dispute does not necessarily result into no infringement of civil rights.” (In: Environmental protection related legal cases and the consulting activity, KJK-KERSZÖV Legal and Business Publisher Ltd., Budapest, 2001., pp. 186-186.)

Also, the Ombudsman 's Office report n. 2820/2005. on the annoying effects of open air performances in residential areas quotes from the book titled *Environmental Protection Act* of Gyula Bándi: „The observance of the set limit values makes the noise emission legitimate only with regard to the public administration law, whereas the infringement of civil rights – for example that to undisturbed possession – may be completed by a behaviour considered annoying in the given legal relationship even without exceeding the limit value and vice versa., (In: Gyula Bándi: *Environmental Protection Act*, Osiris, Budapest, 2000., p. 189.)

19. The property protection rules of the Civil Code protect interests pertinent to the indisturbance of the act of possessing. As for the rules of processing, the property protection procedure is composed of two phases, it does not necessarily has to be instituted directly at the court. In case a property infringement has been lasting for less than a year or the right to possess the property is not disputed on, then the infringed party shall appeal the notary for the genuine possession circumstances be set back and to make

the infringer banned from property infringing behaviour. Should the decree of the notary not result in sufficient mediation of the property infringement within 15 days upon receipt, the amendment of the same decree shall be petitioned at the civil court.

In this present case the complainant shall directly appeal the court as the property infringement has been lasting for more than a year . This dispute is not compliant to the structure of public administration lawsuits, as the defendant would not be the notary but rather the property infringer or the owner, should the other party institute the lawsuit.

20. The standard legal practice unequivocally considers behaviours implying noise, smoke or other environmental pollution as property infringement (e.g. BH 1992. 100., BH 2002. 179., BH 2002. 357.) The practice of the courts is invariable also in as much as it consistently seeks **agreement and compromise** in between the emitter and the sufferer of the pollution. Generally, factories and other polluters are made obliged to mitigate polluting behaviour, to employ protection or filtering devices or to pay indemnification.

B/. Assessment of noises occurring during the reconstruction works of the food shop

Noises resulting from the operation of the shop should be separated from those occurring during the reconstruction of the shop.

21. On the 23rd of April, 2008 a permission procedure was instituted at the district building control authority. Consequently, SPAR Magyarország Commercial Ltd gained permission to build on the 11th of September, 2008.

On the 12th of December 2008, the Regional Public Administration Office of Central Transdanubia cancelled the first instance decree n. Kp/20599/18/2008/VIII. of the 11th September, 2008 of the Building Control Authority at the Public Administration Office of the Mayor's Office of the Local Government of Ferencváros, and ordered the notary of the Local Government of Ferencváros to initiate a new procedure.

During the second instance procedure instituted based on the appeal of the complainant, the supervisory organ established that the first instance building control authority failed to vindicate the dispositions of the law and requirements of the constructional and technical compliance, as well as to ensure to protect the lawful interests of those affected by and within the procedure. The plans making part of the permission procedure should have contained a section on the protection against noise, as per the related law. The justification of the decree pointed out as well that the first instance authority did not require to amend the incompleteness as mentioned above, however the appellant had filed submissions related to the noise during the procedure already.

As per the article (1) of paragraph 4.§. of the government decree n. 284/2007 (X.29) on certain rules on the protection against environmental noise and vibration, in case of a capital and in proceedings related to noise and vibration protection it is the notary of the district local government who exercises the right of first instance authority with respect to retail activities.

Although the appealed decision provides dispositions on noise mitigation, according to the decree on the local regulation of protection against noise n. 13/2002. (VI.26.) of the Syndicate of the Local Government of Ferencváros, it is the environmental protection authority (notary) who exercises the right of the consulting authority in the authoritative permission procedure of *the supermarket as an operating facility*. Consequently, due to lacking competence, the Middle - Danube - Valley Inspectorate for Environmental Protection, Nature Conservation and Water

Management contacted as consulting authority during the procedure was not entitled to make a resolution in the present case concerning protection against noise and vibration.

The Regional Public Administration Office of Central Transdanubia stated that while proceeding, the first instance building control authority applied the substantive and the procedural law improperly. Subsequently, the decree of the first instance building control authority is unlawful. Pursuant to section c) of article (1) of paragraph 121.§. of the Act CXL. of 2004. on the general rules of public administration procedures and services, decisions made without the involvement or by neglecting the statutory statement of the consulting authority shall be annulled.

V. Conclusion

22. Upon our examination we concluded that concerning the appeal on the noise making operation of the SPAR shop in Napfény street in the IXth district, the right to a healthy environment has been violated.

The right to a healthy environment of the complainant was violated while the notary of the Local Government of Ferencváros failed to manage the noise complaints resulting from the operation of the SPAR food shop in Napfény street in the IXth district on its merits during the procedures completed under the terms of both the public administration (protection against noise) and the civil code (property protection).

VI. Instigation to the Local Government of Ferencváros:

Under as defined in sections c), e) and f) of article (3) of paragraph 27/B.§. of the Act No LIX of 1993. on the Parliamentary Commissioner for Civil Rights we endorse the following actions to be taken:

23. We initiate at the notary that in case the notary of the Local Government of Ferencváros is filed a noise complaint, then the complainant be in all cases advised on his related rights and the legal relationships within which the complaint could be examined (procedures under the public administration law or civil code (property protection)) according to article (2) of paragraph 5.§. of the Act CXL. of 2004. on the general rules of public administration procedures and services. Advice shall be given also if the property protection procedure of the given case could be administered in court only.
24. We initiate at the notary that at the end of each completed public administration procedure – including the complaint about the noise resulting from the SPAR food shop - a decree closing the case on its merits be compiled containing advice on possible legal remedies for the complainant. We initiate that the district noise authority provide for the decision missing from the case in question as soon as possible.
25. We initiate at the local government that the noise control decree 9/2008 (III.7.) declared unlawful by the Regional Public Administration Office of Central Transdanubia and put in abeyance with effect from the 31st of December, 2009. be amended and that a new decree fulfilling provisions specified in article (1) of paragraph 48.§. of the Act on General Rules of Environmental Protection n. LIII. of year 1995. be compiled by the 31st of December, 2009.
26. We initiate that the notary of the IXth district of Budapest give advice on the present position statement to the syndicate.

27. Furthermore, I request him to apprise me about dispositions carried into effect with relation to the initiation at the latest within 30 days upon receipt thereof.

VII. Post examination, secondary provisions:

28. Based on the procedure of the Parliamentary Commissioner For Future Generations' Office, each position statement shall be followed by a post examination. Depending on the results of the post examination, the Commissioner is entitled to proceed as follows concerning the present case:

under as defined in article (1) of paragraph 26.§. of the Act on the Parliamentary Commissioner for Civil Rights, should the organ or the superior thereof causing the deviance addressed by the Commissioner fail to stipulate a statement on the merits or to carry into effect the corresponding disposition thereof, or should the Parliamentary Commissioner disapprove the statement or the disposition taken, then, within the confines of the annual report, the Commissioner is entitled to request the Parliament to investigate on the case. Should the case be ranked as exceptionally serious by the Commissioner or impacting a greater circle of private individuals, then the Commissioner is entitled to propose the given case to be scheduled for debate by the Parliament already before the debate of the annual report is due.

Budapest, on the 13th of May, 2009.

Dr. Sándor Fülöp
Parliamentary Commissioner For Future Generations