DECISION 11/2005 (IV. 5.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of petitions seeking the establishment of the unconstitutionality and the annulment of statutes and another legal tool of State administration as well as the establishment of an unconstitutional omission of legislative duty – with a dissenting opinion by Dr. Attila Harmathy, Judge of the Constitutional Court – the Constitutional Court has adopted the following

decision:

1. Acting *ex officio*, the Constitutional Court holds that an unconstitutional omission of legislative duty has resulted from the failure of the Parliament to adopt, in Act CXII of 2000 on the Adoption of the Land Use Plan for the Lake Balaton Special Resort Area and the Establishment of the Lake Balaton Land Use Regulations, provisions guaranteeing the enforcement of the right to a healthy environment enshrined in Article 18 of the Constitution through the protection of the lakebed.

The Constitutional Court calls upon the Parliament to meet its legislative duty by 31 December 2005.

2. The Constitutional Court holds that an unconstitutional situation violating Article 2 para. (1) of the Constitution has resulted from the failure of the Government to regulate the procedural order of specifying the boundaries of the sub-zones defined in the zonal plan sheets of the regional regulation of land use plans and the infrastructure networks defined in the regional structural plan.

The Constitutional Court calls upon the Government to meet its legislative duty by 30 June 2005.

3. The Constitutional Court rejects the petitions seeking the establishment of the unconstitutionality and the annulment of the entire Act CXII of 2000 on the Adoption of the

Land Use Plan for the Lake Balaton Special Resort Area and the Establishment of the Lake Balaton Land Use Regulations and Section 3 para. (2), Section 16 para. (1), Section 20 para. (1), Section 38 item b), Section 45 items b), c), d), e), f), Section 46 item b) and Annexes 3 and 4 thereof, as well as the entire Government Decree 283/2002 (XII. 21.) Korm. on the Regulatory Requirements of the Waterfront Rehabilitation of Lake Balaton and Section 3 items a) and b) thereof.

4. The Constitutional Court rejects the petition seeking the establishment of an unconstitutional omission of legislative duty on account of the failure to perform the obligations defined in Section 21 of Government Decree 283/2002 (XII. 21.) Korm. on the Regulatory Requirements of the Waterfront Rehabilitation of Lake Balaton and in Section 28 of Government Resolution 1075/2003 (VII. 30.) Korm. on Measures Related to Lake Balaton.

5. The Constitutional Court refuses the petition seeking the establishment of an unconstitutional omission of legislative duty in relation to Section 16 para. (1) of Act CXII of 2000 on the Adoption of the Land Use Plan for the Lake Balaton Special Resort Area and the Establishment of the Lake Balaton Land Use Regulations.

6. The Constitutional Court terminates the procedure for the establishment of the unconstitutionality of Section 54 item b) of Act CXII of 2000 on the Adoption of the Land Use Plan for the Lake Balaton Special Resort Area and the Establishment of the Lake Balaton Land Use Regulations.

7. The Constitutional Court terminates the procedure for the establishment of the unconstitutionality of Government Resolution 1075/2003 (VII. 30.) Korm. on Measures Related to Lake Balaton.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

The Constitutional Court has received five petitions seeking the establishment of the unconstitutionality and the annulment of several provisions of Act CXII of 2000 on the Adoption of the Land Use Plan for the Lake Balaton Special Resort Area and the Establishment of the Lake Balaton Land Use Regulations (hereinafter: "ALB"). Having regard to their related subjects, the Constitutional Court has consolidated these petitions and judged them in a single procedure.

1. One of the petitioners requests the establishment of the unconstitutionality and the annulment of Section 3 para. (2), Section 45 items b), c), d), e), f), Section 46 item b) and Annexes 3 and 4 of the ALB. According to the petitioner, these provisions of the ALB unconstitutionally restrict the real estate owners' right to property as they contain stricter rules on building than the ones contained in earlier local settlement development plans and local building regulations. The petitioner claims that the application of the above statutory provisions involves legal uncertainty as the boundaries of the zones and sub-zones cannot be identified due to the scale of the regional structural plans and the plans containing zonal divisions published in Annexes 3 and 4 to the Act on the basis of Section 3 para. (2) of the ALB. Therefore, in the petitioner's opinion, the challenged provisions of the ALB violate the requirement of the rule of law included in Article 2 para. (1) of the Constitution, and they are contrary to Article 9 para. (1) and Article 13 para. (1) of the Constitution. The same petitioner also challenges Section 54 item b) of the ALB providing for its application in pending cases, with reference to a violation of Article 2 para. (1) of the Constitution.

2. Three petitioners request the establishment of the unconstitutionality of the provisions pertaining to "legal shoreline" contained in Section 16 para. (1), Section 38 item b) and Section 45 item e) of the ALB, and in Section 3 item b) of Government Decree 283/2002 (XII. 21.) Korm. on the Regulatory Requirements of the Waterfront Rehabilitation of Lake Balaton (hereinafter: "GD"). The same petitioners challenge the provision in Section 20 para. (1) of the ALB on the establishment of a promenade along the waterfront. In the opinion of the petitioners, Article 10 para. (2), Article 13 para. (2) and Article 18 of the Constitution are violated by the above provisions of the ALB, which – through only defining rules on the protection of the "legal shoreline" – make it possible to change the natural shoreline of Lake Balaton. They also point out that the Act uses the term "legal shoreline" without defining its content, therefore its provisions violate the principles of legislation. Furthermore, the petitioners claim that the term "legal shoreline" is still used in practice in the sense defined in

Joint Decree 21/1970 (XI. 13.) ÉVM-IM-PM on the Provisions on Land Plots on the Waterfront of Lake Balaton, which definition was annulled by the Constitutional Court in Decision 17/1996 (V. 10.) AB.

3. One of the petitioners requests the constitutional examination and the annulment of the entire ALB, GD and Government Resolution 1075/2003 (VII. 30.) Korm. (hereinafter: "GR"). In his opinion, many provisions in the above statutes are unreasonable and unprofessional, reflect intentions contrary to the declared principles, and provide a possibility to change and damage the environment to such an extent that violates the right to a healthy environment enshrined in Article 18 of the Constitution. The same petitioner requests the Constitutional Court to establish an unconstitutional omission due to the Government's failure to ensure the preparation and review of shoreline regulation plans within the deadline specified in Section 16 para. (1) of the ALB and the preparation of waterfront rehabilitation study plans within the deadline specified in Section 21 of the GD, as well as to present a Bill on amending the statutory deadline specified in Point 28 of the GR for the review of settlement development plans.

During its procedure, the Constitutional Court requested the Minister of Agriculture and Rural Development, the Political Undersecretary of State for Regional Development at the Prime Minister's Office, the Minister of Environment and Water Management and the Minister of the Interior to make their comments.

II

1. The provisions of the Constitution referred to by the petitioners are as follows:
"Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law."

"Article 9 para. (1) The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law."

"Article 10 para. (1) Property of the State of Hungary is considered national wealth."

"Article 13 para. (1) The Republic of Hungary guarantees the right to property.

(2) Expropriation shall only be permitted in exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated by law, with provision of full, unconditional and immediate compensation."

"Article 18 The Republic of Hungary recognizes and shall implement the individual's right to a healthy environment."

2. The statutory provisions challenged by the petitioners are as follows:

The challenged provisions of the ALB:

"Section 3 para. (2) The regional structural plan at the scale of 1:100,000 is included in Annex 3 to the Act, and the zonal plan sheets of the regional regulation at the scale of 1:100,000 are included in Annex 4 to the Act."

"Section 16 para. (1) The settlements' areas designated for building (inner areas) may not be increased to the detriment of the water surface delimited by the legal shoreline of Lake Balaton. Further fillings and corrections of the lakebed may be performed on the basis of the shoreline regulation plan. The shoreline regulation plan shall be prepared (reviewed) by 31 December 2002."

"Section 20 para. (1) In all lakeside settlements of the resort area a public promenade is to be established along the waterfront in a width of 5-30 metres, covering at least 30% of the shoreline connected to the inner area, at the same time preserving the natural vegetation of the area."

"Section 38 In the sub-zone of the lakebed (D-1):

a) the lakebed of Lake Balaton may not be decreased in excess to what is defined in the shoreline regulation plan in force;

b) the legal shoreline of Lake Balaton may not be changed – save as specified in the shoreline regulation plan – and no activity affecting the flora, fauna and water quality may be performed;

c) no permanent facility, island etc may be constructed in the lakebed with the exception of piers, breakwaters and harbour facilities;

d) in order to protect the flora and fauna at the shoreline, only facilities of a floating pontoon type causing less damage to the root zone of reed (e.g. boat-landing stages or beach facilities) may be installed in the lakebed, to be used only in the vacation and angling seasons;

e) it is prohibited to perform any mechanical interference (e.g. dredging, filling, building, constructing a stand, a boat course or an angling stage) damaging the stock or quality of the reeds or possibly resulting in reeds destruction, save in the case of licensed public boat-landing stages and in front of existing public beaches, where, for the purpose of creating a sandy beach section, an inlet of not more than 30 meters in width may be established in reeds of classes IV and V, with the approval of the water management authority based on the official consent of the competent nature conservation and environmental protection authority;

f) watercrafts without an operating licence and a landing post in an established harbour may not be stored within the territory of the lakebed."

"Section 45 In the sub-zone of agricultural production areas (M-1):

(…)

b) in the case of the cultivation of arable land on a plot of more than 20 hectares, a building serving the purpose of the regular use of the land and residential purposes may be built, provided that the built-up ground surface does not exceed 0.1% of the plot surface and 500 m2;

c) in the case of a plot of more than 5 hectares in the land use category of "grass", a building serving the purpose of traditional littering livestock farming and residential purposes may be built, provided that the built-up ground surface does not exceed 0.5% of the plot surface and 400 m2;

d) in the case of areas used for viticulture – with the exceptions specified under item e) – on a plot of more than 2 hectares, a building serving the purpose of production, wine tourism and residential purposes may be built, provided that the built-up ground surface does not exceed 1% of the plot surface and 500 m2;

e) the owner of plots used for viticulture and not adjacent to the legal shoreline of Lake Balaton may – provided that the total area of his plots located within a single wine region exceeds 5 hectares – build facilities related to grape cultivation and processing as well as related wine tourism facilities (not of a hotel purpose) only at one of his plots, if such plot is located outside the natural and managed zones of the national park. The size of the built-up area may not exceed 1% of the overall area of the plots taken into account and at the same time the built-up ratio of the plot concerned may not exceed 25%. In the calculation of a total

area of more than 5 hectares, plots within the sub-zone of horticultural areas may be taken into account, however, in respect of such plots, building rights may only be obtained in accordance with the regulations pertaining to the sub-zone of horticultural areas. With regard to the plot taken into account in order to obtain the building right but not built on, a prohibition of establishing a plot and building shall be registered upon the request of the building authority, in the interest of the owner;

f) in the case of a cultivated fruit plantation on a plot of more than 3 hectares, a building serving the purpose of agricultural production and processing as well as residential purposes may be built, provided that the built-up ground surface does not exceed 0.5% of the plot surface and 1000 m2;"

"Section 46 In the sub-zone of horticultural areas (M-2):

(…)

b) no building shall be permitted on a plot of less than 1500 m2 regardless of any settlement development plan or local building regulations allowing it;"

"Section 54 This Act shall enter into force on the 30th day after its promulgation, its provisions shall apply to:

(…)

b) cases not closed with final force in a public administration decision, save if the court orders a new procedure to be started in a case closed by way of a public administration decision adopted before the entry into force of this Act (in such cases the statutes in force at the time of adopting the public administration decision serving as the basis of the new procedure shall be applicable),"

The challenged provision of the GD:

"Section 3 When preparing the study plans on the rehabilitation of the waterfront: a) the present shoreline of Lake Balaton shall be marked by the borderline shown on the map of the land registry at the date of entry into force of the present Decree, b) proposals on the modification of the shoreline of Lake Balaton shall be defined in accordance with the preparation of the shoreline regulation plans defined in Section 16 para. (1) of the Act," (...)

3. The following statutory provisions were also taken into account by the Constitutional Court during its decision-making: Sections 58-59 of the ALB include the following authorising provisions:

"Section 58 para. (1) The Government is hereby authorised to regulate the regulatory requirements of waterfront rehabilitation.

(2) The Minister for Regional Development and Land Use Planning is hereby authorised to

a) delimit the areas affected by the regulatory requirements of waterfront rehabilitation;

b) arrange for the preparation of the study plans necessary for the review of settlement development plans on the basis of the regulatory requirements of waterfront rehabilitation, and issue such study plans in Decrees."

"Section 59 para. (1) At the lakeside settlements of the Lake Balaton Special Resort Area, the settlement development plans and local building regulations in force at the date of entry into force of this Act shall be reviewed and amended – within four years from the entry into force of this Act – in line with the regulatory requirements of waterfront rehabilitation and the study plans to be prepared in respect of the areas affected by waterfront rehabilitation.

(2) At the settlements of the Lake Balaton Special Resort Area, the settlement development plans and local building regulations in force at the date of entry into force of this Act shall be reviewed and amended within four years from the entry into force of this Act.

(3) The settlement development plans and local building regulations of the settlements located in the Lake Balaton Special Resort Area and not having a settlement development plan shall be prepared within five years from the entry into force of this Act."

The amending provision contained in Section 60 para. (2) of the ALB: "(2) Concurrently with the entry into force of this Act, Section 27 para. (1) of Act XXI of 1996 on Regional Development and Land Use Planning shall be amended as follows: (The Government is hereby authorised to specify in a Decree)

'j) the procedural order of specifying the boundaries of the sub-zones defined in the zonal plan sheets of the regional regulation of land use plans and the infrastructure networks defined in the regional structural plan.'"

The provisions of the GD on lakebed and waterfront management are as follows:

"Section 5 para. (1) In the lakebed of Lake Balaton, beach facilities may only be established at places where the waterfront rehabilitation study plans designate shoreline sections suitable for bathing.

(2) Natural shoreline sections shall be preserved and indicated in the waterfront rehabilitation study plans.

(3) Areas filled in the lakebed without a licence may only remain intact where it is allowed in the waterfront rehabilitation study plans in accordance with the regulatory shoreline.

(4) In the reeds, only platforms and boat-landing stages designated in the waterfront rehabilitation study plans, not hindering the free flow of water and located on stands are allowed to remain.

(5) At shoreline sections in front of beaches, the waterfront rehabilitation study plans may limit the size of the reeds to the extent of ensuring direct access to the water from the beach."

III

1. On the basis of the petitions, the Constitutional Court first examined the well-foundedness of the constitutional concerns related to the provisions under Section 16 para. (1), Section 38 item b) and Section 45 item e) of the ALB, and Section 3 item b) of the GD.

1.1. According to the petitioners, the unconstitutionality of the challenged rules basically lies in their use of the term "legal shoreline" despite the fact that the Constitutional Court established the unconstitutionality and annulled the definition of "legal shoreline" by way of Decision 17/1996 (V. 10) AB (ABH 1996, 250).

The petitioners' arguments based on Decision 17/1996 (V. 10) AB (hereinafter: "CCDec") are unfounded. In that Decision, the Constitutional Court examined the constitutionality of Section 1 para. (3) item c) of Joint Decree 21/1970 (XI. 13.) ÉVM-IM-PM on the Provisions on Land Plots on the Waterfront of Lake Balaton (hereinafter: "JD"), which provided that "on other (slightly sloping, reefy etc.) shoreline sections" the map shoreline "shall be identified with the water level at mark "0" of the water gauge at Siófok + 1.0 metre." At that time, the petitioners requested the constitutional examination of the challenged rules of the JD with reference to the possibility of the expropriation of lakeside real estates without compensation. The Constitutional Court established the unconstitutionality of the challenged provision because it provided an opportunity to designate certain areas as part of the lakebed even though such areas did not qualify as lakebed on the basis of Section 38 para. (1) of Government Decree 32/1964 (XII. 13.) Korm. on the Implementation of Act IV of 1964 on Water Management in force at that time, and therefore the rule in the Minister's Decree was

contrary to a statute of a higher level, thus violating Article 37 para. (3) of the Constitution. It was also pointed out by the Constitutional Court that the challenged provision made it possible to change the ownership of land plots not qualifying as lakebed, and thus the rule of the JD excluding compensation resulted in unconstitutionality. (ABH 1996, 250, 251)

In the CCDec, it was within the statutory framework in force at the time that the Constitutional Court established the unconstitutionality of the definition of map shoreline contained in the Minister's Decree.

Section 38 of Government Decree 32/1964 (XII. 13.) Korm. on the Implementation of Act III of 1964 on Water Management and the rules of the JD which had remained in force were repealed by Section 27 para. (7) of Government Decree 72/1996 (V. 22) Korm. on the Exercise of the Rights of Water Management Authorities. Consequently, the statutory provisions with regard to which the Constitutional Court established in CCDec the unconstitutionality of the definition of map shoreline included in the JD are no longer in force.

As a result, the unconstitutionality of the concept of "legal shoreline" cannot be established on the basis of the reasons included in the CCDec. The concept of "legal shoreline" used in Section 16 para. (1), Section 38 item b) and Section 45 item e) of the ALB – in the framework of the statutes in force – fundamentally differs from the concept of "map shoreline" as per the JD in terms of content, purpose and legal consequences. Considering the rules of the JD, it can be concluded that the provision held unconstitutional in the CCDec had been the basis of preparing the map showing Lake Balaton's slightly sloping and reefy shoreline sections, that map had been used to designate the shoreline in the resolution of the authority, and as such it had made it possible to change the areas of lakeside plots and to nationalise pieces of land that had become part of the lakebed. In the ALB, the concept of "legal shoreline" is not related such legal consequences; this term is used for other purposes in the provisions of the ALB.

The challenged provisions of the ALB designate the legal shoreline of Lake Balaton as a limitation on certain activities affecting the shoreline of Lake Balaton. According to Section 16 para. (1) of the ALB, the settlements' areas designated for building (inner areas) may not be increased beyond the legal shoreline, according to Section 38, the legal shoreline may only be changed as specified in the shoreline regulation plans, furthermore, on the basis of Section

45 items d) and e), the building provisions pertaining to areas used for viticulture and connected to the legal shoreline are stricter than the ones concerning similar areas without such connection. The use of the technical term "legal shoreline" in the challenged statutory provisions does not entail any change in the shoreline or water surface of the lakebed of Lake Balaton or the ownership or size of lakeside plots.

Consequently, the concept of "legal shoreline" used in the ALB – in the framework of the statutes in force – cannot be identified with the concept of "map shoreline" defined in Section 1 para. (3) of the JD in terms of purpose and legal consequences. Therefore, in its constitutional evaluation the CCDec cannot be used as a precedent.

In the petitioners' opinion, the requirement of legal certainty stemming from the principle of the rule of law enshrined in Article 2 para. (1) of the Constitution is also violated by Section 16 para. (1), Section 38 item b) and Section 45 item e) of the ALB, because they include provisions related to legal shoreline without the ALB defining the concept thereof.

However, the Constitutional Court has established that – as opposed to the petitioners' claim "legal shoreline" does not qualify as a vague legal concept – used only by water management experts as a technical term – because a statute exactly defines its content.

The legal shoreline of Lake Balaton is defined in Section 2 para. (2) item a) of Government Decree 22/1998 (II. 13.) Korm. on the Protection of the Reeds and Reeds Management in Lake Balaton and its Waterfront Zone:
"a) legal shoreline: the line of the water level at mark 0 of the water gauge at Siófok plus 1 metre, which equals 104.41 metres above Baltic Sea level,". Accordingly, the violation of the requirement of legal certainty stemming from the principle of the rule of law enshrined in Article 2 para. (1) of the Constitution cannot be established on the basis of the vagueness of the concept of "legal shoreline".

Therefore, the Constitutional Court has rejected the petitions seeking the establishment of the unconstitutionality of the text "legal shoreline" in Section 16, Section 38 item b) and Section 45 item e) of the ALB.

1. 2. The petitioners' basically object to Section 16 para. (1) and Section 38 item b) of the ALB and Section 3 item b) of the GD with reference to these provisions offering unlimited possibilities to fill or correct the lakebed, with the exception of the settlements' areas designated for building (inner areas). According to the petitioners, these provisions violate Article 10 paras (1)-(2) of the Constitution and the right to a healthy environment guaranteed under Article 18 of the Constitution.

The Constitutional Court has established that there is no constitutional connection between the rules of the ALB challenged by the petitioners and Article 10 of the Constitution. Article 10 of the Constitution defines the constitutional nature of State property and the statutory level of determining the scope of exclusive State property. The challenged provisions of the ALB affect neither the nature of State property as national wealth nor the requirement of regulating the scope of exclusive State property in an Act of Parliament.

The Constitutional Court has interpreted the right to a healthy environment enshrined in Article 18 of the Constitution in several of its Decisions, and elaborated the constitutional character of the right to a healthy environment – to be followed in the practice of the Constitutional Court – in Decision 28/1994 (V. 20.) AB (ABH 1994, 134).
As stated by the Constitutional Court in that Decision, the right to a healthy environment in its constitutional form is not an individual fundamental right, nor merely a constitutional duty or state goal for which the State may freely choose any means of implementation whatsoever.
"(…) [T]he right to environmental protection primarily constitutes the independent and self-contained institutional aspect in itself of the protection of that right, or, it is, a distinct fundamental right exceedingly dominated and determined by its objective aspect of institutional protection. The right to environmental protection raises the guarantees for the implementation of the state duties in the area of environmental protection to the level of a fundamental right, including the conditions under which the degree of protection already achieved may be restricted. Due to the distinctive features of this right, what the State ensures by the protection of individual rights elsewhere it must ensure in this case by providing legal and organizational guarantees." (ABH 1994, 138)

The Constitutional Court also pointed out in the Decision concerned that the constitutional right to a healthy environment entails the responsibility of the State to protect the environment and maintain the natural basis of life. "Providing such guarantees is not simply more

important in the area of environmental protection than in the case of other constitutional rights where the court (including the Constitutional Court) may provide direct protection of individual rights. Instead, the legislature must provide all the institutional guarantees which are – within the limits of dogmatic possibility – functionally equivalent to those granted by the Constitution in the area of individual rights." (ABH 1994, 139-140)

"Hence, the degree of institutional protection of the right to a healthy environment is not arbitrary. Besides the dogmatic peculiarities outlined above, the key factor in determining the degree of protection is the three-prong raison d'etre of environmental protection – the limited resources for the natural basis of life, the irreversibility of a substantial part of environmental damages and, finally, the sheer fact that these mark the conditions for the continuance of human life. The right to environmental protection guarantees the physical conditions necessary to implement the right to human life. In light of the above, extraordinary rigour is called for in protecting the right to a healthy environment by legislative acts." (ABH 1994, 140)

Furthermore, as stated in the Decision concerned, the State is not free either to allow any deterioration of the environment or a risk thereof. Environmental damage destroys non-renewable resources, is often irreparable, and the neglect of environmental protection sets in motion irreversible processes. Due to these distinct features, prevention has precedence over all other means to guarantee the right to a healthy environment. (ABH 1994, 140-141)

With due account to the above interpretation of the right to a healthy environment, the Constitutional Court has had to examine, on the basis of the petitions, whether, in the course of preparing the ALB, the legislator complied with its regulatory obligation resulting from the right to a healthy environment. It has had to consider whether the legal regulations – in view of the fact that Lake Balaton is a unique natural value of its kind in Hungary – provide adequate guarantees against interference causing the violation of the right to a healthy environment regulated in Article 18 of the Constitution, in order to protect the lakebed of Lake Balaton as well as the flora and fauna of the lakebed and the waterfront.

In the course of the review, the Constitutional Court took stock of the legal regulations – in addition to general statutes on water management, water quality and environmental protection and nature conservation, obviously applicable to the lakebed of Lake Balaton as well –

specifically aimed at the protection of the lakebed of Lake Balaton and the flora and fauna thereof, defining concrete rules in respect of Lake Balaton on the basis of the general regulations, and setting statutory limits to interference decreasing the territory of the lakebed, or damaging or threatening its flora and fauna.

Such a statutory restriction can be found in the challenged Section 16 and Section 38 of the ALB, stating that lakebed reduction, correction or filling, as well as the changing of the legal shoreline may only be performed within the framework of the shoreline regulation plan. Section 38 specifies the facilities and artificial objects allowed to be placed in the lakebed, and, for the protection of the reeds, it also prescribes the manner of their placement.

Section 5 of the GD contains some lakebed protection rules, however, these are only framework rules, leaving the protection of the lakebed and its flora and fauna to the study plans on waterfront rehabilitation to be prepared on the basis of Section 58 item b) of the ALB. According to Section 59 para. (1) of the ALB, it is within the framework of such waterfront rehabilitation study plans adopted in a Minister's Decree that the local governments of the lakeside settlements must review their settlement development plans and local building regulations, which include the concrete provisions on the development of the waterfront zone.
There is a specific statute on the protection of the reeds in Lake Balaton, namely Government Decree 22/1998 (II. 13.) Korm. on the Protection of the Reeds and Reeds Management in Lake Balaton and its Waterfront Zone.

Upon the overview of the regulations, it can be concluded that the ALB itself does not provide for the legal limitations of interference with the lakebed (shoreline correction, lakebed filling, placement of landing stages etc.) in the interest of protecting the water and the flora and fauna living therein. Instead it leaves the determination of the possibilities and conditions of interference to further planning – shoreline regulation plan, waterfront reconstruction study plan, settlement development plans – and to the activities of the various authorities within the limits of such plans.

The ALB contains the land use plan and land use regulations of the Lake Balaton Special Resort Area. Section 23 of Act XXI of 1996 on Regional Development and Land Use Planning (hereinafter: "ARD") defines the fundamental requirements of land use plans in

terms of content. Among these requirements of content, Section 23 para. (3) item d) provides that land use plans shall define the regional tasks concerning environmental and landscape protection as well as nature conservation. This means that it is the task of the ALB to harmonise the resort function of Lake Balaton, tourism and environmental protection, and to define the concrete rules on the protection of the lakebed of Lake Balaton, i.e. the statutory provisions preventing interference damaging the environment. The fact that the ALB refers to further planning work and the individual acts of the authorities in respect of applying the general rules of protecting water, environment and nature to the lakebed of Lake Balaton – including the harmonisation of the interests related to the resort functions and to the protection of nature – results in an exceptionally wide scale of discretionary power in the hands of the public administration bodies approving the plans and the authorities entitled to license acts of interference. The lack of statutory limitations concerning acts of interference allows the business interests of tourism to gain privilege over the interests of environmental protection related to the protection of the lakebed.

On the basis of the above, the Constitutional Court has established that although the provisions challenged by the petitioners do not violate, in themselves, the right to a healthy environment enshrined in Article 18 of the Constitution, an unconstitutional situation has resulted from the fact that the legislator has allowed interference with natural conditions without providing for guarantees – also binding the public administration authorities in charge of approving the plans and exercising the relevant rights and powers – that ensure the enforcement of the right to a healthy environment granted in Article 18 of the Constitution.

According to Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: "ACC"), if an unconstitutional omission to legislate is established by the Constitutional Court *ex officio* or on the basis of a petition by any person because the legislature has failed to fulfil its legislative duty mandated by a statute, and this has given rise to an unconstitutional situation, it shall call upon – by setting a deadline – the organ in default to perform its duty. According to the established practice of the Constitutional Court, the legislature shall be obliged to legislate even when there is no concrete mandate given by a statute if the unconstitutional situation – the lack of legal regulation – is the result of the State's interference with certain situations of life by way of a statute, thus depriving some of the citizens of their potential to enforce their constitutional rights [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86]. The Constitutional Court also establishes an unconstitutional

omission of legislative duty in the case of the lack of the statutory guarantees necessary for the enforcement of a fundamental right [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232].

The Constitutional Court establishes an unconstitutional omission not only in the case of there being no regulation at all on a given subject [Decision 35/1992 (VI. 10.) AB, ABH 1992, 204, 205] but even if there is no statutory provision with a content deducible from the Constitution within the regulatory concept concerned [Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 113; Decision 29/1997 (IV. 29.) AB, ABH 1997, 122, 128, Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138]. "Even when an unconstitutional omission is established due to the incompleteness of the content of the regulation concerned, the omission itself is based on the non-performance of a legislative duty deriving either from an explicit statutory authorisation or – if there is no such authorisation – from the absolute necessity to have a statutory regulation." (Decision 4/1999 (III. 31.) AB, ABH 1999, 52, 57)
In view of the above, the Constitutional Court has established, acting *ex officio*, that an unconstitutional situation of omission has resulted from the failure of the Parliament to adopt in the ALB provisions guaranteeing the protection of the lakebed for the enforcement of the right to a healthy environment enshrined in Article 18 of the Constitution, and it has called upon the Parliament to meet its legislative duty by 31 December 2005.

The Constitutional Court has rejected the petitions seeking the establishment of the unconstitutionality and the annulment of Section 16 para. (1) and Section 38 item b) of the ALB, and of Section 3 items a)-b) of the GD.

2. On the basis of the petitions, the Constitutional Court has also examined the constitutionality of Section 20 para. (1) of the ALB. In the petitioners' opinion, this provision violates Article 10 para. (1), Article 13 para. (1) and Article 18 of the Constitution.

According to this provision of the ALB, in all lakeside settlements of the resort area a public promenade is to be established along the waterfront in a width of 5-30 metres, covering at least 30 % of the shoreline connected to the inner area, at the same time preserving the natural vegetation of the area. This provision of the ALB is not a rule to be directly enforced, a further act of legislation is needed for its implementation. It is a requirement to be taken into account, on the basis of the authorisation granted in Section 58 para. (2) of the ALB, in the

course of designating the areas to be subjected to waterfront rehabilitation and in the course of reviewing the waterfront rehabilitation study plans and the settlement development plans as required in Section 59 para. (1). The location of the lakeside promenade shall be designated in the regulatory plans adopted in the local governments' decrees for settlement development, with due account to the waterfront rehabilitation study plans published in a Minister's Decree. The provision of the ALB at issue does not, in itself, affect owners' rights and it does not violate the right to a healthy environment, either. Whether the establishment of the lakeside promenade entails the restriction or withdrawal of the property rights related to real estates or damage to nature depends on the exact place and manner thereof. It is the task of further legislation to regulate the place and manner of establishing the lakeside promenade in the framework of enforcing Section 20 para. (1) of the ALB, in compliance with the provisions of the Constitution. Therefore, it can only be decided on the basis of the regulatory plans and local building regulations prepared with consideration to the waterfront rehabilitation plans and adopted in local governments' decrees whether the establishment of the lakeside promenade violates Article 10 para. (1), Article 13 para. (1) or Article 18 of the Constitution. Consequently, the constitutionality of the regulations on the establishment of the lakeside promenade can only be judged by the Constitutional Court if it becomes familiar with the complete set of regulations, and on the basis of petitions submitted against the decrees adopted by the local governments concerned.
In view of the above, the Constitutional Court has rejected the petitions.

IV

1. On the basis of one of the petitions, the Constitutional Court has also examined whether the right to property enshrined in Article 13 of the Constitution is violated in respect of the building regulations contained in Section 45 items b), c), d), e), f) and Section 46 item b) of the ALB. It has been consistently stressed in the Decisions of the Constitutional Court that the right to property is not unlimited and it may be restricted for the sake of and proportionately to the public interest.

In Decision 64/1993 (XII. 22.) AB (ABH 1993, 373), the Constitutional Court elaborated its opinion on the characteristics of property protection at the level of fundamental rights, and defined in principle the criteria to be applied during the examination of the constitutionality of property restriction. As stated in that Decision, "[t]he content of property as a fundamental

right must always be understood within the framework of (constitutional) public and private law restrictions. The extent of the constitutional protection of property is always concrete; it depends upon the subject, object and function of the property, as well as the nature of the restriction. Viewed from the other side: the constitutional permissibility of the intervention of the public authorities into the property right varies according to these considerations." [ABH 1993, 380]

In relation to judging the constitutionality of property restriction, the following was pointed out by the Constitutional Court:

"Because of the particularities of the nature of property protection the central point of the enquiry into the constitutionality of state intervention, the field of the constitutional review has become the adjudication of proportionality between the ends and the means, viz., the public interest and the restriction on property. At the outset of an enquiry into the necessity and unavoidability of restricting a fundamental right it must be borne in mind that Art. 13(2) of the Constitution merely requires the 'public interest' to justify expropriation; that is, if monetary compensation is provided a more compelling and justified 'necessity' need not be established for constitutional purposes." It was also established by the Constitutional Court in respect of examining the public interest in restriction that "(…) the constitutional review of the 'public interest' determined by the democratically-elected legislature does not focus upon the question whether such legislation was unavoidably necessary, rather (…) it confines its enquiry to the question of whether the invocation of the 'public interest' is justified, and whether the solution adopted for the 'public interest' violates some other constitutional rights (such as the prohibition of negative discrimination)." (ABH 1993, 382)

With regard to the proportionality of public interest and property restriction, it was stated that "the Constitutional Court may generally decide upon those criteria which determine the constitutionality of an intervention. This method militates against the unavoidable loss suffered by legal certainty on account of the limited review to which the 'necessity' of public interest may be subjected. For instance, the Constitutional Court considers disproportionate a property restriction if its duration cannot be estimated (...). In other cases compensation may be necessary for the proportionality of the restriction on property. According to Art. 13(2) of the Constitution expropriation demands immediate, unconditional and full compensation. But the Constitutional Court may hold in other instances of property restriction as well that proportionality requires the payment of compensation." (ABH 1993, 381-382)

As also pointed out by the Constitutional Court in the Decision concerned, in the case of a limitation necessitated by the public interest, the requirement of proportionality between the necessitated intervention with the owner's property right and the public interest justifying the intervention compels compensation or at least the mitigation of the loss if the property becomes heavily burdened, or if the law only forces one group of property owners to bear the burden whereas others similarly situated remain exempt. (ABH 1993, 381)

In Decision 13/1998 (IV. 30.) AB, the Constitutional Court stated in relation to examining the constitutionality of the building restrictions pertaining to the Lake Balaton resort area: "No one has a subjective right, based on the ownership of a piece of land, to build upon the land owned by him, or to turn his land into building plots in order to build upon them. The right to build is only enjoyed as a subjective right by the owners of building plots classified as such in accordance with the relevant constitutional statutory provisions. However, even the owners of such plots may only exercise this right in compliance with the provisions of the statutes on building. It does not constitute an unconstitutional restriction of the right to property when, for the purpose of preventing the increase of built-up areas, a statute provides for a prohibition of establishing plots and building in respect of areas in which building was not permitted according to the previous statutory regulations, either." (ABH 1998, 429, 434)

The provisions of the ALB challenged by the petitioner contain building regulations regarding agricultural production areas and horticultural areas. These provisions define building regulations pertaining to areas primarily used for agricultural cultivation and basically not intended for building. The challenged rules do not prohibit building, but regulate it by specifying the size of the area that may be built upon, as well as the extent and manner of building. Thus, due to these rules, building has generally become allowed on areas where it was not allowed before. In respect of such real estates, the violation of the right to property enshrined in Article 13 para. (1) of the Constitution does not arise.

As the ALB includes the general rules of building on agricultural production and horticultural areas with regard to the entire special resort area of Lake Balaton, the enforcement of these rules in individual cases might result in the withdrawal or restriction of the building right granted in the local settlement development plan or building regulations. This, however, does not entail the unconstitutionality of the rules challenged by the petitioner.

The ALB defines the challenged rules in the public interest and for the purpose of protecting the environment and the landscape, and the restriction of the right to property cannot be considered disproportionate even in cases where these rules restrict a building right previously granted in the local building regulations.

According to Section 59 para. (2) of the ALB, the settlement development plans and local building regulations of the settlements located in the resort area must be reviewed and amended by the local governments within four years from the entry into force of the ALB, in line with the provisions of the ALB.

In respect of the building regulations contained in Section 45 of the ALB, it can only be decided after the amendment of the settlement development plans and local building regulations whether the building rights related to individual real estates and granted by previous regulations are actually restricted, since Section 45 item a) of the ALB provides for a possibility to define, in the course of preparing the settlement development plans, areas designated for building within the sub-zone, provided that this is allowed by all zonal regulations.

In cases where the settlement development plans and local building regulations adopted on the basis of the above rules of the ALB result in the restriction of the right to property to such an extent that the proportionality of property restriction requires compensation, Section 30 of Act LXXVIII of 1997 on the Shaping and Protection of the Built Environment (hereinafter: "ABE") ensures the possibility of compensation.

In view of the above, the unconstitutionality of the building regulations contained in Section 45 items b), c), d), e), f) and Section 46 item b) of the ALB cannot be established on the basis of the violation of the right to property regulated under Article 13 para. (1) of the Constitution.

2. The same petitioner requests the establishment of the unconstitutionality of Section 3 para. (2) and Annexes 3 and 4 of the ALB. In his opinion, the plans at the scale of 1:100,000 defined in Section 3 para. (2) of the ALB do not make it possible to determine the exact boundaries of zones and sub-zones. In the case of real estates located near the boundaries of zones or sub-zones, the zone or sub-zone to which they belong cannot be identified, and,

consequently, the provisions of the ALB applicable to them in cases of public administration cannot be determined, either. In the petitioner's opinion, this violates the requirement of legal certainty stemming from the principle of the rule of law defined in Article 2 para. (1) of the Constitution.

On the basis of the rules of content included in Section 23 para. (3) of the ARD, land use plans are not aimed at defining the rules on land use and building at the level of boundaries between plots, which could not be technically accomplished due to the large size of the planning area. It is for the regulatory plans prepared in the framework of settlement development planning that the law provides for the obligation to be so detailed as to indicate boundaries between plots. According to Section 12 para. (4) of the ABE, regulatory plans must be presented on maps showing the necessary horizontal, vertical and other data at such a scale that the information on the map can be clearly interpreted with regard to the individual plots, building sites and public areas. Accordingly, the boundaries of zones and sub-zones are to be defined at the level of plot boundaries in the settlement development plans reviewed and amended on the basis of Section 59 of the ALB.

According to Section 59 of the ALB, settlement development plans and local building regulations shall be reviewed and amended by the local governments concerned within four years from the entry into force of the Act, and in the case of settlements without a settlement development plan, the settlement development plan and the local building regulations are to be prepared within five years.

In the phase of settlement development planning – or in areas without a settlement development plan, even after the adoption of such a plan – there are cases where it is not possible to identify the sub-zone to which a real estate belongs, due to the scale of the plan sheets annexed to the ALB (because on the plan sheets the borderlines of sub-zones cover entire real estates).

The Constitutional Court considers this legal situation to violate the requirement of legal certainty stemming from principle of the rule of law regulated in Article 2 para. (1) of the Constitution.

As pointed out by the Constitutional Court in several Decisions, legal certainty is an indispensable component of the rule of law. As interpreted by the Constitutional Court, legal certainty compels the State, i.e. the legislator, to ensure that the law is clear and unambiguous and that its operation is ascertainable and predictable by the addressees of the norm. [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65-66] It has also been established by the Constitutional Court that the clear and unambiguously interpretable normative content is an element of legal certainty. When the normative text is incomprehensible or allows different interpretations, this results in an incalculable situation for those who are addressed by the norm and creates a possibility for the subjective and arbitrary application of the law. [Decision 54/2004 (XII. 15.) AB, ABK December 2004, 14422, 14447]

The plan sheets published as annexes to the ALB are integral parts thereof, and the rules of the ALB on zones and sub-zones may only be interpreted together with those sheets. If, due to the scale of the plan sheets, the boundaries of zones and sub-zones cannot be identified or cannot be identified beyond doubt, it is up to those applying the law to decide which zonal or sub-zonal rules are applied to the real estate in question. (In the case outlined by the petitioner, such discretion by the authority applying the law means that if the real estate is classified into the sub-zone of horticultural areas, a building licence may be granted for an area of more than 1500 m2, while if the real estate is classified into the sub-zone of agricultural production areas, a building licence may be granted for an area of more than 2 hectares.) This legal situation involves the possibility of the arbitrary and discriminative application of the law contrary to the objectives of the Act, in the form of restricting the real estate owners' right to property beyond the limits of the Act, thus making the operation of regulated legal institutions incalculable for the subjects of law.
When preparing the ALB, the legislator reckoned with the problems of law interpretation that might emerge due to the scale of the plan sheets in the case of land use plans. Therefore, in Section 60 para. (2) of the ALB, it amended Section 27 para. (1) of the ARD with a new item j) authorising the Government to regulate in a Decree the procedural order of specifying the boundaries of the sub-zones defined in the zonal plan sheets of the regional regulation of land use plans and the infrastructure networks defined in the regional structural plan. The Government has failed to adopt such a Decree.

In view of the above, the Constitutional Court has established that the unconstitutional situation violating legal certainty – emerging in relation to Annexes 3 and 4 of the ALB – has

resulted from the Government's failure to meet its legislative duty based on a statutory authorisation. Therefore, the Constitutional Court has stated in the holdings of the Decision that an unconstitutional situation violating Article 2 para. (1) of the Constitution has resulted from the failure of the Government to regulate the procedural order of specifying the boundaries of the sub-zones defined in the zonal plan sheets of the regional regulation of land use plans and the infrastructure networks defined in the regional structural plan. It has simultaneously called upon the Government to meet its legislative duty by 30 June 2005.

3. The same petitioner challenges Section 54 item b) of the ALB on the application of the Act in pending cases. In his view, this rule violates Article 2 para. (1) of the Constitution.

In Decision 349/B/2001 AB, the Constitutional Court has already decided on the constitutionality of Section 54 item b) of the ALB on the basis of Article 2 para. (1) of the Constitution. In that Decision, the Constitutional Court held that the ALB did not provide for any obligation or legal liability in respect of the time before its promulgation, the rules of the ALB did not affect acquired rights and legal relations created and closed before the entry into force thereof, therefore the provision on entry into force did not violate the prohibition of retroactive legislation, and the time granted for preparing for the application of the Act was not found unconstitutional, either. Based on the above, the Constitutional Court established that Section 54 item b) of the ALB did not violate the requirement of legal certainty resulting from the principle of the rule of law regulated in Article 2 para. (1) of the Constitution. (ABH 2002, 1241)

On the basis of Section 31 item c) of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof (hereinafter: "CCRP"), the Constitutional Court terminates its procedure if the petition is aimed at the review of a statute (statutory provision) identical with a statute already judged by the Constitutional Court and if the petitioner refers to the same Article or principle (value) of the Constitution, including the same constitutional connection ("*res iudicata*").

In the present case, since the Constitutional Court has already judged petitions having the same content as the present ones, the Constitutional Court has decided as stated in the holdings of the Decision.

V

1. In consideration of the petitions, the Constitutional Court has also had to examine whether the unconstitutionality of the entire ALB, GD and GR can be established due to the violation of Article 18 of the Constitution on the basis of the petitioner's arguments.

1.1. As established by the Constitutional Court during the examination, the GR was repealed as of 19 April 2004 by Section 37 of Government Resolution 1033/2004 (IV. 19.) Korm. on the Pro Rata Temporis Review of the Provisions of Government Resolution 1075/2003 (VII. 30.) Korm. and on Further Measures Related to Lake Balaton. According to Section 1 item b) of the ACC, the competence of the Constitutional Court covers the posterior constitutional examination of statutes and other legal tools of State administration in force. Repealed statutes or other legal tools of State administration may only be subjected to specific constitutional examination in two cases: in the case of a judicial initiative under Section 38 para. (1) of the ACC and in that of a constitutional complaint under Section 48 of the ACC. As the petition submitted against the GR does not belong to either of these categories, the Constitutional Court has terminated the procedure for the establishment of the unconstitutionality of the GR pursuant to Section 31 item a) of the CCRP.

1.2. The Constitutional Court has established that the petition seeking the establishment of the unconstitutionality of the entire ALB and GD is unfounded.

According to Article 32/A of the Constitution, the Constitutional Court is in charge of reviewing the constitutionality of statutes. Neither the Constitution nor the ACC empowers the Constitutional Court to examine the reasonableness, professional quality or well-founded nature of statutes, or any possible unlawful intention to elude the law, underlying the legal regulations. Furthermore, the Constitutional Court is not authorised to examine the lawfulness and constitutionality of the facts, data and records taken into account in the course of legislation, or of the individual decisions of public administration.

On the basis of the provisions of the ALB and the GD – in consideration of the statutory provisions on the protection of the environment, nature, forests, arable land, built environment, national heritage, cultural assets and water management that must be complied

with during the implementation of the ALB and the GD – the danger of damage to the environment is not present to the extent alleged by the petitioner.
Hence, the Constitutional Court has rejected the petition seeking the establishment of the unconstitutionality and the annulment of the ALB and the GD.

2. Based on the petition, the Constitutional Court has also had to take a position on the question whether an unconstitutional omission of legislative duty can be established on the basis of Section 49 of the ACC on account of meeting the deadlines specified in Section 16 para. (1) of the ALB, Section 21 of the GD and Point 28 of the GR.

2.1. According to Section 49 of the ACC, an unconstitutional omission of legislative duty may be established if the legislature has failed to fulfil its legislative duty, and this has given rise to an unconstitutional situation.

This means that the Constitutional Court is not competent to establish an unconstitutional omission if a State organ has failed to perform a non-legislative duty. Section 16 para. (1) of the ALB provides for an obligation to prepare or review the shoreline regulation plan, by setting a deadline. As the shoreline regulation plan is not a statute, the Constitutional Court cannot establish an unconstitutional omission on the basis of the non-performance of the statutory obligation defined under Section 16 para. (1) of the ALB.

Consequently, due to the lack of competence and in line with Section 29 item b) of the CCRP, the Constitutional Court has refused the petition seeking the establishment of an unconstitutional omission related to Section 16 para. (1) of the ALB.
2.2. The Constitutional Court has established the following with regard to the legislator's unconstitutional omission alleged by the petitioner in connection with the regulation of waterfront rehabilitation.

The regulation of waterfront rehabilitation necessary for the implementation of the ALB is provided for in Sections 58-59 of the ALB. Section 58 has authorised the Government to define the regulatory requirements of waterfront rehabilitation, and at the same time the Minister for Regional Development and Land Use Planning has been authorised to delimit the areas affected by waterfront rehabilitation in accordance with the requirements specified in the Government Decree, as well as to arrange for the preparation of the waterfront

rehabilitation study plans and issue such study plans in Decrees. The Government performed its legislative task based on the above authorisation through the adoption of the GD. According to Section 21 of the GD, the waterfront rehabilitation study plans must be adopted by 15 July 2003. Section 21 of the GD – including the deadline specified therein – was repealed by Section 4 para. (2) of Government Decree 213/2003 (XII. 10.) Korm.
On the basis of the Government Decree, since September 2004 the Minister without Portfolio Responsible for Regional Development and Approximation has been issuing Minister's Decrees on delimiting the lakeside settlements' areas affected by waterfront rehabilitation regulatory requirements and on approving their waterfront rehabilitation study plans (see the Decrees on delimiting the areas affected by waterfront rehabilitation regulatory requirements and on approving the waterfront rehabilitation study plans in respect of Keszthely [Decree 18/2004 (IX. 11.) TNM], Balatonmáriafürdõ [Decree 19/2004 (XI. 9.) TNM], Balatonlelle [Decree 20/2004 (XI. 9.) TNM], Balatonboglár [Decree 21/2004 (XI. 9.) TNM], Balatonföldvár [Decree 22/2004 (XI. 12.) TNM], Gyenesdiás [30/2004 (XII. 10.) TNM], Vonyarcvashegy [31/2004 (XII. 10.) TNM], Balatonederics [32/2004 (XII. 17.) TNM] etc.).

Section 59 para. (1) of the ALB requires the local governments of lakeside settlements to review and amend their settlement development plans and local building regulations within three years from the entry into force of the ALB, in compliance with the waterfront rehabilitation requirements and study plans published in Minister's Decrees. Since at the time of adopting the GR it was clear that the study plans would not be adopted within the time specified in the GD, Point 28 of the GR required the Minister without Portfolio Responsible for Regional Development and Land Use Planning and the Minister of Justice to prepare the Bill necessary for the modification of the deadline set in Section 59 of the ALB in respect of the review and amendment of the settlement development plans, and provided for the deadline of 30 September 2003 for submitting the Bill. Section 22 para. (2) of Act LXXV of 2004 on the Amendment of Act XXI of 1996 on Regional Development and Land Use Planning and of Certain Related Acts modified – before the expiry of the original deadlines set in Section 59 of the ALB – the deadlines specified in Section 59 of the ALB concerning settlement development plans and local building regulations. According to the amended Section 59 para. (1) of the ALB, the settlement development plans and local building regulations of the lakeside settlements must be reviewed by the local governments within four years from the entry into force of the ALB, in line with the waterfront rehabilitation study plans.

On the basis of Section 49 of the ACC, the mere fact of failing to perform a legislative task or duty by the relevant deadline does not justify the establishment of an unconstitutional omission. The Constitutional Court may only establish an unconstitutional omission if failure to perform a legislative duty causes an unconstitutional situation. It can be concluded on the basis of Section 20 para. (2) of the ALB that the implementation of waterfront rehabilitation depends on the preparation and adoption of the settlement development plans and local building regulations on the basis of the study plans; the Constitutional Court has found that an unconstitutional omission cannot be established as the failure to comply with the deadlines specified for the preparation of the waterfront rehabilitation study plans as well as the settlement development plans and local building regulations of the lakeside settlements has not resulted in an unconstitutional situation as outlined by the petitioner. Therefore, the Constitutional Court has rejected the relevant petition.

The Constitutional Court has ordered the publication of this Decision in the Official Gazette (*Magyar Közlöny*) in view of the wide scale of affected persons and organisations.
Budapest, 4 April 2005

Dr. András Holló
President of the Constitutional Court
Judge of the Constitutional Court, Rapporteur

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
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Dr. Árpád Erdei
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Dr. Attila Harmathy
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Dr. László Kiss
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Dr. István Kukorelli
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Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Dissenting opinion by Dr. Attila Harmathy, Judge of the Constitutional Court

I disagree with the Decision not establishing an unconstitutionality manifested in the failure to adopt a statute providing for the guarantees of the enforcement of the right to property. In my opinion, the Decision should have established *ex officio* an unconstitutional omission in the above respect, and it should have called upon the Parliament to adopt rules serving the enforcement of the right to property.

My arguments are as follows:

1. According to Article 13 para. (1) of the Constitution, the Republic of Hungary guarantees the right to property. In its practice, the Constitutional Court has always interpreted the right to property as a fundamental right. Accordingly, the principle that a fundamental right may only be restricted due to a forcing cause and to the extent absolutely necessary applies to the right to property as well [Decision 7/1991. (II. 28.) AB, ABH 1991, 22, 25, 26]. The constitutional protection of the right to property is applicable regardless of the subjects of law concerned. Before the change of the political regime, the law differentiated according to forms of ownership. It was part of the essence of that economic system that State property enjoyed privileged status, while private property was only protected to a limited extent, and this was manifested in several provisions of the text of the Constitution adopted in 1949. This is why it was necessary not only to repeal the rules concerned, but – as an essential element of changing the system – to declare in the new text of Article 9 para. (1) of the Constitution, established in Act XXXI of 1989, the equality and equal protection of public and private property. On the basis of the Constitution, the protection of property rights is independent from the forms of ownership [Decision 21/1990 (X. 4.) AB, ABH 1990, 73, 81].

2. Article 13 para. (2) of the Constitution regulates the complete withdrawal of property rights. According to it, expropriation shall only be permitted in exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated by law, with provision of full, unconditional and immediate compensation. This rule serving the protection of the right to property also applies to cases where the right to property is withdrawn by a statutory provision [Decision 21/1990 (X. 4.) AB, ABH 1990, 73, 82]. On the basis of Article 13 para. (2) of the Constitution, the withdrawal of property is conditional upon – in addition to the provision of compensation – being exceptional and required by the

public interest. In such cases, the forcing cause justifying the restriction of the fundamental right is the exceptional circumstance required by the public interest. Consequently, in cases of property withdrawal, the constitutional examination is aimed at deciding whether the reference to the public interest is justified, and whether the solution claimed to serve the public interest violates any other constitutional right [Decision 64/1993 (XII. 22.) AB, ABH 1993, 373, 382].

In the absence of any of the conditions specified in Article 13 para. (2) of the Constitution (e.g. public interest), the act of the authority or statutory provision withdrawing property is unconstitutional [Decision 27/1991 (V. 20.) AB, ABH 1991, 73, 77].

In the case of expropriation, on the basis of Article 13 para. (2) of the Constitution, the protection of property is served by the examination of the existence of exceptionality even if public interest is deemed to exist. In a given case, this may be realised by examining whether it is justified to implement the objective serving the public interest in the case of the real estate for which expropriation is being requested (Decision 479/B/1993 AB, ABH 1993, 665, 667-668). In the practice of the Constitutional Court, any regulation restricting the possibility of the judicial review of a resolution on expropriation is unconstitutional [Decision 58/1991 (XI. 8.) AB, ABH 1991, 288, 290].

3. The practice of the Constitutional Court is in harmony with the principle followed by the European Court of Human Rights, according to which a just balance is to be created between the protection of public interest and the individual's fundamental right (right to property). When examining this balance, the Court checks the existence of public interest and whether the restriction is proportionate with the desired objective (Chassagnou and others v. France, Decision of 29 April 1999, nos. 25088/94, 28331/95, 28443/95, points 75, 91, 92, National & Provincial Building Society and others v. The United Kingdom, Decision of 23 October 1997, no. 117/1996/736/933-935, points 78, 80, 82).

4. According to Section 20 para. (1) of Act CXII of 2000 on the Adoption of the Land Use Plan for the Lake Balaton Special Resort Area and the Establishment of the Lake Balaton Land Use Regulations (hereinafter: "ALB"), in all lakeside settlement of the resort area a public promenade is to be established along the waterfront in a width of 5-30 meters, covering at least 30% of the shoreline connected to the inner area. Section 3 of the ALB provides that from the working parts of the Land Use Plan for the Lake Balaton Special Resort Area, the regional structural plan and the zonal plan sheets of the regional regulation are adopted by the

Parliament as Annexes 3 and 4 to the ALB. Point 2.3 of Annex 3 containing the regional structural plan demonstrates the importance of the region by the fact that 134,000 people live in the waterfront zone on the lakeside. The plan includes the elaboration of a mosaic-like ecological spatial structure and an ecological network on the northern side of the lake, as well as the creation of a conterminous nature conservation area on the southern side.

According to Section 4 para. (1) of the ALB, the land use and building regulations pertaining to the Lake Balaton Special Resort Area and the lakeside settlements therein are defined in the Lake Balaton Land Use Regulations to be adopted by the Parliament in line with Section 3 para. (1) item c) of the ALB. As provided in Section 59 of the ALB, at the lakeside settlements of the Lake Balaton Special Resort Area and at the other settlements within the resort area, the settlement development plans and local building regulations in force at the date of entry into force of the Act shall be reviewed and amended in line with the regulatory requirements of waterfront rehabilitation and the study plans to be prepared in respect of the areas affected by waterfront rehabilitation. Section 58 has authorised the Government to define the waterfront rehabilitation regulatory conditions and the Minister for Regional Development and Land Use Planning to arrange for the preparation of the study plans necessary for reviewing the settlement development plans and to issue such plans in Decrees.

According to Section 6 item d) of Act XXI of 1996 on Regional Development and Land Use Planning (hereinafter: "ARD"), – in line with the provisions of the ALB – the Parliament shall adopt the land use plan of the Lake Balaton Special Resort Area in an Act of Parliament. As stated in Section 23 para. (1), the land use plan is the basis of area planning. It follows from the above provisions that in the case of restricting or withdrawing property on the basis of the land use plan adopted in an Act of Parliament and in line with the detailed data specified in a Decree issued on basis of the authorisation of an Act of Parliament, the court may only evaluate the extent of compensation and may not question the lawfulness of restricting the right to property.

5. In examining the extent to which control may be exercised by the Constitutional Court in respect of the regional development and land use planning of the Lake Balaton Special Resort Area, the following must be taken into account: a/ with regard to the preparation and adoption of settlement development plans, a procedure similar to the one in the ARD has been elaborated in the Act on the Shaping and Protection of the Built Environment. According to Decision 69/2002 (XII. 17.) AB, there are guarantee rules pertaining to this procedure,

requiring local governments to consult the relevant State administration organs and interest groups and to involve the population in such consultations (ABH 2002, 398, 405).

The rules on settlement development plans were examined in Decision 53/B/2003 AB as well, stating that these provisions require the application of such obligatory procedures and solutions that minimise the restrictability of the right to property. In view of the above and with reference to Decision 69/2002 (XII. 17.) AB, the Decision did not state that the adoption of settlement development plans in local government decrees violated the rule of the Constitution on the right to property (ABH 2003, 1554, 1559).

b/ The land use plan of the Lake Balaton Special Resort Area is adopted by the Parliament in an Act, and certain details are specified in the Government's and the competent Minister's Decrees. In this case, harmonisation with the citizens' interests does not take place. Decision 13/1998 (IV. 30.) AB annulled Minister's Decree 1/1989 (I. 1.) ÉVM on the Temporary Restriction of Building Activities in Certain Settlements of the Lake Balaton Resort Area. One of the reasons for the annulment was the violation of the requirement of proportionality, although the restriction of the right to property in the Decree served the public interest. As emphasised by the Constitutional Court in line with its standing practice, the restriction of the right to property is only constitutional if the period of restriction is exactly, calculably and controllably determined in the statutory provision concerned (ABH 1998, 429, 435).

In its Decision 349/B/2001 AB, the Constitutional Court examined the constitutionality of certain provisions of the ALB on the basis of Article 2 para. (1) of the Constitution. As underlined in the reasoning of the Decision, the provisions of the ALB had not been reviewed in relation to the right to property. It was stressed by the Constitutional Court that the restriction of the right to property could only be performed on a case-by-case basis, after inspecting the settlement development plans (ABH 2002, 1241, 1252). However, when examining the constitutionality of the restriction of the right to property with regard to the existence of a forcing cause, it must be taken into account that the Constitutional Court acknowledges the existence of public interest and considers nature conservation to be of more weight than the owner's right if the local government's decree is based on a provision aimed at nature conservation contained in a high level statute (Decision 80/B/2001 AB, ABH 2001, 1465, 1469). In the case of the land use plan adopted in an Act of Parliament, as well as in the case of the detailed rules specified in the Government Decree and the Minister's Decree, the Constitutional Court can hardly verify whether the exceptionality of the restriction or

withdrawal of the right to property and a forcing necessity exists in respect of the individual real estates.

It follows from the above that the procedural rules guaranteeing the protection of the right to property are missing.

6. According to Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court, if an unconstitutional omission to legislate is established by the Constitutional Court on the basis of a petition or *ex officio* since the legislature has failed to fulfil its legislative duty mandated by a statute and this has given rise to an unconstitutional situation, it shall call upon the organ in default to perform its duty.

In the practice of the Constitutional Court formed on the basis of Decision 37/1992 (VI. 10.) AB, an unconstitutional omission of legislative duty is also established when the realisation of a fundamental right is impeded by the absence of regulations inevitably necessary to give it full effect (ABH 1992, 227, 232).

The ALB has failed to define such procedural rules of elaborating the land use plan and the land use regulations that ensure the possibility of the enforcement of the right to property enshrined in Article 13 of the Constitution. Therefore, an omission should have been established *ex officio*.

Budapest, 4 April 2005

Dr. Attila Harmathy
Judge of the Constitutional Court