Decision 16/2022 (VII. 14.) AB

on the establishment of a conflict with the Fundamental Law and the annulment of certain provisions of the Act CXXXIX of 2018 on the Spatial Planning Plan of Certain Priority Regions of Hungary

The Constitutional Court, sitting in plenary session, in a procedure of posterior norm control, adopted the following

decision:

1. The Constitutional Court establishes that the text "unless a ministerial decree issued on the basis of the authorisation of this Act on the subject of the public land use of the waterfront areas of Lake Balaton provides otherwise due to special spatial and settlement planning reasons or a status quo." in section 71 (4) of the Act CXXXIX of 2018 on the Spatial Planning Plan of Certain Priority Regions of Hungary is contrary to Fundamental Law and is therefore annuls it.

Following the annulment, paragraph (4) of section 71 of the Act CXXXIX of 2018 on the Spatial Planning Plan of Certain Priority Regions of Hungary shall remain in force with the following wording:

"No building may be placed within 30 metres of the regulatory shoreline of Lake Balaton, with the exception of an artificial harbour and its associated buildings. Lawfully constructed buildings may be renovated within 30 metres of the regulatory shoreline of Lake Balaton."

2. The Constitutional Court establishes that the text "unless a government decree issued on the basis of the authorisation of this Act on the specific settlement planning and construction requirements for the waterfront areas of Lake Balaton provides otherwise" in section 71 (5) of the Act CXXXIX of 2018 on the Spatial Planning Plan of Certain Priority Regions of Hungary is contrary to the Fundamental Law, and therefore annuls it.

Following the annulment, paragraph (5) of section 71 of the Act CXXXIX of 2018 on the Spatial Planning Plan of Certain Priority Regions of Hungary shall remain in force with the following wording:

"During the preparation or amendment of a settlement planning plan, the maximum permissible building density and building height of the area intended for construction in the area of the waterfront areas of Lake Balaton – in relation to the building zone

designated in the settlement planning plan in force at the time of the entry into force of this Act – may not be increased even in the case of a change of building zone."

3. The Constitutional Court establishes that section 75 (3) (b) of the Act CXXXIX of 2018 on the Spatial Planning Plan of Certain Priority Regions of Hungary is contrary to the Fundamental Law, and therefore annuls it.

4. The Constitutional Court establishes that the text "or a government decree issued on the basis of the authorisation of this Act" in section 76 of the Act CXXXIX of 2018 on the Spatial Planning Plan of Certain Priority Regions of Hungary is contrary to the Fundamental Law, and therefore annuls it.

Following the annulment, section 76 of the Act CXXXIX of 2018 on the Spatial Planning Plan of Certain Priority Regions of Hungary shall remain in force with the following wording:

"Unless otherwise provided for by this Act, the total area of the building zone or zone designated in the settlement planning plan as a beach, camping site, green area, area of traffic in contact with the shore and the length of the shore in contact with the lake bed may not be reduced."

This decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

Reasoning

I

[1] On the basis of Article 24 (2) (e) of the Fundamental Law and section 24 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), fifty-one Members of Parliament have applied to the Constitutional Court for a posterior abstract review of the norm.

[2] The petitioners asked the Constitutional Court to establish that the text "unless a ministerial decree issued on the basis of the authorisation of this Act on the subject of the public land use of the waterfront areas of Lake Balaton provides otherwise due to special spatial and settlement planning reasons or a status quo." in section 71 (4), the text "unless the government decree issued on the basis of the authorisation of this Act on the specific settlement planning and construction requirements for the waterfront areas of Lake Balaton provides otherwise" in section 71 (5), section 75 (3) (b) and the text "or a government decree issued on the basis of the authorisation of this Act" in section 76 of the Act CXXXIX of 2018 on the Spatial Planning Plan of Certain Priority

Regions of Hungary (hereinafter: SPPA) is contrary to the Fundamental Law, and therefore to annul the contested statutory provisions with *ex tunc* effect.

[3] According to the petitioners, the challenged statutory provisions violate Article P (1), Article XXI (1) and Article I (3) of the Fundamental Law.

[4] In their motion, the petitioners presented the specific challenged provisions of the SPPA, pointing out how they constitute exceptions to the general rule. Section 71 (4) of the SPPA provides as a general rule that no building may be placed within a 30-metre zone of the regulatory shoreline of Lake Balaton. The above-mentioned statutory provision of the SPPA allows two exceptions to the general rule. Firstly, an artificial harbour and its associated buildings may be lawfully constructed. In addition, a building may be lawfully constructed if a ministerial decree issued on the basis of the SPPA on the subject of the public use of the waterfront areas of Lake Balaton for public purposes allows for a derogation from the restriction due to special land use and settlement planning reasons or a status quo.

[5] According to the general rule in section 71 (5) of the SPPA, "during the preparation or amendment of a settlement planning plan, the maximum permissible building density and building height of the area intended for construction in the area of the waterfront areas of Lake Balaton – in relation to the building zone designated in the settlement planning plan in force at the time of the entry into force of this Act – may not be increased even in the case of a change of building zone." An exception to the general rule is provided for in section 71 (5) of the SPPA, which states that "unless a government decree issued on the basis of the authorisation of this Act on the specific settlement planning and construction requirements for the waterfront areas of Lake Balaton provides otherwise"

[6] According to the petitioners' interpretation, section 75 (3) (b) of the SPPA provides for an exception that grants an "exemption" concerning the maximum 3% building density limit specified in section 75 (3) (a) of the SPPA in the case of a camping classified as a beach, a special area. In this context, the petitioners draw attention to two circumstances. The first is that, although the Act restricts the classification of a camping as a special area beach, i.e. the way in which a camping can be reclassified as an area of different classification, this restriction does not cover the change of classification of a special area beach. The possibility of reclassifying the special area beach as another area of special classification is "open" as interpreted by the petitioners. Secondly, according to Annex 2 of the Government Decree 253/1997 (XII. 20.) on National Settlement Planning and Building Requirements (hereinafter: NSPBR), the special area may have a building density of up to 40%. According to section 24 (2) (o) of the NSPBR, any area may be designated as a special area. On this basis, the petitioners submit that the building density of the special area beach can also be determined on the basis of

the legal provisions of the NSPBR, and no other interpretation is apparent from the legislative justification for the SPPA

[7] According to the petitioners, the contested provisions of the SPPA provide a derogation without guarantees from the restrictions on building that serve the protection of the environment, stepping back to the level of protection provided by the previous, substantively identical legislation.

[8] The petitioners argue that the challenged provisions of the SPPA violate Article P) of the Fundamental Law. In this regard, they stress that Article P of the Fundamental Law contains a general obligation to protect the environment. The Constitutional Court summarised its findings in this regard in its Decision 28/2017 (X. 25.) AB (hereinafter: "CCDec 1"), from the reasoning of which the petitioners highlighted the following: The obligation to preserve the physical, biological and cultural foundations set out in Article P (1) of the Fundamental Law is a structural principle that permeates the whole spirit of the Fundamental Law, which expresses Hungary's commitment to the preservation of our natural values, in order to pass them on to future generations in a preserved form" (CCDec1, Reasoning [25]). The petitioners have pointed out that the Constitutional Court has also elaborated in this decision on parts of the obligation set out in CCDec 1. According to this: "On the basis of Article P (1) of the Fundamental Law, the present generation is bound by three main obligations: to preserve the possibility of choice, to preserve quality and to provide the possibility of access. The securing of the possibility of choice is based on the consideration that the life conditions of future generations can be secured the best, if the natural heritage they inherit is capable of providing them with the freedom of choice regarding their problems, rather than putting future generations to a track with no alternatives due to the decisions made in the present. According to the requirement of preserving quality, endeavours should be made to hand over the natural environment to the future generations at least in the same state as the one we received it from past generations. The requirement of access to natural resources means that present generations may freely access the resources available as long as they pay respect to the equitable interests of future generations" (CCDec1, Reasoning [33]).

[9] Based on the above findings cited in the CCDec 1 motion, the petitioners emphasize that the State has an obligation to ensure access to natural resources, including natural waters. The obligation of access, as interpreted by the petitioners, means that free access must be guaranteed to the present generation. The "inherent limit" of this access is that it must be granted with due regard for the interests of future generations. This "inherent limit", however, does not mean, according to the applicants, that free access should not be granted, it merely means that the interests of future generations must be taken into account when granting free access, in such a way that reference to them can be a "legitimate basis" for restricting free access. In the absence of the interests of

future generations, however, this internal ground for restriction does not arise, according to the applicants.

[10] The petitioners have pointed out that Article P of the Fundamental Law is closely linked to the right to a healthy environment formulated in Article XXI (1) of the Fundamental Law, the former containing the details of the latter's duty to protect institutions. In this context, the petitioners stressed: "the obligation to maintain and preserve the common heritage of the nation is not only incumbent on Hungarian citizens, but on everyone. Article P (1) is a pillar of the institutional guarantees of the fundamental right to a healthy environment which establishes the protection, maintenance and preservation of the natural and built environment, the values of the common, natural and cultural heritage of the nation, as a general constitutional responsibility of the State and of all and makes it their duty deriving from the Fundamental Law." The petitioners, referring to the Decision 3104/2017 (V. 8.) AB, also pointed out that the Constitutional Court interpreted the scope of protected rights broadly and made important findings in this area, including in the field of the protection of built national heritage: "In the scope of the protection of national heritage, the State thus undertakes an obligation to preserve for future generations the values it wishes to preserve, according to its capacity to bear the burden, sharing – in a constitutional sense – the prohibition of derogation established in the context of the right to a healthy environment. Once something has been placed under protection, there must be an exceptional reason to exclude it. The judge therefore has the constitutional power and the possibility to order the authority to start a new procedure in the event of a violation detected in the registration procedure."

[11] On the basis of the above-mentioned case-law of the Constitutional Court, the petitioners emphasised that Article P of the Fundamental Law and the detailed rules derived from it are uniformly protected as the institutional aspect of the right to a healthy environment. Consequently, in their view, the previous case-law of the Constitutional Court on the prohibition of step-back can be interpreted and applied also in relation to Article P of the Fundamental Law. They referred to the fact that the Constitutional Court had previously laid down its findings on the prohibition of step-back in its Decision 28/1994. (V. 20.) AB (hereinafter: "CCDec 2"). From the reasoning of CCDec 2, the petitioners underlined the following: "It follows from both the subject and the dogmatic peculiarities of the right to environmental protection that the State must not reduce the degree of protection of nature as guaranteed under law unless necessary to realise other constitutional rights or values. Even in the latter case, however, the degree of protection must not be reduced disproportionately with the goal set forth" (ABH 1994, 134, 140). The right to a healthy environment incorporates *inter alia* the responsibility of the Republic of Hungary to ensure that the State does not reduce the degree of the protection of nature as guaranteed under law, unless this

is unavoidable in order to enforce any other fundamental right or constitutional value. Even in the latter case, however, the degree of protection must not be reduced disproportionately with the goal set forth" (ABH 1994, 134).

[12] The petitioners referred to the fact that the obligation of the State to protect institutions and the prohibition of step-back have been examined by the Constitutional Court in its case-law in recent years, determining that the provisions of Article P are the concrete manifestations in the Fundamental Law of the obligation that previously formed part of the right to a healthy environment. In this context, the petitioners quoted the following from the reasoning of the Decision 3223/2017 (IX. 25.) AB: "The rationale for non-derogation as a regulatory benchmark is primarily that the failure to protect nature and the environment may trigger irreversible processes, the adoption of the regulation on the protection of the environment can only be carried out by taking into account the precautionary principle and the principle of prevention. In relation to the regulation, the Constitutional Court also stated that »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 1997, 133, 138). Article P (1) of the Fundamental Law makes this obligation even clearer and elevates it directly to the level of a fundamental right when it states that the »protection, maintaining and preservation of natural resources for the future generations is a duty of the State and of all«" (Reasoning [27]).

[13] The petitioners emphasised, on the basis of the above-mentioned case-law of the Constitutional Court, that a restriction is legitimate if it is in the interest of future generations, but that the requirement of proportionality must be taken into account. If this is not the basis for the restriction, a regression from the level of protection achieved is only possible if it is indispensable to protect a fundamental right or constitutional value.

[14] According to the petitioners, the statutory provisions of the SPPA challenged by the petition do not contain such provisions and reasons. Section 71 (4) of the SPPA merely contains the phrase "special land use and settlement planning reasons or a status quo", whereas "in the other two cases" it does not even lay down such requirements, and merely legitimises the possibility of derogating from the main rule by the fact of enacting legislation. In the view of the petitioners, this is an "incomplete system of guarantees" which does not comply with the rules prohibiting the possibility of derogating from the level of protection achieved.

[15] The petitioners further argued that step-back from the achieved level of protection can be seen not only in the enabling provisions providing for "exemption" from the general statutory rules, but also in comparison with the previous legislation.

[16] The Act CXII of 2000 on the Approval of the Spatial Planning Plan for the Balaton Priority Holiday Zone and Adopting the Balaton Spatial Planning Regulation (hereinafter: BSPR) was in force until 14 March 2019. The derogation (step-back) from the provisions of the BSPR is, according to the petition, significant, in particular, in the case of the contested version of section 75 (3) (b) and section 76 of the SPPA Paragraph 19 (3) (b) of the BSPR allowed a maximum of 15% building density for the special area beach in the event of the reclassification of a camping. Section 75 (3) (b) of the SPPA "removed" this special building density restriction, thus leaving room for the main rule on the building density of special areas. According to the petitioners, the contested provision of section 76 of the SPPA can be compared with section 19 (3) of the BSPR, which was in force until 1 January 2019 and which allowed the reduction of the size of beaches solely with a view to the creation of green areas (i.e. for a specific purpose). Under the contested provision of section 76 of the SPPA, the law-maker may derogate from this provision in a negative direction (even by a decree), i.e. the overall size of beaches and green areas may be reduced, if permitted by the SPPA or by a government decree issued on the basis of the SPPA This, according to the petitioners, is a clear step backwards from the previous situation before 2019, as the beach area can be reduced without increasing the green areas, not for the protection of natural resources, on the basis of an authorisation granted in the law.

[17] The petitioners also argued that, according to the Constitutional Court's case-law, not only provisions which "themselves" impose specific restrictions on these rights are contrary to the Fundamental Law, but also those which may serve as a basis for the development of such an official practice. In this regard, the petitioners quoted from the reasoning of Decision 14/1998 (V. 8.) AB: the challenged legislation, if interpreted in a manner inconsistent with the relevant decision of the Constitutional Court, "carries the risk of the development of an unconstitutional practice of applying of the law. A wording which refers to the determination of the burden on the environment solely in accordance with sectoral concepts could easily give the impression to those applying the law that sectoral concepts have absolute priority over environmental interests" (ABH 1998, 126, 130).

[18] The petitioners emphasised that the provisions of the SPPA challenged by the petition give the Government the opportunity to create legal regulations in the case of section 71 (4) of the SPPA in a ministerial decree, in the case of section 71 (5) of the SPPA in a government decree, while in the case of section 75 (3) of the SPPA in a local government decree, which restrict the constitutional rights detailed in the Fundamental Law and also guaranteed on the basis of the Constitutional Court's case-law.

[19] According to the petitioners, the fact that the challenged rules of the SPPA do not create the guarantee rules at the statutory level that would determine the conditions under which the relevant non-statutory rules can be created, in itself reduces the level

of protection achieved. In the absence of such statutory rules, "statutory instructions", the laws enacted result in arbitrary restrictions on fundamental rights. The petitioners point out that the statutory provisions of the SPPA challenged by the petition constitute in themselves a step backwards from the level of protection achieved, by undermining that level, since they create the possibility of limiting the level of protection without this being indispensable for the exercise of other fundamental rights or, if necessary, proportionate. The petitioners also argued that the procedural rules governing the requirement to adopt laws under the enabling statutory provisions of the SPPA and the publicity given to such legislation (in particular the "adoption procedure") are lower than that of the SPPA It was also objected that "the delegated power to restrict fundamental rights" would circumvent the Fundamental Law's rules on the restriction of fundamental rights in relation to Acts of Parliament, as laid down in Article I (3) of the Fundamental Law.

[20] In their view, the challenged provisions of the SPPA also violate the provisions of Article I (3) of the Fundamental Law, as due to the absence of guarantee rules they "delegate" law-making (regulation) to a lower level of legal source than the level of legal source necessary for the restriction of fundamental rights, which in itself is contrary to the provisions of the Fundamental Law. The petitioners explain that the restriction of fundamental rights is only possible under the conditions of laid down in Article I (3) of the Fundamental Law, accordingly, the restriction of fundamental rights is in accordance with the Fundamental Law if (a) in the case of a direct or significant restriction, it is provided for in an Act of Parliament, {Decision 23/2016. (XII. 12.) AB, Reasoning [168]}, (b) the norm restricting the fundamental right is predictable and foreseeable in its effect [Decision 31/2007. (V. 30.) AB, ABH 2007, 368, 378] [points (a) to (b) together constitute the requirement that the restriction be prescribed by an Act of Parliament], (c) it is unavoidably necessary in order to protect another fundamental right or constitutional interest or objective {Decision 6/2017. (III. 10.) AB, Reasoning [16]}, (d) the restriction is suitable for achieving the objective pursued {Decision 15/2016. (IX. 21.) AB, Reasoning [53]}, (e) the restriction is not arbitrary {Decision 14/2016. (VII. 18.) AB, Reasoning [83]} [points (c) to (e) together constitute the condition of necessity], (f) the importance of the objective to be achieved and the seriousness of the harm to fundamental rights caused in order to achieve it must be in proportion, (g) the legislator uses the least restrictive means possible to achieve the objective in question, (h) the restriction does not affect the essential content of the fundamental right {points (f) to (h) together constitute the condition of proportionality, Decision 17/2015. (VI. 5.) AB, Reasoning [103] to [104]}.

[21] According to the petition, the challenged provisions of the SPPA violate the provisions indicated in point (a), since in the absence of guarantee rules, the regulations may also restrict the essential content of the right to a healthy environment. The effect

of the regulations thus adopted cannot be foreseen, due to the absence of a prior impact assessment, which does not in itself render a law invalid under public law [Decision 24/2019 (VII. 23.) AB]. However, the absence of an impact assessment "due to the reduction of publicity" prevents the impact of decisions taken on environmental matters under the contested provisions from being assessed or, in the absence of such assessment, from being notified in a timely manner.

[22] On the basis of the above, the petitioners conclude that the challenged provisions of the SPPA do not comply with the provisions of the Fundamental Law and the Constitutional Court's case-law developed on the basis of the Fundamental Law in relation to the restriction of fundamental rights, either in form or in content.

[23] The Constitutional Court requested the Minister of Justice and the Minister in charge of the Prime Minister's Office to explain their position on the petition. The Minister of Justice and the Minister in charge of the Prime Minister's Office submitted a joint reply to the Constitutional Court, which the Constitutional Court took into account in its decision.

II

[24] 1 The provisions of the Fundamental Law referred to in the petition:

"Article I (3) The rules relating to fundamental rights and obligations shall be laid down in an Act of Parliament. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right."

"Article P (1) Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

"Article XXI (1) Hungary shall recognise and endorse the right of everyone to a healthy environment."

[25] 2 The provisions of the SPPA challenged in the petition:

"Section 71 (4) No building may be placed within 30 metres of the regulatory shoreline of Lake Balaton, with the exception of an artificial harbour and its associated buildings, unless a ministerial decree issued on the basis of the authorisation of this Act on the subject of the public land use of the waterfront areas of Lake Balaton provides otherwise due to special spatial and settlement planning reasons or a status quo.

Lawfully constructed buildings may be renovated within 30 metres of the regulatory shoreline of Lake Balaton.

Section 71 (5) During the preparation or amendment of a settlement planning plan, the maximum permissible building density and building height of the area intended for construction in the area of the waterfront areas of Lake Balaton – in relation to the building zone designated in the settlement planning plan in force at the time of the entry into force of this Act – may not be increased even in the case of a change of building zone, unless a government decree issued on the basis of the authorisation of this Act on the specific settlement planning and construction requirements for the waterfront areas of Lake Balaton provides otherwise."

"Section 75 (3) The classification of a camping area in another zone shall only be possible

(a) with a maximum of 3% building density per green area, or

(b) as special area beach."

"Section 76 Unless otherwise provided for by this Act, or a government decree issued on the basis of the authorisation of this Act, the total area of the building zone or zone designated in the settlement planning plan as a beach, camping site, green area, area of traffic in contact with the shore and the length of the shore in contact with the lake bed may not be reduced."

III

[26] The petition is well-founded.

[27] 1 The Constitutional Court first examined whether the abstract posterior motion normative review was submitted by those entitled to do so and whether it complied with the requirements for an explicit request set out in section 52(1b) of the ACC. Pursuant to Article 24 (2) (e) of the Fundamental Law, the Constitutional Court shall, on the initiative of one quarter of the Members of Parliament, review the conformity of laws with the Fundamental Law. Section 24 (1) of the ACC, referring back to Article 24 (2)(e) of the Fundamental Law, also provides that the Constitutional Court is competent to examine the conformity of laws with the Fundamental Law on the basis of the aforementioned provision of the Fundamental Law.

[28] In the case under review, the Constitutional Court found that the abstract posterior motion for normative review submitted by fifty-one Members of Parliament, and thus originated from those entitled to submit the motion.

[29] The motion also meets the statutory requirements for an explicit request as set out in section 52 (1b) of the ACC, as follows. The petitioners have indicated the competence of the Constitutional Court and the constitutional and statutory provisions on which they are entitled to base their petition [Article 24 (2) (e) of the Fundamental Law, section 24 (1) of the ACC], they have stated the grounds for initiating the proceedings, have indicated the statutory provisions to be examined by the Constitutional Court [section 71 (4), section 71 (5), section 75 (3) (b), section 76 of the SPPA], indicated the provisions of the Fundamental Law that had been infringed [Article P (1), Article I (3), Article XXI (1)], gave reasons why the provisions of the law in question were contrary to the provisions of the Fundamental Law and made an explicit request for the annulment of the provisions of the law in question with *ex tunc* effect. In the light of the foregoing, the Constitutional Court has examined the merits of the petition, made in accordance with the statutory requirement of an explicit request and submitted by the persons entitled to do so.

[30] 2 The Constitutional Court first of all reviewed the regulation of the SPPA challenged by the petition, as well as the case-law of the Constitutional Court in relation to Article P (1) and Article XXI (1) of the Fundamental Law. The Constitutional Court then had to examine whether the contested provision of the SPPA constituted a statutory provision in the field of nature protection. The Constitutional Court was also required to examine whether the contested provisions of the SPPA could be linked in substance to the provisions of Articles P (1) and XXI (1) of the Fundamental Law, in particular to the scope of the constitutional protection of the fundamental right to a healthy environment. In that context, the Constitutional Court also had to rule on whether, in the event of a constitutionally assessable substantial connection, the decrees which may be enacted on the basis of the challenged statutory provisions of the SPPA – by the persons empowered to legislate in the subject-matter specified in the statutory authorisation – are (could be) constitutionally appropriate as a source of law. The Constitutional Court was also required to rule on whether the contested provisions of the SPPA constitute a step-back in relation to the level of protection of nature in the given regulatory area (already achieved by legislation) and, if so, whether the step-back meets the primary fundamental rights test laid down in Article I (1) of the Fundamental Law.

[31] 3 The SPPA regulates the spatial planning plan of Hungary and certain priority regions.

[32] According to the preamble of the SPPA, the Parliament, taking into account the outstanding economic, social and cultural development of the country in general and of certain regions of the country, and the undeniable contribution to this development by the landscape, natural, environmental and built environment values – as elements that are finite and difficult to renew –, has adopted the SPPA in the subject-matter of

the method and the rules of land use, to pursue a more balanced territorial development of the country, to ensure efficient territorial management of spatial and economic development, rational and economical use of land and the preservation of economic, social and environmental sustainability, in line with a land use principles laid down the National Development and Spatial Development Concept.

[33] In accordance with its preamble, section 1 of the SPPA defines as the aim of the Act to determine the conditions of spatial land use for the whole country and for certain priority areas, the coordinated spatial arrangement of technical infrastructure networks, for the efficient spatial and land-use orientation of territorial and economic development, with regard to sustainable development, and the preservation of territorial, landscape, natural, ecological and cultural endowments, values, national defence interests and traditional land use, as well as the protection of resources. To this end, effective and modern spatial planning forms a continuous, regularly renewed and coordinated system together with the development strategies that shape the country's territorial image.

[34] Section 2 of the SPPA defines the scope of the Act. The territorial scope of the National Spatial Planning Plan contained in Part Two covers the entire administrative territory of the country [Section 2 (1)]. The territorial scope of the Spatial Planning Plan of the Budapest Agglomeration in Part Three covers Budapest and the settlements of the Budapest Agglomeration (Budapest Agglomeration) in Pest County as listed in Annex 1/1 of the Act [section 2 (2)]. The territorial scope of the Spatial Planning Plan of the Balaton Priority Holiday Zone regulated in Part Four covers the settlements of the Balaton Priority Holiday Zone. The list of the settlements belonging to the Balaton Priority Holiday Zone is contained in Annex 1/2 of the Act [section 2 (3)].

[35] The territorial scope of the provisions contained in Chapter XI of the SPPA covers the settlements of the Balaton Priority Holiday Zone that are not considered to be coastal and near-shore ones [section 2 (4)].

[36] The territorial scope of the provisions contained in Chapter XII of the SPPA covers the coastal and near-shore settlements of the Balaton Priority Holiday Zone, the list of which is contained in Annex 1/3 [section 2 (5)].

[37] The territorial scope of the provisions of Chapter XIII of the SPPA covers the waterfront areas of Lake Balaton, the territorial delimitation of which is established by a decree of the Minister responsible for spatial planning [section 2 (5)].

[38] The provisions of the SPPA challenged by the petition are regulated in Chapter XIII of the Act, under the heading “Waterfront areas of Lake Balaton”. The contested provisions of section 71 (4) and (5) of the SPPA are to be found in Chapter XIII, point 44, under the heading “Building density”. Section 71 (4) of the SPPA provides that no

building may be placed within a thirty-metre zone of the regulatory shoreline of Lake Balaton. Two exceptions to that general rule are provided for in the contested provision: first, an artificial harbour and its associated buildings may be lawfully built and, second, if a ministerial decree on the public use of the waterfront areas of Lake Balaton, adopted on the basis of the authorisation of the SPPA, allows a derogation from the general rule. Such a ministerial decree may be issued if justified by special spatial and settlement planning reasons or a status quo. Lawfully constructed buildings may be renovated within 30 metres of the regulatory shoreline of Lake Balaton. The challenged text of section 71 (4) of the SPPA is an exception to the rule allowing the adoption of a ministerial decree based on the statutory authorisation of SPPA, which empowers the Minister to exceptionally allow, by means of a decree on the public use of the waterfront areas of Lake Balaton, the construction of a building within the 30-metre zone of the regulatory shoreline of Lake Balaton, if justified by special spatial and settlement planning reasons or a status quo. The challenged wording of section 71 (4) of the SPPA, as a legislative enabling provision, defines the holder of the authorisation (the Minister competent in the scope of the matter), its subject-matter (the adoption of a ministerial decree on the public use of the waterfront areas of Lake Balaton) and its framework (where there are special spatial and settlement planning reasons or a status quo, the construction of a building may exceptionally be permitted within a 30-metre zone from the regulatory shoreline of Lake Balaton).

[39] Section 71 (5) of the SPPA provides that during the preparation or amendment of the settlement planning plan, the maximum building density and building height of the area intended for construction in the area of the waterfront areas of Lake Balaton designated in the zoning plan in force at the time of the entry into force of the SPPA may not be increased even in the case of a change of the building zoning. The wording of section 71 (5) of the SPPA contested in the petition creates an exception to this general rule when it states that a government decree issued on the basis of the authorisation of the SPPA on the specific settlement planning and building requirements for the waterfront areas of Lake Balaton may exceptionally derogate from the general rule. The contested wording of section 71 (5) of the SPPA, as a statutory rule empowering legislation, defines the holder of the power (the Government) and the relevant subject-matter (government decree on the subject of specific settlement planning and building requirements for the waterfront areas of Lake Balaton, issued on the basis of the authorisation conferred by the SPPA). The framework for the legislation in the form of a government decree is defined in the contested text of section 71 (5) of the SPPA only to the extent that it allows for the creation of an exception rule in the subject-matter in question, namely – as provided for in section 75 (5) of the SPPA – an increase in the maximum permitted building density and building height in the event of a change in the building zoning.

[40] The contested provisions of section 75 (3) (b) and section 76 of the SPPA can be found in Chapter XIII, point 47, under the heading "Camping and beach". Section 75 (3) of the SPPA regulates the way in which the camping area may be classified into a different zone. Pursuant to section 75 (3) (a) of the SPPA, the classification may be implemented as green area with a maximum building density of three percent or, pursuant to point (b) contested by the petition, as a special area beach.

[41] Pursuant to section 76 of the SPPA – as a general rule – the total area of the building zone or zone designated in the settlement planning plan as a beach, camping site, green area, area of traffic in contact with the shore and the length of the shore in contact with the lake bed may not be reduced. The contested wording of section 76 of the SPPA exceptionally allows for a derogation from the general rule, i.e. the reduction described above, if this is permitted by the SPPA itself or by a government decree issued on the basis of the SPPA's authorisation. The wording of section 76 of the SPPA contested by the petition, as a statutory rule authorising legislation, indicates the holder of the authorisation (the Government) and its subject-matter (the adoption of an exemption rule by means of a government decree). The authorising statutory rule does not contain any provision on the framework of the authorisation.

[42] 4 The Constitutional Court has provided an overview of its case-law in relation to Article P (1) and Article XXI (1) of the Fundamental Law, developed since the entry into force of the Fundamental Law. The Constitutional Court considered it necessary to highlight the following observations from the reasoning of the Decision 17/2018 (X.10.) AB, which summarised the relevant case-law, also to provide a guidance with respect to the case under examination:

[43] "According to the case-law of the Constitutional Court, the arguments, legal principles and constitutional connections based on section 18 of the Constitution may be used to answer the questions of constitutionality that affect Article XXI (1) of the Fundamental Law. {see for the first time in the Decision 3068/2013. (III. 14.) AB, Reasoning [46]; reinforced for example in the Decision 16/2015. (VI.5.) AB, Reasoning [90]}. The Constitutional Court pointed out that the Fundamental Law not only preserved the level of protection of the fundamental right to a healthy environment as it contains more elaborate provisions. This way the Constitutional Court developed further the environmental approach and the environmental values. [Decision 16/2015. (VI. 5.) AB, Reasoning [91]; Decision 3223/2017. (IX. 25.) AB, Reasoning [26]}" {Decision 17/2018. (X. 10.) AB, Reasoning [81]}.

[44] "It should be pointed out that the Constitutional Court stated in connection with the right to a healthy environment that although it »is not a subjective fundamental right in its present form, still it is more than just a constitutional duty (state goal) as it is part of the objective and institutionalised protection side of the right to life,

specifying the State's obligation to maintain the natural foundations of human life as an independent constitutional right« {Decision 48/1998. (XI. 23.) AB, ABH 1998, 333, 343., quoted by the Decision 16/2015. (VI. 5.) AB, Reasoning [85]}. Article P (1) of the Fundamental Law lays down the obligation of protecting the environment (extending beyond the provisions of the former Constitution) for the State and for everyone. A substantive standard of absolute character related to the state of the natural resources and thus to the conditions of the environment follows from Article P) of the Fundamental Law and it raises objective requirements concerning the State's activity at all times {CCDec 1, Reasoning [30] to [32]}. It should also be taken into account that, due to the same interests, the content of Article P) (1) – in the scope of using the environment, the reasonable management of natural resources – is closely connected to the range of interpretation of the right to a healthy environment and Article XX of the Fundamental Law is connected the same way, as the environment around us has an influence on human health. This fundamental relation is also manifested in the name of the fundamental right mentioning the securing of a »healthy environment« and this term is at the same time considered as the definition of the fundamental right's subject matter. The state of nature and of the environment determine the quality of life to a great extent. The protection of nature and of the environment are indispensable for the protection of life – not limited to human life – and health. According to the provisions referred to above, the subject of the fundamental rights' legal relationship is »everyone"« i.e. all people, the obliged party is the State, and the aspect of institutional protection is decisive and determining with regard to its content. Consequently, the acceptable level of using the environment is to be specified by the State through creating laws as well as procedural and organisational guarantees. The subject of the obligation of institutional protection by the State is not just human life as it is, but also the maintenance of the natural foundations of life in general" {Decision 17/2018. (X. 10.) AB, Reasoning [83] to [86]}.

[45] "The institution of the prohibition of step-back had been part of the content of the right to a healthy environment earlier as well. However, while the former Constitution only declared the right to a healthy environment, and it had been primarily filled with content by the case law of the Constitutional Court, after the entry into force of the Fundamental Law, it follows directly from the Fundamental Law, as the will of the lawmakers who adopted the Fundamental Law, that human life as well as its vital conditions should be protected in a way not derogating it in any way, in accordance with the generally accepted principle of no step-back. {CCDec 1, Reasoning [28]}. The prohibition of step-back is now interpreted by the Constitutional Court in unity with the principles of precaution and prevention. The Constitutional Court argued that according to the prohibition of step-back, as laid down in Article P (1) and Article XXI (1), »in every case when the regulations on protecting the environment are modified, the precautionary principle and the principle of prevention should be also taken into

account by the lawmaker as 'the failure to protect the nature and the environment may induce irreversible processes'« {Decision 13/2018. (IX. 4.) AB, Reasoning [20]}. Consequently, this substantive approach should be enforced during examining the right to a healthy environment [...]" {Decision 17/2018. (X. 10.) AB, Reasoning [87]}.

[46] The prohibition of step-back was developed as a dogmatic concept at the very beginning of the judicial practice of the Constitutional Court [first in CCDec 2, ABH 1997, 133, 140.] and it has been enforced continuously under the force of the Fundamental Law as well {Decision 3068/2013. (III. 14.) AB, Reasoning [46]; Ruling 3011/2015. (I. 12.) AB, Reasoning [10]; Decision 3114/2016. (VI. 10.) AB, Reasoning [45]; Decision 3223/2017. (IX. 25.) AB, Reasoning [28]; CCDec 1, Reasoning [28]}.

The Constitutional Court defined as follows the reason behind and the essence of the prohibition of step-back as a regulatory standard: »as the failure to protect nature and the environment may trigger irreversible processes, the adoption of the regulation on the protection of the environment can only be carried out by taking into account the precautionary principle and the principle of prevention« {most recently: Decision 3223/2017. (IX. 25.) AB, Reasoning [27]}.

According to the constant case-law of the Constitutional Court, it is a substantive requirement that a specific level of protecting the environment, once achieved, should not be decreased, as expressed in so-called the principle of non-derogation. It should be stressed on the basis of the above that the prohibition of step-back in the fields of both environmental protection and the preservation of nature was deducted by the Court from the argument that a step-back and the decreasing of the protection may trigger irreversible processes that should be prevented for the sake of preserving the foundations of (healthy) life.

The Constitutional Court points out that only step-backs, which may result in the irreparable damaging of nature or of the environment are prohibited by the principle of non-derogation deductible from the Fundamental Law. Due to the precautionary and the preventive principles, the question is if there is a chance of having a damage done. In this respect the constitutional protection of nature and of the environment have the same functional roots: they protect the conditions of (human) life. The irreparable damaging of the environment is typically the result of processes in the long run. The time-scale cannot be specified in general: a few decades, a generation's time, a century or even a longer period of time may be necessary for certain environmental damages to happen. However, damaging the nature can happen in the short run as well. Accordingly, this is the difference between the constitutional protection of nature and of the environment by interpreting Article XXI (1) of the Fundamental Law in accordance with the function of the fundamental right.

The prohibition of step-back does not apply to specifying the level of protection, but it is enforced when the law-maker derogates the already existing limitations of the environmental load that may even result in triggering irreparable processes damaging the environment. [...]

The Constitutional Court also points out that the prohibition of step-back, which forms part of the fundamental rights' aspect reaching beyond the objective institutional protection side of the right to a healthy environment, i.e. belongs to the subjective side of the fundamental right raises substantial requirements against the restrictability of the level of protection already secured by the law, in accordance with Article I (3) of the Fundamental Law. As established in the Decision 13/2018. (IX. 4.) AB, »if a regulation or a measure may affect the state of the environment, the lawmaker should verify that the regulation is not considered as a step-back and thus it does not cause any irreparable damage […]«. As established by the Court, this verification should be beyond doubt: »if, in the case of a regulation, it cannot be verified beyond doubt that it does not cause a step-back, then the constitutionality of the step-back shall be examined in accordance with Article I (3) of the Fundamental Law« (Reasoning [20] to [21]).

Consequently, on the one hand, when the environmental regulations are modified, the reference point is the level of protection achieved earlier by the norm, rather than the untouched original state of the environment or the expected level that might be scientifically justified. On the other hand, it follows from the above that the right to a healthy environment is not an absolute right, it may be restricted in accordance with the test laid down by the Constitutional Court for the restriction of fundamental rights. As interpreted by the Constitutional Court, »it follows from both the subject and the dogmatic peculiarities of the right to environmental protection that the State may not reduce the degree of protection of nature as guaranteed under the laws, unless it is necessary for the enforcement of other constitutional rights or values. Even in the latter case, the degree of protection must not be reduced disproportionately to the desired objective« {in summary: Decision 16/2015. (VI. 5.) AB, Reasoning [80]; Decision 3223/2017. (IX. 25.) AB, Reasoning [27]}.

Accordingly, the prohibition of step-back is not automatic as it is enforced according to its function. One should examine if there is a step-back concerning the level of protection, whether the step-back falls under the scope of Article XXI (1), and finally the constitutionality of the restriction manifested in the step-back should be examined in the light of Article I (3) of the Fundamental Law.

In order to answer the above questions, we need to recall that »the prohibition of stepping back applies evenly to the regulations of substantive law, procedural law and the organisational rules, applicable to the protection of the environment and the

nature, as only these together can secure the full enforcement of the principle as it follows from the Fundamental Law. [...] [...] Therefore, in order to have the prohibition of step-back enforced to its full extent, the lawmaker and the judiciary should indispensably have an attitude that enforces a long-term continuous codification and planning activity that may even arch over government cycles and that follows from the special features of the affected life situations, rather than a short-term approach, which is often based on the economy« {Decision 3223/2017. (IX. 25.) AB, Reasoning [28]; Decision 17/2018. (X. 10.) AB, Reasoning [88] to [96]}.

[47] 5 Based on the content of the challenged provisions, the Constitutional Court found that they constitute a statutory provision in the field of nature protection, as they contain provisions on the building density of the highly protected waterfront areas of Lake Balaton, and thus directly affect the existing natural state of Lake Balaton, which is a highly protected natural value.

[48] The Constitutional Court also found that, in view of the content of the challenged statutory provisions and the constitutional scope of protection of the provisions of the Fundamental Law invoked in the petition – the case-law of the Constitutional Court in this area as described above – the challenged provisions of the SPPA are directly and closely related in content to the provisions of the Fundamental Law found in Articles P (1) and XXI (1) of the Fundamental Law, in particular to the constitutional scope of protection of the fundamental right to a healthy environment.

[49] The Constitutional Court examined, in view of the existing direct and close constitutional link, whether the decrees, which may be enacted by the persons empowered to legislate in the subject-matter specified in the statutory authorisation on the basis of the challenged statutory provisions of the SPPA, (could) provide a regulation at the constitutionally appropriate level of legal source.

[50] In this context, the Constitutional Court pointed out the following in the reasoning of its Decision 23/2016 (XII. 12.) AB – confirming its previous case-law.

[51] "The Constitutional Court has already addressed the question of the level of regulation on several occasions. As pointed out in its earlier decisions, it follows from the State's obligation to ensure fundamental rights that such rights may only be restricted in a manner permitted by the current constitution [Decision 27/2002 (VI. 28.) AB, ABH 2002, 146]. In this respect, Article 8 (3) of the Fundamental Law is to be applied, according to which »the rules pertaining to fundamental rights and duties are determined by Acts of Parliament.« According to the case-law referred to above, »[...] not all kinds of relationship with fundamental rights call for regulation at the level of an Act of Parliament. The determination of the content of a certain fundamental right and the establishment of the essential guarantees thereof may only occur in Acts of Parliament; furthermore, the direct and significant restriction of a fundamental right

also calls for an Act of Parliament [Decision 64/1991 (XII.17.) AB, ABH 1991, 300].« »The promulgation of rules in the form of a regulation which are also related to constitutional rights, but which affect them only remotely and indirectly, and which are of a technical and non-restrictive nature, is not considered in itself unconstitutional [Decision 29/1994. (V. 20.) AB, ABH 1994, 155].« However, in the case of an indirect and remote connection with a fundamental right – it should be stressed that only with respect to the regulation and not the restriction – a regulation by decree is also admissible [Decision 64/1991 (XII. 17.) AB, ABH 1991, 300; Decision 31/2001 (III. 11.) AB, ABH 2001, 261]. Thus it follows that whether there is a need for statutory regulation should be determined on the basis of the particular measure depending on the intensity of its relationship to fundamental rights" {Decision 23/2016. (XII. 12.) AB, Reasoning [168]}.

[52] In the case under examination, from among the challenged provisions of the SPPA, the texts of sections 71 (4), 71 (5) and 76 of the SPPA are regulated at the level of a statutory source of law, and authorise the adoption of an exception to the general rule that enforce and guarantee the fundamental provision under Article P (1) and section XXI of the Fundamental Law and the fundamental right enjoying priority protection, by granting this authorisation for a source of law at the level of a ministerial or government decree, lower than an Act of Parliament. The contested statutory provisions of the SPPA are authorising provisions which confer the power to create, at the level of a decree as a source of law, an exception to the general rule guaranteeing the exercise of a fundamental right. The rules which may be laid down at the level of a decree "weaken" the rules guaranteeing the fundamental right and are clearly restrictive of those rules as the general rules.

[53] The Constitutional Court notes that of the challenged provisions of the SPPA, only section 71 (4) and section 71 (5) specify the exact subject-matter of the regulation of the ministerial decree or government decree that may be issued on the basis of the statutory authorisation, and only section 71 (4) sets out additional statutory conditions (framework) for the possibility of issuing a ministerial decree based on the statutory authorisation regulated therein.

[54] Pursuant to Article I (3) of the Fundamental Law and the relevant case-law of the Constitutional Court, the establishment of essential guarantees of a fundamental right may only be made by an Act of Parliament, and an Act of Parliament is also required for a direct and significant restriction of a fundamental right. In the case at issue, the challenged statutory provisions contained in sections 71(4), 71(5) and 76 of the SPPA, as statutory rules authorising the adoption of decrees, are directly and closely connected in substance with Article P (1) of the Fundamental Law and the fundamental right to a healthy environment enshrined in Article XXI (1) of the Fundamental Law. They are not only detailed rules of indirect concern, but they also create exceptions to

the guarantee rules giving effect to the fundamental right and to the obligation of the State to protect the institutions as laid down in Article P (1) and thus confer the power to restrict it at the level of a decree as a source of law. They create an exception to the State's obligation to protect institutions laid down in Article P (1) of the Fundamental Law and to the general statutory rules giving effect to the fundamental right to a healthy environment enshrined in Article XXI (1) of the Fundamental Law (create the possibility of exceptional regulation by way of decrees) by weakening the guarantees of the fundamental right to a healthy environment and by allowing its restriction, which can only be done at the level of an Act of Parliament as the source of law.

[55] In view of the foregoing, the challenged statutory provisions (texts) of section 71 (4), section 71 (5) and section 76 of the SPPA are contrary to the Fundamental Law, violate Article I (3) and, through this, Article P (1) and Article XXI (1) of the Fundamental Law, and therefore the Constitutional Court annulled them with *ex nun*c effect.

[56] 6 With regard to section 75 (3) (b) of the SPPA, the petitioners complained that it does not specify a maximum percentage of building density in the case of classification of "special area camping" or "special area beach", contrary to the BSPR previously in force, which provided for a maximum rate of 15%. [Section 19 (3) (b) of the BSPR]. This results in their interpretation that the "special area beach" can be defined (i.e. reclassified) as a "special area for construction development" under the NSPBR regulations [section 24 (2) (o) of NSPBR], and as a result, its building density can be as high as 40%. [Annex 2 to NSPBR, point 1, row 15]. In examining this element of the petition, the Constitutional Court found that section 75 (3) (b) of the SPPA does not specify the maximum percentage of the "special area beach" that can be built on, nor is any reason given for this in the relevant legislative justification. Nor is there any provision in the accompanying legislative justification to the effect that any other provision of the SPPA would be applicable to the maximum percentage of building density of a "special area beach". According to the reply of the Minister of Justice, the interpretation of the maximum percentage of building density of the "special area beach" is the same as that of a beach, i.e. 10% [section 75 (4) of the SPPA], and therefore the interpretation of the petitioners as stated in the petition as set out above is "false". According to the Constitutional Court, the lack of a statutory definition of the maximum percentage of building density of a "special area beach" in the contested provision of the law means that the interpretation of a rule at the level of an Act of Parliament directly affecting – as a guarantee of the latter – Article P (1) and Article XXI (1) of the Fundamental Law is open to dispute and, depending on its interpretation, is regulated at the level of a government decree as a source of law. In view of the existing situation violating the Fundamental Law, the Constitutional Court also declared section 75 (3)(b) of the SPPA to be in conflict with the Fundamental Law, on the basis of the reasoning set out above, and annulled it with *ex nunc* effect.

[57] Considering that the Constitutional Court had already established on the basis of the above, that the challenged provisions of the SPPA are in conflict with the Fundamental Law, it did not examine whether they violated, on the basis of the grounds set out in the petition, Article XXI (1) of the Fundamental Law, including the rule of the Fundamental Law on the prohibition of step-back (non-derogation).

[58] The Constitutional Court highlights the following as the *ratio decidendi* of the present decision. Exceptions to the (general) rules of the law guaranteeing the protection of nature, in particular its highly protected values, contained in Article P(1) of the Fundamental Law, and to the fundamental right to a healthy environment (including the prohibition of step-back) laid down in Article XXI (1) of the Fundamental Law, which ensure the fulfilment of the State's obligation to protect institutions and the enforcement of the fundamental right, may only be regulated at the level of an Act of Parliament, and cannot be constitutionally "subdelegated" to the level of decrees a source of law. When the law-maker drafts these exception rules, it is the legislator's responsibility to demonstrate that the exception rules do not weaken the general rule either in the field of the State's obligation to protect institutions, or the fundamental right to a healthy environment – in particular with regard to the prohibition of step-back –, and do not constitute a restriction of the fundamental right contrary to Article I (3) of the Fundamental Law.

IV

[59] According to the first sentence of section 44 (1) of the ACC, this decision shall be published in the Hungarian Official Gazette.

Budapest, 28 June 2022.

Dr. Tamás Sulyok,
President of the Constitutional Court, rapporteur,
Justice of the Constitutional Court

Dr. Ágnes Czine, Justice of the Constitutional Court

Dr. Egon Dienes-Oehm,Justice of the Constitutional Court

Dr. Tünde Handó, Justice of the Constitutional Court

Dr. Attila Horváth, Justice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi, Justice of the Constitutional Court

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Imre Juhász* unable to sign

Dr. Miklós Juhász, Justice of the Constitutional Court

Dr. Zoltán Márki, Justice of the Constitutional Court

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Béla Pokol* unable to sign

Dr. László Salamon, Justice of the Constitutional Court

Dr. Marcel Szabó, Justice of the Constitutional Court

Dr. Mária Szívós, Justice of the Constitutional Court

Dr. Balázs Schanda, Justice of the Constitutional Court

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Péter Szalay* unable to sign