Allotment of areas zoned for public service and institutions

The question is whether available areas that are zoned for public service or institutions in the planning basis may be assigned to a developer without further ado, i.e. without notices and without giving other citizens a chance of obtaining the areas. The immediate answer is yes, of course.

Section 41 of the Planning Act states that the municipality is obligated to publish notices on available areas. Section 42 states that, before a final decision is made regarding area allotment, the application is to be made public, unless the application complies with the planning basis. The Planning Act does not specifically mention separate notices on available areas, deadlines, drawing of lots etc. Municipalities have specified details on the area allotment procedure in town plans (section 22).

Case 1: A municipality zones a plot for a new town hall. According to section 29, the municipality is to promote the implementation of the town plan, i.e. when the plot is zoned for town hall, the municipality is to promote the establishment of a town hall. Pursuant to section 45, sub-section 4, the municipality may demand to see documentation of the technical and financial feasibility of an application. According to section 29, this means that the municipality is to ensure that whoever is granted the area allotment will be capable of operating a town hall. Equal treatment is secured when everyone in a position to utilise the area allotment is allowed to submit an application. In this case, the number of potential applicants is one. It is easy when the authorities are the only one capable of running the business on the area, since only the municipality has a legal title to act as municipality within the municipality.

Case 2: It becomes slightly more blurry when it comes to public service and institutions that may be handled by private parties as well. To present a case on the opposite end of the scale, let us say that the mayor during elections promised to build a large number of homes. A contractor (let us call him “S”) offers to build the promised homes, provided that S is granted all of the areas which have been zoned for this purpose. Is the municipality entitled to say that the municipality is to secure construction of the homes, and that – based on a technical and financial analysis – S is considered the only one capable of carrying out the project, and that equal treatment is safeguarded, even though only S was approached? The answer is clear: No. Why not? Below are the criteria upon which the municipality’s decision is to be based, if notices, drawing of lots etc. are to be skipped:

1. **Legal title to offer public service or run institutions**

The municipality may set out in the town plan that an increase in the number of homes is to be promoted, but that goal may be fulfilled in many ways. Homes are not a public service only offered by public authorities. In order for the municipality to set aside areas for itself, the public service or the institution for which the area is to be used is to have authority in an act, either as an obligation (so-called “has to-provision”, obligatory) or as an option (so-called “may-provision”, optional). If there is a statutory basis for the municipality to offer a service or run an institution, the municipality may grant itself an area allotment. Service and institution are to be understood in the broadest sense to include, e.g., infrastructure.

2. **Purely public, private and public, or purely private activities. Operational responsibility.**

Public service and institutions where the public authorities are responsible for operations are uncomplicated, such as town halls, facilities, infrastructure etc. This goes whether operation is outsourced.

What matters is that the public authorities are responsible for providing a service. The public authorities may reserve areas for itself to the extent necessary to carry out the activity authorised by law.

A number of activities may be carried out by private or public actors, such as schools, dormitories and senior housing. Without going into the specifics on the basis for such activities, a vital feature is that they are defined by an act or an executive order, and that the public authorities may or have to make them available as a public service or institution. If that is the case, the municipality may also grant itself areas for these. For instance, the municipality may grant itself the area for a municipal school, even though private parties may also want areas for a school. Without factual reasons, the municipality is not allowed to prevent private parties from securing an area for a private school, but the municipality is obligated to secure school facilities, and thereby areas for these, to the extent that is necessary to secure municipal school operation.

Altogether, the municipality is obligated to secure enough schools, municipal or private, so it is entirely plausible that a municipality zones an area for a private school. In that case, the municipality cannot reserve the area for a specific applicant, though. The municipality may think that this applicant is the only viable one, and that may be so, but the provisions of the Planning Act aim to ensure that the field of applicants is analysed and that any others are allowed to apply.

The vital matter is the responsibility for the activity. Operations may be outsourced to private parties, but as long as the municipality is responsible, the municipality may grant itself an area. For that matter, the municipality could grant itself areas for all of the schools that were necessary to establish, public as well as private, and then lease school buildings to private persons. Without factual reasons, the municipality would still not be allowed to prevent private persons from building their own school on their own areas, but the municipality may grant itself areas to the extent necessary.

3. Public-private cooperation

What raised the question was an airport – it might also be a port – established and operated by private parties in partnership with public authorities. For the public authorities to be involved, the activity is to be in accordance with the law, as stated above. This means that the area allotment has to belong to the public authorities, or that it is otherwise ensured that the area allotment follows the activity, rather than any private provider.

In case of infrastructure, it may often be that the minimum of service to be secured by the public authorities can be combined with increased private activity. For instance, it only takes a small port to meet the statutory requirements regarding infrastructure, whereas a large port is capable of accommodating more cruisers. In other words, private investors are involved in the project because of the additional income generated by increased tourism.

There are no problems if there are factual reasons for the public authorities to get involved in the project, and if the area allotment is granted to the public authorities – alternatively linked to the activity by means of legislation other than the Planning Act.

There is a range of more or less public company structures, and the main thing is whether they carry out assignments with a statutory basis. In some cases, it may be difficult to decide whether a company

structure is public or private. One criterion may be whether it is governed by the Case Administration Act and the Access to Public Administration Files Act.

4. Only one applicant, pursuant to other legislation

Take a mine that needs a port. It may be a poor example because mines are governed by the Minerals Resources Act, but still. The mine is isolated and needs a port. It is not realistic that any others would need a port in that specific location. In the eyes of the Planning Act, this reason does not suffice, because in principle we do not know if any others are interested. However, the Minerals Resources Act or, e.g., the Tourism Concession Act makes it possible to grant exclusive rights to an activity within a specific area, thereby linking area allotments in the area to the activity.

5. A preferred applicant

This is not a criterion – in fact, it is an illegal criterion. You may set out detailed provisions for an area based on the principles of the town plan and thereby rule out incompetent applicants. But in principle, the municipality places a bar at a certain height, given the requirements specified for the project in the detailed provisions and the requirements for the technical and financial feasibility pursuant to section 45, sub-section 4 of the Planning Act. Lots are drawn (or another objective criterion is applied) among the applicants that passed the bar. It is not possible to assess that a certain applicant passed the bar to a greater extent or in a more satisfactory manner. In other words, it is not valid to state that one applicant seems more technically or financially robust than another, or that the municipal council believes that one applicant will be able to contribute to implementing the town plan more so than the other applicants. Anyone who meets the listed requirements is to be treated equally.