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ZONING PLANS, AMENDMENTS AND LEGAL ACTIONS FOR CANCELLATION OF ZONING PLANS

Selim Dündar
Attorney-at-Law, LL.M.

Alper Utaş
Attorney-at-Law, LL.M.

1. Zoning Plans in General

Two of the main problems brought by urbanization are the supply of living areas to the residents and prevention of negative issues brought by unplanned settlement. For these reasons, central or local administrations prepare plans by taking into account the life style, character, population, area, service and structural relations and connections with external world of the areas constituting living areas and they inspect the progress of settlement to advance in accordance with such plans. The plans prepared for such purposes are called zoning plans. In this article, firstly the types of zoning plans will be examined and then pendent durations, administrative objections and actions related to these plans as well as their reasons will be elaborated.

The zoning plans may be examined under four main headlines. As a matter of fact, zoning plans are separated into four types as (i) regional plan, (ii) environmental plan, (iii) master development plan and (iv) implementation development plan in the Zoning Code (Law No. 3194, published in the Official Gazette dated May 9, 1985 and numbered 18749) ("**Zoning Code**"). These plan types are elaborated below:

a. **Regional Plans :** These are the plans prepared in order to specify the trends of social and economic development, development potentials of the settlements, sectoral aims, distribution of activities and infrastructure. Not being solely a physical plan, regional plans involve a number of policies. The authority to create or order creation of such plans belongs to the Ministry of Development.

b. **Environmental Plans :** These are the plans which specify, in accordance with the regional plans, the settlement and land use decisions for residential, industrial, agricultural, tourism, transportation areas. Environmental plans are drawn through association with the relevant regional plans for the areas which are metropolitan areas or which remain under interest or domain of multiple settlements aspired to be planned together. While they do not have a specific definite scale, they are prepared at a scale of 1/100,000 or 1/25,000 and contain whole of the relevant area.

c. **Master Development Plans :** These plans are drawn on the regional or environmental plans (whichever one existing) through inscription of cadastral

status and show general use functions, main region types, future population densities of regions, (in case it is necessary) structural densities, development direction, sizes and principles of various settlement areas, transportation systems and problem resolution methods of//for the relevant lands. These plans also function to be the source for the implementation development plans. Such plans are explained through a detailed report and constitute a whole along with their reports.

In other words, master development plans determine the general purposes, principles and land use decisions within a report. Metropolitan municipalities are the only authorities in preparation of these plans within the borders of the metropolitan municipalities. In the provinces which are not metropolitan municipalities, relevant provincial or county municipalities are authorized to prepare master development plans. Amendments to the master development plans are only possible through amendments of the plans of same or superior level nature. Map scale of master development plans are generally 1/5,000; however, they may also be prepared at a scale of 1/10,000 or 1/25,000.

d. Implementation Development Plans : Implementation development plans are the plans with the least level of scale. These plans are drawn in accordance with the principles of the master development plans. They set forth, in detail, the settlement and structural order, density and order of the construction blocks, roads, implementation phases which constitute the source of zoning implementation programs as well as other phases and other relevant information. Although they generally have a scale of 1/1,000, they may be drawn at scales of 1/2,000 or 1/500. The authority to prepare implementation development plans belong to the relevant provincial or county municipalities.

2. Main Principle Shaping the Zoning Law: Hierarchy of Plans

The most important principle shaping the zoning law is that a plan with a lower scale cannot be in contradiction with a plan with an upper scale (e.g., implementation development plans cannot contradict with the master development plans). This is called the hierarchy of plans. As per this principle, plans with a lower scale shall conform to the main principles, strategies and decisions of planning set forth in the plans with an upper scale. This principle is also upheld in the Turkish State Council (Supreme

Administrative Court) decisions.[1] For example, the State Council, in one of its decisions, held that conversion of a land, which has been designated as an area for health facilities in a 1/5,000 scale master development plan, into a residential area at a 1/1,000 implementation development plan is in violation of the law and objective characteristic of the master development plan. From this point, non-conformity of a lower scale plan with an upper scale plan is unlawful and therefore constitutes a reason for cancellation of the relevant plan.

3. Administrative and Judicial Procedures Related to Zoning Plans

a. How Are the Zoning Plans Prepared or Zoning Plan Amendments Made?

As elaborated above, the authority of preparation or amendment of zoning plans (as to which institution – e.g., metropolitan municipality, provincial municipality or county municipality – would have such authority) would depend on the type of the zoning plan, the location of land which is subject to zoning (as well as whether such location is in the borders of multiple provinces or not). For example, the authority to prepare master development plans belongs to the metropolitan municipality in an area within the borders of the metropolitan municipality.

The zoning plans are, as a rule, generally prepared by the municipality authorized to prepare them and approved by the relevant municipal council. Subsequent to such approval, they obtain the status of an administrative act which may be implemented. As per Article 8/1(c) of the Zoning Code, the approved plans are announced concurrently for a period of one month in the announcement areas determined by the relevant municipalities as well as their websites. This is called the "pendency period".

"Those concerned" may object to the plans within the one-month pendency period. However, it is a matter of discussion who "those concerned" are. Such persons may be the owner of the area subject to zoning, a real person or legal entity resident in the area or a state institution whose interests are injured.

The objections to the zoning plan or amendment made by "those concerned" are

1 Decision of the Sixth Chamber of the State Council dated May 14, 2010 with Docket No. 2008/6920 and Decision No. 2010/4743.

sent by the municipality to the municipal council. Municipal council examines such objections within 15 days following the objection date and delivers a final decision on them. In practice, it is observed that these objections are rejected almost all the time by the municipal council. In case of such a rejection, "those concerned" may bring a judicial action for cancellation of the administrative act (i.e. final zoning plan or amendment).

b) Bringing a Judicial Action against Zoning Plans or Amendments

Actions brought for the cancellation of zoning plans (i.e. administrative acts) are under the jurisdiction of administrative judiciary. Accordingly, such actions are to be brought either before the administrative courts or State Council, depending on the administrative institution making the administrative act. These cases cannot be brought before the civil courts.

As per Article 34 of the Law of Administrative Judicial Proceedings (Law No. 2577 , published in the Official Gazette dated January 20, 1982 and numbered 17580) ("**Code of Administrative Judicial Proceedings**"), "In implementation of the legal framework related to the immovable property such as zoning, [...], occupancy or in relation to all rights about these and public assets, the court with jurisdiction is the court whereby the immovable property is located." Accordingly, the court with jurisdiction in the cancellation of zoning plans is to be determined in accordance with where the immovable property is located.

As per Article 7 of the Code of Administrative Judicial Proceedings, the time period to bring an action before the administrative judiciary is 60 days normally starting from the date of the announcement (this date would start from the announcement or presumption of rejection of objection in cases where there has been objection in relation to the relevant plan or amendment). This time period is lapse period causing the lapse of the right to bring an action. Accordingly, the right to bring an action which is not used in its due time would lapse and then no direct actions will be able to be brought in relation to the same subject. For this reason, in terms of ownership protection and liability, these actions must be strictly brought in due time.

Two elements are of specific importance on this matter. Firstly, without completion of the pendency (announcement) period, no action for cancellation of zoning

plans (or amendments) may be brought. This is because the zoning plans would not be final (and therefore applicable) unless the pendency (announcement) period is completed. Without completion of such 30-day pendency (announcement) period, any action would be premature and rejected, since there would not yet be any final and applicable administrative act.

Secondly, in case no action would be brought within the time periods indicated above, then no direct action would be brought with the request for cancellation of zoning plans or amendments. However, when an action is brought against the subsequent implementation acts by the administration, cancellation of zoning plans or amendments may be requested. In other words, when an action is intended to be brought against a zoning plan's implementation acts such as construction license, zoning status, parcellation, expropriation, etc., then cancellation of the zoning plan (which is the source of all implementation acts) as well as other upper level plans may be requested. In such case, the rights of action of "those concerned" would not be lost.

4. Main Reasons for Unlawfulness in the Actions for Cancellation of Zoning Plans or Amendments

It should initially be indicated that the zoning plans are, as a rule, non-amendable. They can only be amended in cases required by the public benefit. For amendment, the required conditions (elaborated in further detail below) shall be fulfilled and in case such conditions are not met, the zoning plan or the amendment may be cancelled.

Main reasons for unlawfulness are as below:

a. Non-Obtainment of the Opinion of the Investor Institution: The opinion of the investor ministry or institution, who would execute the project for the relevant facility (e.g., park, hospital, religious buildings, road, school, etc.) located in the social and technical infrastructure area to be amended in the zoning plan, should be obtained. In case the opinion of the investor institution (e.g., ministry, governorship, directorate, etc.) is negative, this would not mean that the plan may not be amended. In other words, even if the investor institution has given a negative opinion, plan amendment may be made. The final decision for this is to be given by the municipality. However, the investor institution has the right to bring an action against the administrative act (i.e.,

amendment).

In one of its decisions, the State Council has found a municipal council decision unlawful because of the fact that the municipal decision has adopted its decision without showing the elements requiring the plan amendment and without obtaining the opinion of the relevant institutions.[2]

b. Non-Allocation of an Equivalent Area: Social and technical infrastructure areas in the zoning plans cannot be removed, made smaller or relocated unless there is a mandatory element. In case such an amendment is made, a new equivalent area shall be allocated in the region whereby the service taken by the facility that is removed, made smaller or relocated. For example, in case an area designated as a park gets to be converted into a residential area, then another area in the same neighborhood with characteristics to be used as a park and with the same size shall be allocated as a park area. Again, in case we replace the park in the above-mentioned example with a car park (a technical infrastructure area), then the same would apply.[3]

c. Plan Integrity Cannot Be Deformed with Amendments: In case of any contemplated zoning plan amendment, population in the area, density, supply balances and requirements shall be researched and it should be examined whether the plan amendment is mandatory. In case it is not mandatory, it would be unlawful to amend the plans in a manner deforming the plan integrity.

d. Compliance of the Zoning Plan and Amendments with the Urbanism and Planning Principles and Public Benefit: As per Article 11 of the Regulation on Spatial Plan Making (published in the Official Gazette dated June 14, 2014 and numbered 29030) ("**Spatial Plan Regulation**"), in preparation of the zoning plans, the assessment shall be made by taking the future concerns in the account together with the current concerns in order to establish a healthy and orderly environment in the future. Accordingly, the public benefit principle would then be taken into account. As also explained above, the plan hierarchy should be taken into account. These are stand-alone reasons for cancellation.

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2 Decision of the Sixth Chamber of the State Council dated October 25, 1989, with the Docket No. 1988/479 and Decision No. 1989/982.

3 *ibid*.

e. Non-Obtainment of the Opinion of the Plan Author or Non-Existence of a Plan Author: As per Article 28 of the Zoning Code and the Regulation on Qualifications of the Authors Undertaking Plan Making (published in the Official Gazette dated January 7, 2006 and numbered 26046), the zoning plans and amendments are to be prepared by plan authors who have the qualification license. In cases which there is no plan author, the reasoned opinion of the author has not been taken for amendment or the amendment has been prepared by the plan author who does not have qualifications, such acts are deemed unlawful.

f. Non-Conformity with Procedural Rules in Amendment of Zoning Plans: Non-conformity with the procedural rules set forth in legislation and regulations for amendment of zoning plans or attendance of a municipal council to the meetings during discussion of an amendment relating to his/her immovable property (i.e., house, land, etc.) constitute examples to the reasons of cancellation.

g. Narrowing of a Road with Continuity or Creation of a Dead End Street: As per Article 26 of the Spatial Plan Regulation, certain regulative norms are stipulated for plan amendments. For example, a road with continuation cannot be narrowed at certain areas. Traffic roads cannot be narrower than 10 meters whereas pedestrian ways cannot be narrower than 3 meters. Again, plan amendments through creation of dead end streets by municipalities are unlawful. However, in determination of lawfulness in certain cases involving imperativeness in administration's zoning-related actions, the State Council has taken the necessities required by public benefit into account.[4]

4 Decision of the Sixth Chamber of the State Council dated February 17, 1988, Docket No. 1987/630 and Decision No. 1988/235.