THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT
ON BEHALF OF THE REPUBLIC OF LATVIA
Riga, 17 January 2008
in case No. 2007-11-03

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Juris Jelāgins, Kristīne Krūma, Uldis Ķinis and Viktors Skudra,

with the secretary of the hearing of the Court, Arnis Žugans,

with participation of the representatives of the applicant – association "Coalition for Nature and Cultural Heritage Protection" *(„Koalīcija dabas un kultūras mantojuma aizsardzībai"*) – Aiga Grišāne and Sandra Jakušonoka,

with participation of the representatives of the institution that adopted the contested act – the Riga City Council – Agris Bitāns, Ginta Sniedzīte, Pēteris Strancis and Gvido Princis,

according to Article 85 of the Satversme [Constitution] of the Republic of Latvia and Article 16, 3rd indent, Article 17(1), 11th indent, and Article 19.2 of the Constitutional Court Law,

in Riga, on 11 and 18 December 2007, in a public hearing, examined the case,

"On Compliance of the Part of Riga Land Use Plan 2006 – 2018 Covering the Territory of the Freeport of Riga with Article 115 of the Satversme [Constitution] of the Republic of Latvia".

The Facts

1. The Riga Land Use Plan[1] 2006 – 2018 (hereinafter also – the Land Use Plan) is regarded as a separate document in the framework of the documentation for the long-term territorial planning entitled "Riga City Development Plan 2006 – 2018" (hereinafter also – the Development Plan). The Development Plan consists of three interrelated documents, namely, Riga Long-Term Development Strategy until 2025, Riga Development Programme 2006 – 2012 and the Land Use Plan.

1.1. Drafting of the Land Use Plan was commenced on June 4 2002, when the Riga City Council (*Rīgas dome*) adopted the Decision No. 1385 "On Commencement of Drafting of the Riga Development Plan 2006 – 2018".

On 1 November 2004, the Environmental Impact Assessment State Bureau adopted the Decision No. 53-p to apply the procedure of strategic assessment of environmental impact to the Development Plan.

After the adoption of the Decision, the Riga City Council and the Riga Centre for Sustainable Development "Agenda 21" initiated the strategic assessment of environmental impact (hereinafter – the Strategic Assessment) and drafted the Environmental Report for the Riga City Development Plan 2006 – 2018 (hereinafter – the Environmental Report). The Strategic Assessment was performed for the Riga Development Plan as a whole, without a separate assessment of the Land Use Plan.

On 15 November 2005, the Riga City Council adopted the Decision No. 584 "On Adoption of the Final Version of the Riga Land Use Plan 2006 –

[1] The term 'Land Use Plan' in other translations of legal acts in Latvia is substituted by term 'Spatial Plan'.

2018, Approval of the Riga Long-Term Development Strategy until 2025 and Approval of the Final Version of the Riga Development Programme 2006 – 2012".

On 23 November 2005, the Environmental Report was submitted to the Environmental Impact Assessment State Bureau (hereinafter – the Bureau), and on 16 December 2005, the Bureau adopted Resolution No. 24 "On the Environmental Report of the Riga City Development Plan 2006 – 2018" (hereinafter – the Resolution of the Bureau).

On 19 December 2005, the Ministry of Regional Development and Local Government submitted an Opinion on the Draft Development Plan dated 15 November 2005 to the Riga City Council. In this Opinion, compliance of the Development Plan with the requirements of the law effective at the time of drafting was assessed.

On 20 December 2005, the Riga City Council approved the Land Use Plan by adopting the Decision No. 749 "On Approval of the Riga Land Use Plan 2006-2018". Under Paragraph 1 of the above Decision, the graphic part of the Land Use Plan and Riga City land use and building regulations were adopted as the Riga City Council Regulation No. 34 "Riga City Land Use and Building Rules" dated 20 December 2005. The Decision was published in the newspaper "Official Gazette" on 3 January 2006.

1.2. Article 2 of the Law On Ports provides that a port is a delimited part of Latvian onshore territory, including artificially created banks, and such part of inland waters, including inner and outer roadsteads and fairways in the port entrance, as is set up for the servicing of ships and passengers, for the conduct of freight, transport and expedition operations and other economic activities. Under Article 1 of the Law on Freeport of Riga, the territory of the freeport is a part of the territory of the Republic of Latvia, within the borders of the Freeport of Riga as determined by the Cabinet.

Under Article 3 of the Law On Ports, the boundaries of a port, including territories which, taking into account their geographical situation, might be

used for prospective development of the port, including State public-use territories of railway infrastructure right of way, are determined by the Cabinet upon a recommendation of the relevant local government, port authority and administrator of the State public-use railway infrastructure.

During drafting and adoption of the Land Use Plan, the territory of the Freeport of Riga (*Rīgas brīvosta*) was determined by the Cabinet of Ministers Regulation No. 516 of 11 December 2001 "On Delimiting the Boundaries of the Freeport of Riga" (hereinafter – Regulation No. 516). After the Land Use Plan came into force, the boundaries of the Freeport of Riga were changed because the Cabinet of Ministers adopted Regulation No. 690 of 22 August 2006 "On Delimiting the Territory of the Freeport of Riga" (hereinafter – Regulation No. 690).

According to Article 7(3), 1st indent of the Law On Ports, The port authority in its capacity of a body governed by private law shall formulate a draft programme for the development of the port in accordance with the approved development concept for the ports of Latvia and the development programme of the relevant city and the land use plan, and it shall ensure the implementation of the port development programme as approved by the Latvian Ports Council.

As to the Freeport of Riga, the Freeport of Riga Development Programme 1996 – 2010, as amended on April 2007 to ensure its compliance with the Land Use Plan, is in force.

On 10 August 2005, the Bureau adopted the Decision No. 2 "On the Application of the Strategic Assessment Procedure to the Freeport of Riga Development Programme". A draft of the Freeport of Riga Development Programme 2003 – 2015 was prepared but was not approved by the Latvian Ports Council.

On 12 June 2007, the Freeport of Riga Council decided to draft a Port Development Programme for 2008 – 2018.

2. The association "Coalition for Nature and Cultural Heritage Protection" (hereinafter – the Applicant) – claims that the part of the Land Use Plan regarding the territory of the Freeport of Riga (hereinafter – the Contested Plan) is contrary to Article 115 of the Satversme [Constitution] of the Republic of Latvia (hereinafter – Satversme).

By referring to the case-law of the Constitutional Court of the Republic of Latvia, the Applicant noted that, under Article 115 of the Satversme, the State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment. This provision, first, places an obligation on the State to establish and ensure a system for an effective protection of the environment. Second, it confers the right on private law persons to challenge the decisions of persons governed by public law, according to the procedures established by law, that infringe the rights of persons in the field of exploitation and protection of environment. Land use planning is regarded as one of the branches of the environmental law.

The Applicant submits that, when drafting the Contested Plan, a number of violations of procedural and substantial law were made, and in case the Contested Plan remains in force, an irreversible harm might be inflicted on the environment. Moreover, there are activities carried out in the territory of the Freeport of Riga that are illegal until strategic assessment has not been performed for the respective territory according to the procedures established by law.

2.1. The Applicant draws attention to several procedural violations, the most relevant of which is failure to perform a strategic assessment for the Contested Plan according to the requirements of regulatory enactments.

The Contested Plan was not subjected to a sufficiently detailed strategic assessment and therefore it was not sufficiently assessed whether it is possible to designate production and industry as the main authorised (planned) use. Moreover, when drafting the Environmental Report for the Riga Land Use Plan, the impact of the planned zoning of the territory on the protected nature

area of European significance (hereinafter – *Natura 2000* territory) has not been assessed.

The Applicant drew attention to the fact that, if compared to the Riga Development Plan 1995 – 2005 (hereinafter – 1995 Development Plan), such use as might cause unfavourable consequences for the environment, the society and particularly for persons living in the territory of the Port and in its vicinity, is designated for a large part of the territory of the Freeport of Riga. For instance, the Krievu Island zoning has been changed from a green zone function to that of a production and industry territory. Moreover, physical transformation of the territory is permitted. Production is also designated as the planned use of the territory on the Žurku Island and in the Spilve Area.

Although no strategic assessment for the territory of the Freeport of Riga had been duly performed, in the territory of the Freeport of Riga, especially on the Krievu Island there are certain activities taking place on the basis of the Development Plan. The Applicant submits that the Freeport of Riga Council misleads businesses by permitting economic activities in the territory of the Freeport of Riga before the required strategic assessment is performed according to the procedure provided for by law.

When drafting and adopting the Contested Plan the requirements of the Law "On Specially Protected Nature Territories", the Law "On Environmental Impact Assessment", as well as the Cabinet of Ministers Regulation No. 157 of 23 March 2004 "Procedures for Strategic Environmental Impact Assessment" (hereinafter – Regulation No. 157) have not been observed. Moreover, the strategic assessment of the Contested Plan has been carried out contrary to the principles of environmental impact assessment. The Applicant particularly emphasises that the precautionary principle has not been observed, namely, the strategic assessment has not been carried out at the earliest possible stage of the planned activity and decision making. The Contested Plan is in conflict with the principle of sustainable development.

Article 175 of the Treaty Establishing the European Community has not been observed. It provides that the Environmental policy of the Community

must *inter alia* affect preservation, protection and improvement of the quality of the environment, protection of human health, as well as prudent and rational utilisation of natural resources, and the policy must be based on the precautionary principle. Likewise, the Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (hereinafter – Directive 2001/42/EC), Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (hereinafter – Directive 79/409/EEC) and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereinafter – Directive 92/43/EEC).

Amending the final version of the Land Use Plan without submitting the updated version to public consultation procedure should be regarded as a substantial procedural violation. Such requirement follows from the Land Use Planning Law and Regulation No. 883 of 19 October 2004 by the Cabinet of Ministers "Procedure of Municipal Land Use Planning" (hereinafter – Regulation No. 883).

The fact that the procedure set out in Regulation No. 883 regarding the procurement of opinions from the institutions mentioned in Section 13 of the this Regulation has not been observed should also be regarded as a substantial procedural violation. The Applicant emphasises in particular that no opinion regarding the final version of the Land Use Plan has been received from the Public Administration of Cultural Heritage. Moreover, taking into account the fact that after the approval of the final version of the Land Use Plan, on 15 November 2005 amendments were made to the Land Use Plan, not only a repeated public consultation, but also a repeated receipt of opinions from all institutions mentioned in the Cabinet Regulation and in the terms of reference was necessary.

2.2. The Applicant submits that, when drafting and adopting the Contested Plan, important provisions of substantial environmental law have also been

disregarded. For instance, the requirements of the Shelter Belt Law[2] have not been observed. Moreover, establishment of an industrial zone in the protection area of a cultural heritage and in the vicinity of a protected monument is contrary to the requirements established by the Cabinet of Ministers Regulation No. 474 of 26 August 2003 **"**Rules on Registration, Protection, Use, Restoration of the Monuments of Culture, the Pre-emption Rights of the State and Granting of the Status of the Object Degrading the Environment".

The Applicant draws attention to the fact that according to the Development Plan and according to the Riga City Land Use and Building Rules (hereinafter – Building Regulation), broad possibilities of territory transformation were opened – to alter the bank of the Daugava, fill coves and washes, and this could be done by simply receiving a permission to carry out repair works in the territory of the port. Transformation of a territory is also planned in the areas that are recognized as potential micro-reserves, namely, on the Krievu Island, the Žurku Island and in the Spilve Area. There exists a possibility that valuable nesting ground of birds that currently is located outside the protected area, will be destroyed, which would be in conflict with the Directive 79/409/EEC.

The Applicant submits that Section 2.8 of the Building Regulation, which provide for a possibility to amend the above regulations without making amendments to the Land Use Plan, should be regarded as illegal since, according to Regulation No. 883, amendments to a land use plan can be made only within the framework of the process of land use planning, i.e., by drafting and adopting amendments to the Land Use Plan according to the procedure required by law.

2.3. The Applicant submits that the inclusion of the residential area of Kundziņsala into the territory of the Freeport of Riga has taken place without any socio-economical justification and contrary to the results of the public consultation.

[2] The term "Shelter Belt law" is also translated as „Protective Zone law" in other translations in Latvia.

The Applicant emphasized that, when drafting the Land Use Plan, the United Nations Educational, Scientific and Cultural Organization's Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter - Convention for the Safeguarding of the Intangible Cultural Heritage) has been disregarded. As a result of an eventual implementation of the Land Use Plan, the living conditions would be worsened: for instance, access to the Daugava in Daugavgrīva, Bolderāja and Mangaļsala would be restricted. Moreover, it is possible that the inhabitants of Kundziņsala will have to leave their places of residence when the Freeport of Riga takes over these territories. After introducing such considerable changes in the Development Plan, its compliance with the Convention for the Safeguarding of the Intangible Cultural Heritage has not been analyzed, and there is a reason to consider that the Convention is being violated.

3. The institution that passed the Contested Act, the Riga City Council – indicates that the Contested Plan was drafted in accordance with the applicable legislation and therefore complies with Article 115 of the Satversme.

The Riga City Council recognises that Article 115 of the Satversme provides for the rights to live in a benevolent environment; however it does not guarantee the rights to conservation of the environment. The rights of a person to live in a benevolent environment are implemented according to the order and form established by and on the basis of law. The City Development Plan is one of the forms how the rights of persons to live in a benevolent environment are implemented.

The Development Plan has been drafted by ensuring a sustainable and balanced development. The Riga City Council submits that, in general, the Freeport of Riga development scenario provides for the implementation of pre-conditions for protection of the historical heritage of the Riga City and improvement of welfare of the inhabitants of the City and its visitors, including

amelioration of traffic organization and reduction of pollution by simultaneously not interrupting the economic activity of the Freeport of Riga.

3.1. The Riga City Council submits that the Contested Plan was subject to an appropriate strategic assessment according to the procedures established by the law. The Environmental Report includes an assessment regarding the territory of the Freeport of Riga to the extent required by the Land Use Plan, namely, the Environmental Report covers only the most important aspects of activities and development of the Port. It is in conformity not only with the formulation of the Land Use Planning Law, but also with the Article 23^5 (1) of the Law On Environmental Impact Assessment.

An equally detailed strategic assessment for both the Land Use Plan and the Freeport of Riga Development Programme would be contrary to the considerations of usefulness. The situation would be absurd if a project planned in the territory of the Freeport of Riga were subject to two strategic assessments and furthermore to the environmental assessment. Hence the law permits and even requires a more detailed strategic assessment for the Freeport of Riga later, i.e. in the framework of the strategic assessment of the Freeport of Riga Development Programme.

The main purpose of the Land Use Plan is to establish the limits of operations of the Port in the common scheme of the city infrastructure plan. The purpose of the Development Programme, however, is to specify the land exploitation options for the territory of the Port thus allowing businesses who are currently or potentially working in the port to plan their operations and development thereof in the territory of the port. Yet, the representative of the Riga City Council also explained that the Freeport of Riga Development Programme is a document of a 'programmatic character', rather than a 'planning document'.

When planning the development of the Freeport of Riga, it is important to take into account the historical development of the territory of the Port by thus ensuring observation of the principle of continuity and succession. The development of the Freeport of Riga since 17^{th} century must be considered, as

well as the fact that construction on the Krievu Island was planned already in 1933. Natural changes of the Daugava riverbed should also be acknowledged.

Concerns expressed in the resolution of the Bureau regarding the need to eliminate possible contradictions between the Land Use Plan and the Port Development Programme will be taken into account when the Freeport of Riga Development Programme for 2008 – 2018 is drafted. In the Environmental Report on the Freeport of Riga Development Programme a repeated analysis will be made concerning impact of the development of the Port on highly protected natural areas in the context of particular services of the Port. The same applies to implementation of particular projects that will be subject to assessment of impact on the environment pursuant to the procedure provided for by law.

It is impossible to implement any project in the territory of the Port unless the procedure of environmental impact assessment is duly applied, including the assessment of the impact of planned development on the *Natura 2000* territories and involvement of the society in evaluation of project implementation risks. Hence there are no reasonable grounds to claim that the Development Plan provides legal basis for the development of the Port disregarding the rights and interests of the inhabitants, including their right to live in a benevolent environment.

3.2. The argument that the fundamental rights established in Article 115 of the Satversme are not observed is ungrounded, because, by applying the procedure of strategic assessment, the inhabitants had an opportunity to participate in the process of land use planning at all stages as required by the law.

Moreover, the Riga City Council has been particularly supportive of public participation in the process of drafting of the Land Use Plan. The Development Plan, which also includes the Land Use Plan, probably is the most democratic document that has ever been drafted in the Republic of Latvia, since large-scale public consultation were ensured on the draft version of the Land Use Plan. However, the Riga City Council is aware that Land Use Plan is

not perfect, and therefore the work on amendments to the Land Use Plan is currently taking place.

3.3. The Riga City Council notes that the territory of the Freeport of Riga is to be used for ensuring the services of a port, which is essentially an economic activity. Moreover, one of the main goals of the Development Plan regarding the territory of the Port is, "by means of territorial planning tools, to ensure that for the development of the Freeport of Riga a sufficiently large territory is available, as well as an adequate infrastructure and efficient access roads (highways and railroads) that would bypass the centre of the city and lead the cargo transport to the highways of the city".

The Riga City Council draws attention to the fact that the territory of the Port has been considerably reduced in the area of the Riga city historical centre. In addition, the reduction of the former territory of the Port is possible only in case simultaneous inclusion and exploration of so far economically unused territories (Spilve Area, a part of Kundziņsala, Mangaļsala and Daugavgrīva) into the territory of the Port is ensured, as well as measures of amelioration of the infrastructure of the port are made, namely, deepening of the main navigation channel, amelioration of access roads and communications network. Taking into account the fact that the territory of the Freeport of Riga has been decreased in Adrejsala, it is understandable that, to compensate for this reduction, the Freeport of Riga is provided with additional territories for its economic activities.

The Riga City Council further notes that, taking into account the positive impact of reduction of the territory of the Port on protection of the environment, preservation of the historical centre of the city and welfare of the people, the priorities of the development of the Port defined in the Transport Development Plan, as well as in Articles 2 and 3 of the Law On Ports, the entire territory of the Port, except for the highly protected natural sites, is marked in the Development Plan as territory for the production and industry.

However, if industry is the authorised (planned) zoning of the territory, it does not mean that the respective territory will be used for such purposes.

The authorised (planned) mode of use of the territory, as established in the Land Use Plan, should be regarded only as a vision or a potential possibility of use of the territory. There could as well be an oil terminal, navy quayside or a joinery company located in the territory of the Port. The representative of the Riga City Council strongly emphasized that the Council, when drafting the Land Use Plan, did not even go into details and did not attempt to envisage in what particular part of the territory of the Freeport of Riga oil or coal reloading terminal would be located.

Development of the Freeport of Riga is ongoing, and, therefore, construction and development projects are being implemented in the territory of the Freeport of Riga. However, none of these projects concerns that part of the territory of the Freeport of Riga, where the zoning of the territory has been considerably changed in the Contested Plan, if compared to the previous land use plan. Moreover, the projects that are currently being implemented are mostly of the kind that reduces risks to the environment, namely, reconstruction, repair and renovation of buildings.

4. The representative of the Freeport of Riga – the Head of the Strategic Planning and Project Management Department, **Vladimirs Makarovs**, in the Court hearing noted that currently the 1996 Freeport of Riga Development Programme is in force, as amended according to Development Plan and approved by the Board of the Freeport of Riga. These amendments were approved by the Latvian Ports Council on 26 September 2007.

The draft of the Freeport of Riga Development Programme 2003 – 2015 prepared by the Riga Port Authority has not been approved by the Latvian Port Council and thus is not legally binding according to the Law On Ports.

On 12 June 2007, the Freeport of Riga Board decided to prepare a new port development programme for the period between 2008 and 2018. The new development programme will be drafted according to the priorities defined in the Development Plan and the borders of the Port set by the Cabinet of Ministers. At present, the structure and deadlines of the new Port Development

Programme are approved. The commencement of drafting of the Environmental Report according to the Law "On Environmental Impact Assessment" is scheduled for March 2008.

The representative of the Freeport of Riga explained that on basis of the Development Plan the borders of the Port had been changed by excluding a territory of about 123 hectares from the Port (39 ha in Andrejsala and 84 ha in Eksportosta), which is currently used for industrial needs of the Port, *inter alia* loading of bulk cargo – coal, grain, building materials, scrap metal; general cargo – ferrous metal, timber products; liquid bulk cargo and other kinds of cargo on to the ships. The borders of the Port have also been considerably reduced in Mangaļsala.

The representative of the Freeport of Riga stated that the existing Development Plan, as well as the Strategic Assessment complies with the needs of the Freeport of Riga. Moreover, he drew attention to the fact that, in the Environment Assessment, inclusion of the residential area of Kundziņsala into the territory of the Freeport of Riga was assessed positively.

During drafting of the Port Development Programme, a compromise has to be reached which would ensure simultaneous realization of social and economic interests, as well as measures of environmental protection. The objective of the Freeport of Riga Development Programme is to foster sustainable development. Moreover, as a matter of fact currently the Freeport of Riga Board pays more attention to environmental, rather than economic aspects.

5. The representative of the State Chancellery – Deputy Director for Legal Affairs, **Elita Ektermane,** provided information on the process of the drafting of Regulation No. 690 (hereinafter – Draft Regulation) at the Cabinet of Ministers.

The representative of the State Chancellery stated that the Draft Regulation was discussed twice by the Cabinet of Ministers. On 14 August 2006 the Draft Regulation was filed by the Ministry of Transport. The Ministry

requested that it be deliberated on the next day according to urgency procedure. The Legal Office of the State Chancellery objected to such treatment, because it complicated the analysis and assessment of the draft. Moreover, the initially submitted draft on the borders of the Freeport of Riga had failed to contain a recommendation from the respective local government and that of the administrator of the state public use railway infrastructure.

Regardless of that, the Draft Regulation was deliberated on already during the meeting of the Cabinet of Ministers on 15 August 2006. The missing documents were submitted during the meeting. However, the lawyers of the State Chancellery concluded that it is impossible to assess whether the recommendations were related to a particular Draft Regulation regarding the establishment of the borders of the Freeport of Riga, or to another project. Therefore, deliberation on the Draft Regulation was postponed to the next meeting of the Cabinet of Ministers.

The Draft Regulation was repeatedly dealt with on 22 August 2006, after the Ministry of Transport had submitted the required documents, namely, certification by the Riga City Council and the Freeport of Riga Board that these institutions support the adoption of the Draft Regulation and an opinion of the joint-stock company "Latvijas Dzelzceļš" that it does not object to the adoption of the Regulation. The repeatedly submitted Draft Regulation also included an opinion of the Ministry of the Environment to the effect that it did not object to the adoption of the Draft Regulation, however it noted that inclusion of the historical buildings of Kundziņsala into the territory of the Freeport of Riga is ungrounded and unnecessary. On 22 August 2006 the Cabinet of Ministers adopted the Draft Regulation.

6. The representative of the Environment State Bureau – the Director of the Environment State Bureau, **Jānis Avotiņš,** stated at the Court hearing that in accordance with Article 6 of the Transitional provisions of the Law "On Environmental Impact Assessment", no strategic impact assessment

is needed for planning documents which are being drafted in accordance with the rules in force until 21 July 2004, if the drafter of the planning document has informed the competent authority, i.e. the Bureau, about the drafting of the planning document until 21 July 2004 and the planning document is adopted until 21 July 2006. This derogation is inapplicable in case the Bureau, after receiving the information and by taking into account the criteria for the necessity of a strategic assessment and the drafting stage of the planning document, as provided for in Article 23^2 of the Law "On Environment Impact Assessment", makes a decision that the strategic assessment of the environmental impact is necessary.

The representative of the Bureau stated that on 10 August 2004 Decision No. 2 "On Application of the Procedure of the Strategic Environment Assessment to the Development Programme of the Freeport of Riga" was adopted. On 1 November 2004 Decision No. 53-p "On Application of the Procedure of the Strategic Assessment of Environmental Impact to the 2006 - 2018 Development Plan for the City of Riga" was adopted. Currently the requirement to carry out strategic assessment is stipulated by the law.

The representative of the Bureau also explained that an opinion on the Environmental Report of the Development Plan drafted in 2005 was given on 16 December 2005. The strategic assessment of the Development Plan was carried out in accordance with the requirements of the applicable rules. The representative of the Bureau explained that the deficiencies identified in the opinion for the sake of efficiency could be eliminated by the Development Programme of the Freeport of Riga. The Bureau has no information as to whether the procedure of the strategic assessment for the Development Programme of the Freeport of Riga is under preparation.

7. The representative of the Public Administration of Cultural Heritage - the Deputy Chief of the Public Administration of Cultural Heritage**, Jānis Asaris,** stated at the Court hearing that there are cultural monuments under State protection which are located in the territory of the Freeport of Riga

– Komētforts and the fortifications compound of the Daugava estuary, which is the only such compound in Riga that has been preserved from the end of the 19th century and the beginning of the 20th century.

On 21 October 2005, the Administration submitted an opinion on the second draft of the Land Use Plan. The opinion was given regarding the Land Use Plan in general, without singling out the contested part of the Plan. An opinion regarding the final version has not been submitted because the Administration did not receive the materials of the final version of the Land Use Plan.

Judging by the materials of the final version of the Land Use Plan that are available to the Administration, not all suggestions included in the opinion of 21 October 2005 on the second draft of the Land Use Plan were taken into account regarding the Contested Plan when drafting the final version of the Land Use Plan.

Preservation of cultural heritage does not exclude a possibility that a production zone is located nearby. However, providing for an industrial zone in the territory of the cultural heritage area is not a favourable solution for the preservation of cultural heritage.

8. The representative of the Ministry of Regional Development and Local Government – the Deputy Director of the Land Use Planning Department, Head of Territorial Planning Supervision Division, **Ilze Aigare**, stated that according to the Land Use Planning Law and Regulation No. 833, the Ministry has assessed and, on 19 December 2005 submitted an opinion on compliance of the Development Plan with the requirements of the rules effective at the time of its drafting.

The representative of the Ministry explained that the opinion identifies shortcomings in the draft of the Land Use Plan, and draws attention to the fact that not all of the institutional opinions required and not all of the necessary documents that validate the procedure of drafting the Plan, are attached to the documentation of the Land Use Plan. It is also noted in the opinion that the

protective belts that are established in the Building Regulations do not comply with the requirements of the Protection Zone Law.

There were certain tasks mentioned in the opinion that had to be completed to improve the final version of the Development Plan. Moreover, it was requested to inform the Ministry about the further course of action of the Riga City Council within two weeks. However, already the next day after the opinion was received, i.e. on 20 December 2005 the Riga City Council adopted the Land Use Plan.

On 5 January 2006 the Ministry received a letter form the Riga City Council "Regarding the Opinion on the Riga City Development Plan 2006 – 2018", wherein the municipality has confirmed its determination to add the documents mentioned in the opinion of the Ministry to the documentation and make respective amendments.

On 17 March 2006 the Ministry of Regional Development and Local Government repeatedly submitted another opinion regarding the already adopted Development Plan stating therein that the recommendations contained in the opinion of 19 December 2005 were only partially observed. It was stated in the opinion that the procedure of drafting of the Plan and the contents of the Development Plan do not comply with the law. The Ministry has *inter alia* reminded that it was noted in its opinion of 19 December 2005 that substantial amendments should be made to the Land Use and Building Regulations in the Territory of Riga, and in the graphic sections by defining all protection zones, changing the planned (authorised) mode of use of the territory in a number of places and establishing requirements for their use that would comply with the law. Therefore, after these amendments, the local government should have ensured public consultation and requested once more the opinions of the institutions that had expressed their objections. The Ministry has noted that the procedure requested by Section 41.2 and 43 of the Regulation No. 883 has not been complied with, and emphasized in particular the fact that no opinion was received regarding the final version of the Land Use Plan from the Public Administration of Cultural Heritage.

In the opinion of 17 March 2006, the Ministry has noted that, based on Article 7(1) 3rd indent of the Land Use Planning Law, the Regulation No. 34 of 20 December 2005 of the Riga City Council must be repealed and the deficiencies mentioned in the opinion must be eliminated. Yet, on 27 March 2006, the Ministry, when updating its previous opinion, has stated that repeal of the Land Use Plan is not necessary, however immediate measures must be taken to eliminate deficiencies of the Land Use Plan.

The representative of the Ministry at the Court hearing could not explain why the Ministry has changed its opinion. The representative of the Ministry stated that the Minister repeatedly assessed the situation and the importance of the violations and as a result of this he decided that it is possible to eliminate the violations in the further planning process. Therefore the Ministry has agreed that the deficiencies can be eliminated later, when amendments to the Land Use Plan are drafted, although the identified problems were mainly related to procedural irregularities of land use planning.

When explaining how the Ministry has monitored whether the Riga City Council has eliminated the deficiencies identified by the Ministry, the representative of the Ministry noted that the deficiencies are being corrected at the moment by introducing amendments to the Land Use Plan.

9. The representative of the Ministry of the Environment – the Director of the Nature Protection Department, **Daiga Vilkaste**, stated at the Court hearing that the Ministry of the Environment has expressed its views regarding the issues under consideration in this case in two opinions.

On 5 October 2005, when assessing the Environmental Report, the Ministry has indicated that the impact of the planning document on the environment in the territory of the Freeport of Riga has not been sufficiently assessed. The Ministry has drawn attention to the fact that the Development Plan shows the territory occupied by the Freeport of Riga, but it does not reveal its internal functional structure by delegating to the Development Plan of the

Freeport of Riga to deal with the matter. Therefore it is hard to predict and assess the possible impact of the activities of the Freeport of Riga and the possible alternative solutions, and to provide for compensatory measures in the process of examining the Strategic Assessment of the Development Plan.

On 16 December 2005, when submitting an opinion to the Ministry of Regional Development and Local Government, the Ministry of the Environment had assessed the Land Use Plan in general, by *inter alia* considering the Contested Plan. Moreover, the Ministry of the Environment has expressed an opinion that the Riga City Council should amend the Land Use Plan and submit an updated version of the Plan to the Ministry of Regional Development and Local Government, having first eliminated the identified irregularities.

However, the representative of the Ministry stated that the final opinion on the Environmental Report is provided by the Environment State Bureau. The final decision on compliance of the Land Use Plan with the requirements of the law is made by the Ministry of Regional Development and Local Government, and therefore assessment of whether and to what extent the opinions provided by other ministries, including the Ministry of the Environment, are taken into account falls within the scope of competence of that same institution.

The Representative of the Ministry explained that according to paragraph four of Article 43 of the Law "On Highly Protected Natural Territories", any proposed activity which may substantially affect the protected sites of European environmental significance (*Natura 2000*), an environmental impact assessment must be made. Hence for each activity intended in the territory of the Freeport of Riga that may substantially affect the *Natura 2000* sites of the natural park "Piejūra" and the restricted area "Vecdaugava", an environmental impact assessment is mandatory, as provided for by the law.

Furthermore, according to Article 43 of the Law "On Specially Protected Nature Territories", the proposed activity is allowed only if it does not negatively affect the *Natura 2000* sites. If such activity affects the *Natura*

2000 sites negatively, it is permitted only in exceptional cases if this is the only option for meeting substantial interests of the society.

The representative of the Ministry explained that the inclusion of the *Natura 2000* sites in the territory of the Port or near the Port does not cause any threat to them if the rules regarding protection of the environment, including the requirement to carry out environment impact assessment, are followed. In other Member States of the European Union (the Netherlands, Germany), the *Natura 2000* territories are also located in the territory of ports and the requirements of the environment and nature protection are successfully balanced with the activities of the ports. The Freeport of Riga is not the only port in Latvia that includes *Natura 2000* sites. Small parts of the *Natura 2000* territories are also located in the Ports in Mērsrags and Salacgrīva.

The representative of the Ministry stated that the programme of the Freeport of Riga must comply with the Land Use Plan. Therefore, when carrying out strategic assessment in a part of the Freeport of Riga in the framework of the Development Programme, it may be that the procedure of strategic assessment turns out to be belated, since the zoning regime for the territory of the Port is already defined in the Land Use Plan. It would be unacceptable if the assessment of substantial issues were carried out in the framework of strategic assessment of the programme of the Freeport of Riga, rather than in that of the Land Use Plan. In the strategic assessment everything has to be evaluated that may cause considerable consequences or changes, so that the exercise results in the best possible solution.

The Motives:

I

10. Article 115 of the Satversme provides: "The State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment."

First, the above provision of the Satversme obliges the public authorities to form and to ensure effective system of environmental protection. Second, it provides for the rights of a person, according to the order established in law, to receive environmental information and to participate in the decision-making process related to exploration of the environment. Third, it establishes the rank of the fundamental right to live in a benevolent environment (*see: Judgment of 14 February 2003 by the Constitutional Court in the case No. 2002-14-04, Para 1 of the Motives; Judgment of 8 February 2007 in the case No. 2006-09-03, Para 11 and Judgment of 21 December 2007 in the case No. 2007-12-03, Para 13).*

The rights to live in a benevolent environment, like other fundamental rights included in Chapter 8 of the Satversme, shall be applied directly (*see, e.g.: Judgment of 5 December 2001 by the Constitutional Court in the case No. 2001-07-0103, Para 1 of the Motives).* Namely, on the basis of Article 115 of the Satversme an individual has the right to apply to the court about the action (inaction) of the public law subject, which infringes the rights and legitimate interests of the person. These individual rights are derived from the specific nature of environmental law (*see: Judgment of 21 December 2007 by the Constitutional Court in the case No. 2007-12-03, Para 13).*

11. The objectives and tasks faced by the contemporary society may be achieved only by close collaboration between the State, the local authorities as well as non-governmental organizations and the private sector. Therefore, the term "the State", used in Article 115 of the Satversme, shall not be interpreted narrowly. It shall also include local authorities and other derived public persons, whose duty, together with that of the public administration institutions, is to protect the right of everyone to live in a benevolent environment. This should be done by taking care for the preservation and improvement of the state of the environment *(see: Judgment of 8 February 2007 by the Constitutional Court in the case No. 2006-09-03, Para 11).*

Moreover, the responsibility of the public authorities to create and ensure an effective system and environmental protection implies responsibility to take into account the interests of environmental protection in cases when policy planning documents or legal acts are drafted or adopted, as well as in the cases if legal acts adopted are applied and the objectives of the policy are implemented (*see: Judgment of 21 December 2007 by the Constitutional Court in the Case No. 2007-12-03, Para 13).*

Therefore, Article 115 of the Satversme does not only confer a person the right to live in a benevolent environment, but it also obliges the public authorities, including local governments, to ensure implementation of these rights.

12. The Constitutional Court has reiterated that the objective of the legislator was not to confront the norms established in the Satversme with the international legal norms (*see: Judgment of 30 August 2000 by the Constitutional Court in the case No. 2000-03-01, Para 5 of the Motives).* A possibility and even a necessity to apply international norms for interpretation of the fundamental rights enshrined in the Satversme is derived *inter alia* from Article 89 of the Satversme, which provides that the State shall recognise and protect fundamental human rights in accordance with the Satversme, laws and international agreements binding upon Latvia. The wording of Article suggests that there was intention of the legislator to achieve harmony of the norms of human rights established in the Satversme with international legal norms (*see: Judgment of 13 May 2005 by the Constitutional Court in the Case No. 2004-18-0106, Para 5 of the Motives).*

The right to live in a benevolent environment and the respective obligation of the State to take care for conservation of the environment, as established in Article 115 of the Satversme, is specified in laws and other acts, and these rights and obligations should be interpreted according to the international legal norms binding on the Republic of Latvia. For instance, the "Aarhus" Convention of 25 June 1998 on Access to Information, Public

Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter – Aarhus Convention), which was ratified by the Saeima on 18 April 2002, grants the rights to the public to access environmental information, to participate in environmental decision-making process as well as to access to justice on environmental matters. Whilst the Law On Environmental Protection specifies the rights established in Article 115 of the Satversme, and even broadens the environmental rights of the society provided in the Aarhus Convention (*see: Judgment of 21 December 2007 by the Constitutional Court in the case No. 2007-12-03, Para 14).*

Article 9 of the Aarhus Convention provides the right of the public to access the court if the rights of the public to access information, public participation on decision-making process are limited or legal acts of the respective State regarding the environment are violated. Therefore, the rights to a benevolent environment include three procedural elements – first, the right of access to information on the environment, second, the right to participate in environmental decision-making, and third, the right of access to the courts in environmental matters (*see: Kramer L. EC Environmental Law. London: Sweet&Maxwell, 2003, p. 137).* These procedural elements form a part of the obligations of the State to ensure a benevolent environment for the next generations.

The paragraph 3 of Article 9 of the Aarhus Convention provides that "[..] each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment." Therefore, this Article of the Aarhus Convention provides that the State has to establish a transparent administrative or judicial review procedures, which would ensure the right to representatives of the public to challenge decisions that not only concern access to information and participation of the public, but also are in breach with other national provisions of environmental law (*see: Stec S., Casey- Lefkowitz S., Jendroska J. The*

Aarhus Convention: An Impementation Guide. New York and Geneva, United Nations, 2000, pp. 130 – 131).

Moreover, the paragraph 4 of Article 9 of the Convention provides that the procedures referred to in paragraphs 1, 2 and 3 shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

Therefore, the international obligations of Latvia require to ensure the public, including associations of natural and legal persons that comply with State established criteria, access to administrative and judicial procedures to challenge decisions or acts of public institutions that limit both, the right of access to information and participation of the public, or are in breach with provisions of the environmental law.

12.1. After examining the procedures established in respective laws on possibility to request review of decisions or actions of the State or a local government, it can be concluded that administrative acts or activities of the State or a local government that do not comply with the requirements of legal acts on environment and cause threats or harm to the environment can be challenged and submitted for review according to the procedure established in the Administrative Procedure Law (*see: Chapter II of the Law on Environmental Protection and the Administrative Procedure Law*). Whereas, compliance of norms or a part thereof with a legal norm of a higher legal rank can be challenged only in the Constitutional Court.

According to Section 45 of the Regulation No. 883 the Council (Board) of a local government adopts land use plan as Regulation of Local government and publishes its graphical part, as well as land use and building regulations. Therefore, the land use plan of a local government is a normative act, and it is binding on each natural and legal person, and serves as a legal basis for making decisions regarding development.

Therefore, it falls within the jurisdiction of the Constitutional Court to assess compliance of the Contested Plan with the Satversme.

12.2. Not only in the context of the Aarhus Convention, but also under Article 3 of the Law On Environmental Protection, which provides the rights of the public in environmental matters, the term "the public" means any private law person, as well as association, organization and group of persons. Therefore, not only private law persons, but also legal persons under private law clearly have the rights regarding the environment. Moreover, national norms do not provide any additional criteria, compliance with which should be assessed in cases when legal persons under private law claim the right to live in a benevolent environment, as established in Article 115 of the Satversme.

The Constitutional Court has recognized that nowadays land use planning is one of the instruments for reaching State environmental policy objectives and, therefore, the sector related to the environment in which public enjoys extensive rights according to Article 115 of the Satversme (*see: Judgment of 8 February 2007 by the Constitutional Court in the case No. 2006-09-03, Para 11*).

Jurisprudence of the Constitutional Court asserts the right of an individual to ask for the constitutional review by contesting compliance of a land use plan or a part thereof with the Satversme (*see, e.g.: Judgment of 8 February 8 2007 by the Constitutional Court in the case No. 2006-09-03, Judgment of 32 December 2007 in the case No. 2007-12-03).* If a person, i.e., a private law person, a legal person governed by private law or an organization of these persons were denied the right to ask for review of compliance of a land use plan with Article 115 of the Satversme, the right of person to a fair trial that provided in Article 92 of the Satversme would be violated, and the obligations of Latvia under the paragraph 3 of Article 9 of the Aarhus Convention would not be observed.

The Constitutional Court has declared that legal person under private law has the right to address the Constitutional Court, and the Court has acknowledged that the individual rights, freedoms and obligations, included in the Satversme are applicable to legal persons as far as they can be by their very nature applied to legal persons. Namely, as far as the nature of these rights,

freedoms and obligations allows to enact them not only by an individual but also by legal person (*see: Judgment of 3 April 2001 by the Constitutional Court in the case No. 2000-07-0409, Para 1 of the Motives).*

Therefore, any individual, as well as association and group of persons is entitled to address the Constitutional Court in order to challenge compliance of a land use plan or a part thereof with Article 115 of the Satversme.

13. The fundamental rights established in the Satversme are not absolute, and they can be limited in certain cases in order to protect the rights of others, the democratic structure of the State and public security, welfare and morals (*see: Judgment of 22 October 2002 by the Constitutional Court in the case No. 2002-04-03, Para 2 of the Motives).* The rights to live in a benevolent environment established in Article 115 of the Satversme are not absolute, and they can be restricted by weighing the rights of individuals and associations of persons with the interests of the society regarding balanced economic development and welfare. In the context of the case under consideration, it should be assessed whether the rights of the Applicant had been infringed as the result of application of a particular legal act, and whether the Applicant, before turning to the Constitutional Court, has explored other means established by law in order to avert this infringement.

13.1. In order to establish whether the contested legal act infringes the rights of the legal person to a benevolent environment, first of all the aims of activities of the legal person, which could be defined in its statutes, should be assessed. It is also indicated in Article 2 of the Aarhus Convention that "the public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making. Consequently, such non-governmental organizations (legal persons under private law) the aim of activities of which is protection of the environment are to be regarded as the public concerned. Moreover, such legal person should be established in accordance with all requirements of legal acts of the respective State.

Therefore it should be established whether the Applicant complies with the above mentioned requirements. According to the case materials, the Applicant is registered in the Register of Associations and Foundations on 20 December 2004 according to the procedure established by law (*see: case materials, Vol. 1, pp. 132 – 136)* and hence should be regarded as the one founded according to the law. Under the statutes of the Applicant, the objective of its activities is to promote preservation of the nature of Latvia and its cultural heritage, as well as protection of the environment (*see: case materials, Vol. 1, p. 133).* Therefore, the fundamental rights of the Applicant established in Article 115 of the Satversme might be violated.

Moreover, breach of the right to live in a benevolent environment established in Article 115 of the Satversme, are to be interpreted broadly by including ongoing activities that may cause imminent threats to human health or the environment, as well as the future, proposed activities (*see: Stec S., Casey-Lefkowitz S., Jendroska J. The Aarhus Convention: An Implementation Guide. New York and Geneva, United Nations, 2000, p. 132*).

13.2. At the same time it should be acknowledged that decisions and rules that may breach the fundamental rights of a person derived from Article 115 of the Satversme are most often related to realization of substantial economic interests. Therefore, when assessing possible violations of Article 115 of the Satversme, the interest of the society to live in a benevolent environment on the one hand, and favouring of economic development, on the other, should be balanced.

Moreover, economic interests of individuals, as well as those of the society as a whole often require transformation of the surrounding environment, *inter alia*, the cultural environment and the nature. Article 115 of the Satversme *a priori* does not provide for preservation of the existing environment and does not prohibit realization of projects related to economic interests. Article 115 of the Satversme, on contrary, requires a balanced and responsible amelioration of the surrounding environment, which includes guaranteeing suitable living conditions, as well as public well-being. However,

Article 115 of the Satversme precludes realization of economic interests if the impact of economic changes on the environment is not assessed and consequently – the impact on each individual, as well as if society is not convinced about the necessity of changes.

In order to balance the necessity for realization of substantial economic interests and the rights of a person to live in a benevolent environment, one has to *inter alia* verify whether a legal person under private law has participated in drafting and adoption of the contested act, for instance, a land use plan, as far as legal acts provide for such possibility and it has been possible to implement it in practice. Moreover, the Constitutional Court Law includes a requirement that a person, before addressing the Constitutional Court, would have exhausted available remedies for the protection of rights, if such remedies exist.

The constitutional complaint and case materials allow to conclude that the Applicant has taken an active part in the process of adoption of the Contested Plan (*see: case materials, Vol. 1, pp. 63 -131 and Vol. 9, pp. 29 – 43*).

Therefore, the Applicant is entitled to submit a constitutional complaint in the Constitutional Court regarding compliance of the Contested Plan with Article 115 of the Satversme.

II

14. According to Article 1 of the Land Use Planning Law, a land use plan is a long-term land use planning document or a set of planning documents which has been drafted and has come into force according to procedures set out in law. According to the level and the mode of planning land use plan reflects the existing and provides for planned (authorised) zoning of the territory and for the limitations of the use of such territory both in writing and graphically.

In the result of land use planning, the directions and requirements for sustainable development are set for both the State territory as well as part of it. Land use planning by drafting mutually coordinated land use plans, takes place

at the national level, that of the planning region, regional government and local government level. Balancing of interests can be achieved by drafting a land use plan according to procedure prescribed by law.

15. The Constitutional Court has noted that law grants extensive discretionary power to the local government in relation to land use planning. However, this power is not unlimited. Still, there are certain limits for the use of the discretionary power. The principles of land use planning and general principles shall serve as the guiding lines for freedom of action in the sector of land use planning (*see: Judgment of 9 March 2004 by the Constitutional Court in the case No. 2003-16-05, Para 5 of the Motives and Judgment of 14 December 2005 in the case No. 2005-10-03, Para 11*).

One of the fundamental principles of land use planning is the principle of sustainable development, which is established in the Law On Environmental Protection, the Land Use Planning Law, as well as in the Regional Development Law. Sustainable development means integrated and balanced development of welfare of the society as well as its economic and the environmental development, which meets current social and economic needs of the society and ensures environmental protection avoiding dangers in order to satisfy the needs of next generations, as well as ensure preservation of biological diversity (Article 1 of the Law On Environmental Protection).

Moreover, drafting of land use plan is not a formal procedure. It is regulated so that it is possible to identify and evaluate different interests and to establish, which should be given the priority. In this process, it is necessary to achieve balance of the interests of both concerned parties, protection of the vulnerable participants and ensuring the interests of the society as a whole (*see: Judgment of 9 March 2004 by the Constitutional Court in the case No. 2003-16-05, Para 5 of the Motives and Judgment of 14 December, 2005 in the case No. 2005-10-03, Para 11*).

The objective of land use planning is not only to create favourable conditions for business development and investments, but also to envisage

preconditions for quality of the environment, rational use of the territory and prevention of industrial and environmental risks, as well as to preserve the natural and cultural heritage, landscape diversity and biological diversity, and to improve the quality of the cultural landscape and populated areas (Article 4 of the Land Use Planning Law). A local government is obliged to determine further development of the territory and accommodate different, even opposite interests by means of a land use plan as an instrument of planning policy implementation. Therefore, the objective of a land use plan is to ensure economic development and implementation of social and cultural interests, as well as protection of the environment.

Moreover, in the process of land use planning, "promoting only the economic growth of the city (profitting), disregarding the specific natural and cultural values, the end result achieved is unlawful." (*see: Judgment of 9 March 2004 by the Constitutional Court in the case No. 2003-16-05, Para 5 of the Motives).* Such interpretation of land use planning can also be derived from the European Union law, where it is established that in the field of particularly sensitive environmental protection, a sole reference to State economic welfare is insufficient to compensate the rights of others [individuals] (*see; Articles 4 and 5 of the Directive (79/09/EEC), Article 9, the fourth part of Article 6 and Article 7 of the Directive (92/43/EEC), case C-44/94 „Regina v. Secretary of State for the Environment" [1996] ECR I-03805 and case C-3/96 „Commission v. the Netherlands" [1998] ECR I-3031*). The European Court of Human Rights has noted that the States, as well as local governments are required, before implementation of a project, to carry out an adequate and complete assessment thereof by considering alternative solutions, in order to find the best solution possible for implementation of the project and ensure balanced observation of different interests (*see: Hatton and Others v. the United Kingdom, Chamber Judgment 2, October 2001, Para 97*).

Balancing of interests is ensured when land use plan is drafted according to the requirements provided by law. Balancing of interests is particularity important when deciding on the planned (authorised) zoning of the territory.

The contents of a land use plan should be determined by acknowledging limits of discretion of a local government and the objective of the land use plan to ensure a coordinated implementation of economic, environmental, social and cultural interests.

16. In order to ensure lawfulness of a land use plan, first, should be properly drafted and adopted, and, second, should comply with law (*see: Judgment of 9 March 2004 by the Constitutional Court in the case No. 2003-16-05, Para 4 of the Motives*). A land use plan or a part of it has not been adopted according to the established procedure if manifest procedural defects are made during the land use planning process.

Several criteria determine manifest defect. First, a manifest defect of the land use planning process is in case when a decision made differs from the one which could have been made if the procedure would have been observed. Second, a manifest defect is made in cases when the rights of the public participation are considerably disregarded during the process of land use planning. Third, manifest defect is constituted also when other principles of land use planning are violated (*see: Judgment of 26 April 2007 by the Constitutional Court in the case No. 2006-38-03, Para 14*).

Therefore, when assessing compliance of the Contested Plan with Article 115 of the Satversme, it is necessary to establish whether the procedure of drafting and adoption of land use plans provided by law is observed and whether the planned (authorised) zoning and restrictions are established according to the level of planning and mode regulated by law.

17. When assessing whether the Land Use Plan is drafted according to the procedure provided by law, the Constitutional Court should first establish whether the procedural requirements regarding drafting of the Land Use Plan are observed. Namely, whether and how the Strategic Assessment was made, whether public consultation in the Planning was ensured and whether all necessary opinions from the respective institutions were received. Only after

assessment of lawfulness of adoption of the land use plan one can examine whether the requirements provided by law on substantive norms regarding environmental protection were also observed.

18. The Applicant submits that, in this case, assessment must be made whether the Kundziņsala residential area is justly included in the territory of the Freeport of Riga. The Applicant submits that inclusion of the Kundziņsala residential area into the territory of the Freeport of Riga took place without any socio-economic basis, moreover by violating the international obligations of Latvia that derive from the Convention for the Safeguarding of the Intangible Cultural Heritage.

In turn, the Riga City Council submits that inclusion of Kundziņsala residential area into the territory of the Freeport of Riga is decisively a political decision. Moreover, the borders are established not by the Land Use Plan, but by Regulation No. 690. In addition to this, this decision is justified by the fact that it is necessary to promote development of degraded territories.

In the context of this case it should be observed that Article 3 of the Law On Ports establishes right for a local government to recommend to the government boundaries of the territory needed for perspective development of the port. Therefore, the special delegation entails the right of a local government to propose and option for the Cabinet of Ministers to accept, by adopting regulation, a territory of a port that shall be developed exclusively for the needs of a port. Moreover, when establishing the border both, the local government and the Cabinet of Ministers are obliged to ascertain whether the new border of a port and the process of delimitation complies with the requirements of laws, *inter alia*, laws that regulate preservation (protection) of the environment, and whether these requirements are reconcilable with the needs of a port.

During the Court hearing the representative of the State Chancellery explained that adoption of the Regulation No. 690 delimiting the boundaries of the Freeport of Riga according to expedient procedure was initiated according

to the draft submitted by the Ministry of Transport. The boundaries of the Freeport of Riga are set by fully relying on recommendations of the Riga City Council, the joint-stock company "Latvijas dzelzceļš" and the Authority of the Freeport of Riga. During adoption of the Cabinet of Ministers Regulation delimiting the boundaries of the Freeport of Riga, the necessity to include the historic buildings of Kundziņsala into the territory of the Freeport of Riga was not considered. Moreover, the opinion of the Ministry of the Environment, which noted that inclusion of the residential area of Kundziņsala into the territory of the Freeport of Riga is ungrounded, was not taken into account. In turn, the representative of the Riga City Council informed that the Department of Culture of the Riga City Council since February 2006 is still in the process of assessing whether and what kind of cultural heritage is located in Kundziņsala.

In the constitutional complaint it is noted that inclusion of the residential area of Kundziņsala into the territory of the Freeport of Riga was ungrounded. However, the complaint does not contain any request for review of the Regulation No. 690, which provides to include the residential area of Kundziņsala into the territory of the Freeport of Riga, as to their compliance with Article 115 of the Satversme. No proceedings were instituted in this respect. Moreover, the institution, which passed the act that establishes the boundaries of the Freeport of Riga – the Cabinet of Ministers – is not a party of this case and has not submitted its memorial.

In specific cases the Constitutional Court may or even must go beyond the strict formulation of a claim in order to ensure effective protection of individual rights and enforcement of a judgment. However, assessment of compliance with Satversme of such acts, which are not subject to review in the respective case, would be contrary to the procedural principles of the Constitutional Court (*see: Judgment of 19 December 2007 by the Constitutional Court in the case No. 2007-13-03, Para 6*).

Therefore, in the case under review, the Constitutional Court has no reason to assess whether inclusion of Kundziņsala or any other territory into the

territory of the Freeport of Riga or exclusion thereof complies with Article 115 of the Satversme. Taking into account the limits of the claim that can be derived from the constitutional complaint, the Constitutional Court shall assess whether the process of drafting and adoption of the Contested Plan, within the boundaries of the Freeport of Riga as determined by the Cabinet of Ministers, complies with Article 115 of the Satversme.

III

19. The parties of the case disagree whether the requirements provided by law on a strategic assessment were observed during drafting and adoption the Contested Plan. There is no dispute whether the strategic assessment was carried out for the Land Use Plan as a whole (*see: case materials, Vol. 1, pp. 163 – Vol. 3, pp. 29 and pp. 30 – 56).*

In this case there is a dispute whether the strategic assessment of the Contested Plan has been carried out to sufficiently detailed degree and whether it is permissible to make a more detailed strategic assessment in the framework of the Environmental Report of the development programme of the Freeport of Riga. Moreover, there is also a dispute whether such approach is allowed because of existence of the *Natura 2000* territories in the Freeport of Riga and its adjacent territories.

Therefore, the Constitutional Court has to establish whether, first, the strategic assessment of the Contested Plan has been made in compliance with the requirements provided by law. Namely, whether the necessary and available information has been collected and assessed in order to envisage possible environmental impact when implementing the planning document and to be able to establish the planned (authorised) zoning of the territory of the Freeport of Riga. Second, whether the normative regulation permits to make a more detailed strategic assessment of the territory of the Freeport of Riga in the framework of drafting of the development programme for the Freeport of Riga. Third, whether such approach is permissible taking into consideration the

presence of the *Natura 2000* territory in the territory of the Freeport of Riga and its adjacent territories.

20. In accordance with Article 1 of the Law On Environmental Impact Assessment, following the procedure established by law a strategic assessment is to be performed for the planning document, implementation of which can have a substantial impact on the environment. A strategic assessment is a procedural instrument, by means of which one of the fundamental principles of the environmental policy – precautionary principle – is implemented during the process of adoption of planning documents related to the environment.

20.1. Article 15 of the UN 1992 Rio Conference Declaration on Environment and Development authoritatively interprets the precautionary principle by stating: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (*see:* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163).

Moreover, in the Annotation of the Treaty of Accession of Latvia to the European Union it is indicated that "In general the transposition of legal acts of the European Union in the sphere of environment already has and will have a very positive impact on the Latvian environment, because in such way Latvia benefits from the long-term experience and developed legislative practice of other Member States of the European Union. By introducing an environmental impact assessment, it is ensured that the impact of the planned economic activities on the environment should be assessed already during the planning period, as well as participation of the society in developing of large environmentally-sensible projects is facilitated. As the result of this, additional guarantees for human health and biological diversity are provided" (*see: http://www.mfa.gov.lv/lv/eu/3883/3749/4004/4005/#II-4*).

The environmental policy of the European Community, which is directed towards achieving a high level of protection, is based on the precautionary principle and on the principle of preventive action. The Court of Justice of the European Communities has indicated in its case-law that Article 174 (2) of the Treaty Establishing the European Community, the precautionary principle in particular is one of the foundations of the high level of protection pursued by Community policy on the environment. According to this principle, environmental impact assessment is to be carried out in case of doubt as to the implications of a plan or project for a specific site. The risk of adverse effects exists if it cannot be excluded on the basis of objective information that the plan or the project will have significant effects on the site concerned. Carrying out of such assessment ensures that plan or project which may adversely affect the integrity of the site is not authorised (*see: Case C-127/02 „Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij" [2004] ECR I-7405, Para 44 and Case C-180/96 „United Kingdom v. Commission" [1998] ECR I-2265, Para 50, 105 and 107*).

The European Commission has confirmed that, taking into account the precautionary principle, the procedures of assessment of a plan should be as transparent as possible and involve all interested parties at the earliest possible stage. This will assist decision makers in taking legitimate measures which are likely to affect environmental protection (*see: Communication from the Commission on the precautionary principle, Brussels, 02.02.2000, COM (2000) 1, pp.17*).

The precautionary principle is of a particular importance in implementation of the environmental policy. According to the precautionary principle, environmental protection is not limited to protection of the environment to prevent impairment or and damage occurring since restoration of the previous conditions of the site after adverse effects occurred is often impossible. Therefore, the objective of the precautionary principle is to minimize possible negative future effects. This requires that the potential risks

are assessed and prevented at an early stage of activities or decision-making. Prevention of negative effects at the earliest stage possible also makes economic sense, since it is normally far more costly to remedy environmental impairment. Consequently, reference of the precautionary principle ensures that potential risks are prevented at an early stage and promotes sustainable development of the environment by securing availability of natural resources as long as possible (*see: Kramer L. EC Environmental Law. London: Sweet&Maxwell, 2003, pp. 21- 23 un Meseršmits K., Meiere S., Ūsiņa E. Eiropas vides tiesības. Rīga, Latvijas Universitāte, 2003, pp. 65).* Moreover, the precautionary principle should also be applied in cases of a potential risk management even when a risk cannot be fully assessed, or scientific uncertainty precludes a full assessment of the risk (*see: Communication from the Commission on the precautionary principle, Brussels, 02.02.2000, COM (2000) 1, pp.13*].

The precautionary principle has two aspects: first, an obligation to prove that the intended activity will not cause any negative consequences. This obligation is binding on the party that intends the respective activity. Second, the party that has intended to carry out a respective activity is obliged to carry out an assessment insofar as "it is possible in practice" and to use such technologies and methods that would reveal possible consequences of the intended activity [*see: Communication from the Commission on the precautionary principle, Brussels, 02.02.2000, COM (2000) 1, pp. 21 –22*].

20.2. The precautionary principle is *expressis verbis* included in both, Article 3 (3), 2nd indent of the Environmental Protection Law as one of the environmental protection principles and in Article 3, 5th indent of the Law On Environmental Impact Assessment as a principle of environmental assessment, including strategic assessment, procedure. The legislator has clearly established that assessment of environmental problems should be initiated already at the moment when no full scientific data is available concerning possible impairment to the environment as a result of action planned. In case if there are reasonable doubts that the planned activity would have a negative impact on

the environment, precautionary measures should be adopted and, if needed, the activity shall be prohibited.

Exploration of precautionary measures in regard to the planning document means that strategic assessment shall be carried out before it is adopted. The third, fourth and the fifth part of Article 4 of the Law On Environmental Impact Assessment provide a list of those planning documents which do require strategic assessment.

A strategic assessment includes drafting of environmental report, public involvement into deliberations on the environmental report and conducting of consultations, assessment of the environmental report and the results of deliberations when drafting the planning document and use during decision-making, as well as dissemination of information on the decision made. Environmental report determines, describes and assesses environmental impact of implementation of the respective planning document (as well as that of possible alternatives). According to the objective of the Law On Environmental Impact Assessment, the strategic assessment, which should be carried out before adoption of the final decision regarding approval of the planning document, should ensure that the information acquired during the assessment would facilitate the adoption of the planning document the implementation of which would prevent or diminish the negative impact on the environment.

Therefore, first, the necessity to carry out a strategic assessment of planning documents is derived from the precautionary principle, which provides for assessment of negative impact before making the final decision. Second, strategic assessment is performed for planning document if it is provided by the legal acts on environmental impact assessment. Third, a strategic assessment shall be carried out taking into consideration the objective of drafting of the planning document.

Non-performance or inadequate performance of a strategic assessment in cases when such assessment is an indispensable constituting part of the process of adoption of the planning document may qualify as manifest procedural defect.

21. Article 4 (3) of the Law On Environmental Impact Assessment includes a requirement to carry out a strategic assessment for planning documents and amendments drafted by a local government related to use of the land, and for land use plans. Moreover, the Law emphasizes the necessity to carry out a strategic assessment for planning documents that can have a substantial impact on the *Natura 2000* territory.

According to Article 23.[1](3) of the Law On Environmental Impact Assessment, the Cabinet of Ministers determines the planning documents that require a strategic assessment. Correspondingly, Section 2 of the Regulation No. 157 lists the planning documents of national, regional and local significance that require a strategic assessment.

The requirement to carry out a strategic assessment applies to the following planning documents of regional or local level: first, development strategies, plans and programmes of regional or local significance; second, policy planning documents of regional or local significance that determine planning of the entire field; third, land use planning of cities and regions; fourth, planning documents related to development of ports.

According to Point 6 of the Transitional Provisions of the Law On Environmental Impact Assessment, a strategic assessment is not required for planning documents, drafting of which has been started before 21 July 2004, if the drafter of a planning document has informed the competent institution, i.e. the State Environment Bureau, of such planning document. However, in case if the competent authority, after having been informed, has made a decision regarding necessity of a strategic assessment by taking into account the criteria mentioned in Article 23.[2] regarding necessity of a strategic assessment and stage of elaboration of a planning document, the strategic assessment is to be performed for the respective planning document.

Drafting of the Land Use Plan was started in 2002. Therefore, the regulation included in the Transitional Provisions of the Law On Environmental Impact Assessment was to be applied to performing of a

strategic assessment for Territorial planning. However, taking into account the fact that the State Environment Bureau, after having assessed the submitted information, on 1 November 2004 adopted the Decision No. 53-p "On Application of the Procedure of the Strategic Environmental Assessment to the 2006 - 2018 Development Plan of the City of Riga", strategic assessment was to be carried out for the Land Use Plan in general, as well as for the Contested Plan.

The Constitutional Court should not re-consider the conclusions made by the State Environment Bureau regarding the necessity to carry out a strategic assessment for the land use plan. Taking into account the fact that in certain cases a strategic assessment is an indispensable part of land use planning, legitimacy of a land use plan can be endangered if a strategic assessment is carried out for a land use plan or a part thereof in non-conformity with the order provided by law.

Article 24(3) of the Law On Environmental Impact Assessment establishes, namely, that the initiator shall be liable for the completeness and authenticity of submitted information, as well as for the preparation of a strategic assessment in accordance with the requirements of this Law and other legal acts, is to be observed depending on the fact whether such liability follows directly form the Law or from the norms included in the Transitional Provisions.

Consequently, a strategic assessment was to be performed for both, the Land Use Plan in general and the Contested Plan in particular, according to the procedure established in law, despite that drafting of the planning document commenced in 2002.

22. The basic provisions regarding the procedure of development, discussion and monitoring of a strategic assessment is regulated in Article 23.[5] of the Law On Environment Impact Assessment. The fundamental provisions of strategic assessment established in the above Article should be interpreted in conjunction with the objective of the procedure of strategic assessment

established in the Law, namely, by observing the precautionary principle, to favour sustainable development, as well as ensuring the integration of environment issues into planning documents, prevention or minimization of the negative impact on the environment, ensuring of information to the society on the possible impact of implementation of the planning document and involvement the society in decision-making.

The principal document that is drafted during the course of strategic assessment is an environmental report. It can be drafted as a part of the planning document, or as document, which establishes, describes and assesses impact on the environment when the planning document, as well as possible alternatives, are implemented by taking into account objectives and intended form of mode of use of the land..

The information and the details which should be included in an environmental report are determined by Article 23.[4] and 23.[5] of the Law On Environmental Impact Assessment. An environmental report should include information that could be provided by the drafter of the report, taking into account the level of knowledge and methods of assessment, the contents of a planning document, place in the hierarchy of planning documents and stage of drafting and degree of detail, up to which it is useful to assess the environmental impact at the respective stage of planning in order to avoid duplication of assessment. If a planning document is hierarchically related to any other planning document and in order to avoid duplication of information, the only information to be included in the environmental report is the information which is necessary at the respective stage of planning, as well as information, which is acquired in the previous planning stages, is to be used. A more detailed regulation regarding the information that is to be included in an environmental report is established in the fourth section of Regulation No. 157 "Information to be Included in the Environmental Report".

Taking into account the fact that the drafter of a strategic assessment is responsible for carrying out thereof, it should be established whether the Riga City Council has worked on the Environmental Report according to the

requirements of Articles 23.[4] and 23.[5] of the Law "On Environmental Impact Assessment".

23. The State Environment Bureau is the institution authorised by the legislator to provide an opinion regarding an environmental report according to Article 23.[5] (6) of the Law On Environmental Impact Assessment. It should assess compliance of an environmental report with the requirements established by law, as well as provide for the justification of the chosen solution.

The State Environment Bureau drafted the opinion regarding the Environmental Report (including the Contested Plan) in general on 16 December 2005. The Bureau, when *ex officio* assessing compliance of the submitted Environmental Report with the requirements provided by law and reasoning of the solutions proposed, has established that the chapter "Impact of the Contested Plan on Development of the Territory and the Environment" of the Environmental Report includes "a short scenario of development for the Freeport of Riga, and possible impact on the environment of their implementation is assessed, however the planning document under consideration defines only the territory occupied by the Freeport of Riga but it does not show its internal functional structure" (*see: case materials, Vol. 3, pp. 42*).

It is concluded in the opinion of the Bureau that *inter alia* "the Environmental Report does not include thorough analysis of the possible impact on the city environment caused by the development activities and intensification of activities of the Freeport of Riga, including change of quality of air, solutions for amelioration of transport infrastructure to ensure functioning of the port, as well as possible environmental impact of implementation of these solutions, protection of and access to the cultural monument "Komētforts" and other issues related to development of the Port". Having assessed possible impact of the Development Plan on specially protected territories and the territories included in the *Natura 2000* network, the Bureau has also established that "several solutions included in the

Development Plan may have an impact on ecologic functions of the *Natura 2000* territories". Whilst, when assessing possible impact on specially protected territories, the Bureau has concluded that "implementation of certain solutions may considerably and negatively influence sites of specially protected breeds (*see: case materials, Vol. 3, pp. 50 – 51*).

However, the Bureau also expresses the following opinion: "taking into account the fact that the State Environment Bureau has adopted a decision to apply of the procedure of strategic environmental impact assessment for the Development Plan [Programme] of the Freeport of Riga, these and other issues are to be dealt with in the Development Plan [Programme] of the Freeport of Riga and their impact on the environment is to be assessed in the process of strategic environmental impact assessment" (*see: case materials, Vol. 3, pp. 50 – 51*). The Bureau indicates that a strategic assessment is applied to the Programme of the Freeport of Riga, according to the State Environment Bureau Resolution No. 2 of 10 August 2004. Its task would be to assess of impact of internal solutions of development of the port on the environment and to develop measures diminishing negative impact on the environment

Thus, the Bureau has acknowledged that the information included in the Environmental Report regarding possible impact of implementation of the Contested Plan on the environment is incomplete.

23.1. If an environmental report does not comply with the requirements of law, and the preferred solution has a substantial impact on public health and the environment or it is not sufficiently substantiated, as well as in cases when the information to the society and public consultation is not ensured or the opinions and recommendations received have not been assessed, the State Environment Bureau is obliged, according to Article 23^5 (7) of the Law On Environmental Impact Assessment, to send the environmental report back to the drafter for revision by indicating the defects to be eliminated or requesting to ensure information of the society and public consultation.

The State Environment Bureau, disregarding violations established in the concluding part of its opinion, did not send the Environmental Report back

to the drafter for revision and concluded that the Environmental Report in general is prepared in accordance with the requirements of Section 8 of the Regulation No. 157, and noted that a more detailed assessment must be performed in the framework of the Development Programme of the Freeport of Riga.

In the recommendation part of the opinion it is noted that in order to avoid collision between the Land Use Plan and the Development Programme of the Freeport of Riga, the Bureau recommends to assess a range of issues when drafting an Environmental Report for the Development Programme of the Freeport of Riga. First, the Development Programme of the Freeport of Riga and the Environmental Report should include assessment of the impact of Port's activities on territories of the Riga City adjacent to the Port, including the *Natura 2000* territories. Second, the Development Programme of the Freeport of Riga, in addition to what is established in the Riga City Development Plan, should also include recommendations on construction of new transport main roads and other solutions that ensure compliance with the level or air quality, noise and vibration, as well as prevention or diminishing of risks of accidents in the territory of the Riga City as established by legal acts. Third, solutions for ensuring of protection and access to the cultural monument "Komētforts" should also be included in the Development Programme of the Freeport of Riga. Fourth, after drafting and adoption of the Development Programme of the Freeport of Riga, the necessity to make amendments to the Land Use plan of the Riga City shall be assessed (*see: case materials, Vol. 3, pp. 55*).

The State Environment Bureau justifies its decision on considerations of reasonableness. Namely, since the 1995 Development Plan is drafted for the time period from 1995 until 2005, upon the expiration of the "validity" of this plan, a new land use plan is necessary. Taking into account that immediate prevention of all defects was impossible, the Bureau considered that it is more useful to deal with the defects established in the opinion within a reasonable time after the adoption of the Land Use Plan.

The Constitutional Court recognizes that this argument has no legal grounds, because it is in conflict not only with the precautionary principle (*see: Paragraph 20 of this Judgment),* but also with legal acts on the land use planning. According to Section 2 of the Regulation No. 883, the local government's land use plan sets the planned (authorised) zoning and respective restrictions on the use within long-term perspective for 12 years. In turn, Section 44 of the Regulation No. 883 provides that land use plan is declared void with the decision on adoption of the new land use plan. The provision regarding the planning perspective for 12 years is related to the planning period, i.e., the period defined for implementation of the development perspective accepted by land use plan, at the end of which a local government has an obligation, by the principles of continuity and succession, to draft a new vision of development and to consolidate it in a new land use plan.

Therefore, the basis for declaring the land use plan null and void is not the end of the planning period of 12 years, but a decision of the local council (board) of a local government on adoption of a new land use plan. This is also borne out by the Decision No. 749 of 20 December 2005 by the Riga City Council "Regarding Approval of the Riga Land Use Plan 2006 – 2018". In Paragraph 2 of the previously mentioned Decision the Decision No. 2819 of 12 December 1995 by the Riga City Council "On Approval of the Riga Development Plan 1995 – 2005 and Approval of the Riga City Building Regulations" has been declared null and void. Therefore, the 1995 Riga City Land Use Plan, which was drafted for the period from 1995 – 2005, has not become invalid on 31 December 31 2005, but on the date when the new Land Use Plan became effective.

Moreover, the State Environment Bureau justifies its opinion on the argument that law provides a mandatory requirement to perform strategic assessment for the Development Programme of the Freeport of Riga. Therefore, it is not reasonable "to transfer the entire burden to hierarchically higher document", i.e., to the Land Use Plan. The defects established during the process of strategic assessment in the Land Use Plan can be eliminated

when working on a Development Programme for the Freeport of Riga. However, the representative of the State Environment Bureau noted that "it would be very sad", if any activities would be undertaken in the territory of the Freeport of Riga that, according to the previous plan, was not zoned as industry territory, before strategic assessment for the Development Programme of the Freeport of Riga is made.

23.2. The State Environment Bureau is the competent authority authorized to monitor the process of performing of a strategic assessment. When establishing non-compliance with the requirements of legal acts, the Bureau should act according to the procedures established by law. The Bureau, i.e. monitoring institution should not overstep its competence by referring to considerations of reasonable application of a law, the right to which have not been attributed to the Bureau by normative acts adopted neither by the legislator nor the executive.

According to the rule of law principle, public administration is bound by law and justice. It acts within the limits of competence established by law. The public administration may use its powers only in accordance with objective and purpose of the authorization. Moreover, the act of a public administrative authority should ensure good governance and the most effective performance of its functions.

Moreover, whether the defects of both the strategic assessment procedure and land use plan drafting procedure are eliminated in a timely manner, depends on how effectively and diligently public administration performs the functions entrusted to it by the law. The conclusions and recommendations in the opinion of the Bureau violate one of the fundamental principles of environmental impact assessment – the precautionary principle, which requires to perform the environmental impact assessment at the earliest possible stage of planning, sketch work and decision-making, rather than after the planning document has entered into force.

Therefore, the State Environment Bureau violated Article 23.^{5} (7) of the Law On Environmental Impact Assessment by identifying the defects

to be eliminated while simultaneously deciding that the Environmental Report should not be given back for revision.

23.3. Recommendations included in the opinion of the State Environment Bureau are transposed into the Informative Report prepared by the Riga City Council on compliance with instructions for the Environmental Report of the Riga Development Plan 2006 – 2018 (hereinafter – Informative Report) published on the internet home page of the Riga City Council (*see:* http://www.rdpad.lv/uploads/rpap/RAP%20informativais %20pazinjoms.pdf*).* According to Section 27 of the Regulation No. 157, the Informative Report should include information on how the Environmental Report and the respective opinion of the Bureau was observed in the planning document and how the assessment provided in Article 23^5 (4) of the Law On Environmental Impact Assessment was performed when adopting the planning document.

In the Informative Report the Riga City Council notes that "it was impossible to transpose all recommendations mentioned in the opinion of the Bureau into the Riga Development Plan 2006 – 2018. However, the draft decision of the Riga City Council is prepared, which provides for an action plan for compliance with the recommendations of the State Environment Bureau during the process of implementation of the Riga Land Use Plan". It is also proposed that the Authority of the Freeport of Riga should prepare a development programme of the Freeport of Riga with additional conditions. Namely, the Development Programme of the Freeport of Riga and Environmental Report should include assessment of the impact of Port activities on the adjacent territories in the Riga City, as well as on the *Natura 2000* territories and, if needed, to develop and to reconcile compensating measures according to the procedures established by law. It is also suggested to include solutions for the protection and access to the cultural monument "Komētforts" into the Development Programme of the Freeport of Riga *(see:* http://www.rdpad.lv/uploads/rpap/RAP%20informativais %20pazinjoms.pdf*).*

Having assessed the contents of the Informative Report, it can be established that the Riga City Council has delegated the solution of several

defects established in the Environmental Report and the opinion of the Bureau to the Authority of the Freeport of Riga, as well as provided the need to solve several essential issues related to protection of the environment and preservation of the cultural heritage only after the Development Plan has become effective.

Therefore, the drafter of the planning document and respectively the drafter of Environmental Report, as well as the State Environment Bureau admits that the information included in the Environmental Report is incomplete, and the strategic assessment of the Contested Plan has been insufficient and not detailed enough, but at the same time the institutions permit that a more detailed strategic assessment of the territory of the Freeport of Riga is to be performed and the established defects eliminated when drafting the strategic assessment of the Development Programme of the Freeport of Riga.

Thus, the Constitutional Court should establish whether the information that is necessary at the relevant stage of planning is included in the Environmental Report and whether additional obtaining of additional information is admissible within the another planning document, in this case – strategic assessment of the Development Programme of the Freeport of Riga. Namely, the Court should establish whether such approach is allowed by Articles $23.^4$ and $23.^5$ of the Law On Environmental Impact Assessment.

24. According to Articles $23.^4$ and $23.^5$ of the Law On Environmental Impact, it must be assessed, whether the Contested Plan and the Development Programme of the Freeport of Riga are hierarchically related documents and what are the objects and purposes of the drafting of these documents, in order to establish the degree of detail up to which it is useful to perform a strategic assessment at the respective stage of planning, as well as admissibility of delegation.

24.1. Riga Land Use Plan is on the lowest level in the hierarchy of land use plans (*see: Land Use Planning Law, Article 5*), which, by balancing

different interests, provides for the planned (authorised) zoning and restrictions of use of the territory and serves as a basis for further development of the City and economic activities carried out therein.

Land use plan of a local government, being an act of general application, grants the right to obtain a building permit and to implement specific projects. A land use plan serves as a basis for any actions with land, including construction, because any building initiative is firstly assessed as to its compliance with the Land Use plan of the local government. According to Articles 3 and 11 of the Construction Law, a building is allowed if it complies with the land use plan. Article 11 of the Construction Law provides that a local government may prohibit building or suggest adjustments, substantiating the decision with the legal provisions that do not allow such construction, as well as taking into account the results of the public consultation on the land use plan (detailed plan) and construction.

The Development Programme of the Freeport of Riga provides for the economic exploitation of the Port's territory. According to the Law On Ports, the Development Programme of the Freeport of Riga as a planning document is hierarchically subordinated to the Land Use Plan. This means that the programme is drafted only after the land use plan is adopted, and it should comply with the land use plan. The Authority of the Freeport of Riga in its capacity of a private law person, drafts a development programme for the Freeport of Riga according to the Development Strategy for the Ports of Latvia, the Riga Development Programme and the Land Use Plan already approved (*see: Law On Ports, Point 1 of the third part of Article 7*).

24.2 The procedure for adoption of a Land Use plan and its contents are stipulated in detail by both, the Land Use Planning Law and the Regulation No. 883. Moreover, other laws set additional requirements that should be observed when working on a Land Use plan of a local government. For instance, the requirement to perform a strategic assessment is provided in the Law On Environmental Impact Assessment and the Regulation No. 157. In addition the Law On Specially Protected Nature Territories includes

requirements that should be observed when preparing a land use plan. Moreover, upon ratification of the Treaty on Accession of Latvia to the European Union, the European Union law has become integral part of the Latvian legal system. Therefore, legal acts of the European Union and interpretation provided by case-law of the European Court of Justice should be taken into account when applying national law. The same applies to laws on land use planning and protection of the environment.

The process of adoption of a land use plan ensures both, transparency and public involvement. Although binding regulations of local governments differ form the laws or regulations of the Cabinet of Ministers, since they are binding only in the administrative territory of a respective local government, a land use plan is an act of general application and thus can be contested at the Constitutional Court (*see: Judgment of December 21, 2007 by the Constitutional Court in the case No. 2007-12-03, Para 26*).

In case of drafting of development programme for the port, law does not provide specific procedural and substantive requirements. The Law On Ports solely requires that a development programme of a port must by approved by the Latvian Port Council. The development programme of a port as a planning document is binding on its author. The development programme of a port is to be taken into account also when assessing the conclusion of an agreement and the receipt of a permit in the Freeport of Riga. The right to conclude an agreement and to receive permission is granted to an enterprise (business entity) that is already founded or will be founded (a candidate is the founder) in the territory of the Freeport of Riga. Moreover, the profile of activities of the enterprise (business entity) and development perspective should comply with the Development Programme of the Freeport of Riga. Accordingly, the Development Programme of the Freeport of Riga in force (1996 – 2010) provides that "the Development Programme is a guiding document for assessing whether plans of project applicants and capital investors comply with development plans of the Riga City and the Port. This could promote decision-making on the use and development of certain sectors of the Port in the future

and serve as an informative material for potential foreign investors about the potential for future development and conditions of the Freeport of Riga" (*see: case materials, Vol. 8, p. 5*).

Therefore, if the Contested Plan establishes the planned (authorised) zoning of the Freeport of Riga, it can be defined more precisely only in the Land Use Plan, but not in the Development Programme of the Freeport of Riga.

24.3. Land use planning is an autonomous function of a local government. According to Article 14 of the Law On Local Governments, following the procedure established by law, local governments are obliged to draft, a development programme and a land use plan of the territory of a local government, to ensure implementation of the development programme of the territory and administrative monitoring of land use planning. This obligation of a local government is derived also from the Article 7 (6) of the Land Use Planning Law, which sets the functions of a local government during drafting of a land use plan.

Neither in the Land Use Planning Law, nor in the Law On Ports, nor in any other law, there is authorization granted to a local government to delegate its competence of land use planning to the port's authority. In accordance with the Land Use Planning Law, the planned (authorised) use of the territory provided in the land use plan of a local government may be specified only with a detailed plan, which is drafted according to the procedure established in the Regulation No. 883.

The Article 6 (5) of the Land Use Planning Law provides that in case if a land use plan of local government insufficiently defines the conditions for land use and construction on a specific piece of land, they should be determined in the detailed plan. A detailed plan is a land use plan for a part of administrative territory of a local government, which is prepared for the territory designated by the decision of the municipal council and which is approved after the local government's land use plan has become effective, by observing the planned (authorised) zoning already set in the land use plan of the local government.

The wording of Article 7 of the Land Use Planning Law currently in force and Section 7 of the Regulation No. 883 provides that a detailed plan is prepared in accordance with land use plan of local government, observing (by detailing and in greater precision) the planned (authorised) use and its limitations of the specific part of the territory. By means of a detailed plan, the regulation of the use and construction on the specific piece of a land can be made more detailed and precise, instead of amending the land use plan of a local government (*see: Judgment of 21December 2007 by the Constitutional Court in the case No. 2007-12-03, Para 25*). Amendments or alterations to the planned (authorised) use of the territory can be introduced only by drafting amendments in land use plan according to the procedure set in law. Therefore, according to the laws on land use planning, there is no planning document of a lower rank, which could establish the planned (authorised) use of the territory.

Thus, there are no legal basis to analyse the most fundamental development approaches of the territory of the Freeport of Riga in the Environmental Report, which is drafted for the Land Use Plan, while a more detailed environmental report is left for the stage when preparing a development programme for the port. The strategic assessment for the development programme of the port is to be performed by taking into account the assignment for its drafting, which differs from the purpose and objective of drafting the land use plan. The development programme of the port is not equivalent to a land use planning document, and the local government is not entitled to delegate its function of land use planning to the port's authority.

Therefore, the Environmental Report on the Contested Plan should include such amount of information that allows a comprehensive assessment of the impact of the planned (authorised) zoning of the Freeport of Riga on the environment, including the impact on the territories in vicinity of the Freeport of Riga and the *Natura 2000* territories.

24.4. Moreover, when drafting a Land Use plan, the permitted (authorised) use of the territory and restrictions should be established according to the level and mode of planning. Such request *expressis verbis* is derived

from the definition of a land use plan included in Article 1 of the Land Use Planning Law. The Article 6 (7) of the Land Use Planning Law also provides that, when working on a Land Use plan of a lower level, the Land Use plan of a higher level in force shall be observed.

According to the Regulation No. 883, in the land use plan the municipality must regulate the following issues: zoning of the territory; terms and conditions for construction and other exploitation of land, including requirements for land units and construction activities, as well as for amelioration of each part of the territory (i.e., each part having a different zoning regime); the boundaries of the planned administrative territory, towns and villages; the development of population structure, as well as other matters.

During the process of preparation of the Land Use Plan and the Environmental Report the Ministry of the Environment noted that the Development Plan reveals the occupied territory of the Freeport of Riga, but it does not reveal its internal functional structure, and delegates to solve those issues to the Development Programme of the Freeport of Riga. Therefore, the performance of a strategic assessment of the Land Use Plan has become burdensome. The Constitutional Court agrees with the position of the Ministry of the Environment that the Contested Plan does not specify internal functional structure of the territory of the Freeport of Riga, and thus work on an adequate strategic assessment corresponding to the requirements of the law is cumbersome.

The Constitutional Court has already recognized that in the field of land use planning normative acts confer to a local government the considerable discretion. However, it is not unlimited. When planning the zoning, namely, how diverse the authorised use of the respective territory should be set, the discretionary power of a local government is restricted by both, the objectives of land use planning – to promote sustainable and balanced development, as well as the principles of land use planning – *inter alia*, the principle of diversity. According to that, the diversity of the nature, the cultural environment, human and material resources and economical activities should

be taken into account when drafting the land use plan. This *inter alia* means that the authorised use must be adjusted so that the development potential of this territory is revealed in the best possible way by observing the diversity existing in the territory, as well as its peculiarities and specificity.

The Constitutional Court has already recognized that the principle of rule of law, which is one of the fundamental principles of a law-governed State, *inter alia* provides that laws should be predictable and clear as well as sufficiently stable and constant. Therefore, legal regulation should be sufficiently stable so that an individual could make not only short-term decisions, but also develop long-term plans for the future as provided in law (*see: Judgment of 25 October 2004 by the Constitutional Court in the case No. 2004-03-01, Para 9.2*).

Thus, not only the drafting process of a Land Use plan, but also its result – a Land Use plan, should be clear and understandable. The planned (authorised) use of the territory should be set in the Land Use plan so that everyone could make long-term plans, including economic, for future, when knowing pre-determined and clearly predictable objective of the use of any territory of a local government. Moreover, the land use plan should define the planned (authorised) use of the territory in a manner which would allow to perform comprehensive strategic assessment of the land use plan.

The Constitutional Court draws the attention of the Riga City Council to the fact that planning practice according to which a territory where there are different circumstances is designated for only one planned (authorised) zoning, while allowing for many modes of its use by thus considerably reducing predictability of use of the territory may come into conflict with both, the principles of land use planning as well as general principles of law.

24.5. The Constitutional Court emphasises that, in order to avoid duplication of information at a later stage, when an environmental report for the Development Programme of the Freeport of Riga is being prepared, it is admissible that the information which is acquired according to the procedure set by law when drafting a planning document of another level, in this case –

the information that is collected when preparing the Environmental Report for the Land Use Plan – is used. Namely, in the context of the strategic assessment of the Development Plan of the Freeport of Riga, the relevant information obtained in the context of the strategic assessment of the Land Use Plan can be used.

This procedure is also confirmed by Article 5 of the Directive 2001/42/EC, which provides that relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I. The preliminary information that is to be summarised on basis of this Article and is referred to in Annex I, includes *inter alia* the information regarding the current environmental situation and its possible development, assessment of the environment of respective territories if the environment of these territories can be substantially affected, objectives of environmental protection established at the international, Community or Member State level, as well as the information on possible significant impact on the environment taking into consideration such aspects as biological diversity, fauna, flora, cultural heritage and so forth, information on the measures intended for prevention, mitigation and compensation to the maximum extent possible of any substantially adverse impact on the environment of implementation of plan or programme, justification of the consideration of reasonable alternatives, description of preparation of assessment by recording all difficulties.

24.6. Therefore, by providing for performance of a more detailed strategic assessment for the Development Programme of the Freeport of Riga, neither the Riga City Council as the author of the Land Use Plan and the Environmental Report, nor the Bureau as the monitoring institution have taken into account the different objectives, content and rank in the hierarchy of planning documents of the Contested Plan and the Development Programme of the Freeport of Riga. Moreover, they did not observe the fact that the Law does

not confer the rights to a local government to delegate its competence of land use planning to the Freeport of Riga Administration.

Since the information necessary for the respective planning level is not established, described and assessed in the Environmental Plan, the strategic assessment of the Contested Plan has not been prepared according to the requirements of the Law On Environmental Impact Assessment.

Therefore, the Strategic Assessment of the Contested Plan is vitiated by a manifest procedural defect.

IV

25. The Constitutional Court holds that performance of a comprehensive and detailed strategic assessment for the Contested Plan is of a particular importance taking into account the fact that almost the entire territory of the Freeport of Riga is determined as a production territory (*see: case materials, Vol. 7*).

25.1. In the territory of the Freeport of Riga, there are two specially protected nature territories – the Krēmeri Nature Reserve and the Mīlestība Island that belongs to the Piejūra Nature Park. The territory of the Freeport of Riga is adjacent to the Nature Reserve "Vecdaugava" and the Piejūra Nature Park, which includes the Daugavgrīva Nature Reserve and Mangaļsala.

According to Article 5 of the Law On Specially Protected Nature Territories, nature parks are territories that represent the natural, cultural and historical values of a particular area, and that are suitable for recreation, education and the instruction of society. Organisation of recreation and economic activities in nature parks shall be carried out by ensuring the preservation of the natural, cultural and historical values located in such parks. Moreover, the Piejūra Nature Park located in both, the territory of the Freeport of Riga and the territories adjacent to it, is included in the Annex of the Law "On Specially Protected Nature Territories" and hence recognized as the *Nature 2000* territory.

In accordance with the Article 43 (4) of the Law On Specially Protected Territories, for any activity envisaged or planning document (both, in the *Natura 2000* territory and outside it), which may significantly affect the *Natura 2000* territory an environmental impact assessment shall be performed.

Therefore, any activity planned in the territory of the Freeport of Riga, which may significantly affect the *Natura 2000* territory – the Piejūra Nature Park and the Vecdaugava Nature Reserve, requires performance of an environmental impact assessment according to the law. When performing a strategic assessment for the Land Use Plan, the possible adverse impact of the planned activities on the ecologic functions of the *Natura 2000* territories, their integrity, as well as objective of formation of these territories had to be assessed.

Therefore, in case when implementation of a planning document may significantly affect the *Natura 2000* territory, the legislator has established a requirement to perform a strategic assessment irrespective of the rank of the planning document in the hierarchy of planning documents.

25.2. The opinion of the State Environment Bureau, *inter alia*, evaluates the information collected in the Environmental Report and possible impact of the planning document on the *Natura 2000* territories. It is established in the opinion that "the objective of use of the entire territory of the Freeport of Riga is a production territory, which is in conflict with the restrictions established by law, because the territory of the Freeport of Riga includes a part of the Piejūra Nature Park, which is the *Natura 2000* territory, the cultural monument "Komētforts" and several territories of the residential area" (*see: case materials, Vol. 3, p. 43*).

The Bureau notes in the Concluding Part that "several solutions included in the Development plan may affect ecological functions of the *Natura 2000* territories", and that "implementation of several measures may have a substantive adverse impact on specially protected fields of breeds, including

formation of a construction area in the Spilve Area" (*see: case materials, Vol. 3, pp. 51*). The Bureau concludes that the Environmental Report insufficiently assesses possible impact of implementation of several initiatives included in the planning document on the *Natura 2000* territories – the Piejūra Nature Park, the Vecdaugava Nature Reserve, and does not address the necessity to introduce compensatory measures according to the procedure set by law (*see: case materials, Vol. 3, pp. 50*).

The Recommendation Part of the opinion indicates that: "The State Environment Bureau holds that before adoption of the planning documents, the Riga City Council has to assess the recommendations included in the Environmental Report [and] [..] this opinion by taking into account the precautionary principle defined in the Law On Environmental Impact Assessment, which provides that solutions for environmental problems shall be identified prior to obtaining scientific data on anticipated adverse effects on the environment and in cases when there are reasonable doubts that the activity planned is likely to have adverse effects on the environment precautionary measures shall be taken or the planned activity should be prohibited. The Council shall also take into account provisions of the Law On Specially Protected Nature Territories which require that activity planned shall be allowed or planning document implemented only if it will not have adverse effects on the ecological functions, integrity of a nature protection areas of European significance (*Natura 2000*) and is not in conflict with the objectives of its designation and protection.

In case if the planned activity or implementation of the planning document is likely to have negative implications on a nature protection area of European significance (*Natura 2000*), it can be implemented only in cases when it is the only solution and is necessary for meeting imperative reasons of overriding public interest, including those of a social or economic nature. When allowing implementation, all compensatory measures should be taken for the network of nature protection areas of European significance (*Natura 2000*)" (*see: case materials, Vol. 3, p. 53*).

25.3. The fact that a *Natura 2000* territory is located in the territory of the port or in its vicinity does not endanger the *Natura 2000* territory in case if environmental and nature protection law is observed, including the requirements related to performance of a strategic assessment and an environmental impact report. As it is noted by the Ministry of Environment, in the territories of ports of other Member States of the European Union (the Netherlands, Germany), the *Natura 2000* territories are also located and the requirements of the environmental and nature protection are successfully balanced with the activities of ports. The Freeport of Riga is not the only port in Latvia where the *Natura 2000* territories are located. Sections of the *Natura 2000* territories are also located in the Ports of Mērsrags and Salacgrīva (*see: case materials, Vol. 10. p. 6*).

The Constitutional Court holds that, when drafting and adopting the Contested Plan, the Riga City Council had to observe the requirements of the Law On Specially Protected Nature Territories which are prescribed in compliance with the regulation of the Directive 79/409/EEC and the Directive 92/43/EEC. According to the law and observing the precautionary principle, the Riga City Council had to assess whether implementation of the Land Use Plan may adversely affect ecologic functions and integrity of the *Natura 2000* territories prior to approval of the plan, as well as the fact whether there would be any conflicts with the objectives of designation of these territories. Whereas, if such planned (authorised) zoning had to be established for a respective area irrespective its possible adverse impact on the *Natura 2000* territories, it had to be assessed whether implementation of the planning document in the respective case is allowed by exceptions established by law and whether the procedure established is observed.

25.4. Taking into account the fact that *Natura 2000* is designation of a site established by the European Union law and taken over in Latvia, Latvian law must be interpreted so as to avoid any conflicts with the obligations of Latvia towards the European Union, unless the fundamental principles incorporated in the Satversme are affected. Thus also regarding the *Natura*

2000 territories the requirements of the directives transposed by Latvia and interpretation of the directives established in the case law of the European Court of Justice should be observed.

According to the European Union law, obligations of Latvia regarding conservation of the environment are a part of common responsibility of the Member States, because the nature of Latvia is a part of common heritage of the entire European Community. Latvia has no legal basis to make alterations to these territories, because this would hinder reaching of the objectives established in the directives of the European Union (*see: Case C-6/04 „Commission v United Kingdom" [2005] ECR I-9017, Para 25; Case C-371/98 „The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd." [2000] ECR I-9235, Para 23 and Case C-67/99 „Commission v Ireland" [2001] ECR I-5757, Para 35).*

Moreover, the he Court of Justice of the European Communities, when interpreting Article 6 of the Directive 92/43/EEC, has stated in its case law that land use plans before adoption should be subject to appropriate assessment of possible implications for the environment of the respective site in order to reduce any potential damage (*see: Case C-6/04 „Commission v United Kingdom", Para, 54 and Case C-98/03 „Commission v. Germany" [2006] ECR I-53, Paras 39 - 40*). This assessment is to be performed for the plans that affect the Nature 2000 territories, as well as to land use plans that are adjacent to the *Natura 2000* territories, that are located in a protected site or in its vicinity.

If it is established that the plan may adversely affect these territories but alternative solutions are absent and the plan must be carried out for imperative reasons of overriding public interest, including those of economic nature, the Member State shall take compensatory measures necessary to ensure protection of the *Natura 2000* territory and inform the Commission on compensatory measures taken (*see: Managing Natura 2000 Sites. The Provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, Luxembourg: Office for Official publication of the European Communities, 2000, pp. 41 – 50*). The national

court called on to ascertain the lawfulness of the plan, shall determine the limits on the discretion of the competent national authorities. Limits on the discretion mean that competent national authorities may authorise a plan in case if they have appropriately assessed that it will not adversely affect the respective site (*see: Case C-127/02 „Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij" [2004] ECR I-745, Para 70*).

The Riga City Council has exceeded the limits of its discretion because, when adopting the Contested Plan, has not assessed its effects on the *Natura 2000* territories, and has not taken into account the fact that, when drafting the Development Programme for the Freeport of Riga, it will no longer be possible to carry out an appropriate assessment and take compensatory measures.

Therefore, manifest procedural defect is done by granting authorisation to the Contested Plan before the effects of its implementation on the *Natura 2000* sites located in the respective territory and in its vicinity has been assessed.

V

26. The Applicant submits that as manifest procedural defect qualifies the fact that the Riga City Council, when adopting the decision on the final version of the Land Use Plan on 5 December 2006, has amended the Land Use Plan, without conducting public consultation on the new version of the Land Use Plan (*see: case materials, Vol. 1, pp. 3*). Thus the society has been deprived of its right to participate in the process of drafting of the Land Use Plan. The Riga City Council disagrees with the opinion of the Applicant and submits that it has not only ensured participation of the society, but even facilitated public involvement in discussing different drafts of the Land Use Plan.

26.1. The principle of balancing of interests requires that during drafting of a Land Use plan, the interests of the State, planning regions and natural persons are balanced.

As the Constitutional Court has already held, on basis of Article 115 of the Satversme and the provisions specifying its contents, the public has the right to obtain information regarding the environment and to participate in public consultations aiming at conservation of the quality of the environment. In turn, subjects of public law are obliged not only to promote and ensure public participation in the decision making process related to protection of the environment, but also to assess views expressed during the public consultation process. During this process, the public administration must inform people about their rights and the possibilities to receive environmental information, as well as to participate in the decision-making procedures.

The public consultation must serve two main objectives: first, to obtain information which facilitates the adoption of a motivated and just decision; second, to convince the public that the opinions expressed are being considered (*see: Judgment of 14 February 2003 by the Constitutional Court in the case No. 2002-14-04, Para 3 of the Concluding Part*).

Effective public participation in decision making provides a possibility for the society to express and for the decision-maker to take into account the opinions and concerns related to drafting of a land use plan. Therefore, the public consultation ensures legitimacy of the plan and transparency of a planning process by facilitating awareness of the public on the environmental issues.

In turn, opinions of the parties expressed during public consultation on a land use plan, as well as opinions submitted by public authorities, allow the local government as promoter of a planning process to opt for the most appropriate development strategy for a particular site.

A local government, when ensuring public consulting in the land use planning process (Article 7 (6) of the Land Use Planning Law), is obliged to act as an objective and neutral institution, the task of which is to admit and to

justly assess the views of all interested parties regarding the most appropriate and adequate way of development for a certain site, as well as to observe the requirements of laws on land use planning.

The public participation in the preparation of a land use plan of a local government is set in detail in the Regulation No. 883. Public consultations on a land use plan of local government and its amendments shall be organised in at least two stages. The first stage is organised upon commencing the preparation of a land use plan of local government. The second stage is organised after the first draft of the land use plan of local government is prepared (Section 3 of Regulation No. 883). In accordance with the provisions of Section 41^1 of the Regulation No. 883, after adoption of the final version of the land use plan of the local government no amendments can be made to the planned zoning and its restrictions. If, however, the land use plan of local government is amended, the local government should ensure, according to Section 43 of these Regulation, that public and the institutions that have submitted their opinions regarding the final version of the land use plan, have a possibility to be informed about the final version of the plan.

However, the decision-maker should not always follow the proposals or objections expressed by public. The public proposals should be carefully assessed, according to considerations of reasonableness. Appropriateness of recommendations, their necessity and conformity with the objectives of the specific plan shall be assessed. On the one hand, a local government is entitled to reject the opinion of an institution, individual or the public concerned by choosing another, a more appropriate result, which generally corresponds better to the original planning objective. However, on the other hand the rejection shall be sufficiently justified. Namely, when rejecting public proposals, the local government shall provide reasons for rejection (*see: Judgment of March 9, 2004 by the Constitutional Court in the case No. 2003-16-05, Para 5 of the Concluding Part*).

26.2. The Ministry of Regional Development and Local Government, on 17 March 2006, when repeatedly submitting an opinion on Land Use Plan,

already approved, emphasised that, when examining the Land Use Plan, it established several violations of the law during drafting procedure and contents of the Plan. The Ministry, in its opinion, emphasised in particular the need to ensure that repeated public consultation on the final version of the Land Use Plan (*see: case materials, Vol. 9, pp. 62 – 63*).

However, the Constitutional Court did not find any proof, neither in the case materials nor submissions by the parties during hearing and information provided by the invited persons that substantive amendments were made to the Contested Plan after adoption of the final version of the Land Use Plan on 15 November 2005 and that were not submitted to public consultation.

Therefore, no manifest procedural defect is established in relation to public consultation of the Contested Plan.

VI

27. The Applicant submits that manifest defect is that no opinion on the final version of the Development Plan was received from the Public Administration of Cultural Heritage. In the opinion of the Administration on the second draft it has been noted that delimited boundaries of the sites of cultural heritage established in the draft Development Plan do not entirely correspond to the requirements of law. Moreover, the territory of the sites Komētforts and the Mangaļsala that are part of the State cultural monument No. 8538 "The complex of fortification buildings of the banks of Daugava entry" is decreased (*see: case materials, Vol. 1, pp. 14 – 15*).

According to Article 3, 2nd indent of the Land Use Planning Law, during preparation of land use plan the principle of balancing of interests shall be observed. The principle is further defined in Section 13 of the Regulation No. 883, namely, a local government is under an obligation to request the a statement of the conditions and opinions which are necessary for drafting a land use plan and its amendments from the authorities included in the Section mentioned and in the terms of reference. The list of institutions is not exhaustive, but it includes the Regional Environment Administration, the

Public Administration of Cultural Heritage, Administration of Specially Protected Nature Territories (if there is one) and a regional department of the State Land Service. If necessary, conditions and opinions from other institutions that are not mentioned in Section 13 of the Regulation No. 883 may be requested.

Since it is impossible for a local government to have detailed knowledge in all fields of competence of the institutions mentioned in Section 13 of the Regulation No. 883, it is obliged to require conditions and opinions from the respective institutions. Therefore, the respective institutions shall be involved at least twice during drafting of a land use plan. Each of the these institutions, according to its competence, collects the requirements that should be observed by the drafters of a land use plan of respective territory when working on plan or its amendments according to law of the respective sphere.

The conditions received shall serve as the basis when working on the first draft of a land use plan or its amendments, and this version, on the basis of a decision of a local government, is submitted to the same institutions for an opinion. Although the opinions delivered by the institutions on drafting of the land use plan are not binding to the local government, they, according to Sections 41 and 69 of the Regulation No. 883, can serve as the basis for redrafting or rejecting of the draft of a Land Use plan, as well as for drafting of a new version according to a new terms of reference.

Since opinions may affect the decision to be made, local government is obliged to receive conditions and opinions, at the same time all institutions mentioned in the terms of reference is under duty to provide such opinions. If this prescription is not observed, the full observance of principles of sustainable development and diversity established in the Land Use Planning Law cannot be ensured.

27.1. Monitoring of activities of local governments falls within the competence of the Cabinet of Ministers that does it via institutions of public administration. In the field of land use planning, monitoring of local governments is generally performed by the Ministry of Regional Development

and Local Government (*see: Judgment of 21 December 2007 by the Constitutional Court in the case No. 2007-12-03, Para 26*).

The fact whether the Riga City Council has observed the principle of balancing of interests and obtained the conditions and opinions from the institutions indicated in Section 13 of the Regulation No. 883, was already assessed by the Ministry of Regional Development and Local Government that, according to Article 7(3), 1st indent of the Land Use Planning Law, methodologically leads, monitors and coordinates drafting of land use plans. On basis of Article 7(3), 1st indent of the Land Use Planning Law and Section 80.3 of the Regulation No. 883, the Ministry gave its opinion on compliance of the Development Plan with legal norms in force at the time of drafting. In its opinion, the Ministry included also assessment of the procedure and contents of the Land Use Plan (*see: case materials, Vol. 9, pp. 44 – 59*).

The Ministry noted that, when examining the Land Use Plan, it was established that, according to the report on of drafting of the Land Use Plan, there were 11 opinions received from 25 State and local government institutions on its first draft, but 17 opinions – on the second draft. The opinions of several institutions noted the need to make the Land Use Plan more precise or to amend it. For instance, the Lielrīga Regional Environment Administration in the Opinion No. 5-10/6483 of 10 November 2005 stated that the conditions are not observed. The Public Administration of Historical Heritage noted in its Opinion No. 2782 of 21 October 2005 that it is necessary to eliminate the defects detected in the Plan and to submit it repeatedly for an opinion. The Ministry, when noting that the above objections are addressed to some extent, stresses that no repeated opinion has been received from the Public Administration of Historical Heritage.

The Ministry also notes that the documentation of the Land Use Plan does not contain attachments of the opinions from the Regional Administration of the Rural Support Service and the joint-stock company "Latvijas valsts meži" on the final version of the Plan. There is also not complete list of

attachments of the documents recording the procedure of drafting of the Plan (*see: case materials, Vol. 9, pp. 44*).

On basis of Article 7 (3), 3rd indent of the Land Use Planning Law and Section 46.1 of the Regulation No. 883, on 17 March 2006 the Ministry delivered opinion on the Land Use Plan already adopted. The Ministry noted that recommendations included in the opinion of 19 December 2005 were only partially accepted. The Ministry emphasised that an opinion of the Public Administration of Historical Heritage on the final draft of the Land Use Plan was not attached to the documentation of the Land Use Plan.

Taking into account other deficiencies mentioned in the opinion, the Ministry, on basis of Article 7(3), 3rd indent of the Land Use Planning Law, requested to repeal the Regulation No. 34, and to eliminate deficiencies established in the opinion and to ensure a repeated public consultation on the final version of the Land Use Plan, as well as to inform the institutions mentioned in Section 13 of the Regulation No. 883 on the possibility to get information on the final version of the Land Use Plan and to ensure them with a possibility to submit their repeated opinions and comments (*see: case materials, Vol. 9, pp. 62 – 63*).

On 27 March 2006, the Ministry amended its opinion of 17 March 2006 emphasising the obligation to observe the requirements of the laws regulating Land Use planning. Simultaneously the Ministry, on basis on the significance of the Land Use Plan for development of the Riga City, did not require to recognise the Plan null and void, but noted that immediately the measures shall be taken to eliminate deficiencies of the Land Use Plan, as well as asked the Riga City Council to provide its opinion and proposals regarding legal solution of the situation as soon as possible (*see: case materials, Vol. 9, pp. 63*). During the Court hearing, the Ministry could not indicate particular reasons why the Ministry has changed its opinion.

27.2. In the letter submitted to the Constitutional Court, the Public Administration of Cultural Heritage holds that it has provided its opinion on the second version of the Land Use Plan. The final version of the Land Use Plan

has not been submitted to the Administration for an opinion (*see: case materials, Vol. 9, pp. 65*). During hearing the representative of the Administration explained that the Administration has not provided its opinion because the Riga City Council has not submitted the materials needed for the assessment.

The Constitutional Court emphasises that a local government, when working on a land use plan, should take into account the opinions provided by the respective competent authorities that include instructions on issues which should be considered during the process of drafting. It is also necessary to acknowledge that the objectives of public administration, including objectives of environmental protection, can be achieved most efficiently when institutions of public administration co-operate. *Inter alia* Chapter VII of the Public Administration Law[3] also provides for cooperation as a process that assists the public administration institutions to perform their functions and tasks more efficiently.

Defects of the procedure of drafting of the Land Use Plan can be recognized as manifest if the competent institutions could not provide their opinions because of action or omission of the drafter of a planning document. In case, if an opinion has not been provided because of the omission of the respective institution, it should be investigated whether the respective institution has acted against the principles of public administration.

One of the most important assignments of a local government during the process of drafting of a land use plan is to ensure the accommodation of different interests by balancing different interests. Therefore, the fact whether the defects made during the process of territorial planning will be eliminated as soon as possible depends on cooperation between of the local government and institutions of the State administration as well as on effective and diligent performance of the functions entrusted to them by the law.

[3] The term 'Public Administration Law' in other translations of legal acts in Latvia is substituted by term 'State Administration Structure Law'

When working on the Contested Plan, the procedure of obtaining and evaluation of opinions requested by the Regulation No. 883 was not observed. In the case under examination, the opinion of the Public Administration of Cultural Heritage was important for the drafting and adoption of the Land Use Plan because, if this opinion would be observed another version of the final Land Use Plan would have been adopted. Moreover, the Administration was not able to provide its opinion due to omission of the Riga City Council.

According to the above-mentioned, the procedural defect is manifest.

VII

28. According to Article 31, 11th indent of the Constitutional Court Law, the Court shall establish the date on which the disputed legal norm (act), in the case – the Contested Plan, is declared null and void.

Article 32(3) of the Constitutional Court Law provides that any legal norm (act) which the Constitutional Court has declared as incompatible with the legal norm of higher rank shall be considered invalid as of the date of publication of the judgment of the Constitutional Court, unless the Constitutional Court has ruled otherwise. In the respective case, the Applicant claimed to invalidate the Contested Plan as of the date of 4 January 2006 when the Plan became effective.

When establishing the date when the Contested Plan becomes invalid, the totality of the manifest procedural defects should be taken into account and the fact that procedural violations opposite to material violations are of such nature that concern the whole of the Contested Plan, not part of it. One of the principles established by the Land Use Planning Law, namely, the principle of succession that allows to annul a local government land use plan only by providing that another land use plan is effective in the respective territory,

should be observed (*see: Judgment of 26 April 2007 by the Constitutional Court in the case No. 2006-38-03, Para 14.1*).

When deciding on the date when the Contested Plan becomes invalid, the Constitutional Court takes into account the fact that its task is to eliminate defects made during the process of drafting of the Plan as much as possible. Under the circumstances, it is possible only by declaring this Plan invalid as from the date it became effective. The Constitutional Court is authorised to regulate issues, which are vital so that new violations of the fundamental rights do not appear after declaring of the Contested Plan null and void and ”withdrawing of particular norms from application” does not cause disorder in the legal regulation of the Freeport of Riga. Therefore, if it is possible and necessary, the Constitutional Court in the operative part of the Judgment may declare that previous planning is regaining its force, which have been replaced with the contested act, which the Constitutional Court has recognised as incompatible with the legal norms of higher legal rank (*see: Judgment of 16 December 2006 by the Constitutional Court in the case No. 2005-12-0103, Para 25*). Moreover, recognition of the Contested Plan as invalid as of the date of coming into force is necessary taking into account the particular nature of a Land Use plan as a legal act, as well as for non-legalization of possible unjustified activities of the local government performed on basis on this Plan.

Insofar as reliance on a particular legal regulation of persons is concerned, the Constitutional Court has already established that the functioning of the principle of legitimate expectations depends on the fact whether the person’s reliance on the legal norm is legitimate, well-grounded and reasonable, in its turn, the legal regulation on its essence should be reasonably definite and constant, so that one could rely on it (*see: Judgment of 19 March 2002 by the Constitutional Court in the case No. 2001-12-01, Para 3.2 of the Motives and Judgment of 25 October 2004 in the case No. 2004-03-01, Para 9.2*). In the respective case it has to be observed that the institution monitoring the process of land use planning, i.e., the Ministry of Regional Development and Local Government, has acknowledged non-compliance of the process of drafting and

approval of the Contested Plan with the requirements of law after it became effective.

Therefore, the decisions made during the process of construction (e.g., terms of reference for planning and architecture, adoption of the construction plan and building permit) that are based on the Contested Plan, are effective insofar as they comply with the previous Land Use plan, i.e. the 1995 Development Plan, in the part of the territory of the Freeport of Riga.

The Operative Part

According to Articles 30 – 32 of the Constitutional Court Law, the Constitutional court:

1. Holds that the part of the Riga City Land Use Plan 2006 – 2018 related to the territory of the Freeport of Riga violates Article 115 of the Satversme of the Republic of Latvia and is invalid as from the date of coming into force, i.e. 4 January 2006.

2. Holds that the Riga City Development Plan 1995 – 2005 and the respective Riga City building regulations are valid within the boundaries of the Freeport of Riga established by the Regulation No. 690 of 22 August 2006 by the Cabinet of Ministers "Regulations on Delimiting the Boundaries of the Freeport of Riga".

The Judgment is final and not subject to appeal.

The Judgment was announced in Riga on 17 January 2008.

The President of the hearing G. Kūtris