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THE OBLIGATION OF THE NEIGHBORHOOD IMPACT STUDY AND THE MUNICIPAL LEGISLATIVE OMISSION

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ABSTRACT

This paper presents the dialogue between Environmental Law and Urban Law to build sustainable cities and it also provides a panorama of the Neighborhood Impact Study, presenting their differences and similarities in what relates to the Environmental Impact Study. From concepts about property right and its social and environmental role and the application of the principles of prevention and precaution, the aim of this paper is to analyze the interface between the two disciplines, as well as to evaluate the obligation to submit the neighborhood impact study in case of municipal legislative omission. The methodology was based on an exploratory and qualitative research, using a hypothetical-deductive method and the bibliographic procedure. The conclusion is that it is necessary to issue a municipal law to keep the presentation of the study mandatory, due to the local interest and the municipal jurisdiction, according to Article 30 of the Federal Constitution in addition to the principles of legality and legal reserve, since article 36 of the City Statute is not self-enforcing.

Keywords: Neighborhood Impact Study; Environmental Impact Study; City Statute Law; urban policy.

A OBRIGATORIEDADE DO ESTUDO DE IMPACTO DE VIZINHANÇA E A OMISSÃO LEGISLATIVA MUNICIPAL

RESUMO

Este artigo apresenta o diálogo entre o Direito Ambiental e o Direito Urbanístico para a construção das cidades sustentáveis e fornece um panorama sobre o Estudo de Impacto de Vizinhança, apresentando suas diferenças e similaridades em relação ao Estudo de Impacto Ambiental. A partir de conceitos sobre o direito de propriedade e sua função socioambiental e a aplicação dos princípios da prevenção e da precaução, o objetivo geral do artigo é analisar a interface das duas disciplinas, bem como avaliar a obrigatoriedade do Estudo de Impacto de Vizinhança em caso de omissão legislativa municipal. A metodologia se baseou numa pesquisa exploratória e qualitativa, utilizando-se o método hipotético-dedutivo e o procedimento bibliográfico. Concluiu-se pela necessidade de edição de lei municipal para manter a obrigatoriedade de apresentação do estudo, em razão do interesse local e da atribuição municipal, de acordo com o artigo 30 da Constituição Federal, além dos princípios da legalidade e da reserva legal, pois o artigo 36 do Estatuto da Cidade não é autoaplicável.

Palavras-chave: *Estudo de Impacto de Vizinhança; Estudo de Impacto Ambiental; Estatuto da Cidade; política urbana.*

INTRODUCTION

The development of the urban policy in Brazil, foreseen in art. 182 of the Federal Constitution, was improved through the promulgation of the City Statute (Law 10.527/2001), which defined, among other instruments, the Neighborhood Impact Survey (EIV). The scope of the study is to evaluate the positive and negative impacts of the project or activity in regards to the quality of life of the population living in the area and its surroundings, thus ensuring social interaction among urban dwellers.

The EIV and the Preliminary Environmental Impact Assessment (EIA) are kinds of Impact Assessments that use the principles of precaution and prevention as a basis, helping the Public Administration in making decisions about the installation of certain projects in the Brazilian territory.

These principles, widely used in Environmental Law, become part of Urban Law, further supporting the idea of a true interface between the two legal disciplines, which were built and gained autonomy in the recent past when compared to the more traditional law subjects.

One should also consider that, in case of cities, urban spaces are the places where environmental protection becomes effective and there is a constant dialogue between environmental and urban standards towards the desired sustainable cities.

Although the importance of the EIV for municipal territorial planning, the guarantee of the inhabitants' well-being and compliance with the social function of the property is clear, it is a fact that not all Brazilian municipalities have laws that specify the activities that are subject to the EIV, allowing for a greater incidence of negative impacts in the neighborhood, with no counterparts or mitigations, in the face of the legislative omission.

The general objective of the article is to evidence the interface between Environmental Law and Urban Law in order to build an Urban-Environmental Law, in addition to analyzing the differences and similarities between EIA and EIV and, finally, to discuss the requirement or not of the jus-urban instrument in case of municipal legislative omission.

The methodology was based on an exploratory and qualitative research, using the hypothetical-deductive method and the bibliographic procedure from the survey, reading and analysis of the doctrine, laws

and jurisprudence on the subject. The first phase was document search and organization, going through a pre-analysis of their content. Then, we proceeded to the selection and analysis of the documents, exploring all the material.

According to Marconi and Lakatos (2003), in the hypothetical-deductive scientific method developed by Karl Popper, one starts from a problem to which a provisional solution is offered, the tentative theory, and then the solution is criticized to eliminate the error so that this process would renew itself, giving rise to new problems.

The problem investigated was the mandatory presentation of the IVE in case of a lacking municipal law to define the activities subject to the study. In view of this scenario, the article intends to analyze whether, in the event of municipal legislative omission, there is still a requirement for the entrepreneurs to present their study only based on the City Statute, a general rule that provides for such an instrument, or according to general principles and legal hermeneutics. The intention is to contribute to the discussion on the subject once the issue remains controversial fifteen years after the enactment of the City Statute.

In Chapter 1, the principles of precaution and prevention, on which EIA and EIV are based, were discussed and the close relationship between Environmental Law and Urban Law in the search for sustainable cities was evidenced. Chapter 2 deals with the right to property, with regard to its socio-environmental function and administrative limitations.

Chapter 3 defines EIA and EIV, pointing out their similarities and differences, and Chapter 4, on the other hand, deals with the municipal regulation of the activities subject to the submission of the EIV and discusses the need or not to present the study in case of legislative omission, addressing municipal competence based on local interest and the principles of legality and legal reserve.

1 THE PRECAUTIONARY AND THE PREVENTIVE PRINCIPLES AND THEIR APPLICATION TO THE ENVIRONMENTAL AND URBAN LAW

In Brazil, the precautionary principle was inserted by the Rio Declaration, the Convention on Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change, all of them signed in 1992 at the United Nations Conference on Environment and Development

- Rio 92.

Principle 15 of the Rio Declaration states that where there is a threat of serious or irreversible damage, the absence of absolute scientific certainty should not be used as a reason to postpone effective and economically feasible measures to prevent environmental degradation.

The wording in the three documents differs as in the Rio Declaration and the Climate Change Convention, the precautionary principle is applied if there is a threat of serious or irreversible damage to the environment, whereas in the CBD, a threat of relevant reduction of biological diversity is enough.

In order to ensure the right to an ecologically balanced environment, the 1988 Federal Constitution granted a greater scope to the precautionary principle by stating that the Public Power shall "control the production, commercialization and use of techniques, methods and substances that pose a risk to life, the quality of life and the environment" (article 225, paragraph 1, V)

Machado (2015) understands that the concept of the principle was not limited to the cases of threats of serious or irreversible damages, but it extended to risk control. For the author, risk is the "real or realistic possibility of a negative event or damage arising from what is not certain or expected, but only more or less likely" (MACHADO, 2015, p. 100).

In the Environmental Crimes Law (Federal Law n. 9.605/1998), there is also implicit reference to the precautionary principle in art. 54, paragraph 3 when it says that the one who fails to take precautionary measures in case of risk of serious or irreversible environmental damage incurs pollution crime.

According to Machado (2015), the implementation of the precautionary principle is not intended to immobilize human behavior, but it aims at the durability of the healthy quality of life of human generations and the continuity of the existing nature on the planet.

The several interpretations of the precautionary principle are based on different assumed assumptions about the nature of scientific and technological knowledge and they are closely related to the risk assessment process (CEZAR, ABRANTES, 2003). For Machado (2015), the purpose is the same, that is, its purpose is to avoid or minimize damages to the environment, the precaution being characterized by the anticipated action in the face of risk or danger.

The precautionary principle is usually used in situations where

there is uncertainty about the prediction of the effects of technologies and it refers to four elements: threat of damage, reversal of the burden of proof, scientific uncertainty and precautionary measures (CEZAR; ABRANTES, 2003).

Thus, the application of the precautionary principle is related to the prior evaluation of human activities before the uncertainty of the damage. When environmental studies are required for the installation of potentially degrading works or activities, not only the right damage is covered, but also the uncertain and the probable ones (MACHADO, 2015).

However, the precautionary principle is not only used in Environmental Law, but also in Administrative Law and Urban Law, as taught by Martins Junior (2014, p. 205):

> The precautionary principle is not exclusive to Environmental Law; Administrative Law precedes it by accepting precaution beyond prevention as one of its principles involving administrative police, civil liability of the State, regulation of economic activities, administrative control, public service, etc. linked to discretion and efficiency. Also permeating Urban Law, the principle of precaution consists in the duty to adopt anticipatory and proportional measures in the face of a state of uncertainty related to the production of damages, disregarding inertia or omission, due to the obligation of diligence incumbent upon the Administration in the cure of general interests.

There is also a reference to the preventive principle, which acts when there is scientific certainty about the dangers and risks to the environment. The environmental permitting of potentially or effectively polluting activities, the EIA and its other modalities, and the EIV are examples of the application of the preventive principle once negative impacts are identified, mitigated and compensated after the assessment with those risk management instruments (LEITE, 2015).

Both the precautionary and preventive principles help decision making by the Public Administration, which should implement it in compliance with the principles listed in art. 37, caption, of the Federal Constitution.

The constitutional principles of legality, impersonality, morality, publicity and efficiency, commonly called principles of Public Administration, are in fact principles of Administrative Law. These legal-administrative principles parameterize the administrative activity of the

State, not being limited to those listed in the above mentioned art. 37, but also including principles in special constitutional precepts or infraconstitutional law (MARTINS JUNIOR, 2014).

The study of Environmental Law and Urban Law should also be confined to Administrative Law, given that, besides the specific principles of the disciplines, they are also subject to legal-administrative principles when applied by the Public Administration.

José Afonso da Silva (2012) says that Urban Law seeks in Administrative Law some fundamental instruments of its activity such as expropriation, servitude and the organization of entities working on urbanism. And the police power, an important institution of Administrative Law, is an essential instrument for urban planning.

For Toshio Mukai (2002), it is necessary to emphasize the link and dependence between Urban Law and Administrative Law, considering that it basically evolves in Brazil as a technical-legal development of Administrative Law. However, the author adds, the current situation is starting to give rise to new types of standards, new institutes, besides the typically administrative ones.

Article 182 of the 1988 Federal Constitution, which deals with urban policy, and the enactment of Law n. 10.257/01 (City Statute) help consolidate the autonomy of the legal discipline.

With the new rules, it is not a matter of just analyzing Urban Law, but especially Environmental Law, since it also aims at protecting the environment (MUKAI, 2002).

This close relationship between the disciplines is evidenced in the following line of thought:

> Environmental and urban standards and resulting legal relations and situations are manifestations of the most ancient administrative activity: the police, incident on fundamental values such as freedom and property. The difference is, of course, due to the objective delimitation of these two legal disciplines, aimed at the consecration of specific legal goods (environment, housing, urban development, social function of property), whose importance in the legal system and the construction of its own principles contributed to the aforementioned autonomy (MARTINS JUNIOR, 2014, p. 206).

From this point of view, that is, city development and planning are inserted in a desired scenario of a healthy and balanced environment,

communication between the disciplines is visible.

EIA and EIV are legal instruments in the domestic order based on the precautionary and preventive principles. They stand out for pursuing sustainable cities, which are those that allow for the coexistence of citizens in an organized way and with the least degree of discomfort and environmental impact, guaranteeing the social welfare and social function of the cities.

2 THE PROPERTY RIGHT AND THE SOCIAL-ENVIRONMENTAL FUNCTION

The property right, although a fundamental right guaranteed in art. 5, item XXII of the Federal Constitution, is conditioned to the fulfillment of its social function according to item XXIII of the same article.

As Mukai (2002) teaches, this corollary is inseparable since the origin of the concept of property. Its social function would be reflected on social life and on the healthy quality of life, as well as the fundamental principle of human dignity (article 1, III, CF/88).

Article 182, paragraph 2 of the Constitution establishes that "urban property fulfills its social function when it meets the fundamental requirements of city planning expressed on the master plan". Article 186, on the other hand, also adds the social function to rural property.

Article 225, caption, of the Federal Constitution, which guarantees to everyone the right to an ecologically balanced environment, brings the idea of the social-environmental function of property, thus broadening its concept.

Similarly, article 170, which deals with the economic order, ensures free initiative provided that the social function of property and the protection of the environment and differentiated treatment according to the environmental impact are respected (sections III and VI, respectively).

In the infraconstitutional legislation, art. 1.228, paragraph 1 of the current Civil Code establishes that the property right must be exercised in order to meet the economic, social and environmental protection objectives. Article 1.228, *caption*, also contains the positive content of the property right, namely, the right to use, enjoy and dispose of property (MUKAI, 2002).

Nevertheless, the right to build is conditioned in art. 1.229 of the Civil Code, which provides that "the owner may erect the buildings

he deems appropriate on his land, except for neighbors' rights and administrative regulations". For Mukai (2002, p.65), the "final part of art. 1.299 is a real bundle of standards conditioning the right to build, which is deployed into civil standards (neighborhood relations) and public-policy standards."

The administrative limitations stem from the Public Administration's police power based on the need to meet the social-environmental function of the property. However, in order to make this function effective, public policies and standards are necessary to ensure their fulfillment and, in this scenario, the importance of the City Statute enactment in 2001 (Federal Law n. 10.257/2001) is revealed.

3 THE NEIGHBORHOOD IMPACT STUDY AND THE PRELIMINARY ENVIRONMENTAL IMPACT STUDY

The City Statute, which established the general guidelines for urban policy in the country, brought the EIV, together with the EIA (Article 4, VI of Federal Law n. 10.257/2001) as one of its instruments.

According to Vanessa Buzelato Prestes, the Statute of the City must be understood as "the legal expression of urban-environmental public policy, a standard that originates a system interacting with the various agents that build the city and recognize its movement" (PRESTES, 2005, p. 81).

For Milaré (2013), the Environmental Impact Assessment (EIA) is a gender whose types can be: EIA, EIV, Preliminary Environmental Report (RAP), Environmental Control Report (RCA), Environmental Control Plan (PCA), among others

The EIV is legally provided for in arts. 36 to 38 of the City Statute. The EIA can be found in the Federal Constitution, art. 225, VI, paragraph1 of the National Environmental Policy (Law n. 6.938/81) and its regulations (Decree n. 99.274/90), in CONAMA Resolutions n. 01/86 and n. 237/97, followed by state and municipal environmental laws.

The EIA is mandatory for activities required by law or whenever there is significant environmental degradation. When EIA is exempt, simplified studies may be required depending on the magnitude of the impact and the activity, at the discretion of the environmental agency.

Thus, EIA and EIV are not to be confused. The City Statute itself sought to resolve any doubts on the matter by stating in art. 38 that the

preparation of the EIV does not replace the preparation and approval of the EIA.

Despite the legal text on the possibility that both instruments coexisted for the same case, Prestes (2005) understands that in cases where the EIA is suitable, it is not necessary to have the EIV since both are management tools for impact assessment.

Thus, it would not make sense to require both studies in the hypotheses in which municipalities are environmental licensors just because they are under the responsibility of different Secretariats in the same Administration. In this sense, instead of improving the management process, it would end up bureaucratizing it and it would not generate a contribution to the improvement of the quality of lives in the cities, which is the real object of the standard (PRESTES, 2005).

Among the similarities of EIA and EIV, the following can be listed: publicity of studies, their preventive character, popular participation, assessment of project or activity impact (positive and negative effects) on the quality of life of the population and on the environment, and both aim at city sustainability.

Regarding their differences, in addition to the constitutional prevision and the greater complexity of EIA, the EIV is part of the urban permitting, while the EIA refers to environmental permitting and environmental legislation, and the study is necessary in the case of significant environmental impact, while the EIV is required in cases where the municipal law defines, regardless of the degree of impact on the neighborhood.

The municipal authority can analyze the EIV, while the EIA is analyzed by the competent agency, which may be federal, state or municipal, depending on the case.

The scope of the EIV has a more specific field of action that is restricted to the neighborhood surrounding the project intended to be implemented, while the EIA covers both the Directly Affected Area and the Direct and Indirect Influence Area. The EIA assesses the impacts on the physical, biological and social-economic resources, and the EIV deals with the impacts on the population's quality of life and routine.

It is also worth mentioning that the EIV analysis goes from the project to the environment, while in the case of the EIA, the environmental diagnosis of the study can define project location and the need for its complementation or even change. As we can see, although both are

instruments that aim to assess project impacts, they have substantial differences.

The minimum content of the EIV is listed in art. 37 of the City Statute and it should encompass the analysis of population densification, urban and community equipment, land use and occupation, real estate valuation, traffic generation and demand for public transportation, ventilation and lighting, urban landscape, natural and cultural heritage.

Therefore, by reading the legal provisions and the doctrine on the subject, it is possible to concluded that the characteristics of the IVE are: (i) technical document; (ii) prior to the issuance of permits or authorizations; iii) demandable for the construction, expansion or operation of private or public projects in urban areas, in the cases provided by law; (iv) dependent on municipal regulatory law; (v) it analyzes the impacts that overload current environmental, landscape, economic, social, and road system conditions; (vi) it culminates in counterparts on the part of the entrepreneur.

4 REGULATION OF EIV BY A MUNICIPAL LAW AND THE HYPOTHESIS OF LEGISLATIVE OMISSION

Regarding the PROJECTS and activities subject to the presentation of the EIV for the concession of urban planning permits, art. 36 of the City Statute sets forth the following:

> Art. 36. The municipal law shall define public and private projects or activities in an urban area dependent on the preparation of a preliminary study of neighborhood impact (EIV) to obtain construction, expansion or operation permits issued by the Municipal Public Power.

From the enactment of the City Statute in 2001 until the current days, an issue that remains open and that demands additional efforts from legal operators, whether they are lawyers, researchers, civil servants or components of the Judiciary Power, is the following: if the municipal law does not define the projects subject to the EIV, is the study still mandatory?

There are positioning divergences as, while a doctrinal current understands that the EIV remains mandatory, since the legal text is not the only law source and, therefore, the principles and the legal hermeneutics must be used, another one understands that there is no legal support for

forcing individuals to present the study in the absence of a regulatory standard.

For Vladimir Passos de Freitas (2009), art. 36 of the City Statute is backed by constitutional provisions and, thus, it does not require a municipal law because it is self-enforcing. In this sense, using hermeneutics, the author understands that the municipal law proves to be unnecessary when the project is notoriously causing impact. Zaneti and Zaneti Junior (2014) defend the immediate application of the EIV, since it was inserted in the Statute of the City, because they consider it as having immediate effectiveness.

Larcher (2016) understands that the municipal law is not necessary, provided that the Master Plan appropriately disciplines the matter, defining the projects and activities subject to previous preparation and analysis of the EIV.

Regardless of the arguments to the contrary, we understand that the absence of legislation specifying the projects subject to the EIV makes the maintenance of the mandatory submission of the study for the issuance of urban permits and planning authorizations impossible.

Article 18 of the 1988 Federal Constitution set forth the Brazilian federal pact, granting autonomy to all federative entities, among which are the Municipalities. Among the duties of the Federal Government is the preservation of the municipal autonomy (article 34, VII, c, of the CF).

The legislative competences of the Municipalities are listed in art. 30 of the Federal Constitution and among them are the local interest and the promotion of the appropriate territorial order, through planning and control of the use, subdivision and the occupation of the urban land (items I and VIII, respectively).

Local interest is not shaped by exclusive interest, but by its predominance, as taught by Machado (2015). Therefore, with the predominance of local interest, the Municipality has the legitimacy to legislate on the subject.

Moreover, art. 182 of the Federal Constitution states that the urban development policy shall be implemented by the Municipal Public Power according to the general guidelines established by law. The general guidelines came with the enactment of the City Statute in 2001 to regulate art. 182 of the constitutional text.

Article 3 of the Statute of the City defines that it is incumbent on the Federal Government to legislate on general standards of urban

law and to establish guidelines for urban development (items I and IV, respectively).

The Master Plan is foreseen in art. 182 of the Federal Constitution. It is one of the general instruments of the urban policy for municipal planning, according to the Statute of the City (article 4, III, a). According to Machado, the Master Plan is:

> the set of mandatory standards prepared by specific municipal law, integrating the municipal planning process, which regulates the activities and projects of the Municipal Government itself and of the individuals or legal entities in the Private or Public Law, to be carried out in the Municipal territory (MACHADO, 2015, p. 449).

According to Mukai (2002), the role of the Master Plan is to outline the general guidelines, the development goals and objectives for the municipality within a given timeframe. It is, therefore, a municipal assignment in the urban field.

The Council of Cities, through Recommended Resolution n. 34 dated July 1, 2005, as amended by Recommended Resolution n. 164, dated March 26, 2014, stressed that the Master Plan shall determine criteria for the application of the Neighborhood Impact Assessment tool.

In this sense, the urban development policy, of which the EIV is an instrument, is inserted both within the local interest of the Municipalities and in the appropriate territorial order, which justifies its legislative competence based on art. 30 of the Constitution. Similarly, the Master Plan, which according to the recommendations of the Council of Cities should propose the general guidelines for the EIV, is also a responsibility of the Municipalities.

Besides, for Mukai (2002), an innovation of the Statute of the City was the EIV, an institute that works as a general rule, but which, being a purely administrative instrument, would not need to be considered in a federal law. According to the author, on his notes regarding Law n. 10.257/2001, the matter has a "purely administrative nature, and its regulation under a federal law is negligible. Only as an urban standard can it be understood as a general standard, pursuant to art. 24, I, paragraph1 of the Constitution." (MUKAI, 2001, p.31)

Therefore, forcing the presentation of an EIV without a municipal law to define the projects subject to the study would be a clear invasion of

municipal competence.

Article 1.299 of the Civil Code already mentioned above forecasts that the standards conditioning the right to build would be the rights of neighbors and administrative regulations. The standards of neighborhood relations, inserted in urban law, would thus be municipal competence.

It is worth mentioning jurisprudence from the Superior Court of Justice (STJ), whose extract is transcribed below, that acknowledged that the requirement of EIV falls under local law and that it maintained a decision on the validity of building permits without the EIV because when there was no municipal law defining the projects and activities subject to the study when it was issued so art. 36 of the City Statute would not be self-applicable and would depend on regulation:

> [...] REQUIREMENT OF NEIGHBORHOOD IMPACT STUDY. LEGALITY OF CONSTRUCTION LICENSE. ANALYSIS OF LOCAL LAW. IMPOSSIBILITY. SUMMARY STATEMENT 280/STF. STATUTE OF CITIES. ALLOTMENT. DECISION BASED ON EMINENTLY CONSTITUTIONAL GROUNDS. UNPROVEN JURISPRUDENTIAL DIVERGENCE. INTERLOCUTORY APPEAL TO WHICH PROVISION IS REFUSED.
>
> [...]
>
> 7. Regarding the requirement of Neighborhood Impact Study (EIV) to approve the construction of a supermarket in the *Jardim Germânica* allotment and the legality of the permit that allowed the project, the decision under appeal stated that:
>
> Concerning the projects subject to the preparation of the Neighborhood Impact Study, article 36 of the City Statute, as seen, states that the Municipal Law shall define the private and public projects and activities in urban areas that depend on the study. Thus, each municipality shall set criteria, by means of municipal laws from which the activities and enterprises subject to the rule of the federal law shall be defined. In view of these considerations, it is noticeable that at the time the permit was issued there was no need for such studies, in that sense, it was the contents of the official letter from the Secretary of Urbanism and Public Service, copies pgs. 427/428: "A project having the size of the construction mentioned herein is preceded by the so-called specific location study carried out by the Urban Planning Institute of Florianópolis, all according to Complementary Law n. 001/97 (Municipal Master Plan). Article 36 of the City Statute provides that the Municipality, through the Municipal Law, shall define and classify the projects for which the Neighborhood Impact Assessment (EIV) would be required. This law is currently following the proceedings at the Lower House of Representatives in the State Capital City. The regulation provided for in the

> City Statute is not self-enforceable since it shall be regulated by a complementary law." Thus, since the judgment kept permit n. 123 valid because it had followed the provisions in Complementary Law n. 001/97 (Florianópolis Municipal Plan) and, at the time the permit was issued, the municipal law would not require the Preliminary Study of the Neighborhood Impact, one cannot bring up the nullity of the permit (p.1527) After all, there is no such municipal law defining the projects and activities that depend on the preliminary study of the neighborhood impact to be granted the respective construction permits and authorizations. Therefore, it is not possible to invalidate the aforementioned permit only and because it was granted without a previous study of neighborhood impact since the legal provision invoked by the authors is not self-applicable, and therefore requires regulation. (p. 1537). However, the appreciation of such aspects requires an analysis of the local laws, which, by analogy, addresses the obstacle contained in the Summary Statement 280 of the Federal Supreme Court ("an offense to local law fails to admit an extraordinary appeal"). (AgRg in AREsp 32299/SC, Minister Rapporteur Teori Albino Zavascki, First Panel, decided on 03.05.2012, Dje 08.05.2012)

For Mukai (2002, p. 67), "urban limitations could not be imposed on private property simply by invoking the constitutional precept, thus bound by a hierarchically lower decree or standard." According to the author, urban limitations, a kind within the gender of administrative constraints that derive from police power, should have the formal law as a primary source of standardivity. (MUKAI, 2002)

Article 5, II, of the Federal Constitution says that no one is obliged to do or not to do anything other than by virtue of law. For Silva (1990), the principle of legality is a basic principle of the Democratic State of Law and its importance in the legal system is emphasized in the following lessons:

> The relevance of the law in the Democratic State of Law should therefore be emphasized, not only regarding its formal concept and abstract, general, binding and amending legal act of the existing legal order, but also regarding its fundamental regulatory function, produced according to a qualified constitutional procedure. The law effectively is the official act of greatest prominence in political life. An act of political decision *par excellence*. Through it, as it emanates from popular will, the state power provides social living with predefined modes of conduct so that society members know in advance how to guide themselves into fulfilling their interests (SILVA, 1990, p. 107).

The principle of legality in the strict sense means to say that the Public Administration can only act according to the law, since it does not have freedom of choice and it must respect the purposes of the law, an expression of the popular will.

The primary objective of the principle would be the fight against arbitrariness, against the concentration of powers and for the consecration of freedom. Thus, by strict legality, the law is the prerequisite of Public Administration's performance, which does not have the freedom, just like individuals, to do whatever is not prohibited. Discretion shall only happen when the law expressly grants margin for some freedom.

Silva (2000) differentiates the principle of legality from the principle of legal reserve because he understands that legality means submission and respect for the law or acting within the sphere set forth by the legislator, while legal reserve consists in stating that the regulation of certain matters must necessarily be done through law.

In the case under analysis, both the legality and the legal reserve principles are there to solve the issue. That is because the Public Administration must lead its actions in accordance with the principle of legality and, in case there is no law to define the EIV is mandatory for certain projects, there would be no way to force the individual to submit the study for the urban permit to be issued.

Secondly because, in compliance with the principle of legal reserve, article 182 of the Federal Constitution determines that the urban development policy, having the EIV as its instrument, shall be carried out by the municipal government and that the Master Plan shall be set forth by municipal law.

Moreover, article 36 of the City Statute itself requires activities subject to the EIV to be defined by the municipal law. Thus, the need for a law is manifest. Similarly, the absence of a law and the consequent non-presentation of the EIV cannot prevent the issuance of the permit for the project.

It is important to emphasize that, in case of legislative omission, it is up to the Judiciary Power to control it, exercising the jurisdictional function of the State to defend the legal order and trans-individual interests.

Among the procedural means for judicial proceedings, the Direct Action of Unconstitutionality by Omission (ADO) and the Public Civil Action (ACP) are listed as they deal with an omission that is detrimental to

the trans-individual rights related to the urban planning order.

The ADO, which is legally supported by art. 103, paragraph 2 of the Constitution, is one of the means to control constitutionality whose scope is the defense of the fundamental legal order against conducts that are incompatible with it. Its object is the mere time-consuming unconstitutionality of the relevant agencies, may they be the relevant competent Power or the administrative agencies, for the implementation of the constitutional standard (MENDES, BRANCO, 2014).

In spite of the immediate applicability of the fundamental rights, according to paragraph1 of art. 5 of the Constitution, there are constitutional standards that are not self-applicable, lacking the legislator's interpretation in order to produce all their effects. Thus, unconstitutionality due to omission or constitutional legislative omission presupposes non-compliance with the constitutional duty of legislating resulting both from explicit commands in the Federal Constitution and from constitutional fundamental decisions identified in the interpretation process (MENDES, BRANCO, 2014).

Following this line of reasoning, in case there is no municipal regulation to set forth the activities subject to the EIV and its compulsory requirement, it is impossible to mend the legislative omission by means of the ADO since the EIV does not have an express constitutional seat. The EIV is a legal obligation for the regular urban development inserted in the general standards, notably the City Statute.

Filing the ACP is enough to overcome the legislative omission on the EIV, since there would be damages to trans-individual rights related to the urban planning order. The urban order is one of the goods protected by then ACP, as a result of Provisional Measure n. 2.180-35/2001, which included art. 1, VI in the Law of Public Civil Action (Federal Law n. 7.347/1985).

Once the EIV is an urban policy instrument for the protection of neighboring rights, it is one of the interests related to the social function of property and the protection of neighbors in the vicinity of impacting projects or that imply a potential and significant change to life in the region.

Its foundations based on harmony, social interaction and the development of the social purposes of the city go beyond individual interests and thus fall within the scope of diffuse rights.

The right to sustainable cities insured by art. 2, I, of the City Statute, is understood as the right to urban land, to housing, to environmental

sanitation, to urban infrastructure, to transportation and public services, to work and to leisure for the present and future generations.

For Prestes (2006), the definition covers all human needs for life in society and it goes beyond individual rights since the right to the city is among those ones that aim to guarantee the perpetuation of life in all its forms. Democratic management is the expression of this diffuse right that requires the participation of citizenship in the actions and decisions that affect the city.

Therefore, that is a harmful omission in regards to trans-individual rights linked to the urban order. It is fully acceptable that the Public Prosecutor's Office or any other legitimate party files a Public Civil Action so that the public entity is convicted to provide an activity due by law, that is, the issue of a municipal law that encompasses the activities subject to the EIV.

Denying a judicial solution for the issue is creating a void, undermining the Union's competence to issue general standards of urban law and urban guidelines.

CONCLUSION

The intense relationship between urban and environmental standards in order to achieve the objectives set out in national public policies is undeniable. Those objectives tend to create an urban-environmental right for social interaction, to guarantee the well-being of its inhabitants and the full sustainable development of cities.

Both the precautionary and the preventive principles are used in Environmental and Urban Law to help the Public Administration make decisions. The EIA and the EIV are examples of its application.

Despite the similarities between the EIV and the EIA, their differences are more remarkable: while the EIV is an urban policy tool, the EIA is more an instrument of environmental policy with greater complexity.

The EIV is an important legal-urban instrument for urban policy in the Municipalities and it is a legal obligation for the regular urban development in general standards, such as the City Statute.

Pursuant to article 36 of the City Statute, projects subject to the submission of an EIV shall be defined by a municipal law. Thus, for the effective application of the EIV, a municipal law shall be issued, may it

be specific or the Master Plan, to define the activities whose installation depend on the preparation and approval of the study.

The reasons for this conclusion are that the EIV is an instrument for municipal urban policy management and, consequently, local interest is predominant and the municipal assignment to standardize the subject based on the municipal competence set forth in art. 30, items I and VIII of the Federal Constitution in addition to the principles of legality and legal reserve.

Once there is no municipal law to establish rules of conduct for the citizens, the obstacle for applying the Statute of the City is clear because the provisions in it are not self-enforcing and require specific municipal regulation.

On that purpose, considering that its effectiveness is only guaranteed by the regulator municipal law, the importance of the Municipal Public Power for the implementation and application of this urban management tool gets clear.

In regards to the lack of a regulatory law, it is possible to file a Public Civil Action to remedy the regulatory omission harming trans-individual rights connected to the urban order by means of a positive prescription for the issue of a municipal law that lists the activities that require the EIV for the permits and planning authorizations to be issued.

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