

Utfordringer ved kommunal arealplanlegging i kystnære sjøområde

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Ingunn Elise Myklebust: Challenges of municipal land use management in coastal waters

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The Norwegian Plan and Building Act of 2008 (PBA) applies to the whole country, including watercourses. In marine areas, the Act applies to a zone extending one nautical mile beyond the baselines of the territorial sea. In this article I present a brief overview of the applicable legal regulations governing management of coastal waters from the time the plan is commenced and up until the time decisions are made in individual cases pertaining to either use or conservation. The objective is to ascertain what the municipality's area of responsibility is in this process, and finally to point out some challenges in conjunction with shared responsibility and dialogue between the municipality and the central government.

Key words: land use management, municipal planning, coastal waters, state control

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1 Introduction

In accordance with Plan and Building Act of June 27, 2008 no. 71 (PBA), the municipality has the authority to make binding decisions regarding land-use plans, including plans for coastal waters, cf. PBA Section 11-15. In this article I will examine the legal basis for the municipal authority and the rules for cooperation between the municipal, regional and state authority in this particular management task. Although the municipality has a planning authority in both land and coastal areas, the authority to decide in individual cases involving coastal waters primarily rests with the public sector authorities, according to sector laws. This distribution of responsibilities may imply that several public interests may be involved in the management of land and resources in the coastal marine environment.

In Norwegian law there is a long tradition of prohibiting building within a 100-meter belt along the waterline, cf. PBA Section 1-8. The

objective is to protect nature and to keep the area open for all. Building prohibition may be waived, but has set important standards for both land use planning and in individual cases.¹ A corresponding statutory judicial control does not exist for the *coastal water*: Coastal waters are basically open for all kinds of activity, but the competition for areas – or localities – is increasing. The coastal zone is valued for fishing, aquaculture operations, industrial and commercial activity, recreational use and environmental attributes. Coastal zone plans are currently the key tool to clarify these conflicts of interest. Competing activities are prioritized through the municipal land use planning processes, under the Planning and Building Act.²

Coordinated management of the marine areas – and resources there – requires being able to see areas in the municipality in a context. In section 3 of the article I discuss in greater detail the rules that apply to marine area management in the *municipal master*

1. See Ot.prp. nr. 32 (2007-2008) p. 175.

2. See more about the process of balancing different interests in e.g. Ann-Magnhild Solås, En regjerlig kyst? Kunnskap og politikk i kystsonoplanlegging, Norges fiskerihøgskole, Fakultet for biovitenskap, fiskeri og økonomi, Avhandling levert for graden Philosophiae Doctor – Februar 2014 (coastal planning in Alta) and Lillian Cathrine Knudzon, Kampen om et strandsoneareal – et diskursperspektiv på en arealbruksbeslutning, Kart og Plan, nr. 5, 2013, pp. 367-381.

plan. General clarifications between the municipalities and the other sector authorities should occur at the municipal planning level, or at an even higher regional level. Only within this overall panorama can one achieve an overall balance among varying interests, finding the localities that are best suited for the various purposes. In section 4 of the article I will also provide an overview of key sector laws and the municipal role in individual decisions about use and protection of the marine maritime area. Important laws include the Norwegian Nature Diversity Act of June 19, 2009, no. 19 (NDA) and the Norwegian Aquaculture Act of June 17, 2005 no. 79 (AA.). Mention should also be made of the Norwegian Marine Resources Act of June 6, 2008, no. 37 (MRA). First, a brief introduction to the development of the Planning and Building Act system and the interaction between government and administrative levels is provided in the following section.

2 History and Background

For many years, municipal planning according to building and planning legislation has focused primarily on growth and development in urban and densely populated areas, while the central government has assumed the main responsibility for management of the environment and nature conservation pursuant to various sector statutes. The planning and building statutes have gradually acquired an *expanded scope of application*, and have thereby taken on a more important role as cross-sector laws.³ The Building Act of June 18, 1965 no. 7 was the first legislation governing land-use planning that was applicable to the entire country, both rural municipalities and densely populated areas. The Plan and Building Act of June 14, 1985 no 77 was the first law that gave equal status to use and conservation as objectives and purposes for area management. Through the amendment of April 21, 1989 no. 17, the Plan and

Building Act is applicable all the way out to the baselines, cf. pbl. (1985) Section 1, first paragraph, second sentence. Previously, the planning regulations were applicable only to the area comprised by the harbour district in accordance with the Norwegian Harbour Act. The extent to which the municipalities were empowered to plan in the coastal waters was therefore dependent on the municipality's having a harbour district, and its size.

Pursuant to the Plan and Building Act of 2008, the municipality's planning competence was extended all the way out to «one nautical mile beyond the baselines of the territorial sea», cf. Section 1-2, first paragraph. The law thereby encompasses areas that is important in terms of implementing the EU Water Framework Directive (WFD).⁴ The WFD will become increasingly important in terms of both what can be subject to protection, and cooperation between the authorities. The obligations entailed by EU/EEA law and the consequences for Norwegian law regarding conservation requirements will not be discussed here.⁵ Although these rules establish limits for the central government and municipalities' competence, a broad leeway for discretion will continue to exist in terms of how member states are to manage their assets and what types of activities can be prioritized. This widened scope of the municipal planning competence through the new law is not limited to the water resources, but applies to all forms of use and conservation.

Parallel with the expanding geographic coverage in the Plan and Building Act, the municipalities are responsible for more tasks that were previously those of central government agencies. An important change occurred in the PBA of 1985, which transferred to the municipality the competence to make final decisions pertaining to the municipal master plan and the zoning plan.⁶ Such decisions – if only formally – had previously been made at the ministerial level. A prerequisite for this division of responsibility is the go-

3. See cf. Helge Fiskaa, *Med lov skal landet byggjast*, Bygningsloven av 1965 – planleggingas «grunnlov» i Norge, *Kart og Plan*, nr. 1, 2014, pp. 32-45.

4. See Ot.prp. no. 32 (2007-2008) p. 172.

5. See e.g. Sigrud Eskeland Schütz, *Strategiar i forvaltning av marine økosystem, i Undring og erkjennelse*, Festskrift til Jan Fridthjof Bernt, Karl Harald Søvig et al. (eds), Bergen 2013, pp. 597-608 (at 603) and in Sigrud Eskeland Schütz, *Vassdirektivet – konsekvensar for næringsverksemd*, TFE no. 1. 2014.

6. See pbl. 1985 Section 27-2 no. 1 and in Ot.prp. no. 56 (1984-85) p. 13.

vernment's opportunities to raise objections. The right to raise objections means that regional and central government sector agencies, as well as neighbouring municipalities, can demand that the decision-making authority for a plan, or part of a plan, be transferred from the municipality to the Ministry, cf. PBA, Section 5-6.⁷ This system will be discussed further in Section 3.5 in the article.

Another change worth special mention involves the greater impact acquired by the PBA in relation to the sector authorities' competence under the provisions of other laws, such as the Norwegian Harbour Act and the Norwegian Aquaculture Act. Particularly significant in this context is the binding nature of municipal land use plans on aquaculture authorities, cf. AA Section 15 a). In the Fish Farming Act of 1985 there were no rules stipulating that fishery authorities were bound by municipal planning. The preparatory works were mute on this issue. In Section 4 of the regulations of July 11, 1990 no. 548, relating to fish farming of species other than salmon, trout and rainbow trout in salt water, it was stipulated that the fishery authorities shall «take into consideration» municipal and regional plans that have been approved for use of areas. If one were to interpret the regulations literally, fishery authorities were not formally bound by any plans made pursuant to the Plan and Building Act. This assessment was also expressed in circular T-4/96 published by the Ministry of Fisheries and the Ministry of the Environment and was applied by fishery authorities for a long period of time without being contested by other authorities. Later, the catchword par excellence became «coordination».⁸

3 Coordination through municipal land use planning

3.1 Introduction

An important objective of the new Plan and Building Act was to strengthen the law as a

cross-sectoral statute, and to make it a common instrument for managing land areas and resources.⁹ The interests of sector authorities are to be catered to by drawing these more integrally into the planning, while also allowing them to make use of particular control provisions that are part of the Plan and Building Act's system. Both coastal zone management and planning of marine areas are basically ordinary planning functions, in which the general rules of the Plan and Building Act for preparing and adopting plans apply. The public sector authorities still have important legal bases for this special kind of management. In the following, I will therefore elaborate the rules for which public authorities are responsible for planning in coastal waters, the substantive legal provision for such planning, and – finally – the special challenges related to state review of municipal judgments.

3.2 Coastal zone planning – a task for national governments, regional governments or local authorities?

Responsibility for all planning functions pursuant to this Act is divided between the municipal councils, regional planning authorities and state governments, cf. Sections 3-2, first paragraph. Particular responsibility for implementation of planning is still placed with the municipalities, which according to paragraph 11-5, first paragraph, are *obliged* to have and to update a land use plan for the entire municipality. Areas of coastal waters are not excluded from this general plan requirement. There is still a prerequisite in the preparatory works, that planning in the marine maritime area must be demarcated by the municipal planning needs.¹⁰ The level of detail of the municipal planning in the coastal zone, and the geographic extent of the plan, will therefore vary. The only exception for municipal land use planning is electricity and petroleum, which are not covered by the Act, cf. Section 1-3.

The responsibility of regional and state governments to start a planning process applies primarily in matters that affect region-

7. See Ot.prp. no. 56 (1984-85) p. 13.

8. See also Synne Movik og Aase Kristiane Aasen Lundberg, «Å følge vannets vei». Erfaringer frå Nordland med EUs vanndirektiv og samordning med andre regionale planprosesser», Kart og Plan, nr. 5, 2013, pp. 333-344.

9. See Ot.prp.no. 32 (2007-2008), pp. 38-39.

10. See Ot.prp.no. 32 (2007-2008), p. 172.

al and national interests. In Section 3-6 «coordinated water planning» and «coastal zone planning» are mentioned as examples of planning tasks in which the state has a special responsibility to consider initiating planning.¹¹ In matters of important national and regional interests, under Section 6-4 Ministries also have a general authority to take over authority which otherwise is placed with the municipal authorities. Government initiated planning is thus a means that can, but is not legally required to be employed.

3.3 Statutory basis for planning of coastal waters

The land use element of the municipal master plan is expressed through a *map* of the area of the municipality, with supplementary provisions, and sometimes zones requiring special consideration, cf. PBA, Section 11-7 – Section 11-11.¹² A municipal master plan can also be subdivided into partial plans when appropriate; for example urban district plans, harbour plans or, as relevant for our topic, *coastal zone plans*. When this is done, the sub-parts become part of the municipal master plan, which must be updated with changes the municipality finds necessary. A coastal zone plan will often include both land and sea areas to make it easier to assess land and sea areas in a wider context.

The Planning and Building Act itself has no guidelines for priorities of exploitation in coastal waters. While there are strict guidelines for the planning of the coastal zone, as mentioned, there are no such guidelines for coastal waters.¹³ The municipality thus plays a crucial role in matters relating to economic development and conservation. This means that local authorities are in principle free to facilitate for industry active in the sea. On the other hand, they are basically also free to choose *not* to permit activity, such as aquaculture, or other commercial development. Some

general guidelines apply. It may be noted that the guidelines for preparatory work emphasize both the need for *nature conservation* and consideration for *recreation* with coastal waters management.¹⁴ The importance of concern for the environment is also reflected in the Constitution Section 112.¹⁵

The municipality is still not completely free in preparing a municipal plan, but must make use of the specific land use objectives as expressed in the law. The municipality may conduct planning for *six* different land-use objectives, cf. PBA Section 11-7. All land-use objectives can be applied to marine areas to the extent that they are suitable. Marine areas, for example, can be specified for «Transport and communications installations and technical infrastructure» or «harbour.» For the purposes of planning for use and conservation of coastal and marine areas, there is also a separate plan category. The rule pertaining to «[u]se and conservation of the sea and river systems» has been transferred from the Act of 1985 into the Act of 2008. The provision is expressed in PBA, Section 11-7 no. 6:

«Use and conservation of the sea and river systems, with associated shore zones. Sub-objectives: Traffic, shipping lanes, fishing, aquaculture, drinking water, nature and outdoor recreation areas, separately or in combination.»

For coastal water, the municipality can develop plans for activities separately or in combination. All combinations are generally permitted.¹⁶ When the municipality regulates for multiple uses, knowledge must either exist or be acquired, about activities that can be suitably combined. Fishing and outdoor recreation are examples of a more or less obvious form of multiple use. Fish farming will, in most cases, require exclusive use of a given area. The activities that may be combi-

11. See Ot.prp. no. 32 (2007-2008) pp. 184–185.

12. See O.J Pedersen, Plan- og bygningsrett, Del 1 Planlegging og ekspropriasjon, 2nd ed., Oslo 2010, pp. 247-279.

13. Government planning guidelines for differentiated management of the shoreline zone along the sea, Established by royal decree of 25 March 2011, cf. Plan and Building Act of 27 June 2008 Section 6-2.

14. See Ot.prp. no. 32 (2007-2008) pp. 224-225.

15. See more on the role of concern for the environment in legal application in inter alia Inge Lorange Backer, *Innføring i naturressurs- og miljørett* 5th ed., Oslo 2012, pp. 52-81 and Hans Chr. Bugge, *Lærebok i Miljøforvaltningsrett*, 3rd ed., Oslo 2011, pp. 122-171.

16. See FOR-2009-06-26-861, Forskrift om kart, stedfestet informasjon, arealformål og kommunalt planregister (kart- og planforskriften).

ned with nature areas will depend on the purpose of the conservation. If the municipality wishes to protect an area of the sea floor, this can often be combined with use of the sea and river surfaces for traffic, fishing and outdoor recreation. In these cases, the municipality must work in close consultation with the other authorities to acquire *knowledge* about the land-use objectives that can be combined, and about the plan objectives that may be suitable to apply to various marine areas in the municipality, cf. also Nature Diversity Act, Section 8, cf. Section 7.

The Plan and Building Act, Section 11-11 no. 4-7 authorizes various conditions which can be used for the land use objectives in Section 11-7 no. 5 (Agricultural, natural and recreational purposes) and the land use objectives in 11-7 no. 6 (Use and protection of sea). Through the authorization of conditions, the land use can be nuanced to a greater extent than what derives directly from the law's various land use categories and sub-objectives.¹⁷ Particular mention is made of no. 6 which authorizes the municipality to make special provisions for «traffic» both in «areas requiring special protection» and «at sea.» Pursuant to no. 7, the municipality can also establish rules on «the groups of species or aquaculture species that may be established separately or in combination.» In this regard, the municipalities have been granted increased competence compared to the Act of 1985. The amendment is an example of increased competence transferred to the municipality so as to ensure that the Plan and building Act stands as the key cross-sector statute governing land and marine area planning. Various forms of ocean farming may make demands on the marine area, location, distance to salmon rivers, minimum distance to a neighbouring fish-farming installation, etc. The municipality can thus find an opportunity to open for aquaculture, but under special conditions. One objection to controlling the aquaculture industry in detail is that it may make it difficult to meet the industry's need for flexibility. A plan is binding until it is amended, but the type of farmed fish or shellfish that is profitable – or environmen-

tally justifiable – to raise at any given time may be a factor that changes much more quickly. The challenge is to find the balance between coordinated management and the need for flexibility. Dispensation pursuant to Section 19-2 may be a way out in such cases.

The local authorities' broad powers in land use planning are constrained by rules concerning the coordination of the planning process and various forms of state control. It is the municipality's authority interacting with these rules, which may determine the municipality's real decision-making powers. In terms of cases pertaining to aquaculture, it was the Ministry of Fisheries, for example, that took the initiative to place greater competence for land-use management for aquaculture within the Plan and Building Act.¹⁸ The thought behind this was probably not primarily a wish to relinquish power and competence to the municipalities, but rather a desire to develop a planning system more suitable for making provisions for a positive development for the aquaculture industry, by providing an opportunity to prioritise forms of ocean farming that could be in harmony with the wishes of others interested in using and conserving marine areas.

3.4 Cooperation in the preparation of the plan

The Plan and Building Act's statutory purpose – Section 1 – states that one of the purposes of the Act is to facilitate «the coordination of central government, regional and municipal functions and provide a basis for administrative decisions regarding the use and conservation of resources.» Here, the law states that the basis, from the outset, is that all planning efforts are to be conducted through collaboration between these three management levels. This principle will be particularly important for the various forms of cross-sector planning, such as, for example, planning of roads, shoreline zones and coastal waters. The principle of participation is also expressed in Section 3-2, third paragraph:

«All public bodies have the right and duty to take part in planning when it concerns

17. See more on this in Marianne Reusch, Adgangen til å stille vilkår ved tillatelse etter plan- og bygningsloven, LoR, 2014, no. 1, pp. 14-33 (especially pp. 21-22).

18. See NOU 2003: 14 p. 192.

their sphere of responsibility or their own plans and administrative decisions, and shall give the planning authorities any information that might be of significance for the planning.»

When planning work commences, affected public bodies and other interested parties shall be notified and have the opportunity to participate in the planning process, cf. Section 5-1 and Section 11-12. Equivalent rules pertaining to consultation rounds and participation are also linked with the new rules concerning municipal planning strategy, cf. Section 10-1, first paragraph. The Planning and Building Act of 2008 provides that there should be a regional forum in each region. Establishment of a regional planning forum in accordance with Section 5-3 should make it easier to clarify and coordinate state, regional and local interests in these processes. The regional planning forum has no decision-making authority, and no formal mediation function, but may contribute to enabling clarification of potential conflicts of interest early in the planning process.¹⁹

In connection with planning of the coastal zone and coastal water, involvement of all concerned authorities is particularly important. State authorities, such as the environmental protection authorities and fisheries authorities also have a strong interest in participating in the planning forum and the planning process. If they do not participate in the planning work, the sector authorities risk that their interests will not be considered. We will examine the rules regarding objections more closely in the following. With regard to the importance of cooperation in the preparation of a land use plan, however, a new and important rule has been added in the Plan and Building Act (2008). Section 5-5, third paragraph, states:

«The right to make objections ceases to apply if the requirement of public participati-

on in the planning process pursuant to Section 3-2, third paragraph, has not been fulfilled, provided that the planning authority has fulfilled its duty of notification and the requirements regarding notification for the type of plan in question.»

An important objective is to resolve conflicts as early as possible in the planning process and to limit the use of objections as much as possible. At the same time, this rule is an important signal of respect for municipal self-government. It is important that central and regional government agencies wishing to provide input contribute early in the processes, in order to avoid extra work and surprises for the municipality.²⁰

3.5 Terms of objection – a need for greater predictability?

The rules regarding objections pursuant to the Plan and Building Act constitute the main practical state control of local management of land-use planning. In cases where objections are put forward, the government has the final decision competence, cf. Section 5-6.²¹ The basic condition for a public sector authority to raise objections, is that the plan applies to questions of «national or significant regional importance», cf. Section 5-4, first paragraph. The first question is therefore whether planning in the coastal sea area, has such a character.

Where a planning proposal is contrary to provisions of the Act, regulations, central government planning guidelines, central government or regional planning provisions, or a general plan, objections always can be made, cf. Section 5-4, fourth paragraph. In cases involving the *shore zone*, the statute has defined the important public interests through rules applying to prohibition of building, cf. Section 1-8, and central government guidelines applying to shoreline zoning.²² In such cases, the municipality must be prepared for «interference» through mediation.²³ This in fact occurs in many cases.²⁴

19. There are studies that show that the planning forum may not work quite as intended. See Martin Lund-Iversen mfl., *Innsigelsler etter plan- og bygningsloven*, NIBR-rapport 2013: 10, p. 65.

20. See for example *Asplan Viak AS and Agenda Kaupang*, *Innsigelsesinstituttets påvirkning på lokalt selvstyre*, Sluttrapport, 20.06.2012, pp. 88-89.

21. After changing of the division of tasks in the new Government, the responsibilities for planning process and the decisions on objections were transferred from the Ministry of the Environment to the Ministry of Local Government and Regional Development (from 01.01. 2014). See H-2/14.

22. Government planning guidelines for differentiated management of the shoreline zone along the sea, Established by royal decree of 25 March 2011, cf. Plan and Building Act of 27 June 2008 Section 6-2.

Correspondingly strict rules and guidelines for prioritizing between use and protection of the coastal water is not provided. In most cases, however, there is little doubt that managing the coastal sea area is also of «national or significant regional importance», cf. also Section 3-6. The usual rationales for raising objections are indeed concern for nature protection, outdoor recreation, landscape, green shoreline zones and cultural heritage monuments/cultural environments.²⁵

Assessment of what is primarily of local interest and what is the national interest is nevertheless difficult in some cases.²⁶ These assessments are largely discretionary.²⁷ In line with the preparatory work, and also expressed in H-2/14, it is the administrative authority that presents the objection which *itself* determines whether the case is important enough to possibly be decided in the Ministry.²⁸

An important question is therefore the *predictability* of what the authorities define as «national» interests in management of coastal waters, is sufficient for the municipalities. This raises the issue of what legitimate expectations a municipality may have to the final authority under the Act. When considering municipal self-government, it is evident that the municipality's administrative responsibilities under the Act must be balanced with the municipality's real opportunities to make decisions on use and exploitation. The legitimacy of local democracy is further contingent on the freedom of the municipalities to set their own priorities.²⁹ Before –taking a final look at this problem, we will examine how the relevant sector law defines the responsibilities of authorities of land use in coastal waters. This may help clarify the state government's special interest and responsibility.

4. The municipality's role in decisions pursuant to sector law

4.1 Introduction

A number of sector laws governing coastal waters include rules for land management that apply in addition to the Planning and Building Act. Although coordination of land use and conservation through public area planning is becoming increasingly more important, the Plan and Building Act must be supplemented with management through sector law. A planning process in which the objective is to resolve every possible issue and situation of conflict can become ineffective. Not all issues can be suitably resolved on a general basis before specific issues are raised concerning an actual measure or a specific project. In relation to important practical measures in the sea, such as ocean farming, there are no rules about the duty to apply the Planning and Building Act, but the Aquaculture Act is applicable, cf. PBA Section 20-4. The issue discussed below is the *municipalities' influence* in realization of plans for developing industry and plans for protection of the sea and the sea floor.

4.2 Responsible authority pursuant to the Aquaculture Act

In Norway, licensing is required for marine farming. This is currently regulated by the Aquaculture Act (2005), Section 4. According to Section 1, the purpose of the law is «to promote the profitability and competitiveness of the aquaculture industry within the framework of a sustainable development and contribute to the creation of value on the coast.»³⁰ Competence to allocate licences is given to the Ministry pursuant to Section 4.³¹

23. See Ingunn Elise Myklebust and Sigrid Eskeland Schütz, Coastal zone management – between politics and law: new guidelines for differentiated management of the shore zone in Norway, *Local Environment*, Online, July 2014.

24. See NIBR-rapport 2013:10 pp.43- 44.

25. See e.g. NIBR-rapport 2013: 10, p. 26 and Erik Engellien et al., *Bygging i strandsona, Metode og resultater*, Statistisk sentralbyrå, p. 11.

26. See e.g. NIBR-rapport 2013: 10, p. 65.

27. In the newly elected Norwegian Government's political platform, emphasis is placed on a vibrant local democracy, greater local control over local affairs, including among others, the opportunity to decide in cases pertaining to shoreline zone management. See Political platform for a government formed by the Conservative Party and the Progress Party, Sundvollen 7 October 2013, p. 47.

28. Cf. Ot.prp. no. 32 (2007-2008) pp. 191-192.

29. See, for example, Harald Baldersheim et al, *Kommunalt selvstyre I velferdsstaten*, 1997 pp. 190-202.

30. Author's translation.

31. Specific rules relating to task distribution between the Ministry of Fisheries and Coastal Affairs, the Directorate of Fisheries, regional offices and regional authorities are provided in the regulations.

The county administration is currently the first-instance authority that allocates permits for aquaculture, cf. Section 6 second paragraph.³² This competence was transferred from the central government (regional office) to the county administration in conjunction with the management reform of 2009.³³

In contrast to the development of land area in accordance with private property rights, there are no applicants for aquaculture that have legal right to permits for aquaculture in sea area.³⁴ Permission for such *exclusive* exploitation of sea areas may be granted on a discretionary assessment, c.f. Section 4. Balancing of interests arising in connection with this decision is thus very important. General conditions for allocating permits, which apply to salmon, trout and rainbow trout as well as other forms of aquaculture, are found in Section 6, first paragraph. Four cumulative conditions must be met before the county administration can allocate a permit. A permit for aquaculture can be granted if: a) it is environmentally responsible, b) the requirements in Section 15 concerning land use plans and conservation measures have been met, c) the land use interests have been weighed in accordance with Section 16, and d) licences have been granted pursuant to the Food Act, the Pollution Control Act, the Harbour Act and the Water Resources Act.³⁵ Fisheries authorities must consider these conditions and make an overall assessment, cf. the discretionary competence as expressed in Section 4. The permit must also always be in compliance with the main objective of sustainable development, cf. Section 1.

The municipality's role in location of aquaculture is primarily ensured through municipal planning work, cf. Section 6 b. A key prerequisite for aquaculture is that the municipal land use plans provide an opening for it, or do not prevent it, cf. Section 15 a). When municipal plans do exclude aquaculture, the municipa-

lity can nevertheless, in conjunction with an application for a marine farming licence, consent to such an initiative, cf. AA Section 15, second paragraph. Through the Aquaculture Act, the municipality thus has an opportunity to *promote* commercial interests, but no statutory ability to impose *additional* conditions for the establishment of aquaculture. Based on precedence, the municipality has the right to participate in the process of processing an application.³⁶ For example, the municipality may give advice on restriction of use of the coastal area, to take into consideration future planning. In accordance with the AA, it is the fisheries authorities, represented by the county administration, who have the crucial say on which inputs from the municipality, if any, should be emphasized.³⁷

4.3 Responsible authority pursuant to the Nature Diversity Act

Like the Plan and Building Act, the Nature Diversity Act (2009) contains rules relating to management of land areas. The purpose of conservation pursuant to the Nature Diversity Act is to protect the natural environment through «conservation and sustainable use», cf. Section 1. In this Act, the state is the final authority, cf. Section 62, first paragraph.

The Act applies to both land and marine areas out to the territorial limit, cf. Section 2, first paragraph. Unlike the Planning and Building Act, the Nature Diversity Act states that decisions on land use are not made based on continuous planning, but through *permanent* administrative decision. The law has provisions pertaining to conservation of special areas and special habitats and organisms. A new feature in the Nature Diversity Act is a separate objective for marine conservation. Section 39, first paragraph, states that «(m)arine protected areas may be established on the grounds of their marine conservation value, but also to safeguard valuable marine

32. See FOR-2010-05-18-708, Section 3 first paragraph.

33. See Ot. prp. no 10 (2008-2009) p. 9.

34. See Ingunn Elise Myklebust, *Strandrett og offentlig styring av arealbruk i sjø*, Oslo 2010, pp. 201-211.

35. See Ot.prp.no. 61 (2004-2005) p. 57.

36. See Ot.prp. no. 61 (2004-2005) p. 32.

37. In cases in which the municipality has opened for marine farming, new questions may arise amongst fishery authorities and environmental authorities concerning the specific conditions for establishment and operation of aquaculture installations. This is nevertheless not a topic here. See Ingunn Elise Myklebust, *Vilkår ved vedtak om lokalisering av akvakultur*, TFE no. 2. 2013, pp. 100-125 and Sigrid Eskeland Schütz, *Vassdirektivet – konsekvensar for næringsverksemd*, TFE no. 1, 2014, pp.11-47.

areas that are ecologically necessary for terrestrial species». The type of measure that may be implemented depends on the purpose of the conservation. Section 39, fourth paragraph, states that the conservation objective and restrictions can apply to «the seabed, water column, surface or a combination of these elements». The statutory provision here is quite similar to the conservation category applying to marine protection pursuant to the Plan and Building Act. The rule may also help to clarify what might be national interests under the Planning and Building Act.

The municipalities can also be assigned responsibility through the Nature Diversity Act, cf. Section 62, second paragraph, but this depends on delegated powers. It is also important to emphasize that municipalities have a key role in administrative procedures for processing of conservation decisions, cf. Section 41. One general political objective is that the municipalities and residents in the municipality feel they have *ownership* of plans adopted at central government level. Increasing emphasis is also being placed on the fact that environmental conservation requires local experience as well as knowledge of national goals and expertise. The municipalities can also be given responsibility to administer protected areas.³⁸

4.4 Responsible authority pursuant to the Marine Resources Act

The purpose of the Marine Resources Act (2008) is stated in Section 1: «to ensure sustainable and economically profitable management of wild living marine resources and genetic material derived from them, and to promote employment and settlement in coastal communities». Responsibilities and tasks pursuant to the Marine Resources Act are assigned to the central government represented by the fishery authorities, cf. Section 7.

The Marine Resources Act has provisions pertaining to fishing gear, periods when harvesting is prohibited, prohibitions against fishing and hunting in certain areas, means

of harvesting, order on harvesting grounds, sales of catches, and other aspects of marine resource use. This scope can also indicate the national interests generally applicable to the management of fish resources, also according to the Planning and Building Act. Local authorities have no liability under this Act, but the county administrations can be given competence pursuant to regulations, cf. Section 8 a).³⁹ The decentralization is valid for resources with *limited extensiveness*, as for example, management of seals.⁴⁰

It is important in this conjunction to point out that ordinary municipal coastal zone planning may significantly constrain traditional and modern coastal fishing. The municipality can reserve areas in the sea to protect important places for casting and securing catches, spawning grounds, etc. Coastal zone planning can thus be an important tool for safeguarding fishing resources more generally. The municipality can take the initiative to do this through land use planning, or may find grounds to include such rules based on input from the fishery authorities.

Use and protection of sea area, may be an example of a planning field in which various government sector authorities may have different interests in use of the sea area. In many cases there will be considerations in favour of aquaculture and considerations in favour of traditional fishing opposing one another in planning in coastal water. Disagreement between the sectoral authorities can make a planning process difficult and time consuming. To see if anything can be done to find better coordination here, the Ministry in a decision made 3 September 2012, adopted a three-year trial relating to the coordination of state objections to municipal plans initiated. After this period, the scheme may be evaluated to ascertain whether this is a tool that better ensures targeted treatment in planning matters and considerations of municipal self-government.⁴¹

38. See Innst. 9 S (2009-2010) pp. 59-60.

39. See Ot.prp.no.10 (2008-2009) p. 52-55.

40. See FOR-2009-10-29-1317

41. See Letter from the Royal Ministry of the Environment represented by the Minister to the county governors and county municipalities, 28 Feb 2013 and H-2/14, Section 2.6.

5 Challenges in state control of local government

The division of responsibilities between the different authorities and levels of administration has not been frozen once and for all, but must be evaluated in light of current requirements for expertise, knowledge and coordination.⁴² An important objective of the planning reform 2008 was to ensure a proper balance between local autonomy and the need to attend to national and regional concerns.⁴³ It may therefore be appropriate to offer some reflections on the development of legislation that provides a legal basis for land management in the coastal water, and the effect this has had on interaction among the public authorities.

One issue that must be assessed is whether municipal autonomy is strengthened by acquiring additional duties, or if self-government is instead overshadowed by increased requirements to cooperate with central governmental authorities and new forms of central planning and control within the Plan and Building Act's system. Does the municipality have real decision-making competence in determining the use of marine areas, or is it rather a case of the municipality merely administering various central governmental and regional inputs? In a comparison of conflicting marine interests, Bjørn Hersoug and Jahn Petter Johnsen (2012) conclude that municipalities are often too small to conduct marine area planning, and that there can be quite a lot of work associated with impact studies and land use processes in marine areas.⁴⁴

Municipal initiative and «partial» responsibility for both the coastal zone and marine

areas, nevertheless quite clearly have benefits also. There is a growing demand for *comprehensive* and *ecosystem-based* management, cf. principle in Nature Diversity Act, Section 10. This implies requirements for making land use plans and requirements related to process.⁴⁵ Through adoption of land use plans under the Planning and Building Act, municipalities may secure a key role in management. Use of coastal waters must be viewed in the context of land use, and the municipality is most often closest to the resources. The municipality has long tradition and experience in management of land, which can be exploited in more extensive planning at sea as well. But one may ask whether there is a need for more guidelines.⁴⁶ Clearer legal prioritisation of particular land use interests will send stronger signals indicating what should be prioritised.⁴⁷ General guidelines can also be used to disseminate knowledge of the natural resources, which must be used in the actual management, cf. Nature Diversity Act, Section 8.

On the basis of three years of central government planning guidelines for coastal zone management so far, I suggest that experience with this form of management can form a basis for assessing similar forms of coastal zone management in marine areas as well. Instruction books and governmental directions can often be useful instruments to achieve effective and coordinated planning.⁴⁸ In the absence of clear statutory rules or guidelines concerning the important values in marine area management, it is difficult for the municipalities themselves to have a clear notion of how to regulate these resources autonomously.⁴⁹

42. See Sigrid Stokstad, *Kommunalt selvstyre, Kompetansefordeling mellom Stortinget, statsforvaltningen og kommunene*, Oslo 2012, p. 344.

43. See e.g. NOU 2003: 14, p. 124.

44. See Bjørn Hersoug and Jahn Petter Johnsen (eds), *Kampen om plass på kysten, Interesser og utviklingstrekk i kystsonoplanlegging*, Oslo 2012.

45. See e.g. Sigrid Eskeland Schütz, *Internasjonale og EØS-rettlige perspektiv*, pp. 85-122, i *Konsekvensutredninger, Rettsregler, praksis og samfunnsvirkninger*, Fredrik Holth og Nikolai K. Winge (red), Oslo 2014 and in particular COM (2013)133 final Proposal for a Directive of the European Parliament and of the Council, establishing a framework for maritime spatial planning and integrated coastal management.

46. See Letter from the Royal Ministry of the Environment represented by the Minister to the county governors and county municipalities, 28 Feb 2013 and H-2/14, section 2.6.

47. See also Nikolai K. Winge, *Kampen om arealene, Rettslige styringsmidler for en helhetlig utmarksforvaltning*, Oslo 2013, p. 406.

48. See Arne Holm m.fl, *Kommunal variasjon i statlige veiledere og retningslinjer*, NIBR-rapport 2013:17, pp. 125-132.

49. See also in this regard one of the conclusions in Sigrid Stokstad and Signe Bock Seggaard, *Forsviner det kommunale selvstyret i klagebehandling*, Rapport KS 2013, p. 108. (Here marine area management in particular is not assessed).