

COMPENSATION FOR DEPRECIATION OF THE PROPERTY VALUE ACCORDING TO POLISH LAND-USE LAW

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INTRODUCTION

The purpose of this Article is to examine the role of compensation rights in property reduction due to planning decisions in Poland. Poland is a post-communist country that has been reforming its planning laws and land-use laws since the early 1990s. Unfortunately, the reforms have not yet achieved positive results. Moreover, the government does not seem to have any vision for land planning reform.

The issue of compensation for planning injuries is being neglected in Poland. It has not received adequate attention in practice, and the courts have reached inconsistent outcomes. In Poland, planning theory and established legal doctrines ignore the negative impact of planning decisions on private property values and regulatory takings issues. The absence of scholarly opinion in this area is surprising, especially taking into account the large number of blighted properties in the past several years. Land-use law doctrine and the judiciary have focused more on the problem of planning gain and a betterment levy. However, it should be noted that Poland is currently awaiting the compensation decision in a land planning case by the European Court of Human Rights in Strasbourg that might strongly influence the future of planning law in Poland.¹

This Article analyzes land planning injury regulations from both a theoretical and practical perspective. Part I briefly explains the historical background of Polish land planning. Part II focuses on the constitutional rules concerning the protection of private property and their effects on land-use law. The influence of the European Convention on Human Rights on Polish law will also be discussed in Part II. Part III examines substantive prerequisites for regulatory takings claims and minor takings claims. Part IV focuses on indirect planning injuries by trying to identify

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1. See *Skibiński v. Poland*, 2006-IV Eur. Ct. H.R., available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Complete Text" for "Skibiński"; then follow "Case of Skibiński v. Poland" hyperlink).

injurious affection claims in Polish law. Part V is devoted to the conditions of compensation claims. Part VI considers both the liability issues and the procedural aspects of planning injuries.

I. HISTORICAL BACKGROUND

A. *Polish Building Decree of 1928*

The legal framework allowing compensation for the decline in the value of private property was introduced in the late 1920s. First, provisions of regulatory taking were contained in article 47 of the Building Decree of 1928.² According to this regulation, an owner might claim compensation for the depreciation in the value of land caused by a building prohibition introduced by a local plan. This decree remained in force until 1946. Expropriation was subsequently addressed in the Expropriation Decree of 1934, which included statutory provisions regarding injurious affection caused by expropriation.³

B. *Planning Decree 1946*

After World War II, the introduction of communism caused dramatic changes in the protection of private property, and the idea of regulatory takings declined. A centralized economy was established, and the government linked planning law with its centralized economic plans. As a result, planning law was used as a tool of the communist regime. The Land Planning Decree of 1946⁴ did not contain provisions relating to compensation for planning injuries.

C. *Communist Planning from 1961 to 1990*

Regulatory taking provisions were not included in the Planning Law Act of 1961.⁵ Planning decisions during this time period aggressively challenged the very notion of ownership. For example, many public roads and electric thoroughfares were built on private plots without the

2. Building Decree of 1928, Dz. U. of 1939, No. 34, item 216 (Pol.).

3. According to article 28 of the Expropriation Decree of 1934, compensation is payable not only for the value of land taken, but also for consequential damage to retained land. Expropriation Decree of 1934, Dz. U. of 1934, No. 86, item 776, art. 28 (amended Apr. 15, 1939) (Pol.).

4. Land Planning Decree of 1946, Dz. U. of 1946, No. 16, item 109 (amended June 6, 1958) (Pol.).

5. Planning Law Act of 1961, Dz. U. of 1961, No. 7, item 47 (amended Jan. 1985) (Pol.).

permission of the owners.⁶ Communist local plans, based on a central plan, introduced significant restrictions on the use of property, with no subsequent obligation to compensate the owner of the regulated and restricted property. Many properties were frozen and could not be developed for many years as a result of their designation as land for public purposes. At the same time, the Expropriation Act of 1958⁷ contained injurious affection provisions, but these provisions were limited to the mandatory purchase of retained land that was injuriously affected and only partly taken. This legal framework was reproduced in the Planning Act of 1984.⁸

D. Land Planning Act of 1994: The First Stage of Reforms

After the demise of the communist regime in Poland, the right to compensation for planning injuries was re-enacted in provisions of the Land Planning Act of 1994 (“LPA 1994”), which came into force on January 1, 1995.⁹ This regulation was substantively different from article 47 of the Building Decree of 1928. Under article 36 of LPA 1994, the local authorities were obliged either to (1) buy plots that were significantly affected by local master plans, or (2) replace those plots with other plots within six months from the date on which a relevant request was submitted, or to award compensation for the real losses caused by the introduction of the plan.¹⁰

Transition regulations contained in article 68 of LPA 1994 limit the scope of compensation claims to injuries caused by local plans approved after January 1, 1995.¹¹ Thus, the obligation of local authorities under

6. Renata Krupa-Dabrowska, *Odszkodowanie dla wl ascieciela za lata zawieszenia jego praw* [Owner’s Compensation for Years of Abrogation of His Rights], RZECZPOSPOLITA, Dec. 21, 2005 (Pol.).

7. Expropriation Act of 1958, Dz. U. of 1974, No. 10, item 64 (amended July 1, 1982) (Pol.).

8. Naczelny Sąd Administracyjny [NSA] [Supreme Administrative Court] IV SA 1040/91 (Dec. 17, 1991) (Pol.) (stating that if provisions of local plans deprived an owner of his right to use property, the property should be acquired or exchanged) (unpublished opinion).

9. Land Planning Act of 1994, Dz. U. of 1999, No. 15, item 139 (amended Mar. 30, 2001) (Pol.). *See also* HAUSER ET AL., COMMENTARY ON THE PLANNING ACT 1994, at 87 (1995).

10. Land Planning Act of 1994 art. 36.

If the value of a piece of real estate declines as a result of the approval of or a change to the local spatial development plan, and the owner or party having perpetual usufruct of the land sells this real estate not having previously taken advantage of the rights provided in paragraph 1, he may demand compensation equal to the decline in value in the real estate from the commune.

Id.

11. Trybunał Konstytucyjny [TK] [Constitutional Tribunal] Sygn. akt K 6/95 (Dec. 5, 1995) (Pol.) (stating that article 68 does not conform to article 1, article 7, and article 67, section 2 of the

article 36 applies only to local master plans that were adopted after LPA 1994 came into force.

II. CONSTITUTIONAL RULES AND INTERNATIONAL CONVENTION ASPECTS

A. *Protection of Property Rights Rule*

Several provisions of the 1997 Polish Constitution protect private property rights.¹² First, article 64 of the Constitution lays down the principle of property rights protection. It states that “[e]veryone shall have the right to ownership, other property rights and the right of succession. [And e]veryone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.”¹³

As the Constitutional Court once put it:

Contemporary legal thinking has rejected the idea of ownership, especially ownership of real estate, as a right governed solely by the individual interests of an owner: the social aspect of ownership is now unanimously recognised. Accordingly, ownership is not absolute in character and may be subject to limitations. In Polish law, such thinking was expressed in the definition of the right of ownership: within the meaning of Article 140 of the Civil Code, all owners’ rights and privileges are limited by statute, principles of morality and the socio-economic purpose of this right. The constitutional basis for limiting the right of ownership is Article 64(3) of the Constitution.¹⁴

B. *Expropriation (Condemnation) Rule*

Article 21, section 2 of the Polish Constitution states that “[e]xpropriation may be allowed solely for public purposes and for just compensation.”¹⁵ The term “expropriation” is defined in article 112 of the

Constitution of 1992).

12. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION OF THE REPUBLIC OF POLAND] Dz. U. of 1997, No. 78, item 483 (adopted Apr. 2, 1997) (amended Apr. 4, 2001).

13. *Id.* art. 64.

14. Trybunał Konstytucyjny [TK] [Constitutional Tribunal] K 9/04 (Mar. 15, 2005) (Pol.), available at http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2005/K_09_04.pdf. For an unofficial summary of the decision in English, see Relinquishing Ownership of Real Estate and Interest of Communes, http://www.trybunal.gov.pl/eng/summaries/documents/K_9_04_GB.pdf.

15. KRP art. 21(2).

Land Administration Act of 1997 (“LAA 1997”) as a physical taking.¹⁶ The Constitutional Court, however, has interpreted this term more broadly to include all forms of takings.¹⁷ In its judgment on May 8, 1990, the Constitutional Court declared, for the first time, that “expropriation” means every deprivation of property for public purposes, notwithstanding the form of deprivation.¹⁸ As stated by the Court in the judgment of April 12, 2000, the definition of “expropriation” contained in LAA 1997 is not binding when interpreting constitutional terms.¹⁹ “Expropriation” is any public action that reduces property value beyond a specified minimum percentage and requires payment by the public for “lost” value above this level. Thus, it is possible to compare the term “expropriation” used in the Polish Constitution with the term “taking” used in the Fifth Amendment of the United States Constitution.²⁰ Among academics, the broader interpretation of the expropriation class has been accepted.²¹

C. The Just Compensation Rule

The second rule set out in article 21, section 2 guarantees that private property shall not be taken without just compensation.²² The Constitution does not use the term “full compensation.” The standard way to decide on the amount of compensation is to use the fair market value of the property taken.²³

However, a number of acts have limited compensation. The most important example is the Act on Toll Highways, which limits

16. Land Administration Act of 1997, Dz. U. of 2004, No. 261, item 2603, art. 112 (amended Oct. 13, 2005) (Pol.).

17. See SYLWIA JAROSZ-ŻUKOWSKA, KONSTITUCYJNA ZASADA OCHRONY WŁASNOŚCI [CONSTITUTIONAL PROPERTY PROTECTION RULE] 230 (2003).

18. Trybunał Konstytucyjny [TK] [Constitutional Tribunal] K 1/90 (May 8, 1990) (Pol.).

19. TK Sygn. K 8/98 (Apr. 12, 2000) (Pol.). In article 112, the Land Administration Act of 1997 defines expropriation as deprivation or limitation by force of a decision of the right of ownership, the right of perpetual usufruct or other rights to property, i.e., mortgage. Land Administration Act of 1997 art. 112.

20. U.S. CONST. amend. V.

21. See BOGUSŁAW BANASZAK, PRAWO KONSTITUCYJNE [CONSTITUTIONAL LAW] 244 (2001); JERZY ONISZCZUK, KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ W ORZECZNICTWIE TRYBUNALU KONSTITUCYJNEGO NA POCZĄTKU XXI W. [CONSTITUTION IN THE JUDGMENTS OF THE CONSTITUTIONAL COURT IN THE BEGINNING OF THE TWENTY-FIRST CENTURY] 196 (2004); Fryderyk Zoll, *Prawo własności w Europejskiej Konwencji Praw Człowieka z perspektywy polskiej* [Property Right in European Court of Human Rights From Polish View], 5 PRZEGLĄD SĄDOWY [JUDICIAL REVIEW] 24, 31 (1998) (Pol.).

22. KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION OF THE REPUBLIC OF POLAND] art. 21(2).

23. Land Administration Act of 1997, Dz. U. of 2004, No. 261, item 2603, arts. 128–135 (amended Oct. 13, 2005) (Pol.).

compensation to the market value that the property held on the day the decision concerning the highway location was issued.²⁴ The reason for limiting compensation for land directly affected by the construction of highways is because of the necessity of further developing the transport infrastructure in Poland.²⁵

Over the last fifteen years, the Constitutional Court has emphasized many times that just compensation should be equivalent to the value of taken property, that is, the amount of compensation should give owners the ability to restore themselves to their prior situation before the taking. However, the Court has not clarified the standard of just compensation. The Court holds that just compensation is compensation related to the value of taken property. In addition, the Court has emphasized the importance of using the term “just compensation” rather than “full compensation” because of the first term’s flexibility.

In its judgment on July 20, 2004, the Constitutional Court explained that the term “just compensation” in article 21, section 2 of the Constitution refers to compensation linked to the value of the expropriated real estate.²⁶ The Court found it significant that the constitutional legislator did not employ the term “full compensation,” but instead used the adjective “just,” thereby giving this provision a more flexible nature. Accordingly, it should be assumed that particular situations may exist where other important constitutional values justify the conclusion that compensation is “just” even when not amounting to “full” compensation.

It is impermissible, however, to limit the amount of compensation in an arbitrary manner. When regulating the issues of compensation payable in the event of expropriation, the legislator is entitled to take into account the Roman law principle *ius civile vigilantibus scriptum est*. This principle requires concerned entities to be vigilant in protecting their own civil rights and is entirely appropriate in democratic states that are governed by the rule of law.

The Constitutional Court has stated that the mechanism of compensation introduced by planning law for regulatory takings is a form of compensation for takings in the meaning of article 21, section 2 of the

24. Toll Highways Act of 1994, Dz. U. of 2004, No. 256, item 2571 (amended Sept. 24, 2005) (Pol.). The period between the day of the planning decision and the day of expropriation is often five years. In this period of time, the value is frozen for the aim of acquisition.

25. Poland still lacks a coherent network of motorways and expressways, which could link major cities and industrial areas. The quality of existing roads cannot handle the growing number of cars and traffic volume. Only 2300 kilometers of road allow the speed of 120 kilometers per hour or higher.

26. Trybunał Konstytucyjny [TK] [Constitutional Tribunal] SK 11/02 (July 20, 2004) (Pol.).

Constitution.²⁷ From this judgment, it may be interpreted that article 21 protects property owners against reductions in property value caused by regulatory takings.

In addition, the Court has developed a compensation doctrine for takings that includes not only compensation for direct expropriations (eminent domain) but also compensation for regulatory takings. The right to compensation for the taking of property includes compensation for any decrease in the value of property. The decrease in value is determined by the land's market value. The Court states that the just compensation rule, contained in article 21, is universal in its meaning, and should be used in every case concerning interference with private property rights due to a specified public purpose.²⁸

D. The European Convention of Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms²⁹ (ECHR) was ratified by Poland in 1993. Protocol No. 1 to the ECHR³⁰ is an important instrument for the protection of private property.³¹ Since Poland's ratification of the ECHR, everyone whose rights are violated by Poland has an effective legal remedy against the actions of government authorities.³² The ECHR's main instrument to protect private property is article 1 of the First Protocol, which limits the ability of public authorities to interfere with private property rights.³³ However, it is not the only relevant article. Equally important articles in land-use law include the right to a fair trial,³⁴ the right to protect one's

27. Trybunał Konstytucyjny [TK] [Constitutional Tribunal] K 37/02 (Nov. 25, 2003) (Pol.).

28. *Id.*

29. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

30. Poland ratified Protocol 1 of the European Convention on Human Rights in 1994.

31. Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Prot. 1 ECHR].

32. ECHR, *supra* note 29, art. 13. "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." *Id.*

33. Article 1 of Protocol 1 of the European Convention on Human Rights provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

ECHR Prot. 1, *supra* note 31, art. 1.

34. *Id.* art. 6.

private life, family life, and home,³⁵ and the prohibition of discrimination.³⁶ Article 1 of the First Protocol is directed principally to the “depreciation” of property, although it may also apply to “control of use.”³⁷

Polish courts rarely apply the provisions of the ECHR directly; however, two recent judgments of the European Court of Human Rights have strongly influenced matters related to property protection and land-use law: *Broniowski v. Poland*³⁸ and *Hutten-Czapska v. Poland*.³⁹

European law is expected to continue to influence Poland’s land-use laws in the near future. The approval of the European Constitution would include the European Union Charter of Fundamental Rights.⁴⁰ Article 17 of the European Union Charter of Fundamental Rights would be particularly influential because it states the following:

[e]veryone has the right to own, use, dispose of, and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions . . . except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.⁴¹

III. COMPENSABLE DIRECT PLANNING INJURIES

There are two distinct types of direct planning injuries. One type is known as “planning expropriation” (regulatory takings), which occurs when the regulation of property use significantly restricts the property owner. The second type is known as “minor planning injuries,” which occur when planning regulations do not significantly limit the use of land but nevertheless diminish its value.

35. *Id.* art. 8.

36. *Id.* art. 14.

37. *See* Sporrang v. Sweden, 5 Eur. H.R. Rep. 35 (1982). Claims for interference with the enjoyment of property because of public works or use may arise under art. 8 (right to a home). *See, e.g.,* Lopez Ostra v. Spain, 20 Eur. H.R. Rep. 277 (1994); Hatton v. UK, 34 Eur. H.R. Rep. 1 (2002).

38. *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 7.

39. *Hutten-Czapska v. Poland*, 2005 Eur. Ct. H.R., <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “case title” for “Hutten-Czapska”; then follow “CASE OF HUTTEN-CZAPSKA v. POLAND” hyperlink).

40. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

41. *Id.* art. 17.

The statutory foundation of the right to compensation for direct planning injuries is insufficient, resting only on articles 36 and 37 of the Land Planning Act of 2003 (“LPA 2003”).⁴² Compensation for regulatory takings, however, is governed not only by the Land Planning Act of 2003,⁴³ but also by the Land Administration Act of 1997,⁴⁴ and the Environmental Protection Law 2001 (“EPL 2001”).⁴⁵ Article 6 of the Land Planning Act of 2003 sets out the rule according to which the provisions of a local plan, together with other legal regulations, shape how real estate ownership titles are executed.⁴⁶ Controversially, land designated for highways is excluded from planning injury provisions.

A. *Planning Expropriation (Regulatory Takings)*

1. *Legal Framework According to the Land Planning Act of 2003*

Planning regulations may have a negative effect on property where the owner (or perpetual user) is unable to realize the market value that would have been obtainable had the owner’s land not been affected by the regulations. This is because prospective purchasers will either not proceed with the purchase or, having learned of the planning proposals, only offer a lower price.

The most significant example of direct planning injuries is planning expropriation (also known as regulatory takings). According to article 36(1) of the LPA 2003, if the use of property in the previous manner has become impossible, or is limited in essential manner, as the result of a revision in the land-use plan or the issuance of a development permission, the landowner may demand:

- Compensation for actual damage (*damnum emergens*); or
- The purchase of the interest in the land (or its part) by the municipality.⁴⁷

42. See ZBIGNIEW NIEWIADOMSKI ET AL., KOMENTARZ DO USTAWY O PLANOWANIU I ZAGOSPODAROWANIU PRZESTRZENNYM [THE COMMENTARY TO LAND PLANNING ACT] (2d ed. 2005) (Pol.). Unfortunately, the commentary poorly explains the compensation issue.

43. Land Planning Act of 2003, Dz. U. of 2003, No. 43, item 296 (Pol.).

44. Land Administration Act of 1997, Dz. U. of 2004, No. 261, item 2603, arts. 128–135 (amended Oct. 13, 2005) (Pol.).

45. Environmental Protection Law of 2001, Dz. U. of 2001, No. 62, item 627 (amended Jan. 1, 2006) (Pol.).

46. Land Planning Act of 2003 art. 6.

47. *Id.* art. 36(1).

The blight notice is not limited by classes of land. By the literal meaning of article 36(1) of LPA 2003, the land does not necessarily have to be designated for a public use.⁴⁸ It should be noted, however, that blight notices exclude land designated for future highways.⁴⁹ Thus, blight that is created by a decision on highway placement cannot be remedied because the Act excludes the application of article 25 to land designated for future highways.⁵⁰

In my opinion, the scope of planning blight should be limited by statute to specified purposes such as roads, green spaces, and spaces for public thoroughfares.⁵¹ This would in practice reduce the rights of landowners to compensation. Theoretically, if private land was designated for commercial purpose, realization of which substantially limited the owner in possibilities of using his land, he has a right to raise a regulatory takings claim against the community under the plain meaning of article 36(1). Such situations should be considered illegal because the land was not taken for public use. As noted above, the regulatory takings provisions were introduced in 1994. In the draft of the Planning Bill of 1994, regulatory takings referred only to land designated for public purposes in local plans.⁵² In Parliament, provisions concerning regulatory takings were changed. Provisions that did not mention public purpose were introduced in article 36(1) of Planning Act 1994.⁵³ The Planning Act of 2003 reproduces these provisions of the 1994 Act and is strongly criticized by commentators as placing a heavy burden on landowners to prove that their property has become blighted land.⁵⁴

48. *Id.*

49. See Toll Highways Act of 1994, Dz. U. of 2004, No. 256, item 2571, art. 325 (amended Sept. 24, 2005) (Pol.).

50. *Id.*

51. Land Administration Act of 1997, Dz. U. of 2004, No. 261, item 2603, art. 6 (amended Oct. 13, 2005) (Pol.).

52. Draft of Land Planning Bill of 1994, art. 38, http://ks.sejm.gov.pl/proc2/projekty/26_p.htm (last visited Mar. 26, 2006).

53. During the debate in Parliament, member Krzysztof Szczypiński explained:

Principal issue for this part of act is article 36. In relation to governmental draft of the bill, during works on the draft provisions were referred to as financial results of approved of local plans which were afterwards modified, expanded and precised. In the governmental draft compensable were only injuries caused by designation of private land for public purposes and owner may claim to acquire of land or exchange. We decided that compensation should be paid not only for properties designated for public purposes.

Krzysztof Szczypiński parliamentary debate comments, May 12, 1994, <http://ks.sejm.gov.pl> (last visited Mar. 26, 2006).

54. TOMASZ BAKOWSKI, USTAWA O PLANOWANIU I ZAGOSPODAROWANIU PRZESTRZENNYM: KOMENTARZ [COMMENTARY ON LAND PLANNING LAW 2003] 115 (2004); Tadeusz Kasinski, *Local Land Use Plan: A Special Form of Non-Compensable Expropriation of Land*, 3 MONITOR PRAWNICZY

In the context of article 21(2) of the Constitution, planning expropriation caused by the designation of private land for a non-public purpose is illegal.⁵⁵ Tadeusz Kazinski has gone even further to argue that planning expropriation itself is illegal.⁵⁶

Another problem arises when one considers the definition of the term “limited in essential manner,” which appears in article 36(1) of the LPA 2003, and extends the scope of blight notice to partial takings. The courts and doctrine have yet to interpret this term. Due to the lack of any Supreme Court opinion, lower courts independently determine whether property has been taken and, if so, what level of decline in economic value, i.e., 50%, constitutes planning expropriation (regulatory takings).

Theoretically, an acquisition claim does not depend on a reduction in the marketability of the property or a decline in the value of the property, but instead refers only to a limitation of the owner’s ability to use the property. In other words, an acquisition claim is not connected with the economic value of the land. Judge Edward Janeczko has suggested that a reduction in land value is irrelevant for regulatory takings.⁵⁷ In contrast, Professor Marek Szewczyk has stated that a decline in property value indicates planning expropriation (regulatory takings) because the term “deprivation of economic value” that is found in article 36(1) of LPA 2003 pertains to a significant or total limitation of the use of property.⁵⁸

According to article 36(1) of the LPA 2003,⁵⁹ an owner (or perpetual usufruct user) can require a local authority to purchase blighted land. The LPA does not contain any provisions for determining the compensation payable for the acquisition. The level of compensation, by analogy to the law on compensation for expropriation,⁶⁰ should equal the market value of the property before it became blighted.

95 (1997) (concerning the interpretation of article 36(1) of the LPA 1994, which was reproduced in LPA 2003).

55. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION OF THE REPUBLIC OF POLAND] Dz. U. of 1997, No. 78, item 483, art. 21(2) (adopted Apr. 2, 1997) (amended Apr. 4, 2001).

56. Tailevusz Kasinski, *Execution of Article 36(2) Claims*, 10 MONITOR PRAWNICZY 403–05 (1997).

57. The conclusion that might be drawn from this rule is that claims mentioned above may occur with or without an actual loss taking place. Edward Janeczko, *Renta planistyczna na the art. 36 ustawy o zagospodarowaniu przestrzennym* [The Planning Rent Under Article 36 of the Land Planning Act], 1 REJENT 117 (2001).

58. ZBIGNIEW LEOŃSKI & MAREK SZEWCZYK, ZASADY PRAWA BUDOWLANEGO I ZAGOSPODAROWANIA PRZESTRZENNEGO [PRINCIPLES OF BUILDING LAW AND LAND USE] 154 (2002).

59. Land Planning Act of 2003, Dz. U. of 2003, No. 43, item 296, art. 36(1) (Pol.).

60. Land Administration Act of 1997, Dz. U. of 2004, No. 261, item 2603, arts. 128–135 (amended Oct. 13, 2005) (Pol.).

According to article 36(2) of the LPA 2003, however, the planning authority may consider adopting an alternative tool—the exchange of property. Formally, an exchange of property between a local authority and a private owner is the only substitute for monetary compensation.⁶¹ Polish planning law does not allow for compensation in forms other than payment in-kind.

As an alternative to serving a blight notice under article 36(1) of the LPA 2003, owners of blighted property can choose to limit their claims to monetary compensation, without demanding that municipalities acquire the land. The compensation is limited only to “actual damage.” The obvious question is how to define “actual damage.” This term signifies the existence of effective damage to the injured owner’s property (*damnum emergens*), as opposed to so-called hypothetical harm, i.e., profits which the injured owner could have obtained had the harm not occurred (*lucrum cessans*). The aforementioned statutory limitations represent an exception to the principle expressed in article 361, section 2 of the Civil Code, according to which compensation encompasses both *damnum emergens* and *lucrum cessans*.⁶² There are no doubts on this matter according to the opinions presented in the legal literature and judgments of the Supreme Court.⁶³ In other words, this rule excludes the right to compensation for lost profits (from commercial activities, for example), and does not cover disturbance costs (such as removal costs or costs of relocating a business).

2. *The Acquisition Claim According to Environmental Protection Law*

Property affected by environmental contamination is separately regulated by provisions found in the Environment Protection Law of 2001 (“EPL 2001”).⁶⁴ Pursuant to article 129 of the EPL 2001, if the use of property is limited in essential manner by a “statute or ordinance of limitation of use,” an owner may demand acquisition of property.⁶⁵ The EPL 2001 contains more detailed regulation on regulatory takings than the Planning Act of 2003. Specifically, article 32 of the EPL 2001 refers to the LAA 1997 for principles and rules for purchase notice that are similar to the compensation for expropriation (market value standard).⁶⁶ Under

61. Land Planning Act of 2003 art. 36(2).

62. KODEKS CYWILNY [CIVIL CODE] art. 361 § 2 (Pol.).

63. Sąd Najwyższy [SN] [Supreme Court] I CKN 191/98 (Oct. 7, 1998) (Pol.).

64. Environmental Protection Law of 2001, Dz. U. of 2001, No. 62, item 627 (amended Jan. 1, 2006) (Pol.).

65. *Id.* art. 129.

66. *Id.* art. 32.

article 33 of EPL 2001, a price of transaction is determined by a “valuator.”⁶⁷

A significant example of a restriction introduced for environmental protection is a limited use zone (LUZ) around a military airfield. Such LUZs exist in Poland, such as Krzesiny near Poznan.

B. Eliminate the Chance for Any Potential Development Rights

Polish law lacks provisions for compensation in situations when local planning provisions eliminate the chance for potential development rights. Suppose, for example, that land that had previously by default been used for agricultural purposes is now explicitly designated for agricultural purposes. Suppose further that the local plan converted other parcels close by from agriculture to building, thereby excluding the land in question from development. Under these conditions, the expectations of the land owner for future development and the reduced chance of gaining rights for development are not subject to compensation. In general, this type of rezoning, which reduces prospective development rights, often occurs in Poland.

C. Compensation for Partial Decline in Value

This section of the Article addresses situations where a planning decision has caused only a partial decline in property value. First, we will examine situations where a plot of land is directly affected by a planning or development decision. Then, we will look at situations where land is indirectly affected by a planning or development decision pertaining to another plot.

In Poland, whenever planning decisions are the cause for the reduction of the value of property, landowners have the right to claim compensation. Article 36(3) of the LPA 2003 provides that when passage of a local plan, or its amendment, causes a decline in property value, the owner, or perpetual user, who transfers (by donating, selling, or exchanging, for example) the property (by notary deed), but did not exercise the rights enumerated in sections 1 and 2 of the LPA,⁶⁸ may claim compensation from the municipality.⁶⁹ Furthermore, pursuant to articles 54 and 63 of the

67. *Id.* art. 33.

68. The failure to exercise the rights enumerated in sections 1 and 2 of the LPA means the failure to submit an acquisition notice.

69. Land Planning Act of 2003, Dz. U. of 2003, No. 43, item 296, art. 36(3) (Pol.).

LPA 2003, compensation claims can also be filed when, in the absence of a local plan, the issuance of a development-permit decision causes a decline in property value.⁷⁰ However, applying the compensation rules to development decisions can cause difficulties in interpretation. For example, more than one development decision can be issued for each property, and it is not obvious which decision ought to be the basis for a valuation.

Under article 36(3) of the LPA 2003, the right to compensation arises when an owner of affected property transfers ownership of the property (or part of it) within five years of downzoning.⁷¹ The original wording of this provision contained the phrase “who sells the property.” This phrase was changed in 2004 to “who transfers the property.” The transfer of property by civil transaction is *condition sine qua non* for compensation.⁷² Under a literal interpretation of the phrase “transfer ownership of the property,” compensation is payable when land is sold, exchanged, donated, or contributed by a shareholder to a company. The Supreme Administrative Court, in a resolution of seven judges from October 30, 2000, narrowly interrupted the term “transfer,” and as result of this opinion, the donation of land to close relatives is excluded.⁷³

Scholars have not accepted this judgment. Specifically, Andrzej Kremis and Jerzy Cisek criticized the Court for this opinion and suggested that a broader interpretation of this phrase, which would encompass the donation of property, is a more appropriate standard for compensation.⁷⁴ According to Kremis and Cisek, the type of transaction in which title of a property is transferred is irrelevant.⁷⁵ Szewczyk stated that the plain meaning of the term “transfer” suggested that every form of transferable interest in land falls within the scope of article 36 of the LPA 2003.⁷⁶

Pursuant to article 37(1) of the LPA 2003, the amount of compensation is valued on the date the property is transferred to a third party.⁷⁷ The decline in value is defined as the difference between the value of property assessed according to the designation of land after the new plan (or plan amendment) comes into force, and the value assessed according to the

70. *Id.* arts. 54, 63.

71. *Id.* art. 36(3).

72. Dedication of land due to land subdivision and expropriation is excluded.

73. Naczelny Sąd Administracyjny [NSA] [Supreme Administrative Court] OPK 16/00, ONSA 2001/2/64 (Oct. 30, 2000) (Pol.).

74. Jerzy Cisek & Andrzej Kremis, *Commentary to the Judgment on Orzecznictwo Sądów Polskich of 2001*, No. 10, item 152.

75. *Id.*

76. LEOŃSKI & SZEWCZYK, *supra* note 58, at 156.

77. Land Planning Act of 2003, Dz. U. of 2003, No. 43, item 296, art. 37(1) (Pol.).

previous land designation.⁷⁸ There is no minimum level in Polish law below which there is no right to compensation, and any decrease in the value of property is compensable. Even a one percent decline in value is compensable. Furthermore, a maximum level does not exist. When an owner makes a compensation claim, a municipality may not pursue an *ex officio* purchase notice, i.e., expropriation.

The primary source for the assessment of compensation is the market value. Article 151 of the LAA 1997 defines market value as the expected price achievable on the market, when the parties of the transaction were not related, and were not acting under pressure.⁷⁹ This valuation is based on examining recent sales prices for other properties in the area deemed to be comparable to the property in question. The level of compensation to be provided for a decline in the value of real estate mentioned in article 36(3) of the LPA 2003 is established by the date on which a property is transferred. Property value decline is determined by taking into account the intended use of the land following approval of, or amendment to, a local plan and the intended use of the land prior to modification of the plan, or the actual manner in which the property was used prior to the approval of the plan.

The detailed compensation rules are contained in the *Cabinet's Ordinance of 21 September 2004 on the Detailed Rules and Procedure for Preparation of the Valuation Report* where valuation mechanisms have a significant impact on the amount of compensation.⁸⁰ Pursuant to section 50 of this ordinance, compensation is assessed on the basis of the market value of a property.⁸¹ The compensation is payable only for the

78. *Id.*

79. Land Administration Act of 1997, Dz. U. of 2004, No. 261, item 2603, art. 151 (amended Oct. 13, 2005) (Pol.).

80. *Cabinet's Ordinance of 21 September 2004 on the Detailed Rules and Procedure for Preparation of the Valuation Report*, in OFFICIAL JOURNAL OF 2004, No. 207, item 2109 (as amended) [hereinafter *Cabinet's Ordinance*].

81. *Id.* § 50.

1. For the purpose of determination of a compensation or a levy specified in Art. 36 Item 3 and 4 Land Planning Act 2003, a market value of a real estate is fixed according to a purpose that the real estate had before adopting or amendment of a local plan and purpose of property after adopting or amendment of the land plan. Integral parts of the real estate are not included.

2. In the event specified in Item 1 above, it is taken into account: status of the real estate on a day when the land plan comes into force or is amended, and prices—on a day of a transfer of property.

3. In the event that before adopting of a local plan there was no other binding plan or a decision on site development, value of the real estate is fixed—for the purpose specified in Section 1 above, according to actual status of the real estate that it had before adopting of the local plan.

Id.

depreciation in the value of land and does not include any decline in the value of buildings, lost profits, and other possible inconveniences. The compensation equal to the decline in market value excludes all consequential damages associated with the takings, such as the loss of future profits.

It should be noted, however, that this ordinance is only considered to be a guideline for valuers on how to prepare valuation reports. Civil courts are not legally bound by these ordinance provisions and may expand the scope of compensation for things such as lost profits. In the process of determining compensation, the valuator ignores whether the injurious decision is typical for the surrounding area or whether the decision may have been reasonably expected in this particular place and environment.

Contrary to planning blight provisions, article 36(3) of the LPA 2003 does not draw a distinction between local plans and development-permit decisions that limit the use of property. In other words, every loss in the economic value of land as a result of downzoning requires the payment of compensation.

We now turn to situations where the decline in property value is caused by the rezoning or development of another plot. In its decision dated October 10, 1960, Poland's Supreme Court clarified that an owner of adjacent property could claim compensation for losses caused by the development of adjoining land by tort law.⁸² Furthermore, a landowner may claim compensation for depreciation in the value of land as the result of a decision on either the conditions of site development or designation of a public use.⁸³ Pursuant to article 63(3) of the LPA 2003, if the decision caused reduction in the value of properties, article 36(3) and 36 of the LPA 2003 shall apply, respectively.⁸⁴ According to article 63(3) of the LPA, the respondent for claims is the investor who received building permission.⁸⁵ In the absence of a local plan, planning authorities may decide on the "conditions of site development," which could negatively affect the value of adjacent plots. Article 63 of the LPA 2003 does not limit the scope of the right to compensation to the area covered by the decision.⁸⁶ As a result of this provision, deprivation in the value of property caused by issuing

82. Sąd Najwyższy [SN] [Supreme Court] Sygn. akt IV Cr 879/1959, OSNC 1962/1/15 (Oct. 9, 1960) (Pol.).

83. *Id.*

84. Land Planning Act of 2003, Dz. U. of 2003, No. 43, item 296, art. 63(3) (Pol.).

85. *Id.*

86. *Id.*

such decisions refers not only to the land covered by the decision but also to the land bordering the affected area.⁸⁷

Contrary to the wide scope of compensation for loss caused by downzoning, no compensation is given when a building permit is rejected due to a lack of local public infrastructure. Furthermore, no legal claim can be made against a local community (*gmina*) to require it to provide local public infrastructure.

D. Types of Injurious Decisions

The Polish planning system has transformed from centralized national planning toward municipal autonomy. Today, there is no efficient national-level planning. Likewise, regional plans play a marginal role in the system of planning; planning is not comprehensive at the local and regional levels. Currently, local land-use plans, which are prepared and approved by municipalities, are the main instruments of regulating development. The plans are mandatory in only a few areas, such as coal-mines and special-protection areas. For other areas, these plans are optional.

Local plans set the legally-binding directives for the type and degree of building, minimum dimensions of building plots, and spaces designated for public purposes.⁸⁸ Poland has no general plans. In the absence of a local plan, decisions on development conditions (*decyzja o warunkach zabudowy*) or decisions on the locating of public services (*decyzja o lokalizacji celu publicznego*) establish the conditions for construction and development of land. These decisions could be identified as development permits, although they are not connected with any local plans. In general, compensation claims may pertain to (1) the introduction of a new local

87. *Id.*

88. As the Constitutional Tribunal explained in the judgment of October 6, 2004,

Local land management plans are a specific type of enactment of local law, placed between classical normative acts and classical acts of an individual character (i.e. whose adoption relates to application of the law, e.g. in individual cases). The specificity of land management plans are mainly related to their subject-matter—they relate to particular geographical areas. The function of a land management plan is to define the expedient designation of the specified area, pursuant to assumed local demands, and within a framework outlined by a number of statutes on spatial management. Such a plan does not, however, represent a compilation of provisions related to the allocation of specific plots of land, since it may also refer to future plots of land which may come into existence as the result of various transformations (the specific 'repetitive' nature of the plan's application). Such a plan also refers to all persons subsequently obtaining the right to administer a given plot of land (the specific 'multilateral' character of the plan).

Trybunał Konstytucyjny [TK] [Constitutional Tribunal] SK 42/02 (Oct. 6, 2004) (Pol.).

plan, (2) the amendment of a local plan, (3) a decision on developing conditions, or (4) a decision on the designation of land for a public purpose.

IV. INJURIOUS AFFECTION AND SEVERANCE

So far, we have talked about depreciation in the value of land caused by planning decisions. However, it is necessary to distinguish this from situations where planning injuries occur because of construction, the use of public works, or severance. Injurious affection occurs when only part of the land is expropriated through acquisition, construction of public works, or the use of public works. The market value of the remaining land thereby decreases. Severance damage equals the depreciation in the value of retained land caused by the loss of the acquired land and typically arises when the acquisition of part of an allotment decreases the potential use of the land or increases the cost of using that land.

A. Injurious Affection and Severance Due to the Expropriation of a Part of a Plot

Historically, injurious affection has been treated as an aspect of expropriation law, which for eighty years has been regulated separately from planning law in Poland.⁸⁹ Currently, Poland does not have rules for injurious affection or severance of retained land when land is expropriated. In addition, there are no rules for injurious affection emanating from the part of the land that was expropriated (in its entirety or through an easement) to the part of the land that is retained by the landowner. Strictly speaking, Polish law lacks general provisions which may be described as classical injurious affection regulations. Poland has no regulations directly related to compensation for the depreciation in the value of land neighboring public works.

Theoretically, one can arguably find quasi-injurious affection claims in the provisions of the LAA 1997. The LAA 1997 contains severance provisions that enable the owner of land that has been partly expropriated to compel the purchase of retained land if the remaining part cannot be properly used for a purpose that it had been used for previously.⁹⁰

89. Article 27(2) of the Expropriation Act of 1958 provided a right to compensation for losses caused to neighboring owners by expropriation. Expropriation Act of 1958, Dz. U. of 1958, No. 10, item 64 (amended Jan. 7, 1982).

90. Land Administration Act of 1997, Dz. U. of 2004, No. 261, item 2603, art. 113(4) (amended Oct. 13, 2005) (Pol.).

Although the rights of landowners in severance cases are important, compensation claims for injurious affection are even more important to landowners. However, the application of Polish law regarding injurious affection claims is ambiguous. The problem arises with interpreting articles 120 and 128(4) of the LAA 1997.⁹¹ Pursuant to article 120 of the LAA 1997, if there is a need to prevent hazard, damage, or inconveniences arising to owners of the adjacent land as a result of the expropriation, the decision on expropriation should establish the necessary utility easements and provide for the obligation to construct and maintain proper facilities to prevent such undesirable events and circumstances.⁹² The focus is on interpreting the words “damage, or inconveniences arising to owners of the adjacent land.” There is no doubt that one may describe this phrase as injurious affection. This is a necessary implication of article 128(4) of the LAA 1997, which sets out the rule that compensation shall also be due to losses caused as a result of the events referred to in article 120 of the LAA 1997.⁹³ A literal interpretation of this clause means that it pertains only to a loss stemming from an expropriation decision and is determined on the day of expropriation. This narrow scope of injurious affection significantly limits the amount of compensation and excludes losses caused by the execution of public works.

Injurious affection provisions were tested in the *Pawilcka-Lisiak* case, which was the first (and the only one so far) in which the Supreme Administrative Court (*Naczelny Sad Administracyjny*) reviewed article 128(4) of the LAA 1997.⁹⁴ Mrs. Pawlicka-Lisiak owned two commercial lots (no. 13/6 and no. 13/7) in the outskirts of Poznan. The construction of the A2 highway involved expropriating from Mrs. Pawlicka-Lisiak lot no. 13/7, which amounted to 1555 square meters. Mrs. Pawlicka-Lisiak used parcel no. 13/6 for tennis courts. Expropriation of parcel no. 13/7 affected the retained plot. A valuator estimated compensation for injurious affection at 64,000 Polish zloty. The *voivode* (the governing official of the region) of Wielkopolska Province (*Wojewoda Wielkopolski*) subsequently awarded her 64,000 Polish zloty as compensation for the depreciation in the value of retained land caused by the planned construction of the highway. The Agency for the Construction and Operation of Highways appealed to the President of the Office of Housing and Urban

91. *Id.* arts. 120, 128(4).

92. *Id.* art. 120.

93. *Id.* art. 128(4).

94. Naczelny Sąd Administracyjny [NSA] [Supreme Administrative Court] OSK 730/04 (Nov. 4, 2004) (Pol.) (unpublished).

Development (*Prezes Urzędu Mieszkalnictwa i Rozwoju Miast*). The appeal was successful. The President rejected the broad interpretation of article 128(4) of the LAA 1997, and stated that these regulations do not refer to the injurious affection of retained land.

On January 30, 2004, the Regional Administrative Court in Warsaw upheld the President's decision. Mrs. Pawlicka-Lisiak lodged an appeal on points of law with the Supreme Administrative Court. She submitted that article 128(4) if the LAA 1997 should be interpreted as creating compensation for injurious affection. On November 4, 2004, the Supreme Administrative Court dismissed the appeal. The Court concluded that article 128(4), in connection with article 120, does not allow claims for compensation as a result of depreciation in the value of property adjacent to expropriated land because this situation is not included in the scope of article 120 of the LAA 1997. The Court pointed out that under this article an owner only has a right to compensation for depreciation in value caused by the creation of an easement.

To summarize this point, according to the opinion expressed by the Supreme Administrative Court, an owner is not entitled to compensation for injury to retained land from the public works in the part of the land that was expropriated. Moreover, the right of the expropriated owner to file a claim under article 36(3) of the LPA 2003 is also questionable because expropriation is not a transfer of interest of land within the meaning of article 36(3) of the LPA 2003.⁹⁵ However, even if the Court were to expand the scope of compensation to damages or inconveniences arising to owners of the adjacent land, this compensation would include only affection by a change in planning (zoning) and would exclude injury caused by public works.

A special form of partial takings is articulated by the phrase "restriction on the manner of using property," or wayleave, which authorizes the construction of physical infrastructure.⁹⁶ This form of partial takings is similar to easement or servitude. As mentioned above in article 128(4) of the LAA 1997, an owner can receive compensation for losses caused by the construction of public works.⁹⁷ Compensation is determined by the decline in the value of property caused by the public works.

95. Adrianna Miler, *Niektóre Problemy Wpływu Miejscowego Planu Zagospodarowania Przestrzennego Na Wartość Nieruchomości* [*Some Problems of the Influence of Local Land Use Plan on the Value of Lands*], 4 PRZEGLĄD USTAWODAWSTWA GOSPODARCZEGO 18 (2005) (Pol.).

96. Land Administration Act of 1997, Dz. U. of 2004, No. 261, item 2603, art. 124(1) (amended Oct. 13, 2005) (Pol.).

97. *Id.* art. 128(4).

B. Injurious Affection When Land is Not Taken

Under provisions of the LAA 1997, the rules for injuries to retained land are equally applicable to injuries caused by expropriation of adjoining land in the absence of a taking. On the basis of article 128(4) of the LAA 1997, compensation is paid only for losses caused by the creation of an easement and depreciation in the value due to the easement.⁹⁸ However, in practice, I have yet to see an expropriation decision that applies only to the taking of an easement. Furthermore, in practice, there is no right to compensation for injurious affection when land is not actually taken. Finally, the compensation for depreciation of adjacent property caused by the use of public works is not subjected to statutory regulation.

Pure injurious affection provisions are included in the Environmental Protection Law of 2001.⁹⁹ Under article 129(2) of the EPL 2001, affected landowners are entitled to compensation, which includes reduction in the property market value, as well as injuries and damages caused by negative environmental effects.¹⁰⁰ The EPL 2001 defines parcels located within a limited use zone (LUZ) as affected land.¹⁰¹ A LUZ is created when a project (or other action) significantly impacts the natural and/or human-made environment, such as the construction and operation of a sewage treatment plant and sewage lagoon. The claim arises against the person or agency whose project or activity caused the limitation in use of the property.

This issue is best illustrated by the LUZ around the military airfield Krzesiny near Poznan, where the most significant disturbance is caused by noise generated by the movement of harrier airplanes. The owners of estates located in the LUZ may submit a claim for injurious affection compensation if they can show that the value of their property has depreciated due to the direct effect of the noise or other physical factors resulting from the creation of new public works as defined by the ELP.

98. *Id.*

99. Environmental Protection Law of 2001, Dz. U. of 2001, No. 62, item 627 (amended Jan. 1, 2006) (Pol.).

100. *Id.* art. 129(2).

101. Limited use zones (LUZ) are created if a project may have significant impact on the environment.

V. PROCEDURAL ASPECTS OF COMPENSATION CLAIMS

A. *Authorities Responsible for Compensation*

Under the Land Planning Act of 2003, compensation is always payable by the *gmina*, which is the basic organizational unit of local government.¹⁰² The municipality's officers acquire property and pay compensation on behalf of the *gmina*. The *gmina* is the only legally responsible authority; it does not matter which of the authorities or investors was responsible for the taking of property or for the decline in the value of the property. The rationale for sole *gmina* responsibility has not been articulated by the legislature thus far. I assume that it is based on the idea that because the *gmina* is the local government body that approved the planning decision, it should therefore pay for the negative results of its planning decision.

Suppose that part of the land was designated for a 100 foot metal tower and eight electric wires and that this plan was approved on a basis of a proposal by the electric company. In this scenario, the *gmina* is the government body that must compensate the landowner. Pursuant to article 36(1) and 36(3) of the LPA 2003, there are no exceptions to the municipality's direct responsibility.¹⁰³ At the same time, the *gmina* is the only government body that is entitled to impose and collect any land development levy.

The LPA 2003, however, introduces one provision which may be described as creating indirect responsibility of the local county (*voivodeship*) authority that is limited to injuries caused by the provisions that a regional plan dictates to a local plan. According to article 44(4) of the LPA 2003, the local government negotiates the sum of money necessary to pay compensation with the county marshal, and they sign an agreement.¹⁰⁴ If negotiations with the *gmina* fail due to disagreement about the conditions for incorporating a regional policy into a local plan, a court will adjudicate this issue.

In addition to this general rule, article 63(3) of the LPA 2003 has a special provision for "indirect responsibility" in cases when the decline in value is caused by issuing a decision on development conditions. In such a

102. In Poland there is a three-tier division of local government: the *gmina* (basic level), the *powiat* (an intermediate level), and the *voivodeship* (major territorial unit). In a municipality village, the *gmina* is represented by a mayor (*wojt*). Depending on the size and character of the municipality, the *gmina* in a city is represented either by a mayor (*burmistrz*) or a president.

103. Land Planning Act of 2003, Dz. U. of 2003, No. 43, item 296, arts. 36(1), (3) (Pol.).

104. *Id.* art. 44(4).

situation, an investor may be defray the costs of both blight notices and compensation claims, but only after receiving a building permit.¹⁰⁵ Article 63(3) of the LPA 2003 states that if any decision on site development has caused the results that are mentioned in article 36 of the LPA 2003, articles 36 and 37 of the LPA 2003 shall apply, respectively.¹⁰⁶ However, this rule is difficult to interpret because, under a literal interpretation of article 63(3) of the LPA 2003, a developer should also reimburse the *gmina* when the developer either acquires land or exchanges it. Because of the uncertainties surrounding this rule, it is not applied in practice.

Finally, according to the EPL 2001, losses caused by environmental injuries are paid by the investor whose project significantly impacts the environment.¹⁰⁷

B. Entitlement to Compensation

Pursuant to article 36(1) and (2) of the LPA 2003, a person who has a valid property interest at the time of either the approval of a local plan or the issuance of a decision pertaining to site development (determination day) is entitled to compensation.¹⁰⁸ Thus, it is important to identify the underlying ownership interest that serves as the basis for the claim. A person who bought land after approval of a local plan has no right to compensation. However, a compensation claim may be transferred to another person, according to the general rules contained in the Civil Code.

C. Time Limit of Claims

In the LPA 2003, there is no specific time limit for the submission of blight notices or compensation claims under article 36(1) of the LPA 2003. There appears to be a problem with the interpretation of expiration issues in this context. Pursuant to general rules contained in the Civil Code, all pecuniary claims expire after ten years from the day on which the claim became enforceable.¹⁰⁹ There is no exception for acquisition claims.

105. *Id.* art. 63(3).

106. *Id.*

107. Environmental Protection Law of 2001, Dz. U. of 2001, No. 62, item 627, arts. 134, 136 (amended Jan. 1, 2006) (Pol.).

108. Land Planning Act of 2003, Dz. U. of 2003, No. 43, item 296, art. 36(1)–(2) (Pol.).

109. KODEKS CYWILNY [CIVIL CODE] arts. 117–125 (Pol.).

Legal scholars have presented contradictory views. Tadeusz Kasinski, for example, has stated that acquisition claims have no expiration dates.¹¹⁰ By contrast, Szewczyk has argued that regulatory takings claims expire after five years.¹¹¹ In my opinion, the acquisition and compensation claims mentioned in article 36(1) and (2) of the LPA 2003 can be made within ten years of the date on which the local spatial development plan, or an amendment to it, was enacted as is the case with other civil claims, according to article 118 of the Civil Code.¹¹²

Compensation claims for cases that do not qualify as expropriation cases may be made within five years of the date on which the local spatial development plan, or amendment to it, was enacted. Local authorities theoretically have no discretion to extend this period, although under article 119 of the Civil Code, they may renounce an “objection of limitations,” but only after this five year period has passed.¹¹³ In practice, the municipalities do not use this mechanism.

Injurious affection claims generally have no time limit because compensation claims for expropriation of property have no time limit. It should be noted, however, that there is a disagreement in the administrative courts on this issue.

D. Information for Landowners

Generally speaking, direct notification to the landowner about a prospective or approved plan that may reduce property values is not mandatory. The procedures for implementing a local plan only require posting the draft of a local plan for public display. Plans are displayed for a twenty-one-day period. Previously, the local government was obliged to provide written notification to landowners whose legal interests might be significantly affected by plan provisions, of the last date by which landowners may look at the draft plan in the municipal office. Under current law, the municipality is only obliged to publish a public notice of the resolution to prepare a local plan in a local newspaper and in any additional manner that is customary for that municipality. In judicial practice, landowners in many cases have stated that they were not aware that part or all of their land had been designated for things such as a new road.

110. Kasinski, *supra* note 56, at 404.

111. LEŃSKI & SZEWCZYK, *supra* note 58, at 154.

112. KODEKS CYWILNY [CIVIL CODE] art. 118 (Pol.).

113. *Id.* art. 119.

E. Procedure for Making a Claim and Appealing a Decision

The regulations concerning the procedures for making a claim are insufficient. The first step is serving a blight or compensation notice on local authorities. Under the LPA 2003, compensation procedures may not be initiated *ex officio* by local authorities. After being served notice, in practice, the *gmina* produces either a specific valuation report prepared by a land valuator commissioned by the *gmina* or a general analysis of the value of the land in that city, which is also prepared by a land valuator. The specific valuation report and the general value analysis are not mandatory, which means that the *gmina* has discretion and may pay more than the market value under article 36(1) of the LPA 2003. According to the above mentioned detailed regulation on the preparation of a valuation report, a written opinion is necessary under article 36(3) of the LPA 2003, and compensation for non-expropriation depreciation is strictly regulated.¹¹⁴

According to the LPA 2003, the *gmina* has six months to negotiate an agreement. However, this is not a deadline for the finalization of an agreement because the municipality can decide to acquire the land. In this situation, compensation can be paid at any time if the two sides agree. If there is a delay in the payment of compensation or a delay in the purchase of the property, the municipality must pay interest at a statutorily dictated rate.

In the absence of an agreement after a six month period, an owner may file suit against the *gmina* in civil court. The form of blight notice or compensation claim is not regulated. There is no special tribunal for adjudicating land compensation cases.¹¹⁵ The independent civil courts (both district and regional) have jurisdiction to hear compensation cases.¹¹⁶ Claimants are required to pay filing fees.

According to the Article 367 of the Civil Procedure Code, the party has the right to appeal the decision of the first instance court to the second instance court.¹¹⁷ The appeals route is from a judgment of the district court to the regional court, and from the regional court to the court of appeals. Additionally, certain judicial decisions issued by second instance courts may be the subject of appeal to the Supreme Court, which is the third

114. *Cabinet's Ordinance, supra* note 80, § 51.

115. For example, there is no Polish equivalent of the land tribunals that exist in England.

116. District courts deal with all matters concerning property law, in which claims do not exceed PLN 75,000 (in common civil cases). The claims exceeding the above stated amounts are heard by regional courts.

117. KODEKS POSTĘPOWANIA CYWILNEGO [CODE OF CIVIL PROCEDURE] art. 367 (Pol.).

instance court. The Supreme Court does not examine the merits of the case, but rather controls and enforces the judgments on demand of the parties.

F. The Burden of Proof

Before a court, the owner has the burden of proof of proving that a basis for compensation or acquiring property exists. The average cost of a written opinion of a land valuator is approximately 100 Euros.

Polish jurisprudence has not yet applied notions of distributive justice in compensation cases. However in theory, the courts should be able to incorporate distributive justice in their decisions because article 5 of the Civil Code states that no one shall exercise any right of his manner contrary to their socio-economical purpose or to the principles of co-existence with others (*zasady współzycia społecznego*).¹¹⁸ Therefore, it is theoretically possible for a court to reject a compensation claim because, on balance, the benefits from the planning or development-control decision outweigh the damage to the owner. We are still waiting for precedent based on distributive justice considerations.

CONCLUSIONS

All the problems outlined above indicate that the existing law definitely needs to be revised. First, for legal clarity it is necessary to delineate a boundary between regulatory takings and the reduction in the value of property (minor planning injury), which requires only the payment of money compensation but not the acquisition of land. It should be necessary, in the near future, to identify when planning decisions rise to the level of expropriation. However, a problem may arise in defining the boundary between pure takings and minor takings. This Article suggests that a reduction equal to fifty percent of a property's initial value should be a differentiating line.

Currently in Poland, there are no published court opinions relating to this issue. Hopefully, this will change in the near future because many local plans have been adopted in the last several months and many claims are expected. Additionally, it should be noted that the Polish government released a draft of the Land Planning Bill in August 2006. Unfortunately the first version of the bill does not contain any crucial changes in the basic principles of regulating compensation. The only notable

118. KODEKS CYWILNY [CIVIL CODE] art. 5 (Pol.).

modification is the government's proposal to introduce an expiration time of seven years for compensation and acquisition claims rather than the current ten years.

The scope of compensation claims should be expanded to injuries affected by new highway schemes. When land is not taken, new land-use proposals should be objected to as injurious affection issues.

It is important to emphasize that in view of all the uncertainties and the lack of a proper legal foundation in court cases, administrative practice, and local authority practice, the existing law is difficult to use, and there is an urgent need to create new laws. Considering the current lack of understanding and the improper application of Polish law, there is significant room for improvement and advancement.