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Expropriation as an Exceptional Tool of Acquisition of Land for Public Purposes

1. Introduction

In the European Convention one fundamental legal prerequisite is that compulsory acquisition may only be prompted by purposes which are in the public interest.

Every natural or legal person is entitled to the peaceful enjoyment of these possessions. No one should 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. However, the European Convention does not specify more exactly who is entitled to acquire property by compulsory purchase. The same goes for the amount of compensation payable. The basic principles of real estate expropriation in Poland are laid down in the Constitution of the Republic of Poland [4], while the detailed procedures have been laid down in acts of the Parliament. The legal aspects of expropriation are primarily regulated by the law of real estate management of 1997 [5]. However, a separate, specific procedure of expropriation is provided for real estate acquisition for motorway or major railway construction.

Real estate expropriation in essence consists in compulsory deprivation of the property rights or other right to a real estate (perpetual usufruct, restricted property rights) by an administrative decision, for just compensation. The just compensation should be equal to the value of the expropriated real estate – the Article of the Constitution.

2. Principles and Legal Procedures of Real Estate Expropriation

Ownership is an important institution of the legal system in Poland. Art. 21 of the Constitution of the Republic of Poland establishes the principles of ownership

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and principles of inheritance. However, the law provides for a possibility of property expropriation for public purposes in return for a just compensation.

Real estates owned by units of territorial self-government or their unions or by individuals can be expropriated for the State Treasury. Expropriation can be related to other rights to a real estate (e.g. perpetual usufruct). Real estate can be expropriated **only** if it is intended for **public purposes** in the local land physical plan.

It is regarded as an exception to the general civil principles of ownership transfer; real estate can be expropriated only if public purposes cannot be achieved in any other way but by depriving someone of their rights to a real estate or restricting such rights. Another condition to be met is that the rights to the real estate cannot be acquired by concluding a relevant contract.

Expropriation can only be executed before the investment project is started. The following conditions must all be met:

- the real estate is indispensable in the achieving of public purposes;
- the real estate is situated in an area which is intended for public purposes in the land development plan;
- there was no possibility to acquire the land by concluding an appropriate contract.

The following exceptions from this general rule have been provided for:

- activities related to searching for, identifying and excavating minerals which are the property of the State (up to 12 months);
- temporary taking over the real estate in the case of force majeure or emergency situation, when considerable damage needs to be prevented (up to 6 months).

The expropriation procedure can be applied in relation to any property right, except the title vested in the State Treasury, and personal property right. Expropriation can be executed in relation to the title, perpetual usufruct and such restricted rights of property, as real estate use, personal servitude or real easement, cooperative member's ownership right to premises.

The authority conducting expropriation proceedings is obliged to specify precisely the purpose of expropriation on the ground of a concrete legal provision and public purposes are defined by the legislator.

The attempts to formulate one, precise definition of the term are bound to be unsuccessful. The absolute and unchangeable definition of the term does not exist, because there is no a constant and unchangeable object of the definition. Public interest must be constantly redefined, it must be specified anew to meet the changing social as well as economic conditions and needs (Fig. 1).

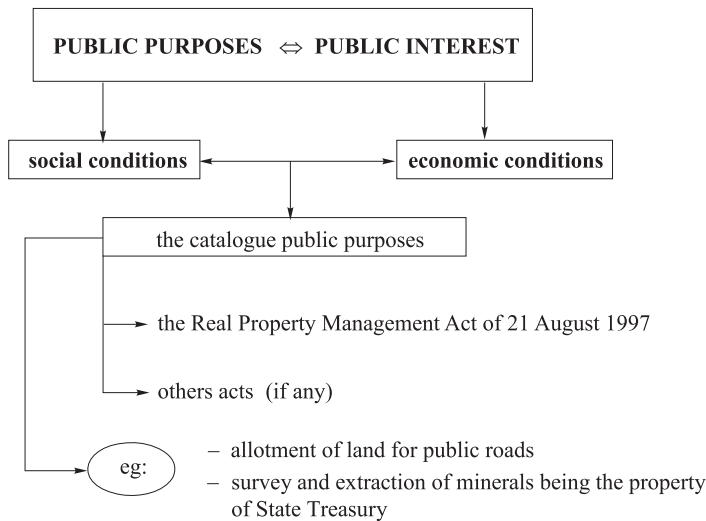


Fig. 1. General characteristics of expropriation

It can only be said that public interest may be understood as the best solution in a given situation with the account taken of current economic and social determinants [3].

Such restricted property rights as **lien** and **mortgage** cannot be objects of expropriation.

Real estate are most commonly expropriated if they are acquired for the following public purposes:

- roads,
- sewage treatment and utilization plants,
- cemeteries,
- construction of networks and technical infrastructure devices,
- schools.

The following stages of the real estate expropriation procedure have been identified in legal acts.

- establishing the necessity to achieve a public purpose on a real estate;
- conducting negotiations with a view to acquiring a real estate by means of concluding a contract → min. 2 months;
- issuing an expropriation decision - instituting the expropriation proceedings - administrative trial;
- establishing the compensation - decision to be taken by the head of the county (district) (starost);
- appeal, if any, against the decision to grant compensation and its amount;
- taking the final decision and payment of the compensation.

Institution the expropriation proceedings have to be preceded by negotiation (during the negotiations a substitute real estate can be offered (Fig. 2):

- the negotiation should offer a possibility to avoid the use of expropriation,
- acquisition of property by means of agreement conducted with the owner is faster way than expropriation proceedings,
- the authority is obliged to make a proposition to the owner to acquire the property by agreement (other rights too – eg. perpetual usufruct),
- it should be evident from the documents that the property could not have been acquired by agreement,
- the negotiations are not formalized,
- the price must be similar to market value of real estate (price must correspond to the average local market value),
- decisions are restricted by the rule of rational spending of public funds.

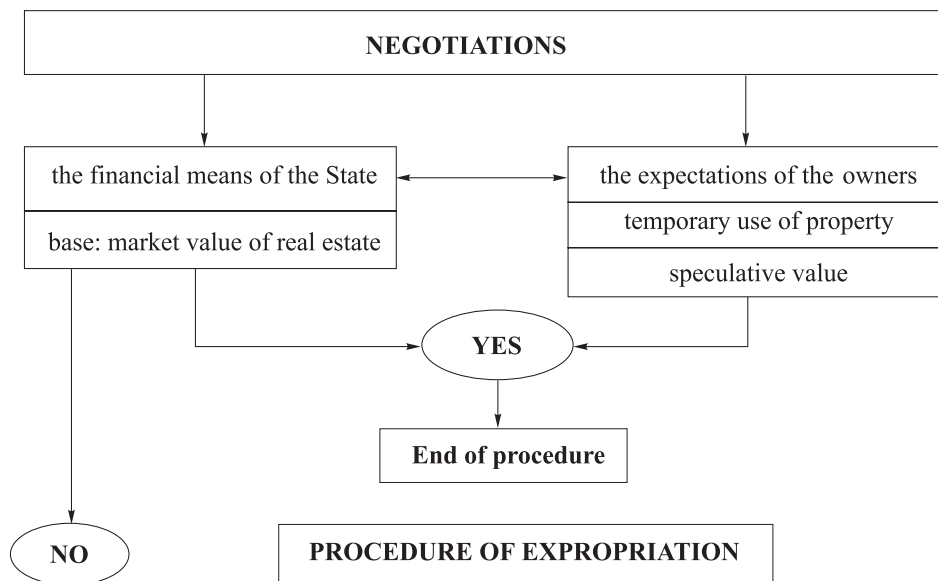


Fig. 2. Negotiations precedes procedure of expropriation

Special rules of real estate expropriation for motorway construction

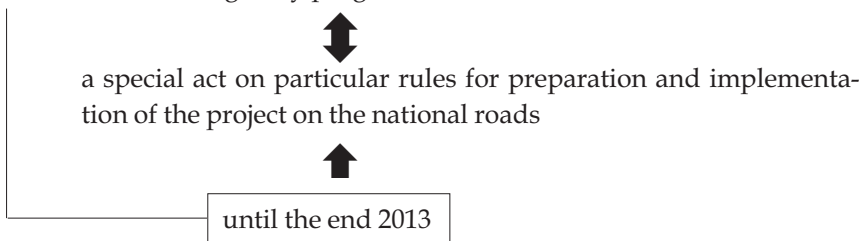
As from 1994 particular principles have been in force of fulfilling obligations with respect to acquisition of real estates under planned motorways [7, 8]. Real estates intended as the land under motorway lanes are acquired for the State Treasury. Those owned by local governments and intended as land under motorway lanes become the property of the State Treasury by virtue of the law as of the day

when the location decision concerning those real estates becomes final. Acquisition of the real estates is confirmed by the provincial governor, who also establishes the amount of compensation for the real estate. The compensation is paid from the financial resources of the Agency for Motorway Construction and Operation.

The following procedure is applied when expropriating real estate for motorway construction:

- The proceedings are instituted upon application from the General Directorate of National Roads and Motorways – upon the ineffective lapse of the period for concluding a contract of real estate purchase (2 months).
- The expropriation proceedings are instituted and the relevant decisions are taken by the **provincial governor**.
- The compensation for the expropriated real estate should be equal to its market value – which is determined as of the day of issuing the motorway location decision.
- The real estate value is determined by real estate appraisers.
- The compensation is subject to revaluation as of the day of payment; the revaluation is done according to the general principles which are in force in the case of return of expropriated real estate.
- The compensation is paid from State resources at the disposal of the General Manager of National Roads and Motorways.
- The expropriated real estates are transferred by the State Treasury to the General Directorate of National Roads and Motorways free of charge for permanent management. The instituting of **permanent management** is confirmed by issuing a relevant decision by the provincial governor.

- 1994 – the Polish highway programme



- 2006 – act was amended.
- It was extended to all public road.
- The procedure for assigning land for road construction.
- The real properties listed in **the road location decision** are subject to acquisition by State Treasury.
- The decision is issued by the Voivode (head of province) – in case of **national roads** or by the Starost (head of district) – in case of **district and local roads**.

In order to speed the procedure of expropriation a special Act on rules for implementation of the projects on the national roads was passed in 2003 [3].

According to this Act:

- the plots of land specified in the “road location decision” are subject to acquisition by State;
- these plots of lands become, **by virtue of law**, the property of State Treasury or of self-government unit, on the day when the decision becomes final;
- the authority notifies the owner about the issued decision by letter sent to the address specified in the land registry;
- the procedure does not leave **any room for negotiations** with the owner concerning either the acquisition of the land or the compensation amount;
- the special act is example of sharp conflict between private ownership protected by the Constitution and aspirations of the State to carry out the public tasks serving interest of the society as a whole.

3. The Principles of Compensation for Real Estate Expropriation

In most countries, the principle of compensation for real estate expropriation is guaranteed in constitutional regulations. The principle is also guaranteed by The Constitution of the Republic of Poland 2 April 1997.

The legal act which regulates real estate matters is the law dated 21 August 1997 regarding real estate management. It provides legal procedures for expropriation and indicated methods of calculating the amount of compensation for expropriated real estates or for the expropriation of titles to the real estate other than ownership.

Detailed principles of real estate appraisal are provided in executive regulations to the law – The Directive of the Cabinet dated 21 September 2004 regarding real estate valuation and preparing the appraisal study [1].

Compensation for expropriation of real estate is reserved to real estate owners, holders of perpetual usufruct of land and holders of other legal interests in land. The amount of compensation is determined by a county head in a decision regarding real estate expropriation once an opinion regarding the value of the real estate has been provided by a real estate valuer.

The amount of compensation is determined on the basis of the condition and the value of real estate being expropriated as of the date of signing the expropriation decision. The condition of the real estate is established on the basis of its detailed description. What serves as the basis for calculating compensation is its mar-

ket value. This does not apply to cases in which the real estate is not subject to market trading due to its functions. In such a case, in order to calculate compensation for expropriation, the basis is assumed to be the cost-based value of the real estate (Fig. 3).

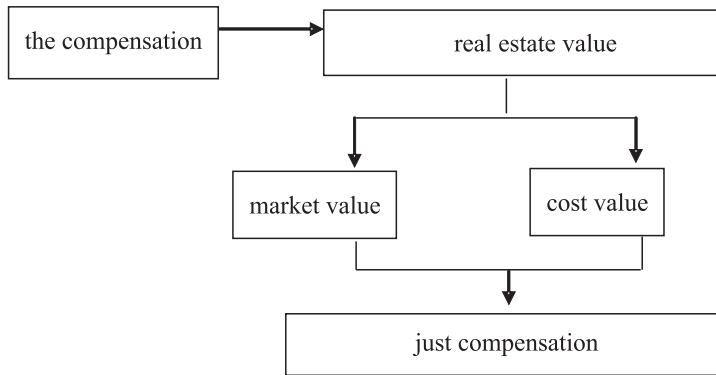


Fig. 3. Just compensation should be equal to the expropriated property

To calculate the market value of a real estate one should consider the following:

- the type of real estate (real estate: land, building, space within a building);
- its location (general, detailed and relative);
- the type of land use (as of the date of signing the expropriation decision);
- the degree of technical infrastructure facilities (ranging from no access to infrastructure to being fully furnished with such equipment);
- the condition of real estate (stage of development, legal status, technical and functional condition of the real estate itself and its surroundings, including the size, character and degree of urbanization of the town in which the real estate is situated);
- current market prices of real estates (prices of similar real estates on the local market).

The market value of a real estate is determined according to its current kind of land use – in case the purpose of the real estate is in line with the purpose of expropriation, its value will not rise. In case the intended purpose of the real estate, in line with the purpose of expropriation, should increase its value, the amount of compensation is to be determined as according to the alternative kind of land use adequate to the new purpose. In case the subject of expropriation is the right of ownership or perpetual usufruct, whereas the real estate is charged with other limited material right, the amount of compensation is reduced by the value of the limited material rights Damage compensation, e.g. resulting from building technical

infrastructure devices (electricity, gas, water) on the ground should be calculated on the basis of the damage caused. If this causes a decrease in the value of the real estate, the compensation is equal to that decrease.

According to the Real Estate Management Act, compensation for expropriated real estates should be paid out as a lump sum within 14 days of the day on which the decision regarding expropriation and the amount of compensation became final. Compensation may be placed in the escrow deposit, which is regarded as if the compensation was paid. The compensation determined in the decision is subject to indexation as of the date of payment. Such a situation may occur in case the compensation is not paid within 14 days. The requirement of indexation does not apply to the compensation correctly placed in the escrow deposit. Indexation of the compensation paid is done with the use of real estate price change indicators announced by Chairman of the General Statistics Office in "Monitor Polski", the RP official journal. Until the indicators are announced, indexation is declared with the use of price indicators of consumer goods and services, announced by this organ in the same official journal. As part of compensation, owners or holders of perpetual usufruct of real estates being expropriated may be offered, and have the right to accept or reject, an adequate **substitute real estate**.

The difference between the amount of compensation determined in the decision and the value of the substitute real estate is balanced with a supplementary payment in cash. The real estate is to be "adequate", which means that it should possess the same features as the expropriated real estate, e.g. area, intended purpose in the spatial development plan, location etc.). Naturally, only an authorized person may propose that another real estate be granted in exchange, and the person has no right to demand it.

4. Final remarks

The power of the state to seize a citizen's private property or rights in property without the owners consent has a different names through the world. In Poland we usually use the term - expropriation, but for example in United States - eminent domain, in United Kingdom - compulsory purchase or compulsory acquisition in Australia [6].

Expropriation may ultimately bring benefits to society but it is disruptive to people whose land is acquired. In many cases, persons being expropriated feel aggrieved by the very fact the expropriation itself as well as by the amount of compensation offered to them. The compensation equal to the market or cost-based value of their built over real estate in some cases proves too low to buy a new real estate. This is the case when the local market offers no similar real estates for sale,

and the cost of purchase of a plot of land and raising a new building is higher than the compensation received.

For all these reasons, there is an urgent need to discuss ways to improve the provisions of the law and the methods of real estate appraisal for the purpose of expropriation. Due to the interference of the state and local governments into the general principle of protecting the right of ownership, the problem of compensation for real estate expropriation touches not only the economic, but also the psychological sphere [7, 8].

Unfair procedures for the compulsory purchase of land and inequitable compensation for its loss can reduce land and inequitable compensation for its loss can reduce land tenure security, increase tension between the government and citizens and reduce public confidence in the rule of law. So transparent procedures are needed and legislation to establish the government's power to expropriation land should be written clearly and with precision. People should be compensated in such a way that they are no worse off than they were before the expropriation process started

The following conclusions of the workshop organized by FIG-Commission 9 in Helsinki and published by FAO [2] are among others:

Valuation and compensation should be based on the factio interests rather de jure interest. Compensation for the factio interests may be calculated on the basis of what would have occurred had the land not been acquired.

The acquiring agency should take steps to ensure that there are a sufficient number of independent valuers and advocates to help people to assess their compensation claims.

The procedures should not be intimidating to people, allowing them to present their own cases.

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