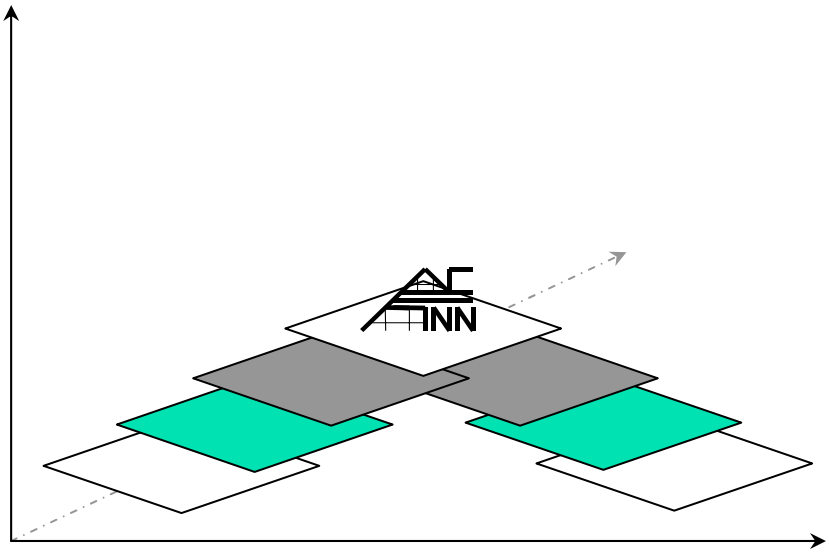
SOME ASPECTS OF COMPULSORY PURCHASE OF LAND FOR PUBLIC PURPOSES



OLSZTYN 2010

SCIENTIFIC MONOGRAPH

SOME ASPECTS OF COMPULSORY PURCHASE OF LAND FOR PUBLIC PURPOSES

OLSZTYN 2010

TOWARZYSTWO NAUKOWE NIERUCHOMOŚCI

POLISH REAL ESTATE SCIENTIFIC SOCIETY

ADDRESS OF THE EDITORIAL BOARD

Polish Real Estate Scientific Society
10-724 Olsztyn, Prawochenskiego 15 Str.

Adres Redakcji:

Towarzystwo Naukowe Nieruchomości
10-724 Olsztyn, ul. Prawocheńskiego 15

www.tnn.org.pl
e-mail: redakcja@tnn.org.pl

ISSUE SPONSORED BY STANISLAW STASZIC SCIENCE ASSOCIATION

ISBN 978-83-61564-20-1
TNN, Olsztyn 2010 r.

TABLE OF CONTENTS

INTRODUCTION

Land expropriation is treated in many countries all over the world as the classic legal norm. Acccording to this rule, government has power to acquire private real estates only in order to provide land for realisation the significant public purposes.

The compulsory purchase ought to be legitimate and the process in which property is taken over should be clearly identified in legislation. Owners, whose property is taken by government for public use, are entitled to be paid adequate compensation. It is constitutionally ensured and is one of the fundamental principles within a rule of law.

The studies presented in this monograph entitled Some aspects of compulsory purchase of land for public purposes make a part of the theoretical and practical studies on compulsory purchase as a tool for the acquisition of land carried out by the scientists from Poland and other countries.

The source materials which constituted the basis for this publication were prepared in the framework of the cooperation between Authors and studies were inspired by FIG/FAO International Seminar on Compulsory Purchase in Helsinki, Finland in September 2007, FIG working week in Stockholm, Sweden in June 2008, and the FIG/FAO International Seminar or State and Public Land Management in Verona, Italy September 2008. At the beginning, scientists from three Universities participated in these studies – Norwegian University of Life Science in Aas, The Leibniz University in Hannover and The University of Warmia and Mazury in Olsztyn. Afterwards, researches from other units decided to join us. They represent University of Economics in Poznań and Katowice, University of Ljubliana and School of Government, University of North Carolina.

General issues formulated for the study were:

1) expropriation in legal regulations
2) term of public purposes
3) rules of just / full / fair compensation.

One the fundamental prerequisites assumed in the study was to analyse particular cases of the land expropriation for different public purposes. The spatial scope of the study was limited to the particular properties (parcels) destined for public construction investments. Detailed analysis was carried out for the following issues and cases:

1) description and comments concerning basic principles of expropriation law,
2) calculating compensation for relocating carrier's company located in area destined for urban redevelopment,
3) expropriation in order to build national road and realise storage reservoir,
4) implementation of the income valuation of real property and corporate real estate in the process of the assessing just compensation,
5) calculating the value of the property with the use of cost approach method.

The results of these studies are presented in three chapters.

The first chapter is the longest one and considers legal and technical aspects of compulsory purchase and accounting the just compensation. The study refers to the situation in the Authors' home countries.

The second chapter contains the methodology of valuation of corporate real estate. It is of significant importance to identify and differentiate between damage to real estate, which is a part of an enterprise and damage to the enterprise itself.

The third chapter presents the way of assessing property's value using cost approach method.

The fourth chapter contains the information about land cadaster in Ukraine.

Each chapter contains the list of the data sources used in articles.

The reference is the last chapter of the monograph.

prof. dr hab. inż. Sabina Źróbek, prof. zw.
Scientific Editor

CHAPTER 1

LEGAL AND TECHNICAL PROBLEMS OF COMPULSORY PURCHASE OF LAND IN POLAND AND IN FOREIGN COUNTRIES

1.1. REAL ESTATE EXPROPRIATION IN POLAND DURING 1919-1990 WITH FOCUS ON COMPENSATION FOR LIMITATION THE RIGHT TO REAL ESTATE

Ryszard Źróbek
Department of Real Estate Management and Regional Development
University of Warmia and Mazury in Olsztyn
e-mail: rzrobek@uwm.edu.pl

Key words: *real estate, expropriation, value, procedures*

Abstract

This article presents an overview of rules concerning assessing the amount of compensation for real estate expropriations in 1919-1990. Some of these regulations stand nowadays and other former solutions can be adjusted to current conditions. Moreover, the selected specific procedures are put forward.

1. Introduction

The expropriation in many countries all over the world is treated as the classic legal norm. According to this rule, government has power to acquire private real estates only in order to provide land for realisation the significant public purposes. The owners of such real estates are provided with equitable compensation, which amount should be based on the real estate value.

Author of this article made some analysis of chosen legal rules related to real estate expropriation for public purposes. Particular changes of rules connected with this procedure and solutions are also presented.

2. Real estate expropriation procedures

2.1. Introduction to expropriation issue

The procedures for real estate expropriation were evolving mainly because of social-economic development and the perception of ownership right. Real estate ownership is both legal and economic term (IGNATOWICZ 1998).

Range and content of ownership along with fundamental features of this law can be considered as historical categories, which are being transformed in correlation to changing social and economic relations. The legal idea (legal norm) is always connected with economic-system changes.

According to Benson (2005), one of the crucial components of expropriation is renewal problem. Moreover, expropriation is treated as the procedure that helps preventing monopoly. On the other hand, the issues of political inefficiency of real estate transfer from private to public sector should be considered. The negative results of such transfer are, among others:

– limited efficiency,

– alternative costs,
– informal sales,
– reducing land tenure security,
– multitude of legal regulations.

Expropriation is treated as the instrument of the governmental policy. This procedure is usually regulated by the Constitution or other legal statutes such as decrees or acts.

2.2. Expropriations in 1919-1939

After achieving independence, in 1919 Polish government passed the decree concerning real estate expropriation in order to build roads and railways. It was assumed that compulsory acquisitions, temporal occupation or easement were possible. Expropriations were realised only after the decision of Head of State on fair and just compensation.

According to the contemporary law, expropriation could be initiated only after analysing data concerning public utility and necessity of compulsory real estate acquisition or temporal occupation (DECREE 1919). The procedure of purchasing real estate for public purposes included:

1) assessing the value of assets in order to commence negotiations to purchase real estate for public purposes,
2) description and valuation of real estate if suggested price differed from real estate value,
3) assessing the real estate value by Assessing Commission established by municipal Peace Judge and participated by Land Commissioner and Treasury Inspector,
4) determining the compensation for expropriation and paying accurate amount for the owner.

The fee for temporal real estate occupation was determined as 6% of real estate value – for each year of occupation. The occupation could not last longer than 3 years.

The next important rule was Act from 15 March 1934 on compensation for land expropriated in order to benefit the community[1] (Dz. U. Nr 29, poz. 242).

This Act was elaborated in reference to 44th article of Constitution on ownership right protection. Its formal range covered only the rules regulating prices for expropriated private land within the housing development which was destined for streets and roads. It was also assumed that price for private squares, market places and piazzas used for public purposes should be half the assessed price of such real estate.

Legal regulations concerning expropriation especially focused on the procedures (WOŚ 1948). Such approach can also be found in the Decree of

[1] The smallest administration unit in Poland.

President of Poland from 24 September 1934 „law on expropriation procedures" (Dz. U. Nr 86, poz. 776).

According to the law, expropriation was possible only for higher utility purposes and with compensation. It could be executed as:

1) depriving of ownership right or other real rights,
2) temporal or permanent limitation of real rights,
3) depriving of rights to materials necessary to build facilities for military purposes, land and water roads and railways,
4) temporary occupation of real estate.

The administrative power in this field had the governor of voivodship. The expropriation procedure included:

1) preparations including application form with attachments,
2) launching expropriation proceedings:
   – registration in mortgage register,
   – publication of the notice in communities,
3) the analysis of entered objections and motions,
4) adequate survey,
5) governor of voivodship statement on expropriation preceded by expropriation proceedings,
6) establishing the compensation,
7) statement on expropriation execution.

According to the rules, compensation should cover the loss deriving from losing the land tenure. However, the increase of property's value resulting from development was not taken into consideration. The amount of compensation set by governor of voivodship could be change only by the Court.

2.3. Expropriations in 1945-1989

During this time (1945-1989) social property was dominant and privileged. It was especially secured by the law. In 1950 „the rule of social coexistence" was introduced into legal system. Other main rules regulating expropriation were:

1) the decree from 1946 on planned spatial management of the country,
2) the decree from 1948 on expropriating the properties occupied for public utility purposes during the war in 1939-1945,
3) the decree from 1949 on acquisition and transfer of real estates necessary to national economic plans realisation,
4) Act from 1958 on rules and procedures of real estate expropriation,
5) Act from 1985 on land management and real estate expropriation.

According to these regulations the expropriation procedures were treated as homogenous, one stage proceeding executed exclusively by administrative organs. Compensation should have been foregoing and determined as particular sum of money.

Real estate expropriation was already mentioned in 37th article of decree from 1946. According to this decree, real estates could have been expropriated in order

to spatial development plans realisation. Government and local governments associations had the power to expropriate land assigned for public utility purposes and social buildings.

According to decree from 1949, governor of voivodship was entitled to make statement on expropriation and compensation. Expropriation procedure included:

1) submitting an application to the governor,
2) launching the proceeding by the governor,
3) determining the compensation.

Compensation covered the loss resulting from expropriation. This loss was calculated on the basis of average prices on real estate market agreed maximum three years before the submitting the expropriation application.

The measurements adequate for particular groups of real estates and rights were described in the decree of the Cabinet. There was also the possibility of substitute real estate.

In the Act from 1958 there was assumed that real estate could have been expropriated only in order to benefit society i.e. for public utility purposes, national defense or realisation of economic plans. Expropriation required compensation, which was calculated according to following rules:

1) agricultural land – on the base of prices achieved for land sold from National Land Fund,
2) sowings, cultivations and drops – according to the value of expected harvest, on the base of their average prices, after discounting expenditures which would appear in connection with harvesting,
3) plantation of long-term cultivations – on the basis of the costs of their establishing and cultivation until first harvesting. Compensation should be amortised each year, and the amount is the result of establishing costs and cultivation costs divided by number of years of its productivity,
4) forestland – similar to agricultural land but after adding the value of trees,
5) buildings and facilities – reconstruction costs reduced to the level of exploitation,
6) house plot in town subjected to real estate tax – from 5% to 10% of average costs of building the house for one family with five rooms (in dependence of town or district, location or land surface),
7) house with maximum five rooms – reconstruction costs reduced in relation to the level of exploitation,
8) other housing building – average costs of building the house for one family with five rooms, compensation could not exceed „technical value of the building" after taking into consideration its wear and damage.

Regulations concerning compensation were modernised in 1973 when new solutions on agricultural land were agreed. Compensation was calculated on the base of prices expected for governmental agricultural land and could have been increased maximum five times.

Moreover, small changes were implemented in order to determine

compensation for other expropriated real estates.

In 1982 there was specified that in the case of buildings compensation should correspond with „wear and tear costs". Reconstruction cost was calculated with the use of „cost estimation method" with taking into consideration contemporary unit prices for building materials, labour and transport.

The next legal rule concerning real estate expropriation was Act from 1985 on land management and real estate expropriation.

In this Act authorities described among others expropriation purposes through listing them and formulating "other exclusively significant government duties described in social-economic plans".

Expropriation could not have been executed in order to benefit agricultural production and could have only been stated by governmental administration organ after the trial. It was stated that governmental and local administration unit should have paid the compensation. To calculate the amount to be paid the following rules were applied:

1) land parcel intended for development or undeveloped land – according to regulations agreed for particular localities by national commission on the voivodship level (land unit prices and conversion ratios)
2) agricultural land and forestland – after taking into consideration:
   a) localisation,
   b) productivity,
   c) level of development (equipment for agricultural or forest production),
   d) melioration.
3) other land – after taking into consideration their localisation and communal facilities.

Compensation for land should have been based on contemporary prices in real estate turnover.

In the case of perpetual usufruct expropriation, the compensation was estimated in similar way as land with ownership right – properly corrected with unused years.

Compensation for limited ownership rights should have been coherent to proportional decrease of the value of this right.

In the cases of compensations for buildings and facilities in farms, the reconstruction costs adjusted with the level of exploitation were taken into consideration.

Similar procedures were in force to assess the compensations for houses, locums in small houses and blocks of flats, residential-guesthouses and recreational houses, commercial buildings and buildings not being a part of agricultural household.

Other regulations concerning compensation for expropriated land parcels were the same as in the Act from 1958.

After changes introduced to Act on land management and expropriation, in 1990 the following regulations were agreed:

1) complete compensation should be paid for expropriated real estates,
2) compensation should be coherent to the value of expropriated real estate or right,
3) market value of real estate should be used for assessing the amount of compensation,
4) expropriation is permissible only with fair compensation,
5) if market value of real estate is not possible to be assessed, the reconstruction value should be applied as a base for compensation,
6) the amount of compensation is set according to the value of expropriated real estate on the day of decision on expropriation.

3. Summary

The construction of expropriation in Poland was significantly changing in 1919-1990. According to Zimmermann (1939), the expropriation should be understood as situation, when government forces real estate owners to sell their rights to land for compensation. Therefore, compensation should be equivalent to taken right to real estate. It should be treated as a kind of satisfaction to land owners for taking their land in order to fulfill public purposes. Moreover, compensation is also the expression of the principle of equality before the law.

Expropriation then deprives landowners of ownership right in order to benefit society for paid compensation. The regulations of calculating the amount of compensation have to be coherent with Constitution. After 1990 in Poland the concept of administration domination in shaping legal relations was rejected. Therefore compensation is necessary part of real estate expropriation procedure. It should be fair and equivalent to the value of expropriated real estate.

Solutions agreed to set compensation for expropriations in analysed period were strictly connected with contemporary political-economic system. Some of these solutions can be applied nowadays – after making adequate corrections and completions. It concerns also the procedure of real estate expropriation. Important issue, which is worth detailed analysis, is problem of lost advantages. From the review of hitherto regulations the following issues were selected:

1) expropriation could be realised only with fair and just compensation (1919),
2) assessing the amount of compensation for expropriated real estates requires **value estimation** (1919),
3) compensation for temporary occupation of real estate **is usually agreed in proportion to real estate value** (1919),
4) prices paid for expropriated private squares, piazzas and market places are half of estimated prices (1934),
5) compensation includes loss that results from taking rights to real estate; it does not take into consideration the increase of value caused by development for which expropriation was conducted (1934),
6) the amount of compensation set by the governor of voivodship can be raised by the Court (1934),

7) compensation includes the loss resulting from expropriation and was calculated on the base of average prices set in last 3 years before expropriation (1949),
8) compensation for buildings should be equal to their reconstruction costs depreciated to the level of their exploitation (1982),
9) compensation for land should include current prices on the real estate market (1985),
10) compensation for limitation of rights to real estate should be proportionally equal to the depreciation of value of this right.

Some of these records and solutions were introduced to legal regulations after 1990 and other can be used as a base for new rules of determining compensations for real estate expropriation.

4. References

Benson B. 2005. *The Mythologhy of Holout as a Justification for Eminent Domain and Public Provision of Roads*. In: *The Independent Review*, v. X, No 2, Fall.

Decree from 7 February 1919 on expropriation in favour od iron roads and other communication routes and other publuc utilitity facilities (in Polish), dziennik praw Nr 192, poz. 162.

Ignatowicz J. 1999. *Prawo rzeczowe*. PWN, Warszawa.

Woś T. 1998. *Wywłaszczenie i zwrot nieruchomości*. PWN, Warszawa.

Zimmermann M. 1939. *Polskie prawo wywłaszczeniowe*. Lwów.

Źróbek R, Źróbek S. 2008. *An assessment and proposal chamges to the principles and procedures of real estate expropriation after 1945*. In: *Compulsory purchase and compensation in land acquisition*. Helsinki University and Technology Publ. (55-70).

1.2. CHOSEN PRINCIPLES OF LAND ACQUISITION FOR PUBLIC PURPOSES AND JUST COMPENSATION DETERMINATION IN POLAND

Marek Walacik[2], Sabina Źróbek
Department of Land Management and Regional Planning
University of Warmia and Mazury in Olsztyn
e-mail: zrobek@uwm.edu.pl, marek.walacik@uwm.edu.pl

Key words: *public purpose, expropriation, take over by virtue of law, just compensation.*

Abstract

The following paper was written due to academic staff's (Norwegian University of Life Science in Aas, The Leibniz University in Hannover and The University of Warmia and Mazury in Olsztyn) initiative to make basis for Norwegian-German-Polish expropriation system comparative study.

It describes conditions enabling property expropriation (take over by virtue of law) use in Poland, explains the notion of public purpose, shows the principles and the procedures of properties' legal status regulation and finally takes into consideration one of the most problematic expropriation issues – the rules and methods of just compensation determination.

1. Introduction

Realization of all the assignments aiming at sustainable development of every society requires from public administration different kinds of objects and infrastructure formation, that ensure safety and create conditions of progress that balance economic, social and ecologic needs. In order to initiate the process of project realization the first thing that has to be done, every investment alike, is the particular area rights obtainment. The way the rights can be obtained can be achieved by:

- concluding a civil agreement,
- expropriation and,
- by virtue of the law.

The last two of the manners given above are exceptional public-legal instruments used in specific situations. According to the Polish Constitutions' 21st

[2] Supported by the European Union within The European Social Fund.
The project has been realized thanks to financial support given by Island, Lichtenstein and Norway from the European Economic Area Financial Mechanism and Norwegian Financial Mechanism Funds within the framework of the Scholarship and Training Fund.

article that kind of situations are public purpose investments. Trying to describe the institution of expropriation on the basis of the literature and law one ought not to forget about the issues justifying and allowing its' use – public interest and public purpose (ŹRÓBEK, WALACIK 2008).

2. The meaning of public interest and public purpose

Public interest, usually identified with public good or social good is a notion that has a fuzzy character, belonging to so called general clauses. In the juridical literature many authors have taken up the identification of its' meaning in terms of the content. According to J. Lang public interest is a "relation between an objective state and the appraisal of that state form the point of view of the benefits that it gives or can give to the society"(LANG 1997). In the opinion of W. Jakimowicz public interest is "an interest of all the people, living in a politically organized community, where realization of particular communities' interests is assured with all the respect given to the rights of individuals by community organized in substantial way (…)"(JAKIMOWICZ 2002).

In spite of the fact that the objective definition of the notion of public interest is impossible, "(…) it draws the boundaries of acceptable public administration activity well enough"(IZDEBSKI, KULESZA 2004) especially while being put together with the notion of the interest of individuals.

The currently dominating opinion in the Polish administrative law doctrine is that public interest and the interest of individuals are mutually dependant.

According to the main assumption of that concept the meaning of public interest derives from the values connected with the interest of individuals so that its' allowance is a constituent element of public interest

On the ground of the state's ownership right area interference public purpose is a notion that specifies strict boundaries of public interest realization.

The meaning of public purpose can be found directly in its' etymology – "a public purpose is related to an entire population, serving and accessible to everyone"(BIENIEK 2008), nevertheless it's not the most important issue in terms of compulsory purchase permissibility and legality. The fundamental answer that has to be given is which investment can be classified as a public purpose investment and which can not.

The importance of that issue has been taken up in Polish legislation by the Real Estate Management Act dated 21 August 1997, the act that has identified the group of public purpose investments in a positive way. According to the 6th article of the following act public purposes are:

- construction and maintenance of public and air transport facilities,
- construction and maintenance of the facilities for carrying liquid, steam and gas and transmitting electricity,
- construction and maintenance of facilities for water supply, for collecting transport and treatment of wastewater and for solid waste utilization,
- construction and maintenance of facilities for environment protection,

- protection of real estate regarded as elements of cultural heritage,
- protection of monuments commemorating mass murders,
- construction and maintenance of government and administration office facilities,
- construction and maintenance of defence and border protection facilities,
- searching, identifying and excavating minerals owned by the state,
- establishing and maintenance of cemeteries,
- establishing and protecting national remembrance sites,
- protection of endangered plant and animal species or natural habitats,
- other public purposes determined in separate legal acts.

The list of the public purpose investments provided in the Real Estate Management Act connected with the use of definite words have specified in possibly best way the content and scope of that notion. Unfortunately not in the way that would leave no room for doubts in terms of its' interpretation. Situations when people question particular public investments classification to the group of public purpose investments are common in Poland.

Public purpose investment realization according to the Polish Constitution is one of the conditions justifying and allowing the use of property rights restriction and taking tools – compulsory purchase and taking properties over by the virtue of law.

3. The institution of expropriation in Polish law regulations

The institution of expropriation and taking properties over by the virtue of law are the exceptions of the general rules concerning ownership protection, rules that "stabilize socioeconomic system and the position of individuals in community"(MIK C., 1993)

Their admission derives from the social function of ownership creating not only owners' entitlements but also his duties.

The expropriation, what has already been mentioned, is possible only for the properties that are indispensible for public purpose, properties situated in the areas which in local plans are allocated for public projects or for which a decision has been issued establishing the location of a public investment project. Expropriation consists in issuing a decision depriving of, or restricting, the right of ownership, the right of perpetual usufruct or another property right to a real estate. Expropriation may be executed if public goals cannot be achieved in any other way but by depriving, or restricting, one's ownership rights, and the rights cannot be acquired by agreement. It is noteworthy that in Poland a real

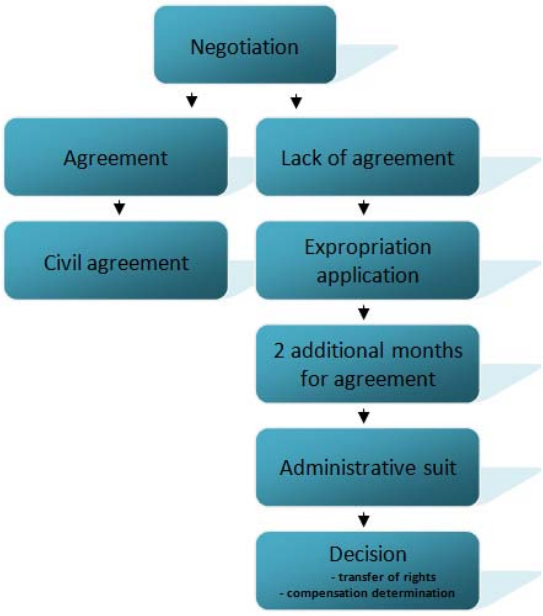
estate may be expropriated only for the benefit of the State Treasury or of a local government unit. A real estate may be expropriated as a whole or in part. If it regards a part of a real estate, and the remaining part can no longer be properly used for the previous purpose, such remaining part is, at the request of the owner of the perpetual user, acquired by agreement by the State Treasury or a local government unit, depending on who is the expropriating entity.

As one can easily notice very big legislative effort has been made in order to make the instrument of expropriation the last resort tool, used only when any other methods fail. The possibility of its' use has been strongly narrowed by many conditions that have to be fulfilled, conditions that influence the procedures of expropriation.

4. The procedures of expropriation and taking properties over by the virtue of law in Poland

According to the main rules saying that expropriation can only be used when there is no other possibility of public purposes realization but through restriction or deprivation of properties' rights and when the rights cannot be acquired by agreement, every expropriation decision must be preceded by negotiations. In cases when the negotiations do not lead to an agreement, particular administrative body has a reason to initiate the whole procedure by forming particular application to the Starost. Before the expropriations' procedure initiates additional period of two months for agreement is given. If that does not end with an agreement the Starost pursues administrative suit that ends with a decision settling among other things the amount of compensation. The transfer of properties' rights takes places when the decision becomes final.

The procedure has been illustrated in the picture 1.



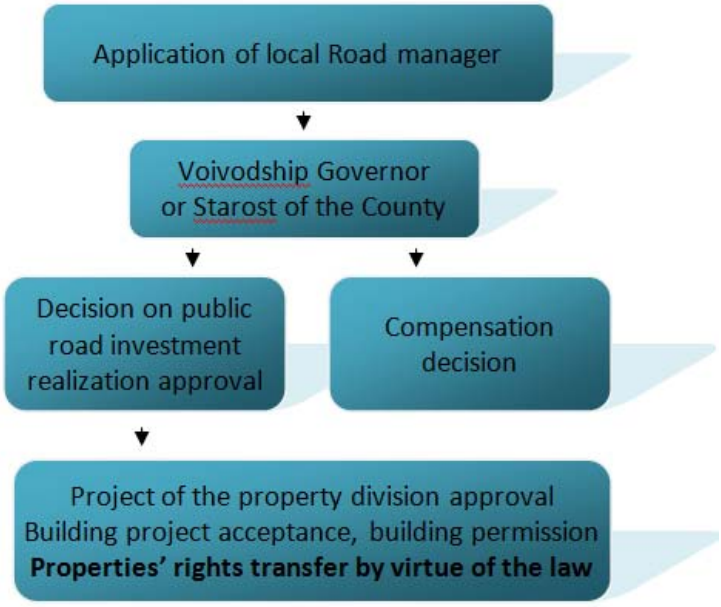
Pic. 1. The procedure of expropriation. *Source*: Authors' own study.

Specific kind of properties' rights deprivation is taking properties over by the

virtue of law. That kind of procedure is acceptable in Poland only in cases of properties necessary for public roads building investments. The process of taking properties over by the virtue of law is much more simpler form the procedural point of view and what follows the regulation of properties' legal statuses faster.

The initiating point for that kind of procedure is an application formed by particular road manager to voivodship governor or starost, depending on the road category. On the basis of that application particular administrative body gives a decision that simultaneously settles the investment location, project acceptance, building permission and what's the most important in terms of the papers' subject properties' rights transfer.

The procedure has been illustrated in the picture 2.



Pic. 2. The procedure of taking property over by virtue of law. *Source*: Authors' own study on the basis of BEŁEJ AND WALACIK (2008).

"Expropriation may ultimately bring benefits to society but it is disruptive to people whose land is acquired" (ŹRÓBEK R., ŹRÓBEK S. 2007) that's is why in Polish legal system there has been another condition given to make expropriation possible - just compensation payment.

5. The rules connected with expropriation compensation

The rules concerning issues connected with compensation for deprivation or restriction of properties' rights basically cover:

- the rules of compensation determination,
- the rules of compensation payment

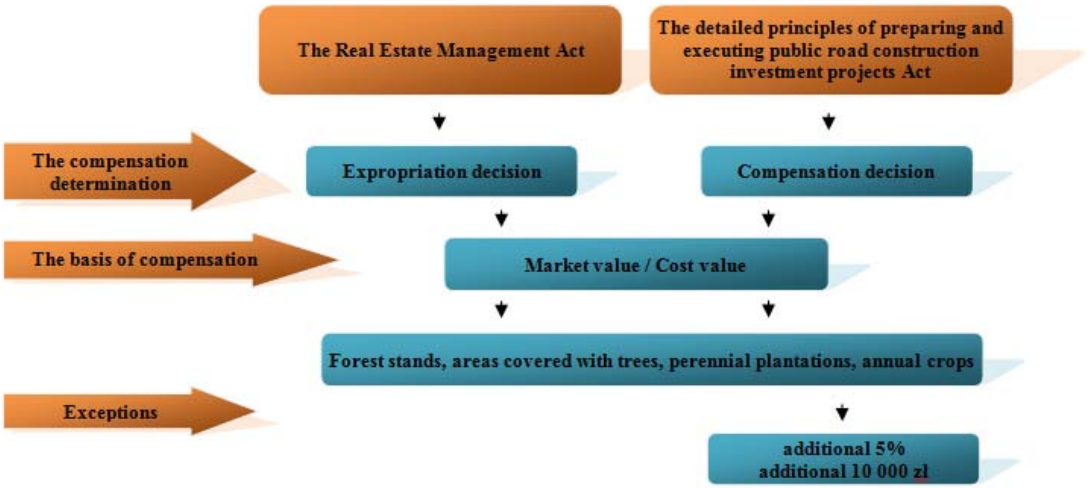
– the rules of loss compensation by exchange property

5.1. The rules of just compensation determination

The Polish legislation acts considering compulsory purchase compensation determination are:

– The Real Estate Management Act dated 21 August 1997 (with amendments)
– The detailed principles of preparing and executing public road construction investment projects Act dated 10 April 2003 (with amendments),
– Directive of the Cabinet dated 21 September 2004 regarding real estate valuation and preparing the appraisal report (with amendments).

The similarities and differences in the ways of compensation determination regulated by The Real Estate Management Act and The detailed principles of preparing and executing public road construction investment projects Act are presented in the picture 3.



Pic. 3. The similarities and differences in the ways of compensation determination regulated by The Real Estate Management Act and The detailed principles of preparing and executing public road construction investment projects Act. *Source*: Authors' own study.

According to acts the right to compulsory purchase compensation have:

– the owners of properties,
– perpetual usufruct users,
– holders of other rights on properties.

The amount of compensation determines Starost in a compulsory purchase decision (or voivodship governor in a compensation decision – public roads investments) on the basis of valuation made by a certified valuers.

The amount of compensation is set according to the state and value of the

property on the date of expropriation decision (or according to the state of property on the date of decision on road investment realization permission and the value of property on the date of compensation decision). The property state determination is made by a detailed description (ŹRÓBEK S., ŹRÓBEK R. 2007)

The basis of compensation is the market value of the property

The most important things that valuer has to consider while estimating the market value of the property are:

- kind of property,
- property use,
- location,
- infrastructure,
- prices of similar properties

Market value of the property is estimated according to current properties' use in case if its value after expropriation will not rise. If it does the market value is estimated according to the kind of land use after expropriation.

As far as residential properties are concerned the amount of compensation can not worsen the living conditions of the owners.

The market value rule does not apply in a situation when a property, because of its' character or function is not sold on a market. In that case the basis of compensation is a cost value assessed in a cost approach according to the following formula (1):

$$V = V_L + V_B \tag{1}$$

where:

V – cost value of expropriated property
VL – market value of unbuilt plot
VB – cost value of the remaining property elements

The market value of the unbuilt plot is estimated with the use of comparative approach

The cost value of all the remaining property elements is estimated with the use of cost approach.

All the general rules presented above do not always apply. Polish legislation provides exceptions form these rules. The first group of exceptions contains The Real Estate Management Act. They are connected with the market value estimation of:

- forest stands,
- areas covered with trees,
- perennial plantations,
- annual crops.

In case of that properties, the amount of compensation includes also lost profits.

In case of forest stand value or value of areas covered with trees determination the amount of compensation depends on the amount of forest stands' usable

material. In that case one ought to estimate the value of wood forming the forest stands and add it to the market value of the ground (2):

$$V = V_G + V_D \tag{2}$$

where:
VG – market value of the ground
VD – the value of the forest stands' wood

If the forest stands do not have any usable material or the value of wood, that could be gained is lower than the cost of afforestation and the cost of cultivation then one has to assess the cost of afforestation (CZ) and the cost of cultivation (CP) up to the date of expropriation (3).

$$V_D = C_Z + C_P \tag{3}$$

While estimating the value of perennial plantations (for example young spruce) one has to estimate the cost of plantation founding (CPZ), the costs of its' cultivation up to the time of first harves (CPZ) and the value of lost profits (VUP) between the date of expropriation and the time for full yielding. The value of the plantation is reduced by the sum of annual amortization allowance (Σ) resulting from the period of plantation use (form the time of first harvest (a1) to the date of expropriation(T)) (4).

$$VPKW = CZP + CP_Z + VUP - \sum_{i=a}^{T} A + VR_G \tag{4}$$

In terms of the annual crops value assessment (VZU) one estimate the value of estimated yield (VPP) on the basis of market prices reduced by essential harvest expenditures (VNK) (5).

$$VZU = VPP + VNK + VR_G \tag{5}$$

During the expropriation procedure the owner of expropriated property can use it only when the use is not aiming at increasing the compensation.

If the ownership or perpetual usufruct right is expropriated and there are other rights established on the property, the amount of compensation is reduced by the value of these rights.

Compensation for losses resulting from for example building on a property technical infrastructure (electricity, gas, water) is determined according to the size of the loss. If the properties' value decreases because of that, compensation equals that decrease.

The Act of detailed principles of preparing and executing public road construction investment projects adds another two exceptions. Both of these were introduced in 2009 in order to speed up the process of public roads building.
The first exception deals with situations when residential properties (build up with

houses or blocks of flats) are expropriated. If so the owner of such property or flat is given additional 10 000 zł (≈2500€). The second exception concerns property owners that hand the properties over to road authorities within 30 days from informing them about the fact that expropriation decision has been made. If that kind of situations the amount of compensation is increased by 5%.

5.2. Compensation payment rules

According to the The Real Estate Management Act compulsory purchase compensation ought to be paid once within 14 days since the expropriation decision and compensation decision become final.

The amount of compensation in cases when the properties' legal status is unregulated can be placed on the court deposit. Placing compensation in deposit is treated as the compensation payment.

The amount of compensation defined in the decision is valorized on the date of payment.

5.3. Exchange property as a kind of compensation

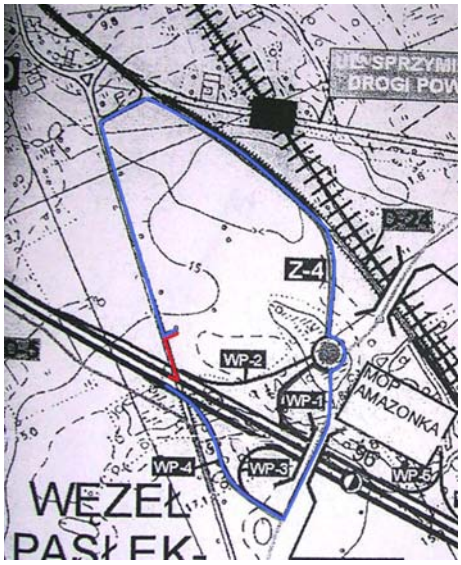
Compulsory purchase compensation can be given if the expropriated owner accept that in a form of exchange property. The difference between the amount of compensation given in the decision an the value of exchange property can be equaled by additional payment. The transfer of the exchange property right to the expropriated owner takes place on the day when the expropriation decision becomes final. The change in property register is made on the basis of that decision

The property has got to be appropriate, which means that it has to have similar features to the expropriated property (area, destination in land use plan, location etc.)

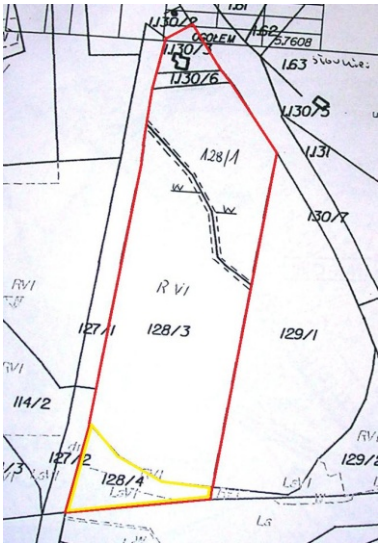
The exchange property value estimation is made according to the rules presented in the previous chapter by certified valuer. It is essential in order to determine for example the amount of additional payment.

6. Case study

The situation described below is a case study of expropriation took place in 2005 during national road building investment in Warmia and Mazury Province (north-east Poland). The property that was included in the expropriation process had a very specific character. It was an agricultural land with a small forest and a building that the owner ran a bar in. In order to widen the existing road, road authorities had to acquire the right to one of the plots (128/4 – yellow color in picture 4) that formed the property. They started the negotiation procedure but the owner of the property did not want to accept their amount of compensation. He claimed that the amount of the compensation he was proposed did not fulfilled his losses. He said that because of that expropriation he will lose not only a plot that he cultivated (yellow line) and a forest (green line) but also a big piece of income that he gained from his business (a bar).



Pic. 4. The map of expropriated property.



Pic. 5. The map of new/old traffic solution.

The new traffic solution that the road authority wanted to choose would dramatically lengthen the way that his potential customers had to go threw in order to reach the bar. The new solution has been shown on the map below (red line – old access, blue line – new access, in picture 5).

Unfortunately the claims of the owner were not taken into consideration. He was expropriated and the amount of compensation he was given was calculated only by two elements:

- the market value of the plot 128/4 (agricultural land - 4000m^2 and forest land - 3800m^2),
- the value of the forest stands.

In terms of the plot's market value assessment, the average price adjustment method (sales comparison approach) was used. The local market analysis were made of properties designated in land use plans for roads that had been sold on free market within the period of two years before the date of valuation. A group of 19 similar properties was selected that had an average price of 10,37zł/m^2, minimum price of 9,01zł/m^2 and maximum price of 13,49zł/m^2. The analysis of the market had shown that there was no property value change because of the time, that is why the unit prices of the properties were not revised to the date of appraisal. In the next step the valuer identified market features differing real estate prices, determined mark scale for each of them and assessed the level of their influence on transaction prices – picture 1.

No	**Features**	**Scale**	**Weights**
1	Location	very good good average	40%
2	Area	small (up to 400 m^2), medium (401 m^2 – 1000 m^2) big (1001 m^2 – 5000 m^2) very big (over 5000 m^2)	30%
3	Infrastructure	full, close (possibility of connection), lack	20%
4	Others (difficulties in property use)	there are difficulties (waste land, waters, afforestation, differentiated lay of the land, marshy land), there are no difficulties.	10%

Pic. 6. The calculation of weights. *Source*: Valuation.

Having done that the valuer could calculate the marginal values of the sum of adjusting ratios (low range of the sum of adjusting ratios – P_{min}/P_{ave} = 0,869, upper range of the sum of adjusting ratios – P_{max}/P_{ave} = 1,301), establish the range of

adjusting ratios for each feature (using weights) and determine the adjusting ratios resulting from marks of subject property – average location, very big area, lack of infrastructure and existing difficulties.

Features	**Weights**	**Low range**	**Upper range**		**Property's features**	**Property's ratio**
Location	40%	0,3476	0,5204	⇨	average	0,3476
Area	30%	0,2607	0,3903		very big	0,2607
Infrastructure	20%	0,1738	0,2602		lack	0,1738
Others	10%	0,0869	0,1301		existing difficulties	0,0869
Σ	100%	0,869	1,301			0,869

Pic. 6. The calculation of marginal values and property's ratio. *Source*: Valuation.

The unit value of the property was determined according to the formula of average price adjustment method (6):

$$V_J = P_a \times \sum_{i=1}^{n} u_i = 10,37 zł/m^2 \times 0,869 = 9,01 zł/m^2 \quad (6)$$

where:

P_a – average price

u_i – the level of i-adjusting ratio

n – number of adjusting ratios

The market value of the plot was (7):

$$V_M = A \times V_J = 7800 m^2 \times 9,01 zł/m^2 = 70\ 278 zł \quad (7)$$

where:

A – area of the plot

V_J – unit value of the property

As far as forest stands' value assessment is concerned, because of the fact that the area of 3800m² was covered with trees (alder (90%) and ash (10%)) that had already established usable material (age of about 65 years), their value was determined according to following index method formula (8):

$$W_D = \left[\sum_i^n \left(W_{Si} \cdot Z_i\right)\right] \cdot C \cdot P_{ha} \cdot U \quad (8)$$

where:

W_D – the market value of the forest stands,

W_{Si} – value index

Z_i – forestation index,

P – area,

C – the price of 1m^3 of coniferous tree wood (WBO2) form the local market,
U – reduction index (9):

$$U = 1 - \frac{K_P + K_Z}{C} \tag{9}$$

where:
K_P – the cost of acquisition
K_Z – the cost of cutting trees

Species	Share	Age	Forestation	Area	Value index	Price	Reduction index	Value (zł)
alder	90%	65	0,7	0,3420	56,3	280	0,82	3095
ash	10%	65	0,7	0,0380	95,4	280	0,82	583
Σ	100%			0,3800				3678

Pic. 6. The calculation of forest stands market value. *Source*: Valuation.

The total amount of the compensation (the value of the plot and the forest stands) was 73 956 zł.

The owner having been informed about the fact that if he didn't accept that amount of compensation he would be expropriated, accepted it.

7. Conclusions

Deprivation or restriction of properties rights in situations when public purpose investment is realized by expropriation or taking properties over by virtue of law procedures are situations that owners of all the properties have to be aware of. Legislator in Poland had made a big effort in order to create an administrative tool that won't threat the basic rules ownership protection in terms of the first condition – public purpose investment. Unfortunately in terms of the second condition – just compensation payment, a lot still has to be done. The situation presented in point 6 (case study) is one of many examples when the owner of the expropriated property (or part of property) looses more than only market value of the property. The issue of what should be compensated then should come up for further discussion. Comparative study of solutions adopted in other countries would be a very good starting point for that.

8. References

ŹRÓBEK R., ŹRÓBEK S. 2007r. *Expropriation as a exceptional tool of acquisition of land for public purposes*. Materiały cyklicznej konferencji międzynarodowej w Helsinkach. www.fig.net.

ŹRÓBEK S., ŹRÓBEK R. 2007r. *Is the amount of compensation for real estate expropriation just? – current state and proposals for changes.* Materiały cyklicznej88 konferencji międzynarodowej w Helsinkach. www.fig.net.

BEŁEJ M., WALACIK M., *„Land acquisition for public purposes in Poland on example of*

public road construction", FIG Working Week 2008, Stockholm, Sweden.
ŹRÓBEK S., WALACIK M., *„Analiza porównawcza wybranych zagadnień wywłaszczania nieruchomości w Polsce i zagranicą"*, Przegląd Geodezyjny 12/2008.
J. LANG, 1997r, *Pojęcie interesu publicznego w administracji, w: Przeobrażenia we współczesnym prawie administracyjnym*, red. A. Błaś, Przegląd Prawa w Administracji
W. JAKIMOWICZ, 2002r., *Publiczne prawa podmiotowe*., Zakamycze
H. IZDEBSKI, M. KULESZA, 2004, *„Administracja publiczna - zagadnienia ogólne"*, Warszawa,
BIENIEK G. 2008, *„Ustawa o gospodarce nieruchomościami: komentarz"*, Warszawa, Lexis Nexis.
C. MIK, 1993: *Prawo własności w europejskiej konwencji praw człowieka*, Pip, nr 5, s. 25.

Legislation acts

KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ Z DNIA 6 KWIETNIA 1997. - Polish Constitution.
USTAWA O GOSPODARCE NIERUCHOMOŚCIAMI Z DNIA 21 SIERPNIA 1997 ROKU. *(*Dz. U. 80/2003 z późn. zm.) - The Real Estate Management Act,
USTAWA O SZCZEGÓLNYCH ZASADACH PRZYGOTOWANIA I REALIZACJI INWESTYCJI W ZAKRESIE DRÓG PUBLICZNYCH Z DNIA 10 KWIETNIA 2003 ROKU. (Dz. U. 80/2003 z późn. zm.) - The detailed principles of preparing and executing public road construction investment projects Act,
ROZPORZĄDZENIE RADY MINISTRÓW Z DNIA 21 WRZEŚNIA 2004 ROKU W SPRAWIE WYCENY NIERUCHOMOŚCI I SPORZĄDZANIA OPERATU SZACUNKOWEGO. (Dz. U. 207/2004) - Directive of the Cabinet regarding real estate valuation and preparing the appraisal report.

1.3. THE PROCESS OF ACQUIRING RIGHTS TO PROPERTIES WITH REGARD TO REALISATION OF PUBLIC INVESTMENT PROJECTS (SELECTED PROBLEMS)

Maria Trojanek
Departament of Investment and Real Estate
Poznań University of Economics
e-mail: m.trojanek@ue.poznan.pl

Keywords: *public goal, infrastructural investments, spatial management conflicts*

Abstract

The subject of the study is acquiring rights to properties with regard to realisation of public investment projects. The author discuss certain laws regulating the procedures of acquiring properties with regard to realisation of public investment projects as well as establishing conditions of claims. Moreover, the most common impediments to purchase of property for public investment projects have been studied on chosen examples.

1. Introduction

Public goals were defined in the article. 6 of Real estate management bill. Public goal [3] is understood as general purpose activity available for all citizens .

Public goals listed in the mentioned legal act do not comprise all possible public activities because according to paragraph 10 other public goals can be defined in the another bills.

This statement in comparison with prior regulations (see art.6 p. 6 of real estate management and expropriation bill[4]) narrows ability to qualify chosen activity as a public goal. This solution is more suitable to market economy than earlier regulations.

The most important in answering the question whether investment can be treated as a public goal are regulations from real estate management act and spatial planning act. In case of contradictory opinions one should refer to other, detailed bills.

According to art. 6 of real estate management bill majority of public goals is linked with infrastructural investment.

One can notify that extreme sophistication of choices made on many levels,

[3] Ustawa o gospodarce nieruchomościami, Komentarz. Praca zbiorowa pod red. G. Bieńka, Wyd. Pracownicze Lexis Nexis, Warszawa, 2008 r., s.449

[4] See : ustawa z dnia 29 kwietnia 1985 r. o gospodarce gruntami i wywłaszczaniu nieruchomości, Dz. U. z 1991 r., Nr 30, poz. 127 z późn. zm.)

their influence on socio-economic development of various administrative districts and society may result in conflicts stemming form spatial management. These conflicts are stemming from the facts that activities of agents within existing space have different goals, criterions and reasons for conducting activities.

Considering field of research analysis in the paper is reduced to find and identify problems linked with gaining property rights in the process of public goal investments. On the other hand activities aimed at reducing possibility of conflict caused by public-goal investment were discussed.

1. Acquiring real estate for chosen linear public investments –construction of public roads according to legal regulations

In the process of public goal investment public agent's aim is to gain possession laws referring to real estate being subject to public investments. Such rights may include:

- property right ,
- perpetual usufruct ,
- permanent administration,
- easement,
- obligations (rent, loan, leasing),
- administrative deed for property disposal (DĄBEK 2009.).

Rights for real estate being subject to public investment can be gained in two ways: on the basis of civil law, and in case if it is impossible on the basis of expropriation. According to existing regulations expropriation procedure can be applied also to real estate mentioned in the placement decision

Way of gaining rights for real estate for public roads, depends on the road category. It can base either on the real estate management bill (this refers to going real estate for public roads, which are subject to partition, and unification. This procedure can be applied both to situation in which new road is being constructed or existing widened) or Ustawa z dnia 10 kwietnia 2003 r. o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych (Dz. U. Nr 80, poz. 721, z późn. zmianami).

Significant changes in the process of gaining real estate for road construction were brought by Specific rules of preparation and development of public roads bill. Regulations included in the mentioned bill (in the period 12 may 2003 to 16 December 2006.) referred only to one category of roads-national roads. According to regulations mentioned in this act real estate for national roads were purchased from natural persons and legal persons by State treasury thorough National Highway Administration on the agreement basis. In this case negotiations with owners (or possessors of Perpetual usufruct) were required. Negotiations were aimed at gaining such rights on the basis of civil contract, according to art. 114 p. 1 real estate management bill (REMB). In case of unsuccessful negotiations expropriation procedure was initiated by voivoda .

Between 16 December 2006 and 10 September 2008 road placement decision

was issued by:

- voivoda in case of national and regional roads,
- county governor in case of county and gminas' roads.

Placement decision was issued on the basis of road manager request. Real estate located on the border lines became property of State treasury in case of national roads or property of local authorities in case of regional, county and gmina roads, when placement decision was final. They can be property either in situation in which compensation was estimated by voivoda or county governor (value of which was stated in another decision) according to art. 12 ust. 4) or real estate was subject to expropriation. Compensation value in the period 16 December 2006 to 12 July 2007 was estimated on the basis :

- condition of real estate and price level in the day of issuing placement decision by voivoda or county governor.

After changes dating 10 may 2007 (Dz. U. Nr 112, poz. 767) compensation between 12 July 2007 and 10 September 2008 was estimated on the basis of:

- condition of real estate and price level in the day of issuing placement decision by voivoda or county governor,
- price level in the day of issuing compensation value decision.

Value was estimated on the basis of REMB, especially art. 134 and §36 ust. 2 p. 1 and property valuation regulation issued by Council of Ministers. In case of dwellings estimated value of compensation cannot lead do deterioration of living conditions of owner.

In case of Real estate being subject to national placement location decisions issued prior to 16 december 2006, art. 12 – 13 of bill in its initial meaning were applied. In this case estimation of value of purchased or expropriated real estate could employ regulations from § 36 ust. 1 of regulation due to sufficient data gained from notary acts for comparable transactions.

The next change of analyzed bill implanted new regulations concerning realization of road investments and estimation of compensation for lawfully sized real estate[5].

Decisions about road placement and building permit were replaced by one road development permit, issued within 90 days from roads manager request. The bill implemented criminal sanctions for violating time limits by agent's issuing permit. The main aim of such regulation is enforcing agents for quick decision which should result in fast begin of the investment.

Additional implemented solution was change of compensation value for real estate seized for road construction. It was raised 5% over agreed value if the real estate will be transferred to road manger within 30 days from notification about delivery of road development permit. Additionally owners and Perpetual

[5]for details see: Ustawa za dnia 25 lipca 2008 r. o zmianie ustawy o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych oraz o zmianie niektórych innych ustaw (Dz. U. Nr 154, poz. 958

usufructers of real estate with dwellings, building with separate dwelling receive compensation added 10000 PLN.

2. Gaining real estate for express road development

Properties of investment

Construction of express road no. S-5 on the way Łubowo – Kleszczewo passing through Gniezno city and gminas: Gniezno, Łubowo, city Kostrzyn and gminas: Pobiedziska, Kostrzyn, Kleszczewo.

Placement decision for mentioned road was issued on the of bill on public road development[6] Real estate located on the border lines listed in the decision became property of state treasury in case of national road when location decision became final. Compensation estimated by voivoda in another decision.

Planned S-5 is presented on the below graph .

The presented road comes mainly across rural areas which are used for agriculture (around. 33 ha). Owners of mentioned real estate are operating family farms, highly productive. Road construction will significantly change character of land. Existing way of exploitation will be changed and in some cases destroyed.

According to request sent to Voivoda of Wielkopolska owners were interested in assistance to get compensation for real estate in the form of other estates from resources of Agriculture Property Agency(APP).

Request contained numerous explanations why compensation should be in the form of other real estate:

- planned express road comes through the middle of fields, leaving small space on the both sides which deteriorates access and raises costs of production,
- farms are main source of income and are crucial for their existence,
- downsizing of farms' area will influence profitability of production,
- there were certain investments on the farms, stemming from specialization, smaller area of farm makes them unnecessary,
- because farms are market oriented and farmers signed production contracts they would be unable to fulfill these agreements.

Farmers expected activity that allow them to buy leased estate owned by state treasury (LLC.). More over thy proposed location of compensatory estate and expected that ".sale will be conducted on proper conditions and price same as (…) in case of buyout of estate for A-2 motorway".

Analysis of requests (Voivoda of Wielkopolski, APP) showed that they do not comply with formal requirements (especially article 131 REMB)[7] was not

[6] for details see : Ustawa z 10 kwietnia 2003 r. (Dz. U. Nr 193, poz. 1194) o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych.

[7] For details see : Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami - Dz. U. z 2004 r., Nr 261, poz. 2603 z późn. zmianami

applicable) needed for transfer of State owned estate LEASED By LLC as compensation.

Graph 1. Planned S-5 express road. *Source*: http://www.gddkia.gov.pl.

Road development permit can be appealed by involved agents (in case of county and gmina roads appeals are considered by voivoda, while in case of decision issued by voivoda by minister responsible for spatial management).

Most common reasons for appealing such permits [8] are:

- reservations about location of road investment which result in diminishing value of neighboring estates (developed estate, estate being subject to partition),
- increase of access costs to real estate caused by road construction and rise of

[8] On the basis of data from State treasury estates management department, Voivoda's office, Poznań 2009

agriculture production costs,
- noise caused by traffic,
- loss of profits from business, and lease of estate,
- inability to fulfill contract agreements,
- to low compensations for agriculture estate,
- not suitable space and shape of real estate used for agricultural production,
- reduction of UE direct payments due to lower area of farm.

Owners (or possessors of perpetual usufruct) have some expectations about solving above mentioned problems:

- request buoyant of the rest estate used for public goal,
- expect compensatory estate, very often showing chosen estate, with compensation ratio 1m² for 1m², considering estate designation,
- demand for buying whole estate,
- request for compensatory estate.

3. Process of gaining real estate for reservoir

Properties of investment

Reservoir is located in southern Wielkopolska within three counties: kaliskie, ostrowskie i ostrzeszowskie and five gminas: Sieroszewice, Godziesze Wielkie, Brzeziny, Kraszewice i Grabów nad Prosną. Area of water surface – 2047 ha (126,0 m elevation over sea level).

Construction of reservoir bases on below listed legal regulations listed in the footnote.[9]

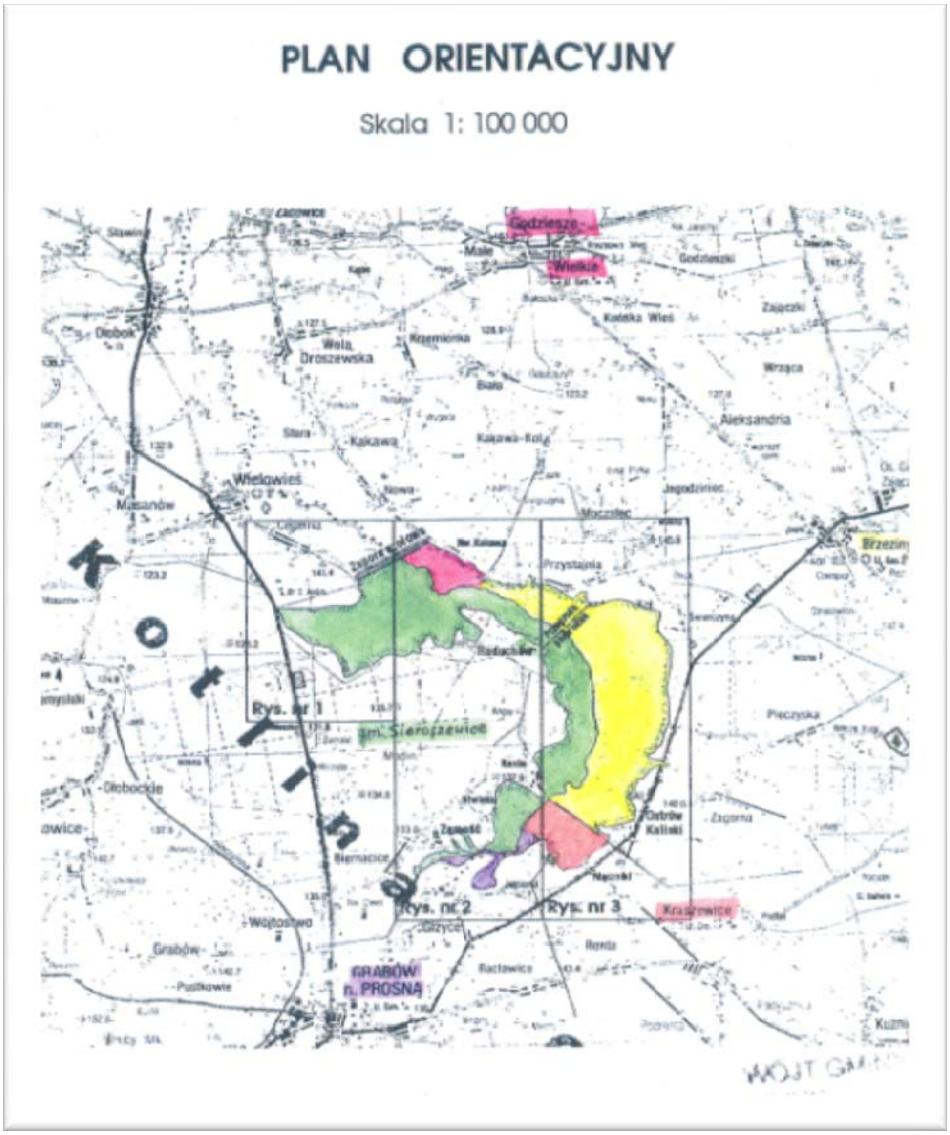
Buyout of real estate

Space of area being subject to buyout for reservoir equals to 1991,15 ha. Property structure is presented below:

- Private property – 1 546,58 ha (78%),
- Local authorities property – 39,33 ha (2%),
- State Treasury Property:
  - Under administration of State Forests – 242,48 ha (12%),
  - In resources of APP and other state units – 162,76 ha (8%).

Presented reservoir was planned in the 50 of last century estate for its construction were included in spatial plans, while buying of estate started in 2002.

[9] -Koncepcja polityki przestrzennej kraju (MP nr 26 poz.432 z 2001 r.),
- Ustawa z dnia 6 lipca 2001 r. o ustanowieniu programu wieloletniego „Programu dla Odry 2006" (Dz. U. nr 98, poz. 1067 z dnia 12.09.2001 r.),
- Strategia Rozwoju Województwa Wielkopolskiego,
- Plan zagospodarowania Przestrzennego Województwa Wielkopolskiego z dnia 26.11.2001 r.,



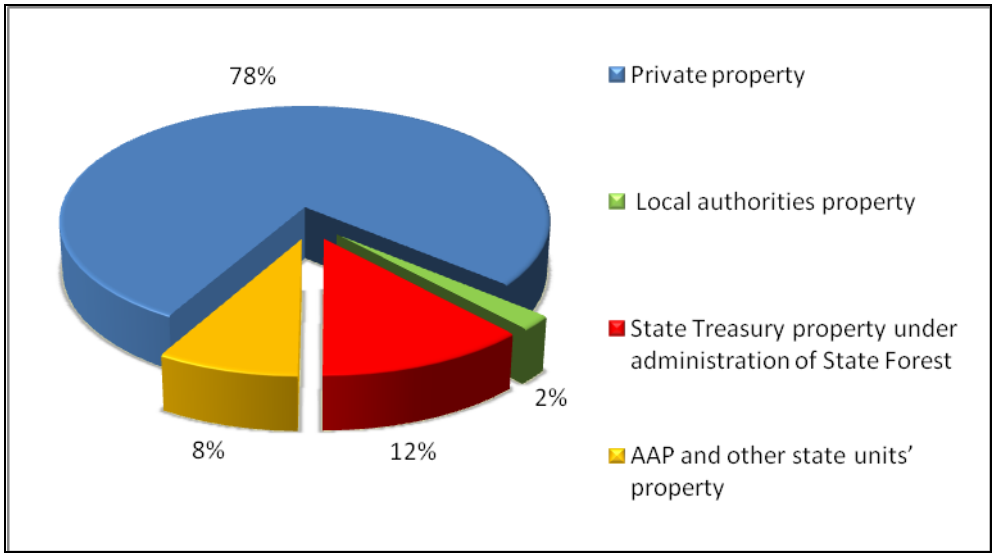
Graph 2. Retention reservoir – plan. *Source*: material of land development administration: Poznań 2009.

For 31.12.2008 existing situation of real estate properties buyout is presented below:

- 972,10 ha –has been bought from farmers; 817,45 ha within area of reservoir and 154,65 ha in the surrounding area,
- within reservoir area 729,13 ha have to be buoyed out, including 7 dwelled

farms. Moreover within this space are estate owned by local authorities (39,35 ha) and State treasury property (under State Forest Administration – 246,22 ha and administered bz APP and other state units – 162,76 ha).

According to pre buyout activities conducted in 2009 83 farmers agreed on buyout. 69 out of total 376 farmers whose properties accounts for around. 253,11ha demanded compensatory estate close to their farms.



Graph 3. Real estate property structure. *Source*: material of land development administration: Poznań 2009.

Attempts to get required estate in the period 2002 – 2008 conducted by Wielkopolska Region and Regional land improvement administration and conversion of them with AAP in Poznan were not fruitful. AAP in Poznan proposed total 366 ha of real estate in w 2003 and 232 ha in 2004, but farmers didn't accepted them despite individual negotiations, mainly due to too big distance to their houses. Another problem is fact that starting 1997 operation by AAP of estate being subject to claims is banned. In spite of numerous activities of governor of Wielkopolska Region in the period 2004 – 2007 addressed to Agriculture minister, State Treasury minister and Prime minister aimed at lift ban in case of 350 ha of claimed estate all requests were rejected. As one can see in table 2, buyout is slowed down also due to problems of unclear legal status of real estate with area equaling to 123,27 ha required for reservoir, which are belong to 92 farmers.

Owners of mentioned estate are not interested in bearing costs required for regulation of legal status (inheritance or usucaption procedure) procedure. Such costs include court dues, wealth tax, preparation of documents required by court. Another problems are existing frictions with families which makes assistance from

investor impossible. Very often obstacle for selling real estate are:

- Unpaid social dues for Agricultural social insurance fund (KRUS).
- Farmers do not have sufficient cash do pay them. As a result KRUS cannot issue permit for striking off mortgage in land and mortgage registry. This is possible only after paying debts to judicial enforcement officer.
- 5 years debts against Agriculture Development Agency: stemming from getting ONW, environmental payments, credits for young farmer, awaiting of owner for structural rent.

Obstacles to buyout of estate for reservoir suggested by farmers are listed in table 1.

Table 1

Obstacles for buyout

Position	**Number of farmers**	**Area**
Farmers possessing estate for reservoir	**376**	**729,1300**
including:		
Farmers agreeing for buyout	83	115,1722
Framers demanding compensatory estate	69	253,1100
Farmers demanding higher compensation	37	41,9000
Farmers waiting with decision	45	58,8100
Undefined owner	19	10,6465
Farmers awaiting achieving age allowing to structural rent	7	32,6098
Farmers refusing buyout without any reason	15	11,5100
Request to mayor for issuing partition confirmation	15	29,6700
Neighbors dispute cornering usage of estate	2	1,6300
Appraisal request for developed plots	2	14,6300
Lack of contact with owners	1	0,0100
Owners concerning sale of whole agricultural underdeveloped plots	3	15,2315
Owners concerning sale of whole agricultural developed plots	5	31,5700
Farmers with parcels with unsettled legal status including:		
Lack of heir appointment decision	32	54,4600

Establishing entry in the land and mortgage register	17	28,4900
Acquisitive prescription	14	25,5200
Mortgage of property	10	4,1600

Source: material of land development administration: Poznań 2009.

According to investor opinion problems to be solved most urgently are:

- Setting unified condition for compensation estate in case of:
  - RZGW in Poznan,
  - State Treasury,
  - Region of wielkoplska ,
  - Located outside reservoirs' influence area and can be changed for parcels seized for reservoir.
- Beginning by w Geodetic and rural administration in Poznan process of merging and changing of buoyed out estate for the benefit of Wielkopolska Region , located outside reservoir influence area.
- Establishing permanent management over all estate bought for reservoir investment.
- Preparation of expropriation procedure in case of farms which have either unclear legal status or in case of which owner did not agree on voluntary buyout.
- Further efforts aimed at gaining compensatory parcels from Poznan AAP resources.
- Securing financing from Odra 2006 program in 2010 r. for further investment.
- Organizing meetings with farmers in order to encourage to voluntary buyout.
- Beginning process of taking over parcels administrated by State Forest Enterprise, local authorities and others.

4. Sources of obstacles in purchasing real estate in the process of preparation and realization of public goals investments according to investor's opinion

Below are presented most common obstacles to acquiring property rights for public investment.

Independently from detailed regulations, compensation for estate used in public goal investment should be paid (i.e. development of reservoir and road by pass). Entitlement to compensation is granted to owners, Perpetual usufruct and possessors of limited property rights. Value and payment of such compensation comply with regulation of REMB. [10] (The compensations' value is assessed on the

[10] Except art. 18 ustawy z dnia 10 kwietnia 2003 r. o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych)

basis of (art. 134 ust. 1 REMB) real estates' market value or in some cases on the basis of replacement value (art. 135 REMB).

Compensation Value

Value of compensation is usually questioned if:

- is not sufficient for re-developing, buying dwelling,
- is not sufficient for transaction costs of buying another estate, removal costs,
- do not compensate lost profits (different purpose of neighboring parcels in the spatial plan),
- is not comparable to compensation paid to other people (agents).

This problem is common especially in case of developed parcels. Granted compensation estimated according to legal regulations of REMB is very commonly insufficient for buying another estate.

The amendment of law which extends compensation by 10 000 PLN will not solve this problem[11]. It may seem that more efficient would be credit guaranty by public agent (State treasury or local authority) which can allow do develop estate in other location. Such credit would be allowance to compensation for estate buoyed out for public goal. This credit should be secured by mortgage and interest rates and bank provision should be added to compensation.

Compensatory estate

Compensation may have form of another estate from (art. 131.1 REMB) state treasury or local authorities resources (art. 131.2 REMB).

This form is no always applicable due to lack of suitable parcels in the resources of ST or local authorities or is no always accepted by benefiters.

Most often compensatory estate came from resources of AAP. For example according to proper road manger can buy on behalf and in benefit of State treasury, region county and gmina various estates including dwellings, located outside road lanes in order to change them for estate located within these lanes or in order to use the in the compensation+unification procedure (art. 13 ust. 2)[12].

Another solution for agents that sold their estate for public goal and are interested in keeping existing state of possession may be granting entitlement to participate n tender organized by AAP or local authorities

The most common obstacle to organize such tender are:

- lack of estate being free of claim by third parties,
- lack of estate being free of claim from former owners,
- inability to meet expectations of interested agents: i.e. location, agricultural usefulness including proper class of soil.

[11] for details see: ustawa o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych

[12] for details see: ustawa o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych (Dz. U. z 2009 r. Nr 72, poz. 620)

5. Summary

Realization of public goal investment usually interferes with third parties business. Requirement of balancing public goals and rights of individual estate owner in the investment process despite implemented changes requires further improvements, especially when contrary interests, aims and decisions are considered.

6. References

BIENIEK J., 2008, Ustawa o gospodarce nieruchomościami, Komentarz, Wyd. Pracownicze Lexis Nexis, Warszawa, 2008;

DĄBEK J., 2009. Urządzenia infrastruktury technicznej, Materiały przygotowane na Warsztaty Zawodowe Rzeczoznawców Majątkowych, Lublin 2009;

Ustawa o gospodarce nieruchomościami (Dz. U. 1997 r., Nr 115, poz. 741; tekst jednolity: Dz. U. 2000 r., Nr 46, poz. 543; tekst jednolity Dz. U. 2004 r., Nr 261, poz. 2603);

Ustawa o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych (Dz. U. Nr 80, poz. 721, z późn. zmianami).

1.4. TOWARDS COMPULSORY PURCHASE WITH DECENCY: ELEMENTS OF NORWEGIAN EXPROPRIATION

Håvard Steinsholt
Department of Landscape Architecture and Spatial Planning
Norwegian University of Life Sciences
e-mail: havard.steinsholt@umb.no

Key words: *expropriation, compensation, marked value, negotiations*

Abstract

Good quality of compulsory purchase processes demand well functioning sets of rules, organisations and performances: In the pre acquisition stage when analysis and assessments are done to clarify if legitimate expropriation could be decided, and attempts to make voluntary agreements are done. In the valuation stage: procedural systems, principles of compensation and methods of valuation. In Norway the formalized systems and standards, developed through different governments and numerous Supreme Court cases, seems rather solid. Challenges are probably larger when comes to the level of professionalism among officers of organisations involved. Ability and possibility to inform and communicate with all kinds of landowners with true respect for both facts and feelings are important elements of this professionalism.

1. Introduction

Taking land without consent of the right holders, is a controversial busyness everywhere. Anyhow in a country where private ownership dominates, often in complex structures of fragmented plots and rights, it is often hardly possible to get agreements from all affected right holders for public or even private land demanding projects.

In this paper some basic principles of Norwegian expropriation law are presented. Some comments about the performance of these institutions are added.

The summary of Norwegian legal principles is based on standard literature on expropriation procedures (FLEISCHER 1980) (LID 1977) and valuation principles (STORDRANGE AND LYNGHOLT 2000) (PEDERSEN, SANDVIK AND SKAARAAS 1990). It is also based on studies of numerous decisions of the Norwegian Supreme Court (app 5-10 cases every year). Those are not referred directly and not listed. Relevant Norwegian legislation is mentioned in the text.

2. Principles and limitations

The Norwegian legal description of compulsory acquisition (expropriation) follows from the Constitution of the Kingdom of Norway (Act of 17th May 1814) §105:

"If the State's needs demands that somebody must leave his movable or

immovable property for the public use he should have full compensation from the treasury"

The Constitution gives in an old fashioned way a probably parallel definition of Compulsory acquisition as FAO (FAO 2008, page 5):

"... the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society."

The European Convention on Human Rights and Fundamental Freedoms (1950) is part of (supreme to) national law (First Protocol, Article 1):

"Every natural person or legal person is entitled to the peaceful enjoyment of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law…."

A wider scope is opened for a discussion on these matters on background of the Istanbul Declaration on Human Settlements 1996: The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action (Chapter 40 b):

"…Providing legal security of tenure and equal access to land to all people, including women and those living in poverty;…"

2.1. Positive law authorisation / permission.

Expropriation to a certain land use purpose is only allowed if so positively written in law. Expropriation Act (23rd October 1959 – latest revision by Act of 19th June 2009 no 704) lists 55 different purposes that could legitimate expropriation. The Plan and Building Act (27nd June 2008 no 71) gives similar authorisations connected to most of the categories of detailed zone plans. There are even a number of authorisations given in other sector laws (WATERFALL, BIODIVERSITY, RAILROAD etc.).

2.2. Information, impact assessment and communication.

The procedures that end up in an Expropriation Decision are described in the Expropriation Act. More often planning procedures of other laws replaces this. In such cases the qualitative standards of the Expropriation Act has to be fulfilled. These standards secure early information to landowners. A landowner should normally be contacted tree times: in connection with the public hearing of the plan or impact assessment, specific hearing about the acquisition, and during the negotiation effort.

2.3. The proportionality principle

The procedures also should secure sufficient plans, analysis and assessments for the weighing of the (public) benefits versus costs and losses for the owner. The benefits should without doubt be larger than the negative effects. Such considerations must be done as part of the Expropriation Decision. This decision is always made by a political body, and there are possibilities of complaint about procedures or conclusions to higher administrative levels and even to court.

2.4. Principle of transparency and popular correction

Any public plan will be object for one or more public hearings. Plans and even most formal Expropriation Decisions are made by (local) elected politicians in open meetings.

Even during compensation process elements of popular correction of levels of compensations and juridical approaches are present: Lay men judges are in majority in the Compensation Courts.

2.5. Principle of negotiation liability

The expropriating body must make attempts to reach a voluntary agreement (purchase). In principle an Expropriation Decision, with few exceptions, cannot be done without such attempts documented. Even with no success at this stage, agreements could be signed all the way through the process until Expropriation Compensation Court decision.

2.6. Expropriation and land use regulations

In Norway law language "expropriation" is only used for "compulsory purchase": sale and transfer of land or rights without present owners' consent. "Agreement under threat of expropriation" is called just that. If compensation is given in other forms than in money Norwegians don't use the word "expropriation" even if land is exchanged compulsory (Land Consolidation etc.).

Expropriation is linked to formal transfer of title to land or rights. Zone planning, land use regulations, protection of cultural heritage or nature conservation etc may impose restrictions that reduce the owner's land use potential substantially, most often without any compensation. Even if the effects for the landowner could be severe, these institutions are not considered expropriation because the title of the land is not transferred.

When the land is expropriated the rules are a bit different: If the land use purpose is to keep land without constructions (parks, nature conservation etc.), other development possibilities should not be taken into consideration (undeveloped land prize). If land is expropriated for some form of construction works (roads, schools, hospitals etc.), land is valued as marked value under conditions and possibilities present before the expropriation purpose plan came up. If land is expropriated for some purpose that alternatively could have been developed privately (housing, industries etc.), land value reflecting such purposes will normally be given.

2.7. Compensations only for affected landowners and servitude holders

Expropriation is connected to compulsory transfer or exclusion of ownership or servitudes. Servitudes don't have to be formalized or registered to be protected. Land use or land interests based on other types of access do hardly enjoy the same economical protection by law. Users of open access (free no-motorised roaming in nature, free angling in the sea, etc.) will have no compensation. Most privileges or

concessions are not be protected by compensation. Not even if economical losses are severe. For example is the free roaming in Norwegian nature extremely important for tourism businesses, but never compensated if lost.

A kind of exception from this is (Sami minority) reindeer herding. Nomadic or semi-nomadic reindeer husbandry is done within large grazing districts. Within the district grazing is free for customary users even on private land. These herders or district organisations are parties in expropriation cases and compensated rather generously.

Link from a private property or private road system to public roads are not considered property or servitude – but as formal accept or privilege given by the road authorities. If such links are demanded moved to another location – it is not considered an expropriation. Compensations for longer private routes, increased costs for snow clearing and road maintenance will not be compensated.

2.8. The principle of (limitation to) direct effect

Compensation should be given to cover the economical effect of the actual land loss. This excludes claims from neighbours (who don't lose land).

If traffic is removed from a shops front door to other routes as part of the project, the reduction of customers will not be included in the compensation (even if land is taken and the losses are large) as long as the loss in trade is an effect of a change in traffic system, not an effect of the acquisition.

The principle of direct effect is clear in Norwegian law but still often not too easy to execute. Losses (marked value) from noise from a new road should be partly compensated. Still it could be discussed if an increased noise level derives from the expropriation or from a general rise in traffic in the district (that also effect neighbours that don't lose land). If forest or river banks are acquired: What are the direct effects to hunting or salmon angling income (the important assets are moving creatures affected many other things).

2.9. The principle of (limitation to) economical loss

The Principle of Economical Loss means that the owner should be compensated the loss in economical holding: Reconstruction of the economical fortune the expropriated property represents. Compensation rules links this to what the owner could get for the property in the marked (normalised marked value) or the capitalized loss of future periodical income.

This principle excludes „personal affections" and then "individual values". Only assets of the property appreciated by the normal marked are compensated.

Tree important exceptions from the Principle of Economical Loss exist: If normalised marked value is not enough to buy a new home of similar function for the owner, he should be compensated the reestablishment cost (if landowner resides this home personally). The owner's own use of vacation home, his own business constructions (mainly farm houses) and constructions of non-profit organisations (sport-clubs etc) are protected in the same way. Secondly if someone

expropriates a right to use an existing construction (private road, water pipeline etc.) and this hardly bring any losses for the owners, the expropriator should pay a proportion of the construction cost (as if constructed today). Thirdly we have some few forms of profit-sharing compensations: Waterfall compensation and (dependent on circumstances) gravel, soil and timber etc.

2.10. Principles of land-owner's adjustment liability

The law presuppose that any landowner struck by an expropriation should do sensible action to adjust to the new situation. Compensated losses should be considered "after" the owner has done sensible adjustments to reduce the losses. It should be noticed that these "liability" are not actions the owner has to do (his only duty is to transfer the property), but the compensations should be set under the consideration of such sensible behaviour.

The adjustment liability principle is relevant to many aspects of compensation: If high value land use is connected to the expropriated part of a property, possibilities to move this use to remaining parts should be considered (a less valuable use is compensated). If the landowners business is reduced by expropriation, possibilities for replacement of vacant labour, technical capacities and even reinvestment of (compensation) capital should be discussed. If expropriation strikes a part of a larger holding that alternatively would have been developed (for housing etc.). Possibilities for revising the full holding's development plan should be considered, both in space and time (discounting development profit presupposing expropriated area "developed last").

2.11. Value changes deriving from the project and linked investments.

Expropriation Compensation Act of (6th April 1984), § 5 states that land value rise (or decrease) deriving from the project, should be excluded from the compensation scope. If a road is constructed trough a forest and brings development possibilities to the area, necessary space for the road should be compensated as forest land.

Land value changes deriving from investments linked to the project, or planned linked investments and former investments younger than 10 years old, should also be left out of consideration.. It should be noticed that these corrections are linked to effects of investments, not effects of plan zoning or regulations.

2.12. Tax effects

If compensation brings any changes in the owner's tax conditions according to tax rules is not taken into consideration. Different tax (percentage) of the compensation sums between different owners is of no interest for valuation.

3. Valuation court proceedings, compensation value principles

The Valuation Court proceedings and systems of appeal are based on Act of Courts (13th August 1915 no 5) and Act of Valuation Court Proceedings (1st May

1917 no 1). The valuation principles are based on standards of Expropriation Compensation Act of (6th April 1984).

Compensations are given separately for the "ground property" (object purchased), and for "damage" of the remaining property (parts of a property expropriated). Damage losses that in principle only can affect the reduced property (land structure problems) are fully compensated. Damage losses that in principle also do strike other properties (noise, air pollution etc.) are only compensated over a common limit.

Normalized marked value is guaranteed as compensation: the probable prize for the property if sold today. If a part of the property is expropriated marked value is found as marked prize for the full property minus marked prize for the reduced property. If higher than marked prize, capitalized loss of future periodical net income will be calculated (5%). Most commonly such "value of use" is used compensating farm or forest land.

As mentioned above, reestablishment costs will be compensated when comes to homes, vacation homes etc., if the property is used for such purposes by the owner.

Process costs (court fees, solicitors, experts, etc) are covered by the expropriator. Process costs connected to appeal cases should in principle be covered by the looser of the case, but most often the expropriator has to cover such costs also. The owners personal costs are although not covered.

Unlike our Scandinavian sister nations (Sweden, Finland and Denmark) Norway has no dedicated public agency or chartered group of professionals in charge of compensation estimation. Some valuation methods or calculation tools have been developed, even if the scientific environments are small. Resent register development opens for better tools. But there are hardly any "authorised" methods for valuation. The Courts can decide what calculation models to use. Most often they don't require such input at all. Due to this, compensations seem to differ, sometimes in unpredictable ways. During negotiations larger State agencies like the Public Road Authority have quite solid prize and negotiation policies (in accordance with law standards) and methodologies, while other actors like municipalities acts more freely (STEINSHOLT 2008).

Norwegian levels of compensation are fluctuating but in general probably not low compared with normal marked prices or valuation done for other transactions.

Purchase process (documents, transfer, subdivision, registration etc) follows the same rules as normal sales of land. Prepossession process (land is taken into possession before the compensation process is finalised) follow special rules given in bylaws.

4. Comments; Rules/principles and realities

Norway has a high proportion of private ownership. Roughly one half of the population are landowners. 57% of the cultivated and forested areas (KORSVOLLA, SEVATDAL, STEINSHOLT 2001, page 49) are held in individual private ownership. A large proportion of the other 43% are held in other forms of private (often

collective) ownership. The state is owner of huge tracts of mountains. Even in those areas locals often have private user rights. This means that most relevant spaces for development (habited lowlands) must involve privately owned land. In many areas fragmented plots, complex systems of user rights and many absentee owners adds to land development complexity.

Such a situation could call for strong tools for getting space for any kind of land development. Still expropriation is not commonly used in Norway. The Norwegian Public Roads Administration resolves app 95% of their purchase cases by voluntary agreements (Norwegian Road Authority 1991). Norwegian municipalities have a wide range of expropriation possibilities, but hardly use them (STEINSHOLT 2008). Agreements dominate. Many agreements are although signed under a (not outspoken) threat of expropriation.

In the former chapters I have tried to give a short description of principles and procedures of Norwegian expropriation. Still this gives a limited picture of how (public) land acquisition is done in the country.

Expropriation is an expensive process. In addition to the workload connected to the processes mentioned, expensive lawyers and other experts will be hired into the compensation court process. Politically expropriation is considered controversial. In particular local politicians prefer to try all other possibilities first. Some would rather stop any project than implement it by expropriation. Some parties even have this as a principle written into their local party election programmes.

5. Development of the expropriation system

The later years there has been a growing international interest in the quality of land acquisition practices. The FIG/FAO International Seminar on Compulsory Purchase in Helsinki, Finland in September 2007, The FIG working week in Stockholm, Sweden in June 2008, and the FIG/FAO International Seminar on State and Public Land Management in Verona, Italy September 2008 gave possibilities for such discussions. The FAO 2008 report could bee read as summing up the discussions so far.

Norwegian law accepts expropriation to even private purposes if there are some (indirect) public interests involved. The national borderlines could be challenged by the international standard discussions.

Main rules for valuation and level of compensations have not been on the political agenda for some years because they represent a kind of political consensus. The present Expropriation Compensation Act was made by a right-wing party government. The main principles were taken from the former act produced by the Social Democrats – mostly codification of former common law.

The government of Sweden has recently proposed (Official Swedish Report 2008) a quite radical change in Swedish legislation that probably will lead to considerable increase in compensations. Among other changes they intend more or less to leave the normalized marked prize as sufficient level for full or fair

compensation. Even forms of profit sharing are proposed. Similar discussions on University level have started in Norway.

Privatization of former public or collective functions of society has been the background of two court cases where compensation based on profit sharing has been claimed. The claims were overruled by district courts of appeal because of the Principle of Economical Loss.

With the 2009 re-elected government coalition (former farmers' party and socialists neutralizing each other in these matters) there will probably be no changes of basic rules and principles in the next four years to come.

As mentioned the Public Road Authorities today gets to voluntary agreements in more than 95% of acquisition cases. In the 1960-ties app. half of the cases went to court. Probably we can consider agreements as a positive measure for quality of the process. At least landowners won't sign if they are too angry. The Road Authorities even score relatively high in questionnaires asking public about "trust". Other authorities (like nature conservation) have not had the same success. What has happened during these years?

Procedures of planning, hearings, decisions etc are not extremely different. The principles of compensation are more or less the same. Levels of compensation have not changed much. Anyhow from the 60-ties the Road Authorities launched an ambition to make land acquisition a profession within their organisation. This development of a profession has had many elements. One important element was to raise awareness of acquisition processes, and landowners legitimate rights within the organisation and build necessary time and resources into every construction project scheme. Trained officers were important: specialists in surveying, road building, expropriation processes and valuation. But more important: trained and decent negotiators with necessary skills and ethical guidelines to meet, respect and communicate with all kinds of landowners affected by road projects.

6. References

FLEISCHER C.A. 1980. *Skjønnsprosessen*. 175 pages, Oslo, Universitetsforlaget.

Food and Agriculture Organisation of the United Nations (FAO). 2008. Compulsory acquisition of land and compensation. FAO Land Tenure Studies no 10, 56 pages, Rome, FAO.

KORSVOLLA K., SEVATDAL H., STEINSHOLT H. 2001. *Eiendomsforhold og næringsutvikling i utmark*. ILP serie B 1/2001, 131 pages, Ås, Norwegian University of Life Sciences.

LID O. 1977. *Oreigning av fast eigedom*. 119 pages, Ås, Norwegian University of Life Sciences.

Statens offentliga utredningar (Official Swedish Report). 2008. SOU 2008:99, 510 pages,Stockholm, Fritzes kundtjänst.

Statens Vegvesen (Norwegian Road Authority). 1991. Ikke uten grunn, Oslo, Norwegian Road Authority.

STEINSHOLT H. 2008. *Land acquisition and expropriation performed decentralized: Stordrange and Lyngholt*. 2000.
Experiences from Norwegian municipalities. Nordic Journal of Surveying and Real Estate research – special series, volume 3: 2008, page 164-176, Helsinki, Finnish Society of Surveying Sciences.

1.5. APPROPRIATE COMPENSATION IN TERMS OF COMPULSORY PURCHASE IN GERMANY

Winrich Voss
Land and Property Management
Geodetic Institute, Leibniz University of Hanover
e-mail: voss@gih.uni-hannover.de

Key words: *expropriation, property rules of compensation*

Abstract

Compulsory purchase is a tool which supports public bodies to acquire privately owned land necessary for implementing plans in cases of important public issues. Within the compulsory purchase procedure two aspects are most important:

- Is the reason for the taking of privately owned land in line with a public purpose fixed in the legislation?
- Is the compensation sufficient to keep the owner able to buy a comparable property and to continue the land-use at a new place without losses?

The second aspect will be in the center of the paper. The paper explains the important position of the compensation within the compulsory purchase procedure. The procedure is composed of the stage of negotiating the possibility of a (voluntary) purchase Wld the stage of the official and formal procedure if the voluntary purchase has been failed. The priority aim of public authorities has to be a voluntary agreement with the land owners. It is shown that the compensation rules in the formal procedure have to be stringent Otherwise the scope or margin of negotiations within the first stage of voluntary results is limited.

The appropriate compensation consists of:

- compensation of the lost property ownership (surrogate is the market value) and compensation of additional losses and other handicaps.
- the important aspects of the date of valuation and - maybe - changes in values during the procedure (incl. court proceedings) are mentioned.

The procedure of expropriation in Germany and the determination of the compensation will be explained by means of an example. The paper intends to contribute to a comparison of the legal rules and practise of compulsory purchase and compensation in Poland (prof. dr hab. inż. Sabina Źróbek), Norway (prof. dr Harvard Steinsholt) and Germany. The compensation is based on a common pattern which is agreed upon the involved partners.

1. Legal basis and general rules of expropriation in Germany

Ownership is ruled in the German constitution (Grundgesetz) Artikel 14, belonging to the basic liberties of the constitution. Ownership is composed of

- the guarantee that private ownership can not be canceled
- the request that property has to serve the public wealth as well (social commitment, ownership is correlated with duties) and
- the possibility to expropriate real property, in accordance with purposes fixed in law, but only if the rules for appropriate compensation are existing in the law.

Article 14 (property, inheritance, expropriation)

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

(2) Property entails obligations. Its use shall also serve the public good.

(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

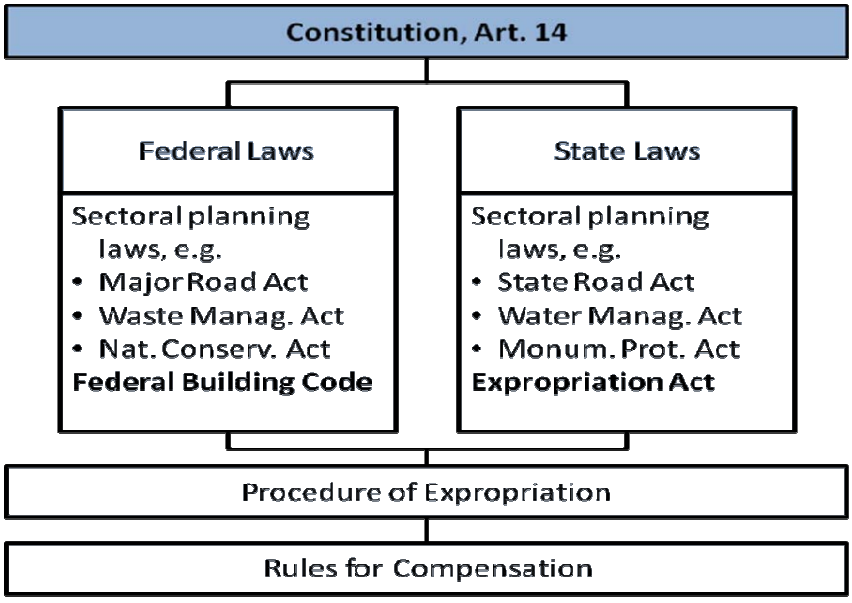


Fig. 1. Legal basis of expropriation in Germany.

Expropriation is allowed in accordance with different laws for different public purposes; there will be about 30 acts or more which enable the taking of land, at the national level as well as at the level of the 16 federal states. Typical are the acts about infrastructure measures as new national roads, highspeed railway lines, airports, pipeline or other energy routes, atomic power stations etc. There are also acts which does not rule a specific infrastructural measure, but a special field of

public interests. One of them is the Federal Building Code (Baugesetzbuch, BauGB) which rules urban planning, settlements and planned development. Additionally in each of the states a special Expropriation Act exists.

Important is that the rules about the procedure and about the compensation are the same although the legal basis for an expropriation might be given in very different acts.

Priority for instruments with less impact on the land owner than expropriation (subsidiary clause):

The subsidiarity clause should ensure the constitutional requirement of the lowest level of interference. It should be impossible that the expropriation purpose can be achieved in another reasonable way. The subsidiary clause requires that the government should attempt to buy the required land in good faith before it uses its power of compulsory acquisition. Therefore, the public authority has to prove in each case whether the result of the expropriation can be achieved in a less drastic way (e.g. by voluntary contract or by re-allocation of land).

Compensation of notable disadvantages and damages caused by public purposes

Today the jurisdiction does not only recognize compulsory purchase as the definite extraction of full ownership rights, but also many restrictions or limitations on ownership have to be compensated (enteignender Eingriff). These are cases of legal actions of the administration, leading to relevant disadvantages of nearby properties; e. g. the construction period of a metro-line in a retail area might endanger business. These kinds of damages usually are atypical and unexpected, and they have to be compensated (e.g. planning damages).

Expropriation of portions of a parcel (Teilenteignung):

From the constitutional requirement to keep the interference into property as low as possible, the following is to be derived: If the public purpose only requires a part of a plot or can be satisfied by easements or servitudes, then the property may not be extracted in its entirety (Teilenteignung). Compensation covers the expropriated part of the plot plus the disadvantages of the remaining plot. If the owner, however, requires that the remaining property cannot be used any longer economically, the expropriation authority has to compensate the whole property. If the remaining parcel gains advantages this will be mentioned in the compensation too.

Three preconditions of compulsory purchase:

A binding development plan does not automatically create a legal basis for expropriating measures. In addition, a particularly public interest-referred justification is necessary and additionally, the implementation must be urgently required, necessary and in relative. The Federal Building Code (BauGB) determines the following conditions for the validity of an expropriation: The compulsory purchase is permissible if

- required for a public purpose in common welfare
- the applicant has endeavoured seriously, but without success, for a voluntary acquisition on appropriate conditions; a “reasonable offer” had

been submitted
- the applicant assures to use the property within an appropriate period for the intended purpose

2. What does "appropriate" in terms of compensation mean?

The most important question in international discussions about compulsory purchase and compensation is: What could be accepted as an appropriate or fair compensation? The FAO Guidelines on Compulsory Land Acquisition and Compensation have been coming into force in 2008. They are dealing with many different aspects of compulsory purchase. The important aspect of compensation is mentioned as follows: "Compensation, whether in financial form or as replacement land or structures, is at the heart of compulsory acquisition." (FAO 2008, p. 23).

An appropriate compensation has to keep the balance between the irreversible impact on the situation of the land owner and the importance of the public purposes and their implementation in an economic manner. It is unjust and abuse of public power if the compensation is rather low; on the other hand the public purposes can not be supported any more if the compensation is rather high. The compensation might be in a favourable balance if the price agreed upon in a voluntary contract is on the same level as the compensation in a compulsory purchase procedure. The expropriated person may not be better-off than in case of a voluntary sale.

The situation of the expropriated person is described by the theory of sacrifices: In case of expropriation the land owner makes sacrifices for a public purpose. The basic idea of the compensation in case of a compulsory taking of private land is that the expropriated owner shall be able to buy a new plot of the same quality and characteristics as the expropriated land (Battis/ Krautzberger/ Löhr (2009), § 93 Rn. 4). In this sense the compensation has to be a "full compensation"; it has to cover the market value of the plot at the current date and the additional expenses the owner has to invest for acquiring another comparable plot and to establish the same business or situation of living as before.

The FAO Guidelines on Compulsory land acquisition and Compensation explain the balance as follows:

"If compulsory acquisition is done poorly, it may leave people homeless and landless, with no way of earning a livelihood, without access to necessary resources or community support, and with the feeling that they have suffered a grave injustice. If projects carry out compulsory acquisition satisfactorily, they leave communities and people in equivalent situations while at the same time providing the intended benefits to society." (FAO 2008, p. 2)

"Compulsory acquisition requires finding the balance between the public need for land on the one hand, and the provision of land tenure security and the protection of private property rights on the other hand. In seeking this balance, countries should apply principles that ensure that the use of this power is limited…" (FAO 2008, p. 5)

„The principle of equivalence is crucial to determining compensation: affected owners and occupants should be neither enriched nor impoverished as a result of the compulsory acquisition. Financial compensation on the basis of equivalence of only the loss of land rarely achieves the aim of putting those affected in the same position as they were before the acquisition;" (FAO 2008, p.23)

In the German system of compulsory purchase and compensation the "reasonable offer" is of high importance. The applicant for a compulsory taking of land has the duty to submit a "reasonable offer" previously to the expropriation procedure; if not, the expropriation procedure will not be started. If the offer of the applicant was at a "reasonable" level but the land owner did not accept the offer, the reasonable offer brings about the limitation that future developments of the property are not mentioned any more. In consequence increases in value which arise after the offer was presented, will not be part of the compensation. The Federal High Court of Justice (BGH – Bundesgerichtshof) noticed that an additional compensation because of delaying tactics should be eliminated if the offer was appropriate. The delaying land owner may not be better-off than the land owner who sells his plot voluntary on the basis of a reasonable offer. This rule should ensure a serious negotiation of the applicant before applying to expropriation process and avoid expropriation as far as possible.

Unsecured expectations (up or down) are not part of the compensation. The future possibilities of an upgrading development of a property or location will be part of the compensation only, if the general market situation already reflects on this possibility. The subjective hope of the land owner for further improvements and increase in value is not subject of the compensation. "Lost profits" in this sense are part of the compensation if they could realistically be expected; possibly existing chances for future profits are not part of the compensation. The compensation shall be sufficient to enable the owner to buy a comparable property and to continue the land-use at a new place without losses; this refers to the market conditions at the date of expropriation.

3. Expropriation procedure

The expropriation procedure is carried out by special higher administrative authorities, the expropriation authorities. In most of the German states they are set up at the regional level of administration. This special authority is responsible for a fair and legally binded procedure in each case of expropriation. The expropriation authority is independent and especially not responsible for the public purpose that should be reached by taking the land. The expropriation procedure takes place on request only. The request of expropriation is to be submitted to the responsible municipality first, which in turn submits it including her statement to the expropriation authority.

The complete procedure is subdivided in

1) the preparation of the procedure (preliminary proceedings) and
2) the formal procedure of compulsory purchase. It can be split up in

- proving if the public purpose and the transfer of ownership is legitimate and
- determining the appropriate compensation.

The preliminary part of the procedure is very important. The authority prepares the formal procedure, gets to know the involved parties, inspects the local situation and proves the possibilities of a voluntary agreement. The applicant must confirm that he tried to buy the property by submitting reasonable offers, that he noticed the possibility of the compulsory purchase and that he made a last offer which was suitable to come to a voluntary agreement. In the majority of cases the formal procedure of expropriation can be prevented during the preparation of the procedure by agreement.

If not, the authority proves the requirement and commissions an independent valuation of the property. The valuation of the property is done by the Valuation Committee responsible for the area or by experienced valuers. A survey of the official board of experts (Gutachterausschuss) is prescribed in case of property withdrawal or order of a hereditary building right. If the expropriation authority comes to the conclusion that the legal requirements of an expropriation are complied the formal procedure will be started. The parties are invited to a trial or hearing. According to law the formal beginning of the expropriation procedure is not the expropriation request, but the date of the official hearing which is a very important part of the procedure. During the official hearing, the expropriation authority is obligated to work towards an agreement between all involved parties. Again a majority of the remaining cases can be solved by voluntary agreements.

If not, it is possible to continue with the full procedure, i. e. proving if the public purpose and the transfer of ownership is legitimate and determing the appropriate compensation. The second possibility only includes the determination of the appropriate compensation; very often the landowners accept the legitimacy of the compulsory taking of the land, but the second part (compensation) needs to be decided by the authority. A partial agreement about the agreed aspects is possible, requires however a supplementing expropriation resolution. The agreement and/or partial agreement is like a contract under public law, which is equal to a contestable expropriation resolution. It requires therefore the execution order to become effective.

Statistical data about the frequency and application of the compulsory purchase procedure in Germany are not known. But experts estimate that less than 10 % of the cases where expropriation seems to be unavoidable, do need a final decision of the expropriation authority.

In cases up to this stage if an agreement was not successful, the decisions of the expropriation authorities are necessary and often are not accepted – in many cases one of the parties appeal against the decision by court.

4. Rules of compensation

The requirement of compensation results directly from constitution Article 14(3)

GG. In this paper the rules of compensation are described according to BauGB.

The compensation is not a payment of indemnity. It concerns rather a fair weighing of interests between the interests of the involved landowners and the interests of the public. The compensation intends to give the chance to the expropriated owner to acquire a comparable property. The range of the compensation thus covers:

- the loss of property rights due to expropriation (real asset loss),
- other property losses due to the expropriation (consequential damages).
- Increasing values of the remaining property have to be mentioned.

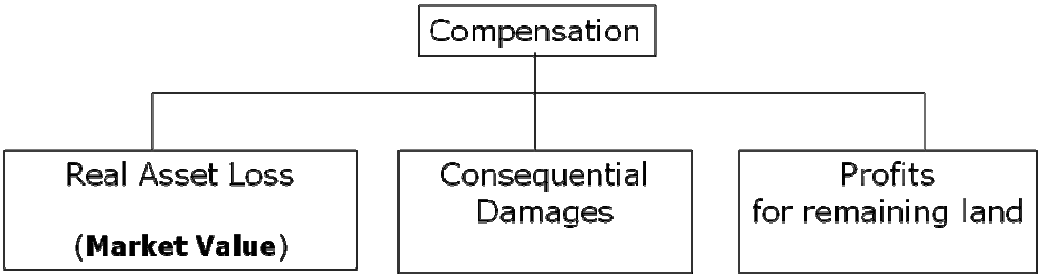


Fig. 2. Compensation might be composed of three parts.

The expropriation acts consider three different kinds of compensation:

- in money,
- in property,
- by grant of other rights.

Since a compensation in money burdens the concerned party more strongly than other kinds of compensation, on the request of the owner the compensation should be granted in property (suitable replacement land) or in other rights, according to constitutional criterion of the lowest level of interference. Compensation in land is imperative if business or livelihood of the owner depend on land. Nevertheless, the compensation in money is the normal case. It has to be paid in one amount, unless the concerned party requests the compensation in regular instalments.

4.1. Compensation of real asset losses

The compensation of the loss of real estate assets is estimated by valuating the current market value. This part of the compensation is independent from the expropriated person. If property or rights are withdrawn, the official "Gutachterausschuss" (a committee of valuation experts responsible for a "Landkreis") is consulted to estimate this part of the compensation (current market value). The valuation of the current market value (Verkehrswert, §194 BauGB) is done with the help of valuation standards defined in the Valuation Ordinance (Wertermittlungsverordnung – WertV).

4.1.1. Quality of land and the "stage of development"

The market value of built up properties mainly can be calculated with the three standard valuation methods (comparison method, capitalization method, cost method) in dependency of the type of property. In case of expropriation the properties predominantly are not built up. Here the "stage of development" of the land is significant. The "stage of development" is correlated to the urban planning and development procedure. The progress in urban planning procedure is of strong influence because the planning process in Germany ends with a legally binding plan.

The valuation standards define four steps of "quality of land for development" within the planning and development procedure of land from "agricultural land" to "building land" (comp. §4 WertV). Relevant are the formal urban plans of the municipality (destinations in the Preparatory Land-use Plan (Flächennutzungsplan) and in the legally binding local development plan or Detailed Land-use Plan (Bebauungsplan)). The next development steps are the re-organisation of the plot structure ("gross"-development area is changed into "net"-development areas) and the servicing of the plots (technical infrastructure). Fig. 3 shows a scheme of the stages of development.

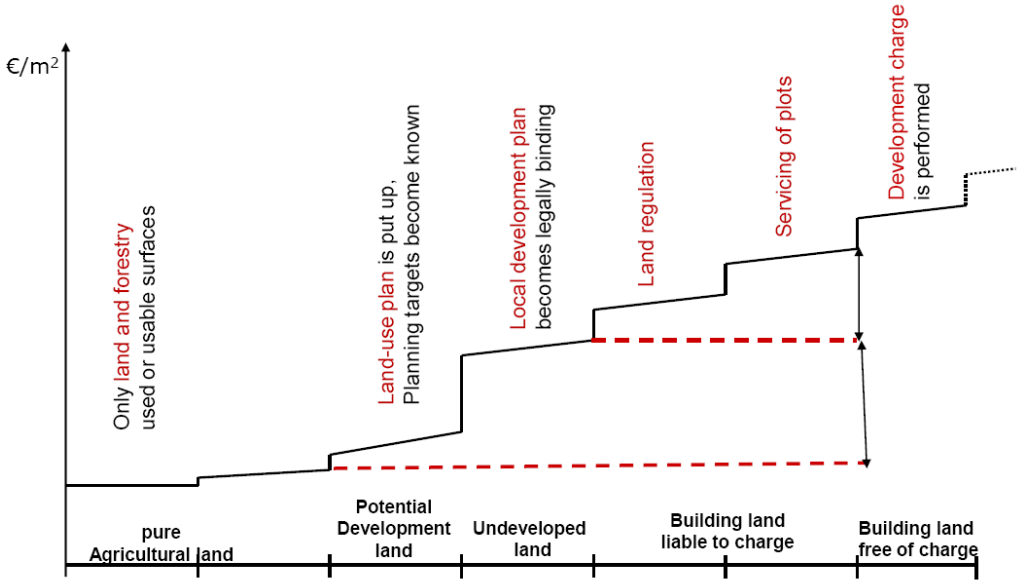


Fig. 3. Correlation of planning/ development procedure and quality of land.

The legal rules concerning compensation determine that the land destination prior to expropriation is relevant. If a parcel is designated for public purpose, the quality of the land – correlated to the "stage of development" - will not rise furthermore. The stage of development which the parcel reached before the public

purpose was destined, determines the quality of land which has to be compensated (development of the land is frozen). This date has to be fixed as important aspect of the valuation and determines the quality of land for the proposed compensation. It is called "the preliminary effect" of the expropriation (§ 95 (2) BauGB). For example, if urban planning designates agricultural land for development the compensation includes the future perspective of the parcel and is clearly higher than the value for agricultural land; the value depending from the state of development (comp. example below). If developed land is needed for a less valuable land use, e.g. for urban greens, the value of developed land is the base for the compensation (= land destination prior to expropriation). These rules guarantee in principle that the compensation will enable the expropriated person to buy another property with the same quality of land as the taken property.

The importance of the planning system is responsible that the market value of a property in Germany includes – next to the value of the existing land use – the expected development potential of a site according to the stage of planning and development. The aspect of "justified expected future" of a parcel from the perspective of public planning is included in the market value and thus in the compensation of the real asset losses.

4.1.2. Date of valuation, development of market prices

Different dates of valuation are possible depending from the procedure of the expropriation.

- The valuation date (Wertermittlungsstichtag) usually is the date of the decision on the expropriation request (§ 95 (1) BauGB).
- In case of granting possession prematurely (§ 116 BauGB) a security usually is requested and the date of valuation shifts to the day of the change of possession.
- A shift also occurs, if the compensation is paid in partial payments (progress payments), since these amounts are to the disposal of the owner; the market value refers to the date of the first payment.

The problem of changing price levels is more important in case of appeals. In case of appeals against the expropriation resolution, it has to be differentiated if the claim is proceeded against the validity of the expropriation – than valuation date remains existing - or against the amount of compensation. If the indemnities refer to the amount of compensation, then the beneficiary of expropriation may fix price conditions by early payment or deposit of the compensation amount specified in the resolution or at first instance. Additional the valuation date receives a special importance in times of variation in real estate prices. The Federal High Court (BGH) developed a special case law according to the changing value in times of rising as well as decreasing prices (Steigerungsrechtsprechung). This can lead to renewed valuations and/or actualizations in particular when the procedure of expropriation takes a long time.

The following example assumes a period of raising prices.

The expropriation authority marks the compensation for 1000 square metres with 80.000 € (80 €/m²) in the expropriation resolution. The party entitled to compensation complains against the amount of compensation. The party obligated to compensation offers the amount for the payment and deposits it with the district court. The court states that the appropriate compensation would have been 95 €/m² at the time of the expropriation resolution, thus an amount of 95.000 €. The obligated party has thus already deposited 84.2% of the appropriate amount, which leaves a rest of 15.8%. Because of intermediate increase of market prices during this time, the market value of the land rose to 105 €/m²; the property has therefore gained a market value of 105.000 € in the meantime. Because of raising prices the compensation would not be sufficient to replace the property at current market prices. The balance in this case means that the deposited portion of the compensation will not be changed, while the remaining portion (15.8% of the compensation) shifts to the new market conditions (remaining sum to be paid = 16.590 €).

4.2. Compensation for consequential damages:

Next to the real asset losses the consequential losses caused by the expropriation are compensated according to § 96 BauGB. The compensation because of consequential damages considers disadvantages caused in the person of the owner and his business, not in the property; this part of the compensation is individual and must result from the compulsory taking of the land; the relationship between the owner and/or his fortune and the expropriated property is decisive. The compensation is conceded to property owners as well as tenants. In case of tenants the consequential losses are calculated with regard to the contract period.

Many items are possible in the categories of consequential damages. The law gives examples but not a complete listing, e.g.

- temporary or permanent losses, which the owner suffers pursuant to his profession or livelihood,
- depreciation of the remaining property (e.g. remaining plot is very small and can not be used independently from neighbours),
- compensation of the physical structures (walls, fences, pavements) in case of partial expropriations,
- compensation of the plant cover in case of horticultural use,
- removal expenses or costs for substitute living space,
- cost of organizing and preparing a new property.
- Not: broker's cost, notarial deed cost, land register cost, surveying cost, transaction tax.

In case of farming land the compensation may include:

- damages or losses because of separation of the remaining fields after expropriation (side-gated, cutted diagonally or transected),
- additional cost because of enlarged routes to the fields (detours),

- loss of a former nearby farmstead,
- lost profits from harvests which already had been sown,
- compensation of the tenants.

An orientation and pattern for calculating the mentioned losses are given in the Agricultural Compensation Guidelines (Entschädigungsrichtlinien Landwirtschaft - LandR), but they are not obligatory. There also are guidelines relevant for compensations in forest use (WaldR). There are specialized valuers for agriculture, listed at the Landwirtschaftskammer (self-governance of agricultural matters).

Additional consequential damages in case of resettlement of a firm or farm:

- travelling cost because of resettlement including additional manpower, cost of site inspections,
- negotiation cost, experts advice,
- cost of relocating the business,
- expenditures because of unusable inventory as far as not included in the asset compensation,
- production downtimes,
- loss of earnings during the resettlement period,
- cost of initial difficulties in the management, change in customers, etc.

The relocation has to be compensated for commercial estate, if the commercial business persists, if it is worthy to relocate and if relocation is economically acceptable. Furthermore compensation because of relocation only is granted for existing parts of the business. If the company is not yet at the market, a new sector should start soon or a spatial extension is planned, not yet operating parts cannot be compensated. The compensation should cover the expenditure necessary to drive the business at a new location in the same manner as the previous one. If the owner prefers the closing down of the company likewise all typical consequential damages are compensated, although the costs will not incur thereby. In most cases in practice, especially in the latter cases, the compensation can not be orientated at the real expenses of the relocation, but it has to be estimated and fixed in advance. There are specialized valuers for resettlements of firms (listed at the Chambers of Commerce and Industry).

5. Examples

Example 1: Compensation in case of a carrier's company

Expertise about the compensation because of relocating a carrier's company located in an action area of urban redevelopment.

a) Compensation for the real asset loss (market value)

Parcel:	5500 sq.m (designated for commercial use)
Office building:	1977 (year of construction), 297 sq.m of usable floor space
Repairing hall:	1977 (year of construction), 628 sq.m of usable floor space
Storage:	1980 (year of construction), 155 sq.m of usable floor space
(Cost method:	820.000 €)

Capitalization method: 567.000 € (11-times of annual gross yield)
Result: Market value: 570.000 €

b) Compensation for consequential damages

Precondition: Relocation is economically suggestive	
Selection of relocation site, etc.	5.200 €
Moving cost, etc.	44.100 €
Equipment, which could not be relocated (cost of substitute)	5.000 €
Lost inventory (current value)	52.000 €
Damage because of interrupting business	24.700 €
Other financial losses	8.000 €
Sum of consequential losses	139.000 €

c) Total compensation (No. 1 + 2): 709.000 €

The total compensation includes compensation of consequential damages of about 20 %.

Example 2: Quality of land and development opportunities

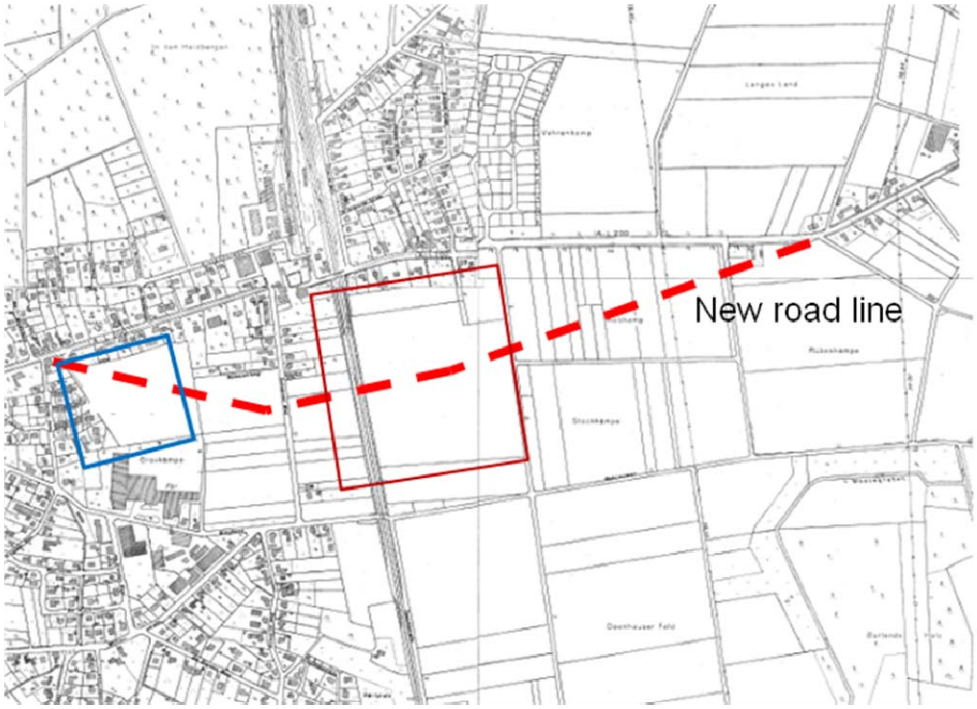


Fig. 4. Illustration for Example 2 und 3. *Source*: Ruzyzka-Schwob 2009, own variations.

A new road is planned in the scenery in Fig. 4 (red line). The owners of the plots within the rectangles are not willing to sell the land needed for the road. In case of compulsory taking the compensation will be calculated as follows:

The parcel marked by the blue small rectangle in Fig. 4 is designated in the Preparatory land use plan (FNP) as a future development area for residential use. The current land use still is agricultural. The official planning document shows that the municipality intends to develop the site. Since publishing the new road line the owner knows that the development of the land under and near the new road project will not go on; the development is frozen in the stage of "potential development land" (comp. Fig. 3). Although at the date of valuation (= date of the expropriation resolution) the land use in fact is agricultural and the future land use will be land for public purpose (traffic line), the compensation of the real asset loss has to mention the future development at the date before the public purpose was fixed (preliminary effect); at that time the owner validly could expect that his parcel will be part of a residential development. The appropriate compensation in this case can be valuated with the comparison approach while using market prices from sales of land of the same stage of development. A lump sum payment in this stage of development is about 25 – 50 % of the prices of building land free of charge.

Example 3: Compensation including consequential damage (transection) of a parcel in agricultural use

a) Compensation for the real asset loss (market value):

The parcel marked by the red big rectangle in Fig. 4 is designated in the Preparatory land use plan (FNP) for agricultural use. The new road may cause some hope for a future development of the remaining parts of the plot; but this can not be part of the compensation because compensation should replace the asset before the road project was planned.

Parcel:	22.000 sq.m
Size of road project:	2.000 sq.m
Comparison approch:	2,50 €/sq.m
Result: Market value:	5.000 €

b) Compensation for consequential damages:

Consequential damages compensate the handicaps to cultivate the remaining two parcels because of smaller sizes and – perhaps - detours (latter not further mentioned). The transection damage can be estimate from market analysis on the correlation between agricultural plot size, quality of soil and prices. Many Committees of Valuation experts (Gutachterausschüsse) in rural areas analyzed data about this correlation. In the example the market values come to

- 2,40 €/sq.m (remaining parcel south, 12.500 sq.m; damage of 0,10 €/sq.m) and
- 2,30 €/sq.m (remaining parcel north, 7.500 sq.m; damage of 0,20 €/sq.m).

- the transection compensation amounts to 2.750 €.

If no figures are available from market analysis alternatively the above mentioned Agricultural Compensation Guidelines (LandR) can be used. The tables and charts in this guideline request input information as

- the cut is parallel to the plot boundaries (here: yes)
- proportion of lateral length before cut (here: 1:1)
- proportion of taken size from whole size (here: less than 10 %)
- level of crop return
- current level of labour cost and machine cost (actualized each 2 years)
- tables are differentiated for plough-land or grass-land
- transactions are calculated as two side-gated cuts

In the case of the red rectangle (Fig. 4) the tables of LandR amount to a compensation of transection damage of about 2.500 €.

c) The compensation in total of 2.000 sq.m of agricultural land would run to 5.000 € (real asset loss) + 2.750 € (consequential damage).

6. Conclusions

"Appropriate" compensation in the German system of compulsory purchase proceeds from the basic aim that the compensation should enable the former owner to buy another property with the same characteristics as the taken one (same quality, comparable location, same standard, at the time of expropriation resolution). It is not decisive if the owner really has the possibility to buy such a property – except livelihood requires compensation in land - or which sum the owner really invested. This constitutional request results in compensations that have to include

- the value of the taken property depending on the estimation of the objective current value of the property (= market value) and
- additional payments because of consequential damages to cover individual losses of the owner's business or depending on costs necessary to reinstate in the same standard as before.

Losses and damages of tenants and short-time leaseholders are compensated too; the compensations go conform to the remaining period of the contracts. Although the decisions on the individual compensation is the main subject of appeals against compulsory purchase resolutions the general principles of compensation explained in this paper are established and not in doubt in Germany.

7. References

BATTIS, KRAUTZBERGER, LÖHR. 2009. *BauGB – Baugesetzbuch.* 11. Auflage, Verlag C. H. Beck. München.

DE WITT, KAMPE. 2008. *Enteignungsverfahren und Enteignungsentschädigung für Grundstücke*, Seminar des vhw.

ERNST, ZINKAHN, BIELENBERG, KRAUTZBERGER. 2009. *Kommentar BauGB.*

Loseblattsammlung Band III, Verlag C. H. Beck. München.
FAO. 2008. *Compulsory land acquisition and Compensation*. FAO Land Tenure Studies No. 10, Rome.
GERARDY, MÖCKEL, TROFF. 2009. *Praxis der Grundstücksbewertung*, Loseblattsammlung, Verlag Moderne Industrie, Landsberg/Lech.
KALBRO, LIND. 2007. *Compulsory Purchase – Reasonable and Fair Compensation.* Nordic Journal of Surveying and Real Estate Research, Vol. 4, Number 1, p. 7-22.
KERTSCHER, VOSS. 2007. *Compulsory purchase and compensation according to the German Federal Building Code*. Seminar on Compulsory Purchase and Compensation in Land Acquisition and Takings, FIG Commission 9, September 6–8, Helsinki.
KLEIBER, SIMON. 2007. *Verkehrswertermittlung von Grundstücken*. 5. Auflage, Bundesanzeiger Verlag. Köln.
MEYER-KLENK: *Der Gewerbebetrieb im Sanierungsgebiet – entschädigungs- und steuerrechtliche Fragen.* Sanierungszeitung Magistrat Frankfurt am Main.
RÖDENBECK. 2001. *Wertermittlung bei der Enteignung, Wertminderung des Restgrundstückes*, Seminarunterlagen Fortbildung der nds. Gutachterausschüsse.
RUZYZKA-SCHWOB. 2009. *Bewertung und Entschädigung von Flächen des öffentlichen Bedarfs.* Seminarunterlagen TAW 25.03. Wuppertal.
SIMON, REINHOLD: *Wertermittlung von Grundstücken – Aufgaben und Lösungen zur Verkehrswertermittlung*, Verlag Luchterhand.
STROTKAMP. 2003. Bewertung von Gemeinbedarfsgrundstücken – Bewertungsfälle und Lösungsansätze, FuB 6.

1.6. REAL ESTATE EXPROPRIATION AND COMPENSATION IN TERMS OF GUARANTEED PRIVATE PROPERTY IN THE REPUBLIC OF SLOVENIA

Maruška Šubic Kovač
Faculty of Civil and Geodetic Engineering, Municipal Economics Institute
University of Ljubljana
e-mail: maruska.subic-kovac@fgg.uni-lj.si

Abstract

Constitutionally guaranteed private property provides for a completely different way of determining the compensation as has been the case in the previous socio-economic system in the Republic of Slovenia. Real estate practice shows the inertia of the old real estate valuation methods in the process of expropriation, which prolongs the expropriation procedures.

This article analyses the relevant legislation in this area in the Republic of Slovenia, presenting in conclusion the possible remedial measures based on an analysis of court decisions. In addition, the elements of compensation for expropriated real estate and real estate exchange are presented in detail, including the assessed value, land status and real estate equivalency.

1. Introduction

The constitution of a particular country represents the baseline for understanding the procedure of expropriating and limiting property rights on real estate for public benefit.

The constitutionally guaranteed private property as such is not understood as being absolute, and therefore it is important, to what extent the private property is guaranteed, and which interferences with private property for public benefit are allowed. In this sense there exists an essential difference between the latter two constitutions of the Republic of Slovenia.

The preceding valid constitution of the socialist system, namely, the Constitution of the Socialist Republic of Slovenia of 1974, defined (1) the existence of social and private land property, (2) superiority of social property, and included a provision (3) that work and the results of work only, based on equal rights and responsibilities, defined the material and social status of man.

The Constitution of the Republic of Slovenia of 1991, representing an essential break from the constitutional tradition of the time and facilitating new conditions and relations on the real estate market, defined: (1) the existence of public and private land property as well as private property in towns, settlements of urban character and in other areas designed for residential and other construction, (2) the equality of private and public land property, and (3) the capital as basis of creating and appropriating income, in addition to work.

The scope of property is defined in the Constitution in three Articles, as follows: Article 33: "The right to private property and inheritance shall be provided for." Article 67: "The law shall lay down the method of property acquisition and usufruct in such a way that its economic, social and ecological function is provided for." Article 69: "Property right on real estate shall be seized in the public interest or limited against compensation in kind or against compensation under the conditions laid down by the law."

The freedom of property of natural and legal persons is not unlimited. Prior to any intervention into the constitutionally guaranteed right referred to in Article 33 it shall be verified if it complies with the principle of proportionality. An intervention shall be admissible if it is: (1) appropriate for achieving the intended, constitutionally admissible aim, (2) required in the sense that it cannot be attained by any other, more lenient, intervention into the constitutionally guaranteed right, or even without it, and (3) proportionate in the narrower sense of the word: proportionality shall exist between the public benefit of the concrete purpose of expropriation and the gravity of intervention into property. Intervention into private property shall therefore not be taken for granted, as it represents the last possibility only of acquiring real estate for public benefit. Expropriation as a method of acquiring property right on real estate for public benefit within the new regulation is therefore no longer an urban policy instrument in cases where the public interest cannot be secured by other methods, or where it is no longer a weapon in the hands of urban planners in executing only the planning interest, as there used to be the case in the past socialist socio-economic system (Šturm et al, 2002).

This article shall be restricted to the expropriation only, i.e. complete suppression of property rights on real estate for the public benefit purposes, and to a pertaining compensation. In addition to compensation, the Constitution defines also the indemnity in kind, where the latter may be realised in certain specific cases only, which are defined by the law. Monetary indemnity, i.e. compensation, remains the basic form of balancing a substantive loss. The analysis in this article will be restricted to the expropriation, compensation and the concept of equivalency in suppressing the property right under the Spatial Planning Act (hereinafter referred to as ZUreP-1), whilst disregarding the specificities of the Agricultural Land Act, the Environmental Protection Act, the Nature Conservation Act, the Mining Act, and others.

2. Expropriation

By 1997, the Expropriation and Forced Transfer of Real Estate in Social Property Act (UL SRS 5/1980) of the past socialist socio-economic system was still in force in Slovenia. In 1997, taking into account the new Constitutional framework within the Building Land Act (UL RS 44/1997), and in 2002, within the Spatial Planning Act (UL RS 110/2002, hereinafter referred to as ZUreP-1) , this land policy instrument was fully redefined.

A multitude of expropriation beneficiaries from the past socialist socio-economic system were replaced by two: the State and the Community. The expropriation obligor is a natural or legal person, who owns real estate that is subject of expropriation. The expropriation obligor may also be a public legal person, except the State.

Property right on real estate under zurep-1 may be seized against compensation or indemnity in kind (expropriation), limited by the right of usufruct for a certain period of time, or encumbered through provisional or permanent real easement. Expropriation and limitation or encumbrance of property right shall be admissible for the public benefit only and provided that, in order to attain public benefit, expropriation is inevitable, and that the public interest of expropriation objective is in proportion with the intervention into private property. Expropriation and limitation or encumbrance of property right shall not be admissible if the state or the community has at its disposal another appropriate real estate for attaining the same objective.

Expropriation may be executed where the necessary conditions have been complied with and for the exactly specified purposes: for construction or acceptance of facilities or land of economic public infrastructure, for construction or acceptance of facilities or land for the needs of the State, national reserves, safety of citizens or their property, and protection against natural or other disasters. The public interest shall be deemed as provided in these cases if these activities have been earmarked in the adopted national or municipal site development plan (national or municipal implementing act/plan).

Where the necessary conditions have been complied with, the real estate may be expropriated also for the following purposes: for construction or acceptance of facilities or land for the needs of implementing public services in the field of public health, education, educational system, culture, science and research, and social security, and for construction of social and non-profit apartments. In these cases, in order to establish public interest, there shall in addition to an adopted national or municipal site development plan be required also a governmental decision or municipality council decision to the effect that construction of such facilities is in the public interest. Where the expropriation obligor is the municipality or another public legal person and the real estate is used for public purposes, within the expropriation procedure, the public benefit obtained through expropriation shall be weighted against the public benefit provided through the use of real estate before expropriation.

ZUreP-1 lays down that the expropriation procedure shall commence at the incentive of the expropriation beneficiary. Expropriation beneficiary may file an expropriation application where within a period of 30 days upon service of the redemption offer to real estate owner the real estate could not be obtained by conclusion of a contract. Expropriation beneficiary shall apply for expropriation no later than within four years upon the entry into force of the land use act that constitutes the basis for expropriation.

The administrative authority decides on the beginning of this procedure and/or introduction of expropriation: at the first instance, the administrative units, and at the second instance the ministry if it is not provided otherwise by another Act. The administrative authority decides on the procedure of expropriation and on the existence of public interest (only), which is a precondition for expropriation, and on the introduction of expropriation procedure. A complaint against this decision to the competent ministry is possible. At the incentive of the expropriation beneficiary, the administrative authority may at this level decide by issuing a relevant decision on the introduction of relevant preparatory activities.

A next step is the expropriation procedure and/or decision on expropriation. This step is performed by the administrative authority as well, in the form of declaratory proceeding. In this procedure, the administrative authority issues an expropriation decision, laying down which real estate shall be expropriated, and defining the deadline by which the construction, which had been the basis for expropriation proposal, shall take place. In case of an agreement between the parties involved, the administrative authority may define the deadline for property transfer of real estate. A complaint against this expropriation decision to the competent ministry is possible. The administrative authority shall give precedence to deciding on a complaint against the expropriation decision. The result of this procedure is expropriation. The Act lays down that property right shall be attained upon finality of the expropriation decision.

Within a period of 15 days upon finality of the expropriation decision, the administrative authority shall invite the expropriated party to conclude an agreement on compensation or indemnity. Should the agreement fail to be concluded within a period of two months, each party involved may motion for instituting the non-litigous civil procedure with the regionally competent court. The expropriation beneficiary shall assume possession after having paid the compensation or provided substitutive real estate or on the date agreed for assuming possession in the agreement.

Where within the appellate procedure and prior to finality of the expropriation decision the competent authority refuses the application for expropriation, and expropriation does not take place, the expropriation decision shall be annulled *ab initio*. The consequence of expropriation decision, which has been annulled *ab initio*, shall be the annulment *ab initio* of any consequences of intervention into the property of the obligor, and defining the compensation for any damages incurred. To this end, the non-litigous civil procedure shall be instituted.

In addition to the "regular" procedure, the Act defines also the "emergency" expropriation procedure. Its basic characteristic is the feasibility of execution prior to finality. This procedure shall be implemented where it is "requisite for the rapid real estate acquisition" to the benefit of the expropriation beneficiary. The Act lays down expressly that there shall exist the "reason for selection" and the "need for application" of the emergency expropriation procedure. Both shall be "additionally substantiated and explained". The Act lays down also that the administrative

authority shall decide as a priority, and a complaint shall not withhold the property right and possession transfer.

3. Deficiencies of the act regarding the legal safeguards of property right

Practice has shown that provisions of the Act laying down the emergency expropriation procedure may be counter-constitutional, in particular on account of disproportionate intervention into property right of each particular obligor. A key issue here is whether it is constitutionally acceptable if the expropriation obligor by filing a complaint cannot prevent the property right transfer on the real estate to the expropriation beneficiary for the very reason of the "emergency" of the expropriation procedure. Or, whether it is constitutionally acceptable that by the mere ascertainment of existence of public benefit, and through the formal legal expropriation procedure, the property right may be transferred if the procedure is defined as an "emergency" procedure? This is exactly what takes place in practice. Expropriation beneficiaries apply this procedure after having failed in acquiring real estate or where expropriation is to be expected and the expropriation beneficiary is behind time in finalising the project. The administrative unit has decided that there does exist public interest in the relevant matter, that the expropriation procedure shall be instituted, and that the procedure shall be instituted as the "emergency" expropriation procedure. If this is allowed to happen by the mere issuing of a decision on the existence of public benefit and on the introduction of the expropriation procedure, without any indication of the substantive reasons for expropriation, it constitutes a most probable gross and excessive interference with property rights of the expropriation obligors (TERŠEK 2008; SKUBIC 2008). Such a procedure places the expropriation obligors in an unequal position, in the absence of emergency reasons or substantive and legitimate reasons, and is therefore disputable under the constitutional law.

Neither is the legal certainty within the "emergency" procedure secured where the property right on a certain piece of land is first transferred, the possession seized, a facility or road constructed, and only thereafter may the legal consequences be instituted for the retroactive ascertainment of the legitimacy of such action, and for determining the possible compensation. Such cases have not been infrequent (Republic of Slovenia, Constitutional Court 2009).

A major project in the Republic of Slovenia in the past twenty years has been the highway construction. Analysis shows (Plahutnik, 2005) that in this case the compensation assessment constituted an important factor that contributed to the prolongation of deadlines and an increase in the construction costs. Though the Act explicitly lays down the elements of compensation, its determination in practice is still rather questionable.

4. Compensation for expropriated real estate

The constitution of the republic of Slovenia lays down in its article 69 that property right on real estate may, in order to secure public benefit, be deprived or

limited against an indemnity in kind or against compensation. The more detailed specifications in this regard are laid down by the law, i.e. Within the zurep-1.

ZUreP-1 lays down that compensation for expropriated real estate shall be determined in agreement between the expropriation obligor and beneficiary, or within the non-litigous civil procedure. Civil procedure shall be instituted in case of dispute as to the right of obligor to compensation.

ZUreP-1 lays down the more detailed specifications concerning the compensation for deprivation of property right on real estate. The compensation for deprivation of property right on real estate comprises the value of real estate in terms of its actual use, and secondary expenses in conjunction with expropriation, as the movement expenses, lost profits for the time of movement, and the possible decrease in value of the remaining real estate.

The Act lays down that appraisers shall in defining the compensation in addition to professional standards take into account the intended use of the land before the entry into force of the land use act that constitutes the basis for expropriation, as well as the actual condition of the real estate on the day of instituting the expropriation procedure. Regarding the surface of the real estate, the data from the land cadastre, or building cadastre if existent and pertaining to the real estate under expropriation, shall be taken into account.

Compensation and expenses incurred through the expropriation procedure shall be paid by the expropriation beneficiary. If the expropriation obligor refuses to accept the compensation, the expropriation beneficiary may comply with his/her obligation by depositing the compensation with the relevant court.

In case that property right is divested on a building or part thereof, used by the expropriation obligor as residence, the expropriation beneficiary shall provide to expropriation obligor the property right on an equivalent building of part thereof, unless the expropriation obligor requires to be compensated in money. The equivalent provisions shall apply *mutatis mutandis* for the real estate constituting the assets for conducting a business or agricultural activity by the expropriation obligor. Notwithstanding the indemnity in kind, the expropriation obligor shall be entitled to a refund of secondary expenses incurred though the expropriation.

Irregularities are frequently found by the court as to the consideration of the type of value, land status, use of appropriate data, and establishing the equivalency. Let us have a closer look at these instances.

4.1. Assessed value in assessing the compensation for expropriated real estate

Question is which value from Article 69 of ZUreP-1 shall be assessed by the appraiser in determining the compensation. There is no explicit indication of which value should be understood there under. We may assume that this is the market value, as:

1) in case of expropriation, the private property, secured under the constitutional law, may only be linked to the previously earmarked market value,

2) Slovenia has ratified Protocol No. 1 to the Convention on the protection of human rights and basic freedoms, laying down the right of a natural or legal person to the consideration of his or her property. No person shall be divested of his or her property, unless in the public interest and in compliance with the conditions laid down by the law and under the consideration of the general principles of the international law (Protocol No. 1, 1994).
3) some West-European countries have, based on identical legal diction, in practice acknowledged 100 % market value for compensations in cases of expropriation.

This was corroborated also by the Higher Court of Koper (VSK/HCK order 1 Cp 963/2000) in finding that the "Complainant has correctly found that the Court of First Instance had failed to take into account the appropriate criteria in assessing the compensation for the expropriated land. In case of expropriation it is possible to take into account the market value of the land at the commencement of the expropriation procedure only."

Unfortunately, even after 1991, the appraisers used to determine the administrative value, i.e. the non-market value of real estate as the basis for determining the compensation (ŠUBIC KOVAČ 1998 a) (ŠUBIC KOVAČ 1998 b).

4.2. Land status in assessment of compensation for expropriated land

Land value depends *inter alia* on its designated land use in the land use act or plan. ZUreP-1 points out that in assessing the compensation, the designated land use shall be taken into account before the enactment of the land use act or plan that constitutes the basis for expropriation.

Key issue here is what value would be attained by the expropriation obligor by selling the land on the market in case that no expropriation procedure had been instituted, still before the land had been earmarked for the purpose within which it is being expropriated. In determining the level of compensation, the definition in the land use act (plan) is important, rather than the actual use of land. If the land has previously been defined as building land, it shall be assessed as building land, and if it has previously been defined as agricultural land, it shall be assessed as agricultural land.

This was the decision made by the Higher Court of Ljubljana (VSL/HCL order 1 Cp 983/2003), finding that: "If the land at issue has (previously) within the land use act/plan been earmarked for construction, and is therefore building land, the compensation for it cannot be determined as if it were agricultural land."

In its order pertaining to the hearing of the constitutional complaint concerning the arbitrary determination of compensation, the Constitutional Court of the Republic of Slovenia found equally as the Higher Court in the preceding case (Up-423/00): "Concerning its (compensation's) level, (the Constitutional Court has) adopted the position that the agricultural land of the expropriation obligor has been converted into building land on account of the planned public infrastructure

facility construction. Its market value did not change thereby as the relevant land is not within the legal trade for the planned land use, and may be sold as agricultural land only. According to the assessment by the Constitutional Court, the relevant position by the Higher Court is not without reasoned legal basis, and is thus deemed not to be arbitrary."

Notwithstanding such decisions and orders by the courts there still spring up doubts in the appraising practice as to what precise land status should be taken into account in assessing the compensation. It may infrequently even happen that land under expropriation is devoid of value as it is not in the free trade or as nobody except the expropriation beneficiary can purchase it.

4.3. Equality of substitutive real estate

ZUreP-1 does not explicitly specify the term of "equivalent" real estate, but it may be inferred that the substitutive real estate is not identical, but rather equivalent by its value. Taking into account the definition of the term "equivalent" in the Dictionary of the Slovene Language, as being "equivalent to another by value", an equivalent substitutive real estate therefore is the one that by its value equals the expropriation obligor's real estate. This means that an owner of land in the area of 800 m^2, with the market value of EUR 100/m^2, may obtain substitutive land in the area of 400 m^2 if its market value amounts to EUR 200/m^2.

It is interesting that in conjunction with the term of "equivalency", ZUreP-1 neither points out the term of "uniformity" nor "similarity" or even "identity". However, taking into account the principle of impartiality within the expropriation procedure, we can see no hindrance either for the expropriation obligor or the expropriation beneficiary standing in the way of procuring for the higher quality land an equivalent land that is inferior in quality, and vice versa. All the more so if we take into account the fact that the status of the expropriation obligor shall not change!

And, moreover, the expropriation constitutes an intervention into the constitutionally secured right to private property, and therefore, the provisions of this Act should restrictively be interpreted, and the expropriation procedure should be conducted so as not to be to the detriment of the expropriation obligor. In case of doubt, the legal regulations benefiting the weaker party, i.e. the expropriation obligor, should apply.

In practice, the State and/or the Community/Municipality almost as a rule do not dispose of any substitutive real estate. The Higher Court of Ljubljana (VSL/HCL order II Cp 720/2002) finds: "Under the Act, on the side of the expropriation beneficiary (the State or the Community/Municipality) there may be selected between two options, where one may not necessarily be more advantageous than the other. The Petitioner (the State) as the expropriation beneficiary explained in the motion on instituting the expropriation procedure that they did not dispose of another equivalent real estate. Considering that the Counterparty (the owner – expropriation obligor) does not indicate any assertions

to the contrary or even require compensation, the appellate court accepts as correct the decision made by the court of first instance, namely, that monetary compensation shall be determined for the expropriated land." Frequently, the concept of equivalency is defined by the court in rather a narrow sense of the word, by exchanging a piece of arable land of best quality for a piece of arable land of best quality only. As such arable land is not at hand, monetary compensation only may be offered instead.

5. Conclusion

Bases for determining the compensation of expropriated real estate have essentially changed in the Republic of Slovenia since 1991 with the adoption of the new Constitution. However, in the initial period of 1991 – 1997 the old administrative and/or socialist methods of determining the rightful compensation within the expropriation procedure were still applied.

The Building Land Act of 1997 and the subsequent Spatial Planning Act of 2002 represent an important turning point in the field of expropriation procedure and determination of relevant compensation. The latter Act defined the expropriation as the last resort in real estate acquisition for public benefit in a democratic society, but it inconsistently introduced the "emergency" expropriation procedure. The ascertaining of whether or not this procedure is controversial under the constitutional law has been under way as (1) such a procedure most probably grossly and excessively interferes with the property right of expropriation obligors, (2) the expropriation obligors are placed in an unequal position, in the absence of emergency or materially legitimate reasons, and (3) it fails to provide legal certainty.

In determining (assessing) compensation for expropriated real estate, the appraising in practice still fails to accept the fact that the value to be assessed is market value of the real estate. In addition, the determining of an appropriate status of the land on the day of instituting the expropriation procedure, and of the equivalency of substitutive real estate, are still problem areas. We believe such cases to be the remnants of inertia of mentality of the past socialist era, and due to the lack of tradition in implementing the expropriation procedure and determining the compensation under the conditions of private property guaranteed by the constitutional law. Thus, the Act should be appropriately supplemented so as to avoid the excessive intervention into the property right of expropriation obligors within the expropriation procedure.

6. References

Constitution of the Republic of Slovenia of 1991, Official Gazette of the Republic of Slovenia, No. 33/1991.

Constitution of the Socialist Republic of Slovenia of 1974, Centre for the self-managing normative activity / Center za samoupravno normativno dejavnost, Ljubljana.

Construction Land Act, 1997. Official Gazette of the Republic of Slovenia, No. 44/1997.
Plahutnik, B.2005. Price analysis of purchased land within the area of the land use plan of the highway in the section of Šentvid – Koseze / Analiza cen odkupljenih zemljišč v območju lokacijskega načrta avtoceste na odseku Šentvid – Koseze, University of Ljubljana, Faculty of Civil and Geodetic Engineering, Ljubljana.
Protocol No. 1 to the Convention on the protection of human rights and basic freedoms, 1994. Official Gazette of the Republic of Slovenia, No. 7/1994.
Republic of Slovenia, Constitutional Court, 2000.Up-423/00, http://www.us-rs.si/ of 1.8.2009.
Republic of Slovenia, Constitutional Court, 2009. Report on the work done by the Constitutional Court in 2008 / Poročilo o delu ustavnega sodišča za leto 2008. http://www.us-rs.si/ of 1.8.2009.
Skubic, M., 2008. The enigmas of the expropriation procedure under the Spatial Planning Act (ZUreP-1) / Zagonetke postopka razlastitve po Zakonu o urejanju prostora (ZUreP-1), Legal Practice / Pravna praksa, No. 41/2008.
Spatial Planning Act, 2002. Official Gazette of the Republic of Slovenia, No. 110/2002.
Šturm et al, 2002. Commentary to the Constitution of the Republic of Slovenia / Komentar Ustave Republike Slovenije, Faculty of Postgraduate National and European Studies / Fakulteta za podiplomske državne in evropske študije, ISBN 9981-238-053-8, pp. 1247.
Šubic Kovač, M., 1998 a. Building land acquisition and valuation in Slovenia. Construction Journal / *Gradbeni vestnik,* No. 5/6/7/1998.
Šubic Kovač, M., 1998 b. Dilemmas of real estate market valuation in Slovenia / Dileme tržnega vrednotenja nepremičnin v Sloveniji. Geodetic Journal / *Geodetski vestnik*, No. 3/1998.
Teršek, A., 2008. Arguments on the counter-constitutional issues in the Spatial Planning Act (ZUreP-1) / Argumenti o protiustavnostih v Zakonu o urejanju prostora (ZUreP-1), Legal Practice / Pravna praksa, No. 37/2008.
Higher Court of Koper, VSK/HCK order 1 Cp 963/2000.
Higher Court of Ljubljana, 2002. VSL/HCL order II Cp 720/2002.
Higher Court of Ljubljana, 2002. VSL/HCL order II Cp 720/2002.
Higher Court of Ljubljana,VSL/HCL order 1 Cp 983/2003.
Expropriation and Forced Transfer of Real Estate in Social Property Act / Zakon o razlastitvi in prisilnem prenosu nepremičnin v družbeni lasti, Official Gazette of the Socialist Republic of Slovenia, No. 5/1980.

1.7. JUST COMPENSATION, CLAIMS FOR LOST BUSINESS PROFITS AND INCOME VALUATION OF REAL PROPERTY

Charles Szypszak
School of Government
University of North Carolina at Chapel Hill
e-mail: szypszak@sog.unc.edu

Abstract

Owners whose property is taken by government for public use are entitled to be paid just compensation, as constitutionally required and as a fundamental principle within a rule of law. Usually the amount of just compensation is based on the fair market value of real estate taken as determined by a comparative market analysis. However, when the real estate is used for a commercial business, an eminent domain taking may cause the business activities on the property to terminate, relocate, or be restricted, and the owner may expect that just compensation should include anticipated loss of future business profits. In the U.S.A., a few states have enacted statutes that require at least some part of estimated lost future business profits to be paid. But according to the law in most jurisdictions, such payment is not required. This surprises many business owners, but the legislatures and courts have resisted calls to expand eminent domain compensation to include business profits for a number of reasons, including the speculative nature of future profits, the difficulty of quantifying them, and practical concerns about unpredictably large compensation awards. On the other hand, courts allow use of business income data to consider the value of real estate. With the "income approach" for property appraisal, the amount a reasonable purchaser is anticipated to pay—fair market value—is based on rents or other income, minus maintenance and operating costs. Government entities, owners, and courts struggle with the distinctions between improper inclusion of future business profits and proper consideration of the real estate's income.

1. Introduction

When government takes private property for public use, it must pay the owner just compensation according to constitutional and fairness principles. Article 21 of the Polish Constitution provides that "(e)xpropriation may be allowed solely for public purposes and for just compensation." The Fifth Amendment to the U.S.A. Constitution prohibits government from taking private property except for public use and only with "just compensation."

Usually a taking by eminent domain involves government acquisition of a portion of real estate, such as a strip of land for a road expansion or an easement to install a utility line across someone's land. In such circumstances the owner's compensation usually is determined by a comparison of two fair market values.

Fair market value is the amount a willing and knowledgeable purchaser could be expected to pay for the property. The eminent domain calculation compares the fair market value of the property before the taking with the fair market value of the remaining property after the taking, and payment is made for the difference.

When the real estate is being used for a business that earns profits and will likely continue to do so, and the taking affects the business operations, the owner may expect to be compensated not only for any diminished value of the real estate but also for the negative economic consequences to the business. For example, a restaurant or store owner may have anticipated a certain stream of income from the property and may expect compensation if that stream is going to be diminished. This idea of compensation for lost business opportunities may take several forms, including:

- The owner may claim that the capacity of real estate to generate income has been diminished by loss of space. For example, if the highest valued use of real estate is as a commercial parking lot, or as floor space for retail stores, and a portion of the real estate is taken that could be put to such uses thereby restricting the number of parking spaces or usable floor area, the value of the real estate for its highest and best use will be diminished. A smaller parking lot or store is probably less valuable for producing income than a larger one.
- The owner may claim that the real estate has become less valuable because changes are being made that restrict access to it. This may be the case, for example, if a restaurant loses easy access from the main road. Customers may be less likely to come to the restaurant after the taking and the real estate's value could be less valuable for restaurant purposes.
- The owner may claim that full use of the real estate is essential to the value of the business operated on it and that a taking of all or a portion of that real estate deprives the owner of future business prospects. For example, if an owner loses property on which a restaurant or store was operated, the owner may lose the profitable stream of income that made the business valuable. Even though the business theoretically could relocate, value may be lost if the location was important to the business, as would be the case if a restaurant or store lost loyal customers as a result of the relocation. The owner may characterize a claim of this sort in several ways. One way is to refer to a value of "good will," which a business acquires with customers who view a particular enterprise favorably. Or the owner may refer to the "going concern" enhanced value of assets resulting from their combination within an operation. This enhanced value is gained as a business learns efficiencies and develops profitable relationships.

In concept, eminent domain awards usually aim to take into account the first two notions of lost business opportunities by comparing the before and after values of the real estate on which the business is operated. The third category—loss of good will or going concern value—is generally not recognized in eminent

domain law. Poland's Real Property Management Act does not authorize payment of lost profits except in connection with certain claims for lost crop values. Similarly, in most U.S.A. jurisdictions no payment for loss of good will or going concern value is authorized.

To some degree the exclusion of good will or going concern compensation is a product of history. Eminent domain compensation rules evolved when real estate was abundant, and legislators and the courts assumed that businesses could easily relocate. Courts and commentators also have explained that business profits are inherently speculative; current conditions are not always indicative of future success, and awards of lost business profits must be based on many assumptions that are unlikely to be completely valid. Some also have argued that successful business owners will find other ways to earn the same or larger profits when their operating conditions change. What may seem like a limitation may turn out to be an opportunity, and the law never requires that the owner reimburse the public when such opportunities were created by public projects.

Critics of these reasons for not awarding compensation for loss of good will or going concern value note that business losses are routinely estimated in other contexts, as when loans are made to businesses, interests in businesses are transferred to heirs or new investors, or claims for lost profits are made in civil disputes. There are many well-regarded experts who regularly appraise business values and many lenders, investors, and business managers must make estimates of business value, formally or informally. These experts and interested parties base their valuations on data about the comparable values of assets, the historic costs of operations, managerial expertise, and reasonable expectations about returns on investment. Despite these realities legislatures and courts continue to be wary about allowing consideration of business profits for eminent domain claims.

Owners are not alone in their confusion about recovery of business profits in eminent domain cases. The issue also confusing to those who decide the amount of an award— judges, juries, and commissioners. Much of the confusion is due to the complexities of real estate valuation, which allow consideration of expected income streams for purposes of valuing real estate but not for purposes of paying compensation for anticipated business profits. Government entities and courts struggle with the distinctions between improper inclusion of future business profits and proper consideration of the real estate's income.

2. Business income in real estate appraisal methodology

Courts in the U.S.A. recognize three permissible methods for appraising the value of real estate for eminent domain purposes. These are the market comparison, cost, and income approaches.

Market comparison is the most common valuation method for real estate and it is the usual approach for appraisal of residential properties and other kinds of properties for which ample market data exist. With this approach appraisers identify similar neighborhoods and property types, research recent sales

information, and make adjustments for differences in lot and building size and characteristics. Occasionally, a *cost* approach is used, by which a fair market value is determined for the land based on comparative data, to which is added the cost of replacing the building adjusted for depreciation. The cost approach generally is not used when sufficient data are available for developing a valuation using the comparable sales approach. The cost approach may be viewed as the best method for a unique property because there is no comparable sales data available.

The *income* approach to real estate valuation reflects the reality that income-producing property, such as a shopping center or an apartment building, is purchased for investment and the amount a purchaser will pay for it reflects anticipated net rents based on the property's characteristics and the market for such properties. The appraiser using an income approach calculates anticipated income using information about market rents, vacancy rates, maintenance and operating costs, and other factors, and converts the anticipated income stream to a value using a capitalization rate. The rate that is applied is intended to reflect the relationship between net operating income expectancy and the total property price or value. American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 419-21 (10th ed. 1992). For instance, if rent-generating properties typically sell for an average value of $1,000,000 and generate $100,000 in annual rent, the capitalization rate would be ten percent, and a property with $150,000 in annual rent would be valued at $1,500,000.

Although the income approach is a well-recognized valuation method based on realistic investor expectations, it is not as readily understood as the comparable sales approach. Acceptable methodologies vary based on the type of property and changes in the market. Decisions about the factors used in the income valuation have significant impact on the result, such as whether to include real estate taxes in the operating cost to determine net income. For the valuation to be valid, care must be taken to justify and support projections of income and expenses, and adjustments must be made as necessary to reflect the appropriate income streams. Expected investment rates must be justified with reliable market data or market-supported technical methodology and computations. In contested matters in which the income approach is used, the parties often dispute the appropriate methodology, income assumptions, and the rate to be applied in converting anticipated income to present value. But the income approach is a well-developed methodology that has been the subject of uniform standards. *See* Appraisal Foundation Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice* (2008).

3. Allowing recovery of business losses

When government actually takes a business for its own proprietary use it is naturally and constitutionally required to compensate the owner for the reasonable value of the appropriated business. For example, during the Second World War the U.S. Army took over a laundry operation with a plant and its 180 employees to

support a nearby military base. In *Kimball Laundry Co. v. United States*, 338 U.S.1 (1949), the U.S. Supreme Court approved an eminent domain award that included an amount for rent, payment for damage to machinery, and an allowance for depreciation. The owner also offered testimony about the value of loss of its usual customers while the Army operated the plant for its purposes. The Court said that when the business operation itself is taken, compensation should include consideration of "any evidence which would have been likely to convince a potential purchaser as to the presence and amount of petitioner's going concern value." 338 U.S. at 16. The owner therefore could properly recover an amount representing future profitability lost when its customers went elsewhere during the Army's take-over.

The appropriateness of going concern value consideration is less clear when the government does not operate the former owner's business. When real estate is taken and owners must move or curtail business operations, they may reasonably believe that the taking has cost them a promising continuing profit stream from the business at its existing location. Although future profit is always subject to various contingencies, and often a business could be operated at least as profitably at a new location, those whose businesses are affected by condemnation may argue that they should be compensated for their estimate of lost anticipated income based on forecasts derived from presently known financial information. Such forecasts are used to calculate damages in other areas of the law, such as negligence and contract breach, as long as the alleged lost business income can be calculated with "reasonable certainty." But the statutes defining compensation for property taken through eminent domain usually do not allow estimated lost business profits.

Most jurisdictions do not specifically address whether any form of business profits is an authorized element of eminent domain compensation. Courts that are interpreting the constitutional and statutory requirements usually hold that the law does not require such payments. However, a few states in the U.S. have authorized damages for loss of business profits under certain circumstances. For example, since 1933 the State of Florida has authorized profit loss compensation awards when a portion of land on which a business is operated is taken by eminent domain for highway construction. Florida's current statute requires payment for "the probable damages" to a business when a portion of the property is taken and "the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing." The statute does not authorize loss of business compensation when all of the land is taken. Fla. Stat. § 73.071(3) (2009). California and Vermont law more broadly require payment of damages for the value of business lost whether the entire property or only a portion of it is taken. Cal. Code Civ. Proc § 1263.510 (2009); Vt. Stat. tit. 19 § 501(2) (2009). None of these statutes explains how damage to a business is to be calculated. Consequently, when laws such as these authorize payment of just compensation for business profits, the owners, governments, and courts that are

involved must struggle with determining how lost business opportunities should be measured and how such estimates relate to the value of the real property itself.

4. Valuing good will

The distinction between diminished real estate value, for which an owner must be compensated in all jurisdictions, and lost business profits, which usually are not compensable, can be difficult to determine. As described above, the income approach to valuing commercial real estate involves calculating income that the real estate is anticipated to generate using such information as market rents, vacancy rates, and maintenance and operating costs. This reflects market realities. A prospective purchaser of rent-generating property will want to know the income history and prospects of the property to analyze reasonably anticipated profit, and this information will be the basis for calculating a reasonable price to pay for the property. Market values are supposed to reflect such realities. On the other hand, the courts in most jurisdictions have made clear that the law requires payment for the real estate taken, and not for anticipated lost business profits.

In the jurisdictions in which compensation is authorized for loss of good will or going concern value, neither the statutes nor the court interpretations of them have prescribed the appropriate valuation methods. The owner must prove the amount claimed as lost business profits using expert testimony based on generally accepted accounting principles. This leaves the parties involved in a business valuation with a wide range of possibilities, because the methodologies for business valuations are not as well defined by standards and practices for income-producing real estate. As the California Evidence Code broadly provides, "(T)he value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable." Cal. Code Evid. § 823 (2009). The courts typically decide that permissible valuation methods may appropriately differ based on the nature of the business. Consequently the outcome of any dispute about business value can be unpredictable. For example, in one California case involving a restaurant property, three experts arrived at three different values by applying different capitalization rates of nine, fourteen, and fifty percent. The rates varied because each of the experts differently analyzed the business risks involved in the future stream of income. An income stream is valued less today when the risk later is higher, and the capitalization rate used is therefore higher. The resulting values of the good will varied widely: $164,356, $775,000, and $963,000. The trial court chose a rate between the experts'—twenty-five percent—and applied it to an income stream of $110,000 per year, awarding $328,712. *Community Development Commission v. Asaro*, 261 Cal. Rtpr. 231 (Cal. App. 1989).

The courts have illustrated many other difficulties as they have struggled with their state statutes authorizing lost good will compensation. For example, the Florida Supreme Court has instructed that compensation may be limited when the owner could reasonably be expected to restore the going concern on the existing tract even though the restoration requires an additional investment. The court held

that an owner could not recover lost future profits when it could have spent a lesser amount to alter the existing business and restore the business—in that case the owner's claim would be limited to the "cost to cure." *System Components Corp. v. Florida Dep't of Transp.*, 14 So. 3d 967 (Fla. 2009).

As noted above, Vermont law authorizes an award of business profits when an entire parcel is taken. The Vermont Supreme Court has explained that in the simplest case the loss of business compensation is to be based on the difference between the value of the entire business and the value of the land at its highest and best use. This includes several components: "(a) the contribution made by the land to the business, (b) the personal property used by the business, (c) the going concern value of the business, (d) the increased value derived from the fact that tangible assets are combined in a single unit and are already functioning in the marketplace, and (e) where appropriate, goodwill." *Chittenden Solid Waste District*, 928 A.2d 1183 (Vt. 2007). In other words, if the owner must shut down the business, the owner is entitled to be paid the value of the business, not just the value of the real estate, and the greater amount can be attributed to a variety of factors including going concern or good will values. But the starting point remains valuation of the entire business, which is subject to many variables.

The Vermont Supreme Court has established additional rules to constrain the circumstances under which a business profits award could be allowed. For example, in one case an owner sought loss of profits when the state highway district took ten lots, on 36,000 square meters, from a project for which the developer had obtained permits and had begun to install internal roads and utilities. The trial court found that the value of the ten lots was $30,000 each. The trial court included business losses of $150,000 based on an estimate of $15,000 profit for each lot sold, and an additional amount for obtaining new permits for the remaining land. The amount of profit was based on the profits that the developer showed for lots previously sold. But there were no contracts pending for the sale of the lots that were taken. The Vermont Supreme Court overturned the profit award, saying that to recover loss of profits the business must be "fixed and established" with "current use, current accessibility, and there must be an identifiable market for the products." The court held that mere plans resting on conjecture cannot be the basis of a fixed and established business sufficient for the purpose of business loss compensation. Therefore, the court held, profits should not have been awarded because they were too speculative.

The Vermont court also said that an award of the claimed loss of profits for the lots taken by the highway department could have resulted in "duplicate compensation." The court explained that the value of the single-purpose land development corporation was equal to the fair market value of the lots, and the "business loss valuation" therefore is substantially the same as the aggregate of the fair market value of the lots. *Pinewood Manor, Inc. v. Vermont Agency of Transportation*, 668 A.2d 653 (Vt. 1995).

5. Distinguishing income valuation from business profits

Distinguishing between the value of land and the value of a business can become especially difficult when part of the owner's real estate is taken. The portion taken could restrict the owner's business, as might occur, for instance, if the result is less rental or parking space.

Consider, for example, the situation in 1962 when the North Carolina highway commission closed off highway access to the Pony Motel just outside Kernersville. The motel was on the main road for those traveling westward through the region, but after the construction drivers would have to exit the highway and take two side roads to work their way back to the motel, a distance of about 0.8 kilometers. Consequently, after the taking visitors were less likely to see the motel as a convenient place to stop and stay. The North Carolina Supreme Court held that the jury could appropriately consider the diminished business capacity of the site when determining the amount by which the taking rendered the land less fit or valuable for its use. The owner offered evidence that the property was worth $80,000 before the taking and only $45,000-$50,000 after, and the court approved an award of $24,000. *Kirkman v. State Highway Commission*, 126 S.E.2d 107 (N.C. App. 1962). Note that this value was based on what a reasonable purchaser could be expected to pay for the motel property, not on any quantified loss of anticipated income. History has shown that the pessimistic valuation about the value of the site was accurate. After the highway relocation, the motel struggled to survive as a business, as other motels have been built in the area with more direct access to the highway.

In the 2006 case of *Department of Transportation v. M.M. Fowler, Inc.*, 637 S.E.2d 885 (N.C. 2006), the owner of a service station along a busy commercial road relied on the 1962 *Kirkman* case to introduce evidence about claimed lost income when a portion of the real estate was taken. The case provides an informative example of how calculations of lost business profits can become very confusing and result in unexpected outcomes. The owner's property is used to sell gas and operate a small convenience store. The state highway department took 1,200 square meters of land along the main road from a parcel originally 4,460 square meters. None of the gas station or store facilities were taken. The taking also changed the site's access driveways. Prior to the changes the site had three access driveways: one on the main road, one on the perpendicular side road, and one to the corner where the main and side roads met. After the taking the access point to the corner was eliminated and replaced with another driveway on the side road running parallel to the main road. The highway department estimated the impact of the taking on the site to be $166,850, based on an adjusted cost approach, which it said was a reasonable amount when the only practical impact on the site was the changes in driveway access.

The owner was allowed to testify that changes to the property required lowering the price of gas to attract customers. According to the owner, the problem

was that after the state eliminated the driveway at the corner a customer "has got to come, essentially, behind the station" and "come up, get gas, and make a u-turn to go back out the way they came." According to the owner, the changes required lowering the price for gas by four cents to attract customers to a less accessible station. Based on sales volume this would result in a loss of $90,000 per year. The owner multiplied this amount times a "conservative factor" of six, which he said would be an investor's analysis of profit potential, for a $540,000 reduction. The jury awarded $450,000, a number much closer to the owner's calculation than the state's, and the state appealed.

The case eventually was heard by the North Carolina Supreme Court. North Carolina does not authorize payment of good will or going concern value. A majority of the justices on the court—four of seven—agreed that "quantified lost business profits" testimony, and any valuation based solely on this evidence, should not have been permitted because it suggested to the jury that the owner should be awarded those losses rather than an amount based on real estate value. The court noted that the income approach may be an appropriate valuation method for real estate appraisal, but "with the income approach, the appraisal must differentiate between income directly from the property and profits of the business located on the land." The distinction between "income directly from the property" and "profits of the business located on the land" may be difficult to discern, but the court said that a distinction must be maintained.

A properly developed income capitalization methodology involves much more than merely assuming a lower price for goods sold. It involves estimating gross income and collection losses, estimating operating expenses and needed reserves, and selecting a capitalization rate derived from market factors. It also involves considering whether the property may be better suited for a different use. The result is an estimate of real estate value based on the income-generating potential of the site for its new highest and best use. In *M.M. Fowler,* the owner made only a statement about being able to charge less for its products.

The jury's award of $450,000 in a state that does not authorize awards of lost business profits shows that seemingly simple information about profits can multiply into substantial compensation awards. The standards and distinctions can be confusing. The trial judge allowed the verdict even though it was not based on well-developed approaches to income valuation. All three judges of the intermediate court of appeals who reviewed the case found no error with the judgment. At the state supreme court the justices were split: four of them voted to overturn the decision, but almost as many—three—would have affirmed it. The opinion of the judges who disagreed with the decision to overturn the judgment said that evidence of lost revenue is appropriately considered "when the property itself contributes in a direct way to the revenue derived from a tract adapted to its highest and best use." *Id*. at 895, 895-902 (Martin, J., dissenting). They approved of the following cautionary instruction given by the trial court: "Loss of profits or injury to a growing business conducted on property or connected therewith are not

elements of recoverable damages and an award for the taking under the power of eminent domain. However, when the taking renders the remaining land unfit or less valuable for any use to which it is adapted, that fact is a proper item to be consider(ed) in determining whether the taking has diminished the value of the land itself." *Id*. at 900. Apparently these justices believed that the jury could understand and honor this distinction.

The state highway department obtained the appellate judgment it wanted when a bare majority of the judges on the court overturned the $450,000 award and sent the case back for a new trial. Nevertheless, the highway department settled the case in March 2008 before a new trial could occur. The settlement was for $653,868—much more even than the award that was successful appealed, and almost four times the state's initial valuation. The amount of the settlement also is large in relation to the assessed value of the entire site—remaining land and buildings—which is $1,850,047.

Why would the state pay such a large settlement even after successfully getting the state supreme court to overturn the jury's verdict? The disagreement among the judges who reviewed the case was one factor—the state could not be confident of a better result the next time the court reviewed the case. The composition of the court or the inclinations of the judges could change sufficient to alter the balance and result. The lawyer for the highway department told the author of this article that he was concerned that the evidence on which the award had been based, despite having been held to have been impermissibly admitted on the appeal, would somehow be admitted in a retrial and the award could again be much more than the state's valuation. In other words, the highway department's lawyer was worried that the standards were too confusing and he could not be confident of a reasonable outcome. Also, interest at eight percent per year was continuing to run from when the case was begun in 1999. These factors led to a result that cannot be tied to any rational approach to valuing the real estate for which compensation was required, but it does reflect the difficulties of trying to decide what is and what is not compensable when a portion of real estate is taken on which a business is operated.

6. Conclusion

The examples described above illustrate the confusion that can arise when claims of lost business are involved in eminent domain situations. When the business itself is taken and operated by the government, the merits of a claim to compensation seem straightforward, although the methodology for the calculation may not be. If the law authorizes an award of business losses when land is taken partially or entirely, the analysis is complicated by unclear methodologies and standards. When the law does not authorize the award the situation is complicated by the need to distinguish between use of net income from the real estate to calculate the value of the real estate and the use of net income from the business as a reflection of its good will value. The blurriness of these distinctions can result in

unexpected awards, and can be addressed only with more well-defined legal and appraisal standards.

CHAPTER 2

THE VALUE OF CORPORATE REAL ESTATE FOR THE PURPOSES OF EXPROPRIATION

THE VALUE OF CORPORATE REAL ESTATE FOR THE PURPOSES OF EXPROPRIATION

Jan Konowalczuk, Tomasz Ramian
Department of Investment and Real Estate
Karol Adamiecki University of Economics in Katowice
e-mail: konowalczuk@ae.katowice.pl, ramian@ae.katowice.pl

Key words: *corporate real estate, expropriation, market and non-market values of real estate and the enterprise*

Abstract

The expropriation of corporate real estate causes economic effects in the form of damage to the real estate (if e.g. only a part is expropriated) as well as to the enterprise. The latter cannot be compensated by payment of damages, if damage concerns operational real estate and reparation is based only on its market or replacement value. Therefore it is of paramount importance to identify and differentiate between damage to real estate, which is a part of an enterprise, and damage to the enterprise itself. The application of the basic division of corporate real estate into operational, investment and current assets and the recognition of the exclusive character of rights over real estate enabled us to propose a classification of corporate real estate based on the criterion of its importance to the enterprise. This classification will allow to identify expropriation based damage to the real estate and to the enterprise. Damage to the enterprise has been presented with respect to the subjective and functional meaning of the term enterprise. The possibility of applying the concept of market value and fundamental value as the bases of the valuation has been pointed out. The reference to the real estate's goodwill has been employed to identify the various ranges of damage to the real estate, as well as to the enterprise, when the latter loses control over expropriated assets.

1. Various meanings of enterprise relevant to valuation

Enterprises, as opposed to other entities relevant to economy, have the capacity to generate income and raise capital (HICKS 1975, p. 146-147). They are themselves most frequently complex systems composed of further sub-systems, each of whom relates to a certain aspect of the functioning of the whole. This enables their presentation and analysis in a number areas: economical, financial, production-related, organizational, legal, ethical, or behavioral (GRUSZECKI 2002, pp. 33-37). The complexity and systematic character of enterprises necessitates the diversified usage and polysemy of the term "enterprise" itself, practically most manifest as far as the differences between the special languages of economics and legal sciences are concerned. It is noteworthy that even though the term is frequently used in

everyday situations, its colloquial meaning is especially ambiguous. Very often non-synonymous concepts such as enterprise, firm, business activity, company, entrepreneur or business are used in the same context.

Even though the fundamental meaning for the purpose of valuation should be ascribed in Poland to the legal definition of enterprise provided in art. 55^1 of the Civil Code, it should be ascertained that there are three basic distinguishable meanings of the term "enterprise" in Polish legislation: subjective, functional, and objective (HABDAS, 2007, p. 2). In the process of valuation of an enterprise it is necessary to define univocally and distinguish these questions from rights to enterprise expressed in financial shares which may also be subject to valuation (INTERNATIONAL VALUATION STANDARDS 2005, p. 207).

Characteristics of various meanings of enterprise assumed for the purpose of valuation are presented in Table 1.

From the point of view of the notion of value, the concept of enterprise is not tantamount to the sum of its components, since purposefulness of the accumulated assets and the connected element of organization should always be taken into consideration, which allows to differentiate between the enterprise and its assets. For the purposes of valuation special significance should be attached to the **static objective concept of an enterprise** as an organized set of tangible and non-tangible components intended to perform economic objectives, which may be subjected to market transactions, e.g. sale, lease, in-kind contribution, as well as non-market transfer, e.g. donation, inheritance, loan for use. However, it should be addend that the **subjective concept of enterprise** seems equally important in the process of valuation, which is connected with the assessment of character of **the subjective right to the enterprise**, analogical to the ownership right of, say, an immovable property. As a result, scholars point to the scope of usage of the expression "ownership of the enterprise" and the necessity to realize an essential difference between this phrase and the property law understanding of ownership (por. HABDAS 2007 p.117 ff.).

The **functional meaning of enterprise** and its significance for valuation stems from its **dynamic character** binding the term with the conducted **business activity**, the goal of which, according to classical approaches, is to generate income. Nowadays this goal is defined as maximization of value for the proprietors. The components necessary in order to conduct such activity (of an enterprise) are tangible and intangible assets which encompass as well the elements of organization, the existence of which is a condition required in order to positively evaluate the purposefulness of accumulation of a particular set of assets.

The functional meaning of an enterprise is linked, from the legal perspective, to economic methodological questions of its analysis by means of the contractual theory of the firm, according to which the common material fueling both the market and firms themselves are (obligational) contracts. The subjective approach, on the other hand, invokes the economic concept of property rights (*property rights school*) (GRUSZECKI 2002, pp. 147, 277). The notion of the *exclusive* character of

property refers to ownership understood economically as exercising control over resources, which control is identified with the exclusive use of particular economic goods.

Table 1

Definitions and interpretation of various legal concepts of enterprise and its organized component

Enterprise meaning	**Definition**	**Interpretation**
Objective	Art. 55[1] k.c.: organized set of intangible and tangible assets intended for conducting business activity.	The enterprise is not merely either an intangible good or set of things and rights. Instead, it is a specific *sui generis* complex thing which encompasses among other elements: – reference marks differentiating the enterprise or its separated parts (name of the enterprise), – ownership of immovable and movable assets, including equipment, materials and output, as well as other *in rem* rights to immovable property or chattels, – rights arising from contracts of lease of immovable or movable property, and rights to use movable or immovable assets arising from other legal relationships, – receivables, rights incorporated in securities and pecuniary means, concessions, licenses and permits, – letters of patent and other rights of industrial property, tangible authorship rights and similar tangible rights, business secret, ledgers and documents connected with the conducted business activity.
Subjective	Entity conducting business activity regardless of the selected	Subject of rights and obligations incurred in connection with the specified business activity. The entity

	legal form. The category encompasses entitled entities participating on a regular basis in commercial and legal transactions, conducting business activity in their own name.	holding rights, especially a party to private law relationships. This concept seems more general than the notion of "enterprise" as defined in Polish legislation in a number of documents. Such definitions are not always of universal significance which could affect the whole sphere of civil law relationships.
Functional	This signifies particular activity of the entity, activity of professional continuous character, subjected to the principle of rational management, and consisting in participation in commercial transactions.	The fact of conducting business in the functional sense denotes activities consisting in satisfying human economic needs within the social dimension (not individual) by means of providing useful tangible goods and services. The activity is conducted on the account of the entity according to the principles of entrepreneurship , and connected in consequence by means of legal relationships with the activities or needs of other entities functioning on the market.
Organized part of the enterprise	Set of properly selected (not at random) tangible and intangible components, yet not itself an enterprise in the sense provided in art. 55^1 CC	Such a part may be subject to separate juridical acts, e.g. sale or in-kind contribution. An organized part of enterprise is separated when it comes to its location, assets, organization, still it is not as independent and structured as an enterprise on its own. Remaining a part of a larger enterprise, the part does not provide a complete basis for the specified business activity.

Source: Self reported data.

Only a purposefully accumulated and organizationally interrelated set of components may be referred to as enterprise. As a consequence it should be pointed out that the dynamic functional approach is decisive and enables the delimitation of the static objective concept of enterprise. The necessary condition for the realization of the concept is that the accumulation of assets should be

purposeful. This in turn is primarily conditioned by the possibility to observe the emergence of intangible assets concerning organization. However, it should be added that such a settlement concerns the factual, not potential condition.

It is often argued for purposes connected with valuation that an enterprise constitutes a special category of thing, qualified in literature as *a sui* generis class (WŁODYKA 2000, p. 16), because even though it is composed of certain tangible (things) and intangible goods, it is characterized by a number of features characteristic only for an enterprise. In consequence, jurists argue that an enterprise in its objective understanding can neither be simply classified among intangible goods nor treated as a mere collection of tangible goods and rights (*universitats rerum et iuris*).

In the course of evaluation all the senses of enterprise should be taken into account:

- the static and objective concept, based on identification and assessment of the full set of components,
- the dynamic and functional concept, allowing to state the existence of intangible assets, especially those related to organization,
- the formal subjective concept, which requires an economic interpretation of the (exclusive) character of rights to the complex.

The situation is additionally complicated by the lack of any comprehensive and thorough legal regulation which would provide a consistent definition. The existing provisions of art. 55^1, 55^2, 55^4, and 75^1 CC are merely considered as a stopgap of such regulation (HABDAS, KONOWALCZUK, RAMIAN 2004, p. 56). As a result, problems arise connected with the delimitation of methodological borders concerning the income approach to valuation of business real estate (properties used for conducting business) and valuation of the enterprise itself. This brings about further complications regarding the identification of objects of market transactions, also problems concerning the settlement of the character of damage which can be possibly inflicted, for instance as a result of expropriation of a property belonging to the assets of the enterprise. Relevant examples may be instances of the sale of gas stations or restaurants which encompass not only sets of movable assets, but also intangible elements. Scholarly economic writings demonstrate that there is a common area concerning closely related (from the objective perspective) transactions regarding business real estate and enterprises (KONOWALCZUK 2009 pp. 184, 159). As a result one may point to examples of hybrid transactions, regarding for instance:

- the transfer of rights to real property (purchase) by means of which the vendee gains control over the business, which makes the differences between the valuation of real estate and the whole enterprise become insignificant (farms, rights to minerals, waste deposits),
- the transfer of inalienable *goodwill* along with the property, e.g. partners acquire shares in a partnership provided that the previous owner is going to continue the conduct of business (THE CAPITAL AND RENTAL VALUATION 2006, p. 3)).

To take into consideration the functional meaning in the process of valuation requires to pay attention to the category of capital and the connected question of activity the purposes of which are subjected to the needs of adjusting the size and structure of capital to the level which assures the required effectiveness of the conducted activity.

Decisions made in the enterprise concern the total of the engaged capital. In relation to real property special significance should be ascribed to the possibility to exercise diversified ways of control, which is most often linked to the selection made between the right of ownership and lease of those resources. The legal (objective) definition of the enterprise provided in art. 55^1 CC points to the following elements:

- ownership of real property(…) other *in rem* rights to real property (…),
- rights arising from various types of lease contracts concerning immovable property (…) rights to use the immovable property (…) stemming from other legal relationships.

The ways of exercising control over immovable property described above determine in Polish conditions the formal and legal frames for the concepts of defining corporate real estates and their classification in accordance with the criterion of the exclusive character of the rights (KONOWALCZUK 2004, p. 30).

1. The notion of corporate real estates (CRE) and their typology

Real estates are one of the fundamental and indispensable elements of enterprises. In the economic dimension the term refers to a particular specified piece of land along with its natural and anthropogenic elements, which are governed by specific rights determining the intensity and quality of the exercised control (KONOWALCZUK 2009, pp. 15-18). Such an approach to the questions of real estate owned by enterprises is a continuation of the definition of corporate real estate (CRE) generally presented by English speaking authors in the literature of the field. The concept is used in the broad sense, referring to immovable properties controlled by the enterprise regardless of the question whether the assets are utilized for business activity or make an investment. The notion covers both the ownership and lease of real estates utilized for the enterprise's productive purposes, whether or not the enterprise considers the immovable property an investment. (KOOYMANS 2000, p. 2). The possibility of distinguishing subjectively a group of CRE is presented on Picture 1.

Expropriation, similarly as other ways of acquiring real property for public purposes, concerns as well the land controlled by enterprises. The facilitation of real estate by an enterprise for business activity causes the emergence of a series of specific problems concerning the definition and scope of the concept of damage inflicted as a result of intervention of public authorities which results in the deprivation of a particular right to the real estate or restriction of its exercise. The type and character of the damage depend on the exclusive character of the right granting control over the property. Additionally, considerable significance should

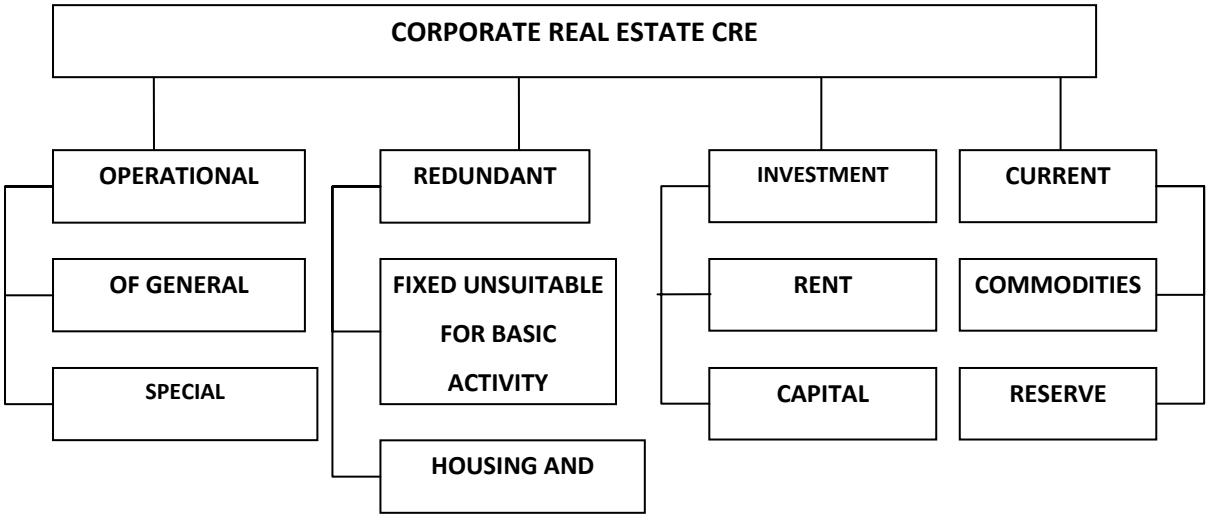
be ascribed to the way of utilization of the property in the enterprise, formally reflected the principles of inclusion in financial reports.

SET OF REAL ESTATES						
HOUSEHOLD ESTATE		CORPORATE (CRE)			PUBLIC PROPERTY	REMAINING PUBLIC ENTITIES
HOUSING PROPERTIES	AGRICULTURAL	PROPERTIES	INDUSTRY AND SERVICES NON-FINANCIAL	INVESTMENT FUNDS AND FINANCIAL INSTITUTIONS	STATE TREASURY AND UNITS OF SELF-GOVERNMENT (MUNICIPALITY, POVIAT, VOIVODESHIP AND OTHER PUBLIC ENTITIES	CHURCHES, ASSOCIATIONS, FOUNDATIONS, PROFESSIONAL ORGANIZATIONS AND OTHERS

Pic. 1. Classification of real estate according to the subjective criterion. *Source*: Self-reported data.

Formally, in the case of CRE expropriation in Poland the immovable properties are approached as the object of the right of ownership, perpetual usufruct or other *in rem* right (ACT ON THE ADIMISTRATION OF REAL ESTATE, art. 112 paragraph 2). Expropriation as such does not concern obligational rights, even though these rights may refer to the expropriated property and influence in diversified ways their market value, the effect of which may be the emergence of surplus value or deficit value as a consequence of lease rents and their surplus or deficit value (KONOWALCZUK 2009, pp. 74-75, 210-223). For the above reasons, the question of control by obligational rights should not be omitted while discussing issues connected with CRE expropriation. The problem appears during expropriation, even if it does not affect the State, but only the owners of immovable properties obliged to settle accounts with lessees.

The most important classification from the point of view of present investigations runs along the criterion of economic utilization and record. This Allows to distinguish between four categories of immovable property, that is: operational, redundant, investment and current assets. The classification of corporate real property according to the criterion of the way of utilization is presented on Picture 2.



Pic. 2. Classification of CRE according to the utilization criterion. *Source*: Self-reported data (RAMIAN, KONOWALCZUK 2009, p. 132).

Operational properties are occupied by the owner (enterprise) and account for "tangible assets utilized for the purposes of production or provision of goods and services, for lease, or administrative needs, the predicted utilization of which is longer than one reporting period" (IFRS 2004, IAS 16). Their utilization for the typical activity of the enterprise causes the situation in which it is impossible to ascribe particular (separate) cash flows to particular properties. Economic benefits from operational immovable assets are measured on the aggregate level of the enterprise or organized part of enterprise, and cover as well synergy effects connected with the ways of organization of the particular business structure. Operational real properties can be further subdivided into immovable properties of general purposes and special properties.

Special operational properties, because of their physical and economic qualities, are not subjected to independent transactions. Their sale or the condition of charging them with an obligational right takes place only together with the operating commercial entity or a part of it. Operational properties for general purposes are also present in an enterprise within a specific structure of assets, that is why it is more difficult to identify particular benefits brought by properties independently.

The remaining CRE are not occupied by the owner for the enterprise activity. Among these one may distinguish:

- investment properties which cover land, buildings and parts of buildings, treated by the owner or lessee in the relationship of financial leasing as a source of income from rents (investment rental properties) or retained because of a growth in their value (investment capital properties), or held for both purposes (ISFR 2004, v.2 , p. 809),

- current real properties – intended for sale as a part of the normal activity of the enterprise, divided into properties reported as commodities, that is ones acquired for further sale, or reserve properties, meaning immovable assets established as a part of normal activity and intended for sale, e.g. housing premises,
- redundant properties (excessive in relation to operational needs) which cover land, whether developed or not, which are not going to be utilized in predictable future for current purposes and are intended to be sold. In Polish conditions this group will also encompass housing and social premises. (EUROPEAN VALUATION STANDARDS 2009, p. 59).

Utilizing properties controlled by enterprises is always connected with the necessity of financial input, and the reference point for decisions concerning the ways of exercising control over the property are transaction costs on the property market. It is accepted that the right of ownership of all sets of properties would not be purposeful, because it could increase the risk of the conducted business activity. As a result, a certain share of operational real estates is leased, since control costs within the organization connected with ownership of a property resource are in practice higher than market costs incurred in the case of lease. Transaction costs (exogenic) are relatively easy to assess on the property market. They are credible and the collected data itself is direct. On the other hand, a credible estimation of costs of properties subject to the right of ownership would require the use of miscellaneous endogenic pieces of information (amortization, repair costs, taxes, fees for the use of environment, management costs, general costs, utilization costs, etc.), which necessitates the application of various complex and indirect calculation methods. In such a situation it is frequently difficult to assure full comparability of exo- and endogenic costs, even if the comparison of those values should be decisive for decisions concerning the selection of control, whether in the form of ownership or based on weaker rights (c.f. RAMIAN, KONOWALCZUK 2009). As a consequence, investigations concerning the problems of value of CRE require the inclusion of both the system of property market and the system of an enterprise. This concerns larger enterprises in particular, ones which determine criteria within which operational CRE function, which excludes the properties from the system of local immovable property market. A local refinery in the south of Poland (Trzebinia or Jedlicze) may serve as an example of an enterprise whose operational CRE are set exclusively within the system of the PKN ORLEN S.A. concern, and not within the system of a local or regional property market.

3. CRE expropriation and the loss of value of an enterprise

The type, size and structure of the capital controlled by the enterprise are to a large proportion dependent on the character of the conducted activity. Different resources are going to be controlled by: a farm, refinery, cinema multiplex and internet portal. Moreover, the structure of capital of an enterprise conducting particular business activity evolves over time. For instance, the physical

parameters of buildings, machines and equipment change as a consequence of introduction of new technologies of production. This in turn has an impact on the physical parameters of products, e.g. as an effect of their miniaturization or use of modern composite materials instead of steel. Additionally, the possession of intellectual capital leading to new organizational solutions can change the business structure of an enterprise. For instance modern solutions regarding logistics considerably decrease the level of reserves, which results in a decline of the required value of liabilities financing those assets, and as far as fixed assets are concerned, a decrease in the needed reserve is observed, which in turn entails a reduction of employment in the enterprise.

Leaving aside the fundamental questions regarding the method of valuation, amply discussed In the literature of the subject, and basic types of enterprise value: book, liquidation, replacement and market ones (c.f. JAKI 2008, ZARZECKI 2000, MALINOWSKA 2001, COPELAND, KOLLER, MURRIN 1997), it should be emphasized that the application of the methods of enterprise valuation, generally accepted as methods leading to the evaluation of market value, may result in the assessment of a number of practical (non-standardized) types of enterprise value:

- market value,
- fair market value,
- intrinsic and fundamental value,
- investment value,
- fair value (PRATT, REILLY, SCHWAICHS 1996) [13].

Out of the enumerated types, only investment and fair values can be easily distinguished on the definition level and refer to non-market values known in the field of property valuation, that is individual and compensatory value, and as such they need not be discussed. The remaining three categories can be analyzed as practical subtypes of the market value of an enterprise, which as a consequence of subtle differences in definition may lead to considerable differences as to the assessed values.

The differences between subtypes of market value of an enterprise derive from varying initial assumptions in the course of valuation connected with evaluation of the condition of the market or competition among firms. Definitions and differences in terms of assessment of particular types of the market value of enterprises are presented in Table 2.

The market value is accompanied by other standardized types of value, the assessment of which is based on similar methodological grounds, and the differences stem from different starting assumptions. Except the depicted standardized types of value of an enterprise, one could also assess other unnamed types which are going to be of subjective, non-market character, e.g. investment

[13] An amp overview of types of enterprise value is presented by D. Zarzecki: Metody wyceny przedsiębiorstw. Zarys teorii i praktyka. Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, Szczecin 2000, p.11 ff.

value, fusion value, or compensatory value. The standardized values of the enterprise usually reflect the assumptions most commonly accepted the in practice of valuation and point to areas of their application.

For the purposes of analysis of expropriation performed from the point of view of the impact on the enterprise value, one should always take into account the diversified significance of CRE to the enterprise's activity. As far as non-operative properties are concerned (investment, current and redundant) the results of expropriation are not going to inflict any damage regarding the enterprise, whereas in the case of operational properties, depending on their strategic significance, one has to do with the diversified possible scope of loss concerning the enterprise which is going to be causally linked with the expropriation of a particular type of immovable property.

For the sake of establishing the relation between the expropriation of a real property and occurrence of damage concerning the enterprise a classification seems helpful which has been established in order to render the problems of the implemented property strategies and their analysis (WILLS 2008 p.42-43). In the case of operational assets instances have been identified and reported in Table 3 where the expropriation of the property inflicted a higher damage regarding the enterprise than the market value of the expropriated CRE.

In an analogical way the problems of investment properties may be discussed, especially assets of the rental type, whereas in the case of investment (capital) land the problem should be taken into consideration only in the instances where the location is unique and because of that it is difficult or impossible to replace the property by means of a market transaction. The analysis of the strategic significance of immovable properties for the enterprise demonstrates that only in the case of expropriation of current properties the market value or the intrinsic value of the enterprise does not decline considerably.

Table 2

Definitions and differences in assumptions concerning assessment of particular types of enterprise market value

Lp	Type	Definition	Different assumptions regarding valuation
1.	Market value	It reflects the most probable price at which a particular asset could be subject to the contract of sale on the sufficiently competitive and open market, on fair terms and at arms length, where the buyer and seller act reasonably, without special	Elimination of the influence of short-term factors (e.g. investor mood) causing the emergence of a gap between the value of enterprise deriving from the evaluation of its ability to generate income and

Lp	Type	Definition	Different assumptions regarding valuation
		motivation, and based on sufficient information.	the current market price.
2.	Fair market value	It reflects the price at which at a particular moment the provided asset could be subject to the contract of sale concluded between willing parties, none of which acts under duress, and each of them is in possession of proper information allowing to make a reasonable decision as regards the terms of the sale transaction.	Perception of value through the prism of current market conditions, which refers as well to factors directly connected with the capital market, such as the current prosperity conditions and tendencies on the market. The reflection of the value defined in this way in market economy are current ratings of stock companies (daily share rates).
3.	Intrinsic and fundamental value	It reflects the value deriving directly from the actual ability of the assessed asset to generate income for its owners, and is based on the characteristics connected with the internal qualities of the asset, dependent neither on the impact of a particular investor nor current conditions on the capital market (current rates of shares and their fluctuations are not taken into consideration.	Assessed with the application of the method of discounted cash flow, this type of value abstains from current share rates and their fluctuations. It is strongly correlated with long-term share ratings on the stock market, which ratings are a close reflection of the market value.

Source: Self reported data based on (PRATT, REILLY, SCHWAICHS 1996 I COPELAND, KOLLER, MURRIN 1997).

In the case of expropriation of operational real estate and a part of investment assets in accordance with the generally accepted, as far as compensation is concerned, "difference theory" (SZPUNAR 1998, p. 51 ff.) a negative difference is going to be observed in the sphere of intangible assets, which difference is

identified as damage. One of the possibilities is the complete loss of particular intangible component. Another one is the decrease of their value, which can be measured by the lowered effectiveness of its utilization which is evident in the decline in cash flows.

3. Application of the concept of goodwill for the identification of enterprise value in the course CRE expropriation

Where income methods are applied for valuation of CRE, especially in the case of the profit method, the literature of the subject points to the necessity to establish properly the income for capitalization in order to avoid confusion between the two types of goodwill connected with the activity conducted in relation to the properties (EUROPEAN VALUATION STANDARDS 2000, 2002, p. 161 - 162 AND INTERNATIONAL VALUATION STANDARDS 2005, 2006, p. 261).

Scholars point to the need to construct and apply for the purpose of assessment of CRE market value a type of income (or cash flows) which would be able to maximally account for intangible elements connected with an immovable property and at the same time exclude similar elements linked solely to the currently operating enterprise. This entails a necessary distinction between two different types of goodwill:

- personal (of the enterprise), understood as the value of profit exceeding reasonable market expectations which would be lost as a result of sale of the property of a special purpose generating income. At this point, financial factors connected with the entity currently in control of the enterprise are taken into consideration, such as: taxes, amortization policy, loan costs and the capital invested in the enterprise.
- alienable / transferable (of the properties), expressed as the value of profit which does not exceed reasonable market values, and which would not be lost along with the sale of the property of a special purpose generating income. This type of goodwill represents the element of intangible and legal values which derives from the enterprise's brand name, reputation, clients, location, products and other factors of similar character which generate economic profits. It is strictly connected with the property of a special purpose which generates income, and becomes transferred to the new owner at the moment of sale of the immovable asset (por. KONOWALCZUK 2009, p. 158).

In spite of essential methodological doubts concerning the forms and credibility of procedures determining goodwill out of the assessed value of the set of assets, it is true that because of the growth in the significance of intangible assets for the success of the conducted activity in the conditions of a competitive market and the willingness to reflect the value of such assets in the balance sheets of companies there appears the necessity to develop further the methodology of valuation of such assets (DUNSE, HUTCHISON, GOODACRE 2004, p. 254). Only the alienable goodwill is revealed in the course of valuation of real property, which is the case

both for the market value and fair value. In addition, where income methods are applied, the assumptions accepted for the purpose of assessment of the market value should encompass:

Table 3

Evaluation of the character of damage regarding the enterprise for various types of operational properties classified according to the strategic criterion

Specification	**Operational**			
	Strategic	**Flag**	**Basic**	**Accessory**
Features	necessary for the control of the operational activity and realization of long-term strategies	necessary for the long- and medium- term strategy	necessary for the realization of the medium-term strategy	necessary for the control of the non-cyclic operational activity
Ways of control	ownership	most frequently ownership	the right of ownership or lease	most frequently leased
Scope of expropriation damage for the enterprise	maximal	broad	significant	narrow
Character of loss apart from the expropriated property	affects the main intangible assets and the synergy of tangible assets	affects the main intangible assets and the synergy of tangible assets	affects intangible assets and the synergy of intangible assets	affects the synergy of tangible assets
Loss of ownership of the enterprise	decline in the market value and intrinsic / fundamental value	decline in the market value and intrinsic / fundamental value	decline in the market value and intrinsic / fundamental value	decline in the market value

Source: Self-reported data.

- settlements concerning the existence of a firm link between the condition of the property and the character of the conducted activity, for the simultaneous lack of market reasons to change the way of utilization of the property;

- assumption of average parameters, durable levels of turnover (sales), and incomes: operative (typical margins and typical earnings performance determined mainly by the condition of the property) and possible to achieve on the market taking into consideration the current demand and competition,
- presumption that the activity is conducted by an averagely effective manager / user,
- calculation of income on the level of the operational activity, that is before the deduction of amortization, wear and tear (depreciation), interest and management fees.

In the case of valuation of properties the part of goodwill unconnected to immovable assets becomes separated from the operational value of the enterprise, which points to the inability to include the full amount of the loss of value of the enterprise in the market. Examples of the two types of goodwill for selected CRE are presented in Table 4.

Making avail of the "difference theory," one should point out that in the case of expropriation of a part of CRE certain elements of personal goodwill are lost, which is causally linked to activities connected with expropriation. This unveils that there is a damage which is not and cannot be fully compensated by the value of the property. The value of such loss may be considerable. For instance, on the British market the value of intangible elements related to hotel properties is estimated at the level between 1 and 1.75 of the average (corrected) annual income (DUNSE, HUTCHISON, GOODACRE 2004, p. 251), however, it must be added that the estimation of this value seems hardly objective and credible, because it is based in the first place on the experience of practitioners without sufficient theoretical background. Nevertheless, it is not disputable that in the instance of expropriation of a hotel, gas station or restaurant the evaluation regards a special property (as a collection of assets) in which case only its particular commercial potential is taken into consideration (turnover, margins) along with the transferable goodwill connected to the condition of the property. Personal goodwill, on the other hand, is not taken into account.

The assumptions of valuation concern a hypothetical situation in which a single property is sold, and the applied comparative or income methods entail a comparison of prices, income and rates of return from similar properties, which allows to include the transferable goodwill arising as a result of the fact of purchasing the property. Personal goodwill is not included in valuation reports, because this value is not really established in market transactions.

As a result of the above, only **market** and **fair market** values reflect alienable goodwill of an immovable property deriving from:

- the characteristic brand name and reputation of the property;
- clients who buy goods at this particular place rather than anywhere else;
- location and the offered products and services;
- franchise contracts where the rights arising from such contracts are

transferable together with the property;
- awarded (or renewed) licenses, permits, permissions, etc. (THE CAPITAL AND RENTAL VALUATION 2006, p. 3).

Table 4

Examples of goodwill of a property and enterprise for the selected types of special immovable properties

№	Property type	Goodwill Of the property (transferable)	Goodwill Of the enterprise (personal)
1.	Hotel	Hotel situated in a touristically or professionally attractive locality	System of room booking (chain, internet)
2.	Gas station	Location at a road of particular traffic intensity and legal monopoly to the location.	Organization of fuel shipment from the enterprise's wholesale dealer
3.	Greenhouse	Brand name of the product connected with the place of production, e.g. "Tomatoes from Siechnice"	Technology of production
4.	Waste incinerating plant	Location permit and permits regarding environmental emissions	Contracts with suppliers and agreements with the State concerning subsidies
5.	Fish-pond	Permit concerning the use of water	Contracts for the sale of Fish with a chain of shops
6.	Restaurant	Location, vicinity, neighborhood	Qualifications of the owner running the restaurant
7.	Brick plant	Material quality and technology of production	System of selling the products (own chain or contracts)
8.	Swimming pool	Location, vicinity	Ticket distribution contracts with other entities and the municipality

Source: (KONOWALCZUK 2009, p. 159).

The mentioned categories of value do not compensate for the total of lost assets, because they fail to cover the category of personal goodwill. As a consequence, well-grounded doubts arise as regards the adequacy of such a limited compensation.

In the conditions of the Polish growing property market inclusion of alienable

goodwill, which cannot be taken into account where replacement approach to valuation of CRE was applied, may be additionally more difficult. That is why the assessment for the purposes of CRE expropriation, especially when referring to operational special properties and investment rental properties, according to their replacement value should be considered incorrect.

It should also be emphasized that in developed economies there are legal systems which enable compensation for CRE expropriation which encompass not only the decline in value of the immovable property itself, but also the possible loss of the value of the enterprise's goodwill. Such solutions are accepted for instance in the USA (TROUT R. 2000, pp. 171-179), Canada (Mc NALLY B. 2004, p. 2.), Great Britain and other countries (NELSON C. 2008, p. 49). In relation to immovable properties the base for compensation is usually the market value which accounts for the optimal way of the property's utilization (current or different), which is of special importance in the case of land valuation, also when referring to investment land. Scholars maintain that this approach to valuation reflects the right of the owner to compensation connected with the actual potential of the immovable property (WRIGTH, GITELMAN, 2000, p.157).

In Polish conditions there is no particular tradition to treat the problems of CRE in any special way in the methodology of valuation. As long as the communist model of economy was exclusive the omni-potential ownership of the State covered as well enterprises which did not control immovable properties on the market. Questions regarding expropriation of private agricultural holdings (farms) were an exception. Here compensations encompassed as well the costs of the movement of agricultural activities to another place (ACT ON LAND MANAGEMENT AND EXPROPRIATION OF IMMOVABLE PROPERTIES art. 62). These special enactments were repealed beginning from 1 January 1998 (Act of 21 August 1997 on the administration of real property). From that date on a uniform methodology of valuation has been applied for expropriation of real properties according to which the market or replacement values should function as the base for compensation (ACT ON THE ADMINISTRATION OF REAL PROPERTY, art. 134 and 135).

One of the most fundamental results of the economic development of Poland after 1989 is the growth in significance of private ownership of enterprises, which should result in adjustments of legal regulations concerning the questions of protection of their right of ownership. Currently, provisions regarding the expropriation of CRE in Poland still stray significantly from similar laws fund in developed economies. However, it should be emphasized that legal issues connected with the value of goodwill in the course of expropriation of immovable properties, e.g. in the USA, were regulated in the 70's of the XX Century, which was linked to the growth in importance of those assets for the value of enterprises. Nowadays, one may observe also in Poland a growth of significance of intangible assets for the establishment of the enterprise value. As a consequence it seems well-grounded to consider a shift in the perception of the constitutional right to

fair compensation, which should cover as well the lost value of personal goodwill.

5. Conclusions

1) Market value and fair market value of CRE do not encompass the elements of personal goodwill. As a result the application of these types of value in the process of valuation for the sake of calculation of compensation does not lead to the coverage of the whole damage inflicted as a consequence of the expropriation of enterprise real estate, which regards especially operational and investment properties of strategic significance to the activity of the enterprise.
2) In developed economies in the course of CRE expropriation the full damage is identified, which encompasses – apart from the value of the property – additional elements of personal goodwill.
3) The increasing importance of private ownership in Poland necessitates an adjustment of the legal regulation governing the expropriation of CRE In a way which would ensure payment of fair compensation guaranteed by the Constitution. Such compensation should cover as well the element of personal goodwill, the loss of which is observable as a result of expropriation of real estate.

6. References

COPELAND T., KOLLER T., MURRIN J. 1997. Wycena: mierzenie i kształtowanie wartości firm, WIG Press, Warszawa.

DUNSE N. A., HUTCHISON N., GOODACRE A. 2004.Trade-related valuations and the treatment of goodwill. Journal of Property Investment & Finance.Vol.22, No 3.

EUROPEJSKIE STANDARDY WYCENY 2009. 2009. PFSRM, Warszawa.

GRUSZECKI T. 2002. Współczesne teorie przedsiębiorstwa. PWN, Warszawa.

HABDAS M., KONOWALCZUK J., RAMIAN T. 2004. Wycena przedsiębiorstwa jako nowy obszar działalności rzeczoznawców majątkowych. Materiały XIV Krajowej Konferencji Rzeczoznawców Majątkowych w Rzeszowie, PFSRM.

HICKS J.R. 1975. Wartość i kapitał. PWN, Warszawa.

INTERNATIONAL VALUATION STANDARDS 2005, 2005. IVSC London.

JAKI A.2008. Wycena i kształtowanie wartości przedsiębiorstwa. Oficyna a Wolters Kluwer business, Polska.

KONOWALCZUK J. 2004. Funkcje i klasyfikacja nieruchomości. W: Inwestycje na rynku nieruchomości. Red. H. Henzel, Wydawnictwo Akademii Ekonomicznej w Katowicach, Katowice.

KUCHARSKA-STASIAK E. 2004. Nieruchomość a rynek. Wydawnictwo Naukowe PWN, Warszawa.

MALINOWSKA U. 2001. Wycena przedsiębiorstwa w warunkach polskich. Difin, Warszawa.

McNALLY B. 2004. Quantifying a Loss on a Business Expropriation or a Permanent

Impairment of Value Relating to a Public Work. Alberta Expropriation Association Annual Conference.
MIĘDZYNARODOWE STANDARDY SPRAWOZDAWCZOŚCI FINANSOWEJ (MSSF) 2004, IASCF Londyn, Wydanie polskie.
NELSON C. 2008. Leasehold Land Compensation—A Comparison of the Compensation Principles in Hong Kong and Australia Journal of Property Tax Assessment & Administration. Volume 5, Issue 4.
PRATT S. P., REILLY R. F., SCHWAICHS R. P. 1996. Valuing a Business. The Analysis and Appraisal of Closely Held Companies, Irwin Professional Publishing, Chicago.
RAMIAN T., KONOWALCZUK J. 2009. Strategie nieruchomościowe przedsiębiorstw. W: Strategie inwestowania na rynku nieruchomości. Red. H. Henzel. Wydawnictwo Akademii Ekonomicznej w Katowicach.
SZPUNAR A. 1998. Odszkodowanie za szkodę majątkową. Szkoda na mieniu i osobie. Oficyna Wydawnicza Brandta, Bydgoszcz.
THE CAPITAL AND RENTAL VALUATION OF RESTAURANTS, BARS, PUBLIC HOUSES AND NIGHTCLUBS. 2006. Valuation Information Paper No. 2: 2nd edition RICS Business Services Ltd, Reading.
TROUT R. R. 2000. Valuing Business Goodwill Loss in Eminent Domain Cases. The Appraisal Journal, April, s.171-179.
USTAWA O GOSPODARCE GRUNTAMI I WYWŁASZCZANIU NIERUCHOMOSCI. 1995. WACETOB-PZITB, Warszawa.
USTAWA O GOSPODARCE NIERUCHOMOŚCIAMI. 1997. Tekst jednolity: Dz. U. Nr 261 z 2004 r., poz. 2603 z późniejszymi zmianami.
WILLS P.C. 2008. Corporate real estate practice in Australia. Journal of Real Estate, Vol.10, No 1.
WŁODYKA S. 2000. Strategiczne umowy przedsiębiorców, C.H. BECK, Warszawa.
ZARZECKI D. 2000. Metody wyceny przedsiębiorstw. Zarys teorii i praktyka. Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, Szczecin.
DESMOND G. M. 1977. Valuing the Loss of Business Goodwill. The Appraisal Journal, April, s. 193-202.
WRIGHT, R.W., GITELMAN, M. 2000. Land Use in a nut shell. 4th ed., West Group, St.Paul, Minn.

CHAPTER 3

NEW METHOD TO DEDUCE REGIONAL FACTORS OF GERMAN COST APPROACH

NEW METHOD TO DEDUCE REGIONAL FACTORS OF GERMAN COST APPROACH

Sebastian Zaddach, Alexandra Weitkamp, Hamza Alkhatib
Land and Property Management Geodetic Institute
Leibniz University of Hanover

Keywords: *German cost approach, regional factor, correlation analysis, deduction by statistical data, deduction by expertises*

Abstract

The real value as result of cost approach is calculated on basis of standard construction costs. These were used to calculate the reproduction costs by involving gross floor area, ancillary construction costs, regional factors and adjustment on effective date of valuation. In a second step, reproduction costs were depreciated due to age. By including value of outdoor and other installations as well as land value you get the real value. Last step is the adjustment to current market value with following in consideration of value affecting circumstances.

The standard construction costs are German-wide mean costs. But however, local costs differ significantly from this mean. Therefore, either regional factors are included or the adjustment is made within adjustment to current market value (Wolfgang Kleiber et al. 2007). But this has the disadvantage of falsified factors for adjustment to current market value and a greater difference between real value and market value, so transparency of method suffers. All factors of cost approach were deduced on real estate market. Yet, only regional factors were mostly estimated by expert knowledge for large regions.

In a first approach, expert knowledge is replaced by statistical data. In case of replacing the regional factors estimated by expert knowledge by statistical ones, adjustment to current market value approximates 1.0 in mean. So the result is far better then by using the estimated regional factors. Yet, the result provides better regional factors, it bases on general data, not on expertises' data.

A second approach is based on expertises' data and the investigation of the interconnections between the factors of cost approach with aim of better knowledge of interaction. Referring to the evaluation of distribution, a correlation analysis is performed in order to understand the link between the regional factor and the remaining components used in cost approach. Two main advantages are counted compared to the first approach. First, an improved interpretability of the regional factors in regard to its functional relationship in the cost approach is achieved. Second, accurate regional factors are provided, which are not based upon expert knowledge but is deduced by a new statistical analysis.

1. Current situation of deduction of the regional factors

The German cost approach is based on the calculation of market values due to production costs of the buildings. The market value which is determined in the German procedure corresponds to the definition in the international context and is described by the International Valuation Standards Committee: "*Market value is the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion.*" (IVSC 2003, p. 96) The market value arises from the real value of buildings taking into account the current market adjustment which considers the current market situation. The German and the English Cost Approach differ in their result. The methodic is nearly the same in both countries, but the German result is the market value by market adjustment of the real value. In the English Cost Approach, the method is not based on market data and the result is only the real value (SCHULTE 2008, p. 520).

There are numerous approaches to evaluate the value of buildings; among these, the most widely used is the German cost approach which is based on the appraisal of the production value of buildings. Federal Ministry of Transport, Building and Urban Affairs provides standard construction costs (NHK) to get the production value. These NHK are mean cost per square meter of gross floor area in Germany. In order to calculate the production value, the NHK-costs have to be multiplied with gross floor area as well as with ancillary construction costs and afterwards adapted to effective date of valuation by building price index. It is mandatory to provide accurate local construction costs, which is possible done by including regional and local differences with a regional and local factor. In case of non-consideration of these differences, a provision of the local specialties is regularly adjusted by means of the market adjustment (WOLFGANG KLEIBER et al. 2007, p. 1922).

Local and regional circumstances would cause significant differences from the German mean, which result in the form of significant deviations from 1.0 in the market adjustment[14]. For this reason, construction costs are used by the regional and local factors:

$$\text{production costs}_{WST} = KKW \times BGF \times BNK \times RF \times OF \times BPI \quad (1)$$

With
KKW = standard construction costs (NHK2000)
BGF = gross floor area
BNK = ancillary construction costs
RF = regional factor

[14] Normally, the market adjustment should only consider the used model and the location, but not the business fluctuation of the building industry (Wolfgang Kleiber et al. 2007, p. 1932 f.).

OF = local factor
BPI = building price index

However, in some regions, like Lower Saxony, there is a combination of both factors in use. Please note that General regional factor is published by different institutions at the Federal state level. In addition, general local factors depending on population are predicted. For these factors, economic complexity of construction industry is more meaningful than geographic location. Hence these general factors should be derived by market common ones. Basis for the derivation is the data on purchasing prices (WOLFGANG KLEIBER et al. 2007, p. 1992). The regional factor reflects business fluctuation of the construction industry. Production costs differ because of, e.g., expensive costs on islands and low priced costs on continent. The reasons therefore are different conditions of transport, higher human costs and seasonal construction freezes (WOLFGANG KLEIBER et al. 2007, p. 1932 f.).

The regional factors are deducted in the area of responsibility of the committee of valuation experts. If the area is highly affected by structural difference, more than one regional factor is deducted. A common way to evaluate the regional factor should be explained at this point. The volunteer members of the committee of experts, especially construction engineers and architects, are consulted. They consider different building types like single family houses, row houses or semi-detached houses with defined information of gross floor area, living space, storey height, roof pitch, floor plan and standard of furniture. The expert has to estimate the production costs of these cases. The results are scaled in a following step to the valuation date of the collected data. The regional factor is deduced by repositioned formula (1) above. The mean difference is established as regional factor. Unfortunately, this approach is suitable only for small, homogenous areas. The main drawbacks of this approach are minor number of building types and the absentee local placement in different localities in the area.

Other possibilities to estimate regional factors are provided by Federal Statistical Office (Destatis) and Information Center for production costs of the German Chamber of Architects (BKI). An estimation on basis of their data or direct takeover of their tables is possible. Disadvantages are missing information about the database. It is assumed that all building types are included, not only single family houses, row houses and semi-detached houses.

2. Statistical Deduction of the regional factors based on data of Lower Saxony's state bureau of statistics

As explained in the preamble, the regional factor reflects business fluctuation in building industry (Wolfgang Kleiber et al. 2007, p. 1932 f.). In order to demonstrate the developed approach to drive the regional factors, an example of an area in Osnabrück and its circumjacent area is used. The data are provided from Lower Saxony's state bureau of statistics.

The economic basic conditions in the building industry are annually

documented by amongst others Lower Saxony's state bureau of statistics on level of joint communities. The usable floor space and estimated building costs are provided. This data can be used, to deduce the regional factor by creation of the quotient of building costs and usable floor space for each joint commune and indexing to a German mean. The achieved results are derived regional factors from the statistical data in proportion to the German mean.

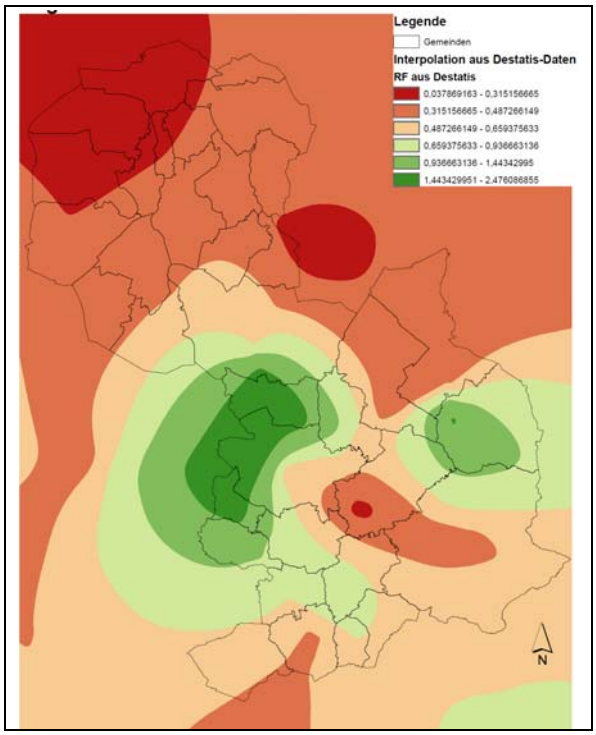


Figure 1. Interpolation of the regional factors based on statistical data by method of Natural Neighbourhood.

An interpolation between the different regional factors of the joint communes is computed with the method of Natural Neighbourhood in ArcInfo (see Figure 1). This method was selected due to the fact that only geometric data (and not statistical data) were used as information for the interpolation. For larger datasets, this interpolation method is more reliable than other methods. With this method, each new point obtains the value of the nearest data-point. The method finds the nearest subset of data-points in proportion to the point which has to be determined. This data receive a weight in proportion to the area, to interpolate the point. The distribution of the points is thereby uncritical. For the purpose of an area-wide interpolation, data of surrounded communes are included (Watson 1999).

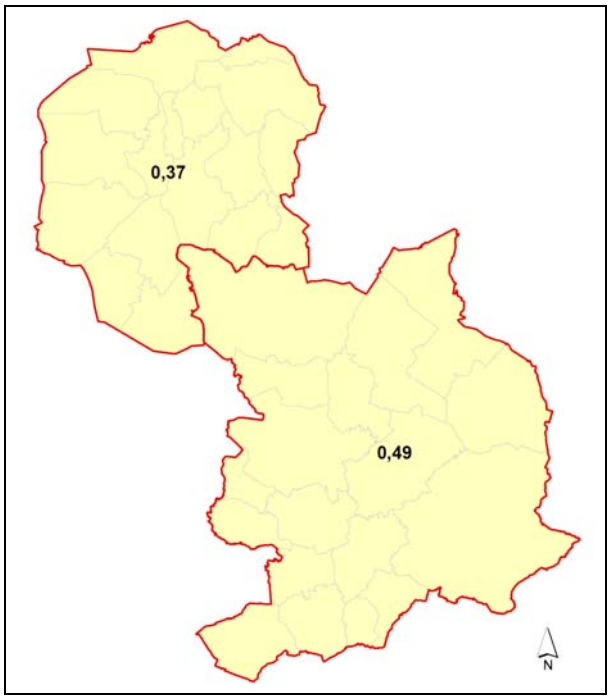


Figure 2. The regional factors, deduced by statistical data of building industry.

The deduction of regional factors for the both regions is computed for their centroid (method for regenerating of the boundary is explained in section 3.3). On this centroid coordinates, the cubic computation of the regional factor is done by sampling the interpolated raster. As a computation method the cubic convolution was used. That is because ArcInfo uses the most input cells (16 most dense ones). The effect is a better improvement especially in the border area. The results are new regional factors of Osnabrück (see Figure 2).

The resulting regional factor in the north of Osnabrück is 0.37 and significantly lower than the obtained value in the south (0.49). Under the assumption that the market value of expertises is accepted as realistic, the expertises were computed with the new deduced regional factors. As variable, the market adjustment is adapted. This factor compensates uncertainties of the regional factors. The resulting market adjustment is in average equal to 1.08 (instead of previous value of 0.74). The standard deviation is increased from 0.11 to 0.19.

3. Statistical deduction of the regional factors based on data on purchasing prices

3.1. Description of the sample of area of Osnabruck

First of all, the expertises used in the analysis are computed with the old method of cost approach. This means that e. g. construction deficiencies are considered before market adjustment. These old cases were used to get a high number of expertises in a homogenous model.

The analysis contains 140 expertises from Osnabrück in the years 2005 to 2009. The used building types of NHK 2000 are single family houses, row houses and semi-detached houses. Accessory buildings are not included. Table 1 gives an overview on building types and configuration standard. The geographical distribution is shown in Figure 3.

Table 1

Overview on sample Osnabrück

building type	no.	configuration standard			
		basic	mean	upmarket	
1.01	85	8	71	6	
1.02	3	0	2	1	
1.03	2	0	2	0	
1.11	20	2	17	1	
1.12	4	0	4	0	
1.13	1	0	1	0	
1.21	13	2	9	2	
1.22	1	0	1	0	
1.32	1	1	0	0	
2.01	4	0	4	0	
2.11	4	1	3	0	
2.12	2	1	1	0	
	140	**15**	**115**	**10**	

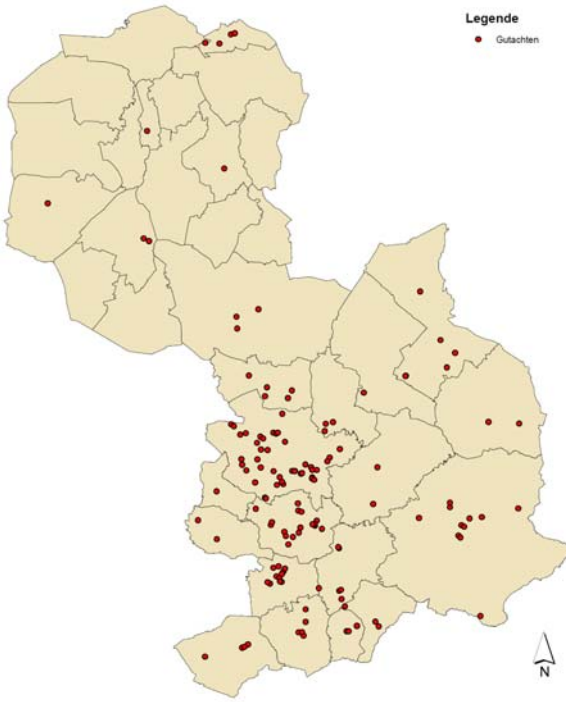


Figure 3. Geographical distribution of used expertises in the region of Osnabrück.

The important attributes of the sample are presented in Table 2. The extend of the sampel is shown by the parameters valuation date, building year, area, standard land value, and market adjustment in its minimum, maximum and mean expand.

Table 2

Summary of the sample

	min	max	mean
valuation date	Jun 94	Jul 09	Feb 06
building year	1915	2003	1967
area	166	2636	782
standard land value	12	360	108
market adjustment	0,5	1	0,73

132 expertises have a regional factor of 0.89 and in 8 expertises the regional factor of 0.80 is used. Unfortunately, there is an unequal distribution within the expertises over the region Osnabrück.

3.2. New statistical approach to deduce regional factors

As mentioned before, the present methods for deducing an appropriate regional factor are based on expert opinion concerning construction costs of model buildings as well as general data given by the Federal Statistical Office of Germany. The following, alternative method is based on expertise's data and on the investigation of the interconnections between the factors of cost approach with aim of better knowledge of interaction. The main advantage is that the regional factors are deduced from the expertise's data and thus from the real estate market, contrary to the methods described yet. A second advantage is a statistically accurate derivation of regional factors.

In the statistical data analysis the major task is to identify empirically the dependences and interconnections between the attributes of an object in order to be able to estimate an applicable conclusion on the strength of interconnection. The classical statistical analysis concerning valuation approaches is the regression analysis which allows the modeling and analysis of several variables, in case the focus is on the relationship between a dependent variable and one or more independent variables. More specifically, the regression analysis shows the functional relationship between the variables. In contrast to this, the correlation analysis allows the determination of statistical relationships between two or more random variables or observed data values. Correlations are useful because they can indicate a predictive relationship that can be exploited in practice. For this reason the correlation analysis shall be used to determine the interconnections in regard to the variables used in cost approach. The real value in cost approach is given by

$$VW = \left[\left(BGF \times KKW \times BNK \times RF \times BPI\right) - AWM + SB + AUA - BMBS - BSWU + BW\right] \times MA \tag{2}$$

with *VW = real value*
KKW = standard construction costs
BNK = ancillary construction costs
RF = regional factor
BPI = construction cost index
BGF = gross floor area
AWM = depreciation due to age
SB = other installations
AUA = outdoor installations
BMBS = construction deficiencies
BSWU = other value-affecting circumstances
BW = land value
MA = adjustment to current market value

In general the methods of statistical analysis imply knowledge about the distribution of the variables. As far as real estate valuation is concerned, standard Normal distribution of the components cannot be assumed. As a general rule, the factors are transformed in a standard normal distribution, so that a regression analysis could be applied. Therefore, it is necessary to define the appropriate distribution of the individual components. The correlation analysis allows the determination of the interconnections between the variables by using different types of correlation coefficients, which measure the degree of correlation. The most

common method is the Pearson correlation coefficient (Joachim Hartung/Bärbel Elpelt 2007, S. 145), which is mainly sensitive to a linear relationship between two variables. The Pearson correlation coefficient is used mostly in case of normal distribution. Other coefficients such as Spearman's rank correlation coefficient have been developed to be more robust than the Pearson correlation, or more sensitive to nonlinear relationships. Rank correlation coefficients are regarded as alternatives to Pearson's correlation coefficient, which can be used in case that Non-Gaussianity in distributions is presumed.

In order to dispose the proper correlation coefficient it is necessary to analyze the distribution of the components of cost approach based on expertise's data as a preparatory step. Because the use of Spearman's rank correlation coefficient does not require any knowledge about the distribution of the variables (Joachim Hartung/Bärbel Elpelt 2007, p. 191) the components merely have to be tested for normal distribution and thus the possibility of using Pearson's correlation coefficient.

For this purpose the Kolmogorov-Smirnov-Test (KS-Test) (JEAN DICKINSON GIBBONS/SUBHABRATA CHAKRABORTI 2003, p. 111 f.) is used. The KS-Test is a form of minimum distance estimation used to compare a data set with a reference probability distribution. The test quantifies a distance between the empirical distribution function of the data set and the cumulative distribution function of the reference distribution. By modifying the KS-Test it can serve as a goodness of fit test. In the case of testing for normality of the distribution, the samples are standardized and compared with a standard normal distribution. The null hypothesis is given by

$$H_0: F(\mathbf{X}) = F_0(\mathbf{X}) \tag{3}$$

and states, that the random variable X is drawn from the reference distribution (which in this case equates standard normal distribution). With acceptance of the alternative hypothesis

$$H_a: F(\mathbf{X}) \neq F_0(\mathbf{X}) \tag{4}$$

the consistency of empiric and theoretical distribution has to be rejected. The KS-Test uses the maximum difference over all X values as its test statistic. Mathematically, this can be written as

$$d = \max | H_b(x_i) - H_e(x_i) | \tag{5}$$

where $H_b(x_i)$ is the proportion of X values less or equal to x_i and $H_e(x_i)$ is the standard normal cumulative distribution function evaluated at x_i with x_i describing the implementation of the random variable. The test size is compared to a critical value which can be calculated to

$$d_\alpha = \frac{1{,}36}{\sqrt{n}} = \frac{1{,}36}{\sqrt{140}} = 0{,}1149 \tag{6}$$

with a level of significance $\alpha = 5\%$. Table 3 shows the results of the KS-Test

(left). For the components of gross floor area, depreciation due to age as well as adjustment to current market value normal distribution can be accepted. However, the other components like the regional factor, standard construction costs, construction cost index, other installations, outdoor installations, construction deficiencies, other value-affecting circumstances as well as the land value have unknown distributions.

Table 3

Results of the KS-Test with original expertise's data (left) und modified expertise's data (right)

	d	d_c
BGF	0,0661	0,1149
KKW	0,1368	0,1149
RF	0,3970	0,1149
BPI	0,2686	0,1149
AWM	0,0551	0,1149
SB	0,2819	0,1149
AUA	0,2324	0,1149
BMBS	0,1768	0,1149
BSWU	0,4776	0,1149
BW	0,1211	0,1149
MA	0,0879	0,1149

	d	d_c
BGF	0,0661	0,1149
KKW	0,1433	0,1149
RF	0,0741	0,1149
BPI	0,2684	0,1149
AWM	0,0551	0,1149
SB	0,2819	0,1149
AUA	0,2324	0,1149
BMBS	0,1768	0,1149
BSWU	0,4776	0,1149
BW	0,1263	0,1149
MA	0,0879	0,1149

As we see from the above table that the alternative hypothesis of the KS-Test is rejected in most cases. Thus Pearson's correlation coefficient cannot be used. In order to determine the correlation between the components of cost approach, Spearman's rank correlation coefficient can be used.

Spearman's rank correlation coefficient r^S is a non-parametric measure of correlation (JOACHIM HARTUNG/BÄRBEL ELPELT 2007, S. 191). It assesses how well an arbitrary monotonic function could describe the relationship between two variables, without making any other assumptions about the particular nature of the relationship between the variables. The realizations $x_1 \dots x_n$ respectively $y_1 \dots y_n$ of the influencing factors given by expertise's data are converted to ranks. The ranks $R(x_i)$ respectively $R(y_i)$ have to be given consistently in ascending or descending order. Afterwards the correlation coefficient r^S can be calculated by

$$r^s = \frac{\sum_{i=1}^{n}\left(R(x_i)-\overline{R}(x)\right)\left(R(y_i)-\overline{R}(y)\right)}{\sqrt{\sum_{i=1}^{n}\left(R(x_i)-\overline{R}(x)\right)^2\sum_{i=1}^{n}\left(R(y_i)-\overline{R}(y)\right)^2}} \tag{7}$$

$$= 1-\frac{6\sum_{i=1}^{n}\left(R(x_i)-R(y_i)\right)^2}{n\left(n^2-1\right)} \tag{8}$$

$$= 1 - \frac{6\sum_{i=1}^{n} d_i^2}{n\left(n^2-1\right)} \qquad \text{with } d_i = R(x_i) - R(y_i) \text{ and } n = 140. \tag{9}$$

If tied ranks exist, a modified formula has to be used. Tied ranks are the result of the same value for several realizations. The same rank as an average of their positions has to be assigned to each of the equal values. In the case under consideration tied ranks are included. For this reason the correlation coefficient is calculated by

$$r^s = \frac{n\left(n^2-1\right) - 6\sum_{i=1}^{n} d_i^2 - \frac{1}{2}\left(D_1 + D_2\right)}{\sqrt{\left(n\left(n^2-1\right) - D_1\right)\left(n\left(n^2-1\right) - D_2\right)}} \tag{10}$$

$$\text{where} \quad D_j = \sum_{k=1}^{p_j}\left(d_{jk}^3 - d_{jk}\right) \qquad \text{for } j = 1, 2 \tag{11}$$

$$d_i = R(x_i) - R(y_i) \qquad \text{for } i = 1, \ldots, n \tag{12}$$

The result, a symmetric matrix, is shown in Table 4. The correlation coefficients of the regional factor are marked in red.

The results reveal that the regional factor shows in particular a high correlation to the land value (23 %) as well as to the adjustment to current market value (15 %). Other dependence exists to the depreciation due to age (11%), to the other installations (11%) and to the other value-affecting circumstances (-10 %). The regional factor therefore cannot be derived statistically accurately from the available data, because it shows a high correlation with regard to the remaining components. In particular the dependence to the adjustment to current market, which includes the uncertainties of the regional factor as described, has to be minimized in order to deduce a significantly factor.

Table 4

Spearman's correlation coefficients based on original data from expertise's information

	BGF	KKW	RF	BPI	AWM	SB	AUA	BMBS	BSWU	BW	MA
BGF	1	-0,10	-0,08	0,05	-0,01	0,12	0,34	0,10	-0,01	0,27	-0,44
KKW	-0,10	1	-0,03	-0,08	-0,73	0,05	0,24	-0,37	-0,08	-0,13	-0,10
RF	-0,08	-0,03	1	-0,02	-0,11	0,11	-0,07	0,07	-0,10	0,23	0,15
BPI	0,05	-0,08	-0,02	1	0,14	0,10	-0,12	0,20	0,17	-0,01	-0,36
AWM	-0,01	-0,73	-0,11	0,14	1	0,01	-0,27	0,37	0,11	0,09	0,05
SB	0,12	0,05	0,11	0,10	0,01	1	0,12	-0,05	0,21	0,08	-0,27
AUA	0,34	0,24	-0,07	-0,12	-0,27	0,12	1	-0,22	-0,07	0,26	-0,15
BMBS	0,10	-0,37	0,07	0,20	0,37	-0,05	-0,22	1	0,10	0,16	-0,01
BSWU	-0,01	-0,08	-0,10	0,17	0,11	0,21	-0,07	0,10	1	-0,03	-0,13
BW	0,27	-0,13	0,23	-0,01	0,09	0,08	0,26	0,16	-0,03	1	0,10
MA	-0,44	-0,10	0,15	-0,36	0,05	-0,27	-0,15	-0,01	-0,13	0,10	1

In the following the expertise's data is used to deduce the regional factor based

on the production costs which have been determined by the committee of valuation experts. Production costs are the values which the valuation experts have ascertained as actual costs for the establishment of the assessment object. We assume that the construction costs given in expertise's data correspond to the values that approximate the true values optimally. The construction cost in cost approach can be calculated by means of formula (13) and (14).

$$HW = BGF \times HK \tag{13}$$

$$HK = KKW \times RF \times BPI \times BNK \tag{14}$$

with HW = value of construction (whole building)

HK = production costs

The sample of expertise's data is based on the modification of the standard construction costs (KKW) because valuation experts consider local differences to the German-wide mean costs given in the tables of the NHK 2000. This means, that the construction costs are not calculated only by using the regional factor but by accessorily modifying the standard construction costs. By this way, local differences are given by the regional factor of 0.80 respectively 0.89. This difference has to be determined in order to be able to deduce an appropriate Regional Factor. In formula (14) ancillary construction costs state a fix parameter, the factor consistently amounts to 16 %. The construction cost index can also be considered as known and is calculated by the Federal State Office of Germany. The modified value of KKW used in the expertise's date can be replaced by the true value from NHK 2000. Finally, the production costs are assumed to represent the true value as described above. With these presumptions in formula (15) the regional factor is calculated, which actually is used in the expertise's data:

$$RF = \frac{HK}{KKW \times BPI \times BNK} \quad . \tag{15}$$

With the regional factors calculated by this way the components "modified KKW" and "regional factor" can be substituted in the expertise's data with the effective values without modifying the real market value inadmissibly. The components are examined once more by means of the KS-Test. The result is shown in Table 3 (right) and besides the three components, which already disposed of normal distribution after the first test, now the regional factor disposes of normal distribution as well. Since the other components, which were not used to calculate a new regional factor after formula (15), still have non-normal distributions another correlation analysis is computed based on Spearman's r^S. The resulting matrix is shown in Table 5.

Table 5

Spearman's rank correlation coefficients based on new regional factor

	BGF	KKW	RF	BPI	AWM	SB	AUA	BMBS	BSWU	BW	MA
BGF	1	-0,06	-0,20	0,05	-0,01	0,12	0,34	0,10	-0,01	0,27	-0,44
KKW	-0,06	1	-0,19	-0,14	-0,82	0,03	0,21	-0,42	-0,06	-0,11	-0,06
RF	-0,20	-0,19	1	0,09	0,09	0,02	-0,02	0,08	-0,06	-0,03	0,01
BPI	0,05	-0,14	0,09	1	0,14	0,10	-0,12	0,20	0,17	0,00	-0,36
AWM	-0,01	-0,82	0,09	0,14	1	0,01	-0,27	0,37	0,11	0,10	0,05
SB	0,12	0,03	0,02	0,10	0,01	1	0,12	-0,05	0,21	0,07	-0,27
AUA	0,34	0,21	-0,02	-0,12	-0,27	0,12	1	-0,22	-0,07	0,25	-0,15
BMBS	0,10	-0,42	0,08	0,20	0,37	-0,05	-0,22	1	0,10	0,16	-0,01
BSWU	-0,01	-0,06	-0,06	0,17	0,11	0,21	-0,07	0,10	1	-0,03	-0,13
BW	0,27	-0,11	-0,03	0,00	0,10	0,07	0,25	0,16	-0,03	1	0,10
MA	-0,44	-0,06	0,01	-0,36	0,05	-0,27	-0,15	-0,01	-0,13	0,10	1

The correlations of the regional factor with other components have changed significantly by the new way of calculation. The previous high correlations to the land value and to the adjustment to the current market value decreased to -3 % and 1 %, respectively. Also the dependence to depreciation due to age, other installations as well as other value-affecting circumstances decreased to less than 10 %. In comparison to the calculations based on the original data the correlation between the regional factor and gross floor area as well as construction costs increased on approximately -20 % in each case. Figure 4 illustrates the different correlation coefficients graphically.

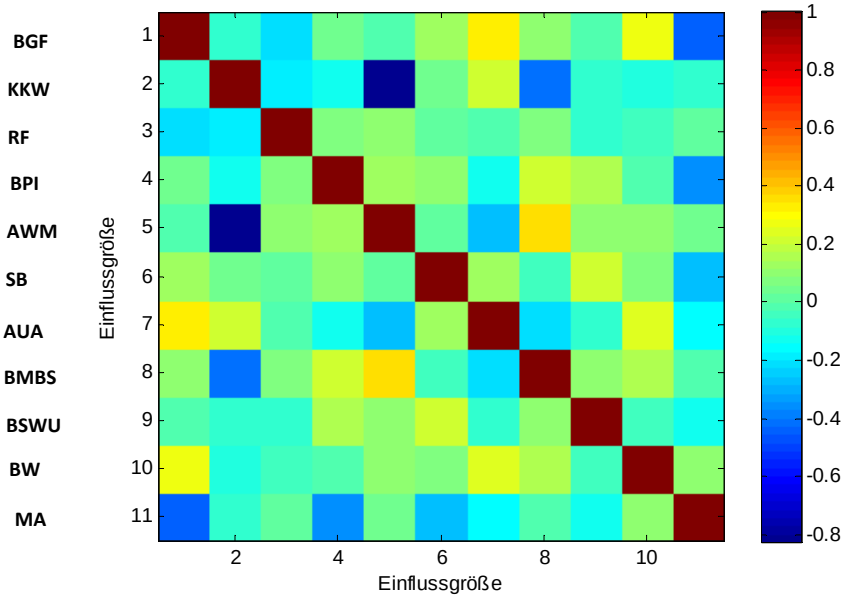


Figure 4. Graphic of Spearman's rank correlation coefficients.

The proof of the independence and thus the deduction of a regional factor whose derivation is adjusted to the influence of the remaining components in cost

approach is given by a statistical test, which is performed with the Statistical Toolbox of the commercial Software Matlab (MATLAB 2007).

Table 6 shows the result of the test, whereas the Figure 5 charts the test values. The significant values below the level of 0.05 are shown in blue, the not significant values in green. The test confirms that a correlation of the regional factor is merely given between gross floor area and the construction cost; the remaining components do not have any dependence. The appearing dependence is to be led back on the functional connection in the calculation of the regional factor to formula (15). As these two components are used to calculate the new regional factor, the dependence can be neglected at this point.

Table 6

P-values of Spearman's correlation coefficients based on modified data

	BGF	KKW	RF	BPI	AWM	SB	AUA	BMBS	BSWU	BW	MA
BGF	0	0,463	0,019	0,596	0,934	0,149	0,000	0,221	0,920	0,002	0,000
KKW	0,463	0	0,025	0,107	0,000	0,704	0,014	0,000	0,518	0,216	0,480
RF	0,019	0,025	0	0,304	0,301	0,831	0,787	0,328	0,483	0,755	0,865
BPI	0,596	0,107	0,304	0	0,090	0,241	0,153	0,015	0,050	0,975	0,000
AWM	0,934	0,000	0,301	0,090	0	0,878	0,001	0,000	0,204	0,254	0,533
SB	0,149	0,704	0,831	0,241	0,878	0	0,157	0,539	0,012	0,427	0,001
AUA	0,000	0,014	0,787	0,153	0,001	0,157	0	0,010	0,414	0,003	0,074
BMBS	0,221	0,000	0,328	0,015	0,000	0,539	0,010	0	0,248	0,067	0,942
BSWU	0,920	0,518	0,483	0,050	0,204	0,012	0,414	0,248	0	0,734	0,115
BW	0,002	0,216	0,755	0,975	0,254	0,427	0,003	0,067	0,734	0	0,233
MA	0,000	0,480	0,865	0,000	0,533	0,001	0,074	0,942	0,115	0,233	0

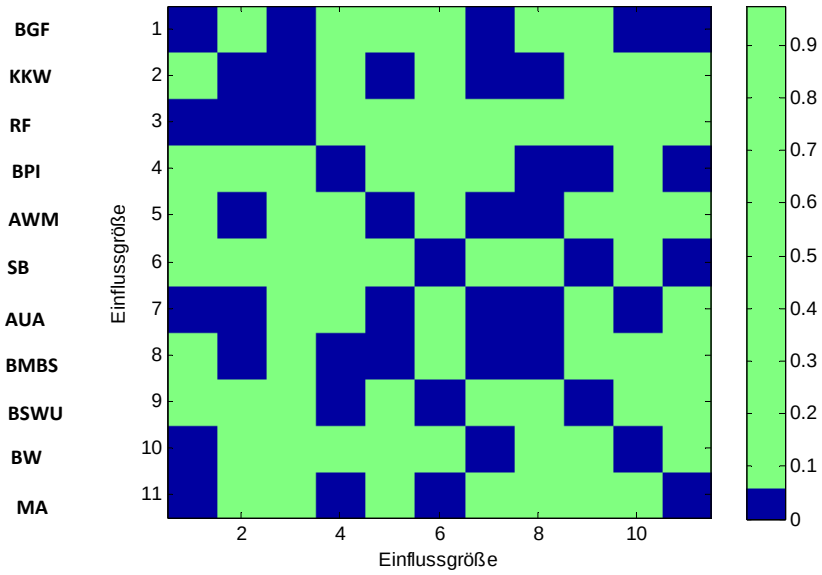


Figure 5. P-values of Spearman's correlation coefficients based on modified data.

As a result of the correlation analysis the indicated approach to deduce regional

factors for the administrative district and the city of Osnabrück from expertise's data can be confirmed as a statistically accurate method.

3.3. Method for regenerating of the boundary of region with common regional factors

The method natural neighborhood was used for the computation of the region factors like it is described for the computation of regional factors from Destatis-Data. As result, area wide region factors could be interpolated like Figure 6 shows. Because of the heterogeneous geographical distribution of the expertises, no data in the outskirts exists. It is disclaimed to extrapolate the data.

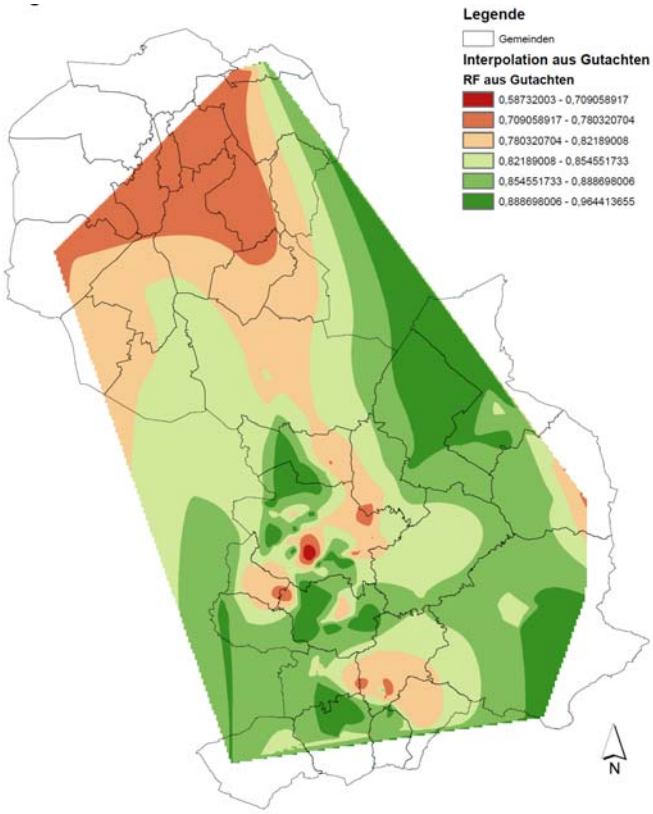


Figure 6. Interpolation of the regional factors based on expertises.

The southern part of the region of Osnabrück is stamped by a high regional factor level. The north shows only a lower level. This trend corresponds to the computation based on Destatis-Data. Both interpolations are shown in ArcInfo together to generate the boundary between the two levels. Both interpolation results were computed by the method of natural interruptions with an even

number of classes (six). Figure shows the mid-points of classes as contour-line in blue and green. The southern part has a high regional factor level. This conclusion is based on the computation by expertises, because of the existing high number of expertises. Only a few parts have a lower level, which bases on only few expertises and do not cover a whole region.

The northern part has a lower regional factor level. This conclusion is based on computation by Destatis-data, because of missing number of expertises, which could properly support this conclusion. Finally, the real case is to find the boundary between the indisputable northern and southern part. The municipalities Bramsche (B) and Neuenkirchen (N) are especially under consideration.

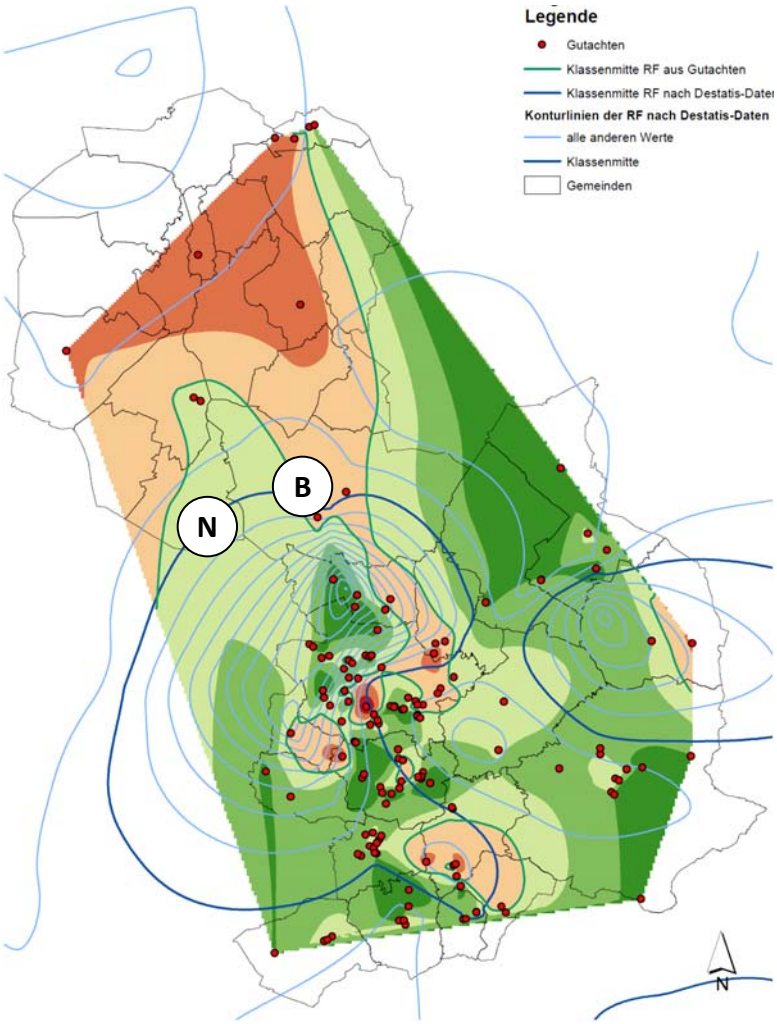


Figure 7. Presentation of the mid-points of classes of the interpolated regional factors based on Destatis- and expertises data (color code see Figure).

The data from the expertises could not be used as the decisive factor because of the low number of expertises. According to the Destatis-data, Neuenkirchen is taken to the northern part and lower level. Only a lesser part of the municipality lies in the higher level. Based on its geographical locality, Neuenkirchen could be compared with the northern municipalities (see spatial structures of BBSR as periphery area with a low density shown in Figure 8). On the contrary, Bramsche could be compared with southern part (see spatial structures of BBSR as interspace with beginning density shown in Figure 8) and one part of the municipality lies in a higher level of regional factor based on Destatis-data. As result of this demarcation, the area of regional factors is presented in Figure 9.

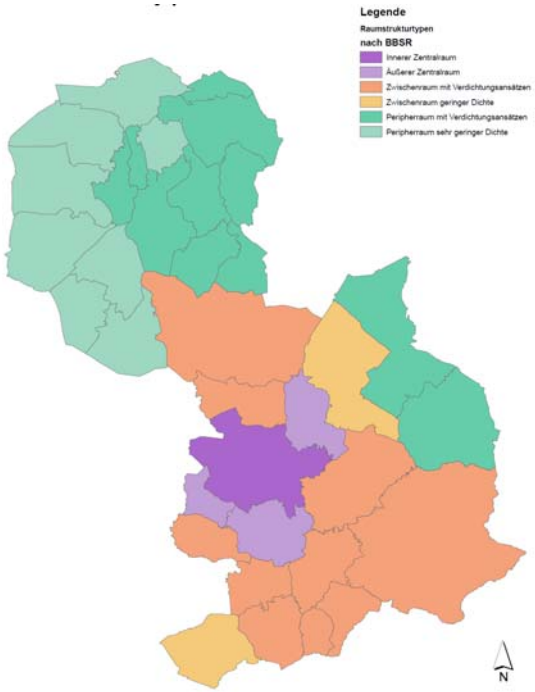


Figure 8. Spatial structures according to (BBSR 2009).

4. Conclusion and Perspectives

The regional factors ascertained by means of the introduced method for both regions (see Figure 9) are used for a final evaluation by replacing the regional factor originally used in the sample of expertise's data. In addition the standard construction costs modified by the valuation experts are substituted with the values strictly interpolated after NHK 2000. In order to confirm the independence another correlation analysis is computed. The result is shown in Table 7. The correlation between the regional factor and the adjustment to the current market

increased up to 10%, between regional factor and land value up to 23%. The remaining correlations approximately correspond to those which have been calculated by use of the original regional factors 0.80 or 0.89 (see Table 4).

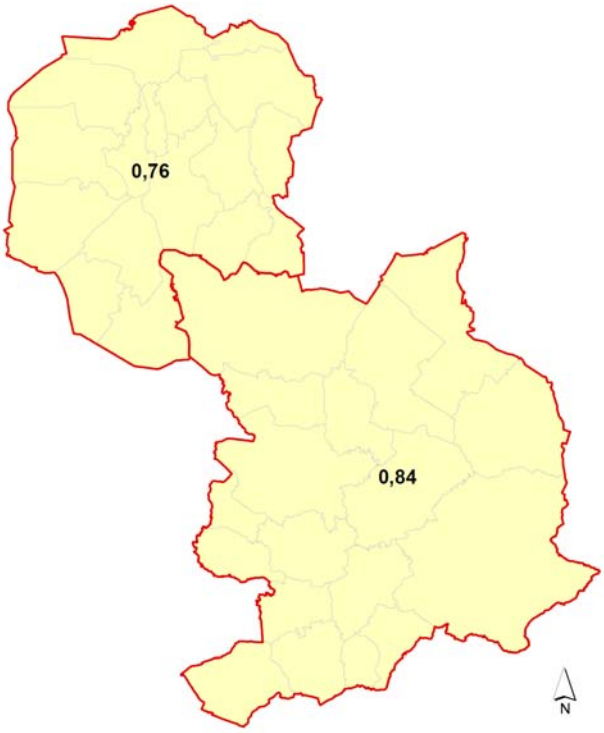


Figure 9. Regional factors based on expertises

Nevertheless, the test of significance (see Table 8) confirms the assumption that the adjustment to current market does not link to the regional factor. The test approves that the land value is the only component which relates to the regional factor. This dependence can be interpreted by the fact that in regions with high land value basically also high-valued buildings with averaged higher production costs are built. The dependence defines the regional factors as they are ascertained by the introduced method.

The theoretical market values which are calculated at basis of the new regional factors and the not modified standard construction costs allow a comparison to the original market from the expertise's. Figure 10 shows the differences between the values in a proportional relation. It is to be recognised that the prevailing divergences lie in the borders of 5% (75% of the certificates, 105 absolutely), furthermore in the borders of 10% (21%, 29).

Beyond these borders only six expertise's lie with an overall part of 4%. The shares of the divergences are shown in Figure 11. The main result is that the

ascertained regional factors in connection with the interpolated standard construction costs after NHK 2000 enable an appraisal of market values derived from the real estate market which dispose of an accuracy given by the originally ascertained market values. Therefore the original regional factors can be substituted. This step has the advantage of the independence of the regional factors of the remaining components as well as the use of the actual standard construction costs and not merely those of the modified ones.

Table 7

Spearman's rank correlation coefficients based on new regional factors

	BGF	KKW	RF	BPI	AWM	SB	AUA	BMBS	BSWU	BW	MA
BGF	1	-0,06	-0,08	0,05	-0,01	0,12	0,34	0,10	-0,01	0,27	-0,44
KKW	-0,06	1	0,06	-0,14	-0,82	0,03	0,21	-0,42	-0,06	-0,11	-0,12
RF	-0,08	0,06	1	-0,02	-0,11	0,11	-0,07	0,07	-0,10	0,23	0,10
BPI	0,05	-0,14	-0,02	1	0,14	0,10	-0,12	0,20	0,17	0,00	-0,33
AWM	-0,01	-0,82	-0,11	0,14	1	0,01	-0,27	0,37	0,11	0,10	0,09
SB	0,12	0,03	0,11	0,10	0,01	1	0,12	-0,05	0,21	0,07	-0,28
AUA	0,34	0,21	-0,07	-0,12	-0,27	0,12	1	-0,22	-0,07	0,25	-0,15
BMBS	0,10	-0,42	0,07	0,20	0,37	-0,05	-0,22	1	0,10	0,16	0,02
BSWU	-0,01	-0,06	-0,10	0,17	0,11	0,21	-0,07	0,10	1	-0,03	-0,14
BW	0,27	-0,11	0,23	0,00	0,10	0,07	0,25	0,16	-0,03	1	0,03
MA	-0,44	-0,12	0,10	-0,33	0,09	-0,28	-0,15	0,02	-0,14	0,03	1

Table 8

P-values of Spearman's correlation coefficients based on modified data

	BGF	KKW	RF	BPI	AWM	SB	AUA	BMBS	BSWU	BW	MA
BGF	0	0,463	0,356	0,596	0,934	0,149	0,000	0,221	0,920	0,002	0,000
KKW	0,463	0	0,459	0,107	0,000	0,704	0,014	0,000	0,518	0,216	0,161
RF	0,356	0,459	0	0,773	0,211	0,195	0,445	0,387	0,220	0,006	0,251
BPI	0,596	0,107	0,773	0	0,090	0,241	0,153	0,015	0,050	0,975	0,000
AWM	0,934	0,000	0,211	0,090	0	0,878	0,001	0,000	0,204	0,254	0,303
SB	0,149	0,704	0,195	0,241	0,878	0	0,157	0,539	0,012	0,427	0,001
AUA	0,000	0,014	0,445	0,153	0,001	0,157	0	0,010	0,414	0,003	0,077
BMBS	0,221	0,000	0,387	0,015	0,000	0,539	0,010	0	0,248	0,067	0,784
BSWU	0,920	0,518	0,220	0,050	0,204	0,012	0,414	0,248	0	0,734	0,111
BW	0,002	0,216	0,006	0,975	0,254	0,427	0,003	0,067	0,734	0	0,688
MA	0,000	0,161	0,251	0,000	0,303	0,001	0,077	0,784	0,111	0,688	0

The introduced method of the correlation analysis allows the derivation of statistically secure regional factors on basis of a sample of expertise's data which represent the market events in the administrative district and in the city of Osnabrück. The question, whether the method can also be applied in other regions has to be answered by evaluating expertise's data in these regions. For this purpose another 160 expertise's data from the committee of valuation experts in Oldenburg will be analysed by means of the method introduced in this article.

The present data of the committee of valuation experts Osnabrück allow the determination of the fact that according to the new calculation of the regional factors after formula (15) no more dependence arise between the components, apart from the already explained connections to the gross floor area and the standard construction costs. Nevertheless, this result depends on the region. It cannot be assumed, that in other samples and thus in other regions there are no

links between the components in cost approach. Correlations may still be given after the deduction of new regional factors. For this case a method will be developed which allows the adjustment of dependence to the remaining components by a partial decorrelation of the regional factor, so that as a result a universally valid method can be indicated for a derivation of a statistically provable regional factor.

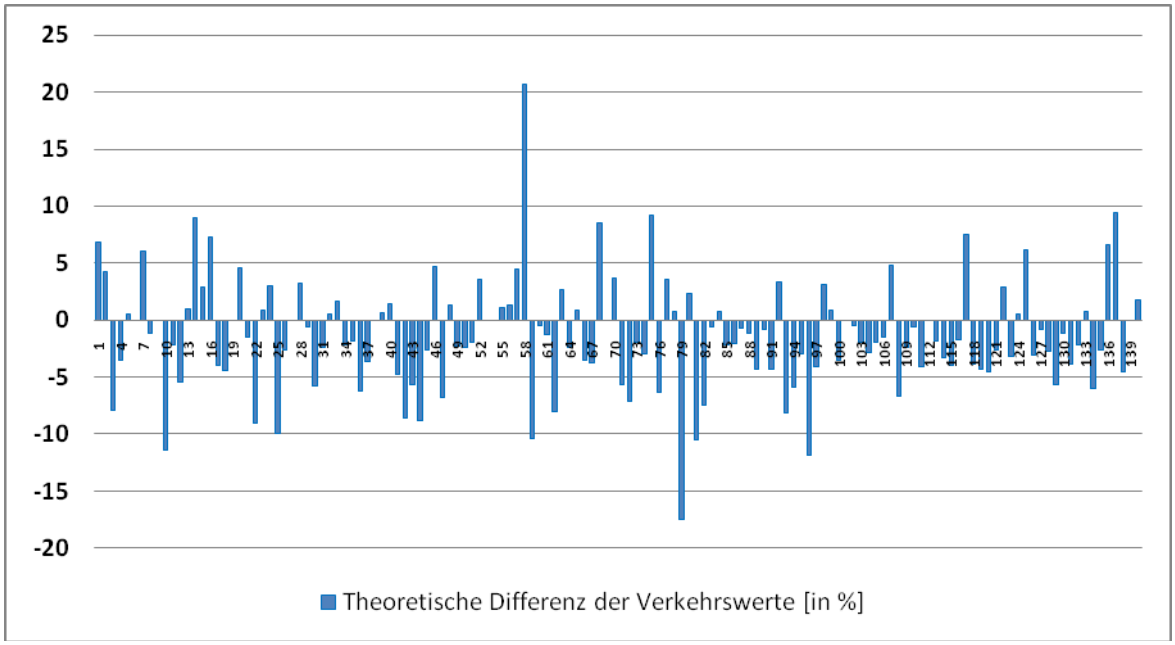


Figure 10. Difference between original market values and calculated market values based on new regional factor and standard construction costs.

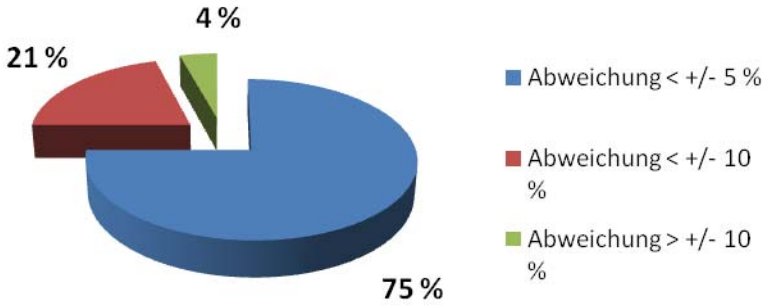


Figure 11. Divergence of calculated market values from original market values.

5. References

BBSR (2009): "Internetpräsenz". Bonn. URL: www.bbsr.bund.de (Stand: 19. November 2009).

IVSC (2003): IVS 1 – Market Value Basis of Valuation. International Valuation Standards, Sixth Edition. London: International Valuation Standards Committee.

Jean Dickinson Gibbons/Subhabrata Chakraborti (2003): Nonparametric Statistical Inference. Forth Edition, Revised and Expanded. Basel: Marcel Dekker AG.

Joachim Hartung/Bärbel Elpelt (2007): Multivariate Statistik: Lehr- und Handbuch der angewandten Statistik. 7. Aufl. München: Oldenbourg Wissenschaftsverlag GmbH.

Matlab (2007): Matlab Version 7.4.0.287 (R2007a), January 29, 2007.

Karl-Werner Schulte: Immobilienökonomie. 4. Auflage, München: Oldenbourg-Verlag, 2008.

David F. Watson (1999): Contouring. A guide to the analysis and display of spatial data ; (with programs on diskette). 4. impr. Oxford: Pergamon (= Computer methods in the geosciences; vol. 10).

Wolfgang Kleiber/Jürgen Simon/Gustav Weyers (2007): Verkehrswertermittlung von Grundstücken: Kommentar und Handbuch zur Ermittlung von Verkehrs-, Beleihungs-, Versicherungs- und Unternehmenswerten und Berücksichtigung der WertV und BauGB. 5. Aufl. Köln: Bundesanzeiger.

CHAPTER 4

CURRENT STATE OF THE NATIONAL LAND CADASTRE IN UKRAINE

CURRENT STATE OF THE NATIONAL LAND CADASTRE IN UKRAINE: PROBLEMS AND PROSPECTS

Pinchuk Oleksander, Terechshuk Oleksander
Chernihiv State Institute of Economics and Management in Chernihiv, Ukraine

Key words: *land cadaster, land management, land reform*

During almost 18 years of democratic power Ukraine is making for reforming economics based on market principles. Therefore, some urgent changes in land laws are needed. The first legislative act about land was considered to be the regulation of Verkhovna Rada under the title "About the land reform" on the 18-th of December 1990. The reallocation of lands with their further right of possession and use is seen as the foremost task. Another important thing is to create favorable conditions for resources conservation and protection, development of different forms of management and formation of mixed economy.

Today, Ukraine has made a big step by restoration of national land property to private ownership. This is mainly concerned with lands of agricultural purpose. Market turnover of lands between farmers and land users has already started. Although it is not yet perfect due to the existing moratorium on the transfer of lands belonging to holders of land shares for conducting commodity exchange economy. This procedure is not valid in case lands are subjected to inheritance or removal for some social needs.

In the course of such important processes as land denationalization and privatization it is of great necessity to set a legislative control of new land relationships. Land code of Ukraine, adopted by the Parliament on the 25-th of October 2002, fully met the aims indicated above. This fundamental law side by side with necessary legal norms of regulating land relationship strengthened legislative norms of land cadastre.

Content and methodological approaches of getting land-cadastral information were already executed and tested in Ukraine before the Independence proclamation. In order to switch over into secular data-based system of land cadastre the Cabinet of Ministers approved on the 12-th of January 1993 a decree "Regulations concerning procedure of the national land cadastre". It presupposes that the land cadastre is aimed at informing consumers not only about land (as it is stated in the Land code) but also about economic and legislative regimes of lands.

At the same time, for lack of financial and science-based support the government failed to make a division between lands of national and communal property (9,7%). Furthermore, the demarcation of population aggregates (64,3 %), lands of naturally-protected, health-improving and recreational functions has not

yet been completed. What is more, such lands of special appointment as defensive (15 %), areas of minerals (5 %) and also territories of a great scientific importance (7%) are not yet arranged.

Regulation of land and property relationships demands implementation of new approaches to registration of land ownerships and land use together with real estate objects located on certain territories.

In 1999 Verkhovna Rada of Ukraine did not approve a bill "About national land cadastre" that serves as a fundamental law for creating an automated guarantee system of land property. Though 80 % of bill regulations in course of 10 years have not changed, the governments did not pass this bill for lack of political will. The blocking processes of its adoption are continuing up to now. Due to the fact that there is no guarantee system of land property, our country does not receive a decent amount of investments.

Thus, according to property theory it is required to ensure the certification of property rights, its free turnover and guarantee system of land property. Unfortunately, none of these stated above obligatory conditions is executed in Ukraine in o proper way. Consequently, it might have a negative effect on the state's economy.

It is evident that the situation in the sphere of land cadastre and land protection is still very complicated. Urgent measures should be taken for its improvement. Today the most acute problems are:

1) absence of conception and state development programme of land relationships;
2) incompleteness of land laws (there are still 25 bills to be drafted and adopted), lack of guarantee system as regards to land property rights (automated system of land cadastre and registration of real estate rights are not established);
3) lack of perspective and strategic planning of land use and protection, inefficient state management of land resources and use;
4) underdevelopment of economic and legal property relationships. As a result, lands of agricultural appointment are concentrated in hands of one person;
5) imperfection of land laws and land market infrastructure, especially when it deals with agricultural lands;
6) absence of laws that are important for conducting national land cadastre and its automated system supposed to solve problems concerning guarantee of property rights.

According to results of the conducted research we could make the following conclusions:

1) It is necessary to improve the national management of land resources; to form legislative and regulatory basis regarding land use and functioning of land market.
2) Economic mechanism of regulating land relationships should be definitely

improved. It is mainly concerned with price regulation of land market turnover. We really need the improvement of land policy and permanent renovation of monetary land evaluation. It is necessary to implement an automated gross-up system for taxpayers and to fix price for land lease. Economic stimulation of sustainable land use and protection play a great role too. The government should impose sanctions for breach of the valid law in sphere of land relationships and use.

3) Updating of land cadastre system and monitoring is seen as the foremost task. It is required to inform landowners and land users about land's quality and fitness for use.
4) It is very important to create legal, social and economic mechanisms for effective realization of property rights on agricultural lands. According to the Constitution of Ukraine the government should complete the issue of the National documents concerning land property rights and demarcate lands that have different forms of ownership and use.

Literature:

МАРКОВ С.Ю. 2003. Загальносвітові тенденції розвитку кадастрової системию Землевпорядний вісник. № 1, с. 46-49.

Про внесення змін до Положення про порядок ведення державного земельного кадастру: Постанова Кабінету Міністрів України // земельні відносини в Україні: Законодавчі акти і нормативні документи / Держкомзем України. К.: Урожай 1998.

Теоретичні основи державного земельного кадастру: Навч. Посібник / М.Г. Ступень, Р.Й. Гулько, О.Я. Микула; за заг. ред. М.Г. Ступеня. – Львів: «Новий Світ -2000», 2006.

ТРЕТЯК А. М. 2009. Основи теорії землеустроєзнавства. Землевпорядний вісник. № 4, с. 25-30.

ТРЕТЯК А.М. 2009. Стратегія реформування земельної політики в Україні на сучасному етапі. Землевпорядний вісник. № 6, с. 12-21.

References

BATTIS, KRAUTZBERGER, LÖHR. 2009. *BauGB – Baugesetzbuch.* 11. Auflage, Verlag C. H. Beck. München.

BBSR. 2009. *Internetpräsenz.* Bonn. URL: www.bbsr.bund.de (Stand: 19. November 2009).

BEŁEJ M., WALACIK M. 2008. *Land acquisition for public purposes in Poland on example of public road construction".* FIG Working Week, Stockholm, Sweden.

Benson B. 2005. *The Mythologhy of Holout as a Justification for Eminent Domain and Public Provision of Roads*. In: *The Independent Review*, v. X, No 2, Fall.

BIENIEK G. 2008. *Ustawa o gospodarce nieruchomościami: komentarz*. Warszawa, Lexis Nexis.

Constitution of the Republic of Slovenia of 1991. Official Gazette of the Republic of Slovenia, No. 33/1991.

Constitution of the Socialist Republic of Slovenia of 1974. Centre for the self-managing normative activity / Center za samoupravno normativno dejavnost, Ljubljana.

Construction Land Act. 1997. Official Gazette of the Republic of Slovenia, No. 44/1997.

COPELAND T., KOLLER T., MURRIN J. 1997. *Wycena: mierzenie i kształtowanie wartości firm*. WIG Press, Warszawa.

DĄBEK J., 2009. *Urządzenia infrastruktury technicznej*. Materiały przygotowane na Warsztaty Zawodowe Rzeczoznawców Majątkowych, Lublin 2009;

DAVID F. WATSON. 1999. *Contouring. A guide to the analysis and display of spatial data*; (with programs on diskette). 4. impr. Oxford: Pergamon (= Computer methods in the geosciences; vol. 10).

DE WITT, KAMPE. 2008. *Enteignungsverfahren und Enteignungsentschädigung für Grundstücke*, Seminar des vhw.

Decree from 7 February 1919 on expropriation in favour od iron roads and other communication routes and other publuc utilitity facilities (in Polish). Dziennik praw Nr 192, poz. 162.

DESMOND G. M. 1977. *Valuing the Loss of Business Goodwill*. The Appraisal Journal, April, s. 193-202.

DUNSE N. A., HUTCHISON N., GOODACRE A. 2004. *Trade-related valuations and the treatment of goodwill*. Journal of Property Investment & Finance. Vol. 22, No 3.

ERNST, ZINKAHN, BIELENBERG, KRAUTZBERGER. 2009. *Kommentar BauGB.* Loseblattsammlung Band III, Verlag C. H. Beck. München.

Europejskie Standardy Wyceny 2009. 2009. PFSRM, Warszawa.

Experiences from Norwegian municipalities. Nordic Journal of Surveying and Real Estate research – special series. Volume 3: 2008, page 164-176, Helsinki, Finnish Society of Surveying Sciences.

Expropriation and Forced Transfer of Real Estate in Social Property Act / Zakon o razlastitvi in prisilnem prenosu nepremičnin v družbeni lasti. Official Gazette of the Socialist Republic of Slovenia, No. 5/1980.

FAO. 2008. *Compulsory land acquisition and Compensation*. FAO Land Tenure Studies No. 10, Rome.
FLEISCHER C.A. 1980. *Skjønnsprosessen*. 175 pages, Oslo, Universitetsforlaget.
Food and Agriculture Organisation of the United Nations (FAO). 2008. Compulsory acquisition of land and compensation. FAO Land Tenure Studies no 10, 56 pages, Rome, FAO.
GERARDY, MÖCKEL, TROFF. 2009. *Praxis der Grundstücksbewertung*, Loseblattsammlung. Verlag Moderne Industrie, Landsberg/Lech.
GRUSZECKI T. 2002. *Współczesne teorie przedsiębiorstwa*. PWN, Warszawa.
HABDAS M., KONOWALCZUK J., RAMIAN T. 2004. *Wycena przedsiębiorstwa jako nowy obszar działalności rzeczoznawców majątkowych*. Materiały XIV Krajowej Konferencji Rzeczoznawców Majątkowych w Rzeszowie, PFSRM.
HICKS J. R. 1975. *Wartość i kapitał*. PWN, Warszawa.
Higher Court of Koper. VSK/HCK order 1 Cp 963/2000.
Higher Court of Ljubljana. 2002. VSL/HCL order II Cp 720/2002.
Higher Court of Ljubljana. 2002. VSL/HCL order II Cp 720/2002.
Higher Court of Ljubljana. VSL/HCL order 1 Cp 983/2003.
IGNATOWICZ J. 1999. *Prawo rzeczowe*. PWN, Warszawa.
International Valuation Standards 2005. 2005. IVSC London.
IZDEBSKI H., KULESZA M. 2004. „*Administracja publiczna - zagadnienia ogólne*", Warszawa,
IVSC (2003): IVS 1 – Market Value Basis of Valuation. International Valuation Standards, Sixth Edition. London: International Valuation Standards Committee.
JAKI A. 2008. *Wycena i kształtowanie wartości przedsiębiorstwa*. Oficyna a Wolters Kluwer Business, Polska.
JAKIMOWICZ W. 2002. *Publiczne prawa podmiotowe*. Zakamycze.
JEAN DICKINSON GIBBONS/SUBHABRATA CHAKRABORTI. 2003. *Nonparametric Statistical Inference*. Forth Edition, Revised and Expanded. Basel: Marcel Dekker AG.
JOACHIM HARTUNG/BÄRBEL ELPELT. 2007. *Multivariate Statistik: Lehr- und Handbuch der angewandten Statistik*. 7. Aufl. München: Oldenbourg Wissenschaftsverlag GmbH.
KALBRO, LIND. 2007. *Compulsory Purchase – Reasonable and Fair Compensation*. Nordic Journal of Surveying and Real Estate Research, Vol. 4, Number 1, p. 7-22.
KARL-WERNER SCHULTE. *Immobilienökonomie*. 4. Auflage, München: Oldenbourg-Verlag, 2008.
KERTSCHER, VOSS. 2007. *Compulsory purchase and compensation according to the German Federal Building Code*. Seminar on Compulsory Purchase and Compensation in Land Acquisition and Takings, FIG Commission 9, September 6–8, Helsinki.
KLEIBER, SIMON. 2007. *Verkehrswertermittlung von Grundstücken*. 5. Auflage, Bundesanzeiger Verlag. Köln.

KONOWALCZUK J. 2004. *Funkcje i klasyfikacja nieruchomości. W: Inwestycje na rynku nieruchomości*. Red. H. Henzel, Wydawnictwo Akademii Ekonomicznej w Katowicach, Katowice.

KORSVOLLA K., SEVATDAL H., STEINSHOLT H. 2001. *Eiendomsforhold og næringsutvikling i utmark*. ILP serie B 1/2001, 131 pages, Ås, Norwegian University of Life Sciences.

KUCHARSKA-STASIAK E. 2004. *Nieruchomość a rynek*. Wydawnictwo Naukowe PWN, Warszawa.

LANG. J. 1997. *Pojęcie interesu publicznego w administracji, w: Przeobrażenia we współczesnym prawie administracyjnym*. red. A. Błaś, Przegląd Prawa w Administracji

LID O. 1977. *Oreigning av fast eigedom*. 119 pages, Ås, Norwegian University of Life Sciences.

MALINOWSKA U. 2001. *Wycena przedsiębiorstwa w warunkach polskich*. Difin, Warszawa.

МАРКОВ С.Ю. 2003. Загальносвітові тенденції розвитку кадастрової системию Землевпорядний вісник. № 1, с. 46-49.

Matlab. 2007. Matlab Version 7.4.0.287 (R2007a), January 29, 2007.

MCNALLY B. 2004. *Quantifying a Loss on a Business Expropriation or a Permanent Impairment of Value Relating to a Public Work*. Alberta Expropriation Association Annual Conference.

MEYER-KLENK: *Der Gewerbebetrieb im Sanierungsgebiet – entschädigungs- und steuerrechtliche Fragen.* Sanierungszeitung Magistrat Frankfurt am Main.

Międzynarodowe Standardy Sprawozdawczości Finansowej (MSSF). 2004. IASCF Londyn, Wydanie polskie.

MIK. C. 1993. *Prawo własności w europejskiej konwencji praw człowieka*. Pip, nr 5,s. 25.

NELSON C. 2008. *Leasehold Land Compensation – A Comparison of the Compensation Principles in Hong Kong and Australia*. Journal of Property Tax Assessment & Administration. Volume 5, Issue 4.

PLAHUTNIK B. 2005. *Price analysis of purchased land within the area of the land use plan of the highway in the section of Šentvid – Koseze / Analiza cen odkupljenih zemljišč v območju lokacijskega načrta avtoceste na odseku Šentvid – Koseze*. University of Ljubljana, Faculty of Civil and Geodetic Engineering, Ljubljana.

Про внесення змін до Положення про порядок ведення державного земельного кадастру: Постанова Кабінету Міністрів України // земельні відносини в Україні: Законодавчі акти і нормативні документи / Держкомзем України. К.: Урожай 1998.

PRATT S. P., REILLY R. F., SCHWAICHS R. P. 1996. *Valuing a Business. The Analysis and Appraisal of Closely Held Companies*. Irwin Professional Publishing, Chicago.

Protocol No. 1 to the Convention on the protection of human rights and basic freedoms. 1994. Official Gazette of the Republic of Slovenia, No. 7/1994.

RAMIAN T., KONOWALCZUK J. 2009. *Strategie nieruchomościowe przedsiębiorstw. W: Strategie inwestowania na rynku nieruchomości*. Red. H. Henzel. Wydawnictwo

Akademii Ekonomicznej w Katowicach.
Republic of Slovenia, Constitutional Court. 2000. Up-423/00, http://www.us-rs.si/ of 1.8.2009.
Republic of Slovenia, Constitutional Court. 2009. Report on the work done by the Constitutional Court in 2008 / Poročilo o delu ustavnega sodišča za leto 2008. http://www.us-rs.si/ of 1.8.2009.
RÖDENBECK. 2001. *Wertermittlung bei der Enteignung, Wertminderung des Restgrundstückes*. Seminarunterlagen Fortbildung der nds. Gutachterausschüsse.
RUZYZKA-SCHWOB. 2009. *Bewertung und Entschädigung von Flächen des öffentlichen Bedarfs.* Seminarunterlagen TAW 25.03. Wuppertal.
SIMON REINHOLD. *Wertermittlung von Grundstücken – Aufgaben und Lösungen zur Verkehrswertermittlung*. Verlag Luchterhand.
SKUBIC M. 2008. T*he enigmas of the expropriation procedure under the Spatial Planning Act (ZUreP-1) / Zagonetke postopka razlastitve po Zakonu o urejanju prostora (ZUreP-1)*. Legal Practice / Pravna praksa, No. 41/2008.
Spatial Planning Act. 2002. Official Gazette of the Republic of Slovenia. No. 110/2002.
Statens offentliga utredningar (Official Swedish Report). 2008. SOU 2008:99, 510 pages,Stockholm, Fritzes kundtjänst.
Statens Vegvesen (Norwegian Road Authority). 1991. Ikke uten grunn, Oslo, Norwegian Road Authority.
STEINSHOLT H. 2008. *Land acquisition and expropriation performed decentralized: Stordrange and Lyngholt*. 2000.
STROTKAMP. 2003. *Bewertung von Gemeinbedarfsgrundstücken – Bewertungsfälle und Lösungsansätze*. FuB 6.
ŠTURM et al. 2002. *Commentary to the Constitution of the Republic of Slovenia / Komentar Ustave Republike Slovenije*. Faculty of Postgraduate National and European Studies / Fakulteta za podiplomske državne in evropske študije, ISBN 9981-238-053-8, pp. 1247.
ŠUBIC KOVAČ M. 1998a. *Building land acquisition and valuation in Slovenia*. Construction Journal / *Gradbeni vestnik,* No. 5/6/7/1998.
ŠUBIC KOVAČ M. 1998b. *Dilemmas of real estate market valuation in Slovenia / Dileme tržnega vrednotenja nepremičnin v Sloveniji*. Geodetic Journal / *Geodetski vestnik*, No. 3/1998.
SZPUNAR A. 1998. *Odszkodowanie za szkodę majątkową. Szkoda na mieniu i osobie.* Oficyna Wydawnicza Brandta, Bydgoszcz.
Теоретичні основи державного земельного кадастру: Навч. Посібник / М.Г. Ступень, Р.Й. Гулько, О.Я. Микула; за заг. ред. М.Г. Ступеня. – Львів: «Новий Світ -2000», 2006.
TERŠEK A. 2008. *Arguments on the counter-constitutional issues in the Spatial Planning Act (ZUreP-1) / Argumenti o protiustavnostih v Zakonu o urejanju prostora (ZUreP-1)*. Legal Practice / Pravna praksa, No. 37/2008.
The capital and rental valuation of restaurants, bars, public houses and nightclubs. 2006.

Valuation Information Paper No. 2: 2nd edition RICS Business Services Ltd, Reading.
ТРЕТЯК А. М. 2009. Основи теорії землеустроєзнавства. Землевпорядний вісник. № 4, с. 25-30.
ТРЕТЯК А.М. 2009. Стратегія реформування земельної політики в Україні на сучасному етапі. Землевпорядний вісник. № 6, с. 12-21.
TROUT R. R. 2000. *Valuing Business Goodwill Loss in Eminent Domain Cases*. The Appraisal Journal, April, s.171-179.
WILLS P.C. 2008. *Corporate real estate practice in Australia*. Journal of Real Estate, Vol.10, No 1.
WŁODYKA S. 2000. *Strategiczne umowy przedsiębiorców*. C.H. BECK, Warszawa.
WOLFGANG KLEIBER/JÜRGEN SIMON/GUSTAV WEYERS. 2007. *Verkehrswertermittlung von Grundstücken: Kommentar und Handbuch zur Ermittlung von Verkehrs-, Beleihungs-, Versicherungs- und Unternehmenswerten und Berücksichtigung der WertV und BauGB*. 5. Aufl. Köln: Bundesanzeiger.
WOŚ T. 1998. *Wywłaszczenie i zwrot nieruchomości*. PWN, Warszawa.
WRIGHT, R.W., GITELMAN, M. 2000. *Land Use in a nut shell*. 4th ed., West Group, St.Paul, Minn.
ZARZECKI D. 2000. *Metody wyceny przedsiębiorstw. Zarys teorii i praktyka.* Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, Szczecin.
ZIMMERMANN M. 1939. *Polskie prawo wywłaszczeniowe*. Lwów.
ŹRÓBEK R, ŹRÓBEK S. 2008. *An assessment and proposal chamges to the principles and procedures of real estate expropriation after 1945*. In: *Compulsory purchase and compensation in land acquisition*. Helsinki University and Technology Publ. (55-70).
ŹRÓBEK R., ŹRÓBEK S. 2007. *Expropriation as a exceptional tool of acquisition of land for public purposes*. Materiały cyklicznej konferencji międzynarodowej w Helsinkach. www.fig.net.
ŹRÓBEK S., WALACIK M. 2008. *„Analiza porównawcza wybranych zagadnień wywłaszczania nieruchomości w Polsce i zagranicą"*. Przegląd Geodezyjny 12/2008.
ŹRÓBEK S., ŹRÓBEK R. 2007. *Is the amount of compensation for real estate expropriation just? – current state and proposals for changes.* Materiały cyklicznej konferencji międzynarodowej w Helsinkach. www.fig.net.

Legislation acts

KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ Z DNIA 6 KWIETNIA 1997. - Polish Constitution.
USTAWA O GOSPODARCE GRUNTAMI I WYWŁASZCZANIU NIERUCHOMOŚCI. 1995. WACETOB-PZITB, Warszawa.
USTAWA O GOSPODARCE NIERUCHOMOŚCIAMI Z DNIA 21 SIERPNIA 1997 ROKU. (Dz. U. 80/2003 z późn. zm.) - The Real Estate Management Act,
USTAWA O SZCZEGÓLNYCH ZASADACH PRZYGOTOWANIA I REALIZACJI INWESTYCJI W ZAKRESIE DRÓG PUBLICZNYCH Z DNIA 10 KWIETNIA 2003 ROKU. (Dz.U. 80/2003 z

późn. zm.) - The detailed principles of preparing and executing public road construction investment projects Act,

ROZPORZĄDZENIE RADY MINISTRÓW Z DNIA 21 WRZEŚNIA 2004 ROKU W SPRAWIE WYCENY NIERUCHOMOŚCI I SPORZĄDZANIA OPERATU SZACUNKOWEGO. (Dz. U. 207/2004) - Directive of the Cabinet regarding real estate valuation and preparing the appraisal report.

ISSN 1733-2478
ISBN 978-83-61564-20-1