JOANNA KAŹMIERCZAK*

# Principal Issues of the Responsibility for Damage Caused by Spatial Planning in Poland: Liability for Spatial Damage From a Bird's Eye View**

**ABSTRACT:** *Liability for planning damage is gaining importance in Polish and European law due to the effects of the accelerating development of civilisation and the increase in the world's population. These phenomena result in the ever-increasing transformation of land for the needs of transforming societies and the economy. However, natural and spatial resources are limited. Moreover, sometimes it is not possible to change a space once developed, or it becomes very difficult and expensive. The above-mentioned circumstances make it necessary to exercise public authority in planning and spatial development to an increasing extent. In turn, the expansion of the scale of public authority activities in this sphere entails a proliferation of the legislation normalising the principles, boundaries and forms within which it should take place. Finally, an increase in the intensity with which planning and zoning tasks are carried out by public authorities leads to a rise in the frequency of planning damage, that is, the damage created to citizens' rights to real estate. In this paper, liability is aimed at compensating for these damages.*

**KEYWORDS:** planning and zoning, planning damage, municipality, local zoning plan, planning authority, claim for compensation, claim for expropriation of property

* Doctor in law, University of Lodz, Faculty of Law, joanna.kazmierczak@uni.lodz.pl, ORCID ID: 0000-0001-9960-0492.

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## 1. Introduction

Liability for planning damage is related to the exercise of public authority in the sphere of planning and spatial development. In European countries, until the formation of the institution of property in modern terms and the development of legislation on planning and spatial development, there was no need to create a legal basis for the liability of public authority for actions related to planning and spatial development, meaning that liability for planning damage has a relatively short history. For instance, its regulation appeared in 1928 for the first time in Polish law in the Presidential Order of 16.02.1928 on the law of construction and development of settlements.[1] After WWII and during the socialist system from 1945 to 1989, the legislator returned to concepts from the interwar period. With the return to a democratic system, the regulation of public authority liability for planning damage was restored with the introduction of Article 36 of the Law of 7.07.1994 on Spatial Development.[2] At present, this matter is primarily regulated by Articles 36 and 37 of the Law on spatial planning and development of 23.03.2003 (LSPD).[3] The current legislation is a continuation of the normative solutions in the preceding law. On 24.09.2023 a law significantly amending the Polish planning and zoning system came into force.[4]

According to the current planning and spatial development regulations, the municipality, as an entity at the bottom of the three-tier hierarchy of local government units, is the primary entity responsible for shaping and conducting spatial policy.[5] To be able to carry out the tasks imposed on it, it has been equipped with planning authority. As an authorisation, which is anchored in the law, it legally determines the use and principles of land development in the form of a binding legal act, regardless of the will and demands of other entities.[6] This authority is exercised by the municipality within the limits of the planning autonomy granted to it. It is accepted in the doctrine that planning independence means 'the ability to carry out in its own name and on its own responsibility tasks in the scope of spatial planning without any interference from other organs or persons'.[7] Both

1 Rozporządzenie Prezydenta Rzeczypospolitej z 16.02.1928 roku o prawie budowlanym i zabudowaniu osiedli (Dz.U.1928.23.202).
2 Ustawa z 7.07.1994 roku o zagospodarowaniu przestrzennym (Dz.U. 1999, nr 15, poz. 139 ze zm.).
3 Ustawa z 27.03.2003 roku o planowaniu i zagospodarowaniu przestrzennym (Dz.U. 2003, nr 80, poz. 717).
4 Ustawa 7.07.2023 o zmianie ustawy o planowaniu i zagospodarowaniu przestrzennym oraz niektórych innych ustaw (Dz.U. 2023, poz. 1688).
5 Krawczyk, 2015, p. 130.
6 Leoński and Szewczyk, 2002, pp. 78–80; Niewiadomski, 2019, p. 21; Zwolak, 2019, p. 12.
7 Dziedzic-Bukowska and Jaworski and Sosnowski, 2016, pp. 187–188; Sosnowski, 2011, pp. 27–28; Boć, 2010, p. 199.

the planning authority and planning independence may not be abused.[8] If the authority is abused, the action of the local government unit becomes unlawful.

The municipality performs planning and zoning duties by developing documents such as strategies, plans, analyses. Some of these are general, while others are for specialised planning.[9] The documents are often interrelated, in that the content of one directly affects the content of others. However, the documents have different legal status. Some are only internally binding on the municipality while others have effects on other entities. For example, the municipality's strategy is enacted on a mandatory basis but has only internal force, that is, it binds internal municipal bodies when creating spatial planning acts. The municipality is also obliged to develop a general municipal plan for the entire territory. This document recently replaced the municipality's zoning study, which was not a normative act and did not have universally binding force.[10] This general plan of a municipality takes the form of a resolution of the municipal council, and consists of a textual and graphic (map) part. The text of the municipal general plan mandatorily defines planning zones and municipal urban planning standards, while optional areas of development replenishment and downtown development areas may also be defined. The graphic part is a mapping of the regulations in the textual part. Due to the need to include the entire area of the municipality on the map, the graphic part is schematic and inaccurate. The dispositions of the municipality's general plan are binding on all private and public entities, in particular during the preparation of planning documents by administrative bodies, including decisions on the conditions of building development and land development. Such decisions can be issued only if the municipality has defined an area of supplementing development in the general plan and only if the investment is made within the boundaries of this area. Another planning document developed by the municipality is the local development plan. Similarly to the general plan, it introduces dispositions on land use in a given area that are binding for everyone.[11] Some varieties less frequently used in practice are the local revitalisation plan and integrated investment plan, which is a new institution in Polish law. All three types of local plans have the same legal status and are subject to the same regulations regarding the consequences of their adoption or amendment. In this article, whenever reference is made to the local development plan, it should also be understood to include its other two specific types.

The municipality's general plan (hereinafter: general plan) and the municipality's local development plan (hereinafter: local plan) have been given a special status in the legal order because they were given the status of normative acts that apply to a strictly limited territory, specifically, to the whole area or, most often,

8 Jakimowicz, 2012, p. 52; Parchomiuk, 2014, pp. 26–37.
9 Niewiadomski, 2002, p. 79.
10 Wlaźlak, 2009, pp. 16–17.
11 Dąbek, 2020, p. 170; Leoński and Szewczyk, 1997, pp. 41–44.

only a part of the municipality that adopted them. In the hierarchy of law sources, both plans are considered acts of local law.[12] Therefore, rules like those for normative acts should be applied to the interpretation of general plans and local plans.[13] When in doubt about interpretation, the principle of *in dubio pro libertate* must be applied. Plan provisions cannot be interpreted in an expansive manner.[14]

Despite the equal and equivalent normative status of the two plans, the most significant is the local plan due to the level of detail of its disposition, scale and the type of determinations made therein. Further attention should therefore be paid to the local plan.

The local plan is adopted by a resolution of the municipal council, which is the decision-making body. Once passed, it is announced in the official journal of the voivodship. After the expiration of *vacatio legis*, which is, as a rule, 14 days, the provisions of the local plan begin to directly affect the legal sphere (interests) of legal and natural persons with legal title to real estate.[15] The amendment of the local plan follows the same procedure as its adoption. The municipality can, with the exceptions explicitly articulated in the law, freely decide whether it wants to introduce a local plan in a given area. Similarly, it retains a relatively high degree of autonomy in determining individual provisions.[16] In particular, it establishes: the purpose of the land, the location of public purpose investments, the manner of development and the conditions for development of the land, as well as the principles of merging and dividing real estate. The most restrictive provision that a local plan may contain is a prohibition on real estate development. The types of land use that a municipality may specify in the local plan are exhaustively listed in implementing legislation (i.e. ordinances). For example, the following types of land use are specified: areas for residential or service development, agricultural use, greenery and water, technical-production development, communications, and technical infrastructure. The land use in the local plan should correspond to the type of planning zone specified in the general plan. In addition to property designation, the local plan details the conditions for the realisation of rights to property, including specifying the rules for its development. The local land use plan consists of a textual part, which describes the rules for the use and development of land in the area, and a graphic part, in which the individual areas are illustrated along with their designation.

Therefore, the momentousness of a local plan is due to the effects that its enactment produces. The local plan has legal effects against any person entitled to the property from the date of its entry into force. A change of ownership does not cause a new purchaser to evade the contents of the local plan affecting the

12 Niewiadomski, 2011, p. 149.
13 Zwolak, 2020, p. 47.
14 Buczyński, 2014, p. 54.
15 Zachariasz, 2015, p. 29.
16 Niewiadomski, 2019, pp. 22-23.

property. Moreover, the provisions of the local plan are binding on all other entities, including state and local government bodies and the municipality that adopted it. The nature of the legal norms contained in the local plan means that it most strongly affects land that has not been developed. Its provisions thus directly shape the content of the right of ownership, determining the extent to which an authorised person can use his own property.[17] They also apply to the right of perpetual usufruct, if it has been established on the property. Further, the provisions on the right of ownership apply *mutatis mutandis* to the right of perpetual usufruct. The impact on the content of the subjective right causes the manner of exercising this right to change as well.[18] Of the powers distinguished in the science of law that specify the right of ownership, the local plan can only lead to a depletion of the right to use real estate. However, outside the scope of the local plan's impact is the right to dispose of property. Despite the enactment of the local plan, there is no exclusion or restriction of the owner's right to dispose of or encumber his real estate with limited property or contractual rights.[19] Nonetheless, different opinions that the local plan could also limit a right to dispose of property are reported in the science of law.[20]

The municipality should weigh public, local, and private interests when determining land use and property development in the local plan.[21] Because of the need to also consider the interests of the public and the local community, the way in which the local plan affects property ownership rights can potentially be both positive and negative from the owner's viewpoint. In the event of an increase in the scope of rights, the municipality's executive body may require the owner to pay a so-called planning fee (up to 30%) for the increase in property value. Collection of the planning fee is carried out administratively after issuing of a decision to determine the one-time fee. However, the local plan may lead to a restriction of the right to use the property, usually entailing a reduction in value. Under Polish law, damage is understood as damage to legally protected goods (and interests) arising against the will of the injured party.[22] Planning damage, being a special case of damage, consists of damage to the legally protected goods and interests of the property owner as a result of the enactment or amendment of the local plan. In terms of the Polish law, the damage can manifest itself both on the property and

17 Bosek, 2012, p. 589; Popardowski, 2012, pp. 212-213; Zięty, 2011, p. 48.
18 Stańko, 2004, p. 93; Szwajdler, 1990, p. 321.
19 Sobel, 2010a, p. 53.
20 Dolnicki, 2019, p. 113.
21 The judgements of the Polish Supreme Court as follows: wyrok SN 18.11.1993, III ARN 49/93, OSN 1994, nr 9, poz. 181; as well as the judgments of the Polish Supreme Administrative Court as follows: wyrok NSA 25.02.2020, II OSK 1048/18; wyrok NSA 11.01.2017, II OSK 932/15; wyrok NSA 28.03.2014, II OSK 518/13.
22 Radwański and Olejniczak, 2021, pp. 91, 94-95. The other definition damage is an impairment to the legally protected rights or interests of the victim, which the legal norm requires to be compensated. Zagrobelny, 2019, p. 577.

on the person, depending on the type of goods and interests affected. However, as the doctrinal understanding of damage is broad, liability for the negative consequences of a legal event manifesting itself in non-property goods is limited only to cases in which there is a clear, explicit legal basis for claiming compensation. Adoption or amendment of a local plan may entail negative consequences for non-property goods. Nonetheless, the scope of possible compensation covers only damages arising in property goods. Therefore, it is not possible to claim compensation for mental suffering and other types of damage to non-property goods as a result of the adoption or amendment of the local plan. However, damage to property, in accordance with the principle of full compensation expressed in Article 361 § 2 of the Act of 23.04.1964 of the Civil Code (hereinafter, the Civil Code), is subject to compensation in full, unless a specific provision states otherwise. Damage understood in this way consists of two elements: the losses that the injured party suffered (*damnum emergens*) and the benefits that he could have achieved (*lucrum cessans*) if the damaging event had not occurred. The amount of property damage is estimated using the differential method (difference method).[23] As a rule, the damage is calculated as the difference between the hypothetical state of the injured party's property that would have existed if the local plan had not been enacted or amended and the state of his property formed as a result of the legal event.

Therefore, the planning damage consists primarily of the property damage revealed as a result of the restriction of the content of the right of ownership of the property possibly established on it. A consequence of the restriction of the right to real estate may also be a reduction in the natural and civil benefits previously enjoyed by the holder. In addition, planning damage may also take the form of expenses incurred in connection with the planned future development of the property in question, which lose their meaning due to the enactment or amendment of the local plan. This category includes, for example, the cost of expert services (architects, engineers, surveyors, geologists etc.) performed for development, the cost of purchasing construction materials, the incurred remuneration for construction work performed, or prepared work for further construction work.

For planning damage, it is not necessary to prove that the damage occurred against the will of the injured party. As previously indicated, the competence of a municipality to make a sovereign, binding determination of the use and principles of land use in the local plan, regardless of the will and demands of others, is the essence of planning authority and autonomy. While entities with a legal interest may postulate certain amendments to drafts of the study or the local plan, as well as participate in public consultations, they are not binding for the municipality.[24] Property owners can only appeal against a resolution to adopt or amend a local

23 Banaszczyk, 2018, pp. 1165, 1206, 1208, 1231; Kaliński, 2014, p. 170.
24 Bielecki, 2007, pp. 166–170.

plan to an administrative court. If the complaint is upheld, the plan loses legal force in whole or in part. However, a possible claim for damages is based on a different legal basis in such a situation. Annulment of a resolution to adopt or amend a local plan triggers liability for unlawful exercise of public authority under Article 417 - 417[1] of the Civil Code. This is a liability based on the opposite premise from the provisions governing the recovery of planning damage. This is because the starting point for liability for planning damage is that the local plan is valid and effective, and the actions of the municipality are within the limits of the law. In other words, for liability for planning damage to be attributed, it is necessary that the action that is the source of the damage is lawful. An action for a declaration of the illegality of a municipal council resolution moves the consideration of liability for damages to a different plane. By contrast, within the limits of the events that fall within planning damage liability, the injured party does not have any legal instruments that can bind the municipality against its will to affect the way it lawfully performs planning and zoning tasks.[25] Any damage caused by the amendment or enactment of a local plan thus arises independently of the will of the injured party.

## 2. General liability for planning damage in the Polish law

As noted at the outset, liability for planning damage is currently regulated primarily in Articles 36 and 37 LSPD. Article 36 paragraph 1 LSPD provides that: 'If, in connection with the enactment of a local plan or its amendment, the use of real estate or a part thereof in the previous manner or in accordance with its previous purpose has become impossible or significantly restricted, the owner or perpetual usufructuary of the real estate may, subject to paragraph 2 and Article 37[1] paragraph 1, demand from the municipality or from the ruler of the closed area, if the enactment of the plan or its amendment was caused by the needs of defence and national security: 1) compensation for the actual damage suffered, or 2) redemption of the property or a part thereof'.

The next two editorial units of Article 36 paragraph 1 LSPD also refer to Article 36 paragraph 1 LSPD. In the next paragraph, the legislator lists the cases in which claims under Article 36 paragraph 1 LSPD are excluded. Then, Article 36 paragraph 2 LSPD stipulates that the realisation of claims under Article 36 paragraph 1 LSPD may also take place by way of the municipality offering the owner or perpetual usufructuary a replacement property, which leads to the expiration of these claims as of the date of the conclusion of the swap agreement.

In Article 36 paragraph 3 LSPD the legislator has normalised another creditor's claim arising in liability for planning damage: 'If, due to the enactment of the

25 Szlachetko, 2017, pp. 57–60, 111–206.

local plan or its amendment, the value of the real estate has been reduced, and the owner or perpetual usufructuary disposes of this real estate and has not exercised the rights referred to in paragraphs 1 and 2, he may demand from the municipality compensation equal to the reduction in the value of the real estate'.

The final part of Article 36 LSPD sets forth the rules for claiming reimbursement of benefits paid to the owner or perpetual usufructuary, which were undue due to the invalidity of the local plan.

In turn, in Article 37 LSPD, the legislator provides detailed rules relating to the manner of calculating the amount of damage and the value of the property, the procedure and the time limit for asserting claims. This provision also partly normalises the prerequisites for determining the planning fee, the analysis of which does not fall within the issue of liability for planning damage.

However, the few provisions in which reference has been made to the appropriate application of Articles 36 and 37 LSPD (Article $37^1$ paragraph 2, Article 37na paragraph 7 and 8 LSPD, Article 58 paragraph 2 LSPD and Article 63 paragraph 3 LSPD), show some distinctiveness that does not allow them to qualify for liability for planning damage. Thus, the legislative technique used underscores a certain dissimilarity between the core of the regulations in Articles 36–37 LSPD and these cases.

Analysing the construction of Articles 36 and 37 LSPD and comparing it with the other provisions of the law, which provide for the right to claim compensation for damage resulting from the municipality's planning activities, one can identify several distinguishing features of this liability. First, the obligation to compensate for damage has been linked to the municipality's exercise of planning authority and the planning autonomy exercised within its boundaries (which can be described as a subjective criterion). Therefore, damages caused by actions not based on the municipality's exercise of its own planning and zoning authority remain outside the scope of liability. As such, the narrowing of liability for planning damage may be a consequence of the limitation or exclusion of the municipality's independence in determining the content of the local plan. In addition, the obligation to compensate for planning damage arises when the municipality enacts or amends the local plan or, exceptionally, it is considered as sanction for failure to comply with the obligation to enact or amend a general plan under Article 13k paragraph 2 LSPD (which can be described as an action criterion). Thus, liability is only linked to the adoption of a normative act establishing on the territory of a municipality the use of land and the manner of its development, with direct effects in the legal sphere on subjects with legal title to real estate. Liability for planning damage cannot include cases of introduction of some restrictions on the use of real estate on the basis of other legal acts (especially laws) and adoption of other planning acts by the municipality. Only a public authority (which can be defined as an entity criterion) can be liable for planning damage. As a general rule, the obligation to compensate for the damage rests with the municipality and, as an

exception of marginal practical significance, with the State Treasury represented by the relevant organisational unit. Outside the circle of entities that may be liable for planning damage are non-public entities. It is thus excluded that there are two private entities on different sides with such claims.

Having isolated certain characteristics of the construction of liability for planning damage, we can define it. The definition of legal liability *sensu largo* should be the starting point. In the Polish science of law, liability is considered 'the incurring of negative consequences by a subject of rights for events or states of affairs that are subject to negative legal qualification and are attributed to a specific subject in the legal order'[26]. Therefore, liability for planning damage should be understood as the totality of negative legal consequences borne by a municipality or the State Treasury in connection with the enactment or amendment, within the limits of the planning authority granted to the municipality, of a local spatial development plan, local revitalisation plan, or integrated investment plan or in connection with the failure to perform an obligation to enact or amend a general plan in certain situations.

Once the definition of liability for planning damage has been established, it is necessary to determine the entities entitled to claim compensation for the damage and associate with them the legal remedies to which they are entitled, as well as the entities obliged to compensate for the damage. The enactment or amendment of the local plan may be felt by everyone who has legal title to the property. However, not everyone with legal title to a property can seek legal protection for an unfavourable provision of the local plan. The legislator has provided a total of four legal instruments to compensate for planning damage. The choice of three of them is up to the aggrieved party alone, while one is left to the joint decision of the aggrieved party and the party responsible for the damage.

The first legal remedy arising from Article 36 paragraph 1 LSPD is a claim for compensation for the actual damage suffered or for buying back the property or part of it. This claim is vested in the owner or perpetual usufructuary of the property. If more than one person is entitled to the property, the claim is due to all co-owners or perpetual users. In the event that perpetual usufruct has been established on the property, the creditor can be only one of the entities indicated as entitled in Article 36 paragraph 1 LSPD. According to Article 233 of the Civil Code, the perpetual usufructuary may use the land to the exclusion of others and his right, like any other right *in rem*, is effective *erga omnes*, not excluding the owner himself.[27] This means that, for the establishment of perpetual usufruct, the person who will be able to raise a claim under Article 36 paragraph 1 LSPD is the perpetual usufructuary and is entitled to claim compensation or redemption of his right to the property, because he cannot dispose of the ownership right to

26 Banaszczyk, 2015, p. 2; Dzienis, 2006, p. 2.
27 Bocianowska and Ciszewski, 2019, p. 409.

a property to which he has no legal title. The entity obliged to satisfy the claim is either the municipality or the State Treasury represented by the entity in charge of the closed area. Under Polish law, a municipality is a unit of local self-government separate from its inhabitants, which is granted legal personality by law.[28] In mentioning the second obligated entity, the legislator refers in Article 2 paragraph 11 LSPD to the legal definition of a closed area in Article 2 paragraph 9 of the Act of 17.05.1989 Geodetic and Cartographic Law. According to this definition, a closed area is an area of nature reserved for state defence and security, as determined by the competent ministers and heads of central offices. Closed military, railroad, and other areas can be distinguished and are established on the basis of regulations or administrative decisions.[29] From the viewpoint of liability for planning damage, their practical significance is marginal.

Article 36 paragraph 1 LSPD provides for two independent claims in a disjoint alternative to each other. The claim for compensation does not lead to the loss of the right to real estate, aiming only to compensate for the loss of property created in the property of the injured party. The claim for redemption of the right to real estate or a part thereof aims to compensate for the damage by paying its value before the enactment or amendment of the local plan in exchange for the transfer of the right to real estate to the responsible party. As a result, the injured party loses the right to the property but receives a sum of money equivalent to its value before the enactment or amendment of the local plan.

Therefore, Article 36 paragraph 1 LSPD provides for two separate claims that are self-executing in nature.[30] The exercise of one of these rights entails the compensation of the damage and, thus, the termination of the compensation obligation.

The second remedy is provided in Article 36 paragraph 2 LSPD. Its use requires the initiative of the municipality and the approval of the creditor. This is because the legislator made it possible for the municipality to exempt itself from the obligation to execute the claim under Article 36 paragraph 1 LSPD for compensation for the actual damage suffered, or to redeem the property or part of it by offering a replacement property. After the aggrieved party accepts the offer, a swap agreement is concluded within the meaning of Article 603 of the Civil Code. Under this agreement, the owner or perpetual usufructuary transfers his right to the municipality in exchange for an amount of money equivalent to the value before the damage was caused. The power to offer a replacement property is only granted to the municipality, which means, first, that it cannot be exercised by the entity that owns the closed area, and second, that the initiative in using the above institution rests with the municipality. As such, the aggrieved party

28 Note the reference to the legal basis in the Polish act on the district: Article 1.1 i 1.2. ustawa from 8.03.1990 o samorządzie gminnym (Dz.U. 2020, poz. 713).

29 Kamińska, 2013, pp. 41, 45.

30 Plucińska-Filipowicz and Filipowicz and Kosicki, 2018, p. 454; Niewiadomski, 2019, p. 334.

cannot effectively demand that the municipality provide a replacement property against its will, and the municipality cannot force the aggrieved party to enter a swap agreement.

To execute a claim under Article 36 paragraph 1 LSPD or conclude a swap agreement, the authorised owner or perpetual usufructuary must retain legal title to the property until the final conclusion of legal proceedings in the second instance of court or the conclusion of an agreement in due form.[31]

The third legal remedy to redress planning damage is regulated by Article 36 paragraph 3 LSPD. Under this provision, the owner or perpetual usufructuary, if the property is sold, may demand compensation from the municipality equal to the reduction in value. Only the municipality may be obliged to compensate for the damage. The right to demand compensation equal to the reduction in value of the real estate is available only if the holder fails to exercise the first or second legal remedies in Article 36 paragraphs 1 and 2 LSPD. If the planning damage had already been repaired due to the realisation of claims under Article 36 paragraph 1 LSPD or the concluding of an exchange agreement, the obligation to demand compensation equal to the reduction in value of the real estate would also expire.

Under Polish law, initially, responsibility for planning damage rested only with the municipality. In practice, however, municipalities abandoned optional local plans due to the threat of liability for damages. Currently, only a small but growing percentage of the country's area is covered by local plans. In an effort to encourage municipalities to be more proactive in adopting a local plan, the legislature has recently introduced several important legislative changes. In 2018, Article 37[1] LSPD was introduced, which led to the exclusion of the municipality's responsibility if the local plan establishes restrictions on development and land use in connection with the location of airport service facilities. This responsibility was shifted to the Polish Air Navigation Agency. In 2020 there was a limitation on the municipality's liability for damages resulting from the introduction of provisions caused by the needs of state defence and security. Since this amendment, liability for planning damage is borne by the entity in charge of the closed area. Article 36 paragraph 1a LSPD specifies situations when Article 36 paragraph 1 LSPD does not apply, that is, when planning damage does not arise. Although legislative changes in recent years have tended to limit the scope of a municipality's liability for enacting a local plan, it is still a principle that the legislature broadly protects the right of property ownership against such damage.

Another tendency to limit the liability of the municipality for damages related to the implementation of planning and zoning tasks is the fact that no liability for damages has been associated with newly adopted general plans into

31 Note the judgements of the Polish Supreme Court as follows: wyrok SN 6.10.2015, IV CSK 778/15; wyrok SN 29.09.2015, II CSK 653/14; the judgements of the Polish courts of appeal: wyrok SA in Krakow 22.02.2021, I ACa 1256/19; wyrok SA in Katowice 20.02.2018, I ACa 850/17; wyrok SA in Katowice 19.03.2018, V ACa 273/17. Note also: Lewicka, 2018, p. 164.

the legal order. As a result, although the general plan, as a normative act, can affect the status of real estate, in particular the content of property rights in it due to its definition of planning spheres and determination of the possibility of its development, the legislature does not provide the same protection as in the case of the adoption or amendment of a local plan. Under the current state of the law, the owner must wait for the enactment of the local plan to claim the damage caused by the fact that his property was not included in the supplementary development zone in the general plan, so that he could not obtain a decision permitting planned investment. The situation of the aggrieved owner is not favourable, as it is not certain when the local plan introducing a development ban behind the general plan would be enacted. In addition, it is not certain that the municipality, before enacting the local plan, will not change the disposition of the general plan as to lift the prohibition on development. If the enacted local plan did not ultimately include a prohibition on development indirectly resulting from the disposition of the previously adopted general plan, the owner could not claim compensation for the period during which his rights to the property were depleted. As such, the legislature's exclusion of liability for damages arising in connection with the adoption or amendment of the general plan should be strongly criticised. Indeed, on the basis of the recently effective state of the law, there is a violation of property without a certain and available remedy from the moment of interference compensating for the depletion in the property.

Liability for planning damage implements the constitutional principle of property protection, but also has a strong axiological foundation. As previously indicated, this liability is a case of the municipality bearing the negative consequences of the lawful exercise of public authority. The related extension of the indemnification obligation also requires a particularly strong extra-normative justification. This is because the principle is a liability for the unlawful exercise of public authority and its absence in the event of lawful action by state and local government bodies.[32] In the Polish legal order, universal theories justifying the liability of public authority for damage caused by its lawful exercise have been adopted without reservation. Therefore, as an axiological foundation for liability for legal damage, one can see the principle of equality of citizens before public burdens (*l'egalité devant les charges publiques*) together with the principle of protection of property, acquired rights and equity developed in French law.[33] In the science of law, one can also find references to the concepts of *Lastengleicheitspriznzip* and *allgemeinen Aufopferungsgedanken* drawn from German legal science.[34] With regard to the planning damage, a theory of breach of trust of the citizen in the planning activities of public authorities responsible for urban planning (*Vertrauensschaden)*

32 Zaradkiewicz, 2016, p. 577, 587.
33 Guillard, 2016-2017, p. 121; Bagińska in Bagińska and Parchomiuk, 2016, p. 94.
34 Bosek, 2012, p. 567; Parchomiuk in Bagińska and Parchomiuk, 2016, pp. 61, 67, 69-70, 148.

was created in German law. According to its assumptions, a citizen who wants to use his property in a way that corresponds to the content of the applicable planning documents acts in trust in the public authority, as well as the permanence and consequences of its spatial policy. As the citizen is prevented from loss of the right to use the property previously guaranteed to him, he should not suffer the negative consequences of acting in trust in the content of the adopted planning documents, as well as a change of spatial policy that is unpredictable from his perspective.[35] All these concepts are directly applicable to the Polish regulation of liability for planning damage.

In summary, liability for planning damage falls into the category of cases of damage indemnification resulting from the fully lawful exercise of public authority. In Polish law, this liability can undoubtedly be attributed to civil law character. The legal relationship that arises between the injured party and the responsible party is compensatory and creates an obligation. However, controversy may arise as to whether claims in liability for planning damage can be included in the tort regime or should be considered *quasi-delict*. In legal science, opinions concerning the character of the claim which arose from the legal action of the public authority are divided on this issue.[36]

## 3. Claim for compensation for actual damage or redemption of property

In the event of planning damage, the injured party is entitled to the claim provided for in Article 36 paragraph 1 LSPD for compensation for the actual damage suffered or to redeeming the property or part of it. The positive prerequisites of the claim differ depending on which entity is obliged to satisfy the claim. Negative premises are regulated uniformly for each of the liable entities.

If the liable entity is a municipality, the demand for compensation for damages under Article 36 paragraph 1 LSPD depends on the cumulative fulfilment of the following conditions:

1) a local development plan has been adopted or amended;
2) use of the property or part of it in the previous manner or in accordance with its previous use has become impossible or significantly restricted; and
3) there is a causal relationship between the enactment or amendment of the local spatial development plan and the impossibility or significant limitation of the possibility of using the property or part of it in the previous manner or in accordance with its previous use.

35 Battis, 2019, pp. 815-816; Jarass and Kment, 2017, pp. 412–413.
36 Łętowska, 1979, pp. 84-86.

However, if the entity in charge of the closed area is responsible for the damage, it can be demanded to enforce the claims of Article 36 paragraph 1 LSPD if the following conditions are cumulatively met:

1) the local development plan was either enacted or amended as a result of the needs of state defence and security;
2) use of the property or part of it in the previous manner or in accordance with its previous use has become impossible or significantly restricted; and
3) there is a causal relationship between the enactment or amendment of the local spatial development plan, which was adopted due to the needs of state defence and security, and the impossibility or significant limitation of the possibility of using the property or part of it in the previous manner or in accordance with its previous use.

The positive prerequisite for claims under Article 36 paragraph 1 LSPD is not a decrease in the value of the property. Most often, the introduction of unfavourable provisions in the local plan will entail a decrease in the value of the right to the property. Sometimes, in exceptional situations, restrictions on the use the property will not cause a decrease in the value of the right. It is possible to raise claims for compensation for the actual damage suffered in a such situation, or to demand the redemption of the right to the property or part of it. This conclusion is justified not because of the content of the provision, but primarily because the claim serves to compensate for the damage caused to the entire property of the right holder, not only to his right to the property. Moreover, planning damage consists in the reduction of the possibility of permissible use of the property. Therefore, it does not matter whether the restriction of this possibility further leads to a decrease in the value of the right. All that matters is the restriction of a certain sphere of the possibility of dealing with the property.

Consequently, the maintenance of the existing value of the right to the property certainly does not preclude the realisation of claims under Article 36 paragraph 1 LSPD. However, if the enactment or amendment of the local plan would lead to an increase in the value of the property, planning damage will likely not arise at all. This is because the increase in the value of real estate as a result of the adoption of a local plan is most often caused by the enactment of provisions favourable to the holder of the property. However, there may be some controversy if the provisions of the local plan simultaneously affect the property in question favourably and unfavourably. It seems that then the rule of *compensatio lucri cum damno* provided for in Article 361 § 2 of the Civil Code should be applied. If the damage exceeded the increase in property value, it would be possible to successfully claim compensation for the planning damage, minus the amount of the benefit gained.

The prerequisites of the two claims in Article 36 paragraph 1 LSPD are shaped in the same way. This means that there is no justification for the interpretation according to which the demand to redeem the property or part of it can be made only for more serious violations of the right to the property. The rules developed under administrative law in the context of real estate expropriation cannot be transferred to the case of planning damage. In particular, the aggrieved party cannot be required to prove that it could not have availed itself of a claim that is less onerous for the municipality, that is, a demand for compensation, before making a demand for the redemption of the right to real estate.[37]

Negative prerequisites for claims under Article 36 paragraph 1 LSPD, leading to the exclusion of the right to compensation for planning damage, are stipulated as situations in which a provision of the local plan negatively affecting the property does not constitute an independent determination by the municipality of the socio-economic use of the land and the manner of its use, but results from one of the alternatively specified circumstances from:

1) hydrological, geological, geomorphological or natural conditions relating to the occurrence of flooding and related restrictions, as determined under separate regulations;
2) decisions on the location or implementation of public purpose investments, issued by other than municipal authorities, public administration bodies or the State Water Company Wody Polskie;
3) prohibitions or restrictions on development and land use, specified in the provisions of laws or acts, including local laws, issued on their basis.

### ■ *3.1. Adoption or amendment of the local development plan*

In Article 37 paragraph 11 LSPD the legislator has defined what is meant by enactment or amendment of a local plan. At present, there should be no doubt that enactment of a local plan refers to the case where no local plan was previously in effect in a given area, or when, although a local plan was in effect, it expired before the local plan that led to the planning damage came into effect, or where a previously enacted local plan is still in effect but is being replaced in its entirety by a new local plan. A local plan amendment a refers only to the situation where a previously adopted local plan is already in effect in a given area and only a modification of the plan is needed, which does not lead to the repeal of the plan in its entirety. Two different local plans cannot be in effect in the same area (the same property) at the same time.[38] The legislator binds liability for planning damage only to the enactment or amendment of a local plan. As indicated above, the consequences of the municipality undertaking other planning and spatial activities are

37 Otherwise: Nowak, 2012, p. 16.
38 Note the judgement of the Polish Supreme Court: wyrok SN 28.04.2016 r., V CSK 473/15.

outside the scope of liability (besides of the mentioned earlier sanction in article 13k paragraph 2 LSPD).

Liability for planning damage is not excluded by the circumstance that some provision, by way of exception to the rule of optionality of enacting local plans, obliges a municipality to pass a resolution to adopt or amend the local plan in a given area. This is because a municipality may be disciplined for having evaded the obligation to adopt or amend a local plan by a complaint for inaction. However, an administrative court may not, in a ruling upholding such a complaint, force a municipality to fulfil its obligation within a certain period.[39]

It is also irrelevant for the municipality to be held liable under Article 36 paragraph 1 LSPD whether the local plan is adopted under the ordinary procedure (i.e. by resolution of the municipal council) or under the substitute procedure described in Article 13k paragraphs 2 and 3 LSPD. The substitute mode is used in the event of a municipality's inaction in enacting or amending an obligatory general plan (i.e. when the municipality has failed to make arrangements in the general plan to enable the implementation of investments of national, provincial, metropolitan, or district significance). Adoption of a local plan under the substitute procedure is a result of the issuance of a so-called substitute order by the governor supervising the municipality's planning activities.

A local plan should be valid and effective. Problems are caused by the moment from which the local plan has legal effects. Some of the jurisprudential and doctrinal statements assume that a local plan can adversely affect a property as soon as it is voted on by the municipal council.[40] However, the normative nature of the resolution to adopt or amend a local plan makes it necessary to take the opposite position. The local plan has legal effects only from its entry into force, which occurs with the lapse of *vacatio legis,* which in the absence of a different provision in the resolution of the municipal council is 14 days from the date of its announcement in the official journal of the voivodship. It is irrelevant that the working out of a draft resolution on the adoption or amendment of a local plan, as well as the voting on this draft cause fluctuations in real estate sales prices. The change in transaction prices prior to the entry into force of the local plan is largely speculative. This view seems to dominate in legal science and judicature.[41]

39 Dolnicki, 2021, pp. 455-456; Stahl, 2013, pp. 68, 71–73, 75.

40 Note the judgement of the Polish Supreme Court: wyrok SN 23.04.2009, IV CSK 508/08; wyrok SN 30.06.2010, V CSK 452/09; wyrok SN 5.07.2012, IV CSK 619/11.

41 Kwaśniak, 2011, p. 245; Świderski, 2006, p. 24. Note the judgement of the Polish Supreme Court: wyrok SN 28.04.2016, V CSK 473/15; wyrok SN 17.03.2016, V CSK 414/15; wyrok SN 28.04.2016, V CSK 473/15; wyrok SN 5.07.2012, IV CSK 619/11.

### ■ *3.2. Restrictions of the ability to use the property in the previous manner or in accordance with the previous use*

This premise applies to two factual situations: (I) when, in connection with the enactment or amendment of the local plan, the use of the property in accordance with its previous purpose has become impossible or significantly restricted and (II) when, in connection with the adoption or amendment of the local plan, it has become impossible or significantly restricted to use the real estate in the previous manner. The impossibility or substantial limitation of the possibility of using the real estate in accordance with its previous purpose or in the previous manner is alternative. Thus, for claims to arise, it is sufficient that just one of the above effects is realised.[42]

Recently, there has been controversy over whether the claims in Article 36 paragraph 1 LSPD also apply when the owner or perpetual usufructuary has not taken any steps to realise the potential enjoyment of his right. This led to the introduction of Article 37 paragraph 11 LSPD into the legal order, which provides guidelines for estimating the value of property before the damage was done. The legislator ordered to count this value based only on the actual use of the land according to the state on the date of entry into force of the local plan. After the aforementioned amendment, the minor representatives of science interpreted this provision as narrowing liability for planning damage to the case when the injured party began to use the property in a potentially previously permissible way.[43] However, the view that planning damage when there has been a restriction of the purely potential possibility of using the property, although the owner or perpetual usufructuary has not taken any steps to realise his rights beforehand, still seems to prevail.[44] This view appears correct, as it considers the construction and protection of the right to property. Ownership is categorised as an absolute right *in rem*, effective *erga omnes*. The right of ownership gives the right to use a thing in any possible way that is not prohibited by law. Nowadays, of course, ownership is not seen as an absolute right in any European legal order. Nevertheless, with the exception of restrictions imposed by statute, principles of social coexistence and the socio-economic purpose of the law, under Polish law, the owner retains a sphere of free, undisturbed ability to exercise his right. It follows that the potential possibility of using a thing, which is not actually used, also co-creates the content of the subjective right belonging to the owner. Consequently, the depletion of this potential sphere of possibility constitutes planning damage. Article 37 paragraph 11 LSPD, which only specifies the method of calculating the value of the property,

42 Otherwise: Świderski, 2006, p. 25.

43 Dumin, 2015, p. 231.

44 Niewiadomski, 2019, pp. 354-355; Nowak, 2020, pp. 185, 195; Fisz, 2018, pp. 317, 321-322. Note the judgements of the Polish Supreme Court: wyrok SN 19.12.2006, V CSK 332/06; wyrok SN 8.01.2009, I CNP 82/08; wyrok SN 11.09.2009, V CSK 46/09; wyrok SN 5.07.2012, IV CSK 619/11; wyrok SN 9.04.2015, II CSK 336/14; wyrok 19.09.2016, V CSK 117/16.

does not modify the prerequisites for claims under Article 36 paragraph 1 LSPD. It is only a technical provision intended to facilitate the realisation of claims for compensation for actual damage suffered or the redemption of the property. It is thus inappropriate to give it a different purpose, contrary to the intentions of the legislator, claiming that it serves to limit the scope of liability for compensation only in cases where it is not possible as a result of the enactment or amendment of the local plan to continue the previous, actually performed use of the property.

Another important problem that arises against the backdrop of the claims under Article 36 paragraph 1 LSPD is the interpretation of the concepts of the use of the property in the previous manner or in accordance with the previous use (purpose). In the science of law and jurisprudence different views have been expressed on this issue. According to the prevailing opinion, the purpose of real estate should be understood as the unrealised, only potential possibility of using it in accordance with the existing dispositions of the local plan or other relevant piece of law passed by municipality, while the existing manner of use refers to the possibility of use actually realised on it, so to the chosen way of developing the property.[45] This problem is not settled unanimously, because the concept of the use (purpose) of the property is understood differently. Some believe that it can be established not only in the local plan, but also in administrative decisions that are issued for the property.[46] Others believe that even the municipality's zoning study (or after the amendment the general plan) can indicate the property's designation.[47]

In my opinion, it is the consideration of the use (purpose) of the property and the rules for its determination by the municipality that should be considered the starting point. In Article 37 paragraph 11 point 2 LSPD, Article 4 paragraphs 1 and 2 LSPD, and Article 15 paragraph 2 point 1 LSPD the legislator clearly indicated that the use (purpose) of the property can be determined only in the local plan. This is because the use (purpose) of the property appears only in the context of this plan. Other planning documents and individual administrative decisions issued by public authorities (decisions on building permits or on zoning and development conditions) can only indicate the manner of using real estate. This is because the use (purpose) of real estate is a technical-legal phrase and should be interpreted strictly. Apart from the use (purpose) of the property, local plans also specify the permitted manner of using of the property. This is important because the damage caused by the enactment or amendment of a local plan may simultaneously consist

45 Note the judgements of the Polish Supreme Court: wyrok SN 22.03.2019, I CSK 52/18; wyrok SN 19.10.2016, V CSK 117/16; wyrok SN 22.11.2013, II CSK 98/13; wyrok SN 13.06.2012, II CSK 639/11.

46 Szewczyk, 2019, pp. 209-210.

47 Note the judgements of the Polish Supreme Court: wyrok SN 22.03.2019, I CSK 52/18; wyrok SN 10.01.2019, II CSK 714/18.

in the establishment of an unfavourable use (purpose) of the property, as well as restrictions on the manner of using it.

Assuming that the intended use (purpose) of the property can only result from the local plan, for planning damage consisting in a significant restriction or exclusion of the sphere of the possibility of using the property in accordance with its previous intended, potential use, it is necessary that, at the time of the adoption of the local plan, a previously adopted local plan was in effect in the area. To restrict the sphere of possibility to use the property in accordance with its intended use, it is thus necessary that there is a direct succession of two local plans. In this regard, it is irrelevant whether the entitled person made efforts to take advantage of the potential use of the property provided for in the local plan or whether he did not exercise his right. However, the second case described in the premise occurs, as a rule, when there was no direct consequence of two local plans. The previous manner of using the property is determined both on the basis of the actually realised manner and the potential, although unrealised, possibility of using the property in the manner provided for in various planning documents or individual administrative decisions. Exceptionally, the analysed premise of change in the previous manner of using the property may refer to the case of a direct succession of two local plans. However, the analysis of local plans should be limited to the provisions relating to the manner of use of the property. Therefore, the dispositions of the local plan regulating the use (purpose) of the property are omitted during such an analysis. The analysed premise refers to two different situations.

### ■ *3.3. The causal relationship between the adoption or amendment of the local plan and the restriction of the possibility of using the property*

The causal relationship between the injurious event and the damage is a prerequisite of any type of obligation arising in liability for damage.[48] For this reason, this institution is regulated by the general provisions on obligations (i.e. Article 361 of the Civil Code). The premise of causation formed on the basis of Article 36 paragraphs 1 and 3 LSPD does not deviate from the general construction of this institution. Therefore, the general provisions should be applied directly to obligations to repair a planning damage. However, due to the nature of the damage, it is not necessary to prove a direct link between the enactment or amendment of the local plan and planning damage.[49]

Some doubts arise regarding the details. The case in which planning damage finds its source in a local plan that covers the entire area of the property by regulation is not controversial. Conversely, one may wonder how to qualify cases in which the local plan normalises the legal status of only a certain part

48 Parchomiuk, 2016, pp. 556-557.

49 Note the judgement of the Polish Supreme Court: wyrok SN 5.07.2012, IV CSK 619/11.

of the injured party's property or refers in its entirety only to the neighbouring property. The jurisprudence has expressed an opinion that recognises the possibility of planning damage in the described circumstances.[50]

In context of the inclusion only in part of the property's area in the regulation of the local plan, the approving position of the jurisprudence law is justified. This is because all parts of the property are functionally and economically related, while the right of ownership serves the holder indivisibly over the entire property. However, the opinion of jurisprudence on the right to claim planning damage when the amended or enacted local plan affects only the entire neighbouring property seems too far-reaching. For the occurrence of planning damage, which is regulated by Article 36 paragraph 1 LSPD, there should be an effect of the change in the content of the right to the property. A local plan regulating the legal status of a neighbouring property cannot make changes relating to the use of another property because the provisions of a local plan cannot be effective outside the area for which it was developed. The fact that a specific use (purpose) has been established for a neighbouring property cannot cause *per se* a change in another property (a change in the use or purpose of the other property would also require the adoption of a local plan regulating the area of that property, which is excluded in this configuration). Therefore, the planning damage in this situation could result only from a change in the permissible use of the property, which would have to be an effect of the adoption of a local plan for the neighbouring property. In practice, it is difficult to imagine factual states that meet these assumptions. Most often, the property owner suffers an impediment to the performance of his right not because of the change or adoption of a local plan for the neighbouring property, but because of the use actually implemented on the neighbouring property. Such cases are beyond liability for planning damage precisely because of the lack of causation. Usually, the injured party can benefit from the legal protection provided by other laws, such as remedies for a nuisance.

## 4. Claim for compensation equal to the reduction in value of the property

The claim for a compensation equal to the reduction in the value of real estate, regulated by Article 36 paragraph 3 LSPD, depends on the cumulative fulfilment of five positive prerequisites:

1) adoption or amendment of the local plan;
2) reduction in the value of the property;

50 Note the judgement of the Polish Court of Appeal in Krakow: wyrok 18.09.2018, I ACa 1664/17.

3) the causal relationship between the adoption or amendment of the local plan and the reduction in the value of the property;
4) disposal of the real estate; and
5) not exercising of the rights referred to in Article 36 paragraph 1 and 2 LSPD.

The claim under Article 36 paragraph 3 LSPD has prerequisites stipulated in the same way as the claim under Article 36 paragraph 1 LSPD described above but also new ones.

■ ***4.1. Adoption or amendment of the local plan***

In this regard, the considerations in relation to the claim under Article 36 paragraph 1 LSPD remain fully valid. However, legal science and jurisprudence recognise a problem that did not arise in the previous claim, which is indirectly related to the date from which the local plan begins to have legal effects. In view of the necessity of disposing of the property for the claim under Article 36 paragraph 3 LSPD to arise, the question appears whether a person who disposed of the property after the adoption or amendment of the local plan but before it came into force can effectively invoke this provision. More supporters prefer the interpretation that denies the previous owner in this situation the right to claim compensation for the reduction in the value of the property.[51] Since the local plan has legal effects only after its entry into force, the disposal of the right to the property before that date appears still in the previous legal state. In practice, the property owner, to protect himself from selling the right at an undervalued price due to the new pending regulation, should refrain from making dispositive legal acts.

■ ***4.2. Reduction in value of property***

In the context of this premise a fundamental difference in the regulation of damage between claims under Article 36 paragraphs 1 and 3 LSPD is noticeable. The science of law has carried out an analysis of whether the reduction in the value of real estate can be understood as an instance of damage subject to civil law regulation, or whether it is a *strictly* autonomous concept, which is fully regulated in the special provisions referred to above. According to the legislator's definition, a reduction in the value of real estate is a property damage determined by the difference between the value of real estate before the date of entry into force of the new or amended local plan and its value after that date. A detailed description of the method of calculating the diminution in the value of real estate is contained in Article 37 paragraph 1 LSPD. Characteristic of the method of determining the

51 Klat-Górska, 2006, p. 131; Sobel, 2010b, p. 46. Note the judgements of the Polish Supreme Court: wyrok SN 6.10.2016, IV CSK 778/15; wyrok SN 28.04.2016, V CSK 473/15; wyrok SN 17.03.2016, V CSK 414/15. Otherwise: Nowak, 2020, p. 187. See also: wyrok SN 30.06.2010, V CSK 452/09; wyrok SN 23.04.2009, IV CSK 508/08.

damage repaired under Article 36 paragraph 3 LSPD is its restriction to strictly defined types of damage - only those that arise in the right to real estate. Thus, the other assets, unlike in the case of a claim under Article 36 paragraph 1 LSPD, are omitted. It is also important to refer to the value, not the price of the property, as a criterion for determining the extent of the damage. In the science of law it is argued that these concepts should be differentiated. Ultimately, the price of real estate is determined for the purposes of a particular legal action, while its value - is objectified and determined in a broader context than a unitary sale, considering a number of similar transactions concluded within a specific territorial and temporal framework.

The definition of the concept of diminution in the value of real estate under the LSPD is a source of interpretive divergence. Some representatives of legal science and jurisprudence assume that the factual price of the disposal of real estate is irrelevant for determining the amount of compensation due. This is because the reduction in the value of real estate is calculated only according to purely objective criteria.[52] Supporters of the opposing interpretation believe otherwise: the price of disposal of the injured party's real estate, achieved by virtue of the legal act performed, is relevant to the final estimation of the compensation claim amount.[53] The first view is based on the assumption that the adoption of the special regulation in a specific normative act such as the LSPD resulted in an exclusion of the general provisions on damage and liability provided for in the Civil Code. The second view takes the exact opposite claim as its starting point. This dispute is not merely theoretical. Indeed, in individual factual situations, there may be a situation in which the reduction in property value, calculated according to objective criteria, is partially or completely diminished by the sale price of the property obtained as a result of its disposal, which deviates from market rules in favour of the owner. For example, the owner may negotiate a price of 400,000 zlotys for the sale of a property objectively worth 300,000 zlotys after the adoption or amendment of the local plan. According to the first interpretation, the excess price obtained from the sale of the right to the property should not reduce compensation. According to the second view, the opposite solution should be adopted, so the compensation should be 100,000 zlotys lower.

In my opinion, it should be assumed that the general provisions on liability for damages apply in such a situation. As a result, the compensable damage may be lower than the objectively estimated difference in value of the property. This is because the compensation should serve to cover the damage actually revealed in the property of the injured party. Otherwise, there would be enrichment of the injured party.

52 Fisz, 2020, pp. 328, 330, 336; Klat-Górska, 2006, p. 131; Zachariasz, 2013, p. 230.
53 Lewicka, 2018, p. 166; Nowak, 2020, p. 187.

### ■ *4.3. The causal relationship between the enactment or amendment of the local plan and the reduction in property value*

The general remarks on causation made in the context of a claim under Article 36 paragraph 1 LSPD are fully applicable to a claim under Article 36 paragraph 3 LSPD. Liability on this basis can be triggered only if the reduction in property value is a normal consequence of the enactment or amendment of the local plan. If the reduction in the value of real estate occurred due to other causes, such as fluctuations in real estate prices resulting from economic phenomena, the claim under Article 36 paragraph 3 LSPD is excluded. To assess whether there is a causal relationship, the general provisions of civil law should be applied.

However, in the context of a claim for compensation for reduced real estate value, there is an additional problem of the extent of the impact of the local plan. The claim under Article 36 paragraph 3 LSPD does not depend on whether, as a result of the enactment or amendment of the local plan, the possibility of using the property in the previous manner or in accordance with its previous use has been restricted. This is because the compensable damage is the decrease in the value of the property. Therefore, the question arises of whether liability for damage covers cases where the reduction in value would be manifested in a property or part thereof to which the provisions of the local plan do not explicitly apply. In other words, it may be questionable whether liability for a reduction in the value of real estate arises if the effects of the enactment or amendment of the local plan manifest themselves outside the boundaries of legal regulation issued by the local plan.

In the science of law, it is unanimously accepted that claims under Article 36 paragraph 3 LSPD are also available when the reduction in the value of a property results from provisions of the local plan that do not explicitly regulate its legal status.[54] As such, a local plan that directly regulates the legal status of another property may cause planning damage to a property that is outside the scope of its regulation. This view should be considered, given the way the premises of the claim are formulated. This position is also justified from a practical viewpoint. This is because it would be difficult, when assessing whether the prerequisites for a claim under Article 36 paragraph 3 LSPD are met, to determine to what extent the change in the value of the property is due to the impact of the local plan directly regulating its legal status, and to what extent it is a consequence of the impact of the local plan on neighbouring properties. The areas regulated by the local plan often form a functional whole. These links can best be observed in the context of investments of infrastructural and communications nature. It is practically impossible to separate the effects of enacting or amending a local plan on the value of a specific property.

54 Zięty, 2011, pp. 57-59; Świderski, 2006, p. 25.

### ■ *4.4. Disposal of real estate*

Some controversy over the claim under Article 36 paragraph 3 LSPD arises in connection with the interpretation of the premise of disposal of real estate. Disposal of real estate in civil law is understood as a disposition by legal action *inter vivos* (between living persons) under a special title (concerning one or only a few assets, not the entire estate), transferring the right to a thing, an intangible good, a mass of property or an organised group of tangible and intangible components. Disposal refers to the situation of transferring an already existing right to another entity, and can be carried out as a result of a paid (as a result of which both parties receive a benefit) or unpaid (as a result of which only one person receives some benefit) legal transaction[55]. In the most general terms, the disposal of real estate means the transfer of the right to it from the previous owner to his successor in title on the basis of a legal transaction concluded between them. Problems with the premise of the claim under Article 36 paragraph 3 LSPD could be comprised in the question of whether it arises only when the disposal is for consideration (paid legal act) or also when it is gratuitous (unpaid legal act).

Currently, the prevailing view in jurisprudence is that a claim for compensation for a reduction in the value of real estate can arise only in the event of a paid legal act.[56] Therefore, outside the bracket of liability, there are cases of disposal of real estate through a gratuitous legal act, such as donations. It can be argued in the jurisprudence that a contrary view would contradict a purposive interpretation. If the claim under Article 36 paragraph 3 LSPD were to also arise in the event of a gratuitous legal transaction, it would make no sense to make its emergence dependent on real estate disposal. This is because, in such a case, the claim would, in principle, always arise if there was a change of ownership of the property, the value of which was reduced as a result of the enactment or amendment of the local plan. According to the legislator's intention, the claim under Article 36 paragraph 3 LSPD is intended to compensate for damage caused by the transfer of real estate after the adoption or amendment of the local plan, which consists in the failure to obtain additional benefits from the sale of the right to the real estate. Although different views are reported in the doctrine, the majority of its representatives take the position that the concept of disposal on the basis of Article 36 paragraph 3 LSPD does not include gratuitous legal transactions.[57] This is supported primarily by the argument that the essence of gratuitous legal transactions implies the owner's consent to the loss of the right to the property without obtaining from the other entity a consideration equivalent to this right. As the owner, by entering into a contract of donation or other gratuitous contract,

55 Gniewek, 2020, pp. 334-335; Kępiński and Kępiński, 2021, p. 1297.

56 Note the judgements of the Polish Supreme Court from: 23.04.2009, IV CSK 508/08; 11.03.2011, II CSK 321/10; 9.03.2016, II CSK 411/15.

57 Popardowski, 2012, p. 222; Klat-Górska, 2006, pp. 133-134; Lewicka, 2018, p. 165; Fisz, 2018, pp. 326-327; Zachariasz, 2013, p. 230; Zięty, 2011, p. 59.

agrees that he will lose the right to the property without any consideration, he cannot make a claim for damages by arguing that he actually received from the counterparty a consideration of less value than he would have received if the local plan had not been enacted or amended.

The categories of contracts whose conclusion may give rise to claims under Article 36 paragraph 3 LSPD include, among others, a contract of sale, exchange, lifetime maintenance agreement, and contribution of real estate to a company in exchange for taking up shares in it.

### ■ *4.5. Not exercising of the rights referred to in Article 36 paragraph 1 and 2 LSPD*

The legislator requires that the entity asserting a claim under Article 36 paragraph 3 LSPD has not previously exercised the rights referred to in Article 36 paragraphs 1 and 2 LSPD. It should be interpreted that, if the entity claiming compensation for planning damage has previously exercised the claim under Article 36 paragraph 1 LSPD or entered into a swap agreement referred to in Article 36 paragraph 2 LSPD, it may not claim compensation under Article 36 paragraph 3 of the LSPD. It is accepted in jurisprudence and legal science that this refers to all situations in which the right holder has not made use of his rights, regardless whether he was entitled to them at all.[58] Use of rights should be understood as voluntary fulfilment by the entity responsible for the damage, termination of the obligation as a result of surrogacy, or the final settlement of the dispute on the claim under Article 36 paragraph 1 LSPD.

## 5. Enforcement of claims

Claims for compensation for planning damage are asserted at two consecutive stages: pre-court and court. In the pre-court stage, the aggrieved party addresses a request to the liable entity to fulfil the benefits of Article 36 paragraphs 1 or 3 LSPD. The request does not initiate any administrative proceedings but is in fact a kind of pre-court summons to fulfil the obligation to pay a certain sum of money or to redeem the property for a certain amount. The obligated entity has six months to fulfil the requested performance. After this date, it falls into delay and the entitled party may claim statutory interest on this account. The legislator allows the parties to change the date of fulfilment, but this is rather uncommon in practice. During the pre-litigation stage, the parties may enter into negotiations and reach an agreement on the remedy. In practice, it is extremely rare to settle a dispute at this stage. Most often, the parties do not reach an agreement and it becomes necessary to bring an action in a civil court demanding payment of

58 Nowak, 2020, p. 187; Sobel, 2010b, p. 47. See also: wyrok SN 17.12.2008, I CSK 191/08.

damages or a judgment replacing the municipality's statement of will to purchase the right to the property from the injured party for a certain amount. Claims are heard in a civil trial.

The issue of time limits for the bringing claims under Article 36 paragraphs 1 and 3 LSPD to court is controversial. Different views are reported in the jurisprudence and doctrine. The statutory regulation provides only one provision explicitly referring to the time within which claims for compensation for planning damage may be submitted. Article 37 paragraph 3 LSPD contains a provision according to which claims under Article 36 paragraph 3 LSPD can be filed within five years from the date on which the local plan or its amendment become effective. The time limit in Article 37 paragraph 3 LSPD applies only to claims under Article 36 paragraph 3 LSPD.59 This term is preclusionary, which means that the claim for a compensation equal to the reduction in the value of the property expires with its expiration.60 However, there is no unified opinion in the science of law and jurisprudence as to the further legal consequences of the expiration of this time limit. Most seem to accept that its lapse closes the right to submit the claim under Article 36 paragraph 3 LSPD before the court. According to the majority, claims under Article 36 paragraph 3 LSPD are not subject to the regulation of the Civil Code and only Article 37 paragraph 3 LSPD establishing a five-year preclusion period should be applied.61 Some rightly believe that this term was reserved only for summons to fulfil an obligation to pay a compensation, not for bringing the case to court. That is, if the summons to fulfil an obligation is sent before an expiration of this term, the general rule of termination of the claims under Article 36 paragraph 3 LSPD regulated in the civil law should apply. The creditor may sue the debtor after the expiration of the five-year's time limit, but before expiration of the six-time limit regulated in the general provisions of the civil law (Article 117 and the following of the Civil Code).

Conversely, to the claims under Article 36 paragraph 1 LSPD, according to the majority of legal scholars and jurisprudence, the general provisions on the limitation of claims found in Article 117 and the following of the Civil Code will apply.62

In my opinion, the due date for both types of claims falls at the end of the six-month period from the date on which the injured party could, at the earliest, file a claim for compensation for damage. Therefore, the beginning of the running of the limitation period for the claim under Article 36 paragraph 1 LSPD will fall on the day after the expiration of six months from the date of entry into force of the local plan. In my opinion, contrary to the majority position of legal science and

59 Fisz, 2018, p. 331. See also: wyrok SN 20.10.2016, II CSK 53/16.

60 Sobel, 2010b, p. 49.

61 Myśliwiec, m2016, p. 20.

62 Klat-Górska, 2006, pp. 128, 130; Zięty, 2011, pp. 52-53. See also: wyrok SN 20.10.2016, II CSK 53/16.

jurisprudence, questioning the applicability of regulations of the Civil Code to claims under Article 36 paragraph 3 LSPD, the start of the running of the limitation period for claims for compensation for a reduction in the value of real estate will begin with the expiration of the six months from the date of disposal. Claims under Article 36 paragraphs 1 and 3 LSPD are subject to the regulation of limitations under the general rules of Civil Code with the expiration of six years from the date of their enforceability. According to the prevailing view, the provisions on the three-year term reserved for claims related to the activities of entrepreneurs do not apply.63

## 6. Conclusions

Under Polish law, liability for planning damage has been broadly regulated. The legislator provides several legal remedies to compensate for the damage caused by the municipality's spatial policy. As a rule, the negative consequences of passing a resolution on the adoption or amendment of a local plan or those equated with it in legal effect (local revitalisation or an integrated investment plan) are subject to compensation. However, legal remedies do not seek to restore the *status quo* prior to the adoption or amendment of the municipal resolution. Liability for planning damage thus has constitutional and axiological legitimacy. The necessity of this regulation is the consequence of the status of property as a freedom and subjective right adopted in the Basic Law. Therefore, liability for planning damage appears as protection of freedom, which is guaranteed at the level of constitutional provisions. From an axiological viewpoint, liability for planning damage is justified for the same reasons that liability for damage caused by the lawful action of a public authority is allowed.

Despite its strong constitutional and axiological foundations, liability for planning damage is not absolute. The Polish legislator explicitly and systematically seeks to narrow its limits and link it to the activities of entities whose functioning is associated with the establishment of a restriction on the use of the property in question. However, any limitation should be in accordance with the rule of protection of property regulated in constitutional law.

63 Niewiadomski, 2019, pp. 334, 347-348; Lewicka, 2018, pp. 164-165; Sobel, 2010b, p. 49. See also: wyrok SN 20.10.2016, II CSK 53/16; wyrok SN 10.01.2017, V CSK 222/16.

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