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Zoning fee in connection with an increase in the value of real property – selected problems

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Abstract

An increase in the value of real property triggers, in some circumstances, the obligation on the part of the ownership title holder or perpetual usufructuary to pay a public levy to the commune. The issues of such mutual settlements between the owner of the real property and the commune arising from a change in the value of the real property have been regulated in the Act of 27 March 2003 on Spatial Planning and Development. Those fees include, for example, the so-called zoning fee which is discussed in this article. The analysis is based on views expressed by legal scholars in their writings, applicable legal acts and jurisprudence of administrative courts in this regard. The zoning fee and the legal issues related to its determination which raise the greatest doubts will be examined.

Keywords: zoning fee, real property, local spatial development plan

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Opłata planistyczna z tytułu wzrostu wartości nieruchomości — wybrane problemy

Streszczenie

Wzrost wartości nieruchomości w niektórych sytuacjach powoduje, że właściciel bądź użytkownik wieczysty zobowiązany jest uiścić na rzecz gminy opłatę o charakterze publicznoprawnym. Kwestie wzajemnych rozliczeń pomiędzy właścicielem nieruchomości a gminą powstałych w związku ze zmianą wartości nieruchomości uregulowane zostały w Ustawie z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym. Do takich opłat zaliczamy m.in. tzw. rentę planistyczną - stanowiącą przedmiot rozważań niniejszego artykułu. Podstawą analizy są poglądy doktryny, obowiązujące akty prawne i orzecznictwo sądów administracyjnych w tym zakresie. Rozważaniom poddana zostanie opłata planistyczna i związane z jej ustalaniem zagadnienia prawne, które budzą największe wątpliwości.

Słowa kluczowe: opłata planistyczna, nieruchomość, miejscowy plan zagospodarowania przestrzennego

1. Introduction

The market value of land properties is the result of many factors. Undoubtedly, one of them is the adoption or change of the local spatial development plan. If as a result of this activity the real property value increases, its owner is obliged to settle with the commune. This settlement takes the form of the so-called zoning annuity. As it is rightly stated by authors studying the theme of space development for many years, the essence of the zoning fee consists in the fact that the legislator requests the owner of real property that objectively got rich as a result of the adoption by the commune of the local plan to share their enrichment, regardless of whether they benefited from it independently or e.g. whether this enrichment due to the generosity of the objectively enriched owner or perpetual usufructuary was granted to someone else[2]. The issue of the zoning fee was and is the object of the doctrine interest. Attention should be drawn to many research papers, including monographies[3], scientific articles[4] and practical comments[5]. Also the case law of administrative courts is broad in this scope and well-established in the case of some issues. Despite it, the determination of this fee still raises in practice a number of questions and problems. Therefore, it is worth taking up this topic. For example, the determination of the zoning annuity in the case of the issue of a decision on land development has been raising controversies for years. The purpose of this article is to present some issues raising most doubts and to refer to them. The studies will be based on the dogmatic legal research method.

Consideration concerning the zoning fee should be carried out on the basis of the concept of administration fee, while the zoning fee cannot be automatically included in this category only on the basis of its name. For the purposes of this article, I assume that the zoning annuity fulfils minimum requirements for considering it as a fee, i.e. the name: fee – given by the legislator, 'monetary value', compulsory nature and generality, obligation to make the payment resulting from the act, being in whole or in part income of budgets of the state or territorial self-government units[6].

2. Zoning fee – general characteristics

The basic mode of determining the zoning fee is provided for in Article 36(4) of the Polish Act of 27 March 2003 on spatial planning and development[7]. Pursuant to its content, if in connection with the adoption of a local plan or its change the

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2 M. Kruś, Z. Leoński, M. Szewczyk, *Spatial Development Law,* Warsaw 2019, p. 181.

3 R. Strzelczyk, *Taxes and Fees concerning Real Properties,* Warsaw 2016; H. Izdebski, *Ideology and Spatial Development,* Warsaw 2013; W. Szwajdler (ed.), *Aspects of Planning Law and Spatial Development,* Warsaw 2016.

4 M. Kruś, M. Szewczyk, *Local Plan vs. Decision on Land Development,* 'Scientific Journals of Administrative Courts' (Zeszyty Naukowe Sądownictwa Administracyjnego) 2018, no. 2, p. 35-52; G. Suliński, *Disposal of Real Property in the Performance of Preliminary Sales Agreement vs. Determination of the Zoning Fee,* 'Municipal Finance' (Finanse Komunalne) 2018, no. 10, p. 40-49; K. Małysa-Sulińska, *Increase in Real Property Caused by the Adoption or Change of the Local Spatial Development Plan,* 'Municipal Finance' (Finanse Komunalne) 2014, no. 3, p. 42-48; Ł. Walo, M. Żmudka, *Subject of Proceedings regarding the Determination of the Zoning Fee on the Basis of Article 36(4) of the Polish Act of 27 March 2003 on Spatial Planning and Development,* 'Casus' 2014, no. 2, p. 34-39.

5 G. Węgrzyn, *One-off Fee vs. Decision on Land Development and Management,* Warsaw 2016; A. Bartosiewicz, *Zoning Annuity,* Warsaw 2018.

6 G. Liszewski (ed.), *Local Government Fees in Poland – Practical Problems,* Białystok 2010, p. 261.

7 Journal of Laws of 2021, item 741, hereinafter referred to as the Spatial Planning and Development Act.

real property value has increased and the owner or perpetual usufructuary disposes of this real property, the head of the commune, mayor or president of the city collects one-off fee determined in this plan, expressed as a percentage of the real property value. This fee is the commune's own income. The amount of the fee cannot exceed 30% of the increase in the real property value.

While performing the general characteristics of this fee, it is worth indicating its public-law and obligatory nature. As far as the first feature is concerned, in the resolution of 26 June 2001 the Supreme Court decided on unavailability of judicial route for awarding a fee on account of the increase in the real property value[8]. While at the beginning the issue whether the provisions of the Polish Tax Ordinance Act of 29 August 1997 apply to the zoning fee was controversial[9], currently it is well-established that the fee for the increase in the real property value does not result from the tax act, and therefore it does not fulfil one of the requirements specified in Article 6 of the Tax Ordinance. Hence, the obligation to make the fee on account of the increase in the real property value caused by the adoption or change of the spatial development plan results from the commune's specific spatial policy[10]. Although in more recent case law this issue is not the object of discourse and has already been settled[11], there are still supporters of the view that the application of the Tax Ordinance to this fee would solve many dilemmas, which cannot be solved in the case of the application of the Code of Administrative Procedure, such as: legal succession in the scope of the obligation to make this fee, possibility to divide it into instalments and postponement of payment deadlines[12]. There is no doubt that these arguments are right and convincing, but there is no indication that the line of case law of administrative courts will change in this regard. Currently it is also indicated that the public-law character of the zoning annuity results from Article 36(4) of the planning act, pursuant to which this fee is the commune's own income[13].

There is no doubt that it is a fee of an obligatory nature – there is no scope of the authority's discretion as to the determination of the one-off fee due on account of the increase in the real property value in connection with the adoption or change of the local plan. The provisions regulating the institution of the zoning fee have the character of norms binding the authority[14]. The obligatory nature of determining the zoning annuity does not raise any doubts also in the current case law[15], which distinguishes this fee from, for example, adjacent fees of a discretionary nature.

The proceedings concerning the determination of the zoning fee are initiated most frequently ex officio (or at the request when the owner or perpetual usufructuary of the real property before its disposal requests the determination of

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8 Resolution of the Supreme Court of 26 June 2001, III CZP 30/01, OSNC 2002, no. 2, item 16; critical gloss: K. Flaga-Gieruszyńska, 'Rejent' 2002, no. 6, item 132.

9 Judgement of the Supreme Administrative Court of 7 November 2001, II SA/Gd 1948/01, OSP 2003, no. 2, item 16.

10 Judgement of the Supreme Administrative Court in Warsaw of 15 November 2006, II OSK 1370/05, LEX no. 321533.

11 Cf. Judgement of the Provincial Administrative Court in Warsaw of 19 April 2017, IV SA/Wa 3330/16, LEX no. 2394616.

12 M. Kruś, Z. Leoński, M. Szewczyk, *Spatial..., op.cit.,* p. 187.

13 T. Bąkowski, *Polish Act on Spatial Planning and Development. Commentary,* Zakamycze 2004, p. 77.

14 Judgement of the Provincial Administrative Court in Białystok of 8 February 2007, file reference II SA/Bk 611/06, LEX no. 929189.

15 Judgement of the Provincial Administrative Court in Warsaw of 28 January 2020, IVSA/Wa 2724/18. LEX no. 3078927.

the fee by means of a decision). It means that the administration authority is obliged to initiate ex officio the proceedings within 5 years from entry into force of the local spatial development plan. This opinion is confirmed by the case law of administrative courts. In the judgement of 4 February 2011 the Supreme Administrative Court indicated that the appropriate application of section 3 of Article 37 of the Spatial Planning and Development Act to fees referred to in Article 36(4) of the Spatial Planning and Development Act should be understand in this way that the head of the commune, mayor or president of the city should, within 5 years from the date when the local plan or its change came into life, initiate (ex officio) administrative proceedings concerning the determination of the one-off fee due on account of the increase in the real property value. The 5-year deadline (from the date when the local plan or its change came into life) referred to in Article 37(3) of the Spatial Planning and Development Act should be understood as the limitation period of claims within the meaning of the civil law and as the maximum deadline within which administrative proceedings concerning the determination of the fee due on account of the increase in the real property value may be initiated, not as the deadline limiting the issue of a decision in the case[16]. This regulation should be also assessed positively as it does not raise such doubts as those existed until the amendment of 2017, which concerned the determination of time limits for initiating proceedings and limitation periods of claims in the case of adjacent fees[17].

3. Premises for determining the zoning fee

In literature it does not raise doubts that the calculation of the zoning fee requires the fulfilment of both of the following premises: increase in the real property value caused by the change or adoption of the local spatial development plan and disposal of the real property by the owner or perpetual usufructuary (within 5 years from the adoption or change of the local plan)[18]. Marian Wolanin additionally indicates the condition consisting in determining in the local plan the percentage of the increase in the real property value, constituting the basis for calculating the amount of the zoning fee[19].

Also in the case law it is uniformly emphasised that the premises for determining the zoning fee referred to in Article 36(4) of the Spatial Planning and Development Act include: 1) the adoption or change of the local spatial development plan, 2) the increase in the real property value caused by the adoption or change of the local plan, 3) the disposal of the real property by means of an agreement before the expiry of 5 years from the date when the spatial development plan or its change came into life. Currently it is emphasised that the increase in the real property value must occur in connection with the adoption of the local spatial

16 Judgement of the Supreme Administrative Court of 4 February 2011, II OSK 207/10, LEX no. 753419; similarly judgement of the Provincial Administrative Court in Poznań of 2 October 2009, II SA/Po 812/08, LEX no. 573832.

17 By the Act of 20 July 2017 on the amendment of the Act on real property management and certain other acts (Journal of Laws, item 1509) the legislator clarified questionable issues and this state changed as of 23 August 2017.

18 R. Kosior, M. Wepa, *Impact of Spatial Planning on the Real Property Value – Zoning Annuity* (part I). 'Rejent' 2005, no. 10(174), p. 96.

19 M. Wolanin, *Basic Problems of the Admissibility of Determining and Collecting the Zoning Fee and its Return,* part II, 'Nieruchomości©' 2011, no. 10, p. 4.

development plan or its change. If despite the adoption of the local plan the real property value has not increased, there are no grounds for the administration authority (the head of the commune, mayor or president of the city) to determine the fee referred to in Article 36(4) of the Spatial Planning and Development Act and to request its payment. Such a situation will take place when the previous purpose of the real property resulting from the provisions of the plan applicable until the adoption of a new plan or its change is the same as its purpose in the newly adopted spatial development plan[20]. In the case of the fulfilment of the indicated premises, the authority is obliged to determine the zoning fee.

3.1. Disposal of real property

Hence, it results from the above that the obligatory premises for imposing the zoning fee is the disposal of real property. Although there is no legal definition of the concept of 'disposal', in this scope it is worth referring to the previous wording of this provision[21], where the word 'sell' was used, which caused the narrow application of this provision to the sale activity. Therefore, it should be assumed that the catalogue of legal events covered by this regulation has been extended. In the resolution of 30 October 2000 the Supreme Administrative Court indicated that the legislator using this term in the Act wanted to assign to it a specific content adequate to the issue regulated by this Act. In the light of the above, it would be unauthorised to identify the term of 'disposal' – undefined in the Spatial Planning and Development Act – with each form of transferring the ownership title, both free of charge as well as against consideration. Therefore, the Supreme Administrative Court concluded that the one-off fee referred to in Article 36(3) of the Polish Spatial Development Act of 7 July 1994, when the real property value has increased in connection with the change of the local spatial development plan, is not collected in the case of donation of share in the co-ownership for relatives[22]. As a consequence, it should be assumed that the term of 'disposal' does not cover the transfer of the ownership title or the right of perpetual usufruct by way of donation. Also in the resolution of 10 December 2009 the Supreme Administrative Court stated that the collection of the fee on account of the increase in the real property value referred to in Article 36(4) of the Polish Act of 27 March 2003 does not cover the situation when the real property has been donated to a relative[23]. It is impossible to disagree with the view that the adoption of the resolution (of 30 October 2000) caused some confusion both in the existing legal framework as well as in judicial activities. It is expressed, for example, by the use by the legislator in some cases of the term of 'sale' (Article 37(1) of the Spatial Planning and Development Act), and in other cases 'disposal'[24]. The case law presents, for

[20] Judgement of the Provincial Administrative Court in Kraków of 19 December 2018, II SA/Kr 1200/18, LEX no. 2611448; also judgement of the Provincial Administrative Court in Kraków of 1 February 2019, II SA/ Kr 1428/18, LEX no. 2630225.

[21] The original wording of the provision of Article 36(4) of the Spatial Planning and Development Act was amended by the Act of 28 November 2003 on the amendment of the Act on real property management and certain other acts, Journal of Laws of 2004, no. 141, item 1492.

[22] Resolution of the Supreme Administrative Court of 30 October 2000, file reference OPK 16/00, OSP 2001, no. 10.

[23] Resolution of the Supreme Administrative Court in Warsaw of 10 December 2009, II OPS 3/09, ONSA- iWSA 2010/2/22.

[24] M. Kruś, Z. Leoński, M. Szewczyk, *Spatial..., op.cit.,* p. 182.

example, the view that the exchange agreement as a rule falls within the concept of the disposal of real property referred to in Article 36(4) of the Spatial Planning and Development Act [25]. Pursuant to the content of Article 36(4) of the Spatial Planning and Development Act, the fee referred to in section 4 is not collected in the case of free-of-charge transfer by a farmer of the ownership title to real properties being parts of a farm on the successor within the meaning of the provisions of the Polish Act of 20 December 1990 on the social insurance for farmers[26] or the provisions on detailed conditions and procedures of granting financial aid within the 'Structural Pensions' measure covered by the Rural Development Programme for 2007-2013 issued on the basis of Article 29(1)(1) of the Polish Act of 7 March 2007 on supporting the development of rural areas with the contribution of funds from the European Agricultural Fund for

Rural Development[27]. In this document the legislator regulated a specific issue concerning farmers who transferred their farms free of charge to successors in exchange for social security scheme benefits. The transfer of a farm in situations referred to in the provision takes place on the basis of equivalence and that is why it became the object of the interference of the legislator, who within the policy of supporting structural transformations of Polish agriculture decided to grant the exemption from the obligation to pay the zoning fee also in these cases. Therefore, such a solution should be assessed positively.

3.2. Concept of real property for the purposes of determining the zoning fee

At this point it is worth discussing, apart from the term of 'disposal', the term of 'real property' for the purposes of determining the zoning fee.

The comprehensive interpretation of the term of real property, used in Article 36(4) of the Spatial Planning and Development Act, was carried out in the case law of administrative courts. It should be noted that in Article 36(4) of the Spatial Planning and Development Act the legislator uses the term of 'real property', while normative meaning of this concept is not explained, in particular Article 2 of the Spatial Planning and Development Act, which is the glossary of statutory expressions, does not contain the definition of this concept. It is not controversial that in different legal acts, taking into account the specific nature and object regulated by them, the legislator may assign to the same term different meanings. As the Supreme Administrative Court explained in the resolution of 17 May 1999[28], and repeated in the resolution of 30 October 2000[29], the concept of real property in the meaning of the code (Article 46(1) of the Polish Civil Code[30]) and in the context of the land and mortgage register (Article 21, Article 24 of the Polish Act of 6 July 1982 on land and mortgage registers and on mortgage[31]) was not uniformly incorporated into other acts,

25 Compare Judgement of the Provincial Administrative Court in Kielce of 26 April 2018, II SA/Ke 160/18. LEX no. 2490180.

26 Journal of Laws of 2017, item 2336 and of 2018, items 650 and 858.

27 Journal of Laws of 2017, item 1856 and of 2018, item 311, as amended.

28 Resolution of the Supreme Administrative Court of 17 May 1999, OPK 17/98, ONSA 1999, no. 4, item 121.

29 Resolution of the Supreme Administrative Court of 30 October 2000, OPK 16/00, ONSA 2000, no. 2, item 64.

30 Polish Act of 23 April 1964 – Civil Code, Journal of Laws of 2020, item 1740.

31 Polish Act of 6 July 1982 on land and mortgage registers and on mortgage, Journal of Laws of 2019, item 2204.

including the Polish Spatial Development Act of 7 July 1994. Although the resolutions cited were adopted when the indicated Spatial Development Act was in effect, in relation to the institution of the so-called zoning annuity the regulation of the Spatial Planning and Development Act contains similar solutions and therefore they may be applied to current solutions. Hence, it is justified to agree with these positions of the judicature in which it was emphasised that due to the connection of the institution of the zoning annuity with the civil law transaction, it should be assumed for achieving the effect referred to in Article 36(4) of the Spatial Planning and Development Act that the above-mentioned provisions refer to such a real property which can be an independent object of the civil law transaction[32]. The real property within the meaning of Article 36(4) of the Spatial Planning and Development Act is also part of the land belonging to the same owner, covered by the local spatial development plan and intended in this plan for a specific purpose, which after the geodetic or legal separation can be an independent object of the civil law transaction[33]. The land and mortgage register can be maintained for one or more plots of land separated geodetically. Hence, in such a situation the concept of real property in the context of the land and mortgage register will not coincide with the concept of real property used in the provisions covered by the interpretation. The same situation will occur when the owner of real property wants to dispose of one of many plots of land being parts of the real property for which one land and mortgage register is maintained (legal division). However, it cannot be excluded that the owner of real property will dispose of all plots of land being parts of the real property for which one land and mortgage register is maintained to the same entity at the same time. If the land and mortgage register is maintained for one plot of land, the concept of real property in the context of the land and mortgage register will coincide with the geodetic concept. In turn, if the land and mortgage register is maintained for two or more plots of geodetic land, the zoning annuity will be determined for the real property in the context of the land and mortgage register. As one may see, the object of the disposal is decisive for establishing the essence of the real property for the purposes of determining the zoning annuity[34]. Therefore, it is reasonable to agree with the fact that the provision of Article 36(4) of the Spatial Planning and Development Act applies also if a separate part of the real property or ideal part defined by its fraction (share) is disposed of[35]. This well-established position is also accepted in doctrinal studies[36]. This interpretation of the concept of 'real property' from Article 36(4) of the Spatial Planning and Development Act is supported by important practical reasons; the literal interpretation coming down 'real property' in the meaning of the cited provision to all plots of land covered by one land and mortgage register, from which only part was the object of disposal, could lead to increasing the sense of the so-called 'zoning annuity'[37]. As a result of such analyses, currently it can be assumed that the real property within the

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32 Judgement of the Supreme Administrative Court of 9 March 2010, II OSK485/09, LEX no. 597632.

33 Judgement of the Supreme Administrative Court of 15 April 2008, II OSK 408/07, LEX no. 467118.

34 Judgement of the Supreme Administrative Court of 3 March 2010, II OSK 455/09, LEX no. 597606.

35 Judgement of the Supreme Administrative Court of 10 March 2010, II OSK 505/09, LEX no. 597653.

36 Z. Niewiadomski (ed.), *Spatial Planning and Development. Commentary,* Warsaw 2011, p. 301; H. Izdebski, I. Zachariasz, *Polish Act on Spatial Planning and Development. Commentary,* Warsaw 2013, p. 234.

37 Judgement of the Supreme Administrative Court in case II OSK 2216/12.

meaning of Article 36(4) of the Spatial Planning and Development Act is also part of the land belonging to the same owner, covered by the spatial development plan and assigned in this plan for a specific purpose, which after the geodetic or legal separation can be an independent object of the civil law transaction as a result of such assignment. Hence, the concept of real property in the context of the land and mortgage register will not coincide with the concept of real property used in the provisions of the Spatial Planning and Development Act. The same situation will occur when the owner of real property wants to dispose of one of many or several of many plots of land being parts of the real property for which one land and mortgage register is maintained. Therefore, if the land and mortgage register is maintained for two or more plots of geodetic land, the zoning annuity will be determined for the real property in the context of the land and mortgage register. As a consequence, for the purposes of determining the zoning annuity, the object of the disposal will be decisive.

3.3. Increase in the real property value

Another necessary condition for imposing the fee is the determination that the real property value has increased as a result of the change or adoption of the local plan. The increase in the real property value is the difference between the real property value determined taking into account the designation of the land applicable after the adoption or change of the local plan and its value determined taking into account the designation of the land applicable before the change of this plan, or the actual manner of the real property use before its adoption[38].

In the case law of administrative courts it is emphasised that the increase in the real property value should be caused only by the adoption or change of the local plan. Therefore, there must be a direct causal relationship between the increase in the real property value and the change of the plan. The determination of the value change is to be objective and cannot result from the phenomenon of supply and demand occurring on a given market. As a consequence, during the performance of the survey, it is necessary to carry out a thorough and comprehensive analysis, which is to demonstrate that the increase in the real property value does not result from reasons other than the adoption of the plan[39]. Similarly in the judgement of 29 November 2007 the Provincial Administrative Court in Warsaw explained that the change of the real property value authorising the determination of the zoning fee must be caused by the change or adoption of the local plan, not by the change of this land designation in the local plan. Therefore, the change of the designation of a given real property in the local plan is not a necessary condition – it is sufficient that in connection with the adoption or change of the local plan the real property value will increase[40]. This position should be supported as the change of the designation of neighbouring land, not a specific real property, may also have an impact on the real property value. Additionally, a

38 M.Wolanin, *Zoning Fee in Spatial Planning, part II: Conditions for Collecting the Zoning Fee,* 'Nieruchomości©' 2005, no. 5, p. 6.

39 Judgement of the Supreme Administrative Court of 25 September 2007, file reference II OSK1244/06, LEX no. 360221.

40 Judgement of the Provincial Administrative Court in Warsaw of 29 November 2007, file reference IVSA/Wa 2049/07, LEX no. 434867.

situation may occur when in the newly adopted plan the designation of the real property is the same as it was previously in the plan which ceased to be applicable. Then, it should be assumed that the real property value will not increase as a result of the adoption of the new local plan[41]. The Provincial Administrative Court in Kraków in the judgement of 18 April 2011 clearly stated that in the case when the plan had ceased to be applicable and a new plan was adopted, the designation of a given real property in the previously applicable local plan should be taken into account, regardless of when and for what reasons it had ceased to be valid. If it results from this comparison that the designations of the same real property are the same, the newly adopted local plan will not cause as a rule the increase in the given real property value, but it only results in the continuation of the previous designation in local plans of the way of the given real property development[42]. It means that in the proceedings concerning the determination of such a fee it is necessary to establish not only whether the local plan applied to a given real property, but also this real property's designation in the local plan.

It is worth drawing attention to the content of Article 37(1) of the Spatial Planning and Development Act, from which it results that if the local plan is adopted for the land to which such a plan did not apply previously, the actual way of the real property use should be established. In this scope the Supreme Administrative Court indicated rightly that the valuation of the real property for the purposes of determining the amount of the zoning fee is the valuation for the purposes indicated in the Spatial Planning and Development Act, not in the Real Property Management Act. It means that determining zoning fees must be based on the provisions of the Spatial Planning and Development Act, in particular Article 37(1). While applying the provisions of the Real Property Management Act, it is not possible to lead to the exclusion of provisions included in the act regulating the zoning fee[43].

3.4. Percentage rate of the zoning fee

In order to determine the amount of the zoning fee, it is also necessary to determine the percentage rate of the zoning fee. As it results from Article 15(2)(12) of the Spatial Planning and Development Act, the local plan obligatorily specifies percentage rates on the basis of which the fee referred to in Article 36(4) of the Spatial Planning and Development Act is determined. As a consequence, it may be concluded that the rate constitutes an obligatory element of the local plan. The amount of the zoning fee cannot exceed 30% of the increase in the real property value. The determination of the amount of the fee is an obligatory element of the resolution introducing the new local spatial development plan or the resolution changing the applicable plan. The fee should be determined by the relevant commune council as a percentage, not as an amount[44]. It is questionable whether the percentage rate used to calculate the zoning fee may be determined by means of a decision.

41 Compare Judgement of the Provincial Administrative Court in Wrocław of 9 December 2010, file reference II SA/ Wr 342/10, LEX no. 755570.

42 Judgement of the Provincial Administrative Court in Kraków of 18 April 2011, file reference II SA/Kr 286/11, LEX no. 993295.

43 Judgement of the Supreme Administrative Court in Warsaw of 15 December 2008, file reference II OSK 1600/07. LEX no. 529211.

44 Z. Niewiadomski (ed.), *Polish Act on Spatial Planning and Development. Commentary,* Warsaw 2004, p. 284.

Pursuant to Article 63(3) of the Spatial Planning and Development Act, if the decision on land development produces effects referred to in Article 36, the provisions of Articles 36 and 37 apply accordingly. Costs of the implementation of claims referred to in Article 36(1) and (3) are incurred by the investor after obtaining the final decision on the building permit. According to Marek Szewczyk, the determination of percentage rates in decisions on the determination of the zoning fee is closest to commonly accepted understanding of the proper application of law, as it is connected with the smallest deviations from the direct application of the provision of Articles 36 and 37 of the Spatial Planning and Development Act and does not require modifications of other provisions of this act. At the same time, it means that the head of the commune (mayor or president of the city) will settle the issue of the percentage rate amount in the decision on the determination of the zoning fee. Therefore, without the local spatial development plan owners and perpetual usufructuaries will not be sure how high the zoning fee will be imposed on them. However, heads of the commune (mayors, presidents of the city) are significantly limited while taking these decisions by two principles expressed in Article 32(2) of the Constitution of the Republic of Poland: the principle of equality before the law and the principle of equal treatment by public authorities[45]. In turn, in the judgement of 11 February 2009 the Provincial Administrative Court in Gdańsk explained that as circumstances justifying the payment of the fee referred to in Article 36(4) of the Spatial Planning and Development Act result from the decision on land development taken by the head of the commune, mayor or president of the city, this authority determines at the same time the percentage rate of the fee due on account of the increase in the real property value. The authority issuing the decision on land development, while determining the percentage rate, has the possibility to 'moderate' it up to 30%. The amount adopted by the authority may depend on the provisions of the decision on land development in the scope of the way of developing the real property, the planned development, previous manner of the use of the land and its designation resulting from the land register. At the same time there is no doubt that the decision in the scope of the percentage rate of this fee should be justified in a manner compliant with the requirements of Article 107(3) of the Polish Code of Administrative Procedure[46]. In this scope the Supreme Administrative Court stated otherwise in the judgement of 6 March 2008, explaining that the commune council is not – in the absence of specific legal basis – authorised, in the case of lack of the local spatial development plan, to determine the amount of percentage rates of the fee due on account of the increase in the real property value in connection with the issue of a decision on land development and is also not authorised to determine it in specific decisions – the head of the commune, mayor, president of the city[47]. This view currently prevails, and that is why it should be concluded that the determination of the zoning fee is strictly connected with the adoption of the local plan, in which the commune council determines the percentage rate, while the obligation to pay it occurs when in connection with the adoption (change) of the local plan the real property value increases, and the owner or perpetual usufructuary disposes of this real property.

45 M. Szewczyk, *Determination of Zoning Fees without Local Spatial Development Plans,* 'Casus' 2006, no. 37, p. 9.

46 Judgement of the Provincial Administrative Court in Gdańsk of 11 February 2009, II SA/Gd 705/08, LEX no. 521936.

47 Judgement of the Supreme Administrative Court in Warsaw of 6 March 2008, II OSK 1887, LEX no. 464945.

The provision of Article 36(4) of the Spatial Planning and Development Act provides for the collection of the fee determined in the spatial development plan. The decision on land development is issued intrinsically only in the situation of lack of the spatial development plan (Article 4(2) of the Spatial Planning and Development Act). Lack of such a plan results in lack of regulations determining the amount of the fee due on account of the increase in the real property value. Therefore, as administrative courts indicate, *de lege lata* or the commune council in a separate resolution, or – even more – the executive authority of the commune by a single decision does not have appropriate authorisations to determine the amount of the percentage rate, and thus lead to imposing public law burdens on an entity.

However, it seems that as the legislator's intention was to apply accordingly the provisions of Article 36(4) of the Spatial Planning and Development Act, it is essential to consider whether in the case of lack of the local plan it is actually impossible to apply the provision of Article 36(4) of the Spatial Planning and Development Act. As the starting point it is necessary to remind the substance of the decision on land development as well as of the decision on the location of the public purpose investment, which taking into account the wording of Articles 50(1) and 59(1) of the Spatial Planning and Development Act were described as an alternative for the local spatial development plan. As a consequence, these decisions may produce similar effects. Therefore, we should fully approve the position that it seems necessary to modify Article 36(4) of the Spatial Planning and Development Act by the following expression: 'If in connection with (the adoption of the local plan or its change) the issue of the decision on land development and management the real property value has increased, and the owner or perpetual usufructuary disposes of this real property, the head of the commune, mayor or president of the city collects a one-off fee specified (in this plan) in this decision, determined as a percentage of the increase in the real property value'. In this way, the legislator's purpose expressed in Article 58(2) of the Spatial Planning and Development Act[48] and Article 63(3) of the Spatial Planning and Development Act would be fulfilled. In this case, also the modification of the provision indicating elements of the decision on land development and management would be a natural consequence (Article 54 of the Spatial Planning and Development Act). Therefore, I fully share the position that in a democratic state it cannot happen that depending on the fact whether the investor obtains the building permit through a local plan, or the decision on land development and management, they are obliged to pay the fee or not[49].

4. Final conclusions

Definitely, the zoning fee constitutes a kind of controversial levy of a public law nature. Due to the fact that the Spatial Planning and Development Act has been in force for a very long time (as for a substantive act), the formation of extensive and

[48] If the decision on establishing the location of the public purpose investment produces effects referred to in Article 36, the provisions of Article 36 and Article 37 apply respectively.

[49] M. Kruś, M. Szewczyk, *Local Plan vs. Decision on Land Development,* 'Scientific Journals of Administrative Courts' (Zeszyty Naukowe Sądownictwa Administracyjnego) 2018, no. 2, p. 35-52.

rich case law of administrative courts, also concerning the zoning fee, is a natural consequence of it. It caused that many legal issues raising doubts were in practice resolved through the well-established line of case law. Nevertheless, it appears that there is still area for issues and discussions, as not all legal issues have been resolved. They include, for example, the problem of calculating zoning fees without a local plan. In this scope I fully share de lege ferenda postulate for the modification of Article 54 of the Spatial Planning and Development Act by one more element, namely the determination of the percentage rate of the zoning fee.

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