

THE PRINCIPLES OF CALCULATING PLANNING FEES, FOLLOWING THE DECISION BY THE CONSTITUTIONAL TRIBUNAL OF 2010

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Summary

The paper presents issues pertaining to the amount of planning fees (fees charged for a planning application) in the context of the decision by the Polish Constitutional Tribunal dated 9 February 2010, file symbol P 58/08. Authors discuss the principles of setting such fees before the aforementioned decision was issued, and the new fee calculation principles following the implementation of the Tribunal's judgement. The Tribunal decision in question produced the change in the regulations of law concerning the calculation of planning fees, which up to that date caused many problems and difficulties, not only for the agencies responsible for setting and collecting the fees, but also for real estate evaluators and appraisers, who performed land valuations for the purpose of calculating planning fees.

Keywords

Planning fees • zoning (development) plan • value of real estate • actual use of property

1. Introduction

The issues pertaining to the “planning fees” (sometimes called the “planning annuities”), including the manner of their collection and calculating their due amount, are specified in the Act of 27 March 2003 on Spatial Planning and Development (Ustawa o planowaniu i zagospodarowaniu przestrzennym, Dz. U. z 2015 r. poz. 199 z późn. zm.).

A planning fee is paid to the municipality. Despite the fact that the use of the word “annuity” might suggest a periodical schedule of payments, in practice, the fee is charged only once.

The purpose of the fee is mainly to compensate the municipalities' expenses associated with the development and the adoption of the local land use plans (spatial development plans), hereinafter simply referred to as the “local plans”.

The imposition of the fee is justified when the municipality has contributed to the increase in the value of real estate by adopting the local plan, which comprises: the

determination (designation) of land use, the distribution of public purpose investments, and the determination of zoning for land development.

This article presents the rules for determining the amount of the aforementioned fee, while taking into account the provisions of law before the issue of the decision by the Constitutional Tribunal on February 2010. Ref. No. P 58/08 and taking into account changes in legislation resulting from the abovementioned judgment.

2. The principles of calculating planning fees before the decision by the Constitutional Tribunal

Pursuant to Article 36 paragraph 4 of the Law on Spatial Planning and Development, if in connection with the adoption of the local plan or its change, the value of the property increases, and the owner or perpetual user disposes of the property, then the mayor or president of the city charges a (one-time) fee set out in the local plan, determined as a percentage of the increase in the value of the property.

The provisions of the aforementioned Act concerning the local plan also apply to zoning and land use (i.e. zoning decisions, and decisions on the location of a public investment project). Namely, in accordance with Article 58, paragraph 2 of the Law on Spatial Planning and Development, if the decision to establish the location of a public investment produces effects referred to in Article 36 of the same Act, the provisions of Article 36 and Article 37 shall apply accordingly. According to Article 63, paragraph 3 of the Act on Spatial Planning and Development, if the zoning decision takes effect, as referred to in Article 36 of the Act, the provisions of Articles 36 and 37 shall apply accordingly, and the costs of the claims referred to in Article 36 paragraph 1 and 3 of the aforementioned Act shall be borne by the investor, after the final decision on the construction permit.

The fee in question is the income of the municipality, and its amount cannot be higher than 30% of the increase in the value of the property. The maximum interest rate on planning fee is determined directly in the Law on Spatial Planning and Development, and it can be stated that one of the tasks of local planning is to determine that amount; while the interest rate may be different for different types of real estate (e.g. allocating housing, services, etc.). The amount of the interest rate may not, however, be determined individually for individual entities. Each of the property owners of the same type (the same designation) is entitled to expect planning fees calculated using the same percentage rate.

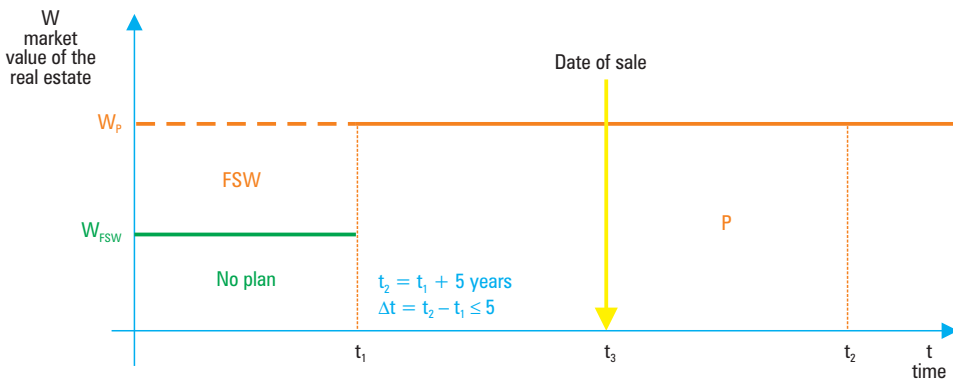
The percentage rate of the planning fee cannot be determined in a ruling separate from the ruling which adopts the local plan. It would in that case be void.

Planning fee is not charged in the case of a free transfer of ownership by the farmer, of the property included in the farm, to the successor, as defined in the Law of 20 December 1990 on Farmers' Social Insurance (Ustawa o ubezpieczeniu społecznym rolników, Dz. U. z 2013 r. poz. 1403, z późn. zm.) or in the regulations on detailed conditions and procedures for granting financial assistance under the measure of "Early structural retirement" under the Rural Development Programme

2007–2013 issued pursuant to Article 29 paragraph 1, item 1 of the Law of 7 March 2007 on rural development assistance with the participation of the European Agricultural Fund for Rural Development (Ustawa o wspieraniu rozwoju obszarów wiejskich z udziałem środków Europejskiego Funduszu Rolnego na rzecz Rozwoju Obszarów Wiejskich, Dz. U. z 2013 r., poz. 173). In the case of sale by the successor of the property provided by the farmer, planning fees shall apply accordingly.

Charge for the increase in the value of the real estate is determined for the date of the sale. The increase in the value of property is the difference between the value of the property as determined taking into account the use of the land existing after the adoption or change of the local plan, and its value to be determined taking into account the use of the land existing prior to the change of the local plan, or the actual use of the property before its enactment.

These correlations are presented in Figures 1–3:



Source: authors' study

Fig. 1. The condition in which the local plan was adopted for the area, where no local plan had existed previously

where:

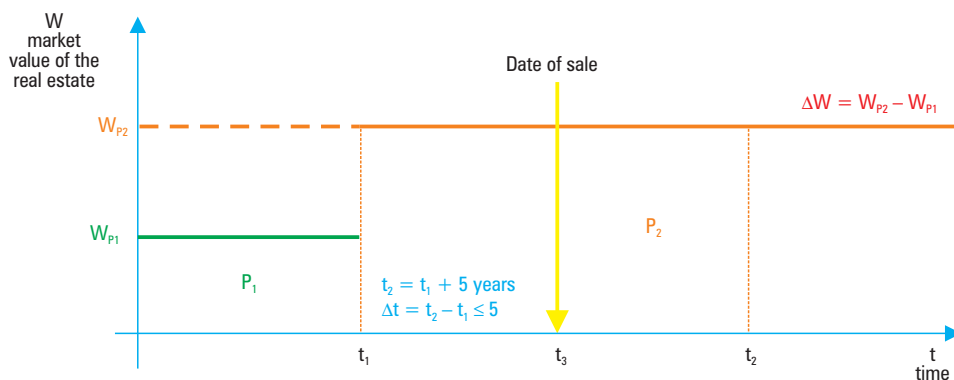
- W_{FSW} – the market value of the real estate established while taking into account the actual use of the property;
- W_p – the market value of the real estate established while taking into account the local plan;
- t_1 – the date of adopting the local plan;
- t_2 – the time period, in which a planning fee still applies in the case of the sale of the real estate ($t_2 = t_1 + 5$ years);
- t_3 – the date of sale of the real estate;
- FSW – the actual use of the real estate;
- P – the land designation (zoning) stated in the local plan.

In the example presented in Figure 1, planning fees are calculated according to the following formula:

$$O_p = S_{\%} \times P_{m^2} [(W_p - W_{FSW})] \quad (1)$$

where:

- O_p – the planning fee;
- $S_{\%}$ – the interest rate determined in the local plan (0–30%);
- P_{m^2} – the area of the real estate in m^2 ;
- W_p – the market value of 1 square meter of the real estate established while taking into account the local plan;
- W_{FSW} – the market value of 1 square meter of the real estate established while taking into account the actual use of the property.



Source: authors' study

Fig. 2. The condition in which the existing local plan (P_1) has been replaced, at time t_1 , with a new local plan (P_2)

where:

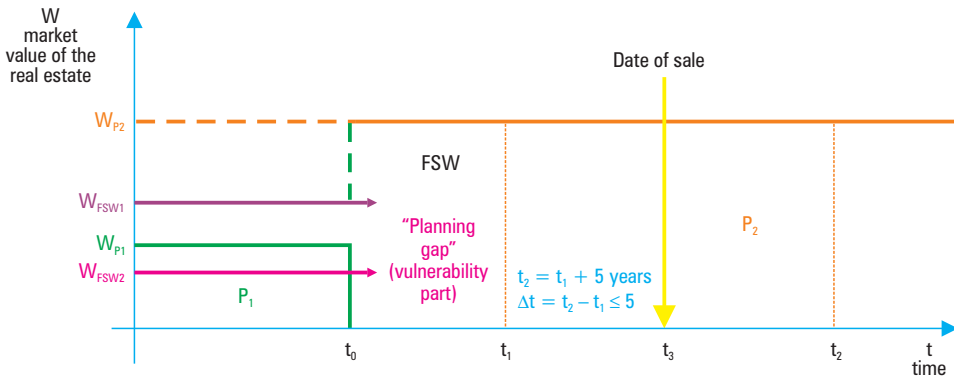
- W_{P1} – the market value of the real estate established while taking into account the old (previous) local plan;
- W_{P2} – the market value of the real estate established while taking into account the new local plan or the modification of the old (previous) local plan;
- t_1 – the date of adopting the new local plan;
- t_2 – the time period, in which a planning fee still applies in the case of the sale of the real estate ($t_2 = t_1 + 5$ years);
- t_3 – the date of sale of the real estate;
- P_1 – the land designation (zoning) stated in the old (previous) local plan;
- P_2 – the land designation (zoning) stated in the new local plan.

In the example presented in Figure 2, planning fees are calculated according to the following formula:

$$O_p = S_{\%} \times P_{m2} [(W_{p2} - W_{p1})] \tag{2}$$

where:

- O_p – the planning fee;
- $S_{\%}$ – the interest rate determined in the local plan (0–30%);
- P_{m2} – the area of the real estate in m^2 ;
- W_{p2} – the market value of 1 square meter of the real estate established while taking into account the new local plan;
- W_{p1} – the market value of 1 square meter of the real estate established while taking into account the old (previous) local plan.



Source: authors' study

Fig. 3. The condition in which, at time t_0 , the existing plan local (P_1) lost its legal power, and a new local plan (P_2) was adopted at time t_1 . The interval ($t_1 - t_0$) created the so-called “planning gap” (vulnerability part) – FSW

where:

- W_{p1} – the market value of the real estate established while taking into account the old (previous) local plan, which has lost its legal power;
- W_{p2} – the market value of the real estate established while taking into account the new local plan or the modification of the old (previous) local plan;
- t_0 – the date of the old (previous) local plan losing its legal power;
- t_1 – the date of adopting the new local plan;
- t_2 – the time period, in which a planning fee still applies in the case of the sale of the real estate ($t_2 = t_1 + 5$ years);
- t_3 – the date of sale of the real estate;
- P_1 – the land designation (zoning) stated in the old (previous) local plan, which has lost its legal power;
- P_2 – the land designation (zoning) stated in the new local plan;
- FSW – the actual use of the property;
- W_{FSW1} – the market value of the real estate established while taking into account the actual use of the property, if that value is higher than W_{p1} ;

W_{FSW2} – the market value of the real estate established while taking into account the actual use of the property, if that value is lower than W_{P1} .

In the example presented in Figure 3, planning fees are calculated according to the following formula:

$$O_p = S_{\%} \times P_{m2} [(W_{P2} - W_{FSW1})] \quad (3)$$

or

$$O_p = S_{\%} \times P_{m2} [(W_{P2} - W_{FSW2})] \quad (4)$$

where:

- O_p – the planning fee;
- $S_{\%}$ – the interest rate determined in the local plan (0–30%);
- P_{m2} – the area of the real estate in m^2 ;
- W_{P2} – the market value of 1 square meter of the real estate established while taking into account the new local plan;
- W_{P1} – the market value of 1 square meter of the real estate established while taking into account the old (previous) local plan;
- W_{FSW1} – the market value of 1 square meter of the real estate established while taking into account the actual use of the property, if that value is higher than W_{P1} ;
- W_{FSW2} – the market value of 1 square meter of the real estate established while taking into account the actual use of the property, if that value is lower than W_{P1} .

Any claims due to both the reduction and the increase in the value of the property may be placed within 5 years from the date on which the new local plan or its modification becomes mandatory. Application of the aforementioned claims occurs through the efficient initiation of proceedings to determine the planning fee, pursuant to the provisions of the Act of 14 June 1960 – the Code of Administrative Procedure (Kodeks postępowania administracyjnego, Dz. U. z 2013 r. poz. 267, z późn. zm.), confirmed, for instance, by the judgment of the Supreme Administrative Court of 4 February 2011 (Reference File II OSK 207/10).

The planning fee is established by a mayor, or president of the city, via an administrative decision, immediately after the receipt (within 7 days from the date of the preparation of the contract for the sale of the real estate) of an extract from the notarial deed from the Notary Public. The content of the decision should match the requirements of the aforementioned Code of Administrative Procedure, i.e. it should include: designation of the public administration body, the release date, the specification of the party or parties, the establishment of a legal basis, the actual decision, the factual and legal justification of the decision, the instruction whether and in what mode an appeal is possible, the signature listing the name, surname and the position of the person authorized to issue a decision or – if the decision was issued in the form of an electronic document – it should be accompanied by a secure

electronic signature verified by a valid qualified certificate. Special provisions may also specify other components, which should be included in an administrative decision. Each administrative decision on establishing the planning fee may be appealed to the municipal agency via the Local Government Court of Appeals, within 14 days of the decision's receipt.

The owner or perpetual usufructuary of the real estate, the value of which has increased in connection with the adoption or the change of the local plan, prior to its disposal may (on his/her own initiative) request from the mayor or the president of the city that the planning fee be established via an administrative decision. The decision of the mayor or the president of the city on the establishment of such a fee upon request (on demand) will therefore be a decision based on meeting the condition, which is to execute the sale of the property.

According to the case law of the administrative courts (for instance, Judgment of the Supreme Administrative Court of 21 June 2013 Reference File II OSK 273/2012), establishing the planning fee is also possible in a situation where the property owner sells only a part of the property, rather than the entire property.

In terms of demands, pertaining to the abovementioned claims, to which the property owner or perpetual user is entitled, and to the issued administrative decisions concerning the planning fee, the mayor, or the president of the city periodically discloses relevant information as needed, but at least once a year, during a session of the Municipal Council.

With regard to the rules for determining the value of the property, and rules for determining the financial consequences of the adoption or the change in the local plans, as well as in relation to persons entitled to determine these values and the financial consequences, the Spatial Planning and Development Law refers directly to real estate regulations. The definition of "property value" contained in the glossary of the Spatial Planning and Development Law states that the Law interprets the value of the property as its market value. This concept is defined in detail in the Law of 21 August 1997 on Real Estate Management, consolidated text (*Ustawa o gospodarce nieruchomościami*, Dz. U. z 2015 r. poz. 1774), according to which market value is determined for a property, which is or may be traded.

At this point it should be noted that in order to determine the market value of the property for the calculation of the planning fee, real estate evaluator should take into account the designation (intended use) of the property in accordance with the guidelines prescribed directly in Article 37 paragraph 1 of the Law on Spatial Planning and Development (i.e. on the basis of the local plan or the actual use of the property before the adoption of such a plan). The evaluator should not, in the absence of a local plan, determine the designation of the property on the basis of studies of urban planning and municipal zoning and land use (i.e. zoning/planning decisions or the decision on the location of a public investment project), as indicated by the provision of Article 154 of the Real Estate Management Law.

Real estate evaluator, determining market values of real estate as indicated above, is guided by the following principles:

- 1) the status of the property is considered as per the date of entry into force of the local plan or its modification,
- 2) the zoning is assumed as in force before the adoption of the local plan or its modification, and after the adoption of the local plan or its modification,
- 3) the actual use of the property is adopted in the absence of a local plan, or when the so-called “planning gap” occurs,
- 4) market prices are adopted as per the date of the sale of the property.

Having said that, the provision of Article 37 paragraph 1, which is closely associated with Article 36 paragraph 4 of the Spatial Planning and Development Law, was subjected to consideration by the Constitutional Tribunal (at the request of the Regional Administrative Court in Kraków) for its compliance with Article 2 and Article 32 of the Polish Constitution – pertaining to the fact that the increase in the value of real estate refers to the criterion of the actual use in situations where the designation of the real estate was identified in the local plan adopted before 1 January 1995, which lost power due to the expiry of the period specified in Article 87 paragraph 3 of this Law. This kind of case is shown in Figure 3. According to the court, such interpretation of Article 37 paragraph 1 of the Law cited above is inconsistent with the aforementioned provisions of the Constitution of the Republic of Poland, as it puts the property owners within its disposition in a worse situation than those owners whose properties lie on the area covered by the continuity of local planning (see Figure 2). The content of the decision of the Constitutional Tribunal and its legal implications are discussed in the next section.

3. The decision by the Constitutional Tribunal and its legal implications

By the force of the decision of 9 February 2010 Reference File P 58/08, the Constitutional Tribunal judged that the provision of Article 37 paragraph 1 of the Law of 27 March 2003 on Spatial Planning and Development – to the extent that the increase in the value of real estate refers to the criterion of the actual use, in situations where the designation of the property is defined the same as in the local zoning plan adopted before 1 January 1995, which lost legal force due to the expiration data set out in Article 87.3 of this Law – is inconsistent with Articles 2 and 32 of the Polish Constitution.

The main concern of the court, which by its ruling addressed the question of law to the Constitutional Tribunal, resulted from the fact that the legislator, by linking the increase in the value of the property sold to the adoption or amendment of the local plan, imprecisely defined the manner of comparison between the “present” and “previous” value of the real estate. As the court pointed out, the term of “present” value is not problematic – such value is determined by taking into account the specific designation of the real estate in the current local plan (new or amended). However, the difficulty arises in determining the “previous” value, because Article 36 paragraph 4 of the Spatial Planning and Development Law, applicable to such

cases, refers only to the situation of the adoption or the change in the local plan. To estimate the value of the property, the procedure referred to in Article 37 paragraph 11 of the Spatial Planning and Development Law and Article 154 of Real Estate Management Law should be applied, which states that the choice of appropriate approaches, methods and techniques for estimating real estate value is to be made by a real estate evaluator (appraiser), who takes into account in particular: the purpose of the valuation procedure, the type and location of the property, the designation of the real estate in the local plan, the condition of the real estate, as well as any available data on prices, incomes and features of comparable real estate properties. In the absence of a local plan, designation of the real estate shall be determined on the basis of urban planning studies and municipal zoning and land use documents. In the absence of such studies and documents as stated above, the evaluator must take into account the actual use of the property.

The Constitutional Tribunal ruled that it is of fundamental importance in this case to determine the “previous” value by referring not to the old local plan which is no longer in force (as it is extinct by law), but to the value of the property determined on the basis of Article 154 of the Real Estate Management Law, and the Ruling of the Council of Ministers, based on this Law and issued on 21 September 2004: On the valuation of real estate and appraisal surveys (Rozporządzenie Rady Ministrów z dnia 21 września 2004 r. w sprawie wyceny nieruchomości i sporządzania operatu szacunkowego, Dz. U. z 2005 r. Nr 196, poz. 1628, z późn. zm.). For the creation of the financial obligation, in this situation it does not matter, what was the designation of the real estate in the old (previous) local plan (now extinct by the power of law). The increase in the property value and the resulting obligation to charge a planning fee, and as a result also its payment, are linked to the criterion of the actual usage of the given real estate, regardless of whether the value of the property coincides with the designation specified in the old (previous) local plan or not. This situation therefore means that the increase in the value of the property does not result from the planning activity of the municipal authorities, but from omissions and failure to adopt a local plan in a timely manner by the authorities.

In the present case the Constitutional Tribunal, examining the compliance of Article 37 paragraph 1 of the Spatial Planning and Development Law with the principle of equality referred to in Article 32 of the Polish Constitution, in terms of the financial burden, found that the potential benefit springing from stabilizing the situation of owners and users of land in connection with the adoption of the local plan, is a significant common feature. The Tribunal ruled that from this fact follows the necessity, in the case of the sale of the real estate, for the costs to be borne by the municipality responsible for the adoption of the local plan. The Tribunal decided that the activity of municipalities in this respect is significant – as the right of the municipality to charge the planning fee is associated with a reference to the actual benefit resulting from the adoption of the local plan.

The Constitutional Tribunal held that the situation of owners of real estate properties located in areas, where on the basis of the Spatial Planning and Development

Law new local plans were adopted after the expiry of the old (previous) local plans, differs from the situation of other property owners located in areas, where in accordance with the law, the new local plans were adopted to replace the old (current) plans local during their term (that is, before the old ones expired). Therefore, here we arrive at the inequality between the situations of property owners, in terms of the existence of a link between the adoption of the local plan and an increase in the value of the sold property, and as a result, charging the planning fee by the municipality. The objective set out in the Spatial Planning and Development Law is to link the adoption of the local plan with the increase in the value of property and, by assumption, also with the price of its sale. Therefore, it should be reasonable that benefits are achieved both by the seller – the property owner or its perpetual user, as well as by the municipality, which has contributed to the increase in the value of the property. Lack of activity on the part of the municipality in adopting a new or changing an old (previous) local plan, while charging planning fees when the newly adopted local plan has not changed, in fact, zoning designations and the rules of their development in relation to the previously applicable local plan, now extinct by law leads to differentiation and creates an inequality, which is in no way justified. The Constitutional Tribunal emphasized that the legislature did not indicate any values in favour of such course of action on the part of municipal authorities, which would advocate differentiating between the legal situation of landlords and freeholders, i.e. the sellers of real estate within the municipality. Therefore, the Tribunal ruled that the regulation of Article 37 paragraph 1 of the Spatial Planning and Development Law, which has been subject to the review by Constitutional Tribunal, is considered to be incompatible with Article 32 of the Polish Constitution.

Having analysed prolongations (extending, several times) of the validity of local plans by the legislature, the Tribunal pointed out that the obligation to draw up a local plan is not and has not been a new, or an unknown task of the local government. The Tribunal noted that for many years it had been known that pre-existing local plans would expire, by law, that they would cease to be valid and that they would need to be replaced with new local plans.

In the current state of affairs, as analysed by the Constitutional Tribunal, the principle of continuity of planning activities by the municipality has been interrupted, which the owners of individual properties acting in a spirit of trust in the established law were unable to predict (the local plan valid from 5 August 1993 were no longer in force on 31 December 2003; while new local plan was adopted only on 2 February 2005, after more than a year has passed during which there existed no valid local plan). Therefore, property owners could not reasonably expect a situation in which a municipality, which possesses a local plan, will lead to its invalidation due to negligence in conducting spatial policy in their area. Property owners should not therefore suffer the negative consequences of the local plan not remaining in force, because of inaction by the municipality. According to the Constitutional Tribunal, that is what is happening as a result of the operation of Article 37 paragraph 1 of the Spatial Planning and Development Law (increase in the value of the property

should be considered as a result of the adoption of a new local plan immediately after the previous local plan (see Figure 2), and not as a result of the loss of planning continuity, which creates a situation of a temporary absence of any local plan and its financial consequences (see Figure 3).

The Constitutional Tribunal also confirmed that the principle of justice requires in particular that legal entities, which share given significant characteristics, must be treated equally. The Tribunal noted that the differentiation of legal entities is allowed under the principles of equality, if it serves the principle of social justice (however, unfair differentiation is prohibited). The Tribunal pointed out that the deterioration of the legal position of landlords and freeholders, determined by the causes completely beyond their control, in the light of the arguments presented, should be considered unequal and incompatible with the principle of social justice, which in the light of Article 2 of the Polish Constitution also expresses the need for a just balancing between the public interest (common good) and the interests of the individual.

In short, it can be indicated that the Constitutional Tribunal based its decision on the following assumptions:

- 1) the purpose of the regulations contained in Article 36 paragraph 3 and Article 37 of Spatial Planning and Development Law was to link the adoption of the local plan with the increase of the value of real estate;
- 2) the imposition of the planning fee is justified if the municipality has contributed to the increase in the value of the real estate by adopting the local plan;
- 3) the above situation (i.e. an increase in the value of the property caused by the adoption of a new local plan) did not take place when the difference in the value of real estate was established due to the failure by the municipal authorities to fulfil their obligation and draw up a local plan replacing the old (previous) plans, i.e. passed before 1 January 1995;
- 4) the owners or perpetual users of the real estate should not suffer negative consequences as a result of neglect on the part of the municipal authorities, which manifests itself in allowing for the old (previous) local plan (i.e. adopted before 1 January 1995) to expire;
- 5) the provision analysed herein, resulted in – one might say – an unjustified differentiation of the legal status between the owners or the perpetual users of real estate properties located within the municipality, conditioned by reasons entirely beyond their control, i.e. by spatial planning activity by municipal authorities for its individual areas.

Therefore, from the content of the above-quoted judgment and its justification, it follows that the interpretation of Article 37 paragraph 1 of the Spatial Planning and Development Law, which allows the determination of planning fee in relation to the sold property when previously existing local plan expired under the law, with the same designation as the one specified in the applicable local plan adopted in

the period not earlier than five years before the sale this property, is contrary to the Polish Constitution.

4. The principles of determining the amount of planning fees as a result of the implementation of the Constitutional Tribunal ruling

The judgment in question has produced an obligation to modify provisions of the Spatial Planning and Development Law within the scope described in the previous section of the article – so that the Law complies with the constitutionality of equal treatment and with the principle of the protection of trust in the State and its laws.

In order to perform the obligation of adjusting the legal system to the above decision of the Constitutional Tribunal, the legislator added to the Article 87 of the Spatial Planning and Development Law a new paragraph (paragraph 3a), according to which, if the adoption of the local plan took place after 31 December 2003, in connection with the expiry of the local plan adopted before 1 January 1995, then Article 37 paragraph 1, second sentence in relation to the increase in the value of the property, shall not apply if the value of the property determined according to the zoning established in the local plan adopted before 1 January 1995 is greater than the value of the property determined according to the actual use of the property after the plan had expired. In this case, the increase in the value of the property referred to in Article 36 paragraph 4 of the Act, is the difference between the value of the property as determined taking into account the existing use of the land after the adoption of the local plan, and its value to be determined taking into account the land designation set in the local plan adopted before 1 January 1995.

It should also be emphasized that the provision indicated above has been added in the “Final and Transitional Provisions” section of the Spatial Planning and Development Law, despite the fact that this provision qualifies as an “exception” to the general rule laid down in the Article 37 paragraph 1 of the Law. This was dictated by the fact that the provision will apply only where local plans expired in connection with the deadline specified in the Law. The introduced exception, therefore, concerns only those cases which may occur until all areas are covered with local plans, which prior to 1 January 1995 were covered by spatial policy planning conducted by the municipal authorities, but later these authorities failed to take activity in this field, that is to say, they did not adopt a local plan.

In summary, the application of Article 87 paragraph 3a of the Spatial Planning and Development Law is subject to the following conditions:

- 1) the property must be located in the area formerly covered by the old (previous) local plan, i.e. the plan adopted before 1 January 1995, which lost its legal force; and at the time of setting the planning fee, it must be located in the area covered by the new local plan, i.e. the plan adopted after 31 December 2003;
- 2) it should be necessary to establish the relationship between the adoption of a new local plan, i.e. the plan adopted after 31 December 2003, and the loss of validity of the old (previous) local plan, i.e. plan adopted before 1 January 1995.

It should be noted that before the introduction of the above changes in the Spatial Planning and Development Law, provisions of the § 50 of the Ruling on the valuation of real estate and appraisal surveys were applicable. According to the provisions of this Ruling, in determining the market value of the property to calculate the planning fee, the evaluator defined the value of the property, taking into account its intended use before the adoption of the local plan, or before the change of the plan, and its designation after the adoption or modification of the local plan. The evaluator did not take into account the components of these properties. In this case, real estate evaluator assumed the condition of the property as per the date of entry into force of the local plan or its amendments; and the price, as per the date of the sale of the property. This disregard of the components of the real estate was, however, contrary to the common practice, as components of the real estate also in fact include buildings, structures, or other infrastructure (the right of perpetual usufruct). Therefore, the evaluator's disregard of the above components in determining the value of the property to calculate the planning fee was contrary to the legal norm in Article 36 paragraph 4 of the Spatial Planning and Development Law, under which for the purpose mentioned above, the value of the whole property is determined, and not merely the value of the land (i.e. excluding the components of the real estate).

Considering the above, on 14 July 2011, the Council of Ministers amended the Ruling on the valuation of real estate and appraisal surveys (Rozporządzenie Rady Ministrów z dnia 14 lipca 2011 r. zmieniające rozporządzenie w sprawie wyceny nieruchomości i sporządzania operatu szacunkowego, Dz. U. z 2011 r. Nr 165, poz. 985), and repealed the abovementioned § 50. As already indicated, this repeal was connected with the fact that the new legal conditions which have arisen as a result of the changes in the Spatial Planning and Development Law (related to the judgment of the Constitutional Tribunal) caused the provisions of § 50 of the regulation to be contrary to the new standards (arising after the aforementioned change) resulting from the Law. After the changes, the Law includes independent regulations of the above issues.

Repeal of the aforementioned paragraph led to the situation, in which the sole basis of the rules for determining the market value of the property in order to calculate the planning fee is the Spatial Planning and Development Law and the general principles set out in the Real Estate Management Law.

It is worth noting that as a consequence of Article 36 paragraph 4, Article 37 paragraph 1, and Article 87 paragraph 3a of the Spatial Planning and Development Law, it is not possible to take into account the valuation of the real estate or any events on this property, which took place after the adoption or the change of the local plan. This is confirmed by the administrative case law – for instance, the judgment by the Supreme Administrative Court of 19 November 2008, Reference File II OSK 1316–1307, according to which “the planning fee can not include changes in the value of the land caused by the division that occurred after the adoption of the plan and its entry into force. Even if the party has sold some plots, which were separated after the adoption of the plan, for the purpose of calculating the planning

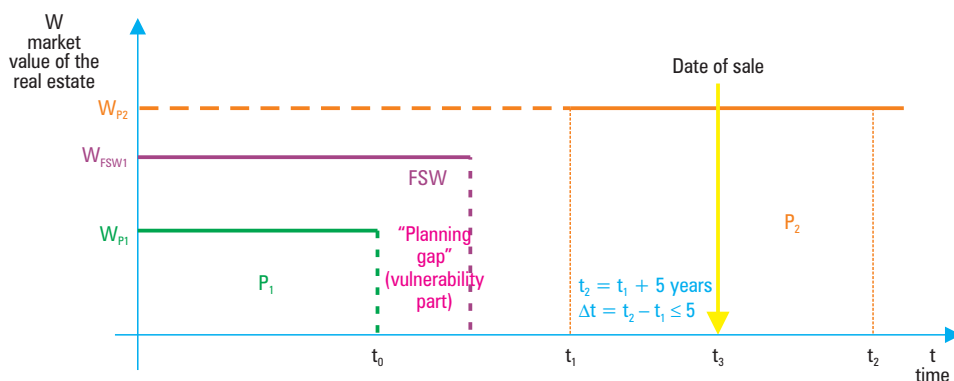
fee, a growth rate in the value of land should be adopted, but in the format as existed on the date of the adoption of the local development plan.”

It should be noted that all the events taking place after the adoption of the local plan may be charged to the property owner using a different kind of fee, for instance, the so-called betterment levy.

So it is with regard to the division of property made before the adoption of the local plan or change it. In this regard, and in regard to determining a planning fee related to the sale of one or several plots created after the division, reassignment of the property designation resulting from the adoption or amendment of the local plan should be indicated as a factor causing the determination of the planning fee.

In such situation as the above, the evaluator performing an appraisal of the plot of land created after the division (valuated as an independent real estate unit, because a plot separated in a geodesic procedure, which can be traded under civil law as a separate property, should be treated as such) should determine the value of the plot in question in reference to its condition before the adoption or modification of the local plan, and after the adoption or modification of the plan.

Using figures and formulas, below we present the rules for determining the amount of the planning fees, as a result of implementing the decision of the Constitutional Tribunal.



Source: authors' study

Fig. 4. The condition in which at time t_0 expiry of legal force of the existing plan local (P_1) occurred, and a new local plan (P_2) was adopted at time t_1 . In the interval $(t_1 - t_0)$ the so-called “planning gap” (vulnerability part, or F_{SW}) occurred, and the value of the property W_{FSW1} is higher than the value of W_{P1}

where:

- W_{P1} – the market value of the real estate determined taking into account the old (previous) local plan, which expired;
- W_{P2} – the market value of the real estate determined taking into account the new local plan;

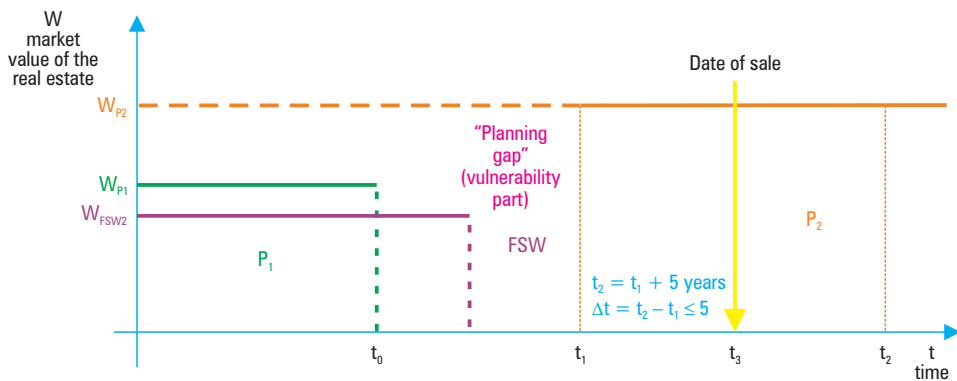
- t_0 – the date of expiry of the old (previous) local plan;
- t_1 – the date of adopting the new local plan;
- t_2 – the time period, in which a planning fee still applies in the case of the sale of the real estate ($t_2 = t_1 + 5$ years);
- t_3 – the date of the sale of the real estate;
- P_1 – the zoning designation stated in the old (previous) local plan, which expired;
- P_2 – the zoning designation stated in the new local plan;
- FSW – the actual use of the property;
- W_{FSW1} – the market value of the real estate established while taking into account the actual use of the property, if the value is higher than W_{P1} .

In the example presented in Figure 4, planning fees are calculated according to the following formula:

$$O_p = S_{\%} \times P_{m2} [(W_{P2} - W_{FSW1})] \tag{5}$$

where:

- O_p – the planning fee;
- $S_{\%}$ – the interest rate determined in the local plan (0–30%);
- P_{m2} – the area of the real estate in m^2 ;
- W_{P2} – the market value of 1 square meter of the real estate determined as per the new local plan;
- W_{FSW1} – the market value of 1 square meter of the real estate established while taking into account the actual use of the property, if that value is higher than W_{P1} .



Source: authors' study

Fig. 5. The condition in which at time t_0 the legal power of the existing plan local (P_1) expired, a new local plan (P_2) was adopted at time t_1 . In the interval ($t_1 - t_0$) the so-called “planning gap” (vulnerability part – FSW) occurred, and the value of the property W_{FSW2} is less than the value of the W_{P1}

where:

W_{FSW2} – the market value of the real estate established while taking into account the actual use of the property, if that value is lower than W_{P1} .

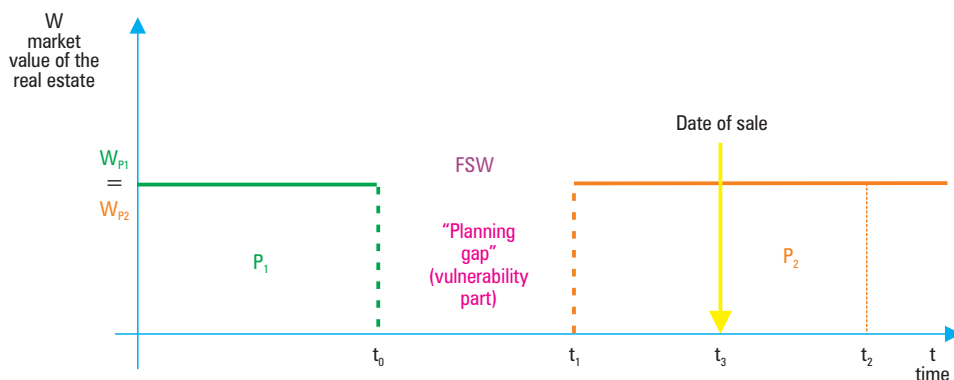
Other symbols as in Figure 4.

In the example presented in Figure 5, planning fees are calculated according to the following formula:

$$O_p = S_{\%} \times P_{m2} [(W_{P2} - W_{P1})] \tag{6}$$

where:

- O_p – the planning fee;
- $S_{\%}$ – the interest rate determined in the local plan (0–30%);
- P_{m2} – the area of the real estate in m^2 ;
- W_{P2} – the market value of 1 square meter of the real estate determined after the adoption of the new local plan;
- W_{P1} – the market value of 1 square meter of the real estate determined as per the old (previous) local plan.



Source: authors' study

Fig. 6. The condition in which at time t_0 the legal power of the existing plan local (P_1) expired, a new local plan (P_2) was adopted at time t_1 . In the interval ($t_1 - t_0$) the so-called “planning gap” (vulnerability part – FSW) occurred. Use (designation) of the site in the old (previous) local plan (P_1) is the same as in the new plan local (P_2)

Symbols as in Figure 4.

In the example presented in Figure 6, planning fees are calculated according to the following formula:

$$O_p = S_{\%} \times P_{m2} [(W_{P2} - W_{P1})] = 0 \tag{7}$$

Symbols as in Figure 6.

Considering the above formulas, the evaluator should therefore define the following market values of real estate:

- 1) the market value of the property as per the old (existing) local plan (W_{p1}),
- 2) the market value of the property, taking into account the actual use of the property (W_{FSW1} and W_{FSW2}),
- 3) the market value of the property as per the new local development plan (W_{p2}).

In each of the above cases, the evaluator must determine the market value of the real estate according to prices as per the date of the sale of the property.

At this point one should recall what is meant by the “actual use the property.” Actually, the Spatial Planning and Development Law offers no definition of the term. This concept, however, was subject to interpretation in one of the judgments of the Supreme Administrative Court (judgment of 7 May 2013, Reference File II OSK 2688/2011), which stated that in the light of Article 37 of the Spatial Planning and Development Law, “the actual use of the property must be interpreted as the actual, current condition of the real estate before the adoption of the plan, not its potential development or future use (...)”.

5. Conclusions and recapitulation

When summing up the analysed legislation in the field of planning fees, it is worth noting the report on the results of an inspection carried out by the Supreme Chamber of Control, titled: “Planning fees and claims for damages pertaining to the adoption or modification of local development plans”. The report includes, among other things, the conclusions, which indicate that the applicable provisions of the Spatial Planning and Development Law, the Real Estate Management Law, and the Ruling on the valuation of real estate and appraisal surveys, still do not facilitate a smooth implementation of income from the planning fees.

The information included in the aforementioned document also suggests that changes in the legislation involving the repeal of § 50 of the aforementioned Ruling, coupled with inconsistent and ambiguous regulations, as well as their uneven interpretation by the authorities competent to hear appeals against decisions on the determination of planning fees, also contribute to the formation of irregularities. The Supreme Chamber of Control indicates that “the effects of faulty regulations and discrepancies in interpretation boil down to:

- 1) difficulty in obtaining evaluators who would be able to estimate the amount of the planning fees for proceedings on the determination of such fees (less interest on the part of the evaluators to perform this kind of appraisal);
- 2) excessive length of proceedings;
- 3) large number and high effectiveness of appeals against decisions setting the planning fees and, as a result, generating additional operating expenses for municipalities and causing delays in obtaining revenues from planning fees.”

According to the Supreme Chamber of Control, it is necessary to make changes in the current law, because of the the existing legal risk that the initiation of administrative proceedings and determination of planning fees will be unprofitable for some municipalities, due to higher costs associated with running these cases.

Mayors and representatives of municipal authorities, who were subjected to the above inspection by the Supreme Chamber of Control, reported a number of problems related to the establishment of planning fees. These problems were mainly related to:

1. Reservations concerning the application of Article 154, paragraph 2 of the Land Management Act, in connection with Article 37 paragraph 11 of the Spatial Planning and Development Law and comparing the value of the property after the adoption of the local plan (in the case of the previous absence of a local plan) to the study of planning conditions and directions of spatial management, rather than to the actual use of the property before the adoption of the local plan, as stated in Article 37 paragraph 1 of the Spatial Planning and Development Law.
2. Inconsistent laws and the difficulties in demonstrating the increase in the value of the real estate.
3. Lack of the definition of “disposal” (sale) used in Article 36 paragraph 4 of the Spatial Planning and Development Law; and of the concept of “the actual use of the property” applied in Article 37 paragraph 1 of the Law, and the difficulty of determining the actual use of the property before the entry into force of the local plan.
4. Doubt whether after the repeal of the § 50 of the Ruling on the valuation of real estate and appraisal surveys, the components of the property should be taken into account or not in order to determine the planning fee. It was pointed out that it may not be in the interest of the party to the proceedings to honestly inform the authorities of the components and their status as per the date of the entry of the new local plan into force. The above situation may affect the price increase of the appraisal, and it can also make the determination of the components’ value impossible (due to the passing of time), which will translate into a negative impact on the whole proceedings.
5. Changing and inconsistent jurisprudence of courts.
6. Changes to the regulations relating to the determination of planning fees, which often render the established procedures void and no longer valid.
7. Difficulties in obtaining real estate experts who would estimate property value, in the absence of tenders for the award of public contracts.

We believe the conclusions included in the aforementioned Report by the Supreme Chamber of Control to be correct. The wording of the provisions of Article 37 paragraph 1 of the Spatial Planning and Development Law should be modified and adapted to the requirements of the decision by the Constitutional Tribunal (the current wording of the Article does not regulate the whole problem). The addition of the paragraph 3a to the Article 87 of the aforementioned Law, the problem of setting

the planning fee and estimating the property value for that purpose was solved only indirectly. Still, in the actual practice, there remain many legal problems to be solved in this area.

In conclusion, we should make changes in applicable laws, which deal with determining the amount of the planning fee, and in the field of property valuation for the above purpose, so that neither the authorities competent to determine and charge the planning fees, nor property experts, competent to estimate the market value of the property (W_{P1} , W_{P2} , W_{FSW1} , W_{FSW2}), would encounter practical difficulties and problems in this respect.

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- Farmers' Social Insurance Law (Ustawa o ubezpieczeniu społecznym rolników).
- Spatial Planning and Development Law (Ustawa o planowaniu i zagospodarowaniu przestrzennym).
- Real Estate Management Law (Ustawa o gospodarce nieruchomościami).
- Ruling changing the Ruling on the valuation of real estate and appraisal surveys (Rozporządzenie zmieniające rozporządzenie w sprawie wyceny nieruchomości i sporządzania operatu szacunkowego).
- Ruling on the required scope of the local development plan (Rozporządzenie w sprawie wymaganego zakresu projektu miejscowego planu zagospodarowania przestrzennego).
- Ruling on the valuation of real estate and appraisal surveys (Rozporządzenie w sprawie wyceny nieruchomości i sporządzania operatu szacunkowego).

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- Decision of the Constitutional Tribunal (Wyrok Trybunału Konstytucyjnego z dnia 9 lutego 2010 r. o sygn. akt P 58/08).
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Judgment of the Supreme Administrative Court (Wyrok Naczelnego Sądu Administracyjnego z dnia 7 maja 2013 r. o sygn. akt II OSK 2688/2011).

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Report on the results of the inspection by the Supreme Chamber of Control on the “Planning fees and claims for damages pertaining to the adoption or modification of local development plans” (Informacja o wynikach kontroli przeprowadzonej przez Najwyższą Izbę Kontroli pt. Opłaty planistyczne i roszczenia odszkodowawcze związane z uchwaleniem lub zmianą planów miejscowych).

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