

Land Acquisition for Public Purpose in Poland on Example of Public Roads Construction

Mirosław BELEJ and Marek WALACIK, Poland

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SUMMARY

Classifying investments to so called “public purpose category” enables the government and local councils to acquire land through expropriation (compulsory purchase). Every restriction on the right to real estate requires compensation. It ought to be just which means, that it should only make up for the constrained use of property but also recompensate the loss of any profits. Currently the amount of compensation in Poland is strictly connected with market value – it equals that value. The loss of future profit, if such is possible, or all the inconveniences associated with expropriation do not influence the amount of compensation. It shows the need of working out new procedures and rules of the compensation estimation, running the registers of compulsory purchase proceedings and thorough analysis of them. The authors of the article are going to analyze the legal status regulation processes that took place in the Warmia and Mazury Province between 2004-2006. The greatest emphasis will be placed on the special localization of the investments, identification of the entities involved in the expropriation, proposed amounts of the compensation and the number of compulsory purchase proceedings.

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1. INTRODUCTION

Investment in the real estate market requires land where investment projects could be executed. Acquiring real estate may be effected in a number of ways, depending on the type of investment, the entity which is executing the investment project and the rights to the subject of investment with the specified restrictions.

Acquiring land for investment should not be understood to denote only acquiring the real estate ownership rights. In particular investment projects it is enough to acquire other rights to a real estate than ownership rights, such as:

- Perpetual usufruct,
- Restricted property rights - usufruct,
- Contractual rights – rent, lease, lending for use,
- Durable administration.

Depending on the purpose, investment projects can be classed into two groups: those which serve a private purpose and public investment projects. From the etymological point of view Bieniek [2007], a public purpose is related to an entire population, serving everyone and accessible to everyone. The concept of a public purpose is associated with a general interest in its broad sense, which is above a private interest and has to take into account the socioeconomic conditions which provide opportunities for the development of the society as a whole.

According to the current legislation, the following are regarded as public purpose investments in Poland;

- construction and maintenance of public and air transport facilities,
- construction and maintenance of the facilities for carrying liquid, steam and gas and transmitting electricity,
- construction and maintenance of facilities for water supply, for collecting, transport and treatment of wastewater and for solid waste utilisation,
- construction and maintenance of facilities for environment protection,
- protection of real estate regarded as elements of cultural heritage,
- protection of monuments commemorating mass murders,
- construction and maintenance of government and administration office facilities,
- construction and maintenance of defence and border protection facilities,
- searching, identifying and excavating minerals owned by the state,
- establishing and maintenance of cemeteries,

- establishing and protecting national remembrance sites,
- protection of endangered plant and animal species or natural habitats,
- other public purposes determined in separate legal acts.

Public investment projects make it possible to acquire land for public activities in a variety of ways, for example, by communalisation of property, acquiring land allocated for public roads in the processes of property division and joining, acquiring land in the processes of location of motorways and other public roads, termination of agreements and expiration of rights and in the process of expropriation. Acquiring land for public purposes in the process of expropriation requires particular caution. Ambiguous, complicated or wrongly worded provisions which regulate the issue may result both in conflicts, economic instability or even in decreasing the economic growth rate.

The issue is currently of particular importance in Poland in connection with the country's accession to the European Union and acquiring funds for infrastructural development as well as obtaining funds for co-hosting the European Football Championships in 2012. It is necessary to eliminate all the obstacles which may hinder the execution of public purpose investment projects, to depart from the procedures applied so far which, in view of the enormity of tasks to perform and the time left (5 years for spending 30 billion Euros allocated for the operational programme entitled "*Infrastructure and environment protection in the years 2007-2013*"), may hinder the execution of the crucial assignments. Motorways, expressways and ring roads should be priority projects due to the vital public interest. This means that the problem of compensation for property ownership restrictions or expropriations will be seen in Poland on an unprecedented scale. In consequence, it is necessary to promptly adapt the legal and organisational procedures related to the issue.

2. RESTRICTION OF PROPERTY RIGHTS - EXPROPRIATION

Along with the right to life and to freedom, the right to property is a foundation of any order, including legal and economic ones. The proper importance of ownership rights in Poland has not been restored until after the change of the country's economic system, from the central control economy to the market economy. This is reflected in the provisions of the Constitution of the Republic of Poland;

- Everyone has the right to ownership, to other property rights and the right to inherit property,
- Ownership, other property rights and the rights to inherit property are subject to legal protection equal for everyone,
- ownership may be restricted only by means of an act of law and only inasmuch as it does not violate the essence of the right of ownership.

It is noteworthy that the ownership right is not absolute in character, i.e. it does not constitute an infinite right (*ius infinitum*), which is not subject to any restrictions. The content of the ownership right and the scope in which the right is protected is determined by the law, which has its foundation in the Constitution, in particular in the principle of general welfare, which

is meant to denote the welfare of everyone, and in detailed regulations. The regulations regarding the restrictions imposed on the ownership rights have to balance the interest of property owners, on the one hand, and the public interest on the other. According to Boć (1985) the welfare of an individual should be regarded as the prime goal of the activities of public administration, but the welfare of other individuals as a social group may decide on restricting the protection enjoyed by the private interest, and in some areas there is no other way to protect a public interest than to restrict individual interests. This means that it is acceptable to restrict ownership rights because of an important public interest.

Each restriction of the right of real estate ownership, as a fundamental good of each individual and entire communities, becomes a cause of dispute. If two or more persons (parties) wish to own the same property, a conflict arises and the interests of the parties are mutually exclusive. The expropriation procedure is the basic example of restricting ownership rights.

Expropriation is possible with regard to the real estates situated in the areas which in local plans are allocated for public projects or to such real estates for which a decision has been issued establishing the location of a public investment project. Expropriation consists in issuing a decision depriving of, or restricting, the right of ownership, the right of perpetual usufruct or another property right to a real estate. Expropriation may be executed if public goals cannot be achieved in any other way but by depriving, or restricting, one's ownership rights, and the rights cannot be acquired by agreement. It is noteworthy that in Poland a real estate may be expropriated only for the benefit of the State Treasury or of a local government unit. A real estate may be expropriated in whole or in part. If it regards a part of a real estate, and the remaining part can no longer be properly used for the previous purpose, such remaining part is, at the request of the owner of the perpetual user, acquired by agreement by the State Treasury or a local government unit, depending on which is the expropriating entity.

The expropriation procedure consists of several stages;

- Following the decision to allocate a real estate as an area for an investment project which is to serve a public purpose, negotiations are started with the owner aiming at the owner selling it voluntarily
- If the parties fail to agree on voluntary sale of the real estate, the expropriation proceedings are not instituted until after the time assigned by the governor of the province or of the county to conclude a voluntary agreement

Administrative proceedings are started and a decision is issued. On the day that the decision becomes valid, the right of ownership of the real estate in question is transferred to the State Treasury or a local government unit

3. RESTRICTION OF PROPERTY RIGHTS – EXPROPRIATION

Before 16 December 2006, the procedure of acquiring land for national roads was in conformity with the law on the principles of preparing and executing project investments in national road construction of 10 April (J. of Laws 2003 No. 80, item 721), also called “special

law". The procedure of acquiring land is started by a decision establishing the location of a road.

The entity responsible for the procedure regulating the legal status of the land was the General Directorate of National Roads and Motorways (GDDKiA). The rights to real estate were acquired in one of the following ways:

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

In the first two cases, it was the task of the GDDKiA to carry out negotiations in which it made a written offer of purchasing the land. If the conditions were accepted, the proceedings were completed. Otherwise, the expropriation proceedings were started by the Provincial Governor. The main difference lay in the third of the mentioned ways in which the land was acquired – by virtue of the law.

This was applied only to land owned by local government units. Their ownership was transferred to the State Treasury on the day that the localisation decision regarding the land became valid. Such local government unit was entitled to compensation determined according to the principles of real estate expropriation. All the flaws of the procedures of acquiring land for road construction became apparent particularly after 2004 (the necessity of transferring the EU funds allocated for infrastructure development). Their most important drawback was the excessively long period needed for their completion, which in many cases delayed the whole project.

Currently in Poland the procedure of acquiring land for public purpose investment, such as road construction, is followed according to the amended law of detailed principles of preparing and executing public road construction investment projects of 10 April 2003 (J. of Laws 2007 No. 112, item 767). After the law was implemented, the procedure of land acquirement became significantly simpler, as now a public road is localised by means of a relevant decision. The decision is issued by the provincial governor (national roads) or by a county head (communal, county and provincial roads); it determined the separating lines and confirmed the plan of real estate division. On the day the decision becomes valid, the land separated by the lines becomes the property of the entities which are executing the investment project.

The owner is entitled to compensation for being deprived of the rights to the land; such compensation is determined by a separate decision issued by a provincial governor or by a county head, respectively. The procedure is presented in a graphic form in Fig. 1.

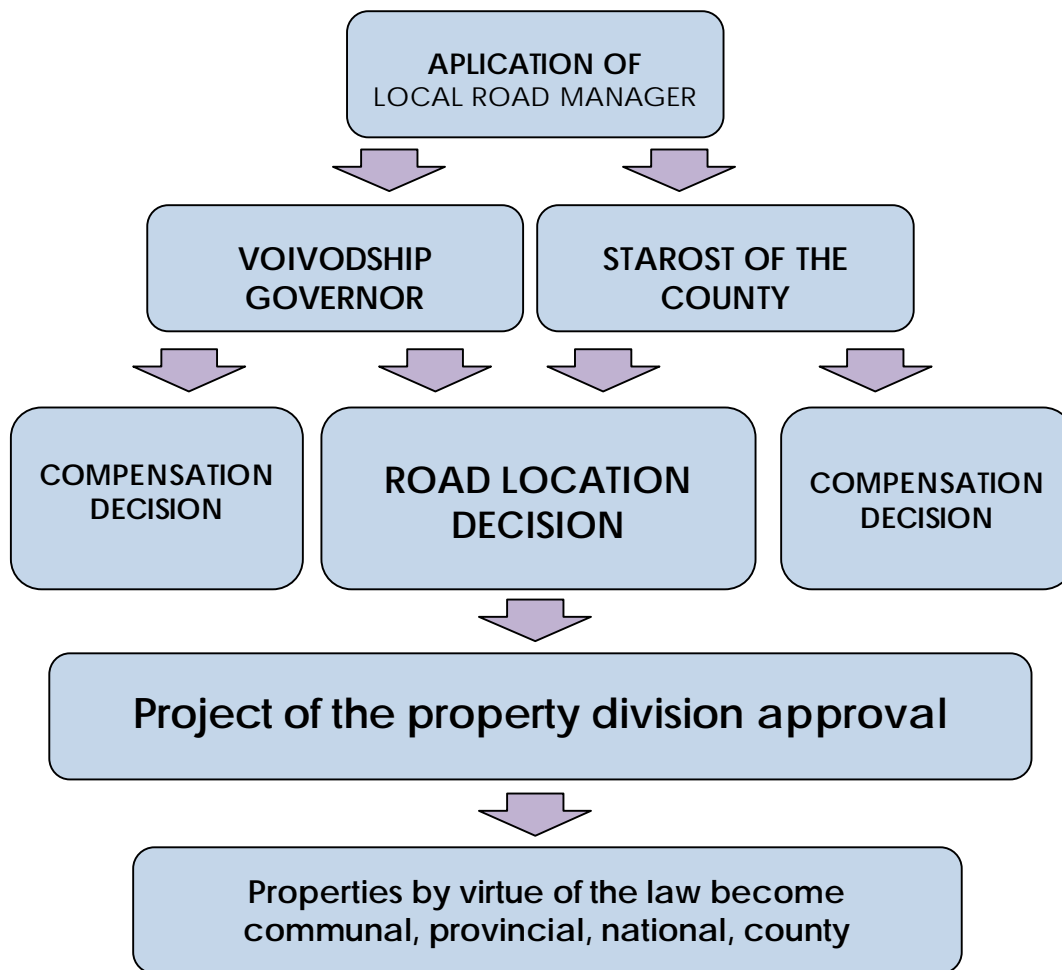


Fig. 1. The procedure of acquiring land for public roads after 16 December 2006.
Source: the author's study

4. EXPROPRIATION – “FAIR COMPENSATION”?

In recent years, the procedure of acquiring land for road construction investment has been liberalised and simplified with a view to accelerating the process of investment execution. A considerable part of the proceedings aimed at regulating the legal status of real estates has been completed in an amicable way. However, there have been individual cases of conflicts between the entity which is carrying out the project and the individuals who are being deprived of their ownership rights.

Their most frequent cause was an inability to reach an agreement about the offer of the real estate purchase. In such cases, the authorities were forced to apply the ultimate measure – expropriation which, in consequence, led to determination of compensation, whose amount was frequently objected to.

According to the Art. 21 of the Polish Constitution, ownership rights are protected by law and expropriation is acceptable only for public purposes and for “fair compensation”. In light of the provisions of the Constitution, the concept of “fair compensation” is viewed in regard to the necessity of expressing the public and private interest in the right proportions. As a result, compensation which is the equivalent of all the damage caused by depriving an individual of the ownership rights may be seen as “unfair” by the whole of the society (taxpayers), while such that does not compensate for 100% of the damage is seen as “fair”. In order to find the right method of calculating the fair compensation, it has to be borne in mind that the expropriation is executed for the public purpose, i.e. with the public welfare in mind. Therefore, accepting a compensation at, say, 500% of the market value of the expropriated real estate, would be rational from an individual perspective, but irrational from the point of view of the state, or rather the national budget. The issue of balancing the proportions in the expropriation procedures carried out in Poland is of particular importance and has been widely debated about and analysed. The issue has been considered by the Constitutional Tribunal, which has dealt with the problem of “fair compensation” in its rulings. For example, on 14 March 2000 (file no. P 5/99) it indicated the connection of achieving a public purpose and ensuring fair compensation as the necessary conditions of the “constitutional acceptability of each expropriation”.

In conclusion, it can be said that there are still no clear and uniform solutions to the problem, and the attempts, if any, have had the form of discussions. On the other hand, the solutions that have been positively tested abroad cannot be directly transposed to Poland due to a different legal environment and economic conditions.

Compensation for expropriation should make up for the loss incurred and for depriving its owner of the right to use the real estate. Currently, such compensation does not include the special value of real estates, such as uniqueness or the personal attitude of the owner to it, e.g. family traditions. Hence, the need to develop new methods of determining the amount of compensation and to make a list of various cases of expropriation and their analysis. According to the current legislation in Poland, the basis for determination of the amount of compensation is the market value of the real estate. It seems, however, that the market value is only one of the components of a fair compensation. All its elements can be presented as below.

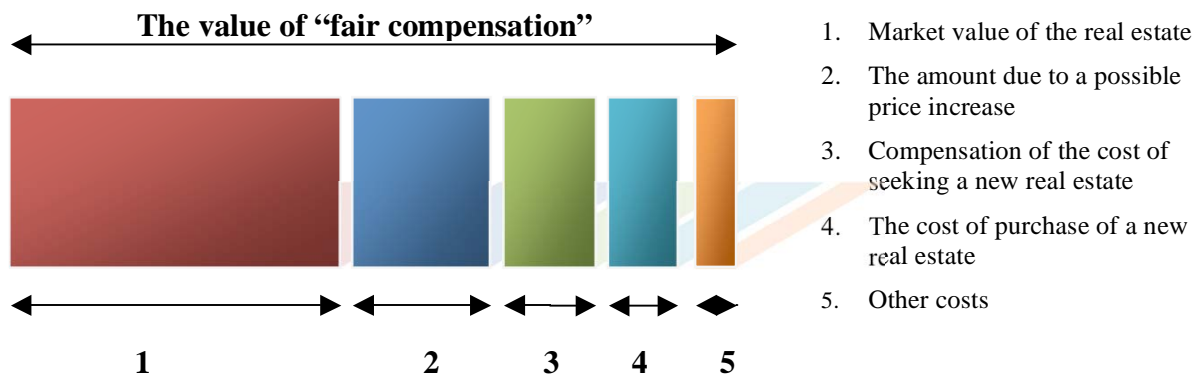


Fig. 2. Components of "fair compensation".

Source: the author's analysis

5. ROAD CONSTRUCTION IN THE PROVINCE OF WARMIA AND MAZURY

The study was conducted in the Province of Warmia and Mazury, which is the fourth largest province in Poland. It occupies an area of 24 thousand square kilometres, which accounts for 7.7% of the area of Poland. However, it is the last in terms of the density of the road network. The situation is described by indicators (the length of hard pavement roads per 100 square kilometres) shown in Fig. 3.

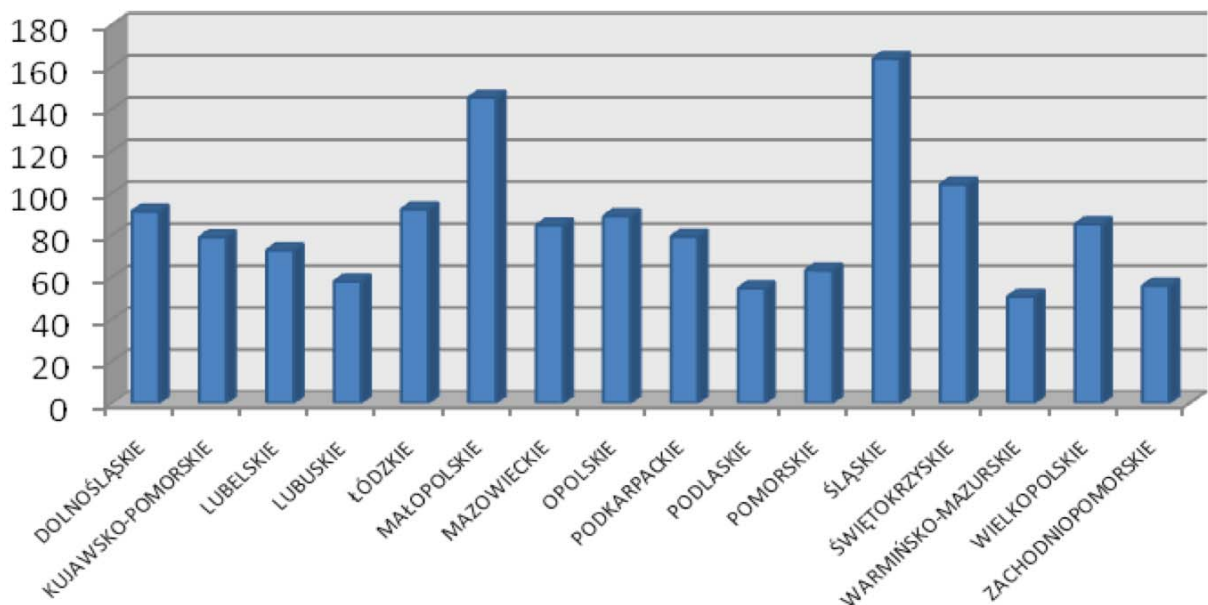


Fig. 3. The indicator of the length of roads per 100 square kilometres for particular provinces.

Source: the author's analysis based on statistical data.

The indicator for the Province of Warmia and Mazury is equal to 50.6. It is a little higher for the Province of West Pomerania (Zachodniopomorskie), and it has the highest value for the Province of Silesia (Śląskie) – 163.9.

The total length of the road network in the Province of Warmia and Mazury, including all the categories of public roads, amounted to 23,608.2 km in 2006, with the highest proportion (57%) of county roads. Then there were communal and provincial roads – 16% each. There were only 2,647.4 km of national roads, which accounted for only 11% of the total road length. The structure of roads in the Province of Warmia and Mazury is shown in Fig. 4.

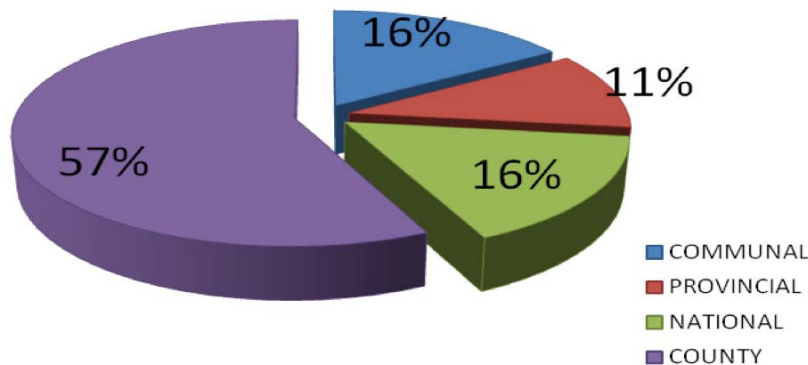


Fig. 4. The road types in the Province of Warmia and Mazury.

Source: the author's analysis based on statistical data.

During the period from 2004 to the first half of 2006, 36 national road construction investment projects were carried out in the Province of Warmia and Mazury. These were:

- construction of 8 ring roads,
- construction of 5 bridges,
- modernisation or construction of 22 sections of national roads.

During the period under study, the largest number of investment projects of road construction was carried out in the central part of the province (near Olsztyn) and in its north-western part (near Elbląg). All of these investment projects were associated with regulation of the legal status and acquiring the land on which they were located. The work was performed by the Olsztyn Branch of the General Directorate of National Roads and Motorways. All of the 36 projects required that the rights of ownership to the total of 2,638 plots of land should be acquired. An analysis of the land registers and the land to be acquired for 17 investment projects, made available by the GDDKiA Branch in Olsztyn, shows the following:

- the investment projects were located in 48 separate registration areas,
- they were located on 1084 plots of land, 51% of which were owned by the state, 18% - by local government units and 31% - by individuals; in consequence, the rights to 533 plots had to be acquired,

- GDDKiA made 273 offers of purchase to the private owners,
- as the market value of the real estates determined in some offers were questioned, GDDKiA made new offers in 47 cases,
- only in 9 out of 17 cases was the land for investment transferred as planned.

It is an unavoidable part of executing an investment project that there are conflicts between the entity which is carrying out the project and the individuals who are being deprived of their ownership rights or whose ownership rights are being restricted. Though such disputes are not too frequent, even one such conflict may stop the whole project. From the beginning of the year to 3 July 2004, 51 applications were lodged with the Province Governor's Office in Olsztyn by the General Directorate of National Roads and Motorways for expropriation of land in connection with national road construction. 46 decisions were issued. Seven of them were appealed against to the then Minister of Building Construction. Four of the Minister's decisions were again appealed against to the Provincial Administrative Court in Warsaw. Out of the 46 decisions issued, 14 regarded individuals, 6 were for real estates with unregulated legal status or the absence of heirs, 18 were for communal real estates, 4 – for real estates owned by counties and 4- those owned by the province.

In order to show the real problems connected with land acquisition for public roads construction, the case study research results were introduced in the following article. The analysed case concerned land of an area 1578m² that belonged to a private owner. The entire procedure of land acquisition started in april 2005, as soon as the allocating decision became legally valid. The GDDKiA started negotiations that could not end up with an agreement. Expropriation process had to be carried out. Its particular stages and their length are shown in a graphic form number 5.

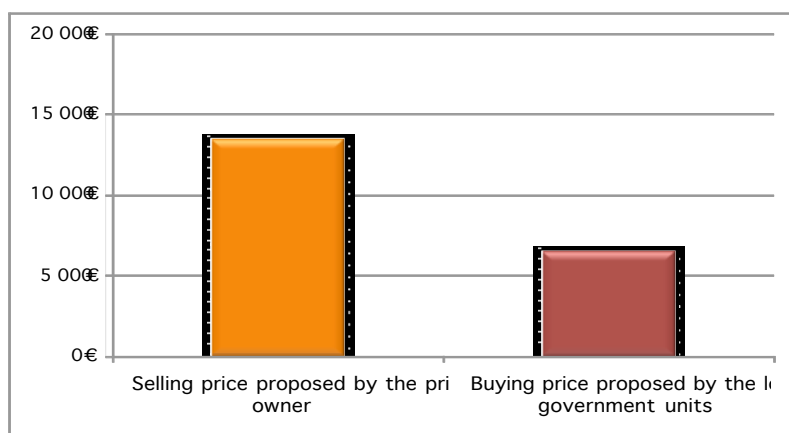
No	STAGES OF THE PROCEDURE	2005			2006				2007				2008	
		Quarter			Quarter				Quarter				Quarter	
		II	III	IV	I	II	III	IV	I	II	III	IV	I	II
1	Road location decision (legally valid)	■												
2	Appraisal of real estate (market value)		■											
3	Negotiations (lack of compromise)			■										
4	Offer of purchasing real estate (market value) with explanation of its estimation			■										
8	Information about starting the compulsory purchase procedure (with additional time compromise in terms of purchasing the property)				■									
10	Lack of compromise				■									
11	Starting compulsory purchase procedure				■									
15	Court trial					■								
18	Expropriation decision					■	■							
19	Appeal against the expropriation decision							■						
22	Problems with entering the property, (private owner does not agree with leaving the property)								■	■				
28	Provincial Administrative Court in Warsaw (second trial)											■		

No	STAGES OF THE PROCEDURE	2005			2006				2007				2008			
		Quarter			Quarter				Quarter				Quarter			
		II	III	IV	I	II	III	IV	I	II	III	IV	I	II		
29	Provincial Administrative Court in Warsaw (expropriation decision is not against law)															
30	Expropriation procedure still in process (expected end of the procedure - second quarter 2008)															

Rys. 5. Stages of the expropriation procedure and their length.

Source: the author's analysis

Land acquisition procedure presented above could have lasted for four months not for 3 years if only the the negotiation stage had ended up with a compromise concerning the amount of compensation. The whole process involved estimating value of the property by chartered surveyor, the price proposed by the private owner was given also. The size of each price is presented in a graphic form number 6.



Rys. 6. Buying/selling prices proposed by two parties

Source: the author's analysis

It is easy to notice that disproportion in the selling price proposed by the private owner and buying price by the local government units are quite big. The reason why the difference is so big comes from the fact that one of the party (private owner) demands fair compensation that consists of all the elements presented in the graphic form number 2 when the other party (local government unit) being limited by the law can propose only compensation than equals the market value of the property. To conclude, one can say that Polish law still lacks clear and uniform solutions of the presented problem while taken up attempts have only debatable character. On the other hand solutions of the foreign countries, can not be directly implemented in Poland because of the differences in law system and economic condition of the country.

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A list of the legal acts

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- The law of public roads of 21 March 1985 (J. of Laws 2000 No. 71, item 838).
- The law on principles of preparation and execution of national roads construction investment projects (J. of Laws 2003, item 721, with amendments).
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BIOGRAPHICAL NOTES

Dr. Mirosław Belej studied surveying and land management and received his diploma (M.Sc.) in Geodesy from the University of Agriculture and Technology in Olsztyn, Poland. After his studies he was research associate in land management, cadastre and land valuation at the Department of Land Management and Regional Development, University of Warmia and Mazury in Olsztyn, joining several projects in Poland and United Kingdom. He was in charge of different scientific projects concerning the cadastre, GIS and land valuation. He received his PhD, in 2001, from the University Warmia and Mazury in Olsztyn, for his work on cadastre.

Marek Walacik studied surveying and land management and received his diploma (M.Sc.) in Geodesy from the University of Warmia and Mazury in Olsztyn, Poland. After his studies he started PhD thesis in Department of Land Management and Regional Development, University of Warmia and Mazury in Olsztyn.

CONTACTS

Mirosław Belej
University of Warmia and Mazury in Olsztyn
Ul.Prawochenskiego 15/117
10-759 Olsztyn
POLAND
Tel. + 48 89 523-38-01
Fax + 48 89 523 38 32
Email: caprio@uwm.edu.pl
Web site: www.uwm.edu.pl/kgn

Marek Walacik
University of Warmia and Mazury in Olsztyn
Ul.Prawochenskiego 15/117
10-759 Olsztyn
POLAND
Tel. + 48 89 523-38-01
Fax + 48 89 523 38 32
Email: wacik@uwm.edu.pl
Web site: www.uwm.edu.pl/kgn