

THE ISSUE OF ZONING FEES – CASE STUDY IN KRAKÓW

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Summary

When a municipal council enacts local spatial development plan or its changes, the result may be an increase in real property value. And if such property is sold by an owner or its perpetual usufructuary in five years since the zoning plan or its changes are in force, a head of the commune or a city mayor are obliged to levy the so-called zoning fees. It is a one-time payment related to increase in real estate value due to resolution or change of local development plan, determined by the provisions of the Spatial Planning and Development Act of 27 March 2003. This study aims at presenting theoretical and practical aspects concerning zoning fees. The proceedings carried out in Kraków with regard to real properties under two local development plans: Opatkowice West and Opatkowice East have been analysed. Moreover, the article examines the impact of the amendment to the Spatial Planning and Development Act adopted on 10 August 2011, to embrace the judgement of the Constitutional Tribunal of 9 February 2010, file no. P 58/08. The analyses are based on data acquired from The Geodesy Department of the Kraków City Office.

Keywords

zoning fee • local spatial development plan • spatial planning

1. Introduction

In accordance with the provisions of Spatial Planning and Development Act of 27 March 2003 shaping and pursuing the spatial policy within a commune (*gmina*) is the own task of its authorities [Act of 2003]. Establishing local development plan, as specified in the Act, is one of these duties [Szwajdler 2013]. To draw up the plan geo-mapping data, especially the land and building register, are necessary [Bujakowski et al. 2008, Bieda et al. 2012]. The local plan is an act of local law aimed at determining the intended land use and the way land is developed and managed [Kwaśniak 2011]. The plan is adopted by municipal council pursuant to the laws, it encompasses specifically the area of a commune and it applies to all entities undertaking any activity related to spatial development within the area covered by the plan [Cymerman 2011]. The procedure of drawing up and adopting the local plan is complex, laborious and is entirely financed from the commune budget. The costs of devising the plan are partly compensated by the so-called zoning fee [Gawroński and Prus 2015].

The idea of zoning fee, derived from the theory of land rents [Wójtowicz 2016] is a colloquial name of a one-time payment for gain in real property value due to resolution or change of local development plan [Hełdak 2009 and Hajduk 2014]. In accordance with the article 36, paragraph 4 of the Spatial Planning and Development Act, 'if, in connection with adoption of a local development plan or its change the value of real properties increases, and an owner or a perpetual usufructuary sells this property, a head of the commune or a city mayor charges one-time payment defined in the plan as a percentage of the property value increase'. The use of this legal regulation is possible when all of the following three conditions are met:

- 1) gain in real property is the result of enacting a new local development plan or a change of the existing one,
- 2) percentage rate equal to the increase of a real property value is determined in a plan, as a basis for charging zoning fee,
- 3) real property is sold by its owner or a perpetual usufructuary before the expiry of 5 years period from the date the local development plan or its change is in force.

Moreover, before selling the real property an owner or a perpetual usufructuary may demand a head of community or a city mayor to give him or her an official decision on what the amount of the fee will be.

The zoning fee is an own revenue of the commune and its amount is determined as a ratio (percentage) not as a limit sum [Niewiadomski 2015], and it cannot exceed 30% of the property value increase. The rate must be determined as an obligatory element of the plan's text. The issues related to its determination, including controversies over 0% rate, have been extensively described in literature [Wolanin 2011b and Bielecki 2011]. This article presents the theoretical and practical aspects of zoning fee, with special emphasis on the impact of content change in the above mentioned Act on the course of administrative procedures.

2. Characteristics of the research area

The analysis focused on the proceedings carried out in Kraków with regard to real properties covered by two local development plans for estates: Opatkowice West and Opatkowice East. The chosen area is characterized by high proportion of completed proceedings to determine the rate of the zoning fee and thus all the information necessary to carry out the analysis could be obtained. The research applies to the period between 2006 (when the plans became legally binding) and 2015. The analyses have been based on data acquired from The Geodesy Department of the Kraków City Office.

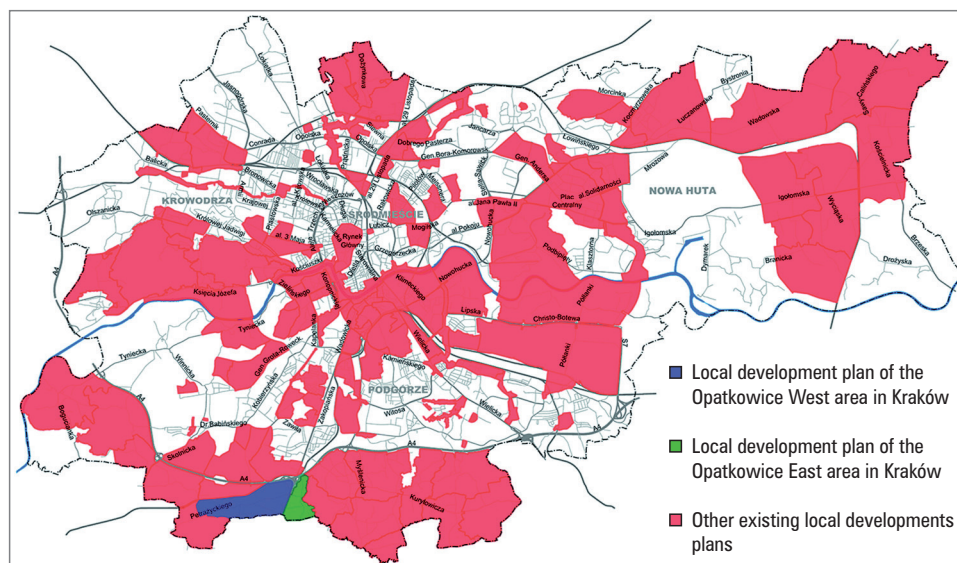
Council of the City Kraków adopted local development plans for areas of Opatkowice-West and Opatkowice East to regulate the principles of the growth of the estate Opatkowice, located in the southern part of Kraków. The plans cover in total 306.02 ha, which is about 0.9% of the whole city. They came into force after 30 days from their publication in the Official Journal of the Małopolskie voivodeship, that is on 6 February 2006 (Opatkowice West) and 14 August (Opatkowice East). The dates mark

Table 1. Characteristic of local development plans of the estate Opatkowice

Name of the local plan	Local development plan for Opatkowice West in Kraków	Local development plan for Opatkowice East in Kraków
Register unit	Podgórze	Podgórze
Premises	84, 85, 87	88, 89
Districts	VII, X	X
Surface	223.17 ha	82.85 ha
Description	The plans cover the areas of housing estate Opatkowice, located in the southern part of Kraków, on the border with the Mogilany commune. It is an example of traditionally agricultural suburban estate, situated within the agglomeration of Kraków, and it successively changes into housing estate. The goal of plans was to sort out the existing situation caused by division of the estate's area by the route 'Zakopianka' (S-7) into two isolated western and eastern parts, with the hope that their development reaches commercial goals and simultaneously is aligned with the city development policy of maintaining and protection of areas of significant natural and landscape values.	
Resolution	No XCIII/932/05 of the City Council of Kraków of 9 November 2005	No CIII/1040/06 of the City Council of Kraków of 1 March 2006
Publication of the resolution	Official Journal of the Matopolskie voivodeship of 6 January 2006, no 2, pos. 18	Official Journal of the Matopolskie voivodeship of 14 July 2006, no 407, pos. 2562
Date of entering into force	6.02.2006	14.08.2006
Percentage rate	30 % 0 % for areas belonging to the Commune of Kraków	30 % for all areas, with the exception of areas 17MN(w) and 23MW(n) 0 % for areas 17MN(w) and 23MW(n)
Remarks	Voivodeship Administrative Court in Kraków by its judgement of 26 February 2007, file II SA/Kr 1161/06, acting on the complaint of voivode of the Matopolskie repealed § 23, § 4 point 1, let. C(8), § 5 sec. 2 point 2 let. c (1), § 6 sec. 1 point 1 let. d – in part regarding open areas marked as 47 ZO, 48 ZO, 49 ZO; § 27 sec. 2, § 28 sec. 2 – in part including words „no less than” and a drawing of a plan of terrains marked as 47 ZO, 48 ZO, 49 ZO of the contested resolution; the judgement is legally binding since 30 April 2007	

Source: authors' study based on data from The Geodesy Department of the Kraków City Office (www.bip.krakow.pl)

the beginning of a 5 year period in which proceedings to determine zoning fees can be effectively initiated. In both plans the percentage rate has been fixed at maximum 30% level, with some exceptions when it is at 0% level. The detailed characteristic of these plans is presented in Table 1.



Source: authors' study based on data from The Geodesy Department of the Kraków City Office (www.bip.krakow.pl)

Fig. 1. Location of the areas concerned on the Kraków map

The studied area, shortly before the local development plans entered into force, were not covered by any arrangements of other local plans, because, according to article 67, paragraph 1 of the Development Act of 7 July 1994, previously effective general development plan of the City of Kraków ceased to be legally binding after 1 January 2003.

3. Analysis of proceedings to decide zoning fee

3.1. Proceedings initiation

The proceedings to decide zoning fee are started *ex officio* or following a request. In the former case they can be initiated only when an owner or a perpetual usufructuary sells real property before 5 year period passes since the local plan or its change are in force, or a property or its part is legally disposed of [Wolanin 2012]. The information about a vend of a real property is provided by an excerpt from the notarial deed sent by a notary who prepared the contract, the subject of which is disposal of real property. The proceedings upon request are began before selling a real property, when an owner or a perpetual usufructuary submit an adequate request to determine the amount of zoning fee.

Between 2006 and 2011 the Mayor of the City of Kraków received in total 28071 notarial deeds handed over by notaries on the basis of art. 37, sec. 5 of the Act.

In the studied period 291 deeds (1%) referred to real properties covered by directions of local plans: Opatkowice West (226 deeds) and Opatkowice East (65 deeds). Table 2 shows the number of notarial deeds handed over by notaries to the Mayor of the City of Kraków to meet the obligation provided for in the Act in every year of the studied period.

Table 2. The number of notarial deeds handed over by notaries (in 2006–2011) to the Mayor of the City of Kraków to meet the obligation provided for in the Spatial Planning and Development Act, art. 37, sec. 5.

Year	2006	2007	2008	2009	2010	2011
Kraków	2354	7570	4932	5400	3766	4049
Register unit Podgórze	967	2397	2204	2237	1700	1782
Local development plan Opatkowice West	27	46	46	31	33	43
Local development plan Opatkowice East	7	16	20	11	3	8

Source: authors' study based on data from Municipal Office of Kraków

In Kraków during 2006–2011 599 proceedings – together *ex officio* and upon request – were initiated to establish zoning fees. In the studied period 86 proceedings (14%) were related to real properties covered by directions of local development plans: Opatkowice West (64 proceedings) and Opatkowice East (22 proceedings). All the proceedings to establish zoning fees in the studied area were initiated in connection with enacting local development plans, not with their changes. Table 3 presents the number of initiated proceedings to determine zoning fees in successive years. 93% of these proceedings were initiated *ex officio*. In the studied period 6 requests were put in to establish the amount of zoning fee before selling a real property.

Table 3. The number of initiated proceedings to determine zoning fees in 2006–2011

Year		2006	2007	2008	2009	2010	2011
City of Kraków		35	129	111	69	146	109
Register unit Podgórze		33	109	90	40	72	38
Local development plan Opatkowice West		7	27	17	5	8	0
Including:	<i>ex officio</i>	7	25	16	5	7	–
	upon request	–	2	1	–	1	–
Local development plan Opatkowice East		1	14	5	2	0	0
Including:	<i>ex officio</i>	1	14	4	1	–	–
	upon request	–	–	1	1	–	–

Source: authors' study based on data from Municipal Office of Kraków

The analysis leads to a conclusion that the proceedings to establish zoning fee are mainly initiated *ex officio*. Though the legislator allows zoning fee to be determined before a real property is disposed of, owners and perpetual usufructuaries rarely exercise this right. The main reason for this is a relatively low level of awareness of an obligatory zoning fee, and vendors usually learn about it at the stage of signing a notarial deed or when proceedings are initiated *ex officio*. However it is worthy to note that the obligation to pay the zoning fee may in many cases can be a considerable financial burden to a vendor, and hence the knowledge about its amount before transaction would be a chance to include the fee in the price of a real property or possibly to withdraw from insufficiently profitable transaction.

3.2. Devising a formula for increase in real property value

Adopting a new local development plan or making a change in an existing one is reflected in a value of real property by means of establishing its intended use in a local plan, or legally admissible way of its development. The information on the ways a real property can be developed is one of the basic price-determining factors, and thus value-determining component in the appraisal process that considers market aspect of investment attractiveness of a real property [Wolanin 2011a]. However, it should be emphasized that the sole fact that a local development plan or its change come into effect does not have to result in the establishment of zoning fee. For the fee to be determined it is necessary to demonstrate that a real property gained in value due exclusively to adoption or change of a local development plan, and thus other factors that could influence the valued increase must be excluded. It is possible only after the commissioned assessment of the property value is carried out as part of the proceedings. Appraisal studies are made by certified property appraisers, chosen in compliance with the rules of the Public Procurement Act of 29 of January 2004. The costs of the appraisal are covered by the office.

The method of determining the increase in value of a real property is specified in the art. 37, 2 sentence of the Act. According to its provisions the value increase is determined differently if the existing development plan was changed and if it a new one was adopted. In the first case, that is when an existing plan had been effective before the change was introduced, the increase in property value is defined as a difference between the value of the property, established on the basis of the land intended use, before and after the change of the local development plan. In the latter case, when immediately before the adoption of a local development plan there was no local plan in force, the increase in value is a difference between the value of the property, established on the basis of land intended use after the plan's adoption, and the property value calculated on the basis of its actual use before the plan's adoption.

A different method of calculating the increase in value of a property was introduced by an amendment to the Act that came into force on 10 August 2011. The amendment was intended to take into consideration the judgement of the Constitutional Tribunal of 9 February, file P 58/08, art. 87, sec. 3a. The amendment was added to the Act, which

states that if a local development plan was adopted after 31 December 2003, that is after the previous act adopted before 1 January 1995 ceased to be legally binding, the art. 37, sec. 1, 2 sentence of the Act, concerning the increase of property value, is not applicable if value of a property (established on the basis of land intended use defined in the local development plan adopted before 1 January 1995) is higher than the value of the property calculated on the basis of its actual use after this plan ceased to be legally binding [Act of 2003]. In practice it means that the gain in value is a difference between the value of the property established on the basis of the land intended use after the local plan's adoption, and its value calculated on the basis of land intended use defined in the local development plan adopted before 1 January 1995.

In the studied area the way to determine the increase in value of property was related to adopting new local plans and not with their changes. Each appraisal study prepared during the proceedings, before the amendment to the Act, defined two market values of a real property: the first took into account the intended use of land after the adoption of the local plan for Opatkowice West or Opatkowice East, the second that took into consideration the actual use of property before adoption of the local plan. In the studied area the change of rules in the Act in the proceedings had a considerable impact on their course. The amendment necessitated the determination in the appraisal study not two, but three market values of a property. Beside those mentioned above, property appraisers also calculated the third market value of a property that took into account the intended use of the land defined in the local general development plan of Kraków.

In the studied period property appraisers completed altogether 82 appraisal studies defining property values that were then used in the proceedings and led to the adoption of a decision. More than half of them – 44 appraisal studies (54%) were completed before the amendment to the Act of 2011. Out of the remaining appraisal studies finished after the amendment, 16 (19%) were used as evidence to determine the increase in property value (or lack thereof) while applying art. 37, sec. 1, 2 sentence of the Act, 21 appraisal studies (26%) while applying art. 87, sec. 3a of the Act, and 1 study (1%) with application of both regulations.

3.3. Administrative decisions

The proceedings to establish zoning fee is decided by an administrative decision. In the proceedings initiated *ex officio* a decision should be adopted immediately after receiving notarial deed, but after previous adequate evaluation of the evidence, including obtaining assessment of the value of the property and informing former owner of a real property or its perpetual usufructuary that the whole evidence has been gathered to adopt a decision [Wolanin 2012]. This principle of the course of the proceedings is also applied to proceeding initiated upon request. The length of the proceedings in the studied area is presented in Table 4. The divergence between the number of initiated proceedings and the number of final administrative decisions comes from the fact that real properties owned by a few people can be sold by one notarial deed (than separate decisions are adopted).

Table 4. Juxtaposition of dates of initiation and completion of proceedings in the studied area

Year of proceedings initiation		No. of final administrative decisions					
		2006	2007	2008	2009	2010	2011
No. of initiated proceedings		8	41	22	7	8	0
Year of adopting an administrative decisions	2006	-	-	-	-	-	-
	2007	3	6	-	-	-	-
	2008	-	32	1	-	-	-
	2009	-	7	2	2	-	-
	2010	-	2	-	-	1	-
	2011	-	-	8	1	1	-
	2012	3	7	10	-	-	-
	2013	2	1	21	5	1	-
	2014	1	2	3	-	-	-
	2015	-	-	-	-	1	-
In course		-	-	-	1	4	-

Source: authors's study based on data from Municipal Office of Kraków

Data presented in Table 4 show that the majority of decisions in proceedings to determine the amount of zoning fee were not adopted in the year of their initiation. This is closely related to the time of evidence proceedings, especially with the need to make appraisal studies to assess the value of a property. The analysis shows that the proceedings took about 3 years on average.

When the increase in property value occurred, a decision on establishing zoning fee is adopted, whereas when no increase has been found, a decision on discontinuation of proceedings is taken. Other reasons for discontinuation of proceedings are: annulment of the local development plan or its part, withdrawal of a request by any side or selling the property before the decision on the amount of zoning fee was adopted in a proceedings initiated upon request.

In the studied period 86 initiated proceedings led to 128 decisions, of which 123 (96%) were final and enforceable decisions, and the remaining 5 are still in proceedings due to appeals and complaints. Out of all the adopted decisions 92 (72%) determined the amount of zoning fee, 32 (25%) annulled the proceedings and 4 (3%) were 'mixed' decisions (in part establishing zoning fee and in part annulling the proceedings). Table 5 presents the types of decision adopted between 2006 and 2015.

Before the amendment of the Act of 2011 there were in total 66 decisions adopted, while 95% of them were decisions establishing zoning fee. The decisions to annul the proceedings adopted in that period referred to the proceedings initiated upon request and were due to withdrawal of requests by one of the side (3 cases).

Table 5. Decisions adopted in proceedings to establish zoning fee in the studied area

Type of decision		Decisions establishing zoning fee	Decisions annulling the proceedings	Mixed decisions	In total
Year of adopting an administrative decision	2006	–	–	–	–
	2007	8	–	1	9
	2008	31	2	–	33
	2009	11	–	–	11
	2010	2	1	–	3
	2011	10	–	–	10
	2012	7	11	2	20
	2013	12	17	1	30
	2014	5	–	–	5
	2015	1	1	–	2
	In course	5	–	–	5
	In total	92	32	4	128

Source: authors' study based on data from Municipal Office of Kraków

The amendment has changed the proportions entirely and it led in practice to considerable limitation of decisions charging zoning fees. In subsequent years in total 62 decisions were adopted, half of which were decisions annulling the proceedings initiated *ex officio*. Undoubtedly it was a result of changes in legislation concerning the estimation of increase in property value, because all decisions to annul the proceedings (28) and decisions partly annulling them (3) adopted in years 2012–2013 were the effect of application of art. 87, sec. 3a of the Act. In case of decisions establishing zoning fees or only establishing it partly, the amendment influenced the determination of the increase in value property in 39% of decisions (12).

3.4. Appeals and complaints

The proceedings to determine zoning fee consist of two instances. The decisions adopted by the first instance can be appealed by sides to a Local Government Appeals Board (LGAB) within 14 days of the date of notification of the decision. The appeal is brought by means of a body of first instance. Decisions of a Local Government Appeals Board cannot be appealed. The side may however lodge a complaint to a proper Voivodeship Administrative Court (VAC), which assess on the legality of the adopted decision. The number of appeals and complaints and their settlement with regard to proceedings carried out in the studied area are presented in Table 6.

Table 6. Number of appeals and complaints and their settlements in proceedings to determine zoning fee in the studied area

Year of the initiation of proceedings		2006	2007	2008	2009	2010	2011	In total
No. of initiated proceedings		8	41	22	7	8	0	86
No. of completed proceedings		8	41	22	6	4	–	81
No. of final decisions		9	57	45	8	4	–	123
Including:	Decisions determining zoning fee	5	53	23	4	2	–	87
	Decision repealing the proceedings	3	3	21	3	2	–	32
	Mixed decisions	1	1	1	1	–	–	4
No. of appeals brought to do LGAB in Kraków		4	19	3	3	5	–	34
No. of decisions upheld by LGAB in Kraków		2	12	2	1	4	–	21
No. of decisions overruled by LGAB in Kraków		2	5	–	1	–	–	8
Other/In course		–	2	1	1	1	–	5
No. of complaints lodged to VAC in Kraków		1	1	–	–	4	–	6
No. of decisions upheld by VAC in Kraków		–	1	–	–	–	–	1
No. of decisions overruled by VAC in Kraków		1	–	–	–	–	–	1
Other/In course		–	–	–	–	4	–	4

Source: authors' study based on data from Municipal Office of Kraków

In the course of proceedings 34 decisions determining zoning fee have been appealed to the Local Government Appeals Board in Kraków, but 3 appeals were out of time. The analysis shows that most of the objections raised in complaints were related to length of the proceedings, validity of charging of the zoning fee and correctness of the appraisal study. Local Government Appeals Board in Kraków upheld 21 (62%) decisions adopted by the Mayor of the City of Kraków and overruled 8 of them and referred the case for re-examination. The overruling of decisions was justified mainly by the inadvertences in appraisal studies determining the value of a property. In one case the decision of the Mayor of the City of Kraków was overruled entirely, and the proceedings were discontinued. One case is still to be examined. Moreover in 6 cases sides exercised their right to lodge a complaint to the Voivodeship Administrative Court in Kraków. 4 cases are still to be examined.

4. Conclusions

The main proceedings to settle zoning fee consists in gathering evidence material to confirm the occurrence of all three reasons for charging a zoning fee and then adopting a proper administrative decision. The effective initiation of proceedings should occur within the statutory deadline of 5 years from the day a local development plan or its change entered into force. However it is not a deadline for cessation of adjudication on

zoning fee in proceedings already effectively initiated. The proceedings to determine zoning fee for real properties covered by directions of local plans Opatkowice West and Opatkowice East were initiated in years 2006–2010. 81 cases (around 94%) were conclusively decided till December 2015.

The analysis showed that the proceedings took around 3 years on average in the studied area. Firstly, the main factor influencing their length was a necessity to confirm the increase in property value due to adoption of a local development plan on the basis of an opinion passed by a property appraiser. He is always selected in accordance with the rules set out in the Public Procurement Act, and therefore the remarks to the procurement procedure, large number of initiated proceedings for establishing zoning fee in Kraków and limited annual financial resources for appraisal studies, in many cases it was impossible to make an appraisal study the same year when the proceedings were initiated. It should be emphasised however that a later date of completing studies has in no way influenced the evidence, because the method of assessment for the purposes of zoning fee is determined by the legislation and it eliminates time-related factor effecting the value of the property. Secondly, the length of the proceedings was undoubtedly affected by appeals brought to the Local Government Appeals Board in Kraków and complaints lodged to the Voivodeship Administrative Court in Kraków. It is noteworthy that the reasons to overrule the decisions of the Mayor of the City of Kraków, which led to re-examination of a case, were mainly objections to appraisal studies, including inadvertences in assessment of the value of the property according to its actual use before the local development plans were adopted. For the above reasons, due to numerous questions concerning interpretation, it would be advisable to make the law more specific in this respect, which would make easier to collect zoning fee in the future. On a side note, the length of proceedings is undoubtedly related to the number of staff responsible for carrying them – Department of Zoning Fee, being the part of the organizational structure of the Geodesy Department of the Kraków City Office. Since in Kraków the area covered by valid local plans is constantly growing larger, and thus the number of proceedings to determine zoning fee grows larger, hiring more people should be considered as a means to shorten the length of the proceedings.

Taking into consideration the content of the verdict of the Constitutional Tribunal of 9 February 2010, by adding art. 87, sec. 3a to the Spatial Planning and Development Act, effectively eliminated the admissibility of charging zoning fee when the use intended in a local plan adopted before 1 January 1995 did not differ from its use after adoption of the local development plan. The amendment to the Act in the studied area influenced 24% of proceedings, which led to decisions to annul the proceedings in their entirety or in part.

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