

Conditions for modifying the mode of land acquisition for road development

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Abstract: The paper discusses the mode of land acquisition for public road development resulting from the process of land severance performed at the request of the owner in terms of: the legitimacy of land acquisition by the State Treasury or local government units, by virtue of law, upon the land severance approval, the compensation for taking over the land severed for roads, the possibility of restitution of partially acquired plots of land in case a road has not been constructed, and therefore the redundancy of land earmarked for public purposes. The author compares land acquisition procedures set out in historical and currently applicable regulations as well as obligation to pay compensation. The aim of the research is to answer the question of whether the regulations according to which the land allocated for roads is acquired by operation of law by public entities should be modified, and if so, to what extent. On the example of a selected city, research was carried out to determine whether the acquired land is used at a later stage for road construction and what is the scale of compensation claims paid by the municipality. The conducted research made it possible to propose solutions to modify the mode of land severance resulting in land being severed for road development, considering both rational property management and the rights of former owners for restitution in the event public entities failed to use this real property for public purposes.

Keywords: property restitution, road plot, severance

1. Introduction

In addition to voluntary civil law contracts, land for planned public road development can be acquired through:

- expropriation, pursuant to the Real Estate Management Act, if the fact that the land is earmarked for road development results from the land use plan or a decision on establishing the location of a public purpose investment;



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- acquisition, by virtue of law, of the land earmarked for roads resulting from land severance procedure;
- municipality's pre-emptive rights;
- acquisition, by virtue of law, under special regulations.

This study analyses the procedure of acquiring, by virtue of law, the land severed for public roads subject to a subdivision survey. The legal and substantive effects of the land severance approval at the request of its owner include the termination of ownership right to a plot of land earmarked for public road construction and it being acquired by the public entity that is competent depending on the road category. Although such regulations ensure the protection of areas earmarked for public roads, they raise doubts as to the legitimacy of the transfer of ownership rights to this land to public entities at the stage of land severance approval.

The performed comparative analysis of land acquisition for the implementation of public purpose investments, including road construction in some European countries (France, Germany, Great Britain) allows for the conclusion that in these countries there are no legal or substantive effects resulting from land severance. In Germany, the process of land acquisition for public purposes is based on expropriation (Winrich, 2010), so is in France (*Code de l'expropriation pour cause d'utilité publique*, 2022). Compared to the regulations in Poland, the differences also apply to compensation for expropriation. For example, in Great Britain (Fisher, 2010), in addition to the market value of the real estate, compensation for expropriated properties also covers intangible losses resulting from expropriation-related discomfort and inconvenience.

Research studies presented in the publication (Rao et al., 2020) identify certain loopholes in the existing process of compulsory acquisition using the example of Scotland and pointing to the need to maintain the basic principles of "social justice". In Coruhlu et al. (2020), attention was drawn to the limitations on ownership rights to real estate intended for public purposes in local land use plans before actual expropriation, which is terminologically referred to as "legal confiscation without expropriation".

The awarded compensation does not sufficiently compensate the expropriated party for adverse effects that the construction of new infrastructure may have on the land in question (Bertolinelli et al., 2013). It is usually associated with economic loss as a direct result of real estate acquisition (Šumrada et al., 2013). Insufficient compensation to farmers for land expropriated for the benefit of extractive industries in China and the related problems are discussed in the publication (Cao et al., 2018). Also, delays in its payment adversely affect the situation of former owners (Tagliarino et al., 2018). The principles governing land acquisition for public road development in Poland in various modes as well as the related surveying and legal problems are contained by Gdesz and Trembecka (2011). The procedure for taking over land as a result of land severance as well as changes in the respective regulations are presented by Wolanin (2009). Zrobek and Walacik (2008) present the manner of carrying out procedures of land acquisition for public purpose investments in Warmińsko-Mazurskie province as well as the resulting disputes.

Currently, the procedure of land acquisition for the development of public roads has been significantly simplified and, consequently, the process of public road construction

has accelerated (Heldak, 2016). Belej and Walacik (2009) discuss simplified expropriation procedures, and in particular the observance of the so-called “balance of the parties” principle in the context of constitutional fair compensation and respect for property rights. Wojtas (2013) analyses the process of acquiring land for public road development on a selected example. Stacherzak et al. (2014) discuss the issues of municipal tasks regarding municipal roads and the financial effects of planning new transport connections of municipal importance in local land use plans. As discussed by Szuma (2011), local governments are obliged to pay compensation for real properties occupied by municipal public roads, subject to the regulations under Article 73 (Act, 1998). The possibility of road investment implementation with the use of public-private partnership institutions specified in the Act of 13 October 1998 (Act, 2008) and the related problems are presented in Tomaszewski (2012).

The author points out problems with concluding contracts between public and private entities due to unbalanced legal procedures, because both entities must comply with the Public-Private Partnership Act (Act, 2008), which is civil law, and the Public Roads Act (Act, 1985a; 1985b), which is an administrative law. The provisions on public finances, according to which public-private partnership agreements affect the level of public debt, are also a significant obstacle. The research objective is to answer the question whether the regulations under which land severed for roads and acquired, by virtue of law, by public law entities upon land severance approval, performed at the owner’s request, are justified, or whether these standards should be modified, and if so, to what extent. In practice, these plots are not used for road construction yet, at the same time, their acquisition results in the obligation to pay compensation.

This problem needs to be thoroughly discussed to draw attention to the fact that the applicable regulations regarding land severance are imperfect, and to suggest possible amendments. The research problem also concerns the analysis of this mode of land acquisition in terms of the possibility of restitution of the acquired plots in case a road has not been constructed, and therefore the land earmarked for public purposes has become redundant. The issues related to the restitution of the land acquired under severance decisions are the subject of numerous controversies as evidenced by the divergent line of jurisdiction of administrative courts. Pawlowski (2021) formulates the thesis that if the condition of the public purpose has been revoked, then regardless of the form of the termination of the right to a property, the obligation for restitution of this property to the former owner or the legal successors is restored.

The research hypothesis is a statement about the advisability of searching for solutions modifying the mode of acquisition of land severed for roads subject to subdivision surveys, considering both rational property management and the rights of former owners for restitution in the event the State Treasury or local government units failed to use this land for public purposes. The research concentrates on the verification of the processes of land severance in terms of the acquisition of land earmarked for road development by public law entities, as well as the rights of former owners to file claims for the restitution of the land that has not been used for road investments. The processes of land severance were verified by analysing the regulations as well as geodetic and legal procedures applicable to

land severance for road development as well as compensations paid. The paper presents the history and comparative analysis of the regulations on land acquisition for road development as well as the effects of applicable legal regulations regarding the obligation to pay compensation for the acquired land on the example of a selected city. The research methods used to verify the formulated thesis include the analyses of legal regulations, judicial and administrative judgements, comparative analysis, inference and a case study in the field of empirical research. The author of this research study analysed the conditions for the acquisition of land allocated for road construction according to the current and historical regulations as well as the applicable methods of proceeding by administrative bodies. The author also compared the land acquisition procedures exercised by the municipality or the State Treasury and the obligation to pay compensation. As part of the quantitative research, based on the analysis of the scale of compensation for land allocated for roads in the years 2009–2019 in the city of Krakow, the number of contracts and decisions on compensation, as well as compensation amounts for individual years, were determined.

Considering its demographic, economic, social and cultural strength, Krakow is the second most important city in Poland. It has unique metropolitan functions that strongly affect the region, the whole country, as well as Europe and the world in various ways. It is currently under intensive economic development, including the construction of road network and municipal infrastructure. By developing a network of transport connections, the city aims at building an integrated and safe transport system. In Krakow, (Fig. 1) there are the following road categories: national roads – 36.3 km, provincial roads – 26.3 km, county roads – 265.6 km, municipal roads – 782 km. Certain opinions were acquired after conducting interviews with road managers on the practical use of the land

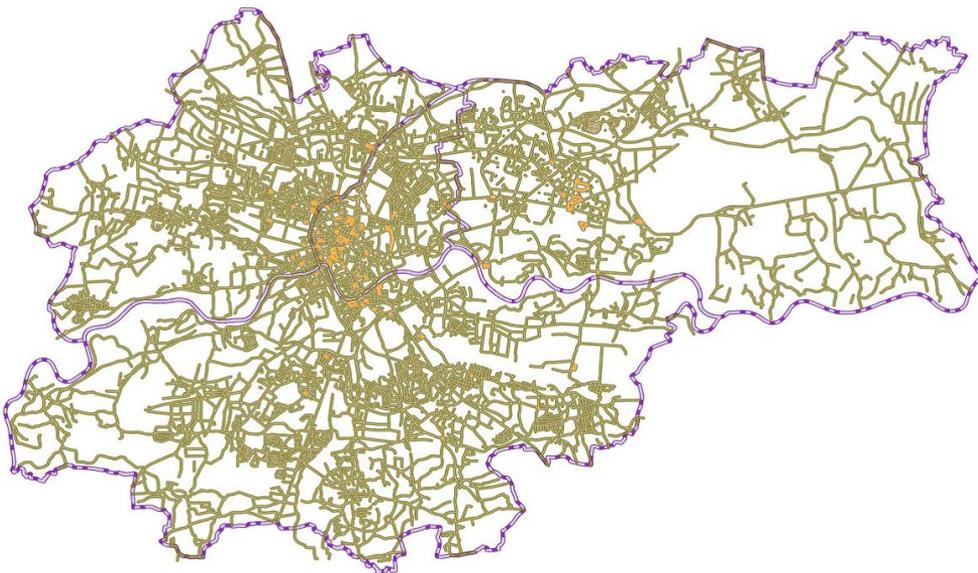


Fig. 1. The map of road network in Krakow. Source: Spatial Information System of Malopolska Province

severed for road construction for investment purposes. Currently, there are no studies on the modification of the legal process of land acquisition for road development, which justifies taking up this topic.

2. Legal and substantive effects of the process of land being severed for public roads subject to subdivision surveys

Pursuant to Article 98 section 1 ([Act, 1997](#)), plots of land severed for public municipal, county, provincial or national roads from the real property, the subdivision of which has been performed at the request of the owner, shall, by virtue of law, become the property of the municipality, county, province or the State Treasury, respectively, the day on which the land severance approval becomes final or the judgement on the subdivision takes effect. According to the regulations ([Act, 1985a](#)), a public road is a road included in one of the road categories that can be used by everyone, in accordance with its intended use, with limitations and exceptions specified in this act or other special regulations. Due to their functions in the road network, public roads are divided into the following categories: national roads, provincial roads, county roads and municipal roads.

The legal and substantive effects specified in this provision also apply to plots of land severed for public roads from real estate put in perpetual usufruct. Then, in the event of submitting an application for land severance by the perpetual usufructuary, the right of perpetual usufruct expires in relation to the plot severed for the public road the day on which the land severance approval becomes final or the judgement on the subdivision takes effect. The above regulations also apply to the surveys aimed at severing plots to widen the existing public roads. The process of severing plots for public roads applies to areas where their construction is only planned. However, due to the fact that the content of Article 98 section 1 ([Act, 1997](#)) refers to the road category, then this category should be determined based on the function for a given road specified in the local land use plan, since the act of assigning the road its category does not exist yet ([Jaworski et al., 2009](#)).

The ownership rights to the plots of land severed for public roads or for the purpose of widening the existing public roads are transferred only when the land severance procedure is triggered at the request of the owner. If the proceedings for the land severance were initiated ex officio pursuant to Article 97 section 3 ([Act, 1997](#)) or at the request of the road administration pursuant to Article 22 section 3 ([Act, 1985a](#)), there is no effect in the form of the transfer of ownership rights to the road plot. The plots of land severed for a road remain the property of the owner, and their acquisition for the benefit of a public-law entity may be exercised under a civil law contract or expropriation procedure.

The issue of taking over a plot of land severed for road construction is not subject to the land severance decision. However, the content of the decision should clearly indicate which plots were severed for road development, and based on which planning document. In addition, the decision should contain information about the effects of law under Article 98 section 1 ([Act, 1997](#)), together with an indication of the entity that acquires, by virtue of law, the ownership of the land severed for road construction.

3. The history of legal regulations on the effects of land severance for road development

The current procedure for acquiring land severed for road construction subject to subdivision surveys has been shaped to some extent by historical legal regulations. These conditions are also important today, especially in terms of assessing the implementation of statutory obligations that ordered the owners to transfer rights to land for public purposes free of charge. The process of land parceling was regulated for the first time by Wolanin (2009) in the Ordinance of the President of the Republic of Poland of 16 February 1928 (Regulation, 1928) on construction law and housing development. If for the land which was being parceled the development plan provided for a new road, the municipality – unlike now – did not take over plots of land for road development unless its construction was intended to be started. The severed plots remained the property of the owners, who could, at their own expense or with the participation of the owners of plots created as a result of the land severance procedure, arrange roads for public use, in accordance with the instructions of the municipality. If the municipality intended to start the road construction, then the acquisition of the land was implemented under a separate expropriation proceeding pursuant to the Act of 10 December 1920 (Act, 1920). Table 1 presents the effects of the regulations on the acquisition of land severed for roads subject to subdivision surveys since 1928 until today.

Table 1. Effects of regulations on the acquisition of land severed for roads subject to subdivision

Legal act	Period of validity	Effects on land severed for roads	Compensation for land severed for roads
Regulation of the President of the Republic of Poland of February 16, 1928 on construction law and housing development (Regulation, 1928)	17 February 1928 – 21 July 1936	The plots severed for roads remained the property of the owner. The municipality took over the land by a separate expropriation procedure, no sooner than the municipality proceeded to construct the road.	without compensation, free of mortgages or debts
Act of July 14, 1936 amending the Regulation of the President of the Republic of Poland of February 16, 1928 on construction law and housing development (Regulation, 1928; Act, 1936)	22 July 1936 – 30 July 1948	The owners were obliged to arrange new roads on the severed land. The municipality took over the above-mentioned objects intended for public use for further maintenance at the owners' request, after developing at least one third of the plots.	without compensation, free of mortgages or debts
Act of June 25, 1948 on property subdivision in urban areas and some housing estates (Act, 1948)	31 July 1948 – 30 August 1972	Property owners were obliged to transfer ownership rights to the land earmarked in the land use plan for streets, squares, roads to the commune – i.e. for public purposes as well as for the future policy of the housing estate, in the amount not exceeding 20% of the value of all the plots subject to land severance.	without compensation

Table 1 (continued)

Legal act	Period of validity	Effects on land severed for roads	Compensation for land severed for roads
Act of July 6, 1972 on single-family and farm buildings, and on land severance in urban areas and housing estates (Act, 1972)	1 September – 31 July 1985	The state took over the land for roads under the resolutions on the establishment of multi-family and single-family housing	compensation determined in accordance with applicable regulations for real estate expropriation
Act of April 29, 1985 on land management and real estate expropriation (Act, 1985b)	1 August 1985 – 31 December 1997	By virtue of law, the municipalities took over the land severed for the construction of streets from the real property subjected to severance procedure upon the owner's request	compensation determined in accordance with applicable regulations for real estate expropriation
Act of August 21, 1997 on real estate management (Act, 1997)	since 1 January 1998	Plots of land severed for public municipal, county, provincial, and national roads – from real estate subject to land severance performed upon the owner's request, by virtue of law become the property of the municipality, county, province or State Treasury	compensation in agreed amount or determined in accordance with applicable regulations for real estate expropriation

In the light of the conducted research, the parcelling provisions set forth in the ordinance (Regulation, 1928) should be considered as more rational. According to these provisions, the plots severed for roads remained the property of the owner until the municipality started the road construction. Such a procedure, contrary to the current one, allowed the owners to use the property until the road investment was initiated. This is important especially when roads are widened, as the loss of land by the owner makes it necessary to establish e.g. an easement in order to access a public road for that part of the property that remains privately owned.

4. Compensation for the acquisition of land severed for roads on the example of a selected city

Pursuant to Article 98 section 3 (Act, 1997), the owners of the land severed for public roads is entitled to compensation in the amount agreed between the owner or perpetual usufructuary and the competent authority. A replacement property may be awarded as compensation as well. If no consensus is reached, at the request of the owner or perpetual usufructuary, the compensation is determined in administrative proceeding subject to the principles applicable to the expropriation procedure, taking account of the values determined in accordance with the provisions of the regulation (Regulation, 2004). Figure 2 illustrates a diagram of the procedure for determining compensation for the acquisition of land severed for a road.

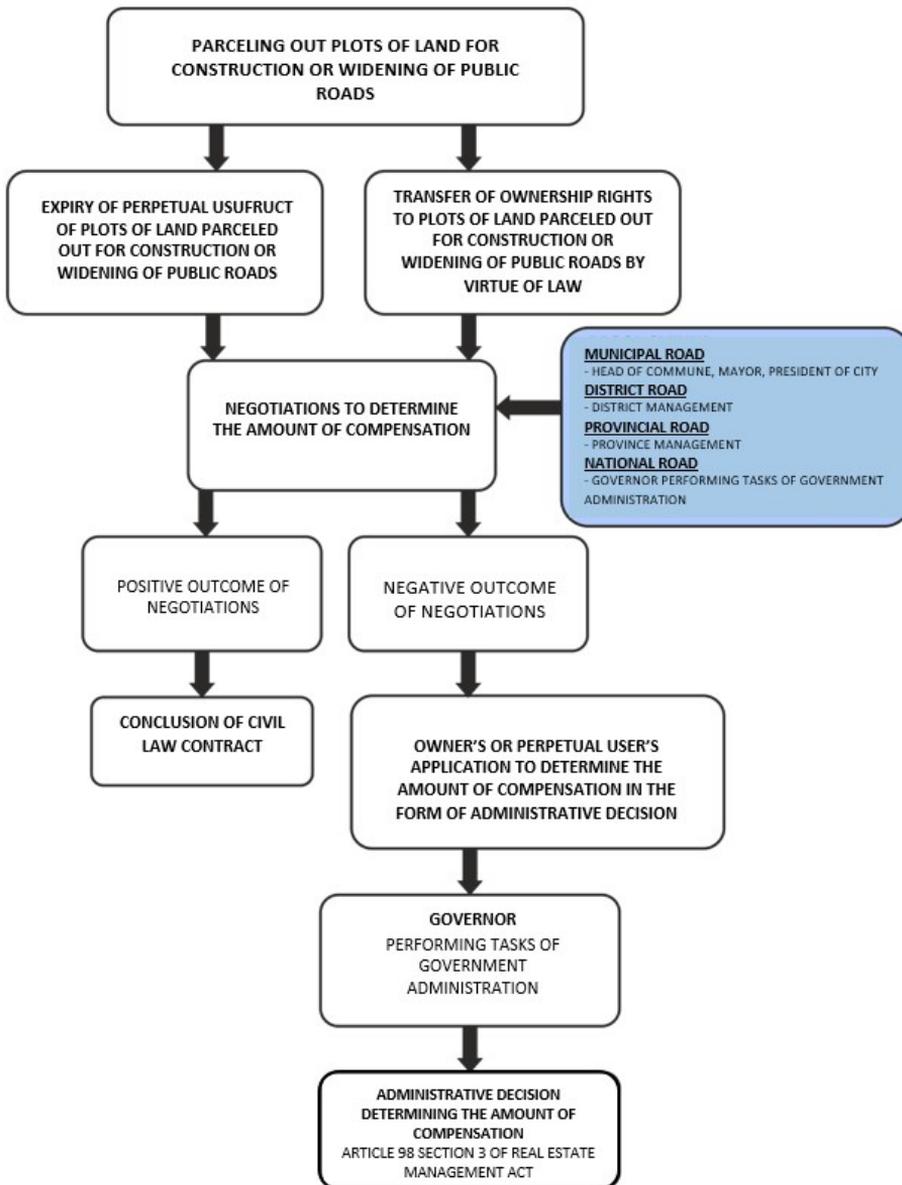


Fig. 2. Diagram of compensation procedure for land severed for public roads subject to subdivision surveys

The process of satisfying compensation claims is seriously extended by former owners and perpetual users questioning the proposed amount of compensation and raising objections as to the valuation of land and its components (Trembecka, 2013). The issue of compensation for areas taken over for road transport under various acts, including the analysed procedure, results in numerous disputes because the procedure is frequently

carried out without the consent of the property owner (Heldak, 2016). To illustrate the scale of compensation claims for the land taken over for road development subject to subdivision surveys (Table 2) the amount of compensation was examined over a period of 10 years on the example of a selected city.

Table 2. Effects of regulations on the acquisition of land severed for roads subject to subdivision

Year	Number of contracts	Compensation amount (PLN)	Number of decisions	Compensation amount (PLN)	Total (PLN)
2010	27	4 976 725	4	2 157 563	7 134 288
2011	12	1 208 546	1	95 513	1 304 059
2012	27	3 150 808	1	346 704	3 497 512
2013	7	552 030	6	1 530 418	2 082 448
2014	33	6 399 552	2	3 527 041	9 926 593
2015	30	2 716 303	3	541 853	3 258 156
2016	36	6 778 195	6	688 995	7 467 190
2017	13	2 236 542	7	2 125 322	4 361 864
2018	20	3 281 048	1	462 316	3 743 364
2019	33	6 814 731	13	483 200	7 297 931
	238	38 114 480	44	11 958 925	50 073 405

The analysis of the compensation paid out for the acquisition of land severed for roads by the city of Krakow demonstrated that a total of over PLN 50 million was paid in the years 2010-2019, based on 238 contracts and 44 administrative decisions. The largest number of contracts were concluded in 2016 for the amount of approximately PLN 7 million, while the largest number of decisions were issued in 2019 for approximately PLN 0.5 million. The highest annual amounts of compensation for land acquisition were paid in 2014 – circa PLN 10 million. Compensation exceeding PLN 7 million was paid in 2010, 2018 and 2019.

In practice, determining compensation for real estate acquired for the benefit of public law entities as a result of land severance procedure pursuant to §36 (Regulation, 2004) is problematic and raises numerous questions. One of them is the correct determination of the value of the plot. Certain doubts arise as to whether the property appraiser should take into account the features of the plot (e.g. area, shape) after its severance, or whether the parameters of the real property should be taken into account before the geodetic severance of the road plot. Another problem is the analysis of the possibility of applying the “benefit principle” in the procedure of road plot valuation and the selection of road transactions that meet market characteristics.

Currently, a draft amendment to the Act (Act, 1997) regarding compensation for expropriation is being prepared, which provides, inter alia:

- the elimination of the benefit principle and equating the amount of compensation to the market value;

- taking into account the costs of relocation;
- taking into account the housing situation of the expropriated;
- the possibility of compensation for the damages suffered.

The majority of the plots of land severed for roads in the years 2010–2019 subject to subdivision surveys have not been used for the construction of roads. One of the reasons is the acquisition of only a part of the land earmarked for the road (within the boundaries of the plot subjected to the subdivision). In the analysed period in the city of Krakow, compensation was disbursed for 236 plots of land, and only 11 of them were covered by road construction, which accounts for approximately 5%. Similarly, a negligible percentage of the severed plots of land were used for public purposes in other cities.

The severance of a road plot is not associated with the intended road investment to be implemented by the public-law entity, but is a consequence of the fact that the property owner cannot develop it in any other way (Wolanin, 2009). The individual plots do not constitute land complexes for the construction of individual roads. It will be possible to construct the road in the future, only after the city acquires the remaining parts of the land, but it may take place at different times and based on separate legal grounds. Moreover, the implementation of the investment depends to a large extent on the city's budget and investment plans. This situation contradicts the legitimacy of acquiring land by virtue of law already at the stage of land severance approvals.

The problem for property owners regarding land severed for the purpose of the widening of existing roads is a separate problem because, as a result of such a subdivision, the remaining parts of the property that remain privately owned are deprived of access to a public road, which significantly limits investment and land development opportunities. It is therefore justified to formulate a view that plots of land severed for roads should remain the property of the current owner until the municipality starts the investment process. Then, the acquisition of the land by the municipal authority could take place under a civil law contract or under a separate expropriation procedure.

5. Analysis of the possibility of restitution of land severed for road construction subject to subdivision survey to the former owner

Pursuant to the Real Estate Management Act, the previous owners or the heirs may request the restitution of the expropriated property or part of it if, pursuant to Article 137 (Act, 1997), it has become redundant for the purpose specified in the expropriation decision. The request for the restitution of the property is filed with the district governor carrying out government administration tasks, who shall notify the competent authority of this fact. The consequence of the severance carried out at the request of the owner under Article 98 (Act, 1997) is that private land is taken over by public entities to construct new or widen existing roads. However, in the jurisdiction of administrative courts, this procedure is not recognized as expropriation and therefore it is not subject to restitution. In the judgement of the Provincial Administrative Court in Opole of 11 February 2020 (Judgement, 2020), the Court stated that the broad understanding of the

concept of expropriation, as any deprivation of property regardless of the form, did not apply to the taking over of a property by the State Treasury or a local government unit based on a land severance approval, performed at the request of the owner. Therefore, in the Court's opinion, this decision was not characterized by the exercise of authority or the compulsory nature of the acquisition of a property by the municipality. It was only a consequence of an application for a land severance ([Judgement, 2017](#)).

However, there are different views in the jurisdiction of administrative courts. For example, in the judgement of the Provincial Administrative Court in Opole ([Judgement, 2008](#)), the Court stated that taking over land for roads related to property severance was a specific form of expropriation, as it was tantamount to depriving the entity holding the legal title to the property ownership rights to it, even though the legislator did not adjudicate in the severance decision on the loss of property. Similarly, the judgement of the Supreme Administrative Court ([Judgement, 2013](#)), mentioned "informal" expropriation for road purposes. A similar view resulted from the publication ([Szachulowicz et al., 2002](#))

[Pawlowski \(2021\)](#) explicitly recognized the acquisition of land for public roads resulting from land severance as a kind of expropriation. The author emphasized that the acts of spatial planning, and in particular the local land use plan, played a prognostic role in relation to the acts of expropriation. At the stage of plot acquisition for the implementation of the public purpose provided for in the plan, it was no longer possible to question its provisions. During the land severance procedure carried out ex officio, in order to be granted rights to the land on which, according to the local plan, a public road is to be built, the municipality would have to initiate a formal expropriation procedure. And this means that the expropriated person would be entitled e.g. to the possibility of applying for a restitution. It is unjustified ([Pawlowski, 2021](#)) to refuse a claim for the restitution in the event the land for road development was acquired by public law entities as a result of land severance. The expiration of more than 10 years from the acquisition of rights to this land and failure to implement the public purpose make this property redundant within the meaning of Article 137 ([Act, 1997](#)). It should not matter then whether the land was acquired by way of an expropriation decision or a severance decision.

6. Discussion and conclusions

By analysing the procedure for the acquisition of land earmarked for public road development and resulting from land severance, an attempt was made to discuss the doubts as to the existing legal regulations and the direction of the desired modifications was outlined. The research demonstrates that the transfer of property rights to public entities to plots severed at the request of the owner and partially acquired for public roads by virtue of law results in the inability to claim their restitution in case a road has not been constructed. This view prevails in the context of the inhomogeneous jurisdiction of the administrative courts.

The conducted research allows for the formulation of a conclusion confirming the need to modify the regulations related to land severance. It mainly concerns the exclusion of

regulations resulting in the acquisition by public entities, by virtue of law, of land severed for public roads upon the severance approval. In the light of the research, parceling provisions set out in the ordinance ([Regulation, 1928](#)) should be considered more rational. The 1928 procedure, in contrast to the current one, allowed owners to use severed plots of land until the road construction was commenced. This is important especially when severing plots to widen the existing public roads. The loss of land already at the stage of its severance results in the necessity for the owner to be granted e.g. the right-of-way in order access the existing public road.

Such modification would allow the acquisition of land for road development subject to the general principles of acquiring land for public purposes, i.e. based on civil law contracts or based on expropriation at the stage of road investment implementation. The effect of the proposed solutions would therefore also include the possibility of submitting claims for the restitution of the property after the lapse of 10 years after the acquisition of rights to this land by the public entity and failure to complete a road investment on it. This would equate the rights of land owners in terms of their right to restitution of their land on which the local plan provides for the implementation of the public purpose investment and, consequently, would aim at respecting the principle of the equality before the law.

In the case of property restitution to the former owner, as a result of which the neighbouring property would be deprived of access to a public road, establishment of the right-of-way should be considered prior to issuing the restitution decision. The analysis presented in this study confirms the hypothesis formulated in the Introduction about the advisability of searching for solutions to modify the mode of acquisition of land severed for road construction subject to subdivision surveys, considering both rational property management and the rights of former owners for restitution in the event the State Treasury or local government units failed to use this land for public purposes.

The results of the research on the consequences of the regulations for land owners may contribute to a discussion on changes in land severance conditions. The presented research studies do not specify a number of the cases in which, as a result of the legal transfer of land to public entities, owners were deprived of access to a public road. This could inspire further research. It would also be worthwhile to broaden the research in order to answer the following question: in how many cases, despite the land having been taken over, were the roads not built and what were the reasons? (e.g. financial limitations, changes to land use plans of the municipality, etc.).

Data availability statement

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