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POLISH DILEMMAS IN COMPENSATING LANDOWNERS IN THE VICINITY OF AIRPORTS – BLACK LETTER LAW VS. LAW IN ACTION¹

Introduction

The constant development of air transport connected with an increasing number of air operations is an undeniable phenomenon that will continue into the foreseeable future. Particularly in Poland, where there is still a significant capacity to grow, air transport is developing rapidly.² According to data published by the Polish Civil Aviation Authority, by 2035, Polish airports will have served roughly three times the number of passengers served in 2016, thus progressing from nearly 34 million passengers in 2016 to the predicted 94 million in 2035.³ Compared to the year 2016, the number of served passengers increased by 16% in 2017, whereas

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² See: *Dalszy wzrost na polskim niebie. Prognozy dla rynku lotniczego 2018*, p. 10–14, <https://www.pwc.pl/pl/pdf/publikacje/2018/prognozy-dla-ryнку-lotniczego-raport-2018.pdf> [access: 30.03. 2020].

³ *Projekcja liczby obsłużonych pasażerów oraz liczby operacji pasażerskich w Polsce do roku 2035*, http://ulc.gov.pl/_download/regulacja_ryнку/statystyki/prognozy/prognoza_2017.pdf and *ULC: Nowa prognoza ruchu lotniczego – dobre perspektywy rozwoju dla polskich lotnisk*, <http://ulc.gov.pl/pl/publikacje/wiadomosci/4284-ulc-nowa-prognoza-ruchu-lotniczego-dobre-perspektywy-rozwoju-dla-polskich-lotnisk> [access: 30.03.2020].

the number of air operations increased by 12%.⁴ The above figures explain why once dormant airports are no longer neutral to neighbours, who are experiencing externalities resulting from airport activities. Although the presented prognoses are likely to be affected by setbacks caused by the current global pandemic of the coronavirus (COVID-19), it is prudent to assume that air transportation's future role will not be diminished.

Although airport externalities do have an important positive aspect (regional development, creation of new jobs, investment in infrastructure, economic development), they also cause negative consequences, mostly in the form of noise that was previously negligible or not at a level that warranted opposition. Additionally, new persons may become exposed to airport externalities in the event of the construction of a new airport. This matter is currently of particular interest in Poland since the government has announced plans to build a new hub airport outside of Warsaw, as the current Chopin airport is almost at its maximum capacity and has no room to expand. The Council of Ministers has already adopted the concept of the new Solidarity Airport – Central Transport Hub for the Republic of Poland,⁵ and thus, new landowners will be exposed to airport nuisance they have not previously experienced.

Undoubtedly, airport nuisance, associated mostly with higher noise levels, is becoming increasingly onerous, particularly to homeowners, as air transport develops and airports enlarge the volume of operations.⁶ Consequently, the affected landowners seek redress for various negative effects of this phenomenon using available legal measures. Thus, the legislator must choose if a dedicated regime of compensation for negative airport externalities needs to be implemented. In addition, important decisions need to be made regarding the scope of compensable loss and the rules or procedures according to which this loss should be compensated.

⁴ *Ruch lotniczy w Polsce – pozytywne trendy w pierwszej połowie roku - statystyki i analiza*, <http://ulc.gov.pl/pl/publikacje/wiadomosci/4484-ruch-lotniczy-w-polsce-pozytywne-trendy-w-pierwszej-polowie-roku-statystyki-o-analiza> [access: 30.03.2020].

⁵ Resolution No 173/2017 of The Council of Ministers of 7 November 2017 on the adoption of the Investment Preparation and Implementation Concept: Solidarity Airport – Central Transport Hub for the Republic of Poland, https://www.gov.pl/documents/905843/1047987/resolution_173_2017.pdf/7514d575-3e62-935f-153b-b55e68b01b78 [access: 30.03.2020].

⁶ S. Banner, *Who Owns the Sky? The Struggle to Control Airspace from the Wright Brothers On*, Cambridge, MA-London 2008, pp. 169–202.

In light of the above, this paper aims to present the solution adopted by the Polish lawmaker to compensate for the effects of airport nuisance on neighboring landowners and analyze the objective of the relevant provisions. Their practical application is then examined and the consequences of a clear disparity between black letter law and law in action are considered. It is argued that the current application of the provisions in force defeats their purpose and reflects inadequate comprehension of the legal instruments the legislator has utilized to balance the public and the private interest. Furthermore, it will be argued that the law's faulty application is only achieving short-term and incidental effects instead of resolving the airport-landowner conflict in a mid to long-term perspective. Consequently, the paper will attempt to show that there is a pressing and justified need to reconsider the current application of the law to avoid speculative behaviour that does not benefit society nor fulfil the legislator's objectives.

1. Restricted use areas (RUAs) around airports

The Polish legislator has approached externalities caused by airport operations from the perspective of environmental protection and has included regulations concerning this matter in the Protection of Environment Act 2001 (POE).⁷ Accepting the fact that despite employing the available technical, technological and organizational solutions, it is currently impossible to contain increased noise levels within the boundaries of an airport, the lawmaker has allowed airports not to meet environmental protection standards regarding noise levels, however only within the so-called RUAs (art. 135 s. 1 POE).⁸ The reason for the above is acknowledging that airports are enterprises of public utility,⁹ and therefore, as an exception, they are allowed not to observe environmental protection standards on

⁷ Act of 27 April 2001, consolidated version: Journal of Statues 2018, item 799, as amended.

⁸ K. Gruszecki, *Prawo ochrony środowiska. Komentarz*, Warszawa 2019, pp. 369-370.

⁹ M. Górski, *Ochrona jakości środowiska i prawo emisyjne*, in: *Prawo ochrony środowiska*, ed. M. Górski, Warszawa 2018, p. 264; J. Boć, E. Samborska-Boć, *Podstawowe regulacje prawnej ochrony środowiska*, in: J. Boć, K. Nowacki, E. Samborska-Boć, *Ochrona środowiska*, Wrocław 2008, p. 303.

the condition that they employ all available technologies and organization in order to minimize their influence on the environment.¹⁰

Establishing a RUA in effect denotes that not observing environmental protection standards is legal within the designated boundaries, outside the territory of the actual airport. This measure is designed to reconcile the protection of property, the protection of economic freedom and the desirable development of the society and civilization (art 21, 22 and 74 of the Constitution of the Republic of Poland -CRP)¹¹ leading to a balance among these values.¹² In other words, the legislator is implementing sustainable development solutions,¹³ which allow continuing social and economic development only if the proper functioning of the ecosystem is preserved.¹⁴ Consequently, neither of the mentioned values can be protected in an absolute manner, but all of them are protected to a certain extent, as required by sustaining a balance between development and the environment.¹⁵

The purpose of creating a restricted use area is to prescribe such current and future uses of land that reduce potential, negative effects to human health caused by the activity of the neighbouring enterprise and allow for the development of sustainable land uses in the vicinity of airports,¹⁶ or other enterprises expressly enumerated by the legislator in

¹⁰ M. Romańska-Ścisel, *Ewolucja instytucji prawnej strefy ochronnej w prawie ochrony środowiska*, *Studia Iuridica Lublinensia* 2004, no. 4, pp. 216, 220–221.

¹¹ The constitution of the Republic of Poland, act of 2 April 1997, *Journal of Statutes* 1997, no. 78, item 483 as amended.

¹² J. Ciechanowicz-McLean, *Prawo ochrony i zarządzania środowiskiem*, Warszawa 2019, p. 49.

¹³ B. Rakoczy, Z. Gołębiowski, J. Ratajczak, G. Smolibowska-Hruszka, *Obszar ograniczonego użytkowania w prawie polskim*, Warszawa 2011, p. 28; for more see J. Ciechanowicz-McLean, *Konstytucyjna zasada wolności gospodarczej a ochrona środowiska*, *Gdańskie Studia Prawnicze* 2014, vol. 31, p. 99 et seq.; T. Bojar-Fijałkowski, *Równe prawo do środowiska należytej jakości w założeniach sprawiedliwości ekologicznej*, in: *Prawa człowieka a ochrona środowiska – wspólne wartości i wyzwania*, eds. B. Gronowska, B. Rakoczy, J. Kapelańska-Pręgowska, K. Karpus, P. Sadowski, Toruń 2018, p. 23 et seq.; also: Z. Bukowski, *Koncepcja zrównoważonego rozwoju a prawa człowieka*, in: *Prawa człowieka a ochrona środowiska...*, p. 39 et seq.; P. Korzeniowski, *Zasady prawne ochrony środowiska*, Łódź 2010, p. 279 et seq.

¹⁴ J. Stelmasiak, A. Wąsikowska, *Zasady ogólne prawa ochrony środowiska*, in: *Prawo ochrony środowiska*, ed. J. Stelmasiak, Warszawa 2010, pp. 26–27.

¹⁵ J. Ciechanowicz-Mc Lean, *Prawo ochrony...*, p. 49.

¹⁶ J. Jendrośka, M. Bar, *Prawo ochrony środowiska. Podręcznik*, Wrocław 2005, p. 696.

art. 135 s. 1 POE.¹⁷ Therefore, when establishing a restricted use area for an airport (in the form of a resolution taken by the highest tier of local government) the legislator requires identifying: 1) restrictions on designating land for particular uses, 2) technical requirements for buildings, and 3) the permissible use of land (art. 135 s. 3a POE). Thus, the RUA may be viewed as a special land planning instrument,¹⁸ resembling a local development plan that indicates admissible land designation and use in a specified area. It should also be noted that analogous to RUAs, are zones established pursuant to provisions concerning the protection of nature (art. 130 POE) or industrial zones (art. 136a POE), all of them (including RUAs) referred to as special zones.

Restrictions implemented in special zones are thus formulated as particular prohibitions regarding land designation and use, but may also include the obligation to perform activities regarding the land or buildings, or to obtain a permit to use land for a given purpose.¹⁹ In the case of RUAs, all prohibitions and requirements should be aimed at protecting landowners from the negative effects of nearby enterprises, which cannot contain their emissions and keep them within specified environmental protection limits.²⁰ The most commonly encountered prohibitions or restrictions introduced in RUAs are prohibitions on developing land, altering the terrain, changing the use of land to specified uses, cultivating specified crops, collecting specified fruits of land,²¹ erecting specified types of buildings, changing the use of existing buildings to other, specified uses, extending or modifying buildings of specified uses.²² All of the prohibitions or requirements must, on the one hand, classify as one of the three types of restrictions indicated by the legislator in art. 135 s. 3a POE and, on the other

¹⁷ Apart from airports, these are as follows: sewage treatment plants, landfill sites, composting plants, highways, electrical supply lines and stations, radio communication, radio navigation and radiolocation installations.

¹⁸ A. Miler, *Obszar ograniczonego użytkowania*, Toruń 2012, p. 218–219.

¹⁹ B. Rakoczy, in: *Prawo ochrony środowiska. Komentarz*, Warszawa 2013, s. 222; T. Suchar, *Ograniczenia sposobu korzystania z nieruchomości w związku z ochroną środowiska*, Casus 2011, no. 59, p. 16.

²⁰ K.B. Wojciechowska, *Lotniskowy obszar ograniczonego użytkowania*, Warszawa 2019, pp. 41–42.

²¹ K. Czajkowska-Matosiuk, *Ograniczenie korzystania z nieruchomości w związku z wymogami ochrony środowiska*, *Prawo i Środowisko* 2015, no. 1, pp. 62–63; M. Pchałek, in: *Prawo ochrony środowiska. Komentarz*, Warszawa 2019, pp. 399–400.

²² K.B. Wojciechowska, *Lotniskowy...*, p. 118.

hand, be justified by the conclusions resulting from the following procedures: the assessment of the environmental impact, the post-completion analysis, or the ecological review.²³

The restrictions implemented in RUAs cannot be discretionary but must follow from the results and conclusions of the mentioned environmental documents²⁴ and be necessary to protect people from the effects of not observing environmental protection standards within the RUA.²⁵ It should also be pointed out that implemented restrictions do not have to, and in practice do not, apply to all land located within a RUA. Prohibitions on specified land designation will not affect land with a different designation which is its highest and best use.²⁶ Also, within a RUA, different zones may be delimited and subject to varying prohibitions and requirements.²⁷

2. Black letter law on compensable loss

Implementing the so-called special zone in the form of a RUA, a nature protection zone, or an industrial zone is, as follows from the above comments, connected with the introduction of restrictions concerning landowners. These restrictions may cause negative effects in the form of loss of property value or possibly also other losses, like loss of profits. The question that naturally arises is whether and to what extent such losses are subject to compensation.

Before considering the above, it must be emphasized that the legislator constantly introduces various restrictions concerning ownership (e.g. ownership of historical real estate, ownership of agricultural or forest

²³ B. Rakoczy, in: *Prawo ochrony środowiska...*, p. 222.

²⁴ A. Miler, *Obszar...*, p. 189–190; M. Górski, *Ochrona...*, p. 265; B. Rakoczy, *Postępowanie w sprawie ustanowienia obszaru ograniczonego użytkowania w prawie polskim*, *Prawo i Środowisko* 2013, no. 2, p. 67.

²⁵ B. Rakoczy, *Postępowanie...*, p. 66; K.B. Wojciechowska, *Lotniskowy...*, p. 117; A. Miler, *Obszar...*, pp. 174–175.

²⁶ I. Foryś, M. Habdas, J. Konowalczuk, *Fair and effective compensation of loss in restricted use areas surrounding airports in Poland*, *Ekonomia i Środowisko* 2019, no. 3, s. 96–97; for the notion of highest and best use cf. The Appraisal Institute, *The appraisal of real estate*, Chicago 2013, pp. 331–358.

²⁷ K. Gruszecki, *Prawo ochrony środowiska. Komentarz...*, pp. 376–377.

land, restrictions that follow from construction law, etc.). Although it is the fullest right to a thing, ownership is not unlimited (art. 140 Polish Civil Code – PCC²⁸) and its limitations are derived from legislation (both private and public law provisions), rules of social coexistence and the socio-economic purpose of owning a particular thing.²⁹ Introducing restrictions of ownership does not, as a rule, necessitate the payment of compensation.³⁰ Restrictions on ownership cannot be equated to expropriation; the latter is only possible for a public purpose and with just compensation (art. 21 s. 2 CRP). According to art. 31 s. 3 CRP and art. 64 s. 3 CRP the legislator may restrict the right of ownership through statutory provisions if the restrictions are necessary in a democratic state to protect public security or order, the environment, public health or morals, or freedoms and rights of other persons. Moreover, when introducing limitations, the legislator must observe the principle of proportionality and abstain from violating the essence of the right, which would lead to the creation of an empty right (*ius nudum*).³¹ Consequently, constricting ownership by introducing land use restrictions is legally permissible, as long as it is done, among other things, for environmental protection purposes and is proportionate to the objective to be achieved.³² Potential compensation for such restrictions is often a means of ensuring that proportionality has been observed, however, there is no legal requirement to compensate the entire extent of changes that the restrictions caused.³³

²⁸ Act of 23 April 1964, consolidated version: Journal of Statutes 2019, item 1145, as amended.

²⁹ A. Stelmachowski, in: *Prawo rzeczowe*, ed. T. Dybowski, Warszawa 2007, p. 228, for more see R. Mikosz, „Ograniczenia” własności (na przykładzie prawa górniczego), *Problemy Prawne Górnictwa* 1982, no. 5, s. 44–53.

³⁰ M. Bednarek, *Prawo do mieszkania w konstytucji i ustawodawstwie*, Warszawa 2007, p. 230; also see S. Jarosz-Żukowska, *Własność w okresie przeobrażeń ustrojowych w Polsce z perspektywy orzecznictwa Europejskiego Trybunału Praw Człowieka*, Wrocław 2016, pp. 138–139; J. Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego na początku XXI wieku*, Kraków 2004, pp. 314–315.

³¹ E. Bagińska, *Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej*, Warszawa 2006, pp. 178–181; M. Habdas, in: *Kodeks cywilny. Komentarz*, vol. 2: *Własność i inne prawa rzeczowe (art. 126–352)*, eds. M. Habdas, M. Fras, Warszawa 2018, pp. 32–33; A. Miler: *Obszar...*, p. 30–35; M. Bednarek, *Prawo...*, p. 227.

³² M. Habdas, *Fundamental premises of land expropriation in Poland*, in: *Rethinking expropriation law*, vol. 1: *Public interest in expropriation*, eds. B. Hoops, E.J. Marais, H. Mostert, J.A.M.A. Sluysmans, L.C.A. Verstappen, The Hague 2015, pp. 303–308.

³³ K. Gray, S.F. Gray, *Elements of land law*, Oxford 2009, pp. 26–27, 1392–1400.

Delimiting the boundaries of ownership by creating various restrictions is a legal activity of the public authority (the legislator or public bodies exercising power) that does not bring about the necessity to compensate loss resulting from such restrictions. Consequences of public authority's legal activities are only compensated exceptionally in the events and to the extent expressly provided for by the legislator.³⁴ Such a solution is consistent with art. 1 of Protocol 1 to the European Convention on Human Rights (ECHR), which does not contain an obligation to provide full compensation whenever property rights are limited.³⁵ The provision reflects the principle of fair compensation,³⁶ and the judgments of the European Court of Human Rights (ECtHR) indicate that restrictions of ownership are permissible if they are enacted for a legally justified purpose, in accordance with the law in force and while observing proportionality between the purpose to be achieved and the measures utilized to do so. The principle of proportionality was extensively explained by the ECtHR in *James and Others v. The United Kingdom*,³⁷ where it was pointed out that neglecting to ensure proportionality is the most frequent cause of violating article 1 of Protocol One to the ECHR. Therefore, the fairness of compensation should be identified with a proper balance between the private and the public interests. Determining compensation and its extent for a given property restriction will depend on the type of restriction, its intensity and whether maintaining proportionality requires an economic intervention.³⁸

In the light of the above, the Polish legislator has decided to compensate owners in the vicinity of airports, whose land is located within

³⁴ See Constitutional Tribunal judgments of 28 May 1991, K 1/91, OTK 1991/1/4 and of 21 June 2005, P 25/02, OTK ZU 2005/6A/65; C. Kosikowski, *Zasada ochrony własności*, in: *Zasady podstawowe polskiej Konstytucji*, ed. W. Sokolewicz, Warszawa, 1998, p. 237; S. Jarosz-Żukowska, *Własność...*, pp. 139–140; S. Jarosz-Żukowska, *Prawo do własności – własność jako prawo podmiotowe*, in: *Prawa i wolności obywatelskie w Konstytucji RP*, eds. B. Banaszak, A. Preisner, Warszawa 2002, p. 267.

³⁵ See ECtHR judgment in *Lithow and Others v. U.K.* (dec.), no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, 8 July 1986,

³⁶ S. Jarosz-Żukowska, *Właściwość Europejskiego Trybunału Praw Człowieka w sprawach dawnych aktów nacjonalizacyjnych i wywłaszczeniowych oraz nowego ustawodawstwa restytucyjnego – sprawy polskie*, *Studia Erasmiانا Wratislaviensia* 2009, no. 3, pp. 196, 199–200.

³⁷ (plenary) no. 8793/79, 21 Feb 1986.

³⁸ J.M. Pawłowski, *Obowiązek odszkodowawczy w związku z naruszeniem art. 1 Pierwszego Protokołu Dodatkowego do Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności*, *Rejent* 2007, no. 5, p. 118.

the created RUA, for the loss which has been caused by the introduced restrictions (i.e. prohibitions and requirements). The relevant provisions of art. 129 s. 1 and s. 2 POE, regulate the cause and extent of compensable loss and apply not only to RUAs, but also other special zones created under art. 130 POE (various nature protection areas) or art. 136a POE (industrial zones). Article 129 POE opens Part IX of POE, entitled: Restrictions on land use connected with the protection of the environment. In section 1 of art. 129 the legislator states that: "if in connection with restricting the manner of the use of land, its use or the use of its part in a manner consistent with past use or past designation has become impossible or materially limited, the owner may demand that the land or its part be bought". In art. 129 s. 2 the legislator provides: "in connection with restricting the manner of the use of land, its owner may demand compensation for the suffered loss; the loss also includes the decrease of the value of land".

The wording of these provisions makes it clear that the legislator wishes to compensate all losses (in the understanding of private law) which have resulted from the restrictions on the use of land introduced through the designation of all special zones regulated in Part IX of POE,³⁹ among them RUAs established for areas surrounding airports. The provision is not aimed at compensating losses that are not a direct consequence of the introduced restrictions in land use (expressed as prohibitions or requirements) even if the mere fact of introducing a special zone causes a change in real estate values, perhaps due to the negative perception of land located within a zone where environmental protection standards are allowed not to be observed.

The premise of applying art. 129 POE is the introduction of a restriction that impacts the designation or use of a given piece of real estate.⁴⁰ No compensatory claims arise out of the mere fact of creating a RUA, the fact that noise levels are or potentially may be exceeded (RUAs for airports are designated on the basis of a prognosis of equivalent noise) or the fact that the use of land within a RUA is less comfortable due to airport noise. The reason for the above is that the legislator does not wish to compensate

³⁹ A. Paczkowska, *Charakter prawny terminu dochodzenia roszczeń odszkodowawczych w związku z ustanowieniem strefy ograniczonego użytkowania*, *Przegląd Prawa Handlowego* 2015, no. 11, p. 38; M. Pchalek, in: *Prawo ochrony środowiska...*, pp. 399–402; B. Rakoczy, in: *Prawo ochrony środowiska...*, p. 210.

⁴⁰ B. Rakoczy, in: *Prawo ochrony środowiska...*, p. 210.

the potential loss of value caused by the location of land, which is always positively or negatively influenced by various changes and developments of the built environment and the neighbourhood. The location itself thus cannot be a cause for compensation.⁴¹ Furthermore, as explained above, the legislator is not obliged to compensate for all effects of introducing a special zone. Even if the mere fact of implementing a RUA may cause loss of value, compensating the effects of a legal activity of public authorities may be limited in scope and subject to modified principles⁴² when compared to general rules on liability for loss as regulated in PCC.⁴³

Unlike the liability of public authorities for actions that violate the law (art. 77 PRC), there is no constitutional rule that regulates the principles of liability for damage caused by legal activities of public authorities.⁴⁴ Nevertheless, the general constitutional principle of equality in law⁴⁵ allows us to construe the principle of equality in being burdened by public duties. This denotes that individuals disproportionately burdened with the consequences of protecting a public interest are entitled to compensation that reinstates proportionality.⁴⁶ The principle of equality in being burdened by public duties is not absolute in the sense that it may be limited by other constitutional values, because it would be impossible to fully compensate all losses or inequalities.⁴⁷ Therefore, liability for the consequences

⁴¹ M. Habdas, J. Konowalczyk, *Cele i warunki skutecznej interwencji państwa w obszarach ograniczonego użytkowania portów lotniczych*, Świat Nieruchomości 2018, no. 3, p. 10.

⁴² Supreme Court judgment of 25 June 2015, III CSK 381/14, LEX no. 1793696.

⁴³ T. Dybowski, *Naprawienie szkody*, in: *Prawo zobowiązań. Część ogólna* ed. Z. Radwański, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1981, pp. 189–190; J. Parchomiuk, *Odpowiedzialność odszkodowawcza za legalne działania administracji publicznej*, Warszawa 2007, p. 360 et seq.

⁴⁴ See J. Parchomiuk, *Odpowiedzialność odszkodowawcza...*, pp. 117–118, who also points out that there is no general right to damages for loss caused by legal activities of public authorities; in such cases, the right to damages must always follow from particular legal provisions, which introduce such a right and specify the scope of compensation, p. 195.

⁴⁵ W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, pp. 39–40; B. Banaszak, *Prawo konstytucyjne*, Warszawa 2017, s. 397–398.

⁴⁶ Also see E. Bagińska, *Odpowiedzialność...*, pp. 41–43, 134–136.

⁴⁷ J. Parchomiuk, *Odpowiedzialność odszkodowawcza...*, pp. 119 i 184 and more on p. 171 et seq.

of public authorities' legal activities must be interpreted strictly, even if the loss is not being compensated to the full extent.⁴⁸

It should also be noted that apart from the compensation provided in art. 129 s. 2 POE, owners within RUAs are also entitled to the reimbursement of costs (i.e. money actually spent) resulting from fulfilling technical requirements concerning buildings, introduced in a RUA (art. 136 s. 3 POE). Liability for these claims has been placed on airports, whose activities are the reason for establishing a RUA (art. 136 s. 2 RUA). The liability of airports must be qualified as objective or absolute liability because there are no exonerating circumstances (characteristic of risk-based liability).⁴⁹ Such severe liability is, however, subject to a very precise identification of the cause and the scope of liability, which is reflected by the legislator's clear decision to introduce liability only for losses (including loss of land value and costs of acoustic improvements) caused by restrictions stipulated in a RUA, and not for any other consequences of "legalizing" increased noise levels.

3. Article 129 s. 2 POE as the object of law in action

In the past decade, the rather concise regulation on compensating the effects of land use restrictions introduced in RUAs has been the object of increased judicial activity, largely caused by the development of regional airports in Poland. Initially, disputes concerned the RUA created for a military airport in Poznań-Krzesiny, to later concentrate on the civil airport in Poznań-Ławica, and to eventually spread to the Gdańsk Lech Wałęsa Airport, Kraków Balice Airport and Katowice Pyrzowice Airport. Surprisingly, the Supreme Court presented a very extensive interpretation of the meaning of art. 129 s. 2 POE⁵⁰ and was followed by

⁴⁸ Zob. M. Wałachowska, in: *Kodeks cywilny. Komentarz*, vol. 3: *Zobowiązania. Część ogólna* (art. 353–534), eds. M. Habdas, M. Frasz, Warszawa 2018, pp. 446–449.

⁴⁹ M. Szalewska, *Model odpowiedzialności odszkodowawczej z tytułu ustanowienia obszaru ograniczonego użytkowania*, in: *Problemy pogranicza prawa administracyjnego i prawa ochrony środowiska*, eds. M. Stahl, P. Korzeniowski, A. Kaźmierska-Patryczna, Warszawa 2017, p. 671.

⁵⁰ Initially in three Supreme Court judgments of: 25 Feb. 2009, II CSK 546/08, LEX no. 503415, of 24 Feb. 2010 r., III CZP 128/09, LEX no. 578138 and 6 May 2010,

a rather indiscriminate acceptance of this view in academic writings.⁵¹ Article 129 s. 2 POE was found to introduce liability for all losses caused by the mere introduction of a RUA, regardless of whether it contained restrictions that impacted the designation or the use of land.

Interestingly, in the judgment of 25 Feb. 2009,⁵² the Supreme Court correctly identified the premises of liability for loss, namely: 1) the entry into force of an act containing restrictions in the use of land, 2) loss experienced by the landowner, and 3) a cause and effect relation between the introduced restrictions in the use of land and the experienced loss. Simultaneously, the Supreme Court held (neglecting the premises of liability it had just identified) that despite the lack of any restrictions concerning the use or the designation of the claimant's residential house (there were no restrictions in the RUA concerning continuing the use of residential real estate) all premises of liability prescribed in art. 129 POE have been met. This contradicted the judgments of lower instance courts (the Regional Court and the Court of Appeals in Poznań), who ruled that since in the case at hand, the RUA contained no restrictions regarding the designation or the use of land utilized for residential purposes, there were no grounds for liability. The courts further stated that experiencing or potentially experiencing increased noise levels is not sufficient to bring about liability based on art. 129 POE.

The position taken in this case by lower instance courts reflected a correct reading and interpretation of the mentioned provision because it captured the cause and effect relation between the introduction of restrictions and the loss such restrictions may cause. Furthermore, the lower instance courts also pointed out there was no valid claim for lost profits.

II CSK 602/09, LEX no. 585768; this line of judgment was later followed in numerous judgments of lower instance courts that are easily accessible and listed in the LEX database, under art. 129 POE.

⁵¹ See e.g. E. Stawicka, *Czy art. 129 ustawy-prawo ochrony środowiska stanowi wyczerpującą podstawę roszczeń właścicieli nieruchomości o wyrównanie strat wynikających z ustanowienia obszaru ograniczonego użytkowania wokół lotnisk, tras komunikacyjnych i tym podobnych zakładów?*, *Palestra* 2012, no. 11–12, p. 205; B. Rakoczy, *Glosa do wyroku Sądu Najwyższego z dnia 25 lutego 2009 r., II CSK 546/08*, *Przegląd Prawa Ochrony Środowiska* 2010, no. 2, p. 167; E. Kacprzak-Szymańska, *Problematyka obszaru ograniczonego użytkowania w orzeczeniach sądów cywilnych*, *Rocznik Samorządowy* 2013, no. 2, pp. 87–88; K. Gruszecki, *Prawo ochrony środowiska. Komentarz...*, pp. 341–342.

⁵² II CSK 546/08, LEX no. 503415.

The claimants argued that a restriction introduced in the RUA prohibiting setting up new operations of nursing homes (e.g. for seniors or persons suffering from chronic conditions) or kindergartens caused them to suffer loss in the form of lost profits because they will never be able to start such a business on their land. The courts held that the claimants had not shown that they had ever seriously contemplated such activity. Meanwhile, proving loss in the form of lost profits (*lucrum cessans*), particularly if it is the only element of loss one is claiming, requires producing evidence that shows an extremely high probability of losing such profits.⁵³ It is necessary to show the highest probability that particular profits would have been achieved and benefitted the claimant.⁵⁴

It should also be noted that the claimants could have argued that the restriction of setting up new operations of nursing homes or kindergartens caused a loss of value of their land (real loss – *damnum emergens*, as opposed to a loss of profits – *lucrum cessans*), which now could not be converted to such a use. This argument would have been justified only if the claimants were able to show that this alternative use of their land, currently utilized and developed for residential purposes (single-family homes), was the optimal use that provided a higher market value. In valuation, an alternative use of land, different from the current one, may only be assumed if the market shows demand for such an alternative use in that location, also considering the existence of other, similar pieces of land on the market.⁵⁵ In effect, the claimants would have to show that there is demand for that alternative use in the location of their land, which creates the highest value of the land in question and is additionally physically and economically possible, taking into account alternative investment opportunities on the real estate market.⁵⁶ In other words, there would have to be

⁵³ E. Bagińska, *Odpowiedzialność deliktowa w razie niepewności związku przyczynowego. Studium prawnoporównawcze*, Toruń 2013, pp. 42–43; Court of Appeals in Katowice judgment of 8 Jan. 2013, I ACa 886/12, LEX no. 1259680; Court of Appeals in Poznań judgment of 20 March 2013, I ACa 117/13, LEX no. 1294823.

⁵⁴ W. Czachórski (updated by M. Safjan i E. Skowrońska-Bocian), *Zobowiązania. Zarys wykładu*, Warszawa 2009, pp. 89–91; M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2011, p. 274 et seq., in particular 278–281 and 286–288.

⁵⁵ Powszechne Krajowe Zasady Wyceny (PKZW) Nr 1, KSWP 1, Wartość Rynkowa i Wartość Odtworzeniowa, point 3.6.6., www.pfsm.pl.

⁵⁶ Also see The Appraisal Institute, *The Dictionary of Real Estate Appraisal*, Chicago 2015, p. 109.

evidence that buyers of single-family houses in that location were paying a premium for those houses because of their perceived potential of being converted to nursing homes, and land with such potential was, in that particular location, valued higher than land used for residential purposes.

It is unclear why, in the mentioned case, the Supreme Court did not accept the reasoning of lower instance courts. The Supreme Court argued that even though the RUA did not introduce any restrictions which concerned the designation and the use of the claimants' land for residential purposes, it did impact the claimants' right of ownership, which led to a loss of value. The Supreme Court neglected to explain what exactly caused the loss of land value (it could not have been caused by RUA restrictions, since they did not apply to the claimants' land) and why such loss, even if it occurred, was to be compensated. The Supreme Court only concluded that lower instance courts applied an unjustifiably narrow interpretation of art. 129 s. 2 POE in connection with art. 140 PCC (identifying the entitlements of the owner of a thing), while those courts utilized a literal reading and interpretation of the law. Even if one accepts the integral approach to interpretation, literal interpretation is the point of departure for the additional application of systemic and functional interpretation.⁵⁷ Suppose the Supreme Court found the phrase "restricting the manner of the use of land" unclear on the basis of its literal interpretation. In that case, the application of systemic and functional interpretation⁵⁸ should have allowed the court to differentiate between restrictions in land use that are formulated in a resolution establishing a RUA, from the comfort and convenience of using land located in a particular neighbourhood. This difference seems to be clear when a similar phrase is used in planning law, and the courts do not identify changes in the designation or the use of land introduced in local development plans (which may lead to compensable loss) with changes in the comfort and convenience of the use land which may result from the entry into force of a new local development plan.⁵⁹

⁵⁷ R. Radwański, M. Zieliński, *Stosowanie i wykładnia prawa cywilnego*, in: *Prawo cywilne- część ogólna*, ed. M. Safjan, Warszawa 2012, pp. 518–519.

⁵⁸ M. Zieliński, *Osiemnaście mitów w myśleniu o wykładni prawa*, Palestra 2011, no. 3–4, p. 25.

⁵⁹ See art. 36 s. 1 act of 27 March 2003 on spatial planning and development (consolidated version: Journal of Statutes 2018, item 1945, as amended), cf. Supreme Court judgment of 22 March 2019, I CSK 52/18, LEX no. 2652429, Supreme Court judgment

The interpretation of art. 129 s. 1 and s. 2 POE provided by the Supreme Court effectively means that compensation is to be paid for all negative effects connected with living in an airport's vicinity. According to this reasoning, the introduction of a RUA confirms the loss of comfort and convenience because it is established for areas in which environmental protection standards are not observed. Since increased noise levels have been "legalized" within a RUA, the right of ownership has been restricted because landowners cannot utilize nuisance claims and demand that the noise is decreased to meet environmental protection standards. The court has identified the loss of comfort and convenience, as well as the restriction of the right of ownership (through the exclusion of the nuisance claim) with restrictions in the use of land which, in the case of RUA, may only consist of particular restrictions on land designation and land use or technical requirements concerning buildings.

Such an interpretation is very extensive and difficult to justify. As has already been mentioned in point 2 above, compensation concerns loss caused by public authorities' legal activities and thus art. 129 POE cannot be interpreted extensively. Liability for loss caused legally and within constitutional limits is an exception that cannot be expanded by interpretation for art. 129 POE to apply to losses that the legislator neither intended to nor was obliged to compensate. The presented interpretation also disregards the cause and effect relationship that is the premise of liability. The imprecise identification of the cause of compensable loss (restrictions in the use of land that take the shape of specified prohibitions or requirements are confused with comfort and convenience of using land, the exclusion of the nuisance claim, the general limitation of the right of ownership, the potential stigma of land located within a RUA or simply in a given neighbourhood, regardless of whether a RUA is or is not implemented) opens the possibility to qualify various phenomena as the effects of such a cause. This, in turn, causes liability to become accidental in the sense that it is unclear what exactly is being compensated and how compensation should be calculated. As a result, conditions for speculative behaviour of landowners are created and supported, intentionally or unintentionally, by lawyers and valuers, all of whom have considerable possibilities of linking various losses with the imprecisely defined cause.

of 19 Oct. 2016, V CSK 117/16, LEX no. 2192629, and also Court of Appeals in Katowice judgment of 17 March 2016, I ACa 34/16, LEX no. 2057749.

4. The problematic application of art. 129 s. 2 POE

The interpretation discussed above was a departure from an earlier Supreme Court judgment of 12 Dec. 2008,⁶⁰ in which it was held that not all limitations or restrictions in the use of land encountered by landowners within a RUA are to be compensated pursuant to art. 129 s. 2 POE, because it concerns only restrictions in land use, which have been formulated in the provisions of a particular RUA. It seems that the departing judgment, discussed in point 3 above, was based on the assumption that any and all limitations of the right of ownership must be compensated. Therefore an extensive interpretation of compensable loss in art 129 s. 2 is justified. Although it is true that the very implementation of a RUA changes the legal situation of landowners by “legalizing” noise, excluding the nuisance claim and thus limiting the entitlements of an owner⁶¹ or even causing a negative perception of land located within a RUA and potentially its loss of value, it is still unacceptable to identify those phenomena with the introduction of precisely worded prohibitions and requirements concerning future land designation and current land use.⁶² In addition, there are no legal grounds to assume that all restrictions or limitations of ownership introduced by the legislator must be compensated (see point. 2 above).

In the light of the above, it is surprising to find that the same justices who issued the judgment analyzed in point 3 above (i.e. the judgment of 25 Feb. 2009, II CSK 546/08) on the very same day issued a judgment II CSK 565/08⁶³ which contained opposite findings. It was held that the loss of comfort in using residential property experienced by the claimants due to increased noise levels allowed in the RUA does not meet the criteria of liability for loss prescribed in art. 129 s. 2 POE. The latter only applies to liability for loss caused by the introduction of formal

⁶⁰ II CSK 367/08, LEX no. 508805.

⁶¹ Zob. np. B. Rakoczy, Z. Gołębiewski, J. Ratajczak, G. Smolibowska-Hruszka, *Obszar...*, p. 29; K. Klenowska, *Wybrane zagadnienia dotyczące odpowiedzialności odszkodowawczej w związku z funkcjonowaniem lotnisk w Polsce*, in: *Europeizacja prawa ochrony środowiska*, eds. M. Rudnicki, A. Haładyj, K. Sobieraj, Lublin 2011, s. 444; E. Stawicka, *Odpowiedzialność cywilna za utratę wartości nieruchomości położonych w obszarze ograniczonego użytkowania wokół lotnisk – wybrane aspekty*, *Paestra* 2014, no. 9, p. 203.

⁶² Zob. K.B. Wojciechowska, *Lotniskowy...*, pp. 115–119.

⁶³ LEX no. 528219.

restrictions in land use and not by noise connected with an airport's operation, even if it does cause the loss of property value.

The fact that the same justices, on the same day, in almost identical cases (residential properties not influenced by restrictions in land use introduced in the RUA), issue judgments containing diverging interpretations of art. 129 s. 2 POE cannot be accepted as it indicates the accidental nature of the court's conclusions. This is undesirable not only because it undermines trust for the Supreme Court's solutions but also because thousands of claims concerning damages for loss of real estate value have been notified to airports on a national scale.⁶⁴ Therefore, it is imperative to consider the economic and social consequences of accepting an accidental court finding as to the rule of interpretation that should be followed, particularly when there are serious doubts regarding its correctness.

In the judgment of 24 Feb. 2010,⁶⁵ the Supreme Court noticed the discrepancy between the findings of the two 2009 cases, however, it decided to follow the opinion that restrictions in the use of land introduced in the RUA are to be interpreted extensively. The court presented the view that the implementation of a RUA, even if no restrictions on the use of land pertain to the land which is the object of the dispute, always brings about a "contraction" (a diminution) of the right of ownership. This diminution is reflected by the fact that the landowner must accept that increased noise levels do or may occur within the RUA, and they cannot be objected to through nuisance claims. The court held that loss compensable on the basis of art. 129 s. 2 POE includes loss of value caused by the fact that the landowner must accept increased noise levels allowed within

⁶⁴ Only in relation to the Poznań-Ławica airport, more than 1200 lawsuits have been brought before court until mid-2019 (see. I. Foryś, M. Habdas, J. Konowalczyk, *Fair...*, pp. 103–104), and currently lawsuits against the airports: Katowice-Pyrzowice, Gdańsk, Kraków-Balice are being submitted. In relation to the Kraków-Balice airport, landowners have already announced filing claims for loss of real estate value that jointly amount to one billion PLN (M. Tabaka, *Nowy pas startowy w Balicach zagrożony. Mieszkańcy piszą do premiera, grożą Strasburgiem*, <https://spidersweb.pl/bizblog/balice-nowy-pas-rozbudowa-protest-mieszkanicy-sad/> [access: 30.03.2020]). The loss allegedly results from the future delimitation of new RUA boundaries, when the new runway (substituting the one currently used) will be built, mostly parallel to the existing runway; also see R. Kędzierski, *Lotniska mogą utonąć w roszczeniach. Nawet 1500 pozwów i 150 mln zł odszkodowania za hałas*, <https://next.gazeta.pl/next/7,151003,24565139,lotniska-moga-utonac-w-rozsczeniach-nawet-1500-pozwow-i-150.html#s=BoxOpImg3> [access: 30.03.2020].

⁶⁵ III CZP 128/09, LEX no. 578138.

a RUA and that a narrow interpretation of the scope of liability pursuant to the mentioned provision is unjustified.

This view cannot be accepted for a number of reasons. Firstly, it does not find confirmation in the text of art. 129 s. 1 and s. 2 POE⁶⁶ because it disregards the difference between limiting the right of ownership (a general notion) and limiting the use of land (a specific notion). So although each limitation regarding the use of land is simultaneously a limitation of the right of ownership, not each limitation/restriction of the right of ownership is also a limitation of the use of land, and only the latter is to be compensated. Secondly, the Supreme Court did not explain what rules of legal text interpretation allow to extensively interpret a provision that is an exception to the rule. It introduces liability for the effects of legal intervention by the public authority. Thirdly, the Supreme Court did not take into account the rule that it is the legislator who decides to what extent limitations of the right of ownership are to be compensated as a result of legal acts that shape the content of the right of ownership. Fourthly, the Supreme Court's stipulation that a narrow interpretation of art. 129 s. 2 is not justified, was not substantiated by reference to the rules of legal text interpretation or the *ratio legis*, both of paramount importance in the light of the existence of two diverging Supreme Court judgments, issued on the same day, by the same justices in almost identical cases. Finally, by stating that the premise of liability is not the introduction of land use restrictions but the implementation of the RUA (identified with the diminution of the right of ownership), the court changed the premises of liability for loss stipulated in art. 129 s. 2 POE.

Despite the above arguments, subsequent Supreme Court judgments have adopted and confirmed the interpretation that loss compensated pursuant to art. 129 s. 2 POE is not limited to losses caused by prohibitions and requirements concerning land use that have been introduced in a RUA, but encompasses loss seen as the diminution of the right of

⁶⁶ See in particular Supreme Court judgment of 12 April 2013, IV CSK 608/12, LEX no. 1347892 regarding the implementation of a special zone for the protection of landscape, which introduced prohibitions on the development of land, where the Supreme Court had no doubts that compensation pursuant to art. 129 s. 2 POE may only be awarded if formal restrictions concerning the use of land have been introduced; similarly Supreme Court judgment of 12 Oct. 2012, IV CSK 216/12, LEX no. 1275002.

ownership, which is reflected in its loss of value.⁶⁷ The reasoning contained in these judgments is usually contradictory, as may be expected when new meanings are artificially associated with clear and unambiguous terms and words of the legal text. Similar arguments and difficulties in substantiating them in a logically consistent manner may be found in numerous judgments of lower-level courts.⁶⁸ Surprisingly, the flawed argumentation of the judgments has been rather indiscriminately accepted in academic writings⁶⁹ without a critical analysis of the manner in which the law has been interpreted, the type of the legal intervention into the right of ownership, the purpose of creating RUAs and the purpose of the POE regulation.

The dominance of the above interpretation of art. 129 s. 1 and s. 2 POE does not diminish the presented above arguments and criticism regarding its correctness and legal justification. The courts do not differentiate between the mere fact of introducing a RUA and the introduction of a restriction in land use, failing to notice that a RUA does not necessarily introduce land use restrictions for all land within that area. Furthermore, the accepted reasoning suggests that compensation has been awarded for noise, which necessitated an introduction of a RUA that in turn is equivalent to an introduction of land-use restrictions. Thus three different occurrences, namely noise, the introduction of a RUA and the introduction of concrete land use restrictions relating to an individual piece

⁶⁷ See e.g. Supreme Court judgments of: 6 May 2010, II CSK 602/09, LEX no. 585768; 25 May 2012, I CSK 509/11, LEX no. 1271642; 21 Aug. 2013, II CSK 578/12, LEX no. 1405253; 24 Nov. 2016, II CSK 113/16, LEX no. 2177083; 15 Dec. 2016, II CSK 151/16, LEX no. 2241380; 21 March 2017, I CSK 440/15, LEX no. 2305911; 23 March 2018, II CSK 306/17, LEX no. 2521627.

⁶⁸ For recent judgments see e.g. Court of Appeals in Warsaw judgment of 31 May 2019, VII AGa 168/18, LEX no. 2713623; Court of Appeals in Warsaw judgment of 12 April 2019, I ACa 693/18, LEX no. 2668801; Court of Appeals in Poznań judgment of 12 March 2019, I ACa 455/18, LEX no. 2675277; Court of Appeals in Poznań judgment of 19 Feb. 2019, I ACa 414/18, LEX no. 2675279; Court of Appeals in Poznań judgment of 31 Oct. 2018, I ACa 33/18, LEX no. 2596582; Court of Appeals in Krakow judgment of 6 April 2018, I ACa 1163/17, LEX no. 2582649; Court of Appeals in Krakow judgment of 15 Jan. 2018, I ACa 647/17, LEX no. 2547054.

⁶⁹ See e.g. K.B. Wojciechowska, *Lotniskowy...*, p. 183 et seq.; B. Rakoczy, *Glosa...*, pp. 165–168; E. Stawicka, *Odpowiedzialność...*, p. 203; E. Kacprzak-Szymańska, *Problematyka...*, pp. 87–88. K. Gruszecki, *Prawo ochrony środowiska. Komentarz...*, pp. 341–342.

of land, are being treated as equivalent notions that may be referred to interchangeably.⁷⁰

The main obstacle in correctly interpreting compensable loss pursuant to art. 129 s. 2 POE is visible in the two 2009 Supreme Court judgments (II CSK 546/08 and II CSK 565/08) discussed above. In both, it was assumed that any limitation of the right of ownership must be compensated and, more so, must be compensated to the full extent. Therefore, in both cases, the Supreme Court searched for a basis to provide full compensation of all effects resulting from a limitation of the right of ownership. In the II CSK 546/08 judgment, it was held that art. 129 – 136 POE independently prescribe rules of compensation, so in order to compensate for all effects of limiting the right of ownership, it had to be assumed that restrictions in land use mean limitations of the right of ownership. In the II CSK 565/08 judgment, the Supreme Court was reluctant to state that limitations of the right of ownership are the same as the notion of limitations in the use of land and therefore decided that art. 129 s. 2 POE only concerns the loss of value caused by particular prohibitions and requirements regarding land use, however other losses are to be further compensated through PCC provisions and tortious liability rules. Since the main assumption, for reasons explained in points 2 and 3 above, is faulty, the findings of the court are also incorrect. A proper interpretation of compensable loss would require accepting the opinion expressed in the II CSK 546/08 judgment that art. 129 POE and art. 135–136 POE independently regulate compensable loss connected with introducing a RUA, and in II CSK 565/08 judgment that only effects of particular prohibitions and requirements, introduced in a RUA, pertaining to a specified piece of real estate are to be compensated.

Confusing various phenomena for the cause of compensable loss leads to questionable judgments. As an example, it was found that the claimants are to be compensated respectively 1000 PLN (approx. 250 Euro)⁷¹ and 2000 PLN (approx. 500 Euro)⁷² for the loss of value of their sin-

⁷⁰ Also see M.T. Drollinger, *Land Use Planning Approaches to Mitigating General Aviation Aircraft Noise*, Transportation Research Record 1332, p. 11–19, <http://onlinepubs.trb.org/Onlinepubs/trr/1992/1332/1332-002.pdf> [access: 30.03.2020].

⁷¹ District Court Gdańsk-Północ judgement of 15 Nov. 2019 (I C 339/18), www.orzeczenia.ms.gov.pl.

⁷² District Court Gdańsk-Północ judgement 26 Nov. 2019 (I C 1140/18), www.orzeczenia.ms.gov.pl.

gle-family houses located within a RUA. The houses have a value of just over 1 million PLN (approx. 250 000 Euro), are located in a RUA, however in a zone where noise limits for residential uses are not exceeded, and no restrictions on residential housing, including current use, future development, extensions or rebuilding have been introduced. It is unclear why the court decided to call an expert witness to calculate the loss of value of these homes, regardless of the fact that no restrictions concerning residential uses have been introduced and the land is not even located in a zone where noise limits for residential uses are exceeded. Moreover, the valuer stipulated that the margin of error when calculating market value is $\pm 5\%$, and yet the court found that loss had been proven at the level of respectively 0,1% and 0,2% of the market value. Such a ruling contradicts even a very general understanding of the notion of market value and completely neglects any causality between the cause of the loss identified in legislation and the loss itself. In fact, it remains a mystery why an expert witness was called, what the valuer calculated and what, if anything, does a shift of 0,1% and 0,2% in the market value prove.

A different example concerns land located within a RUA where noise levels are exceeded for prohibited sensitive developments (i.e. nursing homes, kindergartens, schools, etc.) and for residential uses. However, residential use and development have not been restricted on the condition that new residential developments meet higher acoustic insulation requirements (reimbursed by the airport pursuant to art. 136 s. 3 POE, see point 6 below). The land in question has three non-residential outbuildings and two greenhouses. The Regional Court in Poznań, in a judgment on 22 Aug. 2017,⁷³ and later the Court of Appeals in Poznań on 8 May 2018,⁷⁴ both held that the landowner, as a result of introducing the RUA, suffered a loss in the form of a decrease of land value that amounted to over 200 000 PLN (approx. 50 000 Euro). It is difficult to ascertain what limitations in the right of ownership of land utilized for greenhouses the courts had identified and what exactly had been calculated since no restrictions concerning non-residential land uses were introduced in the RUA and noise levels for such uses were not exceeded.

The above examples show that a lax approach to the proper identification of causes, whose negative effects the legislator wishes to compensate,

⁷³ XII C 1274/16, unpublished.

⁷⁴ I ACa 1223/17, unpublished.

lead to completely abstract calculations and compensation of accidental or even non-existent phenomena. The need to compensate introduced restrictions in the use of land cannot be equated to compensating landowners for the inconvenience of noise. Moreover, since compensation for legal acts taken by the government or self-government may only occur at the express direction of the legislator, it is surprising to see how far away from the wording of art. 129 POE the courts and academics alike have strayed, neglecting to consider the possible consequences of such extensive and unfounded interpretations. Not all property limitations require compensation, and when compensation is provided for, it does not have to be full.

One should also mention that currently, it is also impossible to prohibit humans from utilizing the environment and its resources, even if not all negative impacts can be mitigated.⁷⁵ As a consequence, environmental protection laws do not offer absolute protection of the environment. However, they regulate the rules of using the environment and its resources⁷⁶ on the basis of sustainable development, which allows us to strike a balance between the needs of the environment, human health, and the requirements of social and economic growth and development.⁷⁷

5. Adding insult to injury

An important but underappreciated legal consequence of introducing a RUA is the landowners' right to receive a reimbursement of costs spent on retrofitting buildings in accordance with acoustic standards required in a RUA and regulated in relevant provisions.⁷⁸ As discussed above, one of the main arguments of the courts for an extensive interpretation of art. 129 s. 2 POE is that the right of ownership is constricted as a result of

⁷⁵ W.K. Czech, *Szkoda w obszarze środowiska i wina jako determinanty odpowiedzialności administracyjnej za tę szkodę*, Białystok 2008, p. 26.

⁷⁶ B. Rakoczy, Z. Gołębiowski, J. Ratajczak, G. Smolibowska-Hruszka, *Obszar...*, p. 29.

⁷⁷ J. Boć, E. Samborska-Boć, *Podstawowe...*, p. 303; J. Jendrońska, M. Bar, *Prawo...*, p. 697.

⁷⁸ The acoustic insulation standards of buildings are regulated in the Minister of Infrastructure ordinance of 12 April 2002 regarding the technical requirements of buildings and their location (consolidated version: Journal of Statutes 2019, item 1065 as amended) and issued pursuant to that ordinance Polish Norm PN-B-02151.

introducing a RUA because the landowner cannot utilize nuisance claims to oppose increased noise levels allowed within a RUA. What has not been considered, however, is the potential result of a claim in nuisance (art. 144 PCC) brought by a landowner against the airport.

The objective of a nuisance claim is for the court to balance the interests of neighbouring landowners in a manner that will allow them to utilize their properties in accordance with their use and designation. This denotes that the court's solution must allow all parties to make the fullest possible use of their land, which is not equivalent to ensuring a use of land free from the influence of neighbouring land uses.⁷⁹ Bearing in mind that the airport's operations are legal, the court has limited competence to interfere with binding administrative decisions (also relating to air traffic),⁸⁰ and that the airport, in order to continue its operations, already had to prove that it had taken all technical, technological and organizational measures to minimize the impact of noise on surrounding areas (art. 135 s. 1 POE) it is very probable that the result of the nuisance claim would be obliging the airport to pay for acoustic renovations of buildings in order to further minimize the effects of airport noise on the use of residential properties.⁸¹

The legislator achieves the same effect by providing a claim for reimbursing costs of acoustic renovation pursuant to art. 136 s. 3 POE in connection with art. 129 s. 2 POE. The claim is simpler to utilize than a nuisance claim because it only requires showing that a particular building is located within a RUA where noise levels for a particular type of use have been exceeded, and the costs of improvements factually spent in accordance with the relevant technical provisions. Owners of residential buildings located within a RUA are in this respect in a better situation than owners of other residential properties subjected to noise exceeding the recommended

⁷⁹ J.S. Piątowski, *Zakres i wykonywanie własności nieruchomości*, in: *Prawo własności i inne prawa rzeczowe*, ed. J. Ignatowicz, Wrocław-Warszawa-Kraków-Gdańsk 1977, p. 126; T. Dybowski: *Ochrona własności w prawie polskim (rei vindicatio – actio negatoria)*, Warszawa 1969, p. 324 et seq.; W.J. Katner, *Ochrona własności nieruchomości przed naruszeniami pośrednimi*, Warszawa 1982, p. 77.

⁸⁰ See M. Habdas, in: *Kodeks...*, p. 67.

⁸¹ Cf. analogous reasoning in Supreme Court judgment of 21 March 1984, III CZP 4/84, LEX no. 2986, also see S. Rudnicki. *Sąsiedztwo nieruchomości. Problematyka prawna*, Kraków 1998, pp. 26-27.

levels but located in city centres or close to other sources of noise⁸² for which there is no requirement to establish RUAs.⁸³ The latter owners do not have a special claim for the reimbursement of acoustic retrofitting, and bringing a nuisance claim (particularly where noise comes from multiple sources) may prove expensive, with results difficult to predict.

Technical requirements concerning buildings located within a RUA apply only to newly built buildings. This follows from the fact that the law does not have retroactive effects and from §2 s. 1 of the Minister of Infrastructure ordinance of 12 April 2002 r. regarding the technical requirements of buildings and their location.⁸⁴ Contrary to the opinions voiced by courts,⁸⁵ the above confirms that acoustic requirements specified in a RUA do not apply to buildings that already exist in that area, and those buildings cannot, therefore, be classified as acoustically impaired because of a legal obligation to retrofit⁸⁶.

The increased costs of erecting a building that fulfils requirements specified in the RUA are subject to compensation pursuant to art. 136 s. 3 POE in connection with art. 129 s. 2 POE, because the legislator specifies that meeting the introduced technical requirements qualifies as compensable loss regulated in art. 129 s. 2 POE. That same legal basis applies to costs of retrofitting buildings already existent in the RUA because in art. 136 s. 3 POE, the legislator expressly qualifies costs of acoustic retrofitting, which are not obligatory, as a compensable loss. Pursuant to the mentioned provision: "if within a RUA technical requirements concerning buildings have been introduced, loss mentioned in art. 129 s. 2 POE also includes costs

⁸² See Najwyższa Izba Kontroli, *Ochrona mieszkańców dużych miast przed hałasem*, Warszawa 2014, pp. 17–21, <https://www.nik.gov.pl/kontrole/P/13/134/LBY/> [access: 30.03.2020].

⁸³ P. Kokowski, P. Pękala, T. Kaczmarek, *Poziom hałasu w obszarze ograniczonego użytkowania wokół portu lotniczego*, *Problemy Rynku Nieruchomości* 2015, no. 1, p. 46.

⁸⁴ Consolidated version: *Journal of Statutes* 2019, item 1065, as amended.

⁸⁵ See e.g. Court of Appeals in Poznań judgment of 4 March 2013, I ACa 490/12, LEX no. 1292730; Court of Appeals in Krakow judgment of 15 May 2015, I ACa 295/15, LEX no. 1740679; Court of Appeals in Poznań judgment of 17 July 2013, I ACa 388/13, LEX no. 1356638; Court of Appeals in Poznań judgment of 17 Jan. 2013, I ACa 1104/12, LEX no. 1271919.

⁸⁶ Also see Court of Appeals in Krakow judgment of 17 March 2015, I ACa 1773/14, LEX no. 1711428; Court of Appeals in Łódź judgment of 10 July 2015, I ACa 94/15, LEX no. 1771294.

borne in order to meet these requirements in existing buildings, even if there is no legal obligation to do so”.

The wording of the provision clearly indicates that the legislator qualifies as loss all costs factually spent on ensuring that buildings within a RUA meet the introduced technical requirements, regardless of whether one is dealing with newly erected buildings, where a legal obligation to meet these requirements exists, or already existent buildings, where retrofitting is voluntary but will be reimbursed. The objective of the provision is obvious: the legislator wishes to reimburse all money spent on ensuring that all buildings subjected (factually or potentially) to increased noise levels meet current technical standards and therefore protect human health.

Therefore, it is astonishing to see that the courts have yet again engaged in a mysterious interpretation of the provisions and repeatedly ruled that money necessary for acoustic retrofitting of existent buildings may be awarded even before it has been spent, because the very obligation to perform acoustic improvements constitutes a loss.⁸⁷ The problem is that, as explained above, in relation to existing buildings, there is no legal obligation to retrofit, no sanctions for not retrofitting, and no time limit within which the retrofitting is to be performed. This begs the question of whether awarding money for acoustic improvements in a situation where there is no obligation to retrofit, no time limit to perform the works, and no sanction for not performing them is consistent with the law and the purpose of the provision in question. This purpose is to ensure that persons living or working in restricted use areas with exceeded noise levels function in buildings that are acoustically improved and offer a healthy environment.⁸⁸ If so, awarding money with no means of controlling how it is later spent does not fulfil the legislator’s intention and leads to speculative behaviour. It is also difficult to see what the loss suffered is if no money

⁸⁷ See e.g. the following judgments: Court of Appeals in Kraków, 17 March 2015, I ACa 1773/14, LEX no. 1711428; and 15 May 2015, I ACa 295/15, LEX no. 1740679; Court of Appeals in Poznań 17 July 2013, I ACa 388/13, LEX no. 1356638 and 17 Jan. 2013, I ACa 1104/12, LEX no. 1271919, Court of Appeals in Łódź, 10 July 2015, I ACa 94/15, LEX no. 1771294.

⁸⁸ Comp. M. Burgess, *Effectiveness of the Noise Insulation Program for Houses Around Sydney Airport*, Fifth International Congress on Sound And Vibration, December 15–18, 1997 Adelaide, South Australia, https://www.acoustics.asn.au/conference_proceedings/ICSVS-1997/pdf/scan/sv970397.pdf [access: 30.03.2020].

has actually been spent on acoustic retrofitting and there is no legal obligation to retrofit.

Leaving aside the fact that such rulings must be viewed as *contra legem*, they also lead to economically unjustified money transfers. Since the awarded money concerns theoretical and non-mandatory costs of retrofitting, it is impossible to ensure it is at all spent on acoustic repairs. Moreover, the awarded sums take into account the full extent of work necessary to properly acoustically retrofit a building, while in practice, such retrofitting would apply, if at all, to only a part of the building. Awarding theoretical costs of retrofitting necessarily neglects whether retrofitting at all occurs, whether it is at all necessary (vacant buildings, buildings whose owners do not wish to retrofit for a variety of reasons: old age, incidental use, renting for short term stays, etc.) and whether it in fact applies to the whole building (unused interior areas in the building). Consequently, such practice is ineffective in market and economic terms, leading to speculative behaviour and increasing the social costs of legal intervention into the right of ownership.⁸⁹

Finally, it should be pointed out that the extensive interpretation of compensable loss both in relation to the meaning of introducing restrictions in land use and the acoustic retrofitting costs subject to reimbursement additionally leads to double-counting in compensation awards. If loss of real estate value is calculated on the assumption that it is caused by the confirmation, through the introduction of a RUA, of increased noise levels, then surely that loss is at least to some extent mitigated by the fact that the buildings are acoustically renovated (since money is awarded for theoretical costs of such improvements). In other words, if the loss of value is calculated without assuming the building is acoustically renovated, and then a separate sum reflecting potential costs of acoustic retrofitting is calculated, then these sums overlap and should not (as is currently the practice)⁹⁰ be awarded in full. The double counting is a result of the fact that the loss of real estate value (reflecting the “stigma” of being located within an area with increased noise levels) encompasses the value of potential costs necessary to improve the building’s acoustic standards.⁹¹

⁸⁹ I. Foryś, M. Habdas, J. Konowalczyk, *Fair...*, p. 96.

⁹⁰ E.g. Supreme Court judgment of 21 Aug. 2013, II CSK 578/12, LEX no. 1405253, Court of Appeals in Poznań judgment of 4 March 2013, I ACa 490/12, LEX no. 1292730.

⁹¹ For more see M. Habdas, J. Konowalczyk, *Cele ...*, p. 12.

Conclusion

The current understanding of art. 129 s. 2 POE and art. 136 s. 3 POE applied by courts and academics is not supported by arguments that would justify a surprisingly extensive and contrary to the express wording, interpretation of those provisions. No attempts to evaluate the consequences of such an extensive interpretation have been made, especially in the context of possible overcompensation and double counting in cases where the loss of value is awarded jointly with money for future acoustic improvements of buildings. There is a distinct lack of consideration of the purpose and the goal of compensation, which creates a visible disconnect between private law rules on compensating loss and public law provisions.

The latter introduce an exceptional compensation scheme connected with a very distinct situation in order to balance the interests of parties and in order to achieve the protection of human health⁹² in areas where environmental standards cannot be met. There are no compelling arguments as to why a restriction on land use is interpreted in a manner completely removed from the literal wording, particularly since exactly the same wording, but a completely different interpretation, is employed by courts, when restrictions in land use are introduced by local development plans⁹³ which, much like a restricted use area, prescribe admissible land uses and introduce land use requirements or restrictions.

The extensive interpretation currently employed essentially equates land use restrictions to inconvenience caused by noise and thus causes loss of value to be confused with loss of convenience. This leads to the expansion of compensation obligations beyond the scope expressly prescribed in art. 129 POE. The ubiquity of such an interpretation is not proof of its

⁹² See R. Chepesiuk, *Decibel Hell: The Effects of Living in a Noisy World*, Environmental Health Perspectives 2005, vol. 113, p. 39–41.

⁹³ E.g. Supreme Court judgment of 19 Oct. 2016, V CSK 117/16, LEX no. 2192629; Court of Appeals in Katowice judgment of 17 May 2016, I ACa 34/16, LEX no. 2057749; see K. Świdorski, *Odpowiedzialność gminy z tytułu szkód spowodowanych kształtowaniem ładu przestrzennego*, Samorząd Terytorialny 2006, no. 9, p. 23 et seq.; J.J. Zięty, *Roszczenia właściciela oraz użytkownika wieczystego nieruchomości związane z uchwaleniem lub zmianą miejscowego planu zagospodarowania przestrzennego oraz wydaniem decyzji o warunkach zabudowy bądź lokalizacji inwestycji celu publicznego*, Samorząd Terytorialny 2011, no. 4, p. 48 et seq.; M. Gdesz, *Wywłaszczenie planistyczne*, Samorząd Terytorialny 2014, no. 4, p. 51 et seq.

correctness. The vast discrepancy between the provisions in force and their actual application leads to a complete disregard for the cause and effect relationship between introduced land use restrictions and their effect on land values. The *ratio legis* of the analyzed provisions designed to solve the conflict between airports and neighbouring landowners has not been properly considered in legal practice, and thus the legal, as well as the economic purpose of the intervention, remains overlooked, if not completely lost.

When one considers the scale of notified claims and the amount of compensation payments already adjudicated by the courts,⁹⁴ it is impossible to not wonder about the purpose of the analyzed provisions. The legislator has obviously decided to allow airports to function due to their relevance to social and economic development. In order to minimize neighbour conflicts and to protect human health, the legislator prescribes the implementation of a RUA in which land use and development are controlled, and inhabitants are protected by compensation of losses that result from the imposed restrictions, including compensation of increased costs of construction and costs of retrofitting buildings to comply with higher technical standards of noise insulation. Simultaneously, if one is to accept the prevailing practice, the scope of compensable loss is so great that there is no economic and financial possibility for airports to function and yet it was their operations that the legislator wanted to maintain by introducing the discussed POE provisions.

The correct application of the current POE provisions ensures the compensation of direct and verifiable consequences of restrictions in land use that the legislator introduces within RUAs. Indirect consequences of introducing a RUA are not subject to compensation because they are usually inextricably connected with general changes occurring in the real estate market and build environment. It would be impossible to correctly establish the cause and effect relation necessary to assign liability for compensable loss resulting from a particular occurrence. The current practice may suggest that the courts are attempting to award damages for non-economic loss (pain and suffering) as opposed to economic loss, which would explain the vague and theoretical identification of the occurrence (i.e. the

⁹⁴ See M. Wesolek, *Odszkodowania za hałas na Ławicy. Ile i komu płacić za hałas? „Nie powinniśmy płacić tyle, ile Okęcie”*, <https://poznan.wyborcza.pl/poznan/7,105531,24819766,ile-i-komu-placic-za-halas.html> [access: 30.03.2020].

“constriction” of the right of ownership) which triggers liability for loss. It is also important to emphasize the significance of properly formulating restrictions in land use within a RUA. In particular, areas where it is extremely onerous to function should be subject to an express prohibition on residential use continuation and would lead to buyouts of such properties.

In light of the above, it is imperative to revise the current application of art. 129 s. 2 and 136 s. 3 POE as it finds no legal or economic justification. The discrepancy between black letter law and law in action has resulted in speculative behaviour of landowners, supported by lawyers and valuers, and increased social costs.⁹⁵ Meanwhile, POE provisions were supposed to implement the principle of sustainable development that allows the operation of airports and simultaneously ensures the protection of human health in an attempt to balance environmental, social and economic considerations while allowing to resolve a neighbour conflict in a manner that decreases social costs.

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⁹⁵ See S.J. Spurr, *Economic foundations of law*, London–New York 2019, s. 76–79, 81–84; also see M. Habdas, J. Konowalczyk, *Dyferencja w szacowaniu nieruchomości do celów odszkodowań w obszarach ograniczonego użytkowania portów lotniczych*, *Rzeczoznawca Majątkowy* 2018, no. 4, pp. 21–23.

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Summary

Negative externalities of airport operations, associated mostly with noise, are becoming increasingly onerous to homeowners, as air transport develops. In order to resolve the neighbour conflict, the legislator introduces restricted use areas (RUAs) within which noise levels may be exceeded. In these areas, limitations in the use of land are introduced in order to ensure rational development of land surrounding airports and compensation claims are awarded to landowners. These claims compensate planning restrictions concerning the use of land and costs spent on ensuring sound insulation of buildings. The practical application of provisions on RUAs diverges from their literal content bringing about the compensation of loss without a legal and economic justification and the abandonment of the provisions' objectives. It is argued that a revision of current practice is required in order to fulfill the legal, social and economic objectives of the regulations in force.

Key words: restricted use area, airport noise, legal loss, compensation

POLSKIE DYLEMATY DOTYCZĄCE KOMPENSACJI WŁAŚCICIELI NIERUCHOMOŚCI W SĄSIEDZTWIE LOTNISK – PRAWO PISANE A STOSOWANIE PRAWA

Streszczenie

Negatywne efekty zewnętrzne działalności lotniska, utożsamiane głównie z hałasem, stają się w miarę rozwoju transportu lotniczego coraz bardziej uciążliwe dla właścicieli nieruchomości mieszkalnych zlokalizowanych w sąsiedztwie lotnisk. W celu rozstrzygnięcia konfliktu sąsiedzkiego ustawodawca wprowadza regulacje dotyczące tworzenia obszarów ograniczonego użytkowania (OOU), na których dopuszcza przekraczanie norm hałasowych. W obszarach tych wprowadza ograniczenia w sposobie korzystania z nieruchomości, kształtując racjonalne zagospodarowanie przestrzeni wokół lotniska, oraz przyznaje właścicielom nieruchomości roszczenia odszkodowawcze. Mają one rekompensować planistyczne ograniczenia dotyczące nieruchomości w OOU oraz poniesione koszty na zapewnienie izolacyjności akustycznej budynków. Praktyczne stosowanie przepisów dotyczących OOU odbiega od ich brzmienia, powodując kompensację szkód bez uzasadnienia prawnego i ekonomicznego, a także niweczając cel ustawowej regulacji. Postulowana jest rewizja aktualnej praktyki uwzględniająca prawne, społeczne i ekonomiczne znaczenie obowiązującej regulacji.

Słowa kluczowe: obszar ograniczonego użytkowania, hałas lotniczy, szkoda legalna, odszkodowanie

ПОЛЬСКИЕ ДИЛЕММЫ, КАСАЮЩИЕСЯ КОМПЕНСАЦИИ ВЛАДЕЛЬЦАМ НЕДВИЖИМОСТИ ВБЛИЗИ АЭРОПОРТОВ – ПИСАНЫЙ ЗАКОН А ПРИМЕНЕНИЕ ЗАКОНА

Резюме

По мере развития воздушного транспорта негативные внешние эффекты деятельности аэропортов, определяемые главным образом шумом, становятся все более обременительными для владельцев жилой недвижимости, расположенной в непосредственной близости от аэропортов. Для разрешения конфликтов между соседями, законодатель вводит правила, касающиеся создания зон ограниченного использования, на которых допускается превышение норм шума. В этих областях он вводит ограничения на порядок использования недвижимости, формирует рациональное благоустройство вокруг аэропорта и предоставляет компенсационные иски владельцам собственности. Они должны компенсировать ограничения при планировании недвижимости в зонах ограниченного использования, и затраты, понесенные на обеспечение звукоизоляции зданий. Практическое применение положений о зонах ограниченного использования, отклоняется от их формулировок, вызывая компенсацию убытков без юридического и экономического обоснования, а также разрушая цель законодательного регулирования. Постулируется пересмотр существующей практики с учетом правовой, социальной и экономической важности применимого регулирования.

Ключевые слова: территория ограниченного использования, авиационный шум, правовой ущерб, компенсация

