LAND USE AND DEVELOPMENT

Polish Regulatory Framework and Democratic Rule of Law Standards

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INTRODUCTION

1. THE ISSUE

There is widespread belief in Poland that the spatial planning system is not working well. The way the problem is most often seen in the media is that there is insufficient growth in new residential development when compared with social needs; instead of facilitating the appropriation of new land for residential purposes, the spatial planning system hinders housing development.

The system is also criticised for causing increasing planning chaos in Polish towns and villages. Residential properties are being erected on land without infrastructure and without any possibility of being connected to sewage, drainage, water supply or road networks; a trend that appears to be the rule rather than the exception in the vicinity of big cities. It is noted that traffic-intensive projects (in terms of both collective and individual traffic), such as large shopping centres, are being developed without the local streets and transportation networks being improved.

Developers seem to believe that it is local authorities that are to blame because they do not want to formulate local plans and prefer instead to rely on development decisions, which are more flexible and give more leeway to the local executive authority rather than the local council. On the other hand, despite subsequent amending laws, the government does not want to abolish the scheme involving decisions of development requirements.

In our opinion, however, (which our research results seem to support) the fundamental reason for that undoubtedly bad situation is an incorrectly formulated regulatory framework. The legal system should strike a balance between the justified interests of those concerned, while relying on the individual and common interests of the citizens as the ultimate justification for any land use and development regulation. Accordingly, our reference point is the perspective of a citizen/inhabitant, not just as property owner, but also as a user of the urban environment.

2. SPECIFICITY OF LAND USE AND DEVELOPMENT LAW

Modern spatial planning and development control systems emerged after World War II. They were founded on the observation that the urban space is growing increasingly complex. Firstly, in the 19th century and in the first half of the 20th century the cities themselves were continuously expanding in terms of size and population, and becoming suburbanised. Secondly, the cities...
were becoming more and more dependent for their operations on complex infrastructure networks that affect their spatial organisation: water supply, sewage disposal, power supply, gas supply and, finally, transportation. These processes highlighted the insufficiency of monitoring new developments at the level of use proposals for individual parcels. Decisions relating to specific locations must be made by reference to the whole spatial system, which a modern city is. A decision that seems to affect only one lot may in fact set the development trend for a wider area; for example, where it concerns anchor facilities (large retail centres, services).

This is how the plan gradually played an increasingly important role. The plan was a tool to systematically integrate various points of view and pre-empt real conflicts concerning planned use changes on specific properties. The current spatial planning systems have three fundamental roles:

- they determine the spatial development for specific areas and co-ordinate the spatial activities of public authorities, including primarily their investment projects;
- they monitor the development of land, and land already developed;
- they strike a balance between divergent public and private interests, with a view to ensuring spatial order and providing conditions for spatial development.

The first of these functions is exercised by public authorities of all levels, in accordance with their powers and territorial jurisdiction. Spatial decisions of the lowest-level authorities are dependent on the action of higher-level authorities in two ways: through specific policies pertaining to the siting of supra-local public projects, and to spatial policies contained in substantive laws or in national or regional strategies and relating to such issues as environmental protection, heritage conservation, and housing, etc.

The second function is performed by local authorities in a particular way. It is substantively linked to the policies made in the course of exercising of the first function, but remains within the relatively autonomous powers of local authorities, subject only to administrative or judicial review.

The third function has two aspects: (i) the balancing of "abstract" interests, reflected by public authorities and expressed as various policies or strategies, whether national, regional or local, and (ii) the balancing of interests pertaining to projected uses of specific parcels of land, which is again within the powers of the local authorities.

The spatial development of a town is not and cannot be fully controlled by public authorities on their own, even through refined planning and control tools. The spatial development process has in fact the nature of a network. Any in-depth
analysis of the process must take into account the intentions of not only public authorities but also of investors; both large (developers, shopping chains, large enterprises) and small (such as lot owners). Attempts to influence the development process are also made by local organizations or organisations advocating specific causes, such as environmental or heritage protection groups.

The basic effectiveness measures for any spatial planning and development control system include the prevention of planning chaos and resolution of conflicts over development alternatives. In this context, it seemed necessary for us to refer to democratic rule of law standards because the formal effectiveness of a system may not be the only criterion for its assessment. The following are also needed:

1) clear rules covering any restrictions on citizens’ rights (including primarily property owners), if necessary;
2) maximising of the goals of society as a whole (expressed as public interest); of smaller communities (expressed, for example, through associations or non-governmental organisations), and of private parties (property owners and potential investors, etc.); and
3) ensuring that the system contains mechanisms that will protect the rights of property owners and other citizens whose quality of life may be affected by the project under consideration.

3. OUTLINE OF RESEARCH: GOALS, SCOPE AND METHODS
In consideration of the nature of the issue and subject matter, we have defined our research goal as follows: to ascertain the extent to which the making and applying of spatial planning law at local level in Poland meets democratic rule of law standards, and to ascertain any desired direction changes.

This goal made us focus on the activities of local authorities. We did not study the powers of higher-level authorities, including national, as a separate topic and only took them into account as a reference point for the actions of local authorities.

Reference is to democratic rule of law standards; therefore, the first step in our research was to try to pinpoint these standards. To this end, we analysed two planning systems: German and English. Our attempt to determine the standards is not a study of the essence of theoretical law governing the activities of public authorities in this particular area. The analysis grows from the observation of two real planning systems.

Our selection of the target systems was not arbitrary. They are very different systems and are often described as the two extremes: flexibility (England) versus certainty (Germany). We assumed that the differences between these systems, in addition to allowing for an overview of the specificities, will
facilitate an appreciation of the essence of the effective legal regulation of spatial planning and development monitoring options that meets all the requirements of the democratic rule of law.

When comparing the Polish system on the one hand and the English and German systems on the other, rather than comparing specific legal tools or organisational structures, attempts were made to discover the fundamentals. One fundamental characteristic is that the two systems operate in countries that are governed by the democratic rule of law; this is precisely the context we relied on in determining the desired features of the Polish system.

Another part of the work reported herein involved assessing – by reference to the identified standards of spatial development regulation – how the law is made and applied at local level in Poland. We assessed primarily the legal solutions themselves and used certain empirical data pertaining to land use and development in large Polish, German and English cities. Our research focuses on twelve large Polish cities that are members of the Union of Polish Metropolises (UMP). The selection of their German counterparts includes the central cities of 11 German metropolitan regions (Metropolregionen), while the English metropolitan areas under analysis include London (which is a region in its own right) and the main cities of six metropolitan counties.

For Polish cities, we reviewed framework studies and selected local plans. We also used UMP data from the cities concerning the status of area planning and the number of development decisions and building permits issued (2004-2005).

For German and English cities, we reviewed land use and built development plans in Germany, and local plans in England. We also relied on the available administrative data on land use in large cities, the number of planning permits and planning appeals (England).

4. CONTENTS OF THE REPORT

Chapter I
It is noted that the German system maximises certainty while the English system maximises flexibility. It is also believed that the two systems are effective and mature. In addition, they protect the same values.

We identified five fundamental standards for the democratic rule of law in the field of spatial planning:
1) In both countries, only existing developments are protected: New developments are in principle subject to public authority approval.
2) Planning jurisdiction, meaning the authority to determine the urban structure of a location and to manage the local building processes, is vested in the lowest level of local government.

3) There is a strict relationship between spatial development opportunities (intensification of land use) and the condition of the infrastructure. Ensuring the availability of land infrastructure is a public duty, which, however, may be placed on the private investor. Public infrastructure must be developed before an occupancy permit is issued.

4) The spatial planning discretion of the municipality/district is not absolute: it serves to strike a balance between public and private interests, it is limited by real community involvement in the planning process, and is subject to administrative and judicial review.

5) Spatial development monitoring is in essence a detailed determination of the requirements for land development, but derogations from the development requirements under the plan are legally permissible in special circumstances, as is in the case of investments where no local plans exist.

Chapter II

From a cursory overview of Polish legal solutions it is clear that they do not apparently differ much from those existing in mature planning systems, and try to combine the certainty of the German system with the flexibility of the English one; however, a deeper investigation into the letter of the law and its practical application shows that the Polish system suffers from numerous weaknesses:

1) Even though the constitutional understanding of property rights is similar to that in England and Germany, statutory interpretation suggests that each land owner has a right to develop and, thus, a claim to have development requirements determined for him.

2) The Framework studies on the ramifications and directions of spatial development (“framework studies”) do not fully direct the real spatial policies of municipalities while at the same time revealing substantial derogations from the standards adopted in the German surface use plans or in the English local plans. In particular, there are no reviews of infrastructural needs and expenditures and no land use changes. The decisions that lay down development requirements (“development decisions”) serve as substitutes for the local plan. This mechanism, which disintegrates spatial development, has no counterpart in the German or English system. A comparison of the planned urban areas with development decisions and actual residential developments appears to support the belief that the spatial development of Polish cities is governed by randomly decided local plans or development decisions, rather than by the ordered activities of public authorities.

3) Most municipalities, instead of quoting land infrastructure costs and adopting plans with funds committed for the development of the planned infrastructure, only determine land infrastructure solutions and the
related financing sources. In effect, land is not ready in technical terms for plan-compliant projects.

4) Community involvement in the spatial planning process in Poland is formal and only protects legal (as opposed to factual) interests of inhabitants and owners, while failing to encourage municipalities to offer alternative development solutions. Co-ordination in the Polish system is provided by the approvals mechanism (uzgodnienia); whereas, in the English and German systems, this is provided by legislation and planning documents. Planning supervision and review is \textit{ex post facto} and formal, without going into the merits of the plan.

5) Polish law lacks perfected substantive regulations on admissible land uses. Local land use development plans for cities have a major flaw in that there are no arrangements for land uses and for allowed built developments on specific parcels. There is no formal requirement to prepare and attach to the plan a statement of reasons that would broadly explain the plan policies.

\textbf{Chapter III}

The fundamental flaws in the Polish spatial planning and development control system are that the planning jurisdiction of the local authorities for one thing, and the protection of inhabitants and owners for another thing, have a different scope than in the mature systems. The Polish system is weakly integrated and there are no laws to compel the implementation of effective planning solutions and policies.

The following are the most important proposals for change:

- The provisions of the Land Use and Development Planning Act should be aligned with the constitutional understanding of the protection of property.
- The approvals (\textit{uzgodnienia}) mechanism should be replaced by opinions (\textit{opiniowanie}).
- Clear rules should be provided for development opportunities in the areas for which there is no local plan.
- Community involvement should be enhanced.
- Administrative review of plan preparation should be enhanced.
- Development decisions should be abolished.
- The role of framework studies should be reinforced.
- Rules should be introduced to govern spatial development at local level.
- Local plans should be integrated with investment and financial planning.
- Local land use and development plans should be more detailed.
CHAPTER I
STANDARDS FOR LAWS GOVERNING
LAND USE AND DEVELOPMENT

I.1. THE SPATIAL PLANNING SYSTEMS IN GERMANY AND ENGLAND

Although in terms of sources of law and the organisation, the planning systems in England and Germany are different, both countries attain similar goals and protect similar values.

I.1.1. THE GERMAN SPATIAL PLANNING SYSTEM

Sources of the spatial planning law
German spatial planning law is divided into the spatial order and state planning law (Raumordnungs- und Landesplanungsrecht) and the building law (Baurecht). The spatial order and state planning law provides a framework for macro-regional planning at state and regional level, for which, responsibility rests with federal states (Länder) and the federation (Bund). On the other hand, the building law governs land use and protection, as well as investment processes, including especially residential, industrial and service developments, for which, responsibility is vested in municipalities (Gemeinde).

The spatial order and state planning law is enacted as the Spatial Order Act of 1965 (Raumordnungsgesetz - ROG) and the state planning acts enacted by individual states (Landesplanungsgesetze). The building law consists of the federal statute named the Building Code of 1960 (Bauordnungsgesetz - BauGB) and of state enactments governing building permits and building regulations (Landesbauordnungen).

The organisation of spatial planning
In Germany, spatial planning is the responsibility of federal states and municipalities. Federal states are responsible for planning infrastructural links between major settlement units, or metropolitan agglomerations (Verdichtungsraum, Ballungsraum), which are centres of social and economic life (zentrale Orte), for planning the settlement structure and public infrastructure for those centres and for protecting open spaces. State governments are authorised to lay down the following:

- spatial order plans (Raumordnungspläne) for all the federal states, setting out, inter alia, the state-level settlement structure, protected open areas, agricultural areas, and state infrastructure, including primarily transportation, road and energy infrastructure; these plans are developed by state governments;
• regional plans (Regionalpläne) for areas smaller than federal states; these plans build upon the spatial order plans to provide more detail, and are usually developed through county and municipal unions (Zusammenschlüsse); except in the Stuttgart and Hannover metropolitan areas, where they are prepared by directly elected regional councils that are local authorities; regional plans become binding when approval (Genehmigung) is granted by the state ministers that have jurisdiction for matters of spatial development.

The municipal government is responsible for land development planning, land protection and the management of building processes (Bauleitplanung). Municipal councils are empowered to adopt the following:
• land use plans (Flächennutzungspläne), known as preparatory building plans (vorbereitende Bauleitpläne), which provide for general land use, such as residential, roads, and hospitals, etc;
• land development plans (Bebauungspläne), known as binding building plans (verbindliche Bauleitpläne), which bind public authorities and citizens in development matters and provide, with respect to individual parcels (Parzellenschaf), for the duties of public authorities; such as duties concerning land infrastructure, and for the rights of private parties with respect to development.

Spatial order plans, regional plans and building plans are referred to as general plans (Gesamtpläne), which are superior and integrating (übergeordnete und zusammenfassende) in nature. These plans have the role of coordinating and combining all public authority planning activities, including sectoral plans (Fachpläne) prepared by ministries and central authorities of federal states under separate enabling laws, which provide for such public projects as transportation (roads, canals, and airports), energy supply, waste disposal, telecommunications, defence facilities, environmental protection and landscape conservation, or water conservation.

In terms of spatial planning, the federal government (Bund) has co-ordination powers. There is the Spatial Order Board (Beirat für Raumordnung), affiliated with the Federal Minister for Spatial Order. The Board consists of professionals and representatives of local governments (Spitzenverbände). There is also the Permanent Ministerial Conference for Spatial Order (Ministerkonferenz für Raumordnung), which is a co-operation forum for ministers who have jurisdiction for spatial planning at state level. In addition, the federal minister with jurisdiction for spatial order is in charge of the federal Building and Spatial Order Authority (Bundesanstalt für Bauwesen und Raumordnung), which periodically reports on spatial issues in Germany (Raumordnungsbericht).

County authorities (Landkreise), as units of local government, have no powers in matters of spatial planning; except that county mayors (Landräte) and mayors of cities that have county status are, in their capacity as government administration, empowered to issue building permits.
Substantive laws on spatial planning

The fundamental substantive laws governing spatial planning organisation and procedures include spatial order rules (*Grundsätze der Raumordnung*) laid down in § 2 ROG and construction planning rules (*Grundsätze der Bauleitplanung*) laid down in §§ 1 and 1a BauGB.

Spatial order rules, of which there are a total of 15, bind the public authorities of federal states and municipalities as concerns the contents of their spatial plans. The most important rule is laid down in §2.2.2 ROG. It prevents scattered settlements and developments. According to this rule, settlements must be concentrated in the main populated areas, and existing developments must be regenerated and supplemented before any open space is developed. Moreover, §1.5.2 and §1.5.4 BauGB prescribe that the existing municipal built environment (*Ortsteile*) be maintained, renewed and developed, subject to ensuring differentiated social structure in the locality and promoting affordable single-family housing on a mass scale. According to §1.5 BauGB, it is generally forbidden to designate agricultural land, forests or residential areas for any other uses: A change of use is allowed only where required and must be socially and economically justified.

I.1.2. The English spatial system

Sources of the spatial law

The fundamental enactment is the Town and Country Planning Act 1990 (TCPA), which sets out the responsibilities and powers of the local government (districts and counties) in the area of planning and development control and provides for the intervention of the minister responsible, in the planning process. The English system is now in transition, as the TCPA has been thoroughly amended by the Planning and Compulsory Purchase Act 2004 (PCPA), which is due to enter into force with a scheduled three-year delay.

The major secondary legislation includes the Town and Country Planning (Local Development) (England) Regulations 2004, S.I. 2004 No. 2204, which provide for more details governing plan preparation; the Town and Country Planning (Use Classes) Order S.I. 704, 1987 (as amended), which provides for land use classes; and the Town and Country Planning (General Permitted Development) Order, 1997, S.I. no 418 (as amended), which governs control of new land uses.

The organisation of land use planning

Authorities writing on the subject refer to the English system as ‘land use planning’, the term ‘spatial planning’ being used for the territorial siting and coordination of policies, especially investment policies, pursued by public authorities.

The English system has a specific mechanism named ‘planning permission’, which is required for development or for change of use. Planning permission
is issued by the lowest-level local authorities: districts and unitary authorities, the latter combining the functions of both districts and higher-level authorities (counties).

The developments that require planning permission are defined in statutory instruments. Accordingly, planning permission is not needed, for example, for works that affect only the interior of a building or do not change its external appearance, although these works may require building approval. Moreover, a statutory instrument defines more than a dozen land use classes and stipulates which of these classes require planning permission.

Applications for planning permission are always considered on a full merit basis because the plan does not rule supreme. A decision may be contrary to the plan if it is justified in the light of “other material considerations”. It is noted that this system is plan-led rather than plan-based.

The current plans are based on the 1990 Act and will continue in force until 2007. Two plan levels are distinguished. Counties prepare structure plans that lay down fundamental spatial strategies for counties. Districts prepare local development plans, and unitary authorities prepare unitary plans whose scope reflects the scope of both structure plans and local plans.

Strictly speaking, the TCPA did not provide for any planning documents at the higher levels of government. Instead, it required the preparation of national and regional planning guidance. Except for London, where no regional government exists, such regional guidance is, formally, a cabinet document.

The 2004 reform has changed the planning documents regime: it has introduced regional spatial strategies, abolished structure plans (counties now only prepare mineral and waste plans) and replaced the uniform local development plan with a set of planning documents known as the local development framework. These changes do not, however, affect the fundamental powers and duties of the lowest-level local authorities.

It is each district’s duty to prepare a development plan for the whole area of the district. The plan formulates the general proposals and policies in respect of development, and contains specific proposals for selected kinds of development in the entire area (e.g. a chain of shopping centres) or for selected areas for development (or redevelopment/improvement), in addition to setting out environmental protection areas (green belts), where new developments are permitted only in exceptional circumstances, or urban protection areas (conservation areas).

The PCPA distinguishes local planning authorities (being those empowered to prepare the plans and exercise control over development) and regional
planning bodies, which are not public authorities but which prepare strategic planning documents (regional spatial strategy) that are subject to formal adoption by the minister with responsibility for spatial development. In the English system, the planning authorities also include the relevant minister (Secretary of State), who issues planning documents at national (national planning guidance notes) and regional (regional spatial strategies) level (the guidance notes are issued under the 1990 Act, while the regional spatial strategies are issued under the 2004 Act). Moreover, the Secretary of State may intervene in the planning process and control development at local level, whether by direct planning decisions, by supervising the planning decisions of district authorities, or by issuing orders resulting in the so-called deemed permission.

**National planning guidance**

The English system provides for a specific regulatory instrument of planning guidance. Such guidance is contained in planning policy guidance notes issued under the 1990 Act, which are now replaced by planning policy statements issued under the 2004 Act. Eleven statements issued since 2004, and 14 earlier guidance notes, are currently in force.

Planning guidance is binding on local planning authorities. It provides in more detail for the preparation and contents of local planning documents (PPS 12) and regional spatial strategies (PPS 11), but also reflects cabinet policy in many areas, such as housing (PPS 3), planning for town centres (PPS 6), green belts (PPG 2), and development and flood risk (PPS 25), etc.

I.1.3. **Comparison of the English and German systems**

From the point of view of the system user or „client”, and thus, of a potential investor, the most fundamental difference between the German system and the English system is that the former maximises certainty while the latter maximises flexibility. This means that in Germany a potential investor may, based on the plan, have a high degree of confidence on what and where to build. In England, the investor can be fairly certain that his proposal will be appreciated fully on its merits, not only in relation to the earlier proposals of the public authorities as laid down in the plan, but also according to its advantages (and drawbacks).

This function of maximising two opposite ends is emphasised by the authors of a Commission-sponsored review of 15 European planning systems. Both systems are regarded as mature and effective. The basic measure of a planning system’s effectiveness is that it really affects territorial development processes. The authors of the review indicate that certain southern European systems (including primarily the one in Italy) appear to have window-dressing characteristics in that sometimes the plan, rather than directing the development, only “legalises” ex post facto developments that have been erected without any public plan.
Both systems are based on historically entrenched planning powers of the lowest-level local governments (municipalities and districts). In Germany, these powers have strong theoretical foundations, whereas in England they are rather a creature of practice than a systemic political solution. This kind of planning jurisdiction is exercised by direct control over development.

Despite the large degree of discretion vested in the lowest-level local governments in both countries, their spatial planning activities are subject to decisions of higher public authorities. The law (both spatial planning legislation and substantive laws regulating other sectors such as building, housing, environmental protection) not only lays down formal spatial planning requirements but also determines certain content-related aspects of spatial plans. This, is reflected in a peculiar way in the English system, where of fundamental importance, are documents that are not legal acts but rather formal statements of state policies.

In both countries, planning documents have their hierarchy. Documents prepared at higher levels of local government and for larger areas are binding for the plans prepared at lower levels.

I.2. Property rights and the right to develop

Whether in England or in Germany, the fact that one owns a piece of land does not mean that one has the right to develop it.

I.2.1. Property rights and the right to develop in Germany

The German Constitution (Grundgesetz - GG) guarantees property rights in art. 14, which at clause 1 reads as follows: “1. The right of property and the right of inheritance are hereby guaranteed. Their contents and limits shall be determined by the laws (Gesetz), with clause 2 providing that: “Property is a duty. Property should be also used for public good.” Due to its social import, the ownership of land (Grundeigentum) is subject to a special regulation. According to a judgement of the Federal Constitutional Court (FCC), “the fact that the land and earth are fixed quantities and indispensable, forbids that their use be completely left to the unsupervised play of free powers and to the pleasure of individuals (...) the interests of the public (in protection of the right of property) must be realized in a much fuller measure than with other types of property.”

Under current law, the freedom to build means only the right to develop as limited by administrative law; this kind of right is often called a potential right to develop and is not legally protected. The right to develop is protected in a specific factual matrix (Bestandsschutz), while the owner only has a claim to maintain its status and to protect it (subjektiv-rechtlicher Abwehranspruch) against the illegitimate actions of public authorities.
Landowners do not have a right of action to compel public authorities to determine land development requirements and, on that account, adopt development plans (§2.3 sentence 1 BauGB). Neither can a claim for the issuance of a development plan be based on a promise (Zusage) or a contract (Vertrag) (§2.3 sentence 2 BauGB), and any plans implemented on the basis of these are subject to the generally applicable procedure, without any guarantee of attaining the effects that were promised or agreed. Accordingly, the private party carries the full risk of whether or not the municipality will prepare the plan as agreed. Furthermore, landowners do not have claims for the development of land infrastructure that is for the building or improvement of any roads, sewage or water supply networks (§ 123.3 BauGB), or claims for being given building permits, unless in situations described in §§30, 34 and 35 BauGB whereby development is permitted on certain categories of land (see point I.3).

The term Gesetz as used in the German Constitution, including in its art. 14, which provides for protection of property rights, has basically two meanings: (1) in formal terms it means an act (statute) adopted by parliament (das formelle Gesetz) while (2) in substantive terms it means any legal act containing provisions addressed to the citizens generally, including a statute, a regulation or any other acts of sub-statute level (das materielle Gesetz), in which case, the term is essentially synonymous with the term ‘legal rule/norm’ (Rechtsnorm, Rechtsatz). The Constitution is construed so that the right to develop is not limited only by acts of parliament but also by other generally applicable regulations, including built development plans (Bebauungspläne) that are adopted as statutes (Satzungen), which in the Polish Constitution, are called acts of local law; whereas, in Germany they are termed enactments made by public law corporations within their statutory autonomy.

I.2.2. PROPERTY RIGHTS AND THE RIGHT TO DEVELOP IN ENGLAND

Cullingworth and Nadin write that “...the UK planning system is underpinned by an extraordinary feat of nationalisation which was passed without the revolution that might have been expected in many other countries” Under the Town and Country Planning Act 1947, the right to develop open space and the related appreciation of land value were “nationalised,” with the following major effects:
1) virtually any development requires the permission of public authorities;
2) the grant of permission means payment of a fee that theoretically covers the costs involved in the grant;
3) refusal does not confer a right to compensation (except for a claim for the purchase of an interest in land, which the planning decision renders “incapable of reasonably beneficial use”);
4) public authorities may grant planning permission that is subject to certain conditions or obligations, such as the development of infrastructure, the provision of affordable housing, the maintenance of open space or even the erection of school buildings.
I.3. Planning Jurisdiction

Planning jurisdiction, meaning the power to determine the urban structure of a place and to manage the local building processes, is vested in the lowest level of local government.

I.3.1. The Planning Jurisdiction of German Municipalities

In Germany, planning jurisdiction (Planungshoheit) is vested in the municipalities. It is the power, part of each municipality’s statutory autonomy, to enact planning regulations in order to prepare land for development, including built development, and to manage the land development processes. According to §1.3 BauGB, municipalities shall prepare land use plans and building plans “as long
as this is necessary for the purposes of urban development and order.” Building plans do not have to be prepared in municipalities enjoying orderly urban structure where the authorities do not foresee further development activities. The power not to prepare a plan is also part of the general planning jurisdiction.

Being part of government power (Staatsgewalt), planning jurisdiction is exercised, under art. 28 of the German Constitution, through statutory enactments. Accordingly, the parliaments and governments at federal and state level have the right to determine not only the spatial planning powers of the municipalities but also the kind (Art) and the methods (Weise) of the exercise of such powers. This latter determination is seen not only in the substantive and procedural regulations of the Building Code. Acting within its powers, the federal government determined, by way of the Regulation on Designations used in Planning Documents (Planzeichenverordnung) of 1990, the graphical designations applicable uniformly across the whole of Germany for land use plans and building plans and, by way of the Building Use Regulation (Baunutzungsverordnung) of 1990, the land development categories and the kinds of permitted development.

Municipalities exercise their planning powers under art. 28 of the German Constitution at their own responsibility, and this exercise is subject to legal review (Rechtsaufsicht) by the government administration of the federal states. According to FCC case law, the planning jurisdiction of municipalities may not be restricted in a way that amounts to taking from them any major powers to plan land use and manage the building processes. For example, no act of parliament may take away the municipalities’ power to adopt development plans, and confer that power on the counties (Landkreis).

There are a number of statutes that confer the power to make specific spatial decisions on state governments, such as decisions on the siting of national roads. Restrictions on the municipal planning jurisdiction, whether introduced by general or special planning, are compensated by participation of municipal representatives in state-level planning through their presence in advisory committees (Planungsbeiräte) affiliated with the state ministers that have jurisdiction for matters of spatial development. At regional level, they are compensated through planning associations of municipalities and counties that prepare regional plans. While the municipalities are required to suffer interference with their planning jurisdiction by having to ensure the compliance of their building plans with the rules and goals of spatial order, they may not be bound by any state or regional planning solutions with respect to individual parcels.

I.3.2. The planning jurisdiction of districts and unitary authorities in England

The Planning and Compulsory Purchase Act 2004, which amended the Town and Country Planning Act 1990, introduced, at section 37(4), a new term local planning authorities, and determined that local planning authorities are:
(1) district councils, (2) London borough councils, (3) metropolitan district councils, (4) county councils in relation to any area in England for which there is no district, and (5) the Broads Authority (the Broads are a protected area in east England). Section 37(5) stipulates that a National Park authority is the local planning authority for the whole of its area. As of 2004, county councils are no longer planning authorities; their powers include mainly consultation and their planning jurisdiction has been limited to adopting mineral and waste plans.

Government administration has the power to intervene to a large extent in the way the local authorities exercise their planning powers. Firstly, the minister competent for matters of spatial planning may interfere with the very spatial planning and development control process by raising issues relating to planning proposals or decisions for approval. Secondly, plans prepared and planning permissions issued by districts or unitary authorities are subject to review on their merits (as to plan contents or the merits of the decision) by the government, through the Planning Inspectorate. Each plan is subject to review before adoption; whereas, planning permission/refusal is reviewed on appeal by the applicant. The Inspectorate’s determination is binding on the local authority.

In addition to being restricted by the law itself (such as environmental law, heritage and protection law, etc.), the planning jurisdiction of districts and unitary authorities is limited by the formal pronouncements of government policies, as expressed in national planning guidance notes (regional spatial strategies).

1.3.3. The Importance and Functions of the Local Government’s Planning Jurisdiction

The EU compendium of spatial planning systems and policies (1997) shows that preparation of detailed spatial plans in the 15 EU member states lies within the purview of the local authorities, except for matters specifically enacted into law and usually including large infrastructural projects. An exception here is Greece, where plans are prepared by the government.

Notwithstanding the differences in legal and administrative systems among the countries, modern European spatial planning systems, including the German and the English ones, retain the same fundamental territorial distribution of planning powers: higher-level authorities (including the government itself) are responsible for formulating spatial policies (and spatial aspects of various other policies), while the lowest-level authorities (local government) are directly responsible for development control mainly by means of local and detailed plans (meaning those that contain solutions for individual lots).

The local government’s planning jurisdiction is not absolute (fully autonomous). Planning decisions are subject to laws and regulations, whether...
those pertaining to planning itself or those having a substantive character. Furthermore, as can be seen in the German and English systems, national planning and regional planning intervene in the planning jurisdiction of the municipalities/districts to ensure compliance with national policies.

I.4. INTEGRATION BETWEEN SPATIAL PLANNING AND FINANCIAL AND INVESTMENT PLANNING:

There is a strict relationship between spatial development opportunities (intensification of land use) and the condition of the infrastructure. Public infrastructure must be developed before an occupancy permit is issued.

I.4.1. INTEGRATION BETWEEN SPATIAL PLANNING AND FINANCIAL AND INVESTMENT PLANNING IN GERMANY

According to §123.1 BauGB, the municipality must develop land infrastructure (Erschließungslast). The definition of land infrastructure in §127.2-4 BauGB includes, without limitation, streets, squares and roads, sidewalks, common roads on developed areas, parks, green areas, water supply networks, sewage systems, structures protecting against noise or the emission of harmful substances.

According to §124 BauGB, the development of the land infrastructure may be wholly or partly shifted onto the investor at his expense under a public-private contract (Erschließungsvertrag). The infrastructure must be completed and brought into service no later than when the buildings are brought into use (§123.2 BauGB). The municipality has full discretion as to when infrastructure development is to commence and how long it shall take; however, provided that building permits have been issued, if the infrastructure has not been completed before the buildings are brought into use, the owners (tenants) have a claim for development of the infrastructure. If the municipality delays with completion, government administration may take supervisory measures, including the appointment of an official manager. In order to develop the infrastructure, the municipality may impose real estate assessment (Erschließungsbeitrag), which can provide funding for even up to 90% of the development costs involved. Such statutory solutions compel integration between investment and financial planning and spatial planning at municipality level.

I.4.2. INSTRUMENTS THAT FACILITATE THE INTEGRATION OF INVESTMENT AND FINANCIAL PLANNING WITH SPATIAL PLANNING IN THE ENGLISH SYSTEM

The English local plans are based on a specific time perspective, usually ten years. They include, among other things, proposals for public (infrastructure) investment, which the local planning authority intends to complete throughout the plan duration.
The English system has designed a specific instrument to integrate spatial and investment planning – the area action plan. This is an optional specific plan for areas where special investment efforts are intended, whether to be made by public authorities or by private investors. Among other things, the plan lays down the priority for development objectives and the milestones of the development process as well as co-ordinating the required new infrastructure and municipal services.

Co-ordination between spatial planning and investment planning is also compelled by other laws. Under the Transport Act 2000, districts are obliged to make five-year transport plans. The Planning Policy Statement 3 (Housing) requires regional planning bodies and local planning authorities to plan for housing developments on the basis of projected needs and assessments of availability of developable land, especially including land that has already been in use and can be improved (brownfield).

Other instruments for co-ordination between the condition of the infrastructure and infrastructure projects on the one hand, and territorial development on the other, are related to planning permissions. In terms of negative instruments, planning permission may be refused for want of sufficient infrastructure (e.g. overload of the existing water supply and sewage system, lack of transport infrastructure). In terms of active instruments, the applicant may be required to fulfil certain planning conditions or obligations.

The local planning authorities may grant planning permission subject to such conditions as they „think fit” (TCPA, section 70(1)(a)). Most permission is conditional in this fashion.

The Planning and Compensation Act 1991, which amended the TCPA, introduced at section 106 the mechanism of planning obligations. A planning obligation is an undertaking given by the applicant (whether resulting from agreement with the planning authority or given unilaterally), which ties the development for which permission is sought to the erection or financing of some other project, which usually is an infrastructure project but may also be a recreational project, a park, a school or such like. Such planning obligations are often used for housing development projects where they require the development of a specific stock of affordable housing. In the budget year 2003/2004, planning obligations were involved in 6.9% of all planning permission for new developments.

1.4.3. Urban infrastructure as a condition for spatial development and intensification of land use

The operating efficiency of a spatial planning system as a tool for actual control over development in the given planning area hinges on the link between spatial planning on the one hand, and the existing infrastructure and its proposed and realistically designed changes, on the other. The German solu-
tions focus on ensuring that the spatial development plans directly include investment plans and costs of infrastructure. The English solutions require the local planning authorities to constantly review the local infrastructure itself and the local infrastructural needs, with matters of infrastructure being one of the major content requirements for the plan. 

Whatever legal solution is adopted, it is clear in both systems that any intensification of land use (such as by housing development or erection of a shopping centre) is permitted only by reference to the existing infrastructure. Any spatial development of a town or village, such as through completion of a housing project, is possible only if the existing infrastructure is efficient enough or appropriately expanded.

Although based on the principle that the necessary infrastructure is the responsibility of public authorities, both systems contain mechanisms that allow permission for intensification of land use to be granted subject to a condition that the investor contributes (whether in terms of the carrying out of actual work or in terms of provision of funds) to ensuring that the required infrastructure is in place.

I.5. The planning discretion of the local government versus community involvement and administrative and judicial review

The spatial planning discretion of the municipality/district is not absolute: it serves the purpose of striking a balance between public and private interests, is limited by real community involvement in the planning process, and is subject to administrative and judicial review.

I.5.1. The planning discretion versus community involvement and administrative and judicial review in the German system

A planning decision bears all the hallmarks of administrative discretion, which in spatial development law is named planning discretion (Planungsermessen). According to §1.4 BauGB, all private and public interests (Belange) must be mutually balanced in the planning process. This requirement, being one of the ways in which the principle of the rule of law is implemented, is constitutional. The balancing of interests takes account of not only legally protected interests, especially those that pertain to building development, but also interests for which the law does not offer any protection, so-called factual interests, but which are related to spatial development of any specific area within the municipality. These give the higher-level administrative authorities and the courts an angle from which they review built development plans and land use plans.
As regards the persons affected, the right to have one’s interests included in the balancing process protects not only the interests of property owners or tenants, but also other persons using the space subject to the proposed plan, such as local employees. The adoption procedure for built development plans and land use plans is similar and involves two stages:

- The hearing (Anhörungsverfahren). Once the local council adopts and announces a resolution to prepare a built development plan, the mayor ensures publicity for the planning proposals concerning the affected area and collects feedback on proposals and expectations of the inhabitants. The procedure at this stage is directed by the municipality and allows the inhabitants to voice proposals (interests) in relation to development of the land concerned.
- The submission (Auslegungsverfahren). After draft plan is ready, the inhabitants have the right to submit written comments.

It is noted in both theory and case law that, while balancing public and private interests, regard must be had for the following:

- the rule of conflict prevention (Gebot der Konfliktbeseitigung): planning should predict and pre-empt future conflicts;
- the rule of taking account of private interests (Gebot der Rücksichtnahme): the municipality should protect individual interests, as development on a specific lot affects the adjacent lots and may violate the interests, whether legal or factual, of other property owners.

The balancing process itself (Abwägungsvorrang) and its outcome (Abwägungsergebnis) are also subject to protection. Procedural errors that may ultimately lead to annulment of the plan, whether by higher administrative authority or by action before an administrative court, include the following situations:

- (A) failure to apply the balancing of interests mechanism as a legal instrument (Abwägungsunfall), or
- (B) if the mechanism was used, (1) failure to take account of material interests (Abwägungsdefizit), (2) use of inappropriate planning rules (Grundsätze) (Abwägungsüberschreitung), (3) incorrect assessment of the weight of specific interests (Abwägungsfehleinschätzung), or (4) incorrect assessment of the balance among opposing interests (Abwägungsdisproportionalität).

Comments and proposals submitted by the inhabitants are not considered in the administrative review process unless they have been filed in writing in the course of the proceedings or are (or by law ought to be) known to the municipal authorities. Accordingly, there is a duty to state private interests at the stage of the balancing procedure. If the municipality does not take into account any comments that have been submitted by its inhabitants, it must deliver them to the governmental authority in charge of the administrative review of draft building plans.
The governmental administration has specific powers in relation to the administrative review process, and namely:

- to become legally binding, any land use plan requires the approval (Genehmigung) of a review authority (höhere Verwaltungsbehörde);
- any built development plan requires approval if it is not adopted under a land use plan and is being created for an area where no such plan exists.

Such administrative approval mechanism has the role of reviewing plans for conformity with the law and, primarily, of verifying the compliance of the municipal balancing of interests procedure.

I.5.2. The English development control system as a system that balances public and private interests

The fundamental responsibility of the public authority is control over development and, through it, the balancing of various private and public interests in connection with decisions pertaining to specific areas of land. This activity is purely discretionar and is not capable of being fitted into any algorithms (other than formal ones), even in the complex planning guidance system. The government is empowered to intervene virtually at any stage of the planning and control process, if it considers that the district council has exercised its „conditional” freedom in an inappropriate manner.

The law (sections 29, 40 TCPA, section 18 PCPA; section 17 of statutory instrument issued under the PCPA) and national planning guidance (§ 3.1 - 3.13 of PPS 12) require planning authorities to ensure community involvement in the planning process, and encourage them to go beyond their duties.

The set of required development documents, introduced by the 2004 Act, comprises a statement of community involvement (section 18) which sets out how the local planning authority will provide for the involvement of the inhabitants in the planning process.

During plan preparation, the public have three opportunities to become involved:

1) in an informal manner at the initial stage when spatial issues and options for their resolution are being formulated;
2) by means of formal representations (which require a response) made to the local planning authority after publication of an initial draft of the plan (so-called preferred options document); and
3) by means of representations on the final draft of the plan that is submitted to the Planning Inspectorate. These representations will enter the formal examination procedure conducted by the Inspectorate.
Plan examination by an inspector is conducted in accordance with the written method (based on representations on the plan and planning authority’s responses), by way of a public hearing or by way of a formal inquiry. The outcome is a report that binds the planning authority concerned. The examination includes an inquiry into the conformity of the draft plan with applicable laws and the national and regional planning guidance (or, since 2004, the regional spatial strategy).

After the plan has been adopted by the district council, formal objections against it (on the grounds of violation of the law) may be filed with the court within 3 months.

The public participation requirements for planning permission are weaker. The PCPA prescribes that the statement of community involvement set out a community involvement policy. Any interested persons may submit representations in connection with planning permission. The representations are dealt with by the planning authority at its discretion. The authority also has the discretion to decide on whether planning applications and related representations are to be considered in a written procedure, or in a hearing before the council or a council committee.

The law requires planning authorities to publish all applications for planning permission in publicly accessible registers. It is at the authority’s discretion what publication methods are chosen (but large projects must be publicized either by neighbour notification or by being announced in the area concerned and in the press). Research in the London area shows that the most efficient method is sending notices by post to the neighbours.\(^{29}\)

Planning permission is subject to a strict administrative review regime. The secretary of state may intervene in any planning permission case. In practice, it is done quite infrequently: on over a hundred occasions for about 600 thousand applications a year. The planning authority must keep the secretary informed in relation to its consideration of applications for large supra-local projects and in cases where it intends to grant permission that largely departs from the plan. The secretary then decides on whether or not to intervene and determine the issue.

Planning permission decisions can be appealed by the applicants. The appeals are made to the secretary against refusals to grant permission but also against the conditions subject to which permission was granted. The Inspectorate determines appeals on their merits and its determinations are binding.

Court appeals against planning decisions are less important in practice. They may be based on a violation of the law by the planning authority, usually by acting *ultra vires* (beyond its powers) or by wrongly treating certain matters as “material considerations” that justify the decision.
I.5.3. Discretion in planning decisions as a tool for balancing public and private interests

It is an assumption in both systems, German and English, that the balancing of interests will only be effective if the local government has significant decision-making freedom; however, this freedom is limited by the duty to take account of spatial solutions adopted by higher levels of territorial government (see point I.3), by the requirement to consult with other public institutions and by the duty to ensure community involvement in the planning process.

Both systems attempt to ensure that the planning process takes account of all justified group and individual interests. These interests include, first, those that are expressed “indirectly” in the laws and public strategies and policies binding on the local government in its planning capacity. And, second, they include interests expressed directly through representations made by stakeholders (local inhabitants or their organisations, potential investors, interest groups or NGOs) following the required publication of the draft plan.

Control of public authorities in that regard is enabled primarily by planning decision appeals (which are taken to also include determinations made in the plan itself) and by considering the appeals not only on points of law (whether the local authority exercised due care in the process) but also on the merits.

I.6. Degree of planning detail and derogations from the plan

Spatial development control in essence boils down to a detailed determination of the requirements for development on individual lots; however, derogations from the development requirements under the plan are legally permissible in special circumstances, as is in relation to an investment in an area where no local plans exist.

I.6.1. The scope of German built development plans; opportunities for derogation from the plan and for development in no-plan areas

According to the Building Code, the Regulation on Designations used in Planning Documents and the Building Use Regulation (and in such categories and according to such rules as laid down therein), all development, whether building use or conservation use, must be specified in the narrative portion of the plan and in the built development map (Bebauungsplan) down to individual lots, or else the plan may be annulled in an administrative or judicial review procedure. The development of any lot (parcel) under the built development plan must be consistent with the land use plan and, if no such plan exists for a given municipality, must be approved (Genehmigung) by a higher-level authority.
The Building Use Regulation has introduced:

- four categories of building use of land and 10 built development categories, according to type; the regulation specifies permitted developments for each such type of land, e.g., for small settlement areas (Kleinsiedlungsgebiete) the permitted developments include single-family dwelling houses, shops, restaurants, and specific-purpose developments permitted in special circumstances; such as fuel stations or buildings intended for religious or social uses;

- indicators of the permitted degree of building intensity for each of the above categories (density and height of development, ratio of built area to total area) as well as regulations concerning the permitted number of floors, parking spaces, garages, and prescribed front and rear yard setback lines.

All those elements have their corresponding graphic designations laid down by the Regulation on Designations used in Planning Documents: there are 15 designations for land use and development restrictions and restrictions on the number of flats in buildings, 20 designations for degrees of building intensity, six designations for built development types (detached, semi-detached, etc.), two designations for setback lines; in addition, there are appropriate designations for public infrastructure, public areas, waters, green areas, protected areas and areas intended for regeneration (over 100 designations and graphic symbols in total).

At § 31 II, the Building Code allows for the siting of projects that somewhat depart from the built development plan (derogations) as long as such projects are not contrary to the essence of the plan. Moreover:

- under § 34 BauGB, projects may be sited in downtown areas (Innenbereich), known as dense development areas (im Zuzammenhang bebauten Ortsteile), provided sufficient land infrastructure is in place; municipal councils may adopt resolutions (merely explanatory - Klarstellung) setting out dense development areas (Abgrenzungssatzung) which encompass an area that meets the legal requirements, or resolutions determining areas connected with the dense development area (Abrundungssatzung) - extending them onto neighbouring plots; in such areas, it is possible to have building permits issued in the absence of a building plan;

- under § 35 IV BauGB, certain projects may be sited in uptown areas (Außenbereich) even where no plans exist; these projects are specified in the act and involve either important public investments or additions to existing rural developments.

In matters set out in §§ 31, 34 or 35 BauGB, an application for a building permit is filed with the county authority, which must transmit it to the municipality, as such decisions are made only with consent of the municipality concerned. The municipality is represented by the local council (or council committee). The county authority may not issue a decision without the municipality’s consent.
I.6.2. The position of specific regulations in the English system of local development plans for entire local jurisdictions.

Special regulatory instruments for spatial development

The local plan comprises the entire district area and contains detailed solutions for the siting of basic projects. In addition, it comprises solutions prepared for specific areas: (1) area action plans with detailed maps showing individual lots, (2) conservation areas, which are townscapes deserving protection for reasons of historical or urban interest or town/district tradition; in conservation areas, extra controls over development are in place and additional consent or permission is required.

Local plans may be accompanied by supplementary documents that set out the desired details concerning the development methods, and the landscaping of lots, etc. These documents are not formally part of the plan but, having the status of "other material considerations," are taken into account in the planning permission process.

Another tool for specific development control is the planning permission itself.

Any application for new development must include, without limitation:
1) the location of the building(s), including relative to the street, other buildings, etc;
2) the plans for the building;
3) the exterior appearance of the building;
4) access to the lot, and
5) the landscaping.

These details are assessed in relation to the plan and supplementary documents (if any).

In the English system, lawful derogations from the regular procedures usually involve abolishing the need for planning permission. Currently, there are three types of simplified development control procedure.

Enterprise zones, as introduced under the Local Government Planning and Land Act 1980. A zone plan proposal is prepared by the local planning authority, while the zone itself is established by the government (the Secretary of State). No investor proposing a development that is in accord with the zone plan needs to seek planning permission, but the planning authorities may require that their consent be obtained for certain matters, such as landscaping. Enterprise zones are enabled by sections 88 and 89 of the 1990 Act.

Simplified planning zones, as introduced under the Housing and Planning Act 1986. These are established by the local authorities, which determine
the permitted land uses within the zone and any conditions, restrictions and exceptions governing zone projects. As in enterprise zones, full planning permission is not needed. Under the 2004 Act, simplified planning zones may only be established where they have been provided for in the regional spatial strategy. Simplified planning zones are enabled by sections 82-86 TCPA, as amended by section 45 PCPA.

Urban development corporations, as introduced under the Local Government Planning and Land Act 1980. These are tasked with regeneration of city areas of national importance. They are established by ministerial order with the consent of both houses of parliament. The first such corporations were formed for the regeneration of Merseyside (Liverpool) and London Docklands. Twelve corporations were established in total, of which two are still operating.

An urban development corporation is a body tasked with public duties, a so-called QUANGO (Quasi-autonomous National Government Organisation), which in Polish terms is a governmental agency. Once it is established, its action area is in many respects excluded from local authority control, including planning and building control.

The principal tool used by the corporations is land policy. The Secretary may, by order (and with the consent of both houses of Parliament), transfer for a corporation’s disposal any public land that is within its area of control. Furthermore, the corporation may acquire land and transfer it to investors under any conditions it deems proper in order to compel regeneration of the area.

No uniform development plan is prepared for the area of an urban development corporation, while development is based on private proposals for specific parts of the area (flagship sites), which require ministerial approval. Such corporations are formed for specific tasks and remain in operation for relatively short times. Once the task is completed, any powers and property of the corporation become vested in the local authorities.

Likewise, the ordinary planning permission regime does not apply to large infrastructure projects. These are enabled by works orders issued by the Secretary of State, upon which planning permission is deemed to be granted. Projects of national importance must be approved by Parliament. Works orders are published and subject to publicity requirements, including the making and considering of representations and public inquiries. The applicable legislation is sections 76A and 76B TCPA, as introduced by section 44 PCPA.
I.6.3. The degree of detail in the plan as a tool for effective development control. Exceptions from universal control regime

A planning document may be an effective tool for control over development, including built development, if it is precise and detailed. First of all, it must be based on or refer to a sufficiently precise map that shows individual lots. Secondly, it must contain sufficiently detailed recommendations in relation to the allowed developments so as to facilitate assessment of new project proposals (in the English system, more detail to the plan is added in supplementary documents, which are not formally part of the plan itself).

Rather than for the whole of the local territory, such specific plans are usually prepared for those parts where the local authority expects, permits or wants, to initiate new development or intensify land use. In the German system, these are separate documents (built development plans), while in the English system they have the status of self-contained parts of the plan itself, which relate to specific parts of the district area.

Special development controls may also be negative in nature, i.e., they may protect a certain area from built development or from a change in its environmental or urban character. Such solutions are admitted in both systems under review.

In both systems weaker controls may be in place in areas where built developments already exist. For Germany, this is a building permit without a plan. In England, there is a general legal permission to conduct certain building works, such as repair or improvements that do not materially alter the appearance of the facade (but such works may require a building approval, which in England is something different from the planning permission). The scope of such generally permitted works may be extended by decision of the local authorities.
CHAPTER II

THE MAKING AND APPLICATION OF THE LAW GOVERNING LAND USE AND DEVELOPMENT IN POLAND, AT LOCAL LEVEL

II.1. SPATIAL PLANNING AND DEVELOPMENT LAW

The Polish land use and development system apparently strives to combine the flexibility of the English system with the certainty of the German system. By analogy to the English system, inhabitants are allowed to apply for issuance of development requirements, while the system obliges public authorities to prepare planning documents that govern land use and development processes. By analogy to the German system, municipalities have the discretionary power to determine land uses and developments in the local plans, which are generally applicable legal acts.

II.1.1. THE SOURCES OF SPATIAL PLANNING AND DEVELOPMENT LAW

The fundamental regulation for spatial planning and land development at the central, regional and local levels is contained in the Land Use and Development Planning Act of 27 March 2003 ("LUDPA") and the secondary legislation issued thereunder. The technical conditions of structures and any related infrastructure as well as admission procedures for erection of specific structures on specific land are governed by the Building Act of 7 July 1994. The imposition and collection of fees and assessments related to the development of urban infrastructure by public authorities and the issues of property subdivision are regulated in the Real Estate Management Act of 21 August 1997.

II.1.2. THE ORGANISATION OF SPATIAL PLANNING AND LAND DEVELOPMENT

The Land Use and Development Planning Act of 2003 allocates spatial planning and land development powers and responsibilities between the central government and the local governments at the level of province (województwo) and municipality (gmina).

The minister competent for regional development matters is responsible for the preparation of a national spatial development policy that determines the ramifications, directions and objectives of the country’s sustainable development as well as the actions necessary to achieve such development (art. 47.2 of the Land Use and Development Planning Act).
The policy sets out, among other things, the basic elements of the settlement distribution network, with separate focus on metropolitan areas (art. 47.2.1 LUDPA). The policy is in large part an information document; however, it partially provides the basis for formulating programs governing the implementation of public interest projects of national importance; in which case, it is binding on public administration authorities (art. 47.3 LUDPA).

The provincial government is responsible for preparing the provincial land use and development plan, including the metropolitan area plan (art. 39.1 and 39.6 LUDPA).

In order to formulate their spatial policies, municipal councils are required to adopt framework studies that set out the ramifications and directions of spatial development (framework studies) for the entire municipal area (art. 9.2-3, art. 12 LUDPA). Framework studies bind the municipal authorities in the preparation of local land use and development plans (art. 9.4 LUDPA). A framework study is not an act of local law (art. 9.5 LUDPA), but rather an internal regulation of the municipality. Failure to adopt a study is not only a breach of the duty arising under art. 87.4 LUDPA, but it also prevents adoption of local land use and development plans (local plans) in the municipality concerned.

Local plans are prepared to determine land uses, including land designated for public interest projects, and to determine the land use and development resources (art. 14.1 LUDPA). A local plan is an act of local law (art. 14.8 LUDPA) and is binding on both public authorities and private parties engaged in development processes in the plan area.

According to 20.1 LUDPA, a local plan is to be adopted by the municipal council after its compliance with the framework study is ascertained. While adopting the plan, the council must provide for a procedure to consider representations on the draft plan, how to implement the planned technical infrastructure projects that are at the municipality’s own responsibility, and how to finance these projects in accordance with public finance law.

Where no local plan exists, public interest projects are sited on the authority of project siting decisions (art. 50.1 LUDPA). These decisions are issued on application by the investor (art. 52.1 LUDPA). A public interest project may not be refused to be sited if it complies with other laws (art. 56 LUDPA). Under art. 2.5 LUDPA, a public interest project is any action of local (municipal) or supra-local (county, provincial or national) impact that is designed to achieve any of the purposes set out in art. 6 of the Real Estate Management Act; being actions aimed at developing broadly understood public infrastructure, whether technical (water supply, sewage disposal, public roads, but also air traffic control infrastructure, etc.) or social (schools, community assistance centres, and hospitals, etc.), and infrastructure that protects against harmful environmental impacts.
Where there is no local plan, any change in land use involving the erection of a structure, the carrying out of any other building works, or any change of use of the whole or part of any structure, requires a development decision (art. 59.1 LUDPA), and art. 61.1 LUDPA sets out the following requirements for such decision to be issued:

1) at least one adjacent plot that is accessible from the same public road must be developed in such a way as to enable requirements to be laid down for the new development so as to continue the functions, parameters, features and indicators governing built development and land use, including the size and architectural form of buildings, the setback lines and the intensity of land use;

2) the land must have access to a public road;

3) the existing or projected land infrastructure must be sufficient for the purposes of the project concerned.

Under art. 61.5 LUDPA, the requirement of sufficient existing or projected infrastructure, as set out in art. 61.3, is deemed to be met if development of such infrastructure is ensured in an agreement between the relevant unit and the investor.

According to §3 of the regulation on the determination of requirements relating to new developments and land uses in areas where no local plan exists, in order to lay down requirements for a new development, the competent authority must designate a survey area around the building lot concerned and conduct a survey of functions and features of developments in terms of the requirements set out in art. 61.1-5 LUDPA. The boundaries of such survey areas must be marked on a copy of the base map (plat) and must be at a distance of at least 50 metres.

The power to issue public interest project siting decisions and development decisions is vested in the municipal executive (wójt for rural municipalities, burmistrz/prezydent for towns and cities) or, in the case of closed areas, in the provincial governor (art. 51.1 and art. 60.1 LUDPA).

The local plan or the relevant development decision binds the county authority in connection with its issuance of a building permit.

II.1.3. The principles of spatial planning and land development

In contrast to the German statutes (the Spatial Order Act or the Building Code), LUDPA 2003 does not set out any land use or development principles that would require public authorities to engage in any specific spatial activities. At art. 1.2, LUDPA prescribes that spatial planning and land development must take account of a number of requirements, values, resources and needs (such as public interest, defence considerations, and health protection). A dispute exists as to the legal nature of this provision: whether it is of itself
substantive law containing vague terms, or perhaps is a reference provision (przepis odsyłający).

It is increasingly argued that this provision directly binds the authorities in their spatial functions. It does contain vague terms, but the administrative court can review how the terms are interpreted by administrative authorities in specific cases and can also substitute its own judgement for that of the administrative authority; however, the provision does not in itself enable the siting of any public interest project or the issuance of any development decision and may not be relied on for refusal to approve (uzgodnić) a draft local plan 34.

The approvals mechanism plays a key role in Polish land use and development law. Approvals have in fact become a tool to serve to implement governmental and provincial policies in municipalities. According to art. 11.6-7 LUDPA, the municipal executive authority responsible for preparing the draft framework study must seek approval for the draft with the local government of the province in terms of its compliance with provincial land use and the development plan, and with the provincial governor in terms of its compliance with government programs formulated under the national spatial development policy. There are, however, more authorities whose approval must be sought in the local planning process, including for example, the provincial monument conservation authority, the public roads authority, and certain military authorities, etc. The law does not specify any principles, values, resources, conditions or requirements that are to be attained or protected; limiting itself to stating rather vaguely that the approvals mechanism should reflect the competencies of the authorities concerned and should appropriately follow the procedure laid down in the Administrative Procedure Code.

II.2. The right of property vs. land use and development

The statutory scope of the protection of property rights, the responsibilities and powers of public authorities in the field of land use and development, as well as the interpretation of the Constitution by administrative courts and the Constitutional Court are in principle similar to those in Germany and England; however, whereas English or German administrative law in the area of land use and development has been enacted in line with the prevailing theories on the right of property, the regulation contained in the Polish LUDPA is not consistent in that regard.

II.2.1. Protection of property rights in Poland

The Polish Constitution expressly permits restrictions on property rights for the purpose of attaining socially important goals 35. Property rights are laid down in general terms in three articles of the Polish Constitution: art. 20,
which lays down private property as a foundation of the social market economy; art. 21, which protects ownership and allows expropriation only for public purposes and for just consideration, and art. 64, which stipulates that ownership may be restricted only by statute and only to the extent that such law does not defeat the essence of the property right.

Also, art. 31.3 of the Constitution reads as follows: “Any restrictions on enjoyment of constitutional rights or freedoms may be imposed only in statutory law and only when they are necessary in a democratic country for its safety or public order, for the protection of the environment, health or public morality, or of freedoms or the rights of others. No such restrictions may breach the essence of any rights or freedoms.” This article provides for cases where a property right may be statutorily restricted. In this sense, there is a strict relationship between art. 64.3 and art. 31.3 of the Constitution, as elucidated in Constitutional Court decisions, for example in its judgement of 12 January 1999: “the fact that restrictions of ownership have a separate regulation in art. 64.3 of the Constitution, which specifies when such restrictions are allowed, does not mean that the property right is not governed by the general principle expressed in art. 31.3 of the Constitution [...] In terms of property rights, it is precisely art. 31.3 that should play a fundamental role, while art. 64.3 should be treated as nothing more than a constitutional acknowledgement that the right may be restricted.”

The Constitution does not define a property right. It only provides that ownership, which is a category of proprietary right, should be approached from the perspective of a social market economy. The latter term comes directly from the German theory (soziale Marktwirtschaft), where it refers to art. 14.2 of the German Constitution. The state’s discretion, as laid down in the Constitution and other laws, to intervene and restrict the way ownership is exercised, is also allowed in the social theory of the Church. In the teachings of the Church, this discretion arises with respect to private property (which is a natural right) from a distinction between the power to manage and dispose of property (potestas procurandi et disponendi) on the one hand, and the right to use it (ius utendi) on the other. In the former sense, property can be enjoyed individually to the exclusion of others, while in the latter sense (the using) it is a social function, which, therefore, loses its individualistic nature. The owner must ensure that his property is used for the common benefit (usus communis); whereas, the legislators may determine “upon consideration of the true requirements of the common good, what is permitted and what is not permitted to owners in the use of their property” (Quadragesimo anno Encyclical).

The social teaching of the Church has been reflected in German law, including both art. 14 of the German Constitution, and statutory law such as the Building Code. It is also reflected in the case law of the Polish Constitutional Court, which held in its judgement of 20 July 2004 that “… [the court] has emphasized on a number of occasions that if ownership were taken to
be absolute, this would lead in many cases to a violation of the rights of others. Ownership is not an ‘infinite right’ (ius infinitum), i.e., it is not an absolute value subject to no restrictions [...] Statutory law, which imposes restrictions on ownership, while being an indispensable element in the legal order, should strike a proper balance between the interests of owners and the public interest.37

II.2.2. The right to develop vs. the right of property

Much as in German or English law, while the right to develop is considered part of the property right38, it is also seen as an expression of the entitlement to use property to the extent permitted by statutory law and the rules of equity (zasady współżycia społecznego), entitlement to which may be restricted as constitutional law allows. Despite the rather categorical way in which art. 31.3 and art. 64.3 prescribe what kind of law may impose such restrictions (“in statutory law”, “by statutory law” - these terms do not necessarily have to mean precisely the same), there are no doubts that any restriction capable of being imposed in a local land use and development plan (or, generally, by local law) is fully permissible under the Constitution.

An issue of some relevance in this context is the general tendency, as noted by jurists, to revise the principle of exclusivity of statutory law. The Constitutional Court made it clear that “the new Constitution departed from the earlier understanding of the principle of exclusivity of statutory law, which was taken to mean that certain matters have to be made into law only by act of parliament”, because since 1997 no sub-statutory law can be made in our system of generally applicable laws that would not be directly grounded in a statute and would not be made to give effect to it in accordance with art. 92 of the Constitution. In effect, the only problem that remains is the degree of detail (depth) of statutory law versus what matters may be left to secondary legislation39.

Local law is in the nature of special secondary legislation. It is noted (see e.g. the Supreme Administrative Court’s judgement of 6 October 1999) that a local land use and development plan belongs to a particular category of legal acts known as acts containing plan rules. Plan rules set out the objectives to be attained, without specifying the means to be used for attaining those objectives40. In the statement of grounds for its 3 November 1999 judgement, the Supreme Administrative Court expressly stated that the plan “does not determine anything in matters of land ownership, but, through its regulation, merely affects how the property right is exercised”41.

In Poland, as in Germany and in England, the legal system protects owners and their right to develop on an “as-is” basis. Owner intentions are not legally protected, such as when formerly agricultural land is “de-designated” as such. For supporting case law, see for example the Supreme Administrative Court’s
judgement of 6 December 1999, in which it stated that it was fully permissible to make a provision in the land use and development plan that land belonging to a private owner be designated as reserve land for educational purposes, even if such provision does not change the existing designated use of the land but merely shows its intended future use; and the owner cannot successfully demand that such intended use be changed to a use for unrestricted building purposes.

In both the German and the English land use and development systems, property restrictions involving built developments are accompanied by a restriction on the right to demand determination of land development requirements. On the other hand, LUDPA 2003 repeats art. 3 of its previous enactment (the Land Use and Development Act 1994) and introduces the presumption that such a right does exist (art. 6.2 LUDPA). The practical application of this provision generates inconsistencies with the line of case law of administrative courts and the Constitutional Court (see above) concerning the interpretation of the LUDPA. It also generates a belief that “where there is no plan, issue a development decision.” Under the 1994 enactment, some authors expressly argued that the wording used in art. 3, which is basically repeated in art. 6 LUDPA, actually abolishes public dominion over real estate.

Some authors argue that the rule in art. 6.2 LUDPA does not create a new legal right. It is also, however, put forward that there is a right to develop if it does not violate legally protected third-party interests, and the determination of requirements pertaining to protection of third-party interests is a necessary part of any development decision. This argument is founded on the idea that the provisions of art. 6.2 LUDPA should not be construed “so as to conclude that it leads to an affirmative definition of the way in which the property right is to be exercised, because this would be contrary to both the essence of the right and the constitutional order described above.” The argument gives rise to a presumed right to develop. On the other hand, it facilitates a loose and broad interpretation of the development decisions regime, thus creating the illusion that there is a right to have the development requirements determined in accordance with one’s application, unless statutory law prescribes otherwise.

II.3. Municipal planning jurisdiction vs. spatial development and land use

Planning jurisdiction means the right in the municipality to provide on its own for uses and development of any land located within its municipal area. This theoretically defined planning jurisdiction is statutorily enabled in the law setting out municipal powers and responsibilities. The municipality may adopt legal acts and planning documents that enable it to perform its responsibilities to serve local development and to intervene at its discretion in the exercise of the property right in relation to real estate. On the other hand, the municipality
has numerous statutory duties, including primarily the duty to develop land infrastructure to serve the planned developments and land uses.

The planning process ought to protect the public rights of the local inhabitants, and in particular their legal interests, including the right to be involved in the process. In addition, government administration as well as local and regional authorities have a statutorily protected right to carry out public tasks in municipal areas.

The LUDPA 2003, has, however, introduced material restrictions on the planning jurisdiction, taken to mean the freedom to operate planning documents (framework study) and legal acts (local plans). Preparing the framework study is a duty in Poland (but preparing land use plan in Germany is not), and there are areas for which statutory law requires the preparation of local plans (in Germany, built development plans are not statutorily required to be made)\(^47\). As in Germany, English law does not have a statutorily designation of categories of land for which planning permission must be granted.

The criticism of the spatial planning system in Poland focuses on the planning jurisdiction of municipalities and the need to have this limited. One official and important reason for both enacting the current LUDPA and drafting the 2004 Bill on Land Use and Development in Municipalities, which did not come into force due to, *inter alia*, vehement protests on the part of the local governments, was the need to increase the supply of plan areas in municipalities. Work is in progress at the Construction Ministry to amend the current LUDPA, during which it is argued along the same lines that an insufficient number of local plans is a major obstacle to municipal development, including especially housing development\(^48\).

II.3.1. Framework studies and development efforts of municipalities

The requirement to make framework studies was enacted in the 1994 Act. The LUDPA 2003 expanded the list of actions that must be taken into consideration during study preparation. The Minister of Infrastructure’s regulation of 28 April 2004, on the scope of the draft framework studies that set out the ramifications and directions of the spatial development of municipalities\(^49\), issued under art. 10.4 LUDPA, prescribes uniform national requirements for study preparation, including the planning matter, the map scales, the use of designations, the naming as well as the standards and methods of documenting planning work. Following these changes, the framework studies adopted before enactment of the LUDPA had to be revised even though they remained in force in accordance with art. 87.2 LUDPA.

A review of current framework studies, which focused on spatial policies of the municipalities, including especially their housing policies, shows significant derogations from the standards underlying German land use plans and English
local plans. According to the German and English solutions, local governments must establish a stock of land available for housing development and assess certain investment efforts needed to prime such land for the purpose.

In Poland, there is no operational legal act or national policy document that would provide for orderly government support in the settlement policies of the municipalities while setting out clear guidance for policymaking in respect of priming land for housing development, and which would thus affect municipal framework studies.

Framework studies adopted under the 1994 Act and under the LUDPA 2003, do not establish stocks of land for which change of use is projected, especially changes the municipalities expect to make in respect of existing built development. Moreover, framework studies do not provide for infrastructure development milestones (scheduling), and thus do not prioritise land for infrastructure purposes. Finally, they fail to present and justify the required costs and sources of financing in connection with projected land use changes and do not contain reliable project timing estimates.

The scheduling of land use changes in accordance with the available public and private funding is standard procedure in German land use plans and was a permanent feature of English structure plans, now local plans, especially of the operating parts of the plans, i.e., area action plans.

When adopting framework studies, town councils make quite discretionary choices in respect of land use changes without caring much about fulfilling their promises. For example, the framework study for Wrocław provides that “all city land may be gradually designated for non-agricultural and non-forest uses.” True, this should be done “subject to preservation of the existing trees and other greenery”, but the plan further reads that “it is expected that local plans will be prepared for the areas containing all agricultural and forest land within the city, as a result of which, the use designation of such land may be changed.” The framework study, however, fails to list any economic or financial consequences of such an undertaking, at least those relating to required municipal spending on priming the land for development or to the projected number of new single-family or multi-family developments to be erected on such land. By the same token, no decisions have been made as to which of these areas will be first primed for construction and supplied with the appropriate infrastructure.

Interesting conclusions on spatial policy may be drawn by comparing the uses of land, whether agricultural or settlement areas (housing developments, accompanying green areas, or land for transportation infrastructure purposes) in Polish, German and English metropolitan cities. The cities in all the three countries have similar population densities, although there are exceptions: the Inner London area, whose population density is far above that of any other English, German or Polish city, and several cities with extremely
low population densities due to having large water reservoirs, forests or the like within city limits (Bremen, Leeds, Sheffield and Szczecin).

Table 1. Settlement areas vs. agricultural areas in selected German cities

<table>
<thead>
<tr>
<th>City</th>
<th>Number of inhabitants (’000)</th>
<th>City area (km²)</th>
<th>No. of inhabitants per km²</th>
<th>Settlement and transportation areas in km² (as % of total city area)</th>
<th>Agricultural areas in km² (as % of total city area)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Berlin</td>
<td>3,387.8</td>
<td>891.8</td>
<td>3 799</td>
<td>619.2 (69.4%)</td>
<td>43.9 (4.9%)</td>
</tr>
<tr>
<td>Bremen</td>
<td>545.9</td>
<td>404.3</td>
<td>1 350</td>
<td>228.3 (56.5%)</td>
<td>115.6 (28.6%)</td>
</tr>
<tr>
<td>Frankfurt/M</td>
<td>646.9</td>
<td>248.3</td>
<td>2 605</td>
<td>138.0 (55.6%)</td>
<td>63.7 (25.7%)</td>
</tr>
<tr>
<td>Hamburg</td>
<td>1,734.8</td>
<td>755.2</td>
<td>2 297</td>
<td>142.2 (58.6%)</td>
<td>191.9 (25.4%)</td>
</tr>
<tr>
<td>Hannover</td>
<td>515.8</td>
<td>204.0</td>
<td>2 528</td>
<td>136.6 (69%)</td>
<td>29.5 (14.5%)</td>
</tr>
<tr>
<td>Cologne</td>
<td>969.7</td>
<td>405.2</td>
<td>2 393</td>
<td>245.0 (60.5%)</td>
<td>74.9 (18.5%)</td>
</tr>
<tr>
<td>Stuttgart</td>
<td>590.7</td>
<td>207.4</td>
<td>2 848</td>
<td>104.1 (50.2%)</td>
<td>49.8 (24%)</td>
</tr>
</tbody>
</table>

Based on data from the cities’ statistics offices. Note: settlement areas include built developments, sports facilities, parks and recreation facilities (2006).

The data for English cities are not fully comparable because English statistics for administrative purposes combine agricultural land uses with other green areas (greenspace).

Table 2. Use of land in English metropolitan cities in 2005 as a percentage of the total area of the local jurisdiction, according to lot area

<table>
<thead>
<tr>
<th>City</th>
<th>Number of inhabitants 2006</th>
<th>City area (km²)</th>
<th>No. of inhabitants per km²</th>
<th>Settlement and transportation areas in km² (as % of total city area)</th>
<th>Greenspace (as % of total city area)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Birmingham</td>
<td>1 001 200</td>
<td>267.9</td>
<td>3 737</td>
<td>153.4 (57.3%)</td>
<td>91.7 (34.2%)</td>
</tr>
<tr>
<td>Inner London</td>
<td>2 985 700</td>
<td>328.5</td>
<td>9 088</td>
<td>207.9 (63.3%)</td>
<td>71.0 (21.6%)</td>
</tr>
<tr>
<td>Leeds</td>
<td>723 100</td>
<td>552.3</td>
<td>1 309</td>
<td>131.5 (22.8%)</td>
<td>392.8 (71.1%)</td>
</tr>
<tr>
<td>Liverpool</td>
<td>447 500</td>
<td>161.6</td>
<td>2 769</td>
<td>62.4 (38.8%)</td>
<td>37.1 (23.0%)</td>
</tr>
<tr>
<td>Manchester</td>
<td>441 200</td>
<td>115.6</td>
<td>3 816</td>
<td>59.7 (51.6%)</td>
<td>40.6 (35.1%)</td>
</tr>
<tr>
<td>Newcastle</td>
<td>276 400</td>
<td>115.2</td>
<td>2 400</td>
<td>39.6 (34.3%)</td>
<td>67.1 (58.3%)</td>
</tr>
<tr>
<td>Sheffield</td>
<td>520 700</td>
<td>371.3</td>
<td>1 403</td>
<td>82.1 (24.1%)</td>
<td>283.7 (71.0%)</td>
</tr>
</tbody>
</table>

In Polish cities, land use data are usually based on figures from the land registries (rejestr gruntów) rather than on actual uses, and, therefore, are of limited comparability with German and English data.

**Table 3 Settlement areas in selected Polish cities**

<table>
<thead>
<tr>
<th>City</th>
<th>Number of inhabitants 2006</th>
<th>City area (km²)</th>
<th>No. of inhabitants per km²</th>
<th>Settlement and transportation areas (as % of total city area)</th>
<th>Agricultural areas (as % of total city area)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Białystok</td>
<td>291,823</td>
<td>94</td>
<td>3,105</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Bydgoszcz</td>
<td>366,074</td>
<td>174</td>
<td>2,104</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Gdańsk</td>
<td>458,053</td>
<td>262</td>
<td>1,748</td>
<td>88.4 (34%)</td>
<td>97.8 (37%)</td>
</tr>
<tr>
<td>Katowice</td>
<td>317,220</td>
<td>164</td>
<td>1,934</td>
<td>(33%)</td>
<td>(55%)</td>
</tr>
<tr>
<td>Kraków</td>
<td>756,629</td>
<td>327</td>
<td>2,314</td>
<td>119.4 (36.5%)</td>
<td>174.9 (53.5%)</td>
</tr>
<tr>
<td>Lublin</td>
<td>354,967</td>
<td>148</td>
<td>2,398</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Łódź</td>
<td>767,629</td>
<td>294</td>
<td>2,611</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Poznań</td>
<td>567,882</td>
<td>261</td>
<td>2,176</td>
<td>105.9 (40.1%)</td>
<td>68.8 (26.2%)</td>
</tr>
<tr>
<td>Rzeszów*</td>
<td>158,539</td>
<td>54</td>
<td>2,936</td>
<td>22.3 (41.5%)</td>
<td>6.2 ha</td>
</tr>
<tr>
<td>Szczecin</td>
<td>411,119</td>
<td>301</td>
<td>1,366</td>
<td>88.5 (29.28%)</td>
<td>68.05 km</td>
</tr>
<tr>
<td>Warsaw</td>
<td>1,697,596</td>
<td>517</td>
<td>3,284</td>
<td>263.7 (51%)</td>
<td>51.7 (10%)</td>
</tr>
<tr>
<td>Wrocław</td>
<td>635,932</td>
<td>293</td>
<td>2,170</td>
<td>113.6 (38.8%)</td>
<td>132.0 (45%)</td>
</tr>
</tbody>
</table>

Data from the cities (2005-2006).

The data demonstrate that the percentage of agricultural areas in the total city area is larger in Polish cities than in German ones. The percentage is around 25% in Germany, except for Berlin, while in Poland it ranges from 22.5% in Rzeszów to 53.5% in Kraków, again excluding Warsaw. The Polish figures are comparable with English data (from 21.6% in London to 71.1% in Leeds).

When we compare settlement areas, we note that they are much smaller in Polish cities than in German ones and range from 34% (Gdańsk) to 51% (Warsaw) of total city area; whereas, in Germany the percentages vary from 50.2% (Stuttgart) to 69.2% (Berlin). The English city data vary widely in this regard and do not lend themselves to easy comparisons: from 22.8% in Leeds to 63.3% in Inner London.
Such data apparently could testify to a greater density of built developments in Polish cities than in German or English ones, but this conclusion is contrary to common knowledge.

The percentage of agricultural land in Polish cities does not materially differ from the figure for cities in Germany or England, where such land is a permanent feature of the cityscape and a reserve stock for urban growth. Urban agricultural areas are, however, legally protected in both Germany and England and may be developed only on submission of specific economic studies that justify their being acquired for settlement purposes. In this context, we find it surprising that the Polish construction minister should propose (31 January 2007) amending the LUDPA so as to ‘de-designate’ agricultural land within the city limits. If this proposal is implemented, built development will become even more scattered, without the accompanying land infrastructure in place, while the infrastructure expenditure of municipalities and municipal service companies will become increasingly dispersed.

The Polish land use statistics differ hugely from the figures for Germany and England. The difference is not only in data gathering methodology for data that allow assessment of land use and development intensity nationwide on the same conditions, it is also useful for other purposes. They have been designed to provide information to public authorities for their decision-making purposes in connection with land development (protection) not just at the level of a municipality, but above all on the regional and national scale. No such data are available for Polish authorities.

Those weaknesses in the Polish statistics can be seen in numerous city documents. The framework study for Kraków reads that the land use and development data based on the land register, as well as the related figures “do not reflect the actual development status.” The 2005 City Report for Gdańsk reads that “the stock of developed land and land designated for development has increased 61% in 2005 over the previous year”\(^6\), which would mean that – in German terms – 12.6 km\(^2\) of land was furnished with infrastructure and primed for development.

Please also note the issue of increasing settlement areas. Research conducted in the 1990s in large German cities shows that an increase in settlement areas in 1989-1997 was 3.6% on average and was related to a similar population growth (3.1%)\(^6\). The growth of urban areas in England is not high either. The Department for the Environment projected in 2003\(^6\) that the urban growth in England between 1991-2015 was expected to be slight and range from 1.3% to 3.6% in relation to total area and from 2.6% to 9.9% in relation to urban areas.
Unlike the large German cities, which in 1990s reported a slight 3% increase in their populations, most of the Polish cities under review have since 1990 been losing or, with respect to old industrial cities (Katowice and Łódź), rapidly losing their populations. Slight increases have been reported for Lublin, Kraków and Rzeszów; whereas, Białystok and Warsaw saw quite significant urban growth. According to demographic projections of the Polish Central Office of Statistics, the population of Polish cities will experience a marked decline until 2030.

### Table 4. Population in 1989-2002 and projections for 2030

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
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<td>291 823</td>
<td>+23 738</td>
<td>264 617</td>
<td>–27 206</td>
</tr>
<tr>
<td>Bydgoszcz</td>
<td>380 385</td>
<td>366 074</td>
<td>–14 311</td>
<td>289 716</td>
<td>–76 358</td>
</tr>
<tr>
<td>Gdańsk</td>
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<td>458 053</td>
<td>–6 596</td>
<td>362 385</td>
<td>–95 668</td>
</tr>
<tr>
<td>Katowice</td>
<td>367 041</td>
<td>317 220</td>
<td>–49 821</td>
<td>229 298</td>
<td>–87 922</td>
</tr>
<tr>
<td>Kraków</td>
<td>748 356</td>
<td>756 629</td>
<td>+8 273</td>
<td>651 188</td>
<td>–105 441</td>
</tr>
<tr>
<td>Lublin</td>
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<td>297 061</td>
<td>–57 906</td>
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<tr>
<td>Łódź</td>
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<td>767 628</td>
<td>–84 062</td>
<td>605 104</td>
<td>–162 524</td>
</tr>
<tr>
<td>Poznań</td>
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<td>567 882</td>
<td>–20 836</td>
<td>485 109</td>
<td>–82 773</td>
</tr>
<tr>
<td>Rzeszów</td>
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<td>158 539</td>
<td>+7 785</td>
<td>134 365</td>
<td>–24 174</td>
</tr>
<tr>
<td>Szczecin</td>
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<td>335 590</td>
<td>–75 529</td>
</tr>
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<td>Warsaw</td>
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<td>+42 533</td>
<td>1 532 735</td>
<td>–164 861</td>
</tr>
<tr>
<td>Wrocław</td>
<td>642 334</td>
<td>639 150</td>
<td>–3 184</td>
<td>547 268</td>
<td>–91 882</td>
</tr>
</tbody>
</table>

### II.3.2. Local land use and development plans, and municipal development

One of the most important points for which Polish city authorities are publicly criticized is the lack of updated local plans. This prevents housing development, thereby directly affecting the supply and prices of housing in large cities. According to the press, the lack of local plans is a major factor that hinders building development in Poland. The small extent of plan areas in the largest Polish cities is also criticized by the government.

City data indicate that, as at the end of 2006, plan coverage in territorial terms ranged from 6.2% in Rzeszów to 53.7% in Gdańsk. In line with city council resolutions, local plans are being prepared for further areas that make up from 10% (Gdańsk) to 56.2% (Lublin) of total city area. It is expected that, once these further plans are adopted, plan coverage of urban areas will be between 25.7% (Łódź) and 71.9% (Szczecin). Lublin is a special and rather controversial case, because Lublin city authorities decided to plan the
entire city area. This in English or German standards would mean that the city undertook to provide appropriate land infrastructure for the whole of its area; an effort, the cost of which, undoubtedly exceeds the city’s financial capacity.

### Table 5. Plan Coverage of City Areas (November 2006)

<table>
<thead>
<tr>
<th>City</th>
<th>% of city area under current</th>
<th>% of city area under projected</th>
<th>% of city area under current and projected plans</th>
</tr>
</thead>
<tbody>
<tr>
<td>Białystok</td>
<td>16,2</td>
<td>30,9</td>
<td>47,1</td>
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<tr>
<td>Bydgoszcz</td>
<td>18,0</td>
<td>12,2</td>
<td>30,2</td>
</tr>
<tr>
<td>Gdańsk</td>
<td>53,7</td>
<td>10,0</td>
<td>63,7</td>
</tr>
<tr>
<td>Katowice</td>
<td>11,7</td>
<td>24,4</td>
<td>36,1</td>
</tr>
<tr>
<td>Kraków</td>
<td>10,7</td>
<td>18,7</td>
<td>29,4</td>
</tr>
<tr>
<td>Lublin</td>
<td>43,8</td>
<td>56,2</td>
<td>100,0</td>
</tr>
<tr>
<td>Łódź</td>
<td>15,2</td>
<td>10,5</td>
<td>25,7</td>
</tr>
<tr>
<td>Poznań</td>
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<td>30,7</td>
<td>44,0</td>
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<tr>
<td>Rzeszów</td>
<td>6,2</td>
<td>27,1</td>
<td>33,3</td>
</tr>
<tr>
<td>Szczecin</td>
<td>16,9</td>
<td>55,0</td>
<td>71,9</td>
</tr>
<tr>
<td>Warsaw</td>
<td>15,9</td>
<td>27,6</td>
<td>43,4</td>
</tr>
<tr>
<td>Wrocław</td>
<td>28,8</td>
<td>23,8</td>
<td>52,6</td>
</tr>
<tr>
<td>TOTAL</td>
<td>20,9</td>
<td>27,2</td>
<td>48,1</td>
</tr>
</tbody>
</table>


There is no correlation between the number of plans and the plan area. In Rzeszów, which has the smallest plan coverage (all plans cover only 3.3 km²), there were 53 plans in 2006; whereas Wrocław, which has a plan coverage of 28.8% (84.3 km²), had 126 local plans in 2006. The average plan area in Rzeszów is 0.06 km², which is ten times smaller than in Wrocław, where the figure is 0.6 km².

Is the plan coverage of urban areas really a major barrier to city development in general and to housing development in particular? The available statistics, though not sufficiently complete and precise, seem to show that it is not.

A comparison of the current and projected plan areas for cities containing settlement areas and rural areas allows us to easily note that the size of the plan area in cities such as Wrocław, Warsaw, Poznań and Gdańsk will be the same as or even larger than the areas declared as settlement. Does this mean that the cities have prepared (or intend to prepare) as much land for housing development as will meet social needs and will at the same time be viable to prepare in the light of invested capital?
This question is extremely hard to answer as basic data are missing. No projections, even theoretical ones, have been made of the areas designated under framework studies and under plans for single-family and multi-family developments, and no studies have been prepared in support of any such projections to determine available public sector capacities to develop the required social and technical infrastructure within specific timeframes. There are no projections concerning the amount of capital that is interested in single-family and multi-family development or the demand for such development in the largest Polish cities.

For example, it is hard to say whether the percentage of plan areas designated for single-family and multi-family development in Warsaw (41%) is sufficient, too much or too little in the light of market demand and supply. It should also be noted that the Warsaw real estate market is much larger than the city of Warsaw itself, as it comprises the entire metropolitan area; however, no demand and supply data exist in respect of land primed for single-family and multi-family development in Polish metropolitan areas.

II.3.3. Development decisions and municipal development

Development decisions significantly limit the municipal planning jurisdiction that is exercised through framework studies and local plans. Development decisions are treated as plan substitutes.

Development decisions and municipal planning jurisdiction

By law, that part of a development decision that lays down development or use requirements for the plot concerned does not have to conform to the local framework study. Development decisions are issued by the municipal executive authority (wójt or mayor/president), a power that in large cities is delegated to city hall officials, after obtaining the approval of certain legally defined institutions. The decisions are not reviewed on their merits, whether by local councils or other review authorities. If such a decision is not appealed to the local appeals board (samorządowe kolegium odwoławcze), it becomes binding and is a regulation of sorts, which is followed in issuing the building permit.

Development decisions are issued for small areas, including areas for consolidation or sub-division; the maps underlying the decisions are not more precise than in local plans (the applicable scale is 1:1000). The range of markings applied on maps to designate land uses, built development indicators or nature conservation areas is as limited in development decisions as it is in local plans.
According to the regulation on the determination of requirements relating to new developments and land uses in areas where no local plan exists, before a development decision is issued a specific minimum area must be covered by a survey for the purpose of determining, among other things, if there are adjacent developed plots, access to a public road and existing land infrastructure. A development decision, therefore, may in practice also be issued for a plot that has no adjacent developed plots, no access to a public road and no connection to any land infrastructure. Such practice is supported by the prevailing juristic interpretation of the LUDPA in Poland.

As regards siting decisions for public interest projects, the law permits a number of derogations from the general procedure governing the issuance of administrative decisions. The derogations have been enacted to “simplify the issuance and maintenance of such decisions, which is an expression of procedural preferences for relevant public interests as represented by such projects.” For example, there is no duty to notify social organisations interested in the process, by reason of their charters, or of a social interest in the siting of the public interest project concerned (art. 53.2 LUDPA).

The development decisions regime versus the legal solutions in Germany and England

Neither Germany nor England has a scheme involving a planning decision that would:
1) be issued without review by the council or government administration authority;
2) not have to conform to the land use regulation;
3) enjoy any specially simplified procedures for the siting of public projects;
4) restrict community involvement;
5) allow for the dispersal of developments.

Even if we chose to look for an analogy in the German procedures applicable to dense development areas (im Zussamenhang bebauten Ortsteile), there are still very clear differences in the related legal mechanisms and procedures:

- projects to be erected in dense development areas require building permits, which are issued upon consent of the municipal councils and are additionally reviewed by higher-level administrative authorities;
- resolutions on qualifying lots for dense development areas (Abrundungssatzung) have the purpose of developing adjoining lots rather than adjacent lots in Polish terms, are adopted by municipal councils and require approval of the review authority, while the development must comply with the Building Use Regulation;
• in scattered development areas, town councils may adopt so-called development resolutions (Entwicklungssatzungen) under §34.4.3 BauGB, but both the resolution procedure and its substantive scope are in fact the same as in built development plans.

Andrzej Jędraszko emphasised the contrast between the effects of the Polish and German solutions: “One of the principal purposes of the [Building] Code is to prevent scattered development. This purpose is served by prohibiting development in areas where no land infrastructure is in place and by the above-discussed mechanisms for designation of land for development – all three of them allow for development only in dense development areas. In such a situation, it is not important whether or not built development plans are in place everywhere. As persons with relevant expertise claim, there are actually large differences between cities (especially the larger ones) and rural or small town areas. In the former, which have extensive and efficient planning services, about 80% of permits (and even more in Stuttgart) are granted under built development plans, while in the latter, about 80% are granted on areas designated as coherent development areas (under mechanism two and three). This is how the principal purpose of the law (prevention of dispersal) is achieved, the benefits of which you can see in Germany with your naked eye.”

The English system of development control is based on the planning permission, which in formal terms is similar to the Polish development decision. Like a development decision, planning permission is granted on the application of the interested party (which not necessarily is the lot owner) and covers a new use for the lot(s), including building development. As in the Polish system, planning permission is typically granted by local government officials, except that in England this process is authorised by the district council (for an average of 89% of all permissions in the fiscal year 2005-2006), while in Poland, no control by the local council is provided for.

The two systems also differ in the fact that planning permission follows up on the plan rather than being granted in its absence. Although not regarded as binding legal acts, English local plans covering entire local jurisdictions have much stronger position in the spatial planning system than the Polish municipal framework studies. Planning permission applications are considered by reference to local plans. The local planning authority may make decisions contrary to the plan in the light of “other material considerations”, but such derogations must have material reasons and are subject to administrative review.

Development decisions and municipal development
In the cities under review, from 707 (Katowice) to 6950 (Warsaw) applications for development decisions are filed and from 174 (Katowice) to 6173
(Warsaw) decisions are issued annually. It was found that in 2004 the waiting time for a decision ranged from two months (Warsaw) to seven months (Warsaw and Kraków). Bydgoszcz declared that decisions to site a public interest projects are issued within 35 days.

<table>
<thead>
<tr>
<th>City</th>
<th>Year</th>
<th>Applications for development decisions</th>
<th>Development decisions issued</th>
<th>Development decisions issued per 1000 inhabitants</th>
<th>Development decisions issued per km² of city</th>
</tr>
</thead>
<tbody>
<tr>
<td>Białystok</td>
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<td>1 385</td>
<td>1 819</td>
<td>6,2</td>
<td>19,3</td>
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<td></td>
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<td>1 278</td>
<td>1 480</td>
<td>5,1</td>
<td>15,7</td>
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<tr>
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<td>2004</td>
<td>1 588</td>
<td>1 074</td>
<td>2,9</td>
<td>6,2</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>1 433</td>
<td>1 006</td>
<td>2,7</td>
<td>5,8</td>
</tr>
<tr>
<td>Gdańsk</td>
<td>2004</td>
<td>1 361</td>
<td>1 182</td>
<td>2,5</td>
<td>4,5</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>1 266</td>
<td>1 104</td>
<td>2,4</td>
<td>4,2</td>
</tr>
<tr>
<td>Katowice</td>
<td>2004</td>
<td>707</td>
<td>174</td>
<td>0,5</td>
<td>1,1</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>973</td>
<td>665</td>
<td>2,1</td>
<td>4,0</td>
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<tr>
<td>Kraków</td>
<td>2004</td>
<td>3 392</td>
<td>2 694</td>
<td>3,6</td>
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<td>3 510</td>
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<td>773</td>
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<td>2 103</td>
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<td>8,1</td>
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<td>6,0</td>
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<td>2 026</td>
<td>4,9</td>
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<tr>
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<td>2 205</td>
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<td>5 823</td>
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<td>6 173</td>
<td>3,6</td>
<td>11,9</td>
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<td>Wrocław</td>
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<td>2 313</td>
<td>1 072</td>
<td>1,7</td>
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<td>2 005</td>
<td>1 487</td>
<td>2,3</td>
<td>5,1</td>
</tr>
</tbody>
</table>


It was extremely difficult to collect information about the proportions between development decisions and public interest project decisions. Some of the cities reported that they do not have such statistics. According to statistics from the Ministry of Infrastructure and Construction, between the
commencement of the LUDPA and end of 2004, 4,000 public interest project
decisions, including only 400 refusals (not including Warsaw), and 202,400
development decisions, including 6,200 refusals (not including Warsaw),
were issued in Poland.

As regards the correlation between the number of development decisions
issued and the city population and plan coverage, please note that the largest
number of development decisions per 1,000 of inhabitants (8.7 in 2004 and
6.0 in 2005) were issued in Rzeszów, where local plans cover only 6.2% of the
city area and plans are in preparation for a further 27.1% of its area. On the
other hand, the examples of Gdańsk (where plan coverage reaches 53.7% of
city area), Lublin (where 43.8% is covered by existing plans and plans are being
prepared for the remaining area), and Warsaw (where coverage is more than
two times smaller (15.9%) show that the figures for decisions issued per inha-
titant are comparable: Gdańsk 2.5 (2005) and 2.4 (2006), Lublin 1.8 (2005)
and 2.2 (2006), Warsaw 2.7 (2005) and 3.7 (2006). The number of decisions
issued in Warsaw, Gdańsk and Lublin is comparable to Wrocław (28.2% plan
coverage), for which it was 1.7 (2005) and 2.3 (2006), as well as to Katowice
(10.7% plan coverage), for which it was 0.5 (2005) and 2.8 (2006).

Accordingly, we can hardly conclude that the differences in the number of
decisions issued are related to the plan coverage in the city. It seems that the
number of decisions issued is proportional to the interest of market players
in carrying out developments in the city, while the development choices
made by private owners (developers) involve other areas than those to which
the local planning policies refer. This is so because a development decision
serves many purposes. It may involve a change of use by permitting new
developments or by permitting changes in the use of existing development.
It may also serve to reveal what the permitted land uses and developments
are. Finally, it is also by decision that public interest projects, including com-
munity infrastructure, are sited.

A comparison of the planned urban areas with development decisions and
actual residential developments seems to support the belief that the spatial
development of Polish cities is governed by randomly decided local plans
or development decisions, rather than by the ordered activities of public
authorities.

In Rzeszów, where plan coverage is relatively small and statistically there
are rather a lot of development decision applications per inhabitant, no
more building permits per inhabitant are issued than in the cities boasting
larger plan coverage: 4.9-5.2 permits per inhabitant in Rzeszów and from
3.3 (Kraków in 2004) to 6.0 (Gdańsk and Poznań) permits per inhabitant
in the other cities. Furthermore, in Rzeszów, there are fewer building permits
than development decisions.
### Table 7. Building Permit Decisions and Applications 2004-2005

<table>
<thead>
<tr>
<th>City</th>
<th>Year</th>
<th>Building permit applications</th>
<th>Building permits issued</th>
<th>Building permits per 1000 inhabitants</th>
<th>Building permits per km² of city area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Białystok</td>
<td>2004</td>
<td>1 808</td>
<td>1 464</td>
<td>5,0</td>
<td>15,6</td>
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<td></td>
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<td>1 804</td>
<td>1 354</td>
<td>4,6</td>
<td>14,4</td>
</tr>
<tr>
<td>Bydgoszcz</td>
<td>2004</td>
<td>2 285</td>
<td>1 813</td>
<td>4,9</td>
<td>10,4</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>2 906</td>
<td>1 865</td>
<td>5,1</td>
<td>10,7</td>
</tr>
<tr>
<td>Gdańsk</td>
<td>2004</td>
<td>2 905</td>
<td>2 765</td>
<td>6,0</td>
<td>10,6</td>
</tr>
<tr>
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<td>2 914</td>
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<td>6,0</td>
<td>10,6</td>
</tr>
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<td>8,6</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>1 771</td>
<td>1 476</td>
<td>4,6</td>
<td>9,0</td>
</tr>
<tr>
<td>Kraków</td>
<td>2004</td>
<td>2 481</td>
<td>2 462</td>
<td>3,3</td>
<td>7,5</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>3 121</td>
<td>2 626</td>
<td>3,5</td>
<td>8,0</td>
</tr>
<tr>
<td>Lublin</td>
<td>2004</td>
<td>2 055</td>
<td>1 666</td>
<td>4,7</td>
<td>11,3</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>1 645</td>
<td>1 609</td>
<td>4,5</td>
<td>10,9</td>
</tr>
<tr>
<td>Łódź</td>
<td>2004</td>
<td>3 869</td>
<td>3 706</td>
<td>5,0</td>
<td>12,6</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>3 781</td>
<td>3 607</td>
<td>4,9</td>
<td>12,3</td>
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<tr>
<td>Poznań</td>
<td>2004</td>
<td>3 778</td>
<td>3 423</td>
<td>6,0</td>
<td>13,1</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>3 950</td>
<td>3 317</td>
<td>5,8</td>
<td>12,7</td>
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<tr>
<td>Rzeszów</td>
<td>2004</td>
<td>928</td>
<td>786</td>
<td>4,9</td>
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<tr>
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<td>2005</td>
<td>830</td>
<td>736</td>
<td>5,2</td>
<td>13,6</td>
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<tr>
<td>Szczecin</td>
<td>2004</td>
<td>2 646</td>
<td>2 347</td>
<td>5,7</td>
<td>7,8</td>
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<tr>
<td></td>
<td>2005</td>
<td>2 607</td>
<td>2 233</td>
<td>5,4</td>
<td>7,4</td>
</tr>
<tr>
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<tr>
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<td>8 525</td>
<td>5,0</td>
<td>16,5</td>
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<tr>
<td>Wrocław</td>
<td>2004</td>
<td>3 577</td>
<td>3 105</td>
<td>4,9</td>
<td>10,1</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>3 456</td>
<td>2 896</td>
<td>4,6</td>
<td>9,9</td>
</tr>
</tbody>
</table>


The situation in cities like Gdańsk, Poznań, Łódź, Katowice, Warsaw and Wrocław, where many (1.5 or even two times) more building permits than development decisions are issued, should be approached from a different perspective. The data merely show that there is a greater construction intensity in those cities than in, for example, Białystok or Rzeszów, and that the decisions involving areas for which local plans exist to some extent reflect social needs.

The data on the correlation among building permits for single-family, multi-family and non-residential buildings corroborate the conclusion that development decisions have primarily informational or even speculative functions or serve the purpose of developing public infrastructure rather than housing.

The cities with a relatively large number of issued development decisions report the lowest percentage of building permits for residential and non-residential buildings. In Warsaw, only 17.4% of all building permits involve residential developments, with 10.7% in Wrocław, 17.9% in Gdańsk, 15.6% in Łódź and 17.4% in Kraków. On the other hand, the cities with a relatively low number of issued development decisions report much larger percentages of residential building permits. For example, the percentage is 29.6% in Rzeszów,
20.5% in Lublin and 35.8% in Białystok. These data support the very likely conclusion that a development decision serves largely speculative functions, as the greatest numbers of such decisions are issued in cities attracting considerable interest of developers and ranking high on the attractiveness scale, in which, however, new housing developments are few and far between, relative to the total number of decisions issued.

### Table 8. Residential and non-residential buildings according to building permits issued in 2004-2005

<table>
<thead>
<tr>
<th>City</th>
<th>Year</th>
<th>Building permits</th>
<th>Single-family buildings</th>
<th>Multi-family buildings</th>
<th>Non-residential buildings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Białystok</td>
<td>2004</td>
<td>464</td>
<td>239</td>
<td>47 082</td>
<td>1278</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>354</td>
<td>297</td>
<td>928</td>
<td>37 964</td>
</tr>
<tr>
<td>Bydgoszcz</td>
<td>2004</td>
<td>1 813</td>
<td>123</td>
<td>15 743</td>
<td>67 086</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>1 865</td>
<td>132</td>
<td>52 533</td>
<td>106 928</td>
</tr>
<tr>
<td>Gdańsk</td>
<td>2004</td>
<td>2 765</td>
<td>372</td>
<td>101</td>
<td>191 574</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>2 775</td>
<td>312</td>
<td>259</td>
<td>208 462</td>
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<tr>
<td>Katowice</td>
<td>2004</td>
<td>1 413</td>
<td>224</td>
<td>17</td>
<td>46 237</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>1 476</td>
<td>176</td>
<td>7</td>
<td>64 213</td>
</tr>
<tr>
<td>Kraków</td>
<td>2004</td>
<td>2 462</td>
<td>211</td>
<td>104</td>
<td>252 218</td>
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<tr>
<td></td>
<td>2005</td>
<td>2 626</td>
<td>267</td>
<td>118</td>
<td>218 606</td>
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<tr>
<td>Lublin</td>
<td>2004</td>
<td>1 666</td>
<td>234</td>
<td>37 539</td>
<td>35 505</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>1 609</td>
<td>218</td>
<td>111</td>
<td>369 230</td>
</tr>
<tr>
<td>Łódź</td>
<td>2004</td>
<td>407</td>
<td>422</td>
<td>47</td>
<td>60 692</td>
</tr>
<tr>
<td></td>
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<td>3 607</td>
<td>374</td>
<td>46</td>
<td>19 696</td>
</tr>
<tr>
<td>Poznań</td>
<td>2004</td>
<td>423</td>
<td>205</td>
<td>58</td>
<td>174 353</td>
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<tr>
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<td>223</td>
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<td>112 834</td>
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<tr>
<td>Rzeszów</td>
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<td>706</td>
<td>422</td>
<td>47</td>
<td>60 692</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>3 607</td>
<td>374</td>
<td>46</td>
<td>19 696</td>
</tr>
<tr>
<td>Szczecin</td>
<td>2004</td>
<td>2 447</td>
<td>338</td>
<td>78</td>
<td>87 042</td>
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<tr>
<td></td>
<td>2005</td>
<td>2 233</td>
<td>273</td>
<td>54</td>
<td>128 060</td>
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<tr>
<td>Warsaw</td>
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<td>942</td>
<td>118</td>
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<td>1 107</td>
<td>220</td>
<td>142 040</td>
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<tr>
<td>Wrocław</td>
<td>2004</td>
<td>3 105</td>
<td>299</td>
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<td>3 448</td>
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<tr>
<td></td>
<td>2005</td>
<td>2 896</td>
<td>235</td>
<td>41</td>
<td>92 304</td>
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</tbody>
</table>

*Źródło: Unia Metropolii Polskich*
or improvements in existing buildings. Only 29.5% (177,000) of the permissions related to new developments. The number of planning permissions granted in English cities is generally much higher than the number of development decisions issued in Polish cities. The only Polish cities where the indicators are similar to the English city average (9.17 decisions per 1000 inhabitants) are Białystok (6.2) and Rzeszów (8.7). By analogy, the data on building permits, though not fully comparable, indicate that the growth of new developments is lower in Polish cities than in English ones.

II.4. No integration between spatial planning and investment planning

At §11, the regulation on the required scope of local plans stipulates that the analysis of projected local plan consequences should contain projections on the impact of the plan on the municipality’s own income and expenditures, including on income from real estate tax and other income from transactions in municipal real estate as well as on fees and damages, as set out in art. 36 LUDPA. The analysis should also project the plan’s impact on expenditures related to technical infrastructure projects that are the municipality’s own responsibility. Finally, it should set out conclusions and recommendations concerning plan proposals in the light of their financial consequences.

In practice, the way municipal councils determine the issues of financing for technical infrastructure in the plan is that they adopt appendices to the plan resolution. Two approaches have evolved in that regard.

In fulfilling the duty under the regulation to ensure that the plan is accompanied by a projection of its financial consequences, most municipalities attach appendices to the draft plan in which they only determine how the land infrastructure will be developed and financed. See below, by way of example, the relevant portion of the local plan for Śródmieście, a part of Dolne Miasto housing area in Gdańsk.

“area card no. 032-KD81, local street Łąkowa – Wróbla, redesign from a street having two roadways and four lanes with sidewalks and a green belt, into a street having one roadway and two lanes with equal rights of way for vehicles, pedestrians and bicycles and with sidewalks, parking places and a green belt with land infrastructure (length of ca. 620 m):
• project financed by the municipality out of its own budget;
• there are opportunities to seek financial support from EU structural funds (for street building and land infrastructure purposes) and co-funding under contract with interested investor, while for water supply, sewage disposal and drainage, funding may be sought from central and regional environmental protection and water management funds (NFOŚiGW and WFOŚiGW).”
On the other hand, in addition to setting how the planned infrastructure will be developed and financed, the local plans adopted by Warsaw City Council also quote the sums required for providing infrastructure for the purpose of developments proposed by the city in the local plan. For examples of these, see below an extract from the local plan for the vicinity of the *Pałac Kultury i Nauki* tower in Warsaw.

The costs of implementing the projects will be financed wholly or partly out of the City’s own budget.

As per the analysis of projected financial consequences of the local plan, the cost of planned technical infrastructure is estimated at PLN 160 million, including about PLN 100 million expected to be incurred by the local government of Warsaw. This includes:

- roadworks: PLN 78.4 million
- water supply network: PLN 1.1 million (MPWiK)
- heat supply network: PLN 6.9 million (SPEC)
- sewage disposal network: PLN 6.6 million (MPWiK)

The development cost for gas and power networks, which is expected to reach about PLN 65 million, may be incurred by the relevant companies.

The projects under the plan may be implemented under various legal and organisational forms, such as by forming entities operating as public-private partnerships in accordance with the Public-Private Partnership Act of 28 July 2005 (*Journal of Laws* of 6 Sep 2005, no. 169, item 1420). The estimated project costs should be provided for in the Multi-Year Investment Programme for the Capital City of Warsaw (WPI) and in any new budget resolutions of the Warsaw City Council.

The current WPI and the WPI proposed for 2005-2009, provide for PLN 12 million for preliminary and preparatory work relating to investment projects and comprehensive implementation of the plan as adopted.

Analyses of the Warsaw local plans do not concern only the amount of funding required for implementing public projects, but they also set out the income from planning fees and real estate tax that the city is expected to obtain on changing land use. See below, portions of the local plan for the Zacisze-Elsnerów residential area in relation to expected project costs and incomes:
The project will generate income for the City budget primarily from two sources: from the planning fee (charged for five years from adoption of the plan) and from increased real estate tax receipts (in connection with change of land use and new function). The projected net proceeds in respect of planning fees are estimated to be around PLN 1.285 million. The estimated total net tax proceeds during ten years are around PLN 1.78 million.

As per the analysis of the projected financial consequences of the local plan, the planned technical infrastructure is expected to cost PLN 127 million.

It needs to be remembered, when comparing Polish legislation with legal standards applicable in Germany, that it is absolutely not permissible in Germany for a municipality to adopt a built development plan setting out infrastructure development obligations and then fail to fulfil these duties. The law strictly stipulates that the land infrastructure should be completed no later than on the date on which the buildings concerned are brought into service. In the event of a default, the municipality may be subject to supervisory measures, including official municipal management. Polish law does not have such provisions.

In Germany, when a municipality adopts a built development plan, it can require its inhabitants to pay assessments to cover up to 90% of the cost of land infrastructure. In England, the planning obligations mechanism makes it possible to shift the cost or even completion of infrastructure required for the new developments onto the investor. Under Polish law, municipalities may impose local assessments (opłata adiacencka) on owners (holders of usufruct) of real estate:
1) in connection with the appreciation of the property value, following the erection of technical infrastructure,
2) in connection with consolidation or subdivision of land, or subdivision of property.

In the case of infrastructure development, the Polish assessment is charged on the increase in the value of the property concerned, up to a maximum of 50% of the increase. As local assessments in Poland are linked to appreciation of property value rather than to actual infrastructure development costs, the municipalities use them in their land development activities only occasionally.
In contrast to German or English law, although the LUDPA does set out a formal requirement of stating financial consequences, it does not provide assurance that the local plan will only be adopted if the municipality is able to complete the public infrastructure under the plan, nor does it offer effective protection to the citizens against any failure on the part of the municipality to provide such infrastructure.

II.§ Municipal planning and community involvement, control and review of municipal planning and co-ordination of planning by other public authorities

II.§.1. Community involvement in the planning process. Striking a balance between public and private interests

The principle of the democratic rule of law (art. 2 of Polish Constitution) is construed with emphasis on the huge role of striking a balance between public and private interests, as the fundamental driver behind any interference with property rights, which is protected constitutionally. “The duty to strike a balance between private and public interests arises from the essence of the democratic rule of law, and, therefore, it exists also in spatial planning, whether or not it has been expressly stated by the lawmakers”69.

After a municipal council adopts a resolution to commence preparation of the framework study (local plan), the resolution is published in the local press, by public notice and in such other way as is customary locally, with a notice of the way, place and time (not less than 21 days from publication) for making submissions in relation to the framework study (art. 11.1-2 and art. 17.1-2 LUDPA). A draft study or plan must be made available to the public; during which time, it is subject to a public discussion. Submissions relating to the local plan may be made by anyone who objects to any portion of the draft that has been made available for public inspection. Such submissions must be made in writing (art. 18 LUDPA).

In relation to the procedure for the siting of public interest projects, the commencement, interlocutory rulings and final decisions are notified to the parties by public notice and in such other way as is customary locally. The investor as well as the owner(s) or perpetual usufruct holder(s) of the property(ies) affected must be notified in writing (art. 53.1 LUDPA).

While the LUDPA requires municipal authorities to ensure that draft framework studies and draft local plans are available for public inspection, it does not impose a duty to publicize draft development decisions. Such exclusion of development decisions from the publicity procedures, much as it may
Perhaps be understandable for formal reasons (any possible publicity requirements for administrative decisions are subject to the Code of Administrative Procedure), seems wrong in the light of substantive considerations, i.e. the needs of land use and development control.

Community involvement is seen by both legal theory and case law as playing an important role. According to the Supreme Court judgement of 18 November 1993, “there is under the rule of law no room for the mechanistically and rigidly understood principle that general interest takes precedence over individual interest. Therefore, the authority concerned must in each case define what general (public) interest is meant and prove that it is so important and significant that it absolutely requires a restriction of rights of individual citizens. The issue whether or not such an interest exists, the issue of its significance as well as the reasons why it has to override individual interests in a specific case must always be subject to a careful review by higher authorities and by courts, especially where attempts are made to demonstrate that it is in the public interest to abridge (or abolish) the right of property, which is protected by the Polish Constitution”\(^70\).

Formally, community involvement in spatial planning is guaranteed in the Polish legislation to a comparable extent as in German or English law; however, unlike in the German system, LUDPA 2003 restricts community involvement by treating it as a procedure that in principle serves the purpose of protecting the legal interests of inhabitants\(^70\). A legal interest is an objective concept and it exists only where there is a substantive law from which rights or duties may be inferred for the entity concerned\(^72\).

We have reviewed submissions that have been rejected and have found out that cities try to provide detailed explanations for their rejections based on plan provisions and applicable laws, and referring to the protection of the legal interests of inhabitants. Please note, for example, a statement of reasons for the rejection of a submission concerning the local plan for Morasko – Radojewo – Umultowo area (Dolina Warty - B portion) in Poznań\(^73\).
1. Submission made by: Henryk S.;

Submission contents:
1) Request to allow erection of a house;

Decision: reject;

Reasons: This submission does not conform to the Framework Study for the City of Poznań. The lot concerned is situated in a “no built development area” which in the Framework Study is marked as III. tr (tereny żywielskie), meaning agricultural areas that are not land under existing or planned built developments. It is in breach of the Framework Study to site on agricultural land any housing developments that are not related to agriculture. On a farm, the buildings with their parts, the structures and the stock make an organised business whole related primarily to the conduct of farm business. The principal purpose of a farm is to conduct farm business rather than housing development. Moreover, the Framework Study considers it a threat when continuous stretches of agricultural land are treated as potential stock of building land that is readily available and relatively cheap, a trend that finds its negative example in the interpretative abuses of the provision (in the local plan for the city of Poznań) allowing the erection of “agricultural buildings” on agricultural land. Accordingly, the term “no built development areas” means that no new buildings may be erected but the existing ones may stay. It is permitted to introduce technical infrastructure as necessary, if it is conducive to the protection of the natural environment.

Please also note that community involvement in the planning process, and thus the procedure of finding a balance among private interests and between public and private interests, is not grounded in any substantive laws. In Germany, the enabling laws are both the spatial order rules set out in the Spatial Order Act and, for local community involvement, primarily the built development planning rules set out in the Building Code.

The provisions of art. 1.2 LUDPA, which directly apply to the authorities in their land use and development activities, are general enough not to be capable of providing a clear reference point for decision-making in community involvement processes and, through their vagueness, give plenty of room for the discretion of public authorities trying to affect the outcome of the processes. At the same time, with such generality, the control of higher authorities or courts over municipal determination of community submissions is extremely superficial.
II.5.2. CO-ORDINATION AND CONTROL IN LOCAL LAND USE AND DEVELOPMENT MATTERS

Draft framework documents, draft local plans and draft development decisions must be approved with certain legally-defined local and governmental authorities. This approval process is governed by the appropriate provisions of the Administrative Procedure Code.

The administrative review authority that monitors the framework studies and local plans adopted by municipalities, is the provincial governor, who is the local representative of the government. His review focuses on verifying the contents and the adoption procedure for compliance with applicable laws. Development decisions are not subject to validation but may be appealed to local appeals boards by any of the parties. The municipalities may appeal the decisions of both the local appeals boards and the provincial governors to the administrative courts.

Local inhabitants may appeal board decisions and spatial development instruments to the administrative courts, on grounds of violation of their legal interests.

Co-ordination of central and local government policies in municipalities
The Polish land use and development system differs from the German and English systems in its rules governing co-ordination of public efforts in municipalities. In Poland, such co-ordination is ensured through the approvals mechanism, while in Germany and in England, through legal acts and planning documents.

In Germany there is a duty to ensure that local land use plans and sectoral plans take account of regional and national plans. Sectoral plans are enabled by the laws regulating public administration sectors, such as energy, roads or environmental protection. The sectoral co-ordination of all public administration activities, whether central or local and whether general or special, in municipal areas, is provided in the local land use plan. Any public administration action must comply with that plan.

In England, too, national documents (guidance notes), regional documents (spatial strategies) and county documents (mineral and waste plans) must be taken into account in preparing local plans and making planning decisions. A special role in the English system is reserved for guidance documents (guidance notes and policy statements) which formally set out national policies in many respects, including those relevant for land use and development planning, such as housing and environmental protection.
Control of municipal activity in the area of land use and development

With control of the regulatory activity of municipalities in the area of land use and development, vested in the provincial governor as higher-level authority, in the local appeals board as the administrative appeals body, and in the administrative courts, two fundamental problem areas can be noted. The first one is development decisions, where two major issues are raised.

First of all, based on the applicable law, it is extremely difficult to separate those matters that should be determined in development decisions from those that are appropriate for public interest project siting decisions. The statutory criteria are so unclear that they cause practical problems with interpretation at municipality level, in addition to giving rise to fundamental questions at administrative court level.

Unlike in English or German law, under Polish law whether or not a project is public is determined by what it involves (by subject-matter) rather than who implements it (by entity). Hence, it happens that public interest project siting decisions enable the siting of facilities that serve gainful activities of private parties. In England and in Germany, the term “public project”, to the extent it is used in the literature on the subject (rather than in the law), means an exercise of public functions by institutions wielding public authority. Accordingly, private and public projects are distinguished on the basis of who implements them (by entity).

Secondly, it is argued that the development decisions very often, especially in the initial period after the commencement of the LUDPA, provided too narrow boundaries for the “neighbourhood” survey area, being the area for which the requirements under art. 60.1 LUDPA must be met. The case law of both local appeals boards and administrative courts showed that such surveys should cover areas large enough to either prove or unambiguously disprove that such “neighbourhood” requirements are met. It has been accepted in case law and, hence, in the literature that the term “adjacent plot” set out in art. 60.1.1 LUDPA should be understood broadly and should not be restricted merely to adjoining areas but rather encompass some relatively small radius.

That the area of neighbourhood surveys for development decision purposes should be rather large might perhaps be justified by the fact that the adjoining plot is not always a good example to follow for land use and development purposes; however, the juristic justifications for this, as proposed by certain authorities, are hardly acceptable: “What is at stake is the freedom to develop one’s land, including by conducting built developments on it, as set out in art. 6.2.1 LUDPA. According to this law, anyone has the right, subject to statutory constraints, to develop land to which he holds legal title, in accordance with the conditions laid down in
the local plan or the development decision, provided he does not violate any legally protected public or third-party interests. [...] We, therefore, advocate a broad interpretation of the term ‘adjacent plot’. A restrictive interpretation of art. 60.1.1 would automatically mean that spatial order takes precedence over the right of property”\(^75\).

A 2004 report by the Ministry of Transport and Construction, discussing the results of a statistical survey of spatial policies, notes in relation to development decisions that “we observe a notably low percentage of rejections. This gives rise to a question if the development procedure is perhaps in this case merely another formality, instead of serving as a tool to sift inappropriate project ideas and an instrument of spatial planning policy”\(^76\).

The second problem area in spatial project co-ordination between local and central government is that criticism is levelled against the legal nature of the approvals mechanism. It is said that approvals are not in the nature of individual cases but are rather a step in the planning procedure. Hence, it is doubted whether, despite a clear enabling statutory provision, the approvals process should properly be governed by the Administrative Procedure Code\(^77\).

There are only limited statistics available for the local appeal board and administrative court caseload in the field of land use and development. In 2003, a total of 149,444 cases were on the record with local appeals boards, of which, 15,069 were land use and development cases representing 12.41% of the total (including cases pending under the 1994 Act and the 2003 Act). The Supreme Administrative Court dealt with a total of 69,648 cases in 2003, of which, 3,954 were land use and development cases. On the other hand, from the commencement of the LUDPA until the end of 2004, over 243.4 thousand development decisions were issued country-wide, including 6.6 thousand rejections.

By way of comparison, in England, in the fiscal year 2005/2006, local planning authorities made about 599 thousand decisions, including about 126 thousand rejections (18%). Appeals were made against 3.59% of the planning decisions, that is a total of 21,493 appeals, one third of which were successful (7186, or 1.2% of all planning decisions)\(^78\).

Cullingworth and Nadin refer to a survey of Planning Inspectorate decisions conducted in the 1980s. It transpired that the Planning Inspectorate consistently rejected appeals in almost all cases where the local planning authority had formulated a policy, especially if the policy was formally part of the plan. The authors write that “development control and appeal decisions tend to adhere to the policy, where it exists”\(^79\).

The administrative control solutions in respect of planning decisions in Poland and England differ in several important respects. System-wise, the major
difference lies in the nature of the appeals body. In Poland, where matters of land use and development are by statute the municipality’s own responsibilities, planning appeals are determined by a quasi-local body named the local appeals board. In England, the appeals authority is vested in the appropriate minister acting through the Planning Inspectorate.

Another major difference is that, in the Polish system, the appeal bodies have fairly general competencies and, when specialised issues come into play, cannot do much more than merely seek such expert assistance as may be necessary. In contrast, the English Planning Inspectorate hires inspectors with industry experience and education (and is relatively low-staffed: 300 permanent inspectors and 150 outside consultants).

The most important difference in the administrative review system, however, is that, in England, the Planning Inspectorate must examine local plans before they are adopted and its examination may not be limited to merely formal compliance with the law, but must also cover plan contents. Planning Inspectorate recommendations are binding on the local planning authorities.

Such review and control solutions cannot easily be adapted to Polish realities due to the fundamental differences in legal systems. Yet, being a point of reference for assessing the Polish solutions, the English system puts the low efficiency of the system in Poland in the spotlight.

II.6. Superficiality of local land use and development plans

According to art. 16.1 LUDPA, the local land use and development plan should in principle be drawn on an official copy of the base map (plat) or, where no such map is available, on a copy of a cadastral map, to a scale of 1:1000. Under §6 of the Minister of Infrastructure regulation, of 26 August 2003, on the required scope of the local land use and development plan (the Local Plan Regulation)\(^\text{10}\), local plans for transmission projects (power lines, gas pipelines, etc.) or for large areas, may be prepared on maps to a scale of 1:2000 and for dense development areas and public spaces, on maps to a scale of 1:500. According to §8 of the Local Plan Regulation, the map should be made using a legible graphical technique so that the draft can be published; for example, in the official journal of the province concerned. The Local Plan Regulation has introduced the following area categories (with related designations) for the purposes of local land use and development plans:
- two categories of residential development area: single-family and multi-family,
- three categories of service development area: service developments, sports and recreational developments, and shopping facilities with more than 2000 m\(^2\) of sales space,
three categories of agricultural use area: agricultural areas, areas for services to farms, breeding stations, or horticultural, fishing or forestry establishments, and areas for development of agricultural buildings,

- two categories of manufacturing and technical area: manufacturing sites, stores and warehouses, and mining areas,

- eight categories of green area and waters (including cemeteries, parks, forests, flood lands, etc.), three categories of transportation area and seven categories of technical infrastructure area.

Furthermore, the Local Plan Regulation sets out 13 requirements governing the body text of the local plan in relation to plan areas. In particular, the plan must provide for the following indicators and parameters applicable to developments:

1) setback line,

2) area under the building relative to the total area of the plot or land, including the percentage of biologically active area,

3) the size and height of the proposed development and its roof geometry (§4 of the Local Plan Regulation).

Local land use and development plans have two functions at the level of municipality; namely, they specify land uses and lay down development requirements. In the German system, land uses are generally specified in the land use plan, while the built development plan may only provide additional detail for the land uses set out in the land use plan; with its primary role being to determine development requirements.

In Poland, in framework studies and local plans, there are no extended substantive regulations governing admissible land use designations. The substantive provisions of the draft study and local plan regulations are much less rigid and focus on the necessary planning documents and technical requirements for the plans rather than on creating a rigorous scheme for admissible land uses in specific land categories and admissible developments on the plots located within each category.

II.6.1. Local plan maps

The local plans drawn in 1995-2003 were more precise than the current ones. For example, from them you could read the “urban layout” of an area, being a kind of built development order that those plans provided for. This was because the plans covered smaller areas and, even though they were often based on a scale of 1:2000 rather than 1:1000 or 1:500, they were much more precise than post-2003 plans due to their small territorial coverage and the fact that general plans were also in effect.
In contrast to the German solutions, the local plan regulation introduced a rather narrow range of markings for maps; therefore, the municipalities must use additional designations that go beyond the regulation, or else their plans would be...
completely illegible. Owing to the weaknesses of the regulation, local plan maps provide for only general land use designations and do not make it possible to infer development requirements for individual plots in the plan area.

It is a major flaw in the local land use and development plans in the cities that they lack land use designations and fail to determine admissible developments on specific parcels of land. Unlike in Germany, where built development plans are in principle made for very small city areas, a maximum of a few hectares each, in Polish cities the plans cover areas of more than a dozen or several dozen of hectares. Moreover, much as German built development plans are generally prepared to a scale of 1:500, Polish local plan maps are as a rule made to a scale of 1:1000.

Please note that the above built development plan for an urban area of Aachen, while covering an area of about 3.36 hectares, provides much more detail than a Polish local land use and development plan. The map presents projected setback lines for buildings on each plot and determines on a plot-by-plot basis the basic technical requirements for the buildings as well as providing information about projected and protected trees.

In formal terms, plan drawings for Polish cities display more similarity to English area action plans. For example, both types of plan cover on average much larger areas than German built development plans.

PICTURE 3. BENWELL SCOTSWOOD ACTION AREA PLAN (NEWCASTLE) PROPOSALS MAP
In essence, an area action plan determines the development/regeneration of a specific urban area. It both sets out strategic policies with implementation instruments and determines with parcel precision the locations of planned public projects and admissible land uses. Consequently, maps for area action plans must show the area with individual parcels.

Compared with German built development plans, area action plans provide for land uses rather than for development requirements. Still, they are much more specific than the land use plans: they can designate individual parcels as residential use, but can also determine development requirements for them, such as density. In the English system, the more detailed requirements, for example those concerning facade appearance or landscaping, are contained in supplementary documents that are not formally part of the plan.

English law does not prescribe any specific map scales, but requires that any maps that are formally part of the plan, being those setting out land use designations for specific areas, must be useful to the full extent. This means that the maps should be to such scales as are appropriate in the light of the purposes of the planning document (so as to clearly show all its policies) and that, wherever they illustrate policies made for specific areas or projects, they should refer to existing area boundaries.

The English measure providing direct control over development is planning permission; therefore, such development and land use details in relation to specific lots, which in Germany are set out in built development plans, are provided in the documentation (including maps, usually to a scale of 1:1250) supporting planning applications rather than in the plan itself.

II.6.2. Body text of local plans

While the maps in local land use and development plans are markedly different from those in built development plans, the body texts in both types of plan are very similar as regards development requirements; however, the text of the German built development plan refers to specific parcels marked on the map and specific land designated for development along such lines as drawn on the map; whereas, the text of the Polish local plan refers to an area that is an aggregate of parcels.

The text of the local plan sets out requirements for trees and landscaping as well as technical requirements for buildings. The texts of the German plans usually provide for more detail as to the species of new tree and other greenery to be planted and maintained, as to the technical requirements for buildings (roof geometry, yard setback lines, and orientation in relation to the compass, etc.), and as to the building requirements concerning the
materials for outside portions of buildings or on the situation and parameters of garages or parking places.

Another difference lies in the statements of reasons. Polish law does not formally require that the local plan be accompanied by a statement of reasons that would provide broad grounds for plan proposals in building and environmental terms. Even if such statements are in fact prepared at various stages of the planning process, the local community and the investors find it hard to understand the underlying planning solutions as there is no statutory duty to have such statements attached to the plan.

In Germany, the law requires that the built development plan be accompanied by a statement of reasons (Begründung), running to several dozen or, in complicated cases, over a hundred pages, which should contain:
1) a general statement that includes grounds for the choice of specific area to be covered by the plan; the area’s previous uses (use of adjacent areas); a justification for change in uses; information relevant for the balancing of interests (Abwägung); the objectives expected to be attained through adoption of the plan; developmental ramifications arising from other plans for the same area, such as landscape plans; projects to provide for required land infrastructure on the parcels and involvement of private parties in such projects; the required social infrastructure to be erected in the plan area; the development of public spaces; justification for land uses and built development indicators adopted in the plan (plus examples of how buildings or their parts are to be situated on individual lots); a quantitative statement of land per use category; and the costs of land infrastructure and methods to develop it;
2) an environmental report that provides a survey of the existing environment and a description of plan solutions for the protection of humans against harmful substances, and noise, etc. and for the protection of animals, plants, soil, water, climate and air as well as for environmental monitoring of the plan area.

Plan solutions and policies must also be accompanied by reasons under the English regulations. An English plan contains, within its documents, a reasoned justification. Planning Policy Statement 12 prescribes that a clear distinction should be made, including in terms of graphics and typeface, between plan policies and the reasoned justification, meaning that the latter may not contain any new policies or expand on the existing policies of the plan.

The 2004 Act imposed a separate duty to conduct sustainability appraisals and, for large projects, environmental impact assessments by reference to Directive 2001/42/EC. The findings of both the appraisals and the assessments are included in the draft planning document.
Chapter III
Assessment of Polish land use and development law.
Proposals for change.

III.1. Polish land use and development law vs. standards of the democratic rule of law

III.1.1. In Poland, as in England and Germany, legislation restricts the freedom to develop, meaning the right to build on any land as the owner pleases. Any development must have its requirements laid down by public administration. These requirements can for one thing lead to expropriation or, for another, to the prohibition of any change in existing buildings (development).

In principle, Polish law respects these rules, but, on the other hand, it provides for the development decisions mechanism, which has the effect of giving rise to a presumed claim against the authorities for development requirements to be laid down by administrative decision where no local plan exists.

III.1.2. According to Polish local government and spatial development jurisprudence, it is a principle that municipalities exercise planning jurisdiction, in that they have the power to formulate municipal spatial development policies and have certain legal tools available to enforce that power: the duty to prepare framework studies and the right to prepare local plans.

The jurisdiction is, however, largely restricted by law and administrative action, in a way that is incompatible with democratic rule of law standards. The restrictions include the following duties imposed on the municipalities:
1) to prepare local plans for such spaces as designated in the law;
2) to obtain government approval for the content of framework studies and plans;
3) to issue decisions for the siting of public interest projects.

Restrictions on the planning jurisdiction are not compensated by the right of municipalities to be involved in planning decisions made at regional and national level.
III.1.3. Spatial planning is not integrated with investment planning. A major weakness is the failure to balance the need for, and supply of, infrastructure-supported land with market demand, and with the municipality’s capacity for developing such infrastructure on time, while such balancing should be a fundamental part of the study. Moreover, the law permits a plan to be adopted (development decision issued) and a building permit to be issued even where land infrastructure has not been completed.

Public authorities do not co-ordinate their spatial activities. Framework studies are binding only in the preparation of local plans and not in the issuing of development decisions. They bind municipal authorities, but not local or central government, at regional or national level, which can control spatial development through the approvals mechanism (uzgodnienia).

III.1.4. Community involvement in Poland is formal (protection of legal interests) rather than serving the goal of balancing actual private and public interests at a given area (protection of factual interests). One of the effects is that urban authorities do not propose alternative planning solutions. Private parties are involved in criticising draft plans rather than in participating in planning the best land use/development solutions for the areas of their interest.

As regards the administrative review and the case law of administrative courts in land use and development matters, a major issue is the review of development decisions on their merits. The courts, the local appeals boards and the administrative authorities with review powers do not go deeper into the merits of the plans or decisions in the course of the balancing of interests. While the need to balance interests is not per se contested in the theory of the subject (quite to the contrary, it is put in the spotlight as having great importance for the legal protection of citizens), there are no clear substantive laws that would provide affirmative guidance for the activities of public authorities in that regard.

III.1.5. Local plan detail is not up to such standards as are applicable in Germany or England, whether in relation to the maps or to the body text. Local plans are not made to parcel precision and do not regulate lot subdivisions or consolidations. Finally, there is no requirement to prepare statements of reasons (explanatory reports) for framework studies or local plans.

In summary, the Polish spatial planning and development control system has the following fundamental drawbacks:
1) the planning jurisdiction of the local authorities for one thing and the protection of inhabitants and owners, for another, have a different scope than in the mature systems;
2) the system is weakly integrated and there are no laws that would compel effective planning solutions.
III.2. NECESSARY CHANGES IN LAND USE AND DEVELOPMENT LAW

Generally, the legislative changes must proceed in two directions:

1) to reinforce the planning jurisdiction of municipalities while ensuring effective protection for the rights of owners and inhabitants, as well as introducing mechanisms to facilitate the implementation of national spatial policies;

2) to make laws that would compel good quality planning and integrate the entire spatial system.

Such changes affect two groups of laws. First of all, amending efforts should be targeted at the LUDPA itself (and, in consequence, secondary legislation thereto), the Real Estate Management Act and the Building Act. The solutions employed in these laws should be aligned with the proposed amendments to the LUDPA.

Secondly, any full-scale reform of the system will require changes in a number of other statutes, including primarily, enactments containing substantive laws, and the related secondary legislation.

III.2.1. According to the standards, the following above all should be done in order to determine the scope of the municipalities’ planning jurisdiction:

- **The law should be aligned with the constitutional interpretation of the protection of property**
  
  The current law seems to suggest that, where no local plan exists, there is a claim to compel the issuance of a development decision or a public interest project decision (art. 4 LUDPA) and a right vested in virtually any applicant owner to develop his land (art. 6 LUDPA). This interpretation reinforces the negative effects of using development decisions as a development control tool. Following the German or English legislation, the law should clearly stipulate that protection extends only to existing developments and that only its violation (e.g. by expropriation) justifies any financial claims.

- **The approvals mechanism (uzgodnienia) should be replaced by opinions (opiniowanie)**
  
  The activities of public actors should be co-ordinated through systemic solutions on the basis of documents having legal relevance (substantive laws as well as regional/national and special planning documents), rather than through the parallel discretionary actions of various institutions engaged in the approvals mechanism. These changes would require a number of substantive laws to be amended, including those on environmental protection, construction and management of public roads,
heritage protection, energy and telecommunications, and agricultural areas and woodlands. In addition, there must be a rule that any public entity that wields public power carries out public responsibilities, and so any spatial activities of such entity are public projects. This means that the concept of a public project will be understood from the perspective of who implements it rather than what it involves.

- **Development opportunities without having to prepare a local plan should be clearly determined in law.**
  
  One reason offered to justify the continued existence of development decisions is that there must be some practical solution to allow development in areas for which no local plan exists. True, the law should offer such tools, but they must be aligned with the fundamental objectives of the spatial planning and development control system. It is recommended to ensure that municipalities are required to specify dense development areas in their framework studies, while the local councils are empowered to adopt resolutions (being in fact the nature of simplified local plans) that would indicate with ordnance survey precision the lots where development is allowed without the need for a local plan to be in place; however, such solution must be conditional on the existence of sufficient land infrastructure for the proposed development. In addition, it should become a rule that the consent of the municipal council should be sought for any development for which a building permit was applied for in dense development areas, including especially plan areas.

III.2.2. Certain parallel changes should be made to provide for more comprehensive protection for owners and inhabitants:

- **Community involvement should be enhanced**
  
  Purely formal treatment of community involvement should be prevented. The process should comprise the balancing of the factual interests of the inhabitants (users) of plan areas. Once a draft plan is made available for public inspection, mechanisms should be introduced to facilitate alternative solutions being submitted to the public debate

- **Administrative review of plan preparation should be enhanced and directed better**
  
  The administrative and court control over community involvement processes should be enhanced. Special attention should be paid to submissions that have been rejected. This is justified not only on the grounds of protecting landowners’ legal interests (holders of usufruct), but above all, on the grounds of balancing factual community interests raised during public discussion.
III.2.3. The following proposals are designed to ensure system integration and improve the substantive quality of the plans:

- **Development decisions should be abolished**
  This mechanism disrupts the system and may as well be replaced by “small” local plans that are prepared for limited areas (a few hectares).

- **The role of framework studies should be reinforced**
  Framework studies should take over the role of real reference points that direct land development at municipal level. This may not, however, constitute a reason for issuing building permits without reference to the local plan. In particular, framework studies should set out dense development areas (where gaps exist that can be developed as per the study, as long as sufficient infrastructure exists) as well as areas for development and areas where no development is permitted. The infrastructure provisions of the study (areas, resources) should be binding on all public authorities.

- **Rules should be introduced to govern spatial development at local level**
  The land use and development rules (directives) set out in art. 1.2 LUDPA are general, even vague, and do not provide perfect planning guidance. More such rules should be added to provide for the creation of spatial order; such as the rule that the regeneration and improvement of existing land will take precedence over any open space development, or the rule that dispersal of development should be prevented at national and regional level.

- **Local plans should be integrated with investment planning**
  It should be a rule that, once a local plan is adopted, the municipality becomes obliged to commence implementation of the land infrastructure projects under the plan. When development scheduling is introduced as a system tool, infrastructure implementation should be coordinated with the designation of land for new development. The required infrastructure provided for in the plan should already be completed (improved) when the occupancy permit is issued. Moreover, there should be a requirement, already applicable at the framework study stage, to establish a stock of land in accordance with changes in land use, and to ensure that development projects and land designated for development purposes are scheduled in accordance with the financial capacity of municipal budgets and the incomes of municipal units and companies.

- **Local land use and development plans should be less general and vague**
  To ensure the efficiency of the local plan as a planning instrument, there must be a rule (art. 16.1 LUDPA) to the effect that each plan should be made to parcel precision and contain parcel-related designations. Moreover, new regulations must be enacted concerning the required scope of the local plan and concerning the classification of uses of land and permitted
developments on such land, as well as regulations that provide uniform nationwide indicators of permitted built developments. Each local plan must be accompanied by a statement of reasons.

III.2.4. An amendment is necessary to the Real Estate Management Act, of 21 August 1997, in order to integrate its property subdivision provisions with new property subdivision regulations in the local plan. A procedure should be added to the Building Act, of 7 July 1994, for the issuance of building permits in dense development areas only upon the consent of the local council.

III.2.5. The Polish spatial planning system lacks regulations that would govern the planning process and rules in substantive terms. The far-reaching amendment of the LUDPA and the aligned changes in the Real Estate Management Act and Building Act, are, therefore, not sufficient. A second group of changes is needed to amend a number of substantive law enactments. These changes should involve:

• introducing planning instruments (special planning) for projects implemented by the government;
• aligning provincial spatial plans and framework studies and proposals with such special plans;
• introducing measures to provide for the making of generally applicable laws (regulations and local laws) through which the government would carry out its statutory responsibilities.

The changes should, in particular, mean amending regulatory frameworks that govern such administration areas as rail and road transport, public road construction, energy, telecommunications, mining and minerals, water, environmental protection, the protection of nature, woodlands, agricultural areas, sea, recreational plots (działki), monuments, waste management and spas.
NOTES

1 Krupa-Dąbrowska, Plany pod przymusem, Rzeczpospolita 17.01.2005
2 M. Stefaniowski, Dlaczego tak brzydko, Gazeta Wyborcza 12.08.2004
4 Note from translator: The Polish text of the report makes use of the term demokratyczne państwo prawne (democratic state of law) - according to the continental tradition (German Rechtsstaat, French l’Etat du droit, Spanish Estado de derecho, and Italian Stato di diritto). The English translation makes use of the rule of law term which is deeply rooted in the English-language literature. Still, the reader should beware of historical differences in meanings of both terms.
5 The members of UMP are: Białystok, Bydgoszcz, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań, Rzeszów, Szczecin, Warszawa, Wrocław.
7 Birmingham, Leeds, Liverpool, Manchester, Newcastle and Sheffield.
8 In der Fassung der Bekanntmachung vom 18. August 1997 (BGBl. I P. 2081).
9 In der Fassung der Bekanntmachung vom 27. August 1997 (BGBl. I P. 2141).
10 For more information on the system, responsibilities and powers of German metropolitan areas, see I. Zachariasz, Metropolie w terytorialnym podziale władzy w RFN. Podstawy teoretyczne i rozwiązania praktyczne, Warszawa 2006 (unpublished doctoral dissertation at the School of Law and Administration of the University of Warsaw).
12 The EU compendium of spatial planning systems and policies, 1997.
13 BGBl. I P. 1.
20 The EU compendium of spatial planning systems and policies, 1997.
21 M. Oldiges, op.cit., p. 497.
22 BGBl. 1991 I P. 58.
23 BGBl. I P. 132.
24 BVerfGE 26, 228.
26 M. Oldiges, op.cit., p. 604.
After the 2004 reform, the issues of infrastructure are, together with social, environmental and business issues, considered in the context of sustainable development (cf. *PPS 1: Delivering Sustainable Development*).

From Cullingworth and Nadin, *Town and...*, 2006.

Journal of Laws no. 80, item 717, as amended

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Cf. Z. Niewiadomski (ed.), *Planowanie ...,* p. 79.


The following text is based on a book by H. Izdebski “Fundamenty współczesnych państw,” Warszawa 2007, pp. 137 et seq.

P 2/98 – OTK 1999 nr 1, poz. 2.

SK 11/02 – OTK-A 2004 nr 7, poz. 66.


II SA 807/99 – LEX nr 46219.

IV SA 1678/98 – LEX nr 48263.

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In current law, this duty relates to areas defined in art. 5.1 of the Areas of Former Nazi Concentration Camps (Protection) Act of 7 May 1999 (Journal of Laws no. 41, item 412, as amended) and areas referred to in art. 16.6 of the Historical Monuments Protection and Care Act of 23 July 2003 (Journal of Laws no. 162, item 1568, as amended).

See amendment proposal to LUDPA dated 31 January 1997, prepared by the Construction Ministry.

Journal of Laws No 118, item 1233.


*Załącznik nr 1 do uchwały Nr LIV/3249/06 Rady Miejskiej Wrocławia z dnia 6 lipca 2006 - Studium uwarunkowań i kierunków zagospodarowania przestrzennego Wrocławia, T.1,* p. 240-241.


Following its expansion, Rzeszów has a population of 166,492 and an area of 77.2 km² (data valid at end of January 2007).

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Fischer, *Flächennutzung in Großstädten,* BAW Institut für Wirtschaftsforschung, September 1999, p. 10

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Z. Niewiadomski, Planowanie ..., p. 6.


Z. Niewiadomski, Planowanie ..., p. 41.

M. Szewczyk, op. cit., p. 53.

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