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LEGITIMATE EXPECTATIONS IN SPATIAL PLANNING AND BUILDING

Abstract

The principle of the legality of administration is valid today in its strict or narrow form. Therefore, the administrative bodies are obliged to act in a way determined by the law and by-laws. When it comes to the point when certain change in legislation is necessary, such as situations when an old regulation (spatial plan) is put out of force, one should bear in mind that there is a possibility that new legislation is less favourable for some citizens. In other words, it can be said that the affected party, as a consequence, may suffer certain damage.

Due to such situations, the principle of legitimate expectations has developed and is widely recognized in the European countries. The principle of legitimate expectations is often linked to the principle of legal certainty. Both principles, and the principle of acquired rights of the parties are recognized in the practice of the Court of the European Union, the practice of the European Court of Human Rights, and the practice of the Constitutional Court of the Republic of Croatia. Hence, in situations of amending legislation, local governments should take into the account the protection of legitimate expectations based on valid regulations.

The aim of the paper is to research possible basis for the principle of legitimate expectations in spatial planning and building. The second aim of the paper is to research if there is a possibility for compensation if a lawful general act (spatial plan) is revoked or repealed. The aim of the paper is also to detect European countries which apply planning compensation and whether certain comparative solutions are applicable in Croatia.

Key words: compensation, Croatia, France, Germany, legitimate expectations, Netherlands.

I. Introduction

Spatial planning¹ is an interdisciplinary process which involves wide range of experts such as architects, civil construction engineers, sociologists, geodesists,

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¹ „Spatial planning is a particular form of public policy, one that claims to be focused on the spatial dimensions of a wide range of other sectoral policies from economic development, transportation and environmental protection through to health, culture and language.“ (Adams, Neil, Alden, Jeremy and Neil Harris „Introduction: Regional Development and Spatial Planning in an Enlarged European

economists, lawyers, etc. It is also known as a “coordinator of a sectoral policies and decisions with spatial impacts, including those concerned with the environment, infrastructure and regional economic promotion.”² Two branches of law give special attention to the spatial planning and building, civil law and administrative law. It is also worth mentioning that spatial planning is connected to the certain country and its culture and socio-economic context.³ This paper deals with certain questions which take place in the area of administrative law since procedure of obtaining permits is administrative procedure according to the current Croatian legislative framework.

Legislative framework on spatial planning and building in Croatia is quite complex. Mentioned complexity is partially a result of the territorial organization⁴ of the Republic of Croatia. Spatial plans are organized in three levels as in the most of the European countries,⁵ they are adopted for state, regional and local level.⁶ Physical Planning Act and Building Act⁷ are basic acts and they regulate mentioned procedures of obtaining relevant permits. Both were adopted in 2013, they are in force since 2014, and both are currently undergoing the process of their revision.⁸ Procedure of gaining a building permit is an administrative procedure, meaning that the General Administrative Procedure Act (hereinafter GAPA)⁹ is *lex generalis* in gaining necessary permits. For spatial planning and building is also relevant to

Union“. In *Regional and Spatial Planning in an Enlarged European Union*, edited by Niel Adams, Jeremy Alden and Niel Harris, 1-15. London and New York: Routledge, Taylor and Francis Group, 2016, p. 3.

² Reimer, Mario, Getimis, Panagiotis and Hans H. Blotevogel „Spatial planning Systems and practices in Europe – A comparative perspective“. In *Spatial planning Systems and Practices in Europe – A comparative perspective on continuity and changes*, edited by Mario Reimer, Panagiotis Getimis, Hans H. Blotevogel, 1-20. London and New York: Routledge, Taylor and Francis Group, 2014, p. 1.

³ Knieling Joerg and Frank Othengrafen „Spatial Planning and Culture – Symbiosiy for a better Understanding of Cultural Differences in Planning Systems, Traditions and Practices“. In *Planning Cultures in Europe – Decoding Cultural Phenomena in Urban and Regional Planning*, edited by Joerg Knieling and Frank Othengrafen, xxiii-xxxv. London and New York: Routledge, Taylor and Francis Group, 2016, p. xxiv.

⁴ On territorial organization of Local self-government in Croatia see in: Koprić, Ivan. „Teritorijalna reorganizacija kao preduvjet učinkovitosti lokalne samouprave.“ *Zbornik radova sa savjetovanja pročelnika jedinica lokalne i područne (regionalne) samouprave*; Zagreb: Libusoft Cicom, 2016, pp. 81-88; Koprić, Ivan. „Zašto i kakva reforma lokalne i regionalne samouprave.“ *Hrvatska i komparativna javna uprava* 4(2015): 993-998.

⁵ Nadin, Vincet *et. al.* *Compass - Comparative Analysis of Territorial Governance and Spatial Planning Systems in Europe – Final Report*. ESPON EGTC, 2018, p. 17.

⁶ Article 60 of the Physical Planning Act, Official Gazette, no. 153/2013, 65/2017, 114/2018, 39/2019, 98/2019, 67/2023 (hereinafter PPA).

⁷ Building Act, Official Gazette, no. 153/2013, 20/2017, 39/2019, 125/2019 (hereinafter BA).

⁸ For Building Act public consultation is closed, available at: <https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=28243>, accessed 11 November 2024.

⁹ General Administrative Procedure Act, Official Gazette, no. 47/09, 110/21 (hereinafter GAPA).

mention Act on Ownership and other Real Rights,¹⁰ Act on Expropriation and Determination of Compensation,¹¹ Administrative Disputes Act,¹² etc. There are also numerous by-laws regulating this complex area.¹³ European Union documents referring to the spatial planning are not binding,¹⁴ and they often present soft law mechanisms for the influence in the member states countries.¹⁵ However, *acquis communautaire* is of high relevance for the principle of the legitimate expectations which will be elaborated further in the paper.

II. Principle of Legitimate Expectations in Spatial Planning and Building

Legal systems in democratic societies are based on the principle of legality in its strict or narrow sense.¹⁶ Each legal system is founded on the certain legal principles. Legal principles have their basis in constitution of each country.¹⁷ The principle of legitimate expectations in continental Europe was derived from German law, under the term *Vertrauensschutz*.¹⁸ Sigron states that “*the protection of legitimate expectations is a subjective law construction of the principle of legal*

¹⁰ Act on Ownership and other Real Rights, Official Gazette, no. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 90/2010, 143/2012, 152/2014.

¹¹ Act on Expropriation and Determination of Compensation, Official Gazette, no. 74/2014, 69/2017, 98/2019.

¹² Administrative Disputes Act, Official Gazette, no. 36/2024 (hereinafter ADA).

¹³ The list of acts and by-laws regulating spatial planning and building is available at: <https://www.arhitekti-hka.hr/hr/zakoni-propisi/popis/prostorno-uredenje/> and <https://www.arhitekti-hka.hr/hr/zakoni-propisi/popis/gradnja/>, accessed on 11 November 2024.

¹⁴ See more on that topic in Held, Mateja, Perkov, Kristina, “Spatial Planning in the EU and Croatia under the Influence of Covid-19 Pandemic.” EU and Comparative Law Issues and Challenges Series (ECLIC) 6(2022): 591–624. <https://doi.org/10.25234/eclic/22445>

¹⁵ See for example in Duić, Dunja. “Europska politika zaštite okoliša u Europski zeleni plan.” In *Zakonodavstvo zaštite okoliša i održivi ekonomski razvoj u EU*, edited by Dunja Duić, Uroš Čemalović, 7-24. Osijek: Josip Juraj Strossmayer University in Osijek, Faculty of Law, 2022.

¹⁶ Ivančević, Velimir. *Institucije upravnog prava*. Knjiga I. Osnovna pitanja - izvori - pravni akti uprave. Zagreb: Pravni fakultet, Centar za stručno usavršavanje i suradnju s udruženim radom, 1983, p. 180, Borković, Ivo. *Upravno pravo*. Zagreb, Narodne novine, 2002. p. 67, Đerđa, Dario. “Zaštita legitimnih očekivanja u upravnom pravu.” *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 34(2013): 83.

¹⁷ More on Legitimate Expectation and case law of the Constitutional Court of the Republic of Croatia see in: Blagojević, Anita and Marijana Majnarić, “The Rule of Law, the Doctrine of Legitimate Expectations and the Constitutional Court of the Republic of Croatia”, EU and Comparative Law Issues and Challenges Series (ECLIC), 8(2024): 184–206, <https://doi.org/10.25234/eclic/32276>.

¹⁸ For the development of the concept outside continental Europe, United Kingdom can represent formation of the concept and development in Germany see in: Sigron, Maya. *Legitimate expectations under Article 1 of the Protocol No. 1 of the European Convention on Human Rights*. Cambridge – Antwerp – Portland: Intersentia, 2014, p. 43, p. 46-49.

*certainty, and is particularly warranted in basic rights.*¹⁹ In the European Union the principle of legitimate expectations is incorporated into the principles of the European Union law.²⁰

In European countries, the principle of legitimate expectations is derived from constitutions and has constitutional status in Belgium, Greece, Latvia, Lithuania, Poland, Germany,²¹ Slovenia, as well as in Switzerland and EU legal system.²² Legitimate expectations can be explained on the following simplified example:

*The public authority makes a decision. The person X acts on the basis of that decision, and the public authority subsequently changes it. Person X has a legitimate expectation that the public authority will act as it was foreseen in the first decision. If person X proves a legitimate expectation of private interest, it will be balanced against the public interest. If the public interest prevails, the public authority can be held accountable through compensation for the resulting damage.*²³

Citizens will have confidence in institutions if the behaviour of the institutions, government and public bodies is stable, consistent²⁴ and if it has its basis in the law.²⁵ Stability of the laws is in the core of the principle of legal certainty.^{26,27} However, law should follow the needs of the society. In scientific literature, this is described as *flexibility of the laws*²⁸ meaning that 'the old act' has

¹⁹ Sigron, *op. cit.* in note 18, p. 48.

²⁰ Firstly, it was accepted under the term 'protection of legitimate confidence', and nowadays is broadly used under the term of 'legitimate expectations' (Hartley, Trevor C. *Temelji prava europske zajednice*. Rijeka: Pravni fakultet Sveučilišta u Rijeci, 2004, p.149). However, Sweden and France have no formal recognition of the principle of the legitimate expectations, save the application of EU law. Anyway, certain similar principles are adopted in both countries (ACA Europe. *The Protection of Legitimate Expectations in Administrative Law and EU Law - General Report*, 2016; Sigron, *op. cit.*, p. 45).

²¹ See in article 20 §3 Grundgesetz für die Bundesrepublik Deutschland (BGBl. I S. 2478) (hereinafter GG) and 28 §1 GG.

²² ACA Europe, 2016, p. 3. i Đerđa, *op. cit.* in note 16, p. 86., Sigron, *op. cit.*, p. 62.

²³ Simplified version of legitimate expectations according to Sigron, *op. cit.*, pp. 44-45. The principle of legitimate expectation may differ in different legal systems (Sigron, 2014, p. 45.).

²⁴ See chapter on consistency of law in: Council of Europe, Parliamentary Assembly, Venice Commissions „Rule of Law Checklist“, available at: https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf, accessed on 12 December 2024.

²⁵ Mentioned confidence is „basis for the enactment of the rule of law“ (Đerđa, *op. cit.*, p. 87).

²⁶ Legal certainty is especially emphasized in the administrative law, where public and private interests are often confronted. (See in Đerđa, *op. cit.*, pp. 90-92; Held, Mateja. “The Rule of Law in Spatial Planning and Building,” *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 8(2024): 1056–1077. <https://doi.org/10.25234/eclic/32314>

²⁷ Principle of the good faith is also linked to the principle of legitimate expectations. It is recognized' as a principle underlying the concept of the legitimate expectations' (Sigron, 2014, p. 47; ACA Europe, 2016, pp. 28-30).

²⁸ See in Larsson, Gerhard. *Spatial Planning Systems in Western Europe - An Overview*. Amsterdam: IOS Press, 2006, p. 94-96, Đerđa, *op. cit.*, p. 86.

been repealed (although the acts itself was not illegal), and the new act will be adopted, due to social changes.²⁹ Citizens which gained certain individual rights based on the act which is no longer in force have no legal ground to achieve those rights (because it was repealed). In other words, this situation could give a rise to the principle of the legitimate expectations.

2.1. Protection of Legitimate Expectations in Public Law

Legitimate expectations are protected under certain conditions. Sigron mentions few conditions based on Schwarze,³⁰ *basis, confidence, external manifestations* and *balancing of interests*.³¹ Firstly, legitimate expectations should be formed on *valid basis*. Public authorities' acts, mostly administrative act as an individual decision, and general act, legislative act, representations,³² or practice, are considered as valid basis for legitimate expectations in public law.³³ According to Sigron, individual act present stronger legitimate expectations due to special relation between individual and the state. Therefore, demonstration of legitimate expectations is easier in comparison when general act presents basis for legitimate expectations. On the other side, legitimate expectations based on general act have far greater consequences than only one person is affected.³⁴ *Confidence* as a condition for legitimate expectations is in connection with *foreseeability*. It also means that citizens' actions are in a good faith. For example, if applicant could anticipate interference with his legitimate expectation his confidence is not strong.³⁵ Sigron mentions that according to the certain theoretical approaches, citizen should follow social changes and be aware of possible changes of the legislature.³⁶ *External manifestations* such as demonstrations of actions based on the reliance on the authority's actions are not obligatory, but they could strengthen position with legitimate expectations.³⁷ Balancing of interests refers to the balance between private interest (legitimate expectations) and public interest. Fair balance

²⁹ In the Report of Ireland for ACA Europe, this situation is referred as „administrative flexibility, particularly in the context of allowing the administration to make and change policy as and when the circumstances require“ (ACA Europe, 2016, p. 5).

³⁰ Sigron, *op. cit.*, p. 61.

³¹ For the purpose of this paper, we will focus on the conditions for public law, and those characteristics which can be in relation to spatial planning and building, since Sigron is analysing conditions for both public and private law (*Ibid.*, p. 61-68.).

³² Schønberg, Søren. Legitimate expectations in Administrative Law. Oxford: Oxford University Press, 2000, p. 31.

³³ Sigron, *op. cit.*, pp. 62-63.

³⁴ *Ibid.*, 63-34.

³⁵ *Ibid.*, p. 65.

³⁶ *Ibid.*, p. 65.

³⁷ *Ibid.*, p. 66.

is a task of the courts. They apply different test for balancing public and private interest,³⁸ such as the test of proportionality.³⁹

Consequences of the protection of legitimate expectations according to Sigron⁴⁰ are procedural, substantive and monetary (compensatory).⁴¹ *Procedures* are conduct of authorities with an aim of reducing the feeling of unfairness and mistrust. Therefore, their focus is on the notification of the citizens what is going to happen with legal norm, or any other valid basis for legitimate expectations. Citizens will have time to adapt to the new situation and as a consequence the feeling of unfairness may be lower. Affected person could be heard, and in other forms included into decision-making process. *Substantive protection* means that person can hold the authority responsible for its decision and continue with its actions. Compensatory protection exists if the administrative authority will pay the cost for re-establishing fair balance, or for the damage.⁴² As the most severe consequence Sigron consider preservation of governmental act evoking a legitimate expectation.⁴³ Schønberg also gives three possible ways for handling the situation of violation of the legitimate expectations: procedural protection, material protection and compensation. Special focus is given to the compensation for loss caused by lawful decisions.⁴⁴ Focus in this paper is on the analysis of the compensatory protection of legitimate expectations in the field of spatial planning and building, which is in certain countries known as *planning compensation*.

When it comes to spatial planning and building, legitimate expectations can be derived from an individual act of the administration (administrative act such as location⁴⁵ or planning permit, or building permit), or from the normative act such as law or by-law (spatial plan). The rights of the citizens in spatial planning and building are created based on the normative acts and individual acts. Normative acts in the context of this paper are spatial plans, and implementing acts are mostly location and building permits.

³⁸ On the public side there could be relevant legality, flexibility, legal certainty, good administration, respect for democracy, protection of life and health, financial interests. On the private side are the rule of law, legal certainty, good faith, fairness, basic rights (Sigron, *op. cit.* p. 67).

³⁹ *Ibid.*, p. 66-67.

⁴⁰ *Ibid.*, p. 68.

⁴¹ Schønberg was analyzing protection of legitimate expectations in his book in the chapter 2 - Procedural protection of legitimate expectations, Chapter 3 - Substantive protection of legitimate expectations and chapter 5 - compensatory protection of legitimate expectations. (Schønberg, *op. cit.* in note 32).

⁴² Schønberg, *op. cit.*, p. 1.; See also in Šikić, Marko, Ofak, Lana. "Nova načela upravnog postupka (s posebnim naglaskom na razmjernost, legitimna očekivanja i stečena prava)." Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 32 (2011): 127-151.

⁴³ Sigron, *op. cit.*, p. 68.

⁴⁴ Schønberg, *op. cit.*, p. 173.

⁴⁵ In Croatia, planning permit is called 'lokacijska dozvola'. It is regulated in articles 125 - 150 of the SPA. For translation see also: Vodič kroz praksu Europskog suda za ljudska prava - okoliš, from 30 April 2022, p. 65., available at: <https://uredzastupnika.gov.hr/UserDocsImages/dokumenti/Edukacija/Vodi%C4%8D%20-%20okoli%C5%A1.pdf>, accessed on 9 December 2024.

III. Compensatory Protection of Legitimate Expectations in Spatial Planning and Building

In explaining the nexus between the legal and institutional background and land, Larsson stated that “*the rights to land be it ownership or other interests, are vital. It is also significant how such rights are legally defined, whether they are more or less absolute or limited by specific conditions or rules*”.⁴⁶ In the chapter on flexibility of the spatial plans and its adoption process, Larsson discusses deviations from binding spatial plan and its consequences in the following sentence: “*Possibilities to deviate from a development plan against the will of the landowner, thereby causing him considerable damage, would furthermore be a threat against the real estate market.*”⁴⁷ If we consider spatial plans as binding instruments⁴⁸ adopted for a long period of time, entitled government as a creator of the spatial plan must bear in mind that requests of the society will be changed, together with individual requests of the citizens. So, the crucial question is, how to reconcile flexibility and consistency of spatial planning. Larsson gives three options:

- to grant building permit authorities the power to allow exemptions from a binding plan – to grant exemptions under certain conditions;⁴⁹
- to allow simplified proceedings if it is only a question of modification of an existing plan;⁵⁰
- to avoid detailed planning prescriptions for plan which will not be implemented more or less immediately^{51,52}

On the other hand, citizens should be aware that spatial plan sooner or later must be revised, or even put out of force and exchanged with the new spatial plan which will be valid in the future. In such situations, the question arises what will happen with the landowners’ rights if the change of the existing plan causes them certain damage.⁵³ Changes in the land use plan⁵⁴ will affect the market value of the land, where problem is even bigger if the change means decreasing in the market

⁴⁶ Larsson, *op. cit.* in note 28, p. 2.

⁴⁷ *Ibid.*, p. 95.

⁴⁸ Larsson mentioned that spatial plans can be more or less binding instruments, and this characteristic can differ depending on the level of the spatial plans (*Ibid.*, p. 92-94). In Croatia, spatial plans are by-laws, and general acts by its legal nature, and they are binding documents. PPA have regulation on their mutual accordance due to the hierarchical structure, and as well due to the horizontal accordance. However, illegality of the higher plan does not mean that spatial plan of lower level will be put out of force. For each spatial plan, the individual procedure of the assessment of the legality should exist (see articles 158-165 of the ADA).

⁴⁹ According to Larsson, it was used in several countries, for example in Germany and Finland (Larsson, *op. cit.*, p. 95).

⁵⁰ In France, Germany, Sweden, Denmark, and with some modification also in Ireland, Finland and Italy.

⁵¹ Larsson, *op. cit.*, p. 95.

⁵² In Netherlands, Italy and Spain (Larsson, *op. cit.*, p. 96)

⁵³ Larsson, *op. cit.*, p. 96; Đerđa, 2013, p. 86.

⁵⁴ Land use plan and spatial plan have the same meaning in this paper.

value. Larsson mentions “*in some countries, especially in those having a relatively new planning legislation, the problem seems not yet fully considered*”.⁵⁵ Croatia can serve as an example where systematic approach to the problem does not exist yet. The approaches of the handling those complex situations are different and will be analysed in the following chapters.

3.1. Compensatory Protection of Legitimate Expectations in the Netherlands

“*Compensation rights for land use regulations have been in existence for a long time in the Netherlands*”.⁵⁶ But first, we should present brief overview of the types of the planning acts in the Netherlands.

The Netherlands is one of the leading European countries in spatial planning.⁵⁷ The state is organized in three levels,⁵⁸ national, regional and municipal level.⁵⁹ Policy statements which include planning issues important for the national policy are called *planologische kernbeslissing*.⁶⁰ At the regional level there is *streekplan* (regional plan)⁶¹ which has to be revised every ten years. Provincial executive has possibility to elaborate in detail certain parts of the plan in the future, so basic version of the *streekplan* is quite general.⁶² According to the Spatial Planning Act, local representative body can adopt *Structuurplan*⁶³ which sets out general future development. At local level for the territory outside the built-up areas, there is an obligation to adopt *bestemmingsplan*.⁶⁴ Although it is not an obligation for the municipality to have *bestemmingsplan* in built-up areas, in practice, municipalities do adopt such plan. Municipal council can decide to withdraw parts or the whole plan at any time. However, Spatial Planning Act from 1965 which was revised in 1985 and 1994, does allow for an interested party to

⁵⁵ Larsson, *op. cit.*, p. 96.

⁵⁶ Hobma, Fred, “ ‘New Rules for Planning Compensation Rights in the Netherlands’: (paper presented at the fourth Conference of the International Academic Association on Planning, Law, and Property Rights, Dortmund 10–12 February 2010, p. 2.

⁵⁷ Hobma in the introduction of his paper on planning compensation in Netherlands stated: „*Since Dutch Planning Law, with its matured system of land-use planning, has always drawn attention from foreign countries, this paper may be of interest for international researchers or practitioners seeking information about new Dutch Planning Law*“ (Hobma, *op. cit.* in note 56, p. 1).

⁵⁸ See in Tisma, Alexandra, Meijer Johan, “Lessons Learned from Spatial Planning in the Netherlands, Background Report, In support of integrated landscape initiatives, globally. The Hague: PBL Netherlands Environmental Assessment Agency, 2018, p. 14. Available at: https://www.pbl.nl/sites/default/files/downloads/PBL_-_Lessons_learned_from_spatial_planning_in_NL_-_20181108_-_3279.pdf, accessed 20 November 2024.

⁵⁹ Larsson, *op. cit.*, str. 201.

⁶⁰ *Ibid.*, p. 203.

⁶¹ It is not obligatory for the region to have regional plan (Larsson, *op. cit.*, p. 203).

⁶² Larsson, *op. cit.*, p. 203.

⁶³ *Structuurplan* is not obligatory to have.

⁶⁴ Larsson, *op. cit.*, p. 203.

'claim *planschade*'.⁶⁵ Under certain conditions,⁶⁶ if the new plan (*bestemmingsplan*) causes damage, the landowner can claim to the municipality for the compensation.⁶⁷

The new Spatial Planning Act was adopted in 2008, with the new rules⁶⁸ for the *planning compensation rights* in the Chapter 6.1, called *compensation for loss*.⁶⁹ Aggrieved party could demand compensation under certain conditions. "First, compensation is for those parties who have suffered or will suffer a loss. Second, both capital losses and income losses can be compensated. Third, the damage that is considered for compensation is not limited to damages caused by the determinations of a land use-plan. Other types of damages that are considered for compensation include (1) damages that result from a project decision, and (2) damages that result from the stay of a decision (Dutch: *aanhouding*) regarding the issuance of a building permit. Fourth, compensable damages must have resulted from an irrevocable land-use plan or an irrevocable project decision. Fifth, the only damages that are compensated are those that cannot reasonably be borne by the aggrieved party."⁷⁰ There was introduced a deductible provision of two percent meaning that "*whenever the value of a property decreases, or related income declines, by two percent or less as a result of a planning decision, the damage would not qualify for reimbursement*".⁷¹

Today, in the Netherlands, there is the Environment and Planning Act (*Omgevingswet*) which entered into the force on 1 January 2024.⁷² This Act regulates compensation regarding spatial planning in section 15 under the title 15.1. Compensation for Loss (in Dutch: *Nadeelcompensatie*).⁷³ Regulated are scope of the application, damage not eligible for compensation, claim for damages when environmental permit is not required, active and passive risk acceptance, normal social risk, competent authority, basis for the delegation of rules on the application for compensation, basis for delegation of information requirement.

⁶⁵ *Planschade* was compensation for the financial damage caused by a *bestemmingsplan* (Larsson, *op. cit.* p. 208.)

⁶⁶ Conditions are: the measure is affecting landowners rights' more than is general for the social situation; the plan should not be adopted for the first time, meaning change in the existing plan is necessary condition, and if the landowner had taken no action in the 10 years before the change, Larsson states that he has 'missed the boat' and no compensation needs to be paid (Larsson, *op. cit.*, p. 208.). We can conclude that this reason has grounds in the necessity of the revision every ten years.

⁶⁷ Larsson, *op. cit.*, p. 208.

⁶⁸ Reasons for change of the legislation were following according to Hobma: developments in the case law, comparative research and financial reasons (Hobma, *op. cit.*, pp. 3-4).

⁶⁹ *Ibid.*, pp. 1, 3.

⁷⁰ *Ibid.*, pp. 6-8.

⁷¹ *Ibid.*, p. 8.

⁷² Text of the Environmental and Spatial Planning Act is available at: <https://wetten.overheid.nl/BWBR0037885/2024-01-01>, accessed on 20 November 2024.

⁷³ For the purposes of this paper analysis is based on the consolidated version form 2021 (available at: <https://iplo.nl/regelgeving/omgevingswet/english-environment-and-planning-act/>, accessed on 20 November 2024) since the text of the new Environmental and Planning Act from 2024 is not available in English yet.

3.2. Compensatory Protection of Legitimate Expectations in Germany

The German spatial planning system is complex and hierarchically structured,⁷⁴ due to the organization of the state.⁷⁵ At the federal level, the most important for spatial planning is the Federal Spatial Planning Act (*Raumordnung, ROG*) where federal government defines basic goals and principles of the country's spatial organisation.⁷⁶ Since 1986 local land use planning is regulated in Federal Building Code (*Baugesetzbuch, BauGB*).⁷⁷ At state level (*länder*), there is a division on state, regional and local level.

Länder formulate goals and strategies in spatial planning act usually called Land's development plan (*Landesentwicklungsplan*).⁷⁸ At regional level the task is mostly in the coordination of regional spatial planning. That includes incorporation of federal principles from the one side, and providing a framework for the spatial development of the municipalities on the other side.⁷⁹

Municipalities create framework for land-use planning (urban development planning). Land use planning is “a compulsory municipal task created by Federal Building Code”.⁸⁰ There are two types of local planning acts. The first one is the Zoning Plan or Preparatory Land-use Plan (*Flächennutzungsplan*) adopted for the entire territory of the municipality. According to the Section 5 of the Federal Building Code (*Baugesetzbuch, BauGB*)⁸¹, Preparatory Land-use Plan is a framework instrument.⁸² It represents a type of land use arising for the entire municipal territory in accordance with the intended urban development.⁸³ The second type of local planning act is regulatory and public binding land-use plan (*B-Plan, Bebauungsplan*). It is regulated in the section 8 till the section 10 of the BauGB. They define „the type and amount of building development for each plot of land in the plan area.“⁸⁴

⁷⁴ It is also based on the three basic principles, subsidiarity, municipal autonomy and mutual feedback principle (Blotevogel, Hans H., Danielczyk, Rainer, Münter, Angelika. “Spatial Planning in Germany.” In *Spatial Planning and Practices in Europe – A Comparative Perspective on Continuity and Changes*, edited by Mario Reimer, Panagiotis Getimis and Hans Heinrich Blotevogel, 83-108. London and New York: Routledge, 2014, p. 84.).

⁷⁵ *Ibid.*, p. 84.

⁷⁶ Scharman, Ludwig, Introduction to the German Spatial Planning System, Interreg, Reinmann project, 2020, p. 4., available at: https://rainman-toolbox.eu/wp-content/uploads/2020/06/RAINMAN_Spatial-Planning_Germany.pdf, accessed 25 November 2024.

⁷⁷ Larsson, *op. cit.*, p. 160.

⁷⁸ Blotevogel, Danielczyk, Münter, p. 85.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Baugesetzbuch (BGBI. I S. 3634; BGBI. 2023 I Nr. 394), hereinafter Federal BauGB.

⁸² Scharman, Ludwig, Introduction to the German Spatial Planning System, Interreg, Reinmann project, 2020, p. 11.

⁸³ Section 5 of the Federal BauGB.

⁸⁴ Reimer, Mario, Getimis Panagiotis and Hans Heinrich Blotevogel, *Spatial Planning and practices in Europe – A comparative Perspective on continuity and changes*. Routledge, 2014, p. 86.

When it comes to compensation in relation to legitimate expectations, there is a section 39 of the Federal Building Code according to which “*the owners, or any other persons entitled to exercise rights of use, have made preparations for the realisation of such uses as are provided for in the legally binding land-use plan in justifiable faith in the continuing validity of a legally binding land-use plan, they are entitled to demand an appropriate amount of financial compensation to the extent that material investments fall in value as a result of the amendment, supplementation or revocation of the legally binding land-use plan.*”⁸⁵ This also applies in the case of levies under federal or federal state law charged for the provision of local public infrastructure.⁸⁶

Similar provision exists at the *länder* level. For example, compensation is regulated because legally binding development plan was amended or repealed. Article 33/2 of the Bavarian State Planning Act (*Bayerisches Landesplanungsgesetz, BayLplG*) states:

(2) *If a municipality has to compensate a third party in accordance with Sections 39 to 44 of the Federal Building Code because it has amended or repealed a legally binding development plan on the basis of spatial planning objectives,*⁸⁷ the Free State of Bavaria shall compensate it.

3.3. Compensatory Protection of Legitimate Expectations in France

France has three levels of spatial planning, state, regional and local level. All levels are characterized by numerous spatial plans.⁸⁸ At the national level, France has only sectoral guidelines. The most important document regarding spatial planning is SNADT (*Schéma National d'Aménagement et de Développement du Territoire*). At the regional level, there is SRADDT (*Schéma Régional d'Aménagement et de Développement Durable du Territoire*). This document is not binding.⁸⁹ At the local level, “the core document is *Schéma de Cohérence Territoriale (SCoT)*.”⁹⁰ SCoT “sets sustainable spatial development perspective for its area and it is at the top of the hierarchy of local documents”.⁹¹

⁸⁵ Emphasized by the author.

⁸⁶ § 39 of the Federal BauGB.

⁸⁷ Emphasized by the author.

⁸⁸ OECD. The Governance of Land Use in France: Case studies of Clermont-Ferrand and Nantes Saint Nazaire. Paris: OECD Publishing. <http://dx.doi.org/10.1787/9789264268791-en>, Accessed on 12 December 2024.

⁸⁹ Only one region has legally binding SDRIF (*Schéma Directeur de la Région Ile-de-France*) (Geper, Ana. “France, drifting away from the regional economic approach.” In *Spatial Planning and practices in Europe – A comparative Perspective on continuity and changes*, edited by Reimer, Mario, Reimer, Panagiotis Getimis and Hans Heinrich Blotevogel, 109-126. London and New York: Routledge, 2014, p. 111-112).

⁹⁰ *Ibid.*, p. 112.

⁹¹ *Ibid.*, p. 112.

The development of the legitimate expectations was under the influence of the CJEU⁹² and of the ECtHR, namely, under the protection of individual rights and freedoms falling within the scope of the Article 1 of the Protocol 1 of the ECHR.⁹³ However, according to the French Report for the ACA Report, legitimate expectations “*does not bind the legislative authorities save for the matters falling into the ambit of EU law. However, the most recent jurisprudence on the principle of non-retroactivity of laws presupposes relatively similar restrictions. Even though the legislature is entitled to modify the legal acts, it cannot do so without a sufficient public interest and by failing to give the acquired rights proper legal significance.*”⁹⁴

Compensatory protection of legitimate expectations seems more complex in France than in Netherlands or in Germany. In France, the decision should firstly ‘create rights’, and it is not easy task to determine whether decision ‘create rights’. Schønberg stated that “to determine which decision create rights, one must therefore examine the conditions that decision must fulfil in order to be irrevocable and in what circumstances decisions may nevertheless be revoked.”⁹⁵ When it comes to statutory compensation, it is provided in situations where general planning restrictions interfere with existing (lawful) building permission. So, if a person has building permission, and the new planning regulations now declare the previous building zone as non-building area, the entitled person has a right to ask for compensation.⁹⁶

3.4. Situation in Croatia

Spatial planning in Croatia is regulated by two basic acts, PPA and BA. While adoption of the spatial plans as general by-laws is regulated in the articles 53 - 124 of the PPA, issuance of permits is regulated in both, PPA and BA.⁹⁷ Similar as other European countries, Croatia has spatial planning organized in three levels. What differs from all other countries is the fact that spatial plans in Croatia are binding, at least at the regional level and at the local level. Croatia also has more

⁹² On legitimate expectations in the EU law see also: Sokol, Tomislav. “Načelo zaštite legitimnih očekivanja u upravnom pravu Europske unije i pravna autonomija država članica.” *Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku* 34 (2018): 33-54.

⁹³ ACA Europe, p. 9.

⁹⁴ *Ibid.*, p. 16.

⁹⁵ Schønberg, *op. cit.*, p. 70-71. Building and demolition permits are listed as capable of creating rights (*Ibid.*, p. 70).

⁹⁶ In France, compensation for lost profits is rarely awarded. (*Ibid.*, p. 177).

⁹⁷ Those acts are called implementing acts (*akti za provedbu prostornih planova*), and they are regulated in article 114/2 of the PPA (for example in the article 114/2 are mentioned location permit, permit for change of usage, decisions on determining the building plot). Each mentioned implementing act title is regulated in special section of the PPA. Building permit is regulated in special section of the BA (section 7, articles 106-127 of the BA).

plans on each level of spatial planning than the Netherlands and Germany.⁹⁸ Therefore, PPA on Croatia contains provisions for the resolving questions regarding the strength of the spatial plans.⁹⁹

By its legal nature, spatial plans are by-laws, and they are basis for issuance of planning and building permissions. However, in Croatia, there is no legal or codified rule which would provide obligation for compensation if the legitimate expectations are violated. In Croatia, there is no formal codification of the principle of legitimate expectations. Derđa points out that although the principle of protection of legitimate expectations is not explicitly established in Croatian law, it can be found in the provisions of the GAPA.¹⁰⁰ On legal certainty in the area of administrative law (in connection with the principle of legitimate expectations) Derđa points out as follows:

„Legal certainty is particularly emphasized in administrative law, because individuals must have the possibility to rely on the actions of the public administration in general and to adapt their private interests to the interests of the community established in laws and by-laws. The trust that arises as a result of such reliance is the basis for realizing the rule of law in the state. Here, it has application in particular in two institutes: acquired rights and legitimate expectations of individuals.“¹⁰¹

When general act can provide basis for legitimate expectations, it is important that government takes into the account the rights of the citizens and their legitimate expectations.¹⁰²

Constitutional Court of the Republic of Croatia, in its Decision U-IIIIB/4366/2005 from 5 April 2006¹⁰³ has confirmed that legitimate expectations exist, and every person is entitled to express the violation of its legitimate expectation before the public bodies and the courts:

“The highest values of the constitutional order of the Republic of Croatia are the rule of law and respect for human rights. They are the basis for interpreting the Constitution. The obligation to respect the aforementioned constitutional values necessarily leads to the obligation to interpret relevant laws and other regulations in accordance with two important principles that are components of the aforementioned constitutional values. These are the principle of legal certainty (certainty) and the related principle of protecting the legitimate expectations¹⁰⁴ of the parties in the procedures in which their rights and obligations are decided.”¹⁰⁵

⁹⁸ For detail comparison see in: Krtalić, Vladimir. “Sustavi planiranja razvoja države, regionalnog i lokalnog planiranja.” Zagreb: Hrvatski inženjerski savez, 2021, p. 38-40.

⁹⁹ Article 61 of the PPA.

¹⁰⁰ Articles 103 and 155 of the GAPA (Šikić, Marko. “Zaštita pravne sigurnosti stranaka u upravnom postupku - pravomoćnost i legitimna očekivanja.” Zbornik Pravnog fakulteta Sveučilišta u Rijeci 34 (2014): 157).

¹⁰¹ Derđa, *op. cit.*, p. 87.

¹⁰² *Ibid.*, p. 28.

¹⁰³ Mentioned Decision of the Constitutional Court is on the building permit and violated legitimate expectations of the applicant, by the domestic public bodies.

¹⁰⁴ Emphasized by the author.

¹⁰⁵ §9 of the Decision of the Constitutional Court of the Republic of Croatia, Decision U-IIIIB/4366/2005 from 5 April 2006.

Constitutional Court of the Republic of Croatia has emphasized the principle of legitimate expectation also in the Decision U-I-659/1994 i from 15 March 2000:

“...in a legal order based on the rule of law, laws must be general and equal for all, and legal consequences must be certain for those to whom the law will apply. The Court also notes that the legal consequences must be appropriate to the legitimate expectations of the parties in each specific case in which the law directly applies to them”

Conclusion for Croatia is that legitimate expectations are not codified in PPA or BA. However, courts' case law shows that legitimate expectations are protected, and even more, they present one of the most important values in Croatian legal order, next to the principle of certainty, stability of the laws, principle of legality and the rule of law. Here is also important to mention that Larsson in his book on spatial planning in western democracies was dealing with the problem of the compensation for the damage caused by the public authority when legally binding act is amended, revoked, or repealed and for countries with relatively new spatial planning systems has stated: “... for the future is necessary to find suitable legal solutions to the problem of handling old and unused development rights.”¹⁰⁶

IV. Conclusion

Principle of legitimate expectations is nowadays recognized and confirmed in the European countries, in the case law of the European Court on Human Rights and the Court of the European Union. Although it is not codified in Croatia, nowadays is widely recognized in Constitutional Courts' case law and it is not unusual for citizens to point out violation of the legitimate expectations before the administrative courts in Croatia when it comes to spatial planning and building.¹⁰⁷

Focus of this paper was on presenting basis for the legitimate expectations in spatial planning and building in connection to the administrative law. Procedure of issuance of local permit and building permit is the administrative procedure, and local permit and building permit are administrative acts. Research has shown that administrative act, as an individual act, can present valid basis for the protection of the legitimate expectations. Another possible basis for the protection of legitimate expectations is general act and by-law, for example binding spatial plan. If a binding spatial plan is amended, revoked or repealed, it could present valid basis for the legitimate expectations.¹⁰⁸

¹⁰⁶ Larsson, *op. cit.*, p. 96.

¹⁰⁷ See Judgement of the Administrative Court in Rijeka UsI 1069/2012-18 from 30 April 2015, Judgement of the Supreme Court of the Republic of Croatia Uzz 15/13-4 from 27 November 2013, Judgement of the High Administrative Court of the Republic of Croatia Usž-2842/16-2 from 21 September 2016.

¹⁰⁸ It should be emphasized again that paper was dealing with the amendment of the lawful spatial plans, and not with the procedure of the abolishment of the unlawful spatial plans before the entitled courts.

The second aim of the paper was to research whether compensatory protection of the legitimate expectations exist in spatial planning and building and if yes, if there exist European countries with codification of such a compensation. Research has shown that legitimate expectations are protected in substantive, procedural and compensatory way,¹⁰⁹ but realization of compensation or compensation schemes differ among countries.¹¹⁰ Central question was what happens when lawful general act has to be replaced or amended. Motivation of local government for such action relies in the public interest. Research has shown when public authorities are amending or revoking general act, certain conditions must be fulfilled. Therefore, public authorities should always act in accordance with the principle of legal certainty and the principle of good administration.¹¹¹ In conformity with the mentioned principles, citizens should be informed on planned changes in legislation. Public discussion should follow information on the proposed changes as well as citizen should have adjustment period after the change in legislation was introduced. Also, in any case, compensation must be considered for those affected by the decision that was put out of force, and for them was representing vested rights.¹¹²

When considering applicability of the comparative solutions in Croatia, which was the third research question, it should be mentioned that compensation exists for *binding* spatial plans. In Croatia spatial plans adopted at local and regional level are binding. In comparison with the Germany and Netherlands, Croatia has more spatial plans at each spatial planning level.¹¹³ Therefore, compensation is possible, but under certain conditions. Firstly, there should be a valid basis - individual act or at least spatial plan which was lawful, but was revoked. While legitimate expectations in spatial planning and building regarding vested rights based on the individual decision exist in domestic case law as well as before the ECtHR under the Article 1 Protocol 1 of the ECHR, compensation for the legitimate expectations based on the spatial plan has no codified version and it is not part of the PPA or BA. Therefore, the suggestion is to incorporate substantive, procedural and compensatory protection of legitimate expectations into the new PPA, for those spatial plans which are the closest to the citizens, considering comparative regulation where spatial plans at state or regional level mostly do not have binding effect. Those local spatial plans in Croatia are called – urbanistic development plans (*urbanistički planovi uređenja*).¹¹⁴ Of course, this suggestion is followed by other

¹⁰⁹ Sigron, *op. cit.*, p. 61, Schönberg *op. cit.*

¹¹⁰ In France, there is non-compensation scheme, where the owner should have building permission to apply for compensation. In Germany, there is all or nothing compensation scheme, while in the Netherlands, there is division on direct and indirect damage, and all types of damage are compensated. For more detail see in: Lacoere, Peter *et. al.* “Compensating Downzoning. A Comparative Analysis of European Compensation Schemes in the Light of Net Land Neutrality.” Planning Theory & Practice, 24 (2): 190-206, 2023., DOI: 10.1080/14649357.2023.2190152

¹¹¹ Schönberg *op. cit.*, p. 103.

¹¹² *Ibid.*

¹¹³ See in Krtalić, *op. cit.* in note 98, pp. 38-40.

¹¹⁴ According to the article 56/3 of the Physical Planning and Building Act, Official Gazette no. 76/2007, 38/2009, 55/2011, 90/2011, 50/2012, 55/2012, 80/2013, they were also called

multiple unanswered questions such as the determination of the affected party entitled to apply for compensation (party in the procedure of issuance of location or building permit, person with valid location or building permit, etc.), determination of the public body which should be responsible for the payment of compensation, determination of the amount of compensation, determination of deadlines for lodging a request for compensation, etc., which could be considered with the adoption of regulation of the legitimate expectations in spatial planning and building.

It is possible to adopt regulation for the protection of legitimate expectations into the PPA in Croatia, and conditions could be listed as it follows. Protection of legitimate expectations could be guaranteed to the parties which have at least shown an intention to provide action based on the valid spatial plan which was put out of force.¹¹⁵ This intention could be, for example, valid location or building permit, or ongoing procedure of gaining such permissions. As such intention one can consider situation when a potential party was searching information regarding location (*lokacijska informacija*),¹¹⁶ or was asking any other information (in the Croatian GAPA called *obavješćivanje o uvjetima ostvarivanja i zaštite prava*)¹¹⁷ regarding the land covered by spatial plan which was put out of force, when conduct of municipality was not in accordance with the issued information, all based on the article 155 of GAPA. Under the valid intention, one can consider also guarantee of acquiring rights (*jamstvo stjecanja prava*)¹¹⁸ which is also in connection with the principle of legitimate expectations and could present valid basis for the compensatory protection of the legitimate expectations in spatial planning and building. In the end of the paper, author suggests regulation of protection of legitimate expectations in PPA, with gradually listed conditions for the protection.

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‘implementing spatial plans’ (*provedbeni akti*) in Croatia till 2013 and the adoption of the PPA in 2014.

¹¹⁵ Research has shown that Legitimate expectations which are protected should have valid basis, they should be reasonable, and they should be in a good faith.

¹¹⁶ Location information in the article 36 of the PPA.

¹¹⁷ Article 155 of the GAPA.

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