


Municipal *Lex Contractus* – Effectiveness of the Terms and Conditions for the Sale of Real Estate from the Municipal Real Estate Stock in Shaping the Real Estate Development Process

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Abstract: The municipality, acting in the sphere of dominium, independently decides on the use and manner of use of individual assets. However, the trade in real estate constituting the subject of ownership of this local self-government unit requires compliance with a number of legal regulations, the most significant of which is the Act of August 21, 1997 on Real Estate Management (consolidated text Journal of Laws of 2021 item 1899, as amended). However, none of the provisions of the law refers explicitly to the freedom and limits of shaping by the municipality of the terms and conditions for the disposal of real estate, which in the case of a non-tender route are determined in negotiations conducted with the buyer, while in the case of a tender they are announced in the contract notice. The content established in this manner is then included in the protocol, which forms the basis for the conclusion of the contract, and thus directly affects the shape of the contractual legal relationship. The purpose of the publication will therefore firstly be to set out the legal framework for the municipality's determination towards the future buyer of the real estate of the specific manner, in which the investment is to be carried out, as well as to answer the question as to the real possibility of the former owner (municipality) co-shaping the investment process on the sold real estate after the buyer has signed the contract.

The importance of the issue under consideration is expressed in the decision as to whether the creation by the municipality of its own *lex contractus* by means of the terms and conditions for the disposal of the real estate relating to specific deadlines for the commencement and completion of the investment process, the manner of use and development of the real estate, as well as the liability of the new owner towards the previous owner for their violation, is legally effective and can actually be enforced by the municipality.

1. Introduction

The basic instrument for shaping the spatial policy by the municipality is the adoption of the local spatial development plan. Already in Article 6 of the Act of March 27, 2003 on Spatial Planning and Development,¹ it is explicitly indicated that the provisions of the local spatial development plan are one of the factors shaping the manner of exercising the ownership right to real estate. In the doctrine and jurisprudence, there are no greater doubts that the said Act, together with the acts of local law issued pursuant thereto – local spatial development plans, constitute one of the limitations to the rights arising from the ownership right (Article 140 of the Civil Code of April 23, 1964² – hereinafter the CC or the Civil Code). Therefore, their level of detail must correspond to the constitutional principles of the rule of law, proportionality, equality and the protection of property, as it translates into the degree of interference of the municipality's planning authority in the private interests of real estate owners located in the areas covered by the local spatial development plans.³ Determining directions for new development and guaranteeing the efficient management of space and the preservation of the economic value of this space on the scale of a specific land real estate is also possible using civil law instruments. The basic legal relationship that limits a private entity's right to land is perpetual usufruct. The specific elements of the contract on the handover of real estate for perpetual

¹ Consolidated text Journal of Laws of 2022 item 503, as amended.

² Consolidated text Journal of Laws of 2022 item 1360, as amended.

³ See the judgments of the Supreme Administrative Court of: March 17, 2022, Ref. No. II OSK 831/21, LEX No. 3338063; June 18, 2016, Ref. No. II OSK 478/16, LEX No. 2107247; November 14, 2012, Ref. No. II OSK 2226/12, LEX No. 1291967; March 17, 2022, Ref. No. II OSK 884/21, LEX No. 3352194; February 16, 2022, Ref. No. II OSK 754/21, LEX No. 3342365.

usufruct, which affected the use of the land by the holder, were the work commencement and completion dates, the type of buildings or facilities and the obligation to maintain them in a good condition, the conditions and dates for reconstruction in the event of the destruction or demolition of buildings or facilities during the term of perpetual usufruct (Article 239 of the CC). As of January 1, 2019, pursuant to the Act of July 20, 2018 on the Transformation of the Right of Perpetual Usufruct of Land Developed for Residential Purposes into the Ownership of Such Land (consolidated text Journal of Laws of 2022 item 1495), the right of perpetual usufruct of land developed for residential purposes is transformed into the ownership of such land. As a result, local self-government units disposing of municipal land have lost the possibility to influence the manner of development and construction of real estate intended for housing. It is only fair to point out that it is precisely on such real estate that there is a great deal of abuse on the part of investors that, hoping to make a substantial profit from the sale, exploit the real estate development to the limit of legality. In the language of the real estate trade, a new term has already become established that is known as “patodevelopment” (pathological development), meaning a development that formally conforms to the lowest criteria, conditions and parameters of the construction law, but which, in terms of its use for residential purposes, the standard of the area and the quality of life in this area, leaves much room for controversy.⁴ Special attention should be paid to the fact that local self-government units and the State Treasury are obliged to manage real estate in a manner consistent with the principles of sound economy (Article 13 of the Act of August 21, 1997 on Real Estate Management⁵ – hereinafter REM). Furthermore, the management of real estate, in particular municipal real estate, is linked to the exercise of particular care in performing the management in accordance with the purpose of that real estate and its protection (Article 50 Act of March 8, 1990 on Municipal Self-Government – hereinafter MSG⁶). It can therefore be concluded that

⁴ For a summary of 2021 in terms of the lack of quality by new developments, see: Michał Bachowski, “10 najgorszych przejawów polskiej patodeveloperki,” NOIZZ, accessed June 10, 2022, <https://noizz.pl/design/10-najgorszych-przejawow-polskiej-patodeveloperki-w-2021-r/6ex1hpl>.

⁵ Consolidated text Journal of Laws of 2021 item 1899, as amended.

⁶ Consolidated text Journal of Laws of 2022 item 559, as amended.

public entities are obliged to exercise their property rights in a manner that corresponds to the indicated regulations.⁷ The special nature of the municipality and the tasks it has to perform makes it necessary to pose the question of the possibility of influencing the manner of development and use of land intended for housing by the new owner (investor) that acquired the real estate from the municipality.

There is no doubt that a municipality, as a local self-government unit, acting on the basis and within the limits of the law, may establish civil law relationships. It is possible thanks to the fact that regulations of the law acknowledge a municipality as an independent participant in legal relationships by granting it legal personality and equipping it with assets to manage. From solutions included in the Constitution, the Civil Code, to system-related statutes, a municipality, as well as higher-level local self-government units, was granted legal personality.⁸ The legal personality of local self-government units, in addition to decentralization of public authority, is also one of the aspects of local self-government – thus being a guarantor of its independence.⁹ Granting legal personality to a municipality (and other local self-government units) causes it to gain the status of a hybrid entity in legal transactions. Primarily because it combines the capacity to establish civil law relationship on its own behalf with competences to decide with authority in individual cases (while exercising public authority) and with constituting acts of local law. However, a municipality, while maintaining this multifaceted identity, depending on the type of its operation, cannot cumulate the rights it is afforded. Therefore, while functioning in private law transactions, a municipality is subject to rules binding on all participants, and thus may not authoritatively shape the rights and obligations of

⁷ Magdalena Habdas, “Komentarz do art. 140 KC,” in *Kodeks cywilny. Komentarz. Tom II. Własność i inne prawa rzeczowe (art. 126–352)*, eds. Mariusz Frasz, Magdalena Habdas (Warsaw: Wolters Kluwer Polska, 2018).

⁸ See: Article 165 of the Constitution of the Republic of Poland of April 2, 1997, (Journal of Laws No. 78, item 483) and Article 33 of the CC.

⁹ Joanna Jagoda, “Podmiotowość prawna jednostek samorządu terytorialnego,” in *O czym mówią prawnicy, mówiąc o podmiotowości*, ed. Agnieszka Bielska-Brodziak (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2015), 347; Lucyna Rajca, “Upodmiotowienie publicznoprawne (polityczne) i cywilnoprawne (gospodarcze) gminy a rozwój lokalny,” *Przegląd Sądowy*, no. 2 (2001): 110.

its counterparty, which is admissible in exercising public authority. Nevertheless, a municipality as a civil law entity remains a special entity. Contrary to other – from the perspective of civil law regulations – entities of the law equal to it, it cannot enjoy the same scope of independence in deciding about its intentions and ways to achieve them. The premise that a municipality, as part of a separated state apparatus, is to perform public tasks on its own behalf and on its own responsibility, including satisfying the needs of a self-governing community, still plays a key role in this respect. In this context, therefore, it needs to be assumed that managing municipal assets, though on the basis of civil law measures, will have a purposeful nature to a greater extent. This is why the driving force behind the activities taken in this regard will always involve the performance by municipalities of specific public tasks, which will directly or indirectly impact the degree of the municipality's involvement in civil law transactions. It is postulated that it is a concept sufficient for a private law approach to this issue. Whereas the manner of performing government authority-related tasks, alien to civil law, resulting from the public law nature of these entities, is an open issue.¹⁰ The legal personality is exercised solely in the sphere of property relationships, and does not prove true in the sphere of administrative competences in terms of administrative authority and does not substantiate their independence and separateness from state bodies in terms of implementation of public tasks.¹¹ In turn, trading in public real estate is one of the best examples of administrative law permeating civil law, as well as excellent substantiation for non-government authority-related forms of activity of public entities. It needs to be added that the existing subjectivity of municipalities and other local self-government units is derived from civil law (mainly because only there this issue is regulated in detail). This does not mean that a public entity which uses private law measures loses this status. It is still bound by public law regulations, which are the basis of

¹⁰ Sławomir Fundowicz, “Osoby prawne prawa publicznego w prawie polskim,” *Samorząd terytorialny*, no. 3 (2000): 3; Zygmunt Niewiadomski, “Pojęcie samorządu,” in *System Prawa Administracyjnego, Tom 6, Podmioty administrujące*, eds. Roman Hauser, Andrzej Wróbel (Warsaw: C.H. Beck, 2011), 119; Piotr Radziejewicz, “Kilka uwag w sprawie prawnej przydatności pojęcia osoba prawa publicznego,” *Samorząd Terytorialny*, no. 6 (2000): 4.

¹¹ Niewiadomski, “Pojęcie samorządu,” 118–120.

its operation in general and, in particular, the use of civil law instruments to achieve a specific goal.¹²

Regardless of the disputes on the approach to legal personality, it needs to be highlighted that as a consequence of granting this attribute to the municipality, it not only becomes a separate entity in the sphere of property relations, but it also becomes equipped with property that forms its facilities to exercise the functions and tasks vested in it, not only of a public nature. The discussed problem lies in finding an admissible manner of protection of the property interest of the municipalities as an entity under civil law, which by establishing civil law relationships may shape the real estate development process. However, the choice of the appropriate measures depends on many issues, which will be discussed below.

2. REM in the Scope of the Dominium (Economic) Sphere and the Imperium (Authority-Related) Sphere in the Activities of the Municipality

As has been highlighted above, it is highly problematic to capture the boundary between exercising public authority and satisfying collective interests of a community in the course of economic activity, especially when the municipality undertakes activities on its own and does not entrust them to third parties (such as for-profit municipal companies). The main criterion allowing a differentiation of the dominium (economic) sphere and the imperium (authority-related) sphere will therefore involve establishing a systemic position of this entity towards the rest of participants of legal transactions in general and civil law transactions in particular. In fact, the indicated criterion will refer to the possibility of deciding about a specific legal situation of an entity by establishing individual or general norms, secured with the possibility of exercising state coercion. As a consequence, the dominium sphere will be free from legislative acts, final and non-revisable court decisions or other final decisions. Therefore, if a local self-government unit cannot exercise public authority towards its counterparties, then it may impact the position of the other party solely in the scope of competences granted on the basis of private law regulations. This is why in the dominium sphere such

¹² Kazimierz Strzyczkowski, *Rola współczesnej administracji w gospodarce (zagadnienia prawne)* (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 1992), 148.

an entity has, as a standard, an equal position towards the rest of the participants, and thus may not independently shape the rights and obligations of its counterparties. The only source of establishing legally significant relations will be to perform acts in law. However, contrary to non-public legal entities (other than those exercising public authority), it will not enjoy the same level of autonomy. Violating any of the additional criteria of participation in economic trading causes the acts in law performed contrary to them to lose legal significance. It is because only acts in law which are compliant substantively (content-wise) and formally (manner of performance) with the system of the law may shape civil law relationships in a binding way.¹³ It needs to be noted that the scope of admissible acts in law is limited by the scope of the municipality's legal subjectivity determined by the attribute of legal capacity and of the capacity to perform acts in law. A municipality may be a subject only to those civil law rights and obligations, which on the basis of detailed regulations may not be attributed to a legal person in general, or, even more so, associated with entities such as a local self-government unit.¹⁴

Managing real estate which is the property of the State Treasury and the property of a municipality (and other local self-government units) is subject to separate rules compared to trading in private real estate. The public real estate management is regulated by several legal acts. The most important legal act is REM and secondary legislation, which is *lex specialis* to the CC. This last legal act applies only if other acts have not regulated the issue of the discussed real estate management. A sale of real estate or granting land real estate for perpetual usufruct is carried out through a tender or in a non-tender procedure. The REM imposes an obligation on the bodies representing the State Treasury and local self-government units to manage the real estate in a way which is compliant with the principles of sound economy management. The principles of sound economy management assume the achievement of maximum economic profits from

¹³ Zbigniew Radwański and Krzysztof Mularski, "Normatywna podstawa skuteczności prawnej," in *System Prawa Prywatnego, Tom 2, Prawo cywilne – część ogólna*, eds. Zbigniew Radwański and Adam Olejniczak (C.H. Beck: Warsaw, 2019), 9–11.

¹⁴ Józef Frąckowiak, "Osobowość prawna gminy," *Acta Universitatis Wratislaviensis. Prawo*, no. 219 (1993): 134; Adam Doliwa, *Osobowość prawna jednostek samorządu terytorialnego* (Warsaw: C.H. Beck, 2012), 167.

the point of view of the owner, while maintaining social utility.¹⁵ It fits in a wider concept of good governance principles and their impact on real estate management.¹⁶ The REM by establishing civil law relationships may achieve public goals in the longer run.

3. Formation of the Manner in which a Future Buyer Exercises its Rights under the Ownership Right

3.1. Significance of Terms and Conditions for Disposal of Real Estate in Light of the REM

The only possibility of influencing the way in which the future buyer exercises its rights under the ownership right is the terms and conditions of disposal set by the municipality at the very beginning of the procedure for the disposal of the land. First of all, it should be pointed out that there is a lack of uniformity on the part of the legislator with regard to the permissible legal acts that may comprise the process of disposal of real estate. Article 4 (3b) of the REM defines disposal and acquisition of real estate as a legal transaction based on which the ownership of real estate is transferred or the right of perpetual usufruct of land is transferred or given for perpetual usufruct. Article 13 (1) of the REM, which contains only an exemplary catalogue of legal acts related to real estate transactions, seems to correspond to this definition. Within the scope of actions having a dispositive effect, the legislator indicates in particular sale, exchange and relinquishment, as well as granting for perpetual usufruct. However, when indicating the manner in which the real estate owned by a local self-government unit is to be disposed of, which is to be carried out either through a tender or in a non-tender procedure, it refers to the sale or granting of perpetual usufruct of land (Article 28 (1) of the REM). However, paragraph 2 of this article already refers to the terms and conditions for disposal of the real estate, which should be specified in the invitation to tender or during negotiations conducted

¹⁵ Ewa Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany* (Warsaw: LEX, 2022), Article 12; Jacek Jaworski et al., *Ustawa o gospodarce nieruchomościami. Komentarz* (Warsaw: Legalis C.H. Beck, 2022), Article 12.

¹⁶ Marta Gross, Ryszard Żróbek, and Daniela Špirková, "Public Real Estate Management System in The Procedural Approach – A Case Study Of Poland And Slovakia," *Real Estate Management and Valuation* 22, no. 3 (2014): 63.

with the buyer. It is argued in the literature that, also taking into account the content of Articles 34 (1), 37 (2) and 68 (1) (2) of the REM, it should be considered that Article 28 of the REM only applies to the sale of real estate and the granting of perpetual usufruct.¹⁷ When contrasting the term “terms and conditions for the disposal of the real estate” with the term “terms and conditions of the tender” in Article 38 (2) of the REM, it should be clearly indicated that the latter refers to the determination already in the content of the tender contract notice or in the protocol of the negotiations of the required distribution of rights and obligations, which will correspond to the content of the future contract. In the case of the tender procedure, it is the moment of publication of the tender contract notice that is the key moment of the establishment of the rules binding both parties on the content of the future contract. The impossibility to introduce additional regulations influencing the legal situation of future parties to the contract results directly from Article 28 (3), § 10 of the Regulation of the Council of Ministers of September 14, 2004 on the manner and procedure of conducting tenders and negotiations for the sale of real estate¹⁸ and Article 70 (4) of the CC. The organizer remains bound by the terms and conditions for the disposal of the real estate made available by such organizer and the tender conditions, which imply not only the rules of specific conduct during the tender (rights and obligations of the parties during the tender process), but also after its conclusion (rights and obligations of the parties to the future contract).¹⁹ Therefore, the question must be asked about the extent of

¹⁷ Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami*, Article 28.

¹⁸ Journal of Laws of 2021 item 2213.

¹⁹ The literature and case law point to different legal qualifications of the sources of such an obligation, with the prevailing view being that a pre-contractual agreement arises (*pactum de procedendo*) see: Piotr Nazaruk, “Komentarz art. 701,” in *Kodeks cywilny. Komentarz aktualizowany*, eds. Jerzy Ciszewski and Piotr Nazaruk, Warsaw: LEX, 2022); Bernard Łukańko, “Komentarz art. 701,” in *Kodeks cywilny. Komentarz. Tom I. Część ogólna, cz. 2 (art. 56–125)*, ed. Jacek Gudowski (Warsaw: LEX, 2021); Krzysztof Czub and Maja Maciejewska-Szałas, “Komentarz do art. 701,” in *Kodeks cywilny. Komentarz*, eds. Małgorzata Bałwicka-Szczyrba and Anna Sylwestrzak (Warsaw: LEX, 2022), with cited literature; Przemysław Miklaszewicz, “Komentarz do art. 701,” in *Kodeks cywilny. Komentarz*, eds. Konrad Osajda and Witold Borysiak (Warsaw: Legalis C.H. Beck, 2022. As regards case law, reference should be made to the judgment of the Supreme Court of July 15, 2007, Ref. No. II CZ 37/07, LEX No. 488947.

the competence of the tender organizer to influence the rights and obligations of the parties to the future contract, and thus the content of the legal transaction. As already indicated, the terminological confusion in the REM, which consists in the use of different terms (sale/disposal) in the same context, does not facilitate the possibility of answering the question thus posed. Moreover, the REM only defines the term of disposal/acquisition of real estate and does not refer to the term of sale,²⁰ treating such contract only as one of the events leading to the transfer of ownership rights. Therefore, if there are no limitations in the REM other than the manner of determining the price and its reduction, then it should be pointed out that the Civil Code should be applied to assess the competence to shape the content of the contract of sale concluded through tender or non-tender procedure not regulated in the REM and MSG. The duty of economy (Article 13 of the REM) and due diligence (Article 50 of the MSG) is related not only to the property aspect (usually understood as obtaining the highest possible price), but also to the non-property aspect (understood as obtaining the most favorable terms and conditions for disposal).

3.2. Contract of Sale with the Right of Repurchase

Taking into account the raised issue of the contractual predetermination of the manner of development or use of the land by the future owner of the real estate, together with the obligations of the municipality to manage its assets, it should be concluded that the typical content of the contract of sale provided for in Article 535 et seq. of the Civil Code will be insufficient in certain situations. This is also evidenced by the Act of December 16, 2020 on the Disposal of Real Estate with Settlement “Premises for Land,”²¹ which sets out the principles for the disposal of real estate from the municipal or district real estate resource with settlement in the price of such real estate of the price of premises or buildings transferred by the buyer of the real estate for ownership to the municipality or district. However, the difference between the analyzed options is that a contract of sale concluded under the “premises for land” settlement serves the purpose of enriching

²⁰ In contrast to the term “land real estate,” which is defined in the REM in Article 4 (1) and is a compilation of Articles 46, 47 and 48 of the Civil Code.

²¹ Journal of Laws of 2021 item 223, as amended.

the municipal or district real estate stock with premises or land real estate developed with a building with specific standards and use.²² In contrast, in this case it is about situations, in which the municipality has no interest in receiving replacement real estate from a future buyer, as this interest will exist in the future use of the real estate by this buyer. First of all, it should be pointed out that in addition to the typical contract of sale regulated in Articles 535–581 of the CC, the legislator distinguished in Articles 583–602 of the CC special types of sale, including sale subject to the right of repurchase and sale subject to the right of pre-emption. However, the dynamics of business transactions and the objectives pursued by the parties have led to the singling out of special types of sale, such as franchise sale²³ or sale subject to exclusivity.²⁴ Regardless of whether new types of contract of sale have their – even fragmentary – legal regulation,²⁵ the possibility to create new types of sale or to expand the content of typical contracts of sale is based on the competence of the parties resulting from the principle of freedom of contract (Article 3531 of the Civil Code). In this light, therefore, it will not be very controversial if, in order to secure a certain land use, the subject of the tender is not a classic contract of sale of real estate, but a contract of sale subject to the right of repurchase. It is also not excluded that the parties, in an attempt to establish at the contract conclusion stage the rules for future settlements related to the re-transfer of the real estate as a result of the exercise of the right of repurchase, will introduce a suspensive negative potestative condition making the exercise of the right of repurchase contingent on the real estate not being developed in a specific manner within an agreed period of time. It should also be added that this legal figure is linked to the new view of doctrine and case law as regards the possibility of stipulating a condition in unilateral legal acts serving the purpose of exercising a formative power. A condition in actions of this kind is admissible

²² E.g. buildings with social housing adapted for persons with disabilities or premises prepared for the operation of a municipal crèche or kindergarten.

²³ Wojciech J. Katner and Jerzy Pisuliński, “Szczególne rodzaje sprzedaży poza przepisami Kodeksu cywilnego,” in *System Prawa Prywatnego, Prawo zobowiązań – część szczegółowa*, ed. Jerzy Rajski (Warsaw: C.H. Beck, 2018), 7: 25.

²⁴ Wojciech J. Katner, “Umowy w obrocie towarowym,” in *System Prawa Handlowego*, ed. Mirosław Stec (Warsaw: C.H. Beck, 2017), 5: 1013.

²⁵ E.g. specification of sale – Article 549 of the CC.

when its fulfilment depends on the behavior of the addressee of this action and does not cause uncertainty in the legal situation of this addressee.²⁶ Assuming that the mere fact of reserving the right of repurchase introduces a state of uncertainty on the part of the buyer, it is undoubtedly in the interest of the buyer to objectify the circumstances that will induce the seller to exercise the right of repurchase, and in particular when it is the future buyer itself that presents the development concept to which the buyer is committed. It should also be noted that the mere reservation of the right of repurchase does not transform the contract of sale into a contract concluded under a resolutive condition.²⁷ A contract of sale concluded subject to the right of repurchase still has the character of a definitive contract, as – in principle – it does not limit the buyer’s legal rights. However, the awareness on the part of the buyer that, during the term of the right of repurchase, the buyer remains under an obligation to retransfer the real estate gives rise to an obligation on its part to refrain from acts which would prevent this effect from being achieved in the future.²⁸ It is an obligation that is effective only in an obligatory relationship, and therefore has a relative – *inter partes* – effectiveness.

²⁶ See: Supreme Court, Judgment of May 28, 2020, Ref. No. I CSK 547/19, LEX No. 3051743. In literature: Bartłomiej Swaczyna, “§ 4. Zobowiązania,” in *Warunkowe czynności prawne* (Warsaw: LexisNexis, 2012), which, among other things, in relation to the right of repurchase, indicates that “It should namely be considered admissible to exercise these shaping powers only under a condition precedent involving the behavior of the addressee of the declaration of will (most often the other party to the legal relationship). A resolutive condition is admissible only if the exercise of the shaping power does not entail the creation of immediately irreversible legal consequences. As already mentioned, an example of such a power is termination by notice.” This view is supported in commentary studies on Article 89 of the Civil Code; see: Radosław Strugała, Komentarz do art. 89, in *Kodeks cywilny. Komentarz*, eds. Edward Gniewek and Piotr Machnikowski (Warsaw: Legalis C.H. Beck, 2021); Joanna Kuźmicka-Sulikowska, “Komentarz do art. 89,” in *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC. Tom I. Komentarz*, ed. Piotr Machnikowski (Warsaw: Legalis C.H. Beck, 2022).

²⁷ Marek Safjan, “Article 593 of the CC,” in *Kodeks cywilny. T. II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, ed. Krzysztof Pietrzykowski (Warsaw: Legalis C.H. Beck, 2021).

²⁸ Article 593 of the CC, even indicates that refraining from actions that could prevent the exercise of the right of repurchase in the future is the essence of the buyer’s obligation under the right of repurchase; *ibid*.

3.3. The New Type of Contract of Sale

Another possibility, which will be based on the use of the sale contract structure, is to incorporate an additional obligation into this obligation structure. It will be charged to the buyer as the new owner and will consist in the implementation of specific land development through on its own.

The municipality's normative personification, anchored i.a. in property independence, allows a separation of this entity's property and non-property interest. The protection or satisfaction of these interests allows the municipality to act autonomously in civil law transactions, which eventually will best solve issues at the local level which lie at the basis of this entity's activity. The possibility to protect these interests for the future is important for ensuring effective operation, especially in the praxeological aspect. The collective interests of a local community may be satisfied by transferring public real estate, and thus by indirectly gaining funding for municipal investment, or by deciding about developing this real estate, which directly influences the investment process by appropriate establishment of the tender requirements and the content of the contract of sale within the limits to which autonomous participants can interact with each other.

Bearing this in mind, one may demonstrate that in trading in real estate, depending on the circumstances, public entities will act as a kind of sellers, who can afford to wait for as long as it is necessary to sell at fair market values or with restrictions in land use, and sellers, who cannot wait, but have to sell more quickly due to various constraints or against market conditions.²⁹ This is why, taking appropriate decisions about the sale itself and about establishing the tender requirements, including the price, requires a new vision of the public nature of municipal real estate and management of it concentrating on the efficiency, effectiveness and quality of

²⁹ Omboi Bernard Messah and Anderson M. Kigige, "Factors Influencing Real Estate Property Prices A Survey of Real Estates in Meru Municipality, Kenya," *Journal of Economics and Sustainable Development* 2, no. 4 (2011): 35, 42; Gary E. Heiland writes that selling real estate along with all applicable rights makes a buyer more likely to pay a different price, cf. Gary E. Heiland, II MAI, AI-GRS, "Property Rights Brought to Light: Principles and Misconceptions," *The Appraisal Journal* 87, no. 3 (2019): 191–192, accessed July 15, 2022. http://www.mvginco.com/documents/PropertyRightsBroughttoLight-PrinciplesandMisconceptions_000.pdf.

public services.³⁰ In this approach the achieved price may not play a major role, if the municipality, as a former owner, achieves a different goal of a much greater value but impossible to measure in monetary terms. This allows an assumption that sometimes the obligations allowing satisfaction of the creditor's interest may be an instrument that serves the achievement of statuses that go beyond the civil law regulations, which are associated with local governance. However, this does not change the statement that these goals are supported by interests that are not necessarily related solely to material values, but relate, for example, to local ecology or the reduction of certain market influences on local community and the environment.³¹ This is because sometimes it may involve preserving the terrain or caring for the historic heritage inscribed in the architectural aspect of the development or remains of past constructions.

Due to its special nature and the tasks entrusted to it, the legislator imposes on the municipality, as well as on other public entities, the obligation to exercise the right of ownership, although it is not part of the content and essence of ownership.³² This is in favor of the existence of a creditor's interest worthy of protection, which will form the basis for the new obligation. Even though in civil law transactions a municipality acts as a real estate owner, it cannot always use and enjoy this right in a similar way towards other entities. This results primarily from the fact that it is a manifestation of the residents' community. Hence its "particular interest" is not detached from the interest of the community, which is echoed in each decision directly proportionately to the consequences it will bring to this community. Trading in real estate, in particular preparing the real estate for transfer is the best exemplification of this phenomenon. Even though sale of the real estate is to be carried out by means of an open tender, due

³⁰ Daniela-Luminita Constantin et al., "Municipal Real Properties and the Challenges of New Public Management: A Spotlight on Romania," *International Review of Administrative Sciences* 84, no. 1 (2018): 123; Kyle J. Mamounis and Walter E. Block write that "Legitimacy of property from its use, rather than its acquisition, is not a workable system of property rights;" Kyle J. Mamounis and Walter E. Block, "The Molecular Basis of Private Property," *Acta Oeconomica* 69, no. 3 (2019): 326.

³¹ Loka Ashwood, Danielle Diamond, and Fiona Walker, "Property Rights and Rural Justice: A Study of U.S. Right-to-Farm Laws," *Journal of Rural Studies* 67, (2019): 126.

³² Magdalena Habdas, "Komentarz do art. 140 KC."

to this interest it may take the form of an oral or written tender. Sometimes the municipality is not able to manage a given real estate in a way best suited to the established local spatial development plan. Sometimes leaving given land as unused is to the detriment not only to the local community but also the assets of this entity. For this reason, the real estate is sold in order to use its potential in an appropriate way, which is possible only thanks to the potential of a new buyer – a private investor (developer). Thus, the problem arises: how to transfer land at the same time guaranteeing the implementation of the discussed investment, which by default is to satisfy a current need? In order to emphasize the analyzed issue one may use the following example. The progressing problem of industrialization and urbanization of urban agglomerations, caused mainly by the need to satisfy ever greater housing needs of a given community, causes the use of available space to the limits of its development. A direct consequence of such practices involves erecting buildings in proximity that is far from maintaining privacy so much protected today, at best guaranteeing only apparent protection. It is about demonstrating that the right to privacy may be reflected both in the ownership right and in the way real estate is developed as the arena of accommodating both complementary and conflicting social impulses.³³ As a result of such practices it is more and more difficult to satisfy this elementary need of human contact with nature in large agglomerations. Appropriate spatial planning of areas with residential functions tries to prevent such emerging “concrete jungles.” These acts of local law determine numerous issues, not only regarding the distance between neighboring buildings and the minimum number of parking places, but also the percentage of the area that is to be devoted only to natural elements. Managing real estate, even rural real estate if located within administrative boundaries of cities, needs to take into account the existing spatial order and the one that will probably appear in the future. As a result, arable lands in urban agglomerations may be and usually are transformed into terrain for single-family or multi-family developments, let alone permitting services-related development. One thing is certain, after transferring the ownership right, a municipality in fact loses the possibility of influencing the development of this

³³ Abraham Bell and Gideon Parchomovsky, “The Privacy Interest in Property,” *University of Pennsylvania Law Review* 167, (2019): 871.

land, with the exception of exercising public authority which takes the form of construction administration and shaping the spatial order.

In this approach, the last possibility of influencing the future buyer is to create an obligation which will facilitate the achievement of a goal that cannot be expressed economically and that does not have a direct reference to the property-related situation of both of the parties. A goal which fits within a wider spectrum of municipality's activity as an entity of a dual legal nature, which may use civil law instruments to achieve public goals, though never the other way round.

The existence of a contractual legal relationship is determined by the occurrence of a creditor's interest worthy of protection, which may be both property and non-property interest. The presented types of creditor's interest imply the possibility of employing various measures of contract law, which not only determine the validity of a created obligation, but also allow its effective performance and safeguarding the creditor's interest.³⁴ It is reasonable, where the transferred land on which a specific investment is to appear or which should be developed in a way suitable to the self-governing community, to create an additional obligation for the buyer to develop or use the transferred land in a manner compliant with the contract of sale. The accuracy of this conclusion is based on obligatory tender procedures for transferring public real estate. One may assume on this basis that a commune's interest worthy of protection is expressed in selling the land to a person who guarantees its best development and also offers the highest price. Determining this premise in public real estate trading is easy in so far that it may clearly result from the tender requirements which each tender participant is obliged to become acquainted. It cannot be ruled out either that the driving force behind preparing the land to be sold, and then to be transferred, involves this very interest. Referring to the above-outlined example, the municipality decides to sell a specific piece of land in order for it not to lie fallow and for it to start fulfilling its function resulting even from applicable planning acts. The participation in a tender procedure – in nature multilateral and involving elimination – proves that an appropriate

³⁴ Eric Posner, "Economic Analysis of Contract Law after Three Decades: Success or Failure?," *The Yale Law Journal* 112, no. 4, (2003): 833; Malvin Aron Eisenberg, "The Emergence of Dynamic Contract Law," *California Law Review* 88, no. 6 (2013): 1745.

contractor has been selected in the course of the tender procedure and they are capable of undertaking and performing the discussed obligation. This obligation is indeed a result of mutual assent. Such a legal construct which assumes supplementation of a contract of sale of land real estate with an additional obligation may be vulnerable to a challenge about not observing the required equivalence of parties' performances, and thus violation of the principle of the freedom of contract under Article 3531 of the CC, which entails invalidity of such an act as contrary to the nature of the relationship.³⁵ It is mainly due to the fact that the former owner, who is still a creditor, holds a claim against the debtor, new owner, for which it gets nothing in return. Not to mention potential legal in rem connotations associated with the owner's position and admissibility of setting limits on ownership rights. Nevertheless, it is important for the analyzed issue to be examined only in the aspect of obligation-related rights. It is because from the very outset it is not about the ownership right which is unconditionally transferred on the buyer (the successful tenderer), but about the additional contractual relationship included in the contract of transfer of this real estate, which obliged the buyer to achieve a result specified therein which corresponds with the commune's interest. *Per analogiam* if regulations allow establishing an obligation the subject of which is to limit the entitled entity in managing the transferable right (see Article 57 § 2 of the CC), it is all the more possible to establish a legal relationship which will oblige the entitled person to perform specified factual acts associated with exercising this right (by reason of analogy to solutions associated with regulation of neighborly relations and nuisance, or intensification of activity aiming to achieve a status compliant with the applicable local spatial development plan).

It needs to be mentioned that the equivalence of performances of the parties is a condition necessary for mutual contractual obligations to be valid. One needs to support the view that the equivalence should be referred to the parties' subjective perception of performances as being bilateral. Mainly due to the fact that the parties, while exchanging performances, believe that they will benefit from it since in their belief they receive

³⁵ See judgment of the Supreme Court of June 28, 2017, Ref. No. IV CSK 511/16, www.sn.pl.

a more valuable performance.³⁶ It is not about the fact that the performances (even in the opinion of the parties) are to be of equal value; it is about one performance being carried out in exchange for the other, in accordance with the *do ut des* principle. Each performance, therefore, is a counterpart, not an equivalent of the other.³⁷ When laying the indicated views onto the assumptions of public real estate trading, one may even set forth a thesis about objectification of this element, characteristic to bilateral contracts. One must highlight the fact that a public entity may in no way conceal such an additional obligation from potential participants and even more so, it is not capable of forcing them to accept this additional obligation, which is to be associated with the conclusion of a contract of sale. It is all due to the open nature of the tender procedure and making publically available of all information about the real estate in the tender contract notice itself, which is the first document on the basis of which the participants will take a decision whether they will participate in the procedure. It is because entities that are of equal status and that are free to take decisions both on taking part in the tender procedure and on concluding an appropriate contract on the terms and conditions specified in the tender contract notice. Thus, it is not about limiting the ownership right, but about supplementing the buyer's obligations towards the transferor, which was one of the elements of the legal reason for creating this legal relationship. Moreover, it concerns creating such an obligation which will in no way undermine the effectiveness of transferring ownership. The only consequence of such an additional obligation will be expressed in the consequences of its non-performance by the person who undertook it. The artificial separation of an obligation to develop the real estate from the content of a contract of sale should be considered incorrect. From the very beginning, the contract may be constructed in such a way that the performance of payment of the price and the obligation of specific development of the land is to correspond with the transfer of ownership of the land.

³⁶ Adam Olejniczak and Zbigniew Radwański, *Zobowiązania – część ogólna* (Warsaw: C.H. Beck, 2018), 125.

³⁷ Maciej Gutowski, "Komentarz do art. 487 KC," in *Kodeks cywilny. T. II, Komentarz do art. 353–626*, ed. Maciej Gutowski (Warsaw: C.H. Beck, 2018), 1160.

4. Conclusions

It is true that the existence of a contractual legal relationship is determined by the existence of a creditor's interest worthy of protection. As a result, it means that a municipality, trying to achieve the intended result in the form of a specific and timely development of the real estate after its sale, must demonstrate the existence of a property and non-property interest which would allow considering the creation of the obligation to develop the sold land in a specific way as valid. The demonstration of a creditor's interest worthy of protection when creating an obligation of a specific real estate development will look different depending on the chosen procedure for concluding the contract and the type of this contract. The requirements imposed by the municipality on potential buyers, which clearly affect the specificity of the terms and conditions for the disposal of the real estate, should be assessed *ad casum*. In the case of a written tender and a non-tender procedure, the imposition of the described obligations on the prospective buyer will be more justified for two reasons. Firstly, in both cases the criterion of the price obtained is not a priority due to other more relevant circumstances. Secondly, the prospective buyer has a real influence in shaping its legal situation, which will directly affect the preservation of equivalence of benefits. The issue under scrutiny will be different in the case of an oral tender, where a similar procedure may be applied only on the condition that the real estate is sold below the market price, which is possible if an appropriate discount is granted under the REM, or the valuation of the real estate takes this fact into account. Due to the obligation to sell public real estate by means of a tender procedure, it may be assumed that a municipality's interest worthy of protection was expressed in selling the land to a person who guarantees its best development, which entails obligations on public entities to manage their assets properly and carefully. The key criterion here is the content of the tender contract notice, which can be read by each tender participant. In turn, the established tender requirements, including a description of an additional obligation associated with the conclusion of the contract, is a basic criterion to take decisions by potential tenderers on whether participation in this procedure is economically rational for them. On this basis one may assume that a suitable contractor is selected through the tender procedure, that is able to undertake and perform the disputed obligation, and most of all, a contractor that agrees to the terms associated with the acquisition of the land real estate.

Creating a unilateral obligation to develop the real estate in a specific way, which constitutes an additional contractual reservation supplementing the contract of sale, is also supposed to serve the achievement of the purpose of the contract. The municipality loses its ownership status but achieves the position of a creditor, while the buyer, upon becoming the new owner, undertakes to assume the obligations of a debtor. It needs to be highlighted that this construct in no way interferes with legal *in rem* aspects of ownership transfer, which is definitive and effective. The discussed construct of a unilateral obligation concerns the manner of using the real estate which does not affect other aspects related to the ownership right, in particular collecting the fruits and other incomes from that real estate and the possibility for dispose of that thing. It is because from the very beginning it does not concern the ownership right, but an additional contractual obligation described first in the tender requirements, and then included in the contract of sale, which obliged the buyer to achieve a result compliant with planning acts applicable to this real estate within the time frame stipulated for in the contract.

Given the above, it needs to be concluded that the discussed construct in the presented approach will be free from the challenge of non-equivalence of performances and of violation of the principle of freedom of contract under Article 3531 of the CC as contrary to the nature of the relationship. The correctness of this conclusion is also based on the fact that regulations allow undertaking an obligation the object of which involves restricting the entitled entity in managing the transferrable right (see Article 57 of the CC), which is why it is all the more possible to establish a legal relationship which will oblige the entitled party to perform specific factual acts (by analogy to the solutions associated with regulation of neighborly relations). It also needs to be mentioned that the equivalence of performances of the parties is a necessary requirement for mutual contractual obligations to be valid, but this equivalence is understood subjectively, and the best proof that the said performance meets this criterion as far as the buyer is concerned and involves the buyer's participation in the tender procedure. Moreover, this potential economic non-equivalence between mutual performances of the parties does not matter greatly as long as both parties agree to it at the time of making the contract. One of the indirect effects of the tender procedure also involves the fact that it makes it impossible to

conceal before potential participants the contractual provisions that are unfavorable to them, and all the more so it excludes the possibility of forcing tenderers to accept additional obligations associated with the conclusion of a contract of sale which are unfavorable to them. It is because the entities that are of equal status and that are free to take decisions both on taking part in the tender procedure and on concluding an appropriate contract on the terms specified in the tender contract notice. Thus, one cannot have reservations as to the facts, which do not concern contractual limitation of the ownership right, but which concern supplementing the buyer's obligations towards the transferor, which became one of the elements of the legal reason for creating this dual-effect legal relationship. Therefore, the additional contractual reservation – concerning an additional obligation safeguarded by liquidated damages – constituted the content of the contract of sale from the very beginning, which was constructed in such a way that the performance of the payment of the price and of specific development of the land was to correspond with the transfer of the land ownership.

Taking the above into consideration, it should be stated that the hypothesis adopted at the beginning has been confirmed. Indeed, a municipality can use obligation structures (*lex contractus*) to shape the real estate development process. However, the key to the correctness of the concept adopted in the publication involves fulfilment of several conditions.

Firstly, acknowledging that satisfaction of a civil law interest does not exclude the simultaneous achievement of a socially useful consequence (e.g. the construction of generally accessible recreational facilities on the sold land). The civil law measures are predominantly of a targeted nature in this approach and the leitmotif for the undertaken activities will always involve the commune's satisfying specific needs of a self-governing community.

Secondly, the application of civil law measures may under no circumstances serve to secure public law issues, such as, for example, an increase in budget revenues from public levies, which, by definition, would be paid by the buyer after specific development of the real estate.

Thirdly, the satisfaction of basic pillars of civil law in the form of: a) autonomy of the will through the transparency of the content of the tender contract notice, which is mainly to allow an economically rational decision to be made by the future buyer; b) maintaining the equivalence of

the parties' performances, even with the buyer's obligation to develop the real estate in a specific way, which will be expressed at the stage of preparing the valuation report by taking into account all rights and encumbrances related to its acquisition in the value of the real estate.

Lastly, the selection of the appropriate conditions (*lex contractus*) for the sale of the land real estate to the chosen procedure for the disposal of that real estate. The more the procedure of disposal deviates from obtaining the highest price, the more the seller (in the case of a tender procedure) or the parties (in the case of a non-tender procedure) have greater freedom to shape the legal relationship of sale to an extent that even goes beyond the Civil Code regulations (see section 3.3).

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