

road infrastructure, real estate, road investment

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THE ACQUISITION OF REAL ESTATE FOR THE TRANSPORT INFRASTRUCTURE ELEMENTS BUILDING – LEGAL ASPECTS

Summary. Article discusses general issues of the real estate expropriation for the transport roads investment. In assumption, changes in Polish regulations should speed up the road building process. As a result of several amendments in Act on Specific Rules of Preparation and Performance of the Public Roads' Investments there are many significant changes in the structure of the road investment performance.

POZYSKIWANIE TERENU POD BUDOWĘ ELEMENTÓW INFRASTRUKTURY TRANSPORTOWEJ – ASPEKTY PRAWNE

Streszczenie. W artykule omówiono problematykę związaną z pozyskiwaniem terenów przeznaczonych pod inwestycje dróg transportowych. Zmiany w polskich przepisach prawnych w założeniu powinny przyspieszyć proces budowy dróg. W wyniku przeprowadzonych nowelizacji ustawy o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych wprowadzono wiele zasadniczych zmian w konstrukcji procesu inwestycyjnego w zakresie dróg publicznych.

1. INTRODUCTION

The distinctive element of the transport infrastructure in Poland is the low quality of all its components. The most pressing seems to be the lack of the developed system of motorways and expressways, as well as the advanced network of railway tracks, connecting main industrial centers of the country. Delays with regard to the construction of the modern transport infrastructure hinder the growth of industry, commerce and services. They also reduce the size of the economic exchange, both with the EU Member States and the non - EU countries. By the same token, the delays restrict the mobility of the citizens. During the years 2007-2013, Poland shall reap most profit from the European Policy of Coherence. Within the latter, it is feasible to receive a total of €67 billion, shared between the EFRR intervention, EFS and the Coherency Found. The largest part of the EU funds (€16 milliards) has been assigned to the development of transport, 60% of which is to be allocated to roads and 30% - to the railway network [1].

In order to improve actions connected with putting into life transport undertakings, the Polish Legislator has passed numerous new legal acts and has changed significantly the acts already in force,

so that they correspond with the latest needs and challenges. The most important of those legal acts are as follows:

- The 28 March 2003 Railway Transport Act (art. 9n – 9ad) [2],
- The 12 February 2009 Act on the Specific Rules of Preparation and Performance of the Public Airports' Investments [3],
- The 10 April 2003 Act on Specific Rules of Preparation and Performance of the Public Roads' Investments [4].

The abovementioned acts regulate, among others, the principles of the localization and acquisition of the real estates, necessary for the construction of railway tracks, airports and all categories of public roads, inclusive of paid motorways, the common characteristic elements of the acts being the simplification of the respective procedures in both the preliminary stage of the investment and the subsequent phase of its performance. Having said that, special attention should be granted to the, so called, "expert road act". As a result of many amendments, the structure and the course of the investment processes has been significantly modified.

The goal of this article is to present a sequence of actions needed to be undertaken within the procedure of granting a decision on the permission for the performance of the road investment from the angle of the real estate acquisition issue. Emphasis has been put on those procedural components which application within narrow time limits may result in outcomes disadvantageous for the investment procedure participants, especially on the incorrect assessment of the expropriated real estate's value.

2. THE ACQUISITION OF REAL ESTATES FOR ROAD INVESTMENTS

2.1. General remarks

The rules on the acquisition of real estates for road investments are set forth in The 10 April 2003 Act on Specific Rules of Preparation and Performance of the Public Roads' Investments, while the matters not regulated by the abovementioned act should be assessed in accordance with the Act on the Real Estate Administration. The first of the two is a specific regulation of an extraordinary character, which introduces procedures to accelerate the performance of road investments, while its Chapter III is wholly dedicated to the issue of the real estate acquisition.

The fact that the provisions on the real estate acquisition have been thus set apart, may well suggest that the respective undertakings constitute a confined stage of the road investment process, locked within a given sequence. However, the discussed problem is of a very complex nature and, in reality, its scope covers nearly the entire investment process.

In other words, the analysis of the real estate purchase issue, as comprehended universally, has to include also the preliminary, commencing phase of an investment, as well as, in certain aspects, the proper stage of road-building. This follows from the structure of the road investment performance, set forth by the Polish Legislator and resulting from numerous amendments.

The main focus of the respective legal structure is the decision on the permission for the performance of the road investment. The administrative authority competent for its issuance is, with regard to the national and province roads, the province governor and with regard to district and communal roads – the district governor. On the other hand, the motion for the decision is filed by the proper road manager, especially the General Manager of National Roads and Motorways.

The extremely significant feature of the decision on the permission for the road investment is the fact that it entails a large number of legal effects, which formally needed an issuance of several decisions (result: the reduction of necessary proceedings and, simultaneously, the diminishing of the possibility to appeal by the parties). Respectively, the said decision contains the resolution on the localization and the course of the road (consequences within the scope of special development), constitutes the legal basis of acquisition of the right of ownership of the real estate designated for investment by the State Treasury or the territorial self-government entity (consequences within the

scope of ownership and other rights to the real estate) and results in the approval of the construction scheme.

2.2. The specification of the acquired real estates

While referring to the issue of the acquisition of the real estates, it needs to be indicated that the process commences with the filling of a motion by the proper road manager for the granting of the decision on the permission for the performance of the road investment. The motion has to contain maps setting forth the suggested course of the road and the partition of real estates located within the scope of the road. Therefore, the motion constitutes also the preliminary specification of the real estates which will be subsequently acquired by the State Treasury or the territorial self-government entity.

The instigation of the procedure as a result of the filled motion is made known to the owners, those vested with the right of perpetual usufruct and other parties by way of an announcement in proper offices, their internet sites and in the local press. The announcements are issued by the province governor with respect to the national and province roads and by the district governor with respect to the district roads. Apart from the specification of the real estate, the announcement contains also the time and place, where the parties will be granted insight into the files of the case.

The notification is sent to the address given in the real estate cadastre (up to the moment of its creation – in the sites' and buildings' files) and results in effective delivery, even if the recipient changes his place of residence. Taken into consideration the small social consciousness with respect to the submission to the district governor of all alterations of the data stored within the sites' and buildings' files, inclusive of the place of residence, it is not hard to imagine a situation where the owner of the real estate will simply fail to receive information on the proceedings in course and, subsequently, of the issued decision. This may result in the lack of possibility to exercise proper protection of the legal interests of the party, e.g. by way of an appeal from the unfavorable decision.

In the case that the real estate, which is the subject of the road manager's motion, is of an unregulated legal status or when the owner or the perpetual usufructuary are dead and their heirs have not yet proved their rights to the estate, the authority conducting the proceedings does not issue the notification at all. By the same token, the authority is not obliged to check, who is the real owner or the perpetual usufructuary of the real estate.

The regulation described above arose as a response to the frequent paralysis of the investment processes. The nightmare of all administrative proceedings in which the subject are real estates and the reason of their protracted mode of conduct, is the identification of the parties thereto (usually the owners). However, this is also precisely why the adopted solution, although correct in its assumptions, may result in highly unprofitable outcomes for a real estate owner in the instigated proceedings, connected with the issuance of the decision on the permission for the performance of the road investment.

The remarks on the delivery of notifications about the instigation of the proceedings pertain equally to the delivery of the notifications about the issuance of the proper decision on the permission for the performance of the road investment. The latter also contains information about the place where the parties will be granted insight into the files of the case.

2.3. The consequences of the decision on the permission for the performance of the road investment regarding the rights to the real estate

As mentioned above, the decision on the permission for the performance of the road investment constitutes the main point of the entire investment process, also from the perspective of the acquisition of the real estates for road purposes. It specifies the spatial scope of the investment, adopted by the proper administrative authority, grants approval for the partition of the real estates and specifies the real estates or their parts which become the ownership of the State Treasury or the appropriate territorial self-government entity. In addition to that, the decision constitutes a basis for the entries in the land and mortgage register and the real estate cadastre.

Special attention needs to be paid, above all, to the component of the decision which pertains to the expropriation of the real estate. Due to the decision, the State Treasury with regard to the national roads and the appropriate territorial self-government entity with regard to the province, district and communal roads, acquires the ownership of the real estate or its part. At this point it should be underlined that the transfer of ownership takes place solely by virtue of law, without the necessity for the administrative authorities to issue some other kinds of acts in law, especially without the need to issue a separate expropriatory decision. This effect takes place on the day when the decision becomes fully binding. The latter, on the other hand, happens in the case that the appeal authority issues a decision which maintains the legal force of the decision on the permission for the performance of the road investment or if, due to the lapse of the two weeks' time period calculated from the delivery of the decision, the party cannot file an effective appeal within the administrative course of the proceedings [5]. If the decision has been issued by the district governor, the appeal authority is the province governor; if the decision has been issued by the province governor, the proper appeal authority is the minister appropriate for the matters of construction and spatial and housing administration.

It is also crucial to indicate that the legal provisions stipulate extremely short time periods in which the case ought to be examined (thirty days). This, of course, speeds up the performance of the road investment process, but the final outcome thereof might be an automatic and inconscientious assessment of the motions and claims of the appealing party. There is also the two months' restriction period set forth with regard to the administrative court examining the appeal from the decision. It seems however that this time period is only of an auxiliary character.

The other significant reservation introduced by the Legislator is the lack of the possibility to reverse the entirety of the decision on the permission for the performance of the road investment or to declare it wholly invalid, in the case that the possible legal defect pertains only to the part of the decision e.g. specific real estate or lot. Taken into consideration the complexity of the decision's structure and the realistic threat of a paralysis of the whole investment process in the face of some unavoidable flaws, the adopted solution should be adjudged as well-aimed and correct.

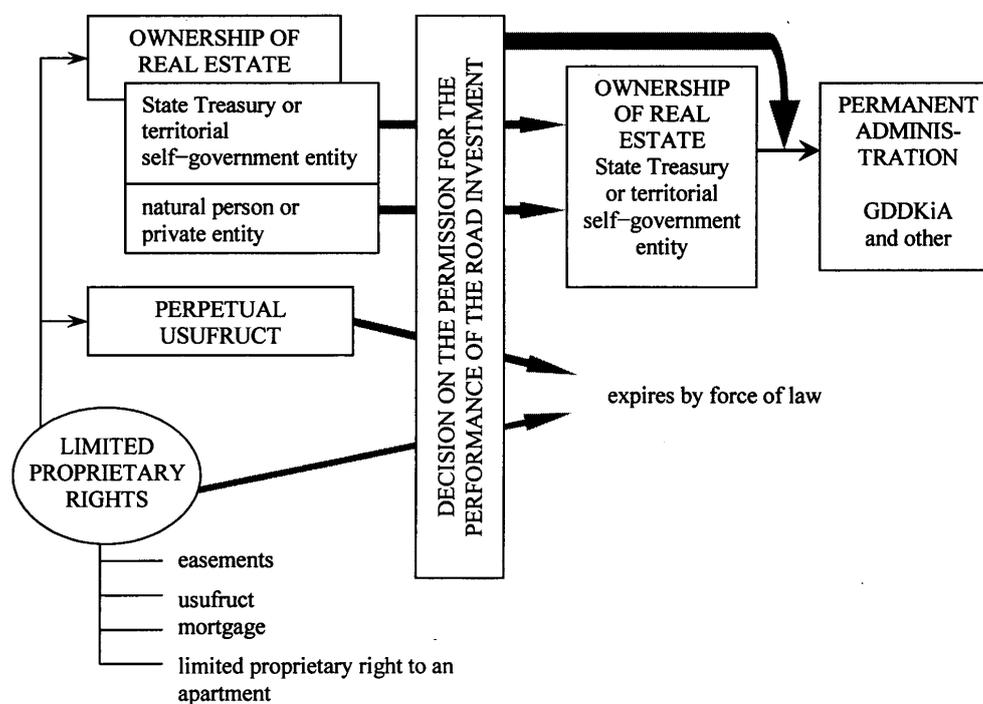


Fig. 1. The alterations of the rights and the forms of exercising one's power over the real estates
Rys. 1. Przebieg zmian prawa do nieruchomości i form władania nimi

The abovementioned decision brings about effects not only on the level of ownership but also with regard to other proprietary rights. Upon its gaining full legal force and effect, there expires the perpetual usufruct established on the real estates owned by the State Treasury or the territorial self-government entity. The same happens with all other proprietary rights burdening the real estate designated for road purposes (usufruct, easements, mortgage, co-operative right to an apartment). Similarly as with the issue of ownership, the abovementioned alterations take place by virtue of law.

In a sense, the expired right of ownership and the perpetual usufruct are replaced by a temporary right to the gratuitous use of the real estate, specified in the decision on the permission for the performance of the road investment. Additionally, the authority which issued the decision is burdened with a legal obligation of a Constitutional origin to assess the scope of and to reimburse the arose damages. Due to its extraordinary significance, this aspect of the real estate acquisition is analyzed separately in the chapter 3 below.

On the other hand, the General Management of National Roads and Motorways or the territorial self-government entity are vested by virtue of law and free of charge with permanent administration of, respectively, the real estates owned by the State Treasury or the territorial self-government entity. This effect too takes place on the day when the decision gains its full legal force and effect.

The alterations of the rights and the forms of exercising one's power over the real estates, following the fully binding decision on the permission for the performance of the road investment are illustrated by the diagram on fig. 1.

It is worth noticing that the provisions of the "expert act on roads" allow for the road manager to acquire on behalf of the State Treasury, province, district or commune, the real estates located outside the road course, in order to exchange them for those located within that course. This constitutes a certain inconsequence of the Legislator, who previously gave up the idea that the real estates or their parts are acquired for road purposes by way of a civil law agreement and that the expropriatory decision comes into play only after the ineffective lapse of the time period designated for the execution of the agreement. The mode presently in force, which presupposes the deprivation of the right of ownership by way of a one-sided administrative act leaves little space for the implementation of those solutions.

The Polish Legislator provided also a very significant right for the owner or the perpetual usufructuary of the real estate, which, due to the partition and takeover of its part on the basis of the decision on the permission for the performance of the road investment, no longer lends itself to application for previously pursued goals. Should this be the case, the road manager is obliged to, in accordance with the demand of the specified parties, to acquire also the residue of the real estate.

2.4. The obligation to transfer the possession of the real estate

As mentioned above, the decision on the permission for the performance of the road investment may also specify the time period in which the possession of the real estate should be transferred, as well as in which the apartments and other premises should be emptied. The said time period cannot be shorter than one hundred and twenty days (*circa* four months) commencing on the day on which the decision gains its full legal force and effect.

However, this rule is subject to an exception. If the authority, which issued the decision on the permission for the performance of the road investment provides the decision with a pain of immediate feasibility in accordance with the motion of the appropriate road manager, justified by the social or economic interest, than the owner or the perpetual usufructuary is obliged to transfer the possession of the real estate, as well as to empty the apartments and other premises without delay. Granting of the pain of immediate feasibility hence enables the commencing of the construction works. Therefore, it seems that the conditions which allow to provide the decision with a clause resulting in such significant legal consequences for the owner and the perpetual usufructuary should be regulated more thoroughly and in a way that better restricts the possibility of the fulfillment of the conditions. This could be achieved e. g. by way of using the expression: "important" social or economic interest or a social or economic interest of "special importance". The abovementioned expressions have been, to a

certain extent, already described by the legal doctrine of the administrative law and the numerous judgments of the administrative courts.

The provisions of the “expert act on roads” also stipulate a certain “bait” used by the Legislator in the case that the owner or perpetual usufructuary of the real estate within the scope of the decision on the permission for the performance of the road investment transfers its possession without delay. The meeting of that condition will result in the increase of the due damages by five percent’s worth of the real estate or the right of perpetual usufruct.

Bearing in mind the deprivation of the owner and the perpetual usufructuary of the real estates, which, in many situations, served them as places of residence, the question of providing those people with replacement accommodation gains special importance. The respective obligation rests on the road manager in the case that the real estate has been developed by way of a residential building or a building in which there has been established a separate, independent apartment.

However, the replacement apartment is supposed to be supplied only from the actual transfer of the real estate’s possession to the road manager up to the time specified in the decision as the moment of transfer of the real estate’s possession. In other words, the person deprived of the real estate developed in the way described above gains the right to a replacement apartment during the time specified in the decision, after the lapse of which the replacement apartment should be emptied. The correlation of the right to a replacement apartment with the course of the investment process designated by the administrative authority and not with the moment of the actual obtaining of the damages, which could serve as a way to acquire a new place of dwelling for the expropriated person, results in serious doubts as to the equity and fairness of such a solution.

The enforcement of the obligation to transfer the possession of the real estate, as well as to empty the replacement apartment takes place in accordance with the provisions on the administrative enforcement proceedings [6].

3. DAMAGES WITH RESPECT TO THE DEPRIVED RIGHTS TO REAL ESATES

3.1. General remarks

Former owner, perpetual usufructuary and the persons, who has been vested with a proprietary right to the real estate are entitled to the reimbursement of damages entailing from the deprivation of the ownership, perpetual usufruct and the expiry of the proprietary rights to the real estate. The respective decision on damages is issued by the administrative authority - the same that issued the decision on the permission for the performance of the road investment. The issuance of the decision on damages should take place within thirty days since the moment when the decision on the permission gained its full legal force and effect.

The height of damages is to be ascertained on the basis of the real estate’s condition on the day of issuance of the decision on permission by the first instance authority and in accordance with its worth on the day of the issuance of the decision on damages. The damages due to the owner or the perpetual usufructuary are reduced in accordance with the worth of the proprietary rights established on the real estate. The total amount of damages granted to the former owner or perpetual usufructuary and the damages granted for the expiry of the proprietary right on the real estate cannot, in aggregate, exceed the worth of the right of ownership or the perpetual usufruct. The liability of the State Treasury and the local government entities has been restricted in an acceptable scope.

However, the abovementioned rules are not absolute. In addition to the 5% “bonus” for the prompt transferring of the real estate’s possession, the amount of damages paid to the benefit of the former owner or the perpetual usufructuary of a real estate developed by way of a residential building or a building in which there has been established a separate, independent apartment is to be increased by 10 000,00 PLN, contingent on the fact the said person has been living in the apartment.

3.2. The evaluation of the real estates and the respective market

At present, most of the actions connected with the acquisition of the real estates for the purposes of the road investments in Poland, exclusive of the abovementioned provisions on the road, railway, airport and other infrastructure facility construction, are regulated by the 21 August 1997 Act on the Real Estates' Administration [7]. The general principles enclosed therein are essentially undisputed. Nevertheless, when facing the ultimate outcome in the manner of expropriation, as a result of the legally binding decision on the permission for the performance of the road investment, as well as of the performance of other transport investments (such as railway tracks and public airports) the participants of the proceedings might experience some fundamental doubts with regard to the mode of the assessment of the due amount of damages for the deprived right of ownership or other rights to real estates. The real estate market theory, together with the means of real estate market evaluation are formative of the arose inconsistencies. The real estate market, as described by E. Kucharska – Stasiak [8], “constitutes the total of circumstances encompassing the real estates' right transfer and the agreements entailing mutual rights and obligations, combined with the possession of the real estates”. The real estate market is characterized by several features which make it distinctive from other markets. Those are as follows [8]:

- the small price flexibility of supply and demand, meaning that both supply and demand are slow at adapting to price fluctuations;
- regional character of the market;
- small efficiency – due to the fact that the prices are a poor reflection of the actual data on real estates;
- the large margin of error – the market does not easily lend itself to an analysis due to, mainly, the poor transparency of the transactions, the lack of equal access to vital information by the market players, the sensitivity of the real estate value to the changes in the surroundings, the influence of the mode of exploitation on the real estates' worth, irrational actions undertaken by the buyers/sellers, etc.

Generally speaking, it may be concluded that the real estate market in Poland is, at least in some of the sections, poorly developed, which manifests itself in a small number of executed transactions, both at the national and regional nivo.

The amount of damages for the acquisition of real estates for the road investment purposes is to be ascertained by taking into consideration their market value (contingent on the fact that they constitute an element of commerce) or their reconstruction value. In accordance with the definition introduced by the Federation of Polish Property Appraisers' Associations in the Basic National Evaluation Standard 1, the market value of a real estate [9] is the “estimated price, which can be called for the real estate, given that the parties have a firm intention of executing the agreement, are mutually independent, act in accordance with knowledge and reason, are not under any means of coercion and that the time period for the display of the real estate on the market has already lapsed”. A similar description of the real estate market value may be found in the art. 151 of the Act on the Real Estate Administration and in the European Evaluation Standards [10].

If the owner decides on the sale of the real estate on the basis of the art. 24.1 of Act on the Specific Rules of Preparation and Performance of the Public Airports' Investments [3] or the art. 9t of Railway Transport Act, there can be no mention of the meeting the conditions set forth by the definition of the market value. The same with expropriation of the real estates. The amount of the damages for the deprived rights is to be assessed in accordance with the comparative approach [11]. This approach is “put into practice, under the assumption that the commercial prices of the real estates similar to the one at stake, the conditions of the transactions and the features of the real estate, especially those which influence the differences in the prices, have all been made known” [12]. The real estate defined as “similar” to the subject of the evaluation is supposed to be comparable with the latter by way of location, legal status, intended use, the mode of exploitation and other elements. The data for the evaluation should not be older than two years. It can well be question whether the property appraiser shall have the actual opportunity to genuinely assess the real estate's value taken into account the short time period of the said assessment and the diversity of the evaluation's subject, no matter the standard

of the available databases. In practice, the access to the documents which ought to be used in the evaluation report is extremely restricted. The lack of indispensable information also makes it impossible to perform a thorough market analysis in order to eliminate the data superfluous for the evaluation.

Due to the circumstances mentioned above, the estimated amount, constituting the result of the real estate's evaluation may be significantly inconsistent with the true market value of the real estates.

4. CONCLUSIONS

As a result of several amendments in Act on Specific Rules of Preparation and Performance of the Public Roads' Investments there are many significant changes in the structure of the road investment performance. The most important consequences of these changes are:

- the decision on the permission for the road investment substitutes three formerly issued decisions, i.e. decision on localization of a road, decision on expropriation of real estate and decision on building permit;
- the reduction of necessary proceedings and, simultaneously, the diminishing of the possibility to appeal by the parties;
- combination of many aspects of investment performance and necessary actions that need to be undertaken within the scope of only one proceeding, which influences favorably on speeding up the preparations of road building, but may simultaneously result in outcomes disadvantageous for the investment procedure participants, such as lack of information about the instigation of the procedure and about means of protection real estate owner's legal interest;
- introduced changes have not eliminated already noticed defects of evaluation of the expropriatory real estates process.

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