

EXPROPRIATION AND OTHER LIMITATIONS OF OWNERSHIP OF REAL ESTATE BY VIRTUE OF ACTS OF APPLICATION OF LAW BY PUBLIC ADMINISTRATION

1. The right to own real estate is not *ius infinitum* because it does not give the owner absolute power over an object. The scope of the law is defined by the totality of provisions of the legal system. The legislator has decided that in the limits defined by laws and principles of communal life, the owner can, with the exclusion of other persons, use the object in accordance with the socioeconomic purpose of his right and, in particular, he can receive proceeds and other income from the object (Art. 140 of the Civil Code). These statutory limits are constraints provided for in civil law and in administrative law.

The history of Polish law has various examples of the state's interference in the property rights to real estate by means of administrative law measures. In the post-war period, property was taken away on the basis of nationalization acts. This form of dispossession was characterized by the fact that property rights were taken away on the basis of a general act and, as a rule, without compensation. After 1990, as a result of reactivation of territorial self-government, communalization of property consisting in transferring ownership from the state to the local government, became a new legal phenomenon. In case of communalization, the procedure of transferring ownership to the entities of local government is generally based on general acts and decisions of the public administration entity (province governor – wojewoda) are of declaratory nature¹. The common characteristic of both forms of dispossession is the fact that the transfer of ownership takes place solely by virtue of law to the state

1 For example, compare a similar institution provided for in Art. 73 passages 1 and 3 of the Act of 13 October 1998 on provisions that introduce acts reforming public administration (Journal of Laws No. 133, item 872 with subsequent changes): "Real estate that, as of 31 December 1998, remains in the dominion of the State Treasury or the dominion of entities of local government, do not constitute their property and have been occupied by public roads, become, as of 1 January 1999, by virtue of law, the property of the State Treasury or competent entities of local government with compensation." "The basis for revealing in the land and mortgage register the transfer of ownership of the real estate mentioned in passage 1 to the State Treasury or to entities of local government is the final decision of the wojewoda (head of the government administration on the level of province)."

or to the local government, and the verdict of the entity confirming this fact is of declaratory nature².

The ability of public administration to interfere with property rights of private persons is determined by the provisions of law. In a democratic state governed by law, dispossession of private persons by virtue of a general act of the government must be considered as an exceptional situation caused by important constitutional reasons. Consequently, in the current legal system, the instruments of the administrative law that influence property rights of private persons are most often provisions that allow expropriation of real estate or another form of limiting the property by virtue of an individual administrative act of constitutive nature.

Interference of public authorities in property rights is justified by public purposes. The Constitution of the Republic of Poland refers to the term “public purpose” on two occasions. In Art. 21 passage 2, the constitutional legislator states that expropriation is effected for public purposes and with just compensation, and in Art. 216 passage 1, he states that the financial means for public purposes are collected and spent in ways defined in a statute. The term “public purpose” is also a statutory term³. The understanding of “public purpose” in the statute applies to issues concerning expropriation and other forms of limitation of property rights defined in that legal act⁴. Moreover, the legislator uses this term in other statutes. Consequently, limitation of property rights to private real estate may result, among others, from the need to achieve public purposes. In the process of application of law, in case of lack of a legal definition, administration entities are to deduce the purpose from the statutes that are in force⁵.

2. The most far-reaching legal instrument to influence property rights under administrative process is expropriation. It consists in depriving of or limiting, by means of a decision, property rights, perpetual usufruct, or another real right to a property. The competent entity in expropriation cases is the head of local government on the district level, the starosta. Real estate can be expropriated only

2 Recently, there has been an effort to take stock of the state and communal property. Under the Act of 7 September 2007 on revealing in land and mortgage register the property right of real estate belonging to the State Treasury and entities of local government (Journal of Laws No. 191, item. 1365), the competent starostas were supposed to prepare and transfer to the competent wojewodas, marshals of the provincial parliaments, heads of local governments on district, town, and city levels, within 6 months of the act taking effect, lists of real estate that, by virtue of separate laws, became the property of the State Treasury and are owned by the State Treasury or by entities of local government.

3 Art. 6 of the Act of 21 August 1997 on real estate management (the uniform text is available in Journal of Laws 2004, No. 261, item 2603 with subsequent changes) defined public purpose. This provision defines public purpose as, for example, demarcating land for public roads or waterways; construction, maintenance and performance of construction works on such roads, buildings, and equipment of public transportation, as well as public communication and signaling; separating land for railways as well as construction and maintenance of railways.

4 Compare M. Gdesz, *Cel publiczny w gospodarce nieruchomościami*, Zielona Góra 2002.

5 Compare on this subject W. Jakimowicz, *Wykładnia w prawie administracyjnym*, Warsaw 2006, p. 114–115.

to the benefit of the State Treasury or a local government entity. Expropriation of real estate can be effected if public purposes cannot be achieved in a way other than deprivation or limitation of property rights and these rights cannot be obtained by means of a contract. Initiation of an expropriation proceeding must be preceded by negotiations to purchase, by means of a contract, the property right, perpetual usufruct, or other limited real rights. The transfer of the property right to the State Treasury or to a local government entity takes place on the day when the decision to expropriate a piece of real estate becomes final. Such a decision constitutes a basis to make an entry in the land and mortgage registry. The real estate to be expropriated must be located in an area designated in the local development plans for public purposes or a decision to locate a public purpose investment must be issued for it.

As mentioned above, deprivation of property right to real estate or of another right takes place with compensation to the expropriated person corresponding to the value of the expropriated real estate or the value of the right. The compensation is determined by the starosta. The amount of compensation is determined on the basis of the condition and the value of the expropriated real estate on the day the expropriation decision is issued. The amount of compensation is determined on the basis of an assessment by a property expert that specifies the value of the real estate. The basis for the determination of the compensation is the market value of the real estate. The procedure includes the obligation to conduct an administrative proceeding, unless the procedure concerns real estate with unregulated legal status. Moreover, the expropriation decision may indicate the necessary easements or to impose the obligation to build and maintain equipment that will prevent risks, damage, and inconveniences to the owners or the users of adjacent real estate.

3. The legislator provides for other forms of limiting property rights, besides expropriation, which may result from acts of application of law by public administration. According to the aforementioned act on real estate management, the starosta performing a task that is in the scope of competences of government administration can limit, by virtue of his decision, ways to use real estate by issuing a permit to install and lay in the real estate draining systems, conduits and equipment to convey liquids, steam, gas, and electricity, equipment for public communications and signalling, as well as other utilities and equipment located underground, on ground surface, or overground, that are necessary to use these conduits and equipment, if the owner or perpetual usufructory of the real estate does not agree to it. Similarly to the case of expropriation, this limitation can take effect if it is in conformance to the provisions of the local development plan or, in the case such plan is not in place, if a decision has been made to locate a public purpose investment that results in such limitation. If installation or laying of such paths, conduits, and equipment makes it impossible for the owner or perpetual usufructory to properly use

the real estate the same way as he did before, or in a way that is in conformance to its earlier purpose, the owner or perpetual usufructer can demand that the starosta or the person applying for a permit purchase from him, to the benefit of the State Treasury, by virtue of a contract, the real estate or the perpetual usufruct. The location of the aforementioned paths and equipment causes the owner or perpetual usufructer to take the obligation to give access to the real estate for the purpose of performing actions related to the maintenance and repairs of the paths, conduits, and equipment. The obligation to give access to the real estate is subject to execution of the administrative decision.

In situations where the interests protected by law are endangered, the legislator allows for an immediate interference with the property right. The statute of 24 August 1991 on fire protection (the uniform text can be found in Dz.U. [Journal of Laws] of 2002, No. 147, item 1229 with subsequent changes), the leader of a fire crew can take possession of real estate and equipment that is useful in the crew's actions for the time of such actions (Art. 25 passage 1 item 3). Another example is Art. 90 of the Act of 4 February 1994, Geological and Mining Law (the uniform text can be found in Dz. U. [Journal of Laws] of 2005, No. 228, item 1947 with subsequent changes). This law provides for decisions by competent mining supervision agency to allow a seizure of real estate in case of a risk to life or health of persons, to safety of a mining company and its operation, and to public utilities in connection with operations of a mining company, for a period required to remove the risk and its effects. Such a decision stipulates what real estate is subject to seizure, the purpose of the seizure, as well as the date and duration of the seizure. The decision is subject to immediate execution. The owner is entitled to receive compensation for damage resulting from the seizure of his real estate.

4. Another example of limitation to the possession of real estate is the requirement to allow an investor to access the real estate when the investor wants to initiate construction works on the neighboring lot. According to the Building Law Act (Art. 47), if preparatory works or construction works require accessing the neighboring building or premise, or entering the neighboring real estate, the investor is required to obtain, prior to beginning the works, the permission of the owner (or tenant) of the neighboring real estate, building, or premise to enter it, and to agree on the expected method, scope, and dates of using these facilities, as well as a possible compensation for these actions. If such terms are not agreed on, the competent entity, upon request of the investor, decides, within 14 days of filing such a request, by virtue of decision, on the necessity to enter the neighboring building, premise, or real estate. If the investor's application is found to be justified, the body defines the limits of the required need and the terms of usage of the neighboring building, premise, or real estate. Upon completion of the works, the investor is required to repair all damage

that have occurred as a result of his usage of the neighboring real estate, building, or premise, in conformance to the principles defined in the Civil Code.

5. The content and scope of the dominion over land, to include property rights, is also defined by the obligation to obtain various licenses and permits. Examples of such interference in the area of changing the arrangement of land by placing buildings thereon: a decision on terms of construction⁶, a decision on environmental conditions for obtaining a permit to complete a project⁷, and a building permit. Similar examples in the area of use and change of use of real estate: a decision to change a forest into farmland, a decision to change the type of use of a building, a decision that requires the owner of a house to connect his property to a sewage system if the technical conditions allow it, a decision to allow cutting down a tree growing on a lot of land. The above-mentioned decisions allow for a certain type of behavior on the land and, on the other hand, serve the purpose of competent bodies of public administration defining various limitations that influence the content and scope of exercise of property rights (for example the outline of a planned building is defined in a decision on construction terms as, in principle, an extension of the existing buildings in neighboring lots – § 4 passage 1 of the ordinance of the Minister of Infrastructure of 26 August 2003 on methods to define requirements of new buildings and arrangement of land in the case of lack of a local development plan (Dz.U. [Journal of Laws], No. 164, item 1588).

6. Apart from the typical limitations on the ownership of real estate, one can point at orders issued to owners of real estate (persons having dominion over real estate) which are called public burdens, that is requirements to fulfill certain obligations (active behavior) of non-pecuniary nature, for the purpose of achieving certain public purposes. The material public burden is the duty to provide or give access to objects that are in the dominion of the obligated subject⁸. An example of a duty to bear public burdens is Art. 22 of the Act of 18 April 2002 on the state of natural disaster (Dz.U. [Journal of Laws], No. 62, item 558 with subsequent changes), which provides for the possibility to introduce the duty to provide material aid if the means and measures available to the wójt (head of local government on the level of a rural commune), the starosta, or the burmistrz or president (mayor) of a city are insufficient. Such material aid includes:

- allowing the use of owned real estate or movable objects,

6 Art. 59 passage 1 of the Act of 27 March 2003 on spatial planning and management, Journal of Laws No. 80, item 717 with subsequent changes.

7 Art. 46 passage 1 of the Act of 27 April 2001, Environmental protection law (the uniform text is available in Journal of Laws 2006, No. 129, item 902).

8 M. Szubiakowski, in: M. Wierzbowski, ed., Prawo administracyjne, Warsaw 1999, p. 138.

- granting access to premises to evacuated persons,
- using the real estate in a certain way and in a certain scope.

7. Based on an analysis of the aforementioned examples of interference of state administration in property rights of real estate, the types of acts of application of law can be attributed different functions and purposes. The first group includes examples of acts of limitation of ownership due to the need to complete projects serving the society as a whole (for example expropriation of a property in order to build a school – Art. 112 and next of the Act on real estate management). The second group includes decisions in argument of civil nature, in relations between administered entities, in which the administrative body plays the role of an arbiter (a decision concerning the breach of water relations – Art. 29 passage 3 of the Water Law Act). The third group includes decisions of supervisory and control function. By defining and allowing for a certain behavior in real estate, the administration influences the observance of the current law and achieves goals stipulated in laws (decision on construction terms – Art. 59 of the Act of 27 March 2003 on spatial planning and development. The last group includes acts of interference with property rights performed in emergency situations where important interests protected by law are endangered. These acts can be defined as acts protecting the public interest, since it is in the interest of the state to prevent disasters or other phenomena that are socially undesirable.

Streszczenie

Historia polskiego prawa dostarcza różnych przykładów ingerencji państwa w prawo własności nieruchomości za pomocą środków administracyjnoprawnych. Na przykład w okresie powojennym odbierano własność na podstawie aktów nacjonalizacyjnych. Obecnie, oprócz decyzji o wywłaszczeniu nieruchomości, jako przykłady ingerencji państwa w prawo własności można wskazać: decyzję o ograniczeniu korzystania z nieruchomości poprzez udzielenie zezwolenia na zakładanie i przeprowadzanie na nieruchomości ciągów drenażowych; wprowadzenie przez wójta obowiązku świadczeń rzeczowych polegających, między innymi, na udostępnianiu pomieszczeń osobom ewakuowanym, w trakcie prowadzenia akcji ratowniczej realizowanej zgodnie z postanowieniami ustawy o stanie klęski żywiołowej; decyzję o zezwoleniu na zmianę lasu na użytek rolny. Przewidzianym przepisami prawa ingerencjom administracji w prawo własności można przypisać różne funkcje i cele.