

Providing Land Properties with Access to Public Roads through the Establishment of Easements – Selected Issues within Civil and Administrative Law

Adequate access to a public road is essential for the use of land in a manner fully consistent with its socio-economic purpose. The law provides for institutions that purpose and function is to provide a land property with appropriate access to a public road, and what follows, to enable the owner of a property to exercise his rights under Article 145 of the Civil Code. Such regulations exist within civil and administrative law and are applicable both in factual circumstances in which a land property is already deprived of access to a public road (curing function) and in situations in which the land may only be created without such access (preventive function). They arouse certain doubts as to their interpretation, which concern in particular the premises for establishing an easement by necessity and the consequences of not establishing an appropriate easement for the separated property which does not have direct contact with a public road.

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Key words:
access to a road, easement, easement by necessity, right of way, property division

<https://doi.org/10.36128/priw.vi31.91>

1. Any land property should be guaranteed adequate access to a public road. The deprivation of access to a road may make it much more difficult or even impossible to exercise certain ownership rights, in particular *ius utendi, ius fruendi* and *ius fruendi*. In such circumstances, the right of ownership may actually be reduced to one of its normative attributes, namely *ius disponendi*, although the exercise of that right (because of the depreciation of the property or the actual difficulty in disposing of it) may prove to be significantly restricted.

The legal system includes institutions whose aim is to provide land properties with adequate access to public roads. They are provided

for in civil law as well as in administrative law. Among them, one can indicate those that serve to ensure adequate access to a road for a property, which is already deprived of such access (i.e. curing the so-called „historical events” resulting from the absence of established land borders, incorrect divisions of land, faulty development, unfavourable terrain, deficiencies of road infrastructure)¹. Such an institution is, in particular, an easement by necessity, although it is also possible to consider using the institution of expropriation in the actual state of affairs in question (provided, of course, that its statutory premises exist)². In addition, there are also legal regulations supposed to prevent the creation and existence of land properties without access to a road (e.g. rules concerning contractual and court division of land properties provided for in civil and administrative law). Later in the article I will present issues concerning institutions of civil and administrative law, whose function is to provide land property with access to a public road, which have the greatest significance for the practice of trading; issues which are open to interpretation.

2. A leading institution of civil law (or more precisely: property law), which serves to cure the factual state of affairs in which a land property has no connection with a public road, is an easement by necessity (a right of way). Theoretically, different ways of normalising a right of way can be considered. In particular, the right to use a road leading through a neighbouring land may be included in the content of the ownership right or in the content of the easement arising from the law³. Nowadays, however, the provisions of the property law provide for a claim of the owner of real estate deprived of access to a public road (isolated real estate) to establish, against remuneration, an appropriate easement of land for his benefit (Article 145 of the Civil Code). Such an easement entitles to walk or drive a vehicle (also possibly to drive animals) in order to reach a public road⁴ through the encumbered real

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- 1 Waław Kocon, *Droga konieczna* (Warszawa: Wydawnictwo Prawnicze, 1977), 7.
 - 2 Tadeusz Woś, *Wywłaszczanie nieruchomości i ich zwrot* (Warszawa: LexisNexis, 2010), 83.
 - 3 Kocon, *Droga*, 15-18. This issue is also flagged up by Józef Piąkowski, [in:] *System Prawa Cywilnego*, t. II, *Własność i inne prawa rzeczowe*, ed. Jerzy Ignatowicz (Wrocław-Warszawa-Kraków-Gdańsk-Łódź: Ossoli-num, 1977), 131.
 - 4 Wojciech Szydło, [in:] *Kodeks cywilny. Komentarz*, ed. Edward Gniewek, Piotr Machnikowski (Warszawa: Wydawnictwo C. H. Beck, 2014), 321; Anna Zbiegień-Turzańska, [in:] *Kodeks cywilny. Komentarz*, t. I, *Przepisy wprowadzające. Część ogólna. Własność i inne prawa rzeczowe*, ed. Konrad Osajda (Warszawa: Wydawnictwo C. H. Beck, 2013), 948.

estate, usually adjacent⁵ to the isolated property (easement by necessity – Articles 145-146 of the Civil Code). A demand to establish a proper right of way may be made by the owner of a property which is deprived of proper access to a public road (Article 145 of the Civil Code) or an owner-like possessor of such a property (Article 146 of the Civil Code), however, the latter may demand the establishment of a personal easement, and not a land easement. The institution of the easement by necessity (both in its land and personal variants) is therefore aimed at curing the so-called „historical events”.

A claim for the establishment of a land easement of a right of way arises by operation of law, provided that the circumstances specified in Article 145 of the Civil Code occur⁶. It is the owner of an isolated property or its owner-like possessor that is entitled to the aforementioned claim. The establishment of an easement by necessity may also be demanded by an agricultural production cooperative which is not the owner of an isolated property (a cooperative which owns an isolated property as a user of land contributed by members of the cooperative or a lessee of the State Treasury land – see Article 286 of the Civil Code)⁷. The claim in question is enforceable against the owners of neighbouring properties (Article 145 of the Civil Code). It should be assumed that the neighbouring property, within the meaning of Article 145 of the Civil Code, is not only a property directly adjacent to an isolated property (having a common border⁸) but also another property situated in its vicinity⁹, not necessarily physically adjacent to it¹⁰.

According to the wording of the provision of Article 145 of the Civil Code, the prerequisite for establishing an easement by necessity is the lack of

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- 5 Michał Bieniak, „Materialnoprawne aspekty ustanowienia służebności drogi koniecznej” *Monitor Prawniczy*, No.6 (2004): 270; Jerzy Ignatowicz i Krzysztof Stefaniuk, *Prawo rzeczowe* (Warszawa: LexisNexis Polska, 2012), 235; Stanisław Rudnicki, [in:] Stanisław Rudnicki i Gerard Bieniek, *Nieruchomości. Problematyka prawna* (Warszawa: LexisNexis Polska, 2011), 60.
 - 6 Ignatowicz, Stefaniuk: *Prawo*, 235; Piątowski, *System*, 135.
 - 7 Piątowski, *System*, 135; Kocon, *Droga*, 83.
 - 8 Bieniak, *Materialnoprawne*, 270; Ignatowicz, Stefaniuk, *Prawo*, 235; Rudnicki, *Nieruchomości*, 64; Szydło, *Kodeks*, 325.
 - 9 Bieniak, *Materialnoprawne*, 270; Ignatowicz, Stefaniuk, *Prawo*, 235; Szydło, *Kodeks*, 325; Zbiegień-Turzańska, *Kodeks*, 948.
 - 10 R. Czarnecki, „Niektóre zagadnienia prawa sąsiedzkiego” *Nowe Prawo*, No.6 (1969): 906; see also the verdict of the Supreme Court of 20 November 1981, III CRN 232/81, OSNCP 1982, No.4, poz. 62; the verdict of the Supreme Court of 21 December 1971., III CRN 403/71, OSP 1972, No.11, poz. 208.

appropriate access of a property to a public road¹¹ (or farm buildings belonging to this property¹² such which are used to accomplish economic and social purposes connected with the social and economic use of real estate, i.e. for living or conducting professional or economic activity)¹³. It is therefore not necessary for a claim to arise that the real estate has no access to a public road; it will also arise where access exists but is inadequate. Adequate access to a public should be defined as a connection, between property and a road, which is legally guaranteed, free of the will of third parties and which permanently allows isolated property to be used in a manner compatible with its socio-economic purpose¹⁴. Access to a public road, which the owner of an isolated road property uses as a courtesy of a neighbour¹⁵ or under a contractual agreement cannot therefore be regarded as appropriate. Similarly, access that can only be used periodically (e.g. only in summer) should be assessed in a similar way¹⁶.

In the relevant literature and judicial decisions one can see views which seem to suggest that the lack of proper access of a property to a public road (or farm buildings belonging to this property) is not the only reason for establishing an easement by necessity.

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- 11 Article 1 of the Act on Public Roads of 21 March 1985, Journal of Laws. 2017, item 2222 (uniform text), according to which a public road is a road which may be used by anyone, in accordance with its intended use, with restrictions and exceptions specified in the Act, which is classified in one of the categories indicated in the Act.
 - 12 Article 3(2) of the Act of 7 July 1994, Construction Law, (Journal of Laws 2017, item 1332, vol. 1), according to which a building is a civil structure permanently connected with the ground, separated from the space by means of building partitions, having foundations and a roof.
 - 13 Kocon, *Droga*, 26.
 - 14 Bohdan Bładowski i Alfred Gola, *Służebności gruntowe i osobiste* (Warszawa: Wydawnictwo Prawnicze, 1988), 27; Kocon, *Droga*, 33, 35; Andrzej Kubas, „Ustanowienie służebności drogi koniecznej” *Nowe Prawo*, No.3 (1966): 341; Stanisław Rudnicki, *Sąsiedztwo nieruchomości* (Kraków: „Zakamycze”, 1998), 43.
 - 15 Kocon, *Droga*, 36; Anastazy Kuźniar, „Ustanowienie służebności drogi koniecznej” *Nowe Prawo*, No.10-11 (1977): 1444; Zbiegień-Turzańska, *Kodeks*, 949; ruling of the Supreme Court of 28 April 2000, II CKN 257/00, Lex No.52618.
 - 16 Kocon, *Droga*, 36; Zbiegień-Turzańska, *Kodeks*, 949; ruling of the Supreme Court of 14 August 1985, III CZP 44/85, OSNC 1986, No.7-8, poz. 106.

According to one view in the legal doctrine, the prerequisite for establishing an easement by necessity are the „the needs of a property” deprived of access to a public road (or farm buildings belonging to it)¹⁷. To start with, the use of the term the „needs of a property” may raise doubts. In the common sense, a „need” means a strongly felt desire; something that is necessary, indispensable for normal existence or for proper functioning¹⁸. The „needs” understood in this way are attributed to people, not to things. In relation to things, however, it is difficult to indicate a concept that would have a similar meaning, hence the use of the term „the needs of a real property” in the context of the premises for establishing an easement by necessity. However, a question arises as to what is meant by the term „needs” of an isolated property, which will be satisfied by the establishment of an easement by necessity¹⁹. The author of this view states that the needs of an isolated property are „all the negative properties that do not allow to properly use the property due to the lack of access, or lack of adequate access, to a public road”²⁰. Accepting the view presented above would lead to the conclusion that the establishment of a right of way depends on the existence of two premises: lack of adequate access to the public road and certain negative properties of the isolated property, which are consequences of the lack of adequate access to the public road. Therefore, a right of way could not be required if the lack of adequate access to a public road did not cause inconvenience to the current owner of the isolated property (for example, in the case of wasteland with no significant economic significance, etc.). It seems that a different understanding of the needs of an isolated property needs to be assumed and that these needs are some of its negative characteristics, the removal of which will enable or facilitate the use of the property in a manner consistent with its socio-economic purpose. Within this approach, the lack of adequate access to the public road or farm buildings belonging to it is a „need” of an isolated property. It is therefore of objective nature and independent of the way the property is currently used. Lack of adequate access to the public road or to farm buildings owned by the property therefore amounts to the existence of a need for such access on the part of the isolated property. It is therefore unreasonable to separate the needs of an isolated property as an additional prerequisite for establishing an easement by necessity.

17 Kuźniar, „Ustanowienie”, 1443.

18 <https://sjp.pwn.pl/szukaj/potrzeba.html>.

19 Wąsiewicz, *System*, 676; Kamil Zaradkiewicz, [in:] *Kodeks cywilny*, t. I, *Komentarz. Art. 1-449*¹, ed. Krzysztof Pietrzykowski (Warszawa: Wydawnictwo C. H. Beck, 2015), 762-763; see also Michał Warciński, *Służebności gruntowe według Kodeksu cywilnego* (Warszawa: Wolters Kluwer Polska, 2013), 123.

20 Kuźniar, „Ustanowienie”, 1447.

What was also formulated in decisions of the Supreme Court was the view that it is desirable that, before applying for the establishment of an easement by necessity, an owner of an isolated property should attempt to obtain appropriate access by his own actions²¹ (e.g. by changing the manner in which the property is developed, adapting the existing inadequate access, etc.). Taking into account the view formulated by the Supreme Court, it may be considered whether there is an additional reason for a claim for the establishment of an easement by necessity. Such an additional reason might be the ineffectiveness of an isolated property owner's efforts to gain access to a public road. However, such a position cannot be reconciled with Article 145 § 1 of the Civil Code²². This provision does not preclude a pursuit of the establishment of an easement by necessity either by the owner of the property who has not previously made efforts to gain access to the public road or by the owner who, through his own actions, has even led to the isolation of his property. It is of course impossible not to agree with the Supreme Court, according to which that in a situation where a property is deprived of access to a public road, it is most appropriate for the owner of such property to make efforts to obtain access to the road without encumbering the neighbouring properties with easements. However, failure to make such efforts does not preclude a claim for the establishment of a necessary road servitude. A claim for establishment of easement by necessity the owner of the property who did not take any steps to obtain appropriate access to the public road or even deprived the property of such access by his own action (for example by placing equipment on it or erecting buildings) should be subject to assessment as to its compliance with Article 5 of the Civil Code.

The Civil Code provides that organising a right of way should take into account the needs of an isolated property with the lowest possible burden on the property through which the way is to lead (Article 145 §2 sentence 1 of the Civil Code) and taking into account the socio-economic interest (Article 145 § 3 of the Civil Code). Moreover, if the need to organise a way is a consequence of a legal transaction, in particular the sale of real estate, the road

21 See the ruling of the Supreme Court of 20 September 2012, IV CSK 34/12, Lex No.1230155; the ruling of the Supreme Court of 6 April 2004, V CKN 552/03, OSNC 2005, No.4, poz. 70; ruling of the Supreme Court of 18 June 1953, I C 442/53, OSN 1954, No.II, poz. 43 (issued under the Property Law Act of 1946); ruling. SN of 16 February 1963, III CR 15/62, OSNCP 1964, No.1, poz. 19 (issued under the Property Law Act of 1946); however, cf. the ruling of the Supreme Court of 7 November 2003, V CK 396/02, Lex No.381021.

22 Krzysztof Matuszczyk, „Głosa do orz. SN z 6.04.2004r., I CK 552/03” *Przegląd Sądowy*, No.4 (2006): 107.

should be carried out through the land subject to the transaction (Article 145 § 2 sentence 2 of the Civil Code).

When establishing an easement by necessity, the court should first determine which land property will be used for the road (if it is possible to consider alternative encumbrance of various properties at all) and then determine the route of the way in the property (properties) under encumbrance. When determining the course of the way, pursuant to Article 145 § 2 sentence 1 of the Civil Code, the court should take into account circumstances concerning both the isolated property and the land through which the road is to be located (the principle of taking into account the interests of the owner of the isolated land property) and the neighbouring land through which the right of way is to run)²³. In practice, this means that the road should take the shortest possible route, if possible across land which is not used economically²⁴. Specific guidelines apply in cases where lack of adequate access to a public road is a consequence of a legal act relating to immovable property and there is no agreement between the parties concerning the establishment of an appropriate easement. Namely, in such circumstances the court should, if possible, organise a way across the land which was the subject of the transaction (Article 145 § 2 sentence 2 of the Civil Code). In each case, the execution of the organ should take into account the social and economic interest (Article 145 § 3 of the Civil Code)²⁵.

The interpretation of Article 145 of the Civil Code leads to the conclusion that the statutory indications concerning the course of the way provided for in that provision should be taken into account in sequences, which results from their inclusion in successive sections. First of all, the course of way should meet the needs of isolated land as fully as possible, at the same time causing the lowest possible load for the neighbouring plots of land through which the service road runs (Article 145 § 2 sentence 1 of the Civil Code). Later, the social and economic interest should be taken into account (Article 145 § 3 of the Civil Code). This means taking into account the principles of sound management (e.g. the use of a part of an encumbered property that is wasteland and not farmland as a right of way), as well as certain subjective circumstances, such as the fact that the owner of an isolated and the owner of an encumbered property remain in a dispute²⁶, that could escalate as a result

23 Bieniak, *Materialnoprawne*, 271; Kocon, *Droga*, 42-44.

24 Kocon, *Droga*, 43.

25 Bieniak, *Materialnoprawne*, 271; Szydło, *Kodeks*, 323-324.

26 Cf. The decision of the Supreme Court of 21March1983, III CRN 14/83, OSP 1984, No.12, poz. 256.

of the establishment of an easement²⁷. Therefore, conclusions drawn from the consideration of the socio-economic interest may confirm or correct the arrangements, concerning the course of the way, made in accordance with the principles resulting from Article 145 § 2 of the Civil Code.

3. The function of the institution of a right of way is to provide access to a public road to a property which, as a result of various circumstances, has been deprived of such access. There are legal constructions within civil and administrative law, the purpose and function of which is to prevent the creation of real estate that would be deprived of adequate access to a public road. This preventive function of these institutions may be implemented, in particular, by the establishment of appropriate rights of way which provide access to public roads for real estate resulting from the division of land (see Article 93(3) of the Act 21 August 1997 on Real Estate Management)²⁸.

Land may be divided up in different circumstances. In the first group one should include factual circumstances in which the division is carried out at the initiative of the owner of the property who intends to dispose of the parts of the land resulting from the division. The second group consists of factual circumstances in which the property subject to division is an object of co-ownership, and its division is made within the framework of abolishing co-ownership²⁹. In the case of land owned by a single entity, the division takes place in two stages: first, the geodetic division of land in administrative proceedings (geodetic division), and then, by selling the plots of land separated geodetically, the legal division of real estate is made³⁰. The division of land in connection with the abolition of co-ownership may be made under a contractual procedure or through court proceedings. The contractual dissolution of co-ownership is carried out in a manner similar to the one described above and involves geodetic division and legal division³¹. The court abolition of co-

27 Beata Burian, [in:] *Kodeks cywilny. Komentarz*, ed. Edward Gniewek, Piotr Machnikowski (Warszawa: Wydawnictwo C. H. Beck, 2014), 323-324.

28 Journal of Laws of 2018, item 121, uniform text, hereinafter referred to as the Act on Real Estate Management.

29 Magdalena Durzyńska, *Rozgraniczenie i podział nieruchomości* (Warszawa: LexisNexis Polska, 2009), 288, 290.

30 Durzyńska, *Rozgraniczenie*, 288; Elżbieta Makarewicz, „Przeniesienie własności działki bez spełnienia warunku określonego w decyzji o podziale nieruchomości” *Monitor Prawniczy*, No.17 (2010): 972.

31 Magdalena Durzyńska, „Podział nieruchomości a dostęp do drogi publicznej” *Rejent*, No.6 (2010): 11; Zygmunt Truskiewicz, „Apekty konstrukcyjnoprawne podziału nieruchomości” *Studia Iuridica Agraria*, Vol. X (2012): 111.

-ownership by a physical division of land takes place according to the rules specified in the provisions of the Civil Code (Article 210 et seq. of the Civil Code). By virtue of a statutory reference, the provisions on the abolition of joint ownership apply accordingly to the inheritance division (Article 212 § 1 sentence 2 in connection with Article 1035 of the Civil Code) and, in matters not regulated by the provisions of the Family and Guardianship Code, to the division of joint property of spouses (Article 212 § 1 sentence 2 in connection with Article 46 of the Family and Guardianship Code and Article 1035 of the Civil Code).

Detailed issues related to the division of real estate in the administrative phase (i.e. geodetic division of real estate), ending with the issuance of a decision of the head of the gmina district or the mayor of the city or the town approving the division, are regulated by the provisions of the Act on Real Estate Management. The geodetic division takes place in two phases³². In the first phase, the administrative body (the head of the gmina district, mayor of the city or town) should verify the presented draft of the division of the property with the provisions of the local zoning plan. This phase is completed by issuing an opinion on the compliance of the proposed division with the arrangements of the local plan in the form of a decision of the head of the gmina district or the mayor of the city or town. (Article 93 (4 and 5) of the Act on Real Estate Management³³. In the second phase of the proceedings, an administrative decision is issued approving the proposed division of the real estate³⁴. The fact that previously a positive decision giving an opinion on the compliance of the planned division with the provisions of the local plan has been issued does not yet determine the approval of such a division of the property. The approval of the division depends on additional premises, including the provision of access to the public road to all the planned plots of land (Article 93 (3) of the Act on Real Estate Management)³⁵.

The provision of Article 93 (3) of the Act on Real Estate Management stipulates that, in the case of division of real property, access to a public road must be ensured for each plot of land designed to be separated. Namely, it states that the division of real estate is not acceptable if the land plot to be separated is not accessible to a public road. It should be stressed that the provision of access to a separate plot of land for a public road can take many forms. Namely, access to the public road may consist in the physical vicinity of the public road; it may also be ensured by isolating an internal road and

32 Durzyńska, *Rozgraniczenie*, 306; the verdict of the Voivodship Administrative Court in Warsaw of 5.02.20015 r., I SA/Wa 3099/14, Lex nr1746065.

33 Durzyńska, *Rozgraniczenie*, 308.

34 Durzyńska, *Rozgraniczenie*, 313.

35 Durzyńska, *Rozgraniczenie*, 315.

establishing appropriate easements for the separated land plots on that road or by selling shares in the plot constituting the internal road to the purchasers of the separated land plots or establishing other road easements for those plots, if it is not possible to isolate a separate road from the real property included in the division.

The obligation to establish easements ensuring access to the public road for separated plots of land is secured by the provision of Article 99 of the Act on Property Management. According to this provision, the division of real estate is made on condition that rights of way are established when selling the separated plots of land. It should be emphasised, however, that in the decision approving the division of real estate, the head of the gmina district, the mayor of the city or the town does not establish a right of way³⁶, nor does it indicate its designation or course. The administrative decision approving the draft of geodetic division of real estate issued in accordance with Article 99 of the Act on Property Management includes only a reservation on the necessity to provide access to a public road for the separated plots of land (without indicating any specific solutions). Therefore, the easement does not have to be created before the decision approving the division becomes final and binding, but only when the legal division of the real estate is made³⁷.

The execution of the obligation to establish appropriate easements for a property created as a result of a division should therefore be enforced upon transfer of ownership of the separated property³⁸. Persons performing legal actions should submit declarations of intent on the establishment of appropriate easements, while maintaining the form specified in the provisions on the establishment of limited property rights (notarial form for the declaration of the owner of encumbered real estate – 245 § 2 sentence 2 of the Civil Code).

Against this background, the question arises as to the consequences of the transfer of ownership of separate plots of land without meeting the condition referred to above. Two ways of assessing the presented issue may be considered. Both seem to assume that the provisions of Articles 93 and 99 of the Act on Real Estate Management concern the geodetic and legal division of real estate³⁹.

36 Durzyńska, „Podział”, 14-15; Eugeniusz Mzyk, *Ustawa o gospodarce nieruchomościami. Komentarz*, ed. Gerard Bieniek (Warszawa: LexisNexis Polska, 2005), 360.

37 See the ruling of the Voivodship Administrative Court in Gorzów Wielkopolski in the verdict of 14 December 2011 r., II SA/Go 720/11, Lex No.1257496.

38 Durzyńska, „Podział”, 14-15.

39 Agnieszka Gieral-Siewielec, „Podział nieruchomości budynkowych i lokalowych” *Rejent*, No.7-8 (2000): 28-29.

According to the first method, in the event an easement is not established when transferring the ownership of a separated plot of land, the legal act is valid⁴⁰. The legal division of real estate comes to the effect, and as a result real estate deprived of access to a public road is created. The argument in favour of such an approach is the fact that Article 99 of the Act on Real Estate Management does not specify what are the consequences of failure to meet the condition referred to therein. In particular, failure to comply with the condition cannot be the basis for the annulment of the decision approving the division, since such an event is not included in the list of the grounds for annulment of the administrative decision referred to in Article 156 of the Code of Criminal Procedure. The decision approving the division of the property is therefore valid, and failure to meet the condition specified in it does not affect the validity and effectiveness of the geodetic or legal division of the property⁴¹. This would mean that the purchaser of the ownership of a separated property becomes the owner of a property without proper access to the public road. His situation, however, is not hopeless. There are statutory prerequisites specified in Article 145 of the Civil Code, which make it possible to apply for the establishment of an easement by necessity⁴².

Indeed, failure to meet the condition referred to in Article 99 of the Act on Real Estate Management does not invalidate the decision issued by the head of the gmina district or mayor of the city or town approving the geodetic division of the real estate. Contrary to the impression that the wording of Article 99 of the Act on Real Estate Management may give rise to, the decision approving the geodetic division of the real estate, taking into account Article 99 of the Act on Real Estate Management, is not a classic conditional decision⁴³. The establishment of appropriate easements for the benefit of the purchaser of a separated real estate is not a condition under administrative law (or civil law)⁴⁴. The addressees of this „condition” are not only the entities of administrative proceedings at the geodesic stage of real estate division. It should be assumed that the addressees are the seller of the real estate and the buyer, and indirectly also the notary⁴⁵. Accordingly, the failure to establish

40 Mzyk, *Ustawa*, 360, however, Mzyk, *Ustawa*, 338.

41 Mzyk, *Ustawa*, 361.

42 Makarewicz, „Przeniesienie”, 973, 974; Mzyk, *Ustawa*, 361, 338; see also the decision of the Supreme Court of 16 November 2011, V CSK 478/10, Lex No. 1095957.

43 Marian Wolanin, *Ustawa o gospodarce nieruchomościami. Komentarz 2017, Komentarz do art. 99 u.g.n.* (Warszawa: Legalis, 2017).

44 Ewa Bończak-Kucharczyk, *Komentarz aktualizowany do art. 99 ustawy o gospodarce nieruchomościami*, (Warszawa: Lex, 2018).

45 Durzyńska, „Podział”, 14-15; see also Mzyk, *Ustawa*, 361.

an appropriate easement cannot be regarded as a failure to satisfy a condition with the result that the decision providing for that condition does not produce legal effects⁴⁶.

The above does not mean, however, that failure to fulfil the condition referred to in Article 99 of the Act on Real Estate Management is legally indifferent. It should be accepted that an administrative decision authorising a division of real estate subject to the establishment of appropriate easements has the legal effect specified therein once it has become final, irrespective of whether the condition laid down in the decision is met or not⁴⁷. Failure to comply with the condition set out in the decision will not render the decision invalid. However, it will affect the validity of the agreement transferring the ownership of the separated property. Failure to meet the condition will therefore have consequences at the stage of legal division of the property. Namely, the sale of separated real estate without complying with the said condition will be illegal⁴⁸.

The provisions of Art. 93 par. 3 and 99 of the Act on Real Estate Management introduce a general prohibition on division of real estate if it would result in the creation of real estate deprived of access to a public road. They are mandatory⁴⁹. Transfer of ownership of a separated plot of land without meeting the condition of establishing appropriate easements is therefore a legal act contrary to the Act and therefore invalid (Article 58 § 1 of the Civil

46 Makarewicz, „Przeniesienie”, 973; Bończak-Kucharczyk, *Komentarz aktualizowany*.

47 Durzyńska, „Podział”, 18.

48 Elżbieta Klat-Górska, *Komentarz do art. 99 ustawy o gospodarce nieruchomościami*, (Warszawa: LEX, 2018; Wolanin, *Ustawa o gospodarce*; the resolution of the Supreme Court of 4 June 2009, III CZP 34/09, OSNC 2010, No.2, poz. 20, see also the decision of the Supreme Court of 24 April 2003., IV CSK 571/12, Lex No.1365714.

49 Elżbieta Klat-Górska, *Komentarz do art. 93 ustawy o gospodarce* (Warszawa: LEX, 2018); differently: Mzyk, *Ustawa*, 361 (the author states *inter alia* that Article 99 of the Act of Property Management is of „only informative, technical-legal and postulatory nature”).

Code)⁵⁰. Such a position is also supported by teleological considerations.⁵¹ Introduction to the system of Article 93 (3) and Article 99 of the Act on Real Estate Management and Article 99 is intended to prevent divisions of real property without ensuring proper access to a public road for the separated plots of land. The owner of a separated plot of land should be guaranteed the unrestricted use of the property, which is excluded if the property does not have access to a public road. The argument that in the case of transfer of ownership of plots deprived of access to the public road, the owners of these plots will be able to demand the establishment of the easement of the necessary road (Article 145 of the Civil Code) is not convincing. The consequences of a faulty division of real estate should not be removed, as it were, *post factum* and at the expense of the owners of neighbouring properties. They should be prevented, which is reflected in the fact that the transfer of ownership of a separate plot of land deprived of access to a public road without the establishment of an appropriate easement is considered an invalid act.

Such an approach correlates with the solutions adopted with regard to the judicial liquidation of co-ownership of real estate by its physical division, as provided for in the Civil Code (it should be emphasized that the physical division of property is an essential way of abolishing co-ownership)⁵². Namely, in the circumstances of a particular case, it may not be possible to divide the property under joint ownership in such a way that each of the separated plots has direct access to a public road. In such cases, it is the duty of the court to establish the appropriate rights of way⁵³. Namely, in the circumstances of a particular case, it may not be possible to divide the property under joint ownership in such a way that each of the separated plots has direct access to a public road. In such cases, it is the duty of the court to establish

50 Klat-Górska: *Komentarz do art. 99 ustawy o gospodarce*; Wolanin, *Ustawa o gospodarce*; the resolution of the Supreme Court of 4 June 2009, III CZP 34/09, OSNC 2010, No.2, poz. 20, see also the decision of the Supreme Court of 24 April 2003., IV CSK 571/12, Lex No.1365714, cf. the decision of the Supreme Court of 16 November 2011., V CSK 478/10, Lex No.1095957.

51 See the resolution of the Supreme Court of 4 June 2009, III CZP 34/09, OSNC 2010, No.2, poz. 20; see also Durzyńska, „Podział”, 19.

52 Roman Dżiczek, *Postępowanie cywilne w sprawach dotyczących nieruchomości* (Warszawa: LexisNexis Polska, 2010), 214; Ignatowicz, Stefaniuk, *Prawo*, 142; see inter alia the ruling of the Supreme Court of 30 October 1978, III CRN 214/78, unpublished; ruling of the Supreme Court of 19 January 2001, V CKN 1436/00, Lex No.52398, the ruling of the Supreme Court of 9 September 2010r I CSK 674/10, Lex No.960518.

53 Ignatowicz, Stefaniuk, *Prawo*, 143.

the appropriate rights of way. Pursuant to Article 212 § 1 sentence 2 of the Civil Code, the court, by abolishing co-ownership by the physical division of real estate, may encumber individual parts of the real estate subject to division with „necessary” easements. In this way, each of the separated parts of the property is provided with access to a public road⁵⁴. The owners of the properties created as a result of the division acquire road easements upon the court decision becoming final and binding (Article 624, sentence 1 of the Civil Procedure Code). In the case of the judicial liquidation of joint ownership by the physical division of a property, no property without proper access to a public road may therefore arise. Acceptance of the interpretative conclusion that failure to establish an appropriate easement for a separated plot of land in the case of out-of-court division of real estate does not affect its validity would mean that the consequences of not providing access to the road for the separated property would differ depending on the mode of abolishing co-ownership. The interpretation of Articles 93 and 99 of the Act on Real Estate Management, which permits the creation of properties without access to the public highway following the division, must therefore also be regarded as systemically inconsistent and, consequently, as inadmissible.

4. Both civil law and administrative law include institutions whose aim is to provide land properties with access to public roads. The institution provided for by civil law is an easement by necessity (a right of way) which serves to ensure access to a road for a property which is already deprived of such access. The prerequisite for establishing an easement by necessity is the lack of appropriate access of a property to a public road (Article 145 of the Civil Code). According to one view in the legal doctrine, the lack of proper access of a property to a public road does not seem to be the only reason for establishing an easement by necessity. The prerequisite for establishing an easement by necessity are also the „the needs of a property” deprived of access to a public road. These needs are understood as „all the negative properties that do not allow to properly use the property due to the lack of access, or lack of adequate access, to a public road”. Accepting this view would lead to the conclusion that a right of way could not be required if the lack of adequate access to a public road did not cause inconvenience to the current owner of the isolated property. This conclusion cannot be accepted.

The Supreme Court formulated a view that, before applying for the establishment of an easement by necessity, the owner of an isolated property should attempt to obtain appropriate access by his own actions. Therefore, it may be considered whether there is an additional reason for a claim for the establishment of an easement by necessity. This view cannot be accepted. Even the owner of the property who did not take any steps to obtain appropriate access to the public road can make a claim to establish an easement by

54 Cf. Article 93 (3) of the Act on Property Management.

necessity. However, his claim should be subject to assessment as to its compliance with Article 5 of the Civil Code.

Administrative law includes institutions which are supposed to prevent the creation and existence of land properties without access to a public road. The Act on Real Estate Management establishes appropriate rights of way which provide access to public roads for real estate resulting from the division of land (see Article 93). According to this Article, in the case of division of real property, access to a public road must be ensured for each plot of land designed to be separated. The provision of access to a separate plot of land for a public road can take many forms, including the establishment of road easements. According to Article 99 of the Act on Real Estate Management, the division of real estate is made on condition that rights of way are established when selling the separated plots of land. Failure to fulfil this condition will affect the validity of the agreement transferring the ownership of the separated property. The sale of separated real estate without complying with the said condition will be illegal (Article 58 of Civil Code).

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