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Forest road and public purpose investment

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ABSTRACT

The functioning of forest districts in Poland should be based on their mutual cooperation with local authorities in order to achieve social interest, one of the examples of which is construction or reconstruction of roads. Due to the fact that achieving mutual investments encounter real legal problems arising from underspecified and unclear concepts, an assessment should be made of whether the construction and reconstruction of forest roads is a public purpose and also answer, what is a forest and forest road within the meaning of the provisions of the Act. It is necessary to present views of legal science and jurisdiction of administrative courts. The judicial direction of administrative courts is not beneficial for achieving investments; it does not even take into account that one of the investors' purposes – forest districts – is nature management. Presenting the contrary argumentation to judicature positions should help courts make a proper assessment in the interpretation of provisions.

KEY WORDS

forest, public roads, public purpose investment, public tasks

INTRODUCTION

From the point of view of the functioning of forest districts in Poland, cooperation with local authorities is not indifferent. What's more, only cooperation between the indicated units can lead to effective realization of social interest, which are essential because of the functioning of State Forests and also municipalities. The condition of the roads is one of the basic elements in the functioning of probably all public and private entities. Of course, maintaining or improving them cannot interfere in the environment contrary to law.

All the more, it should be taken with a lot of caution when interpreting legal regulations, based on which

road investments are carried out. Interpretation of the legal norms must take into account the principle of sustainable development, which justifies departure from such environmental protection, which takes place with unjustified legal violation of other rights and liberties protected by law.

The role of administrative courts, especially provincial administrative courts, is crucial. Making an erroneous interpretation of the law can lead to significant financial damage on the side of legal entities. It is related to the fact that the cases that get to them often, or even usually, concern factual situations that refer to the already started road investments.

MATERIAL AND METHODS

Cases seem obvious in situations when a certain road is considered to be in the public road category. Therefore, from the perspective of the functioning of forest districts in Poland, it is important if a forest road can be treated as a public road. A positive response in this matter causes that the reconstruction, to implement a public purpose, subject to the exceptions listed in Article 24 §2 point 3 of the Nature Conservation Act, dated 16 April 2004 (Ustawa 2018), item 1614, as amended, and thus, possible prohibitions regarding the lack of interference in natural habitats contained in the resolutions of provincial assemblies do not apply in the present case.

Due to this, it should be considered what public purposes are. According to Article 6 §1 of the Real Estate Management Act, dated 21 August 1997 (Ustawa 2018), public purposes within the meaning of the Law are: 1) release of land for public roads, cycling trails and waterways, the construction, maintenance and construction of these roads, public transport facilities and public communications and signalling; 1a) the separation of the land under the railway lines and their construction and maintenance; 1b) release of land for the airport, equipment and objects to handle air traffic, including areas of approaches and the construction and operation of the airports and equipment; 2) construction and maintenance of drainage strings, cables, and devices for the transmission or distribution of liquids, steam, gas and electricity, as well as other facilities necessary for the use of those wires and devices; 2a) construction and maintenance of transport network of carbon dioxide; 3) construction and maintenance of public water supply equipment, storage, transit, and wastewater treatment and recovery and disposal of waste, including its storage; 4) construction and maintenance of facilities for the protection of the environment, tanks and other equipment of water for water supply, regulating flows and protection against flooding, as well as the regulation and maintenance of water and land reclamation, owned by the State Treasury or local government units; 5) caring real estate agent representing the monuments within the meaning of the provisions for the protection of monuments and the care of monuments; 5a) the protection of the Monuments of destruction under the provisions for the protection of the sites of former Nazi death camps

and places and monuments commemorating victims of communist terror; 6) construction and maintenance of premises for offices, government authorities, courts and prosecutors' offices, public schools, federations of the higher education system listed in Article 165 federation § 1 point 1 Act of 20 July 2018 – the Law on Higher Education dated 20 July 2018 (Ustawa 2018), State or local government cultural institutions within the meaning of the provisions on organizing and conducting cultural activities, as well as the public: health protection objects' kindergartens, social welfare homes, nursing-educational, sport objects; 6a) construction and maintenance of buildings and premises necessary for the implementation of the obligations in the provision of universal service by the designated operator within the meaning of the Act of 23 November 2012 – Postal law, dated 23 November 2012 (Ustawa 2017), as well as other properties and facilities associated with the provision of those services; 7) construction and maintenance of facilities and equipment necessary for the defence of the State and protection of the State border, as well as to ensure public safety, including the construction and maintenance of detention centres and establishments for minors; 8) search, recognition, extraction of mineral deposits covered by the mining property; 8a) search for or recognition of the complex of underground storage of carbon dioxide; 9) establishment and maintenance of cemeteries; 9a) establishment and protection of national remembrance sites; 9b) the protection of endangered plant and animal species or natural habitats; 9c) release of land for publicly available local government: pedestrian squares, parks, promenades or boulevards, as well as their organisation, including the construction or reconstruction; 10) other public objectives specified in separate laws.

The term public purpose investment shall be understood as activities of local (municipal) and supra-local (district, province and national) that constitute realization of objectives listed in Article 6 of the Real Estate Management Act. Inter alia, this list foresees the construction and maintenance of public roads, cycling trails.

In the literature of the subject and judicial decision, it is pointed out that in Article 6, the list of public purposes is closed and points out the need of using literal interpretation without taking into account the extensive interpretation (Bończak-Kucharczyk 2018; Jaworski

2017; Marmaj 2010; Matusik 2012; Szachulowicz 2005; Wolanin 2010; Woś 2011). However, it may be necessary to use systemic interpretation, because in order to specify particular public purposes, we must base it on legal acts regulating the particular issue (Bieniek and Rudnicki 2013; Grossmann 2005; Marmaj 2010; Matusik 2012; Wolanin 2017). It is indicated that there is no justification for applying restrictive interpretation, thus limiting the scope of the designations of a given concept in terms of the list resulting from literal interpretation, if the requirement of such limitation does not result from regulations of relevant laws (Matusik 2012). And especially that the calculation of public purposes in that regulation aims to reduce public authority in the field of expropriation (Szachulowicz 2005; Matusik 2012).

As it is indicated in legal theory, for example, the public road itself is a construction included in one of the categories of public roads, which can be used by anyone for its intended purpose, within the limits described in the law. In this way, a public road is defined in Article 1 in conjunction with Article 4 point 2 Act of Public Roads, dated 21 March 1985 (Ustawa 2016). In functional terms, a public road shall ensure unlimited driving for everyone, limited access to this road can be only made based on regulations. The public purpose in functional terms is not only the construction of a public road, the road must be universal for everyone, with the reservations of limited access based on regulations, for example, parking fees, toll roads, all restrictions and prohibitions signalled by road signs, set up on the basis of road traffic regulations (Wolanin 2010).

Therefore, the reconstruction of a forest road, which is to serve the general community, is a public purpose investment. This statement becomes meaningful in relation to these forest roads, which are not only intended for the local community, but for millions of tourists visiting, for example, the Białowieża Forest, both from Poland and abroad.

It should also be noted that based on the content of Article 6 paragraph 1 of the Real Estate Management Act, the legislator pointed out that public purpose is also the construction and maintenance of facilities and environmental protection equipment. According to Article 3 point 2 of the Forest Act, dated 28 September 1991 (Ustawa 2018), a forest is the land connected with silviculture, used for purpose of forest management: buildings and structures, water facilities, spatial

division lines in forests, forest roads, areas under power lines, forest nurseries, wood stockpiling areas and also used for forest parking lots and tourist equipment.

Whereas having regard to the content of this statutory definition, it should be noted that forest roads constitute a forest within the meaning of the regulations of the Forest Act. Undoubtedly, actions aimed at improvement, for example, reconstructions of forest roads are made in the interest of the forest, which belongs to the environment within the meaning of the applicable law. This is due to the fact that the concept of land is crucial in the definition of forest. The intention of the legislator was that the forest was a ground that met the criteria referred to in Article 3 paragraph 2 of the Forest Act. According to Article 3 point 39 of the Environmental Protection Law Act dated 27 April 2001 (Ustawa 2018), the environment is all of the natural elements, including those transformed as a result of human activity, in particular the surface of the Earth, minerals, water, air, landscape, climate and other elements of biological diversity as well as the interaction between these elements.

Such content of the environment directly refers to the land as a natural element; what makes the forest within the meaning as defined in the Forest Act is the environment within the regulations of Environmental Protection Act (Czech 2015).

Therefore, it should be recognized that actions undertaken for forests are undoubtedly environmental actions and thus they fit into the public purpose referred to in Article 6 paragraph 1 of the Real Estate Management Act. Reconstruction of a forest road certainly fits into the construction and maintenance of objects and devices used to protect the environment. The regulations of the Real Estate Management Act do not contain definitions of legal terms 'construction', 'maintenance', 'object' or 'device'. Due to the fact that objects and devices are intended to protect the environment, an attempt to interpret them should be made by using the Environmental Law. The regulations of this act also do not have all the definitions of these terms, except for 'device'. Within the meaning of Article 3 point 42 non-stationary technical device is understood, including means of transport. However, in Article 76 of the Environmental Protection Act, the legislator included environmental protection requirements for a newly built or reconstructed building object, complex of objects or

installations. The Act does not contain a definition of the term ‘object’.

However, based on the regulations of the Construction Law, dated 7 July 1994 (Ustawa 2018), we can determine that the road is a linear object (Article 3, point 3a), which in turn is a building structure. To the building structure refer remaining terms, that is, the construction (so the construction of the building in a certain location, as well as reconstruction, extension of, superstructure of the building structure), construction work (which should be understood as construction, reconstruction work, assembly, renovation or demolition of a building structure), reconstruction (it shall be understood that performing road works as a result of which there is a change in technical parameters of an existing building object).

Therefore, within the meaning of the regulations of the Construction Law, reconstruction of a forest road is the construction of a building, which applies requirements of environmental protection. There is also no doubt that this building is intended to protect the environment, for educational reasons, or for the use of this road by Forest Services that deal with environmental protection and fulfil their statutory tasks in this area.

It is worth noting that the Act of Public Roads dated 21 March 1985 (Ustawa 2018) in Article 4 includes its own definitions of legal terms: ‘road construction’, ‘road reconstruction’ and ‘road renovation’.

Therefore, the position of the Provincial Administrative Court in Białystok, expressed in the judgment of 21 March 2019, should be regarded as a simplification of the whole issue. The Provincial Administrative Court in Białystok identified *de facto* public purpose with the public road, and therefore, concluded that a forest road is not an investment of public purpose. Such a position does not conflict with provisions in force. *Nota bene* the Provincial Administrative Court in Białystok, in statement of reasons, that ‘the definition of a public purpose investment indicates two features of this concept. The first feature characterizing a public purpose investment is its scope, that is, to determine whether a given venture may be classified to activities of local, supra-local, national or metropolitan importance. The second characteristic feature of this concept is the intended purpose, that is, whether it constitutes realization of objectives listed in Article 6 Act of 21 August 1997 of

the Real Estate Management Act (Ustawa 2018). In turn, “public purposes” – in accordance with Article 6 point 1 of this Act – were defined, *inter alia* as: separation of land for public roads, cycle paths and waterways, construction, maintenance and construction works of these roads, objects and public transport equipment, as well as public communications and signalling. Article 6 point 8 Act of 28 September 1991 on forests (Ustawa 2018) clearly states that forest roads are roads located in forests that are not public roads within the meaning of public roads.’ Still, however, in his arguments, the Provincial Administrative Court in Białystok pointed to statements that are not reflected in provisions in force. The far progressing motion of the judicature, should admit, when the Provincial Administrative Court in Białystok confirmed that ‘provisions in force do not provide that the construction of a forest road, which was directly excluded by the legislator from the category of public roads, was a public realization.’ It should be emphasized once more that in an ill-grounded way, the Provincial Administrative Court in Białystok reduces the public purpose only to activities related to public roads. This is unauthorized, for example, due to the reading in Article 6 par. 1 point 4 of the Real Estate Management Act. In the case of forest roads, it is important that the reconstruction of a forest road *de facto* improves the forest (in the form of better adaptation to social purposes), and thus, leads to environmental protection. Improvement of the forest road, resulting in greater availability of the forest, for example, for educational purposes of the society, without a shadow of doubt, is part of the activities for environmental protection.

Most roads that do not fit into the definition of a public road do not constitute a forest within the meaning of the Forest Act; therefore, it does not fulfil art. 6 par. 1 point 4 of the Real Estate Management Act, and it does not serve environmental protection. Therefore, the argument of the Provincial Administrative Court in Białystok should be considered as misguided because ‘It cannot be counted as a public construction, maintenance, separation, construction works related to internal roads, or related to access and local roads, which do not fit into the definition of a public road (e.g. the Provincial Administrative Court in Warsaw in the judgment of 4 March 2005, IV SA 3935/03, Lex No. 176118 and the judgment of the Provincial Administrative Court in

Warsaw of 1 March 2007, I SA / Wa 1889/06, Lex No. 315055), the reconstruction of a forest road cannot be treated as a realization of a public purpose.'

It is impossible to agree with the decision of the Provincial Administrative Court in Białystok also due to the regulations of other legal acts, such as the Public Procurement Act or the Public Finance Act. As rightly noted in the legal theory, the genesis of public procurement is connected with the appearance in the legal transactions of entities with public funds. The state intervention (initiated in the XXth century) leads to recognition as 'public' of various public entities, including those with the status of private law entities, if they implement appurtenant tasks to public entities or those whose activities are financed by public funds derived from tributes transferred to the state or other entities of public authorities (e.g., local government units) (Czarnik 2013).

The State Forestry Enterprise is undoubtedly an entity with public funds within the meaning of the above-mentioned laws and applying in the scope of investments related to the construction or reconstruction of a forest road the regulations of the Public Procurement Law. This should be taken into account from the point of view of assessing the public purpose of a given investment.

In the science of law, the qualification of a given undertaking as a public purpose investment should not take place in isolation from the criterion of action within the framework of public purpose with the performance of a public task. Public purposes remain in a close relationship with specific public tasks that are implemented by public administration bodies. The scope of generic public tasks and public purposes in many instances is convergent, if not identical, especially when it comes to infrastructure investments. In addition, the qualification of a project as a public purpose investment should take into account the criterion of unmet community needs, satisfaction is in the essence of public tasks (Czarnik and Mikolik 2018).

CONCLUSIONS

In the considerations outlined above, it should be adopted that the reconstruction of a forest road is a public investment for the general public, but it also serves to protect the environment. The investor's main purpose

in this case is environmental protection. Though, of course, the presented problems do not exhaust the whole issue in terms of the impact of terminological chaos on the possibility of reliable determination of the indicated provisions, such as, e.g. an object within the meaning of the Real Estate Management Act. The adjudicated judgment of administrative courts, however, is based essentially on interpreting Article 6 para. 1 of the Real Estate Management Act, particularly from the point of view of public purpose assessment, taking into account regulations of the Act on Public Roads. It is desirable to make an appropriate interpretation in relation to other legal acts, including the provisions of the Environmental Protection Law Act, the Construction Law or the Public Procurement Law. Forest resources are an element of the environment, and forests are a component of the natural element. The analysis of these regulations cannot take place without taking into account the principle of sustainable development, as well as the investment purposes of entities implementing them.

REFERENCES

- Bieniek, G., Rudnicki, G. 2013. *Nieruchomości. Problematyka prawna*. LexisNexis, Warszawa.
- Bończak-Kucharczyk, E. 2018. *Ustawa o gospodarce nieruchomościami. Komentarz*. Wolters Kluwer, Warszawa.
- Czarnik, Z. 2013. *Prawo Zamówień publicznych. Komentarz*. LexisNexis, Warszawa.
- Czarnik, Z., Mikolik, M. 2018. Legal status of an entity implementing public communication as an investment of public purpose. *Zeszyty Naukowe Sądownictwa Administracyjnego*, 3, 33–46.
- Czech, E.K. 2015. The issue of unambiguity and consistency of terminological standards, basis on which forests are protected - study of selected laws (in Polish with English summary). *Białostockie Studia Prawnicze*, 18, 45–54.
- Grossmann, T. 2005. The Concept of public purpose investment in the field of communications *Państwo i Prawo*, 9, 80–93,
- Jaworski, A., Prusaczyk, A., Tułodziecki, A., Wolanin, M. 2017. *Ustawa o gospodarce nieruchomościami. Komentarz*. Legalis, Warszawa.

- Marmaj, Z. 2010. Komentarz do art. 6. In: Ustawa o gospodarce nieruchomościami. Komentarz. (ed.: G. Bieniek). LexisNexis, Warszawa.
- Matusik, G. 2012. Komentarz do art. 6. In: Ustawa o gospodarce nieruchomościami. Komentarz. (ed.: S. Kalus). LexisNexis, Warszawa.
- Szachułowicz, J. 2005. Ustawa o gospodarce nieruchomościami, Wydawnictwo Prawnicze LexisNexis, Warszawa.
- Ustawa z dnia 21 marca 1985 r. o drogach publicznych (Dz.U. tj. z 2016 r., poz. 1440 ze zm.).
- Ustawa z dnia 28 września 1991 r. o lasach (Dz.U. tj. z 2018 r., poz. 2129 ze zm.).
- Ustawa z dnia 7 lipca 1994 r. Prawo budowlane (Dz.U. tj. z 2018, poz. 1202 ze zm.).
- Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (Dz.U. tj. z 2018, poz. 2204 ze zm.).
- Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska (Dz.U. tj. z 2019, poz. 1396 ze zm.).
- Ustawa z dnia 29 stycznia 2004 r. Prawo zamówień publicznych (Dz.U. tj. z 2019, poz. 1843).
- Ustawa z dnia 16 kwietnia 2004 r. o ochronie przyrody (Dz.U. tj. z 2018, poz. 1614 ze zm.).
- Ustawa z dnia 23 listopada 2012 r. - Prawo pocztowe (Dz.U. z 2017 r. poz. 1481 oraz z 2018 r. poz. 106, 138, 650, 1118 i 1629).
- Ustawa z dnia 20 lipca 2018 r. – Prawo o szkolnictwie wyższym i nauce (Dz.U. poz. 1668).
- Wolanin, M. 2010. Ustawa o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych. Komentarz. C.H. Beck, Warszawa.
- Woś, T. 2011. Wywłaszczenie i zwrot wywłaszczonych nieruchomości. Wydawnictwo LexisNexis, Warszawa.