

Right-of-way easement – general issues and effects of changes to regulations concerning the perpetual usufruct right

Easement is one of limited rights stipulated in the Polish Civil Codeⁱ next to the right of usufruct, pledge, mortgage, etc. A right-of-way easement grants a right to travel or pass through adjoining land (referred to as burdened, or servient land) in favour of another property. Furthermore, when a given real property has no legal access to a public road or outbuildings ancillary to the property, the owner of the property whose utility is to be improved (dominant land) may request that the required right-of-way easement (necessary right-of-way) be established over adjoining properties against paymentⁱⁱ.

The necessary right-of-way easement is established pursuant to an agreement executed in the form of notarial deedⁱⁱⁱ – provided that the owners of adjoining properties agree as to the contents of the deed, i.e. the scope and manner of exercising the easement and the amount of due payment. If the property owners fail to reach an agreement, the court grants a decision staking out the right of way. When granting the right-of-way easement, it should be borne in mind that the right of way should be established taking into account particular needs of the property which has no access to a public road while also thinking about the least possible encumbrance on the property through which the right of way cuts, as well as considering the social and economic interest.

There are various types of easements, including easement appurtenant and per-

sonal easement. Easement appurtenant is a right over use of the servient property for the benefit of another property, regardless of who the owner of the dominant property is. Accordingly, easement appurtenant remains effective even if the properties, whether the dominant land or servient land, change hands because the right of way has not been established for the benefit of the land owner but, precisely, for the benefit of a specific estate. The easement expires only when a single person becomes the owner of both estates, dominant and servient.

A right of way can also be granted as a personal easement, conferred upon an owner-like possessor of the dominant estate. However, it should be noted here that a personal easement is non-transferable, nor may the right to exercise it be assigned to another entity; therefore, it expires in the event of change of owner-like possessor or when owner-like possession comes to an end. Since it is attached a specific person, the personal easement expires no later than upon the death of this person.

The issue of the right-of-way easement concerning land held in perpetual usufruct should be considered separately. In this case, there is no reason to grant personal easement as the perpetual usufructuary is a dependent possessor rather than owner-like. The position established among legal commentators^v and the rulings of the Supreme Court indicate that a right-of-way

easement can be established over the right of perpetual usufruct or for the benefit of a perpetual usufructuary.^v

Considering the above, how will the changes arising from the Act on Transforming the Perpetual Usufruct Right of Land Developed for Housing Purposes into Ownership, which entered into force on January 1, 2019 affect the right-of-way easement established by a perpetual usufructuary of a dominant estate^{vi}? The very answer is presented directly by the provisions of the said act. Encumbrances on perpetual usufruct existing as at the transformation date become encumbrances on the property. Rights related to perpetual usufruct are converted into rights related to the ownership of the property. The above indicates that easements appurtenant established in the preceding years will remain unchanged. The only change will be the owner of the given property.

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ⁱ v. Art. 244 of the Polish Civil Code dated April 23, 1964 (i.e. *Journal of Laws of 2018 item 1,025, as amended*).

ⁱⁱ Art. 145 *ibid*.

ⁱⁱⁱ Art. 245 *ibid*.

^{iv} v. *Jankowska Marlena. Art. 145. In: Kodeks cywilny. Komentarz. Tom II. Własność i inne prawa rzeczowe (art. 126-352). Wolters Kluwer Polska, 2018*

^v v. *Supreme Court's decision of 15 October 2008, court docket I CSK 135/08 et al.*

^{vi} *The Act on Transforming the Perpetual Usufruct Right of Land Developed for Housing Purposes into Ownership dated July 20, 2018 (Journal of Laws item 1,716, as amended)*