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Reflections on the Context of Public Law and Private Law on the Example of the Decision on the Permit for the Implementation of the Road Investment

Introduction

Already during the last decade of the twentieth century, it was possible to observe scholars adopting an intensified approach to the issues of the interface between public law and private law in Polish legal science. The progressive economic changes taking place after the political transformation in the Republic of Poland contributed to the analysis of the boundaries between these great branches of law. Public entities have become equal entities in economic turnover with entities from the private sector, and at the same time, they have not lost their sovereign powers, which are inherently associated with them and cannot be delegated to anyone else.

One of the terms used more frequently at the time was “providing administration”. As indicated by Sierpowska, this denoted creative service activities and meeting the needs of citizens. The essence of this function was the provision of administration to the public and treating the administration as acting for the benefit of the public.¹ A similar understanding of this concept was presented by Szmulik, who pointed out that the concept of providing administration is understood as the administration of social services, securing living matters through public utility

1 I. Sierpowska, *Z rodowodu doktryny administracji świadczącej*, in: *Pomoc społeczna jako administracja świadcząca. Studium administracyjnoprawne*, Warsaw 2012.

institutions and supporting the administration. Providing administration should include, inter alia, communal facilities and public things (roads, squares, parks, schools).²

As an introduction to the remainder of the article, one should also mention the position of Kokocińska, who emphasized that more and more norms and institutions appear in legislation, the legal nature of which raises doubts not only in the doctrine but also in the process of applying the law. We define them as hybrid solutions, and the environment in which they operate – on the border of branches of laws.³ One of the examples of such institutions is the decision on the permit for the implementation of a road investment.

Decision on the Permit for the Implementation of a Road Investment

The decision on the permit for the implementation of a road investment was introduced into the Polish legal system by the Act of April 10, 2003, on special rules for the preparation and implementation of investments in the field of national roads.⁴ This legal act has been in force for more than 17 years, which constitutes a good time to summarize and analyze it, given the impact and frequency of the use of its legal instruments. It is worth noting that in the originally enacted version of the special act, Art. 45 indicated that the act would expire on 31 December 2007, and the act itself, in its original version, applied only to national roads, to which – under Article 5 Section 1 point 1 of the Act of March 21, 1985, on Public Roads⁵ –

2 B. Szmulik, *Cechy administracji i jej podziały*, in: *Zarys prawa administracyjnego*, ed. K. Miaskowska – Daszkiewicz, S. Serafin, B. Szmulik, ed. 4, Warszawa 2017, p. 9.

3 K. Kokocińska, *Problematyka cywilnoprawnych form działania administracji. O przenikaniu i wzajemnym oddziaływaniu prawa*, in: *Konstytucyjne bariery stosowania prawa prywatnego w sektorze publicznym. Studium prawnoporównawcze ze szczególnym uwzględnieniem prawa polskiego i niemieckiego*, red. R. Szczepaniak, Scientific Publishing UAM Poznań 2020, p. 152.

4 Journal of Laws of 2003, no. 80, item 721, further as: the Special Act.

5 Journal of Laws of 1985, no.14, item 60, further as: Act on Public Roads.

also included highways and expressways, as well as roads lying in their paths until the construction of highways and expressways.

As indicated above, originally the Special Act was to be in force until the end of 2007, but its duration has been extended until today. According to the justification to the draft amendment, it was a regulation serving the implementation of the Government's Economic Strategy in the part concerning "Infrastructure – the key to development". It aimed to radically simplify the rules of preparation and implementation of investments in the field of national roads by the end of 2007, resulting from the need to reduce the differences in road construction between Poland and the European Union countries. The aim was to significantly accelerate the pace of construction and modernization of national roads (including motorways and expressways), and the means to achieve this goal was to simplify the procedures for the preparation and implementation of road investments. Before the entry into force of the act, the location procedure included two stages:

- determination of location indications by the minister for public administration;
- determination of the location by the voivode.

The procedure was time-consuming, therefore the Special Act included the first stage in the second stage. Article 2 Section 2 provided that the decision to determine the location of the road was issued by the voivode within 3 months from the date of submission of the application by the General Director for National Roads and Motorways.

It was also necessary to take into account the need to divide the property through which the road was to run. In the earlier legal status, the determination of the location of the road did not lead to the division of the real estate – therefore the act included the division procedure in the location procedure. In this way, the decision to determine the location of the road became at the same time the decision to approve the location project for dividing the property attached to the application. The solution functions until today without any changes.

The civil law effects of the decision on the permit for the implementation of a road investment, in particular concerning ownership changes, have significantly changed over the years that the Special Act has been in force. In the original version of the Special Act, Article 13 Section 1 provided that the General Director for National Roads and Motorways purchases, on behalf of and for the State Treasury, real estate or parts thereof for road construction purposes, by way of an agreement, subject to Article 14. Article 14 Section 1 provided, however, that real estate intended for road lanes, owned by local government units, shall become the property of the State Treasury on the date on which the decision to determine the location of the road regarding these real estate becomes final. In connection with the above, it can be concluded that the ownership of real estate owned by local government units was transferred *ex lege* to the State Treasury as soon as the location decision was granted the final attribute. The competent local government units were entitled to compensation for these properties (Article 14 Section 3 of the Special Act), which was determined by the voivode by way of a decision (Article 14 Section 4 of the Special Act).

The procedure of expropriation of real estate not owned by local government units was different. Under Article 15 Section 1 of the Special Act, the initiation of expropriation proceedings concerning real estate intended for road lanes took place at the request of the General Director of National Roads and Motorways, after the expiry of the deadline for concluding the contract referred to in Article 13 Section 1, designated by the voivode in writing to the owner or perpetual usufructuary of these properties. This deadline could not be shorter than 30 days from the date of receipt by the owner or perpetual usufructuary of the property of the written offer of the General Director for National Roads and Motorways regarding the conclusion of the contract. Article 16 Section 1 of the special act stipulated that the expropriation procedure is initiated at the request of the General Director for National Roads and Motorways, and the voivode issues decisions in its course. The decision

on expropriation of the real estate specified the time limit for issuing the real estate – it could not be shorter than 30 days from the date of delivery of the decision to the owner or perpetual usufructuary of the real estate.

The property was expropriated for compensation, the allocation of which was defined in Article 18 of the Special Act. Article 18 Section 1 stipulated that the amount of compensation for expropriated real estate is determined according to its state as of the date of the decision on the determination of the location of the road and its market value on the date of the decision on the expropriation of the real estate. The value of the real estate was determined by property appraisers referred to in the Real Estate Management Act (Article 18 Section 2 of the Special Act).

The very implementation of the road investment was defined in Chapter 4 of the Special Act, entitled “Implementation of a road investment”. Under Article 24 Section 1 of the Special Act, the voivode issues a decision on a permit to build a road on the terms and according to the provisions of the Construction Law,⁶ subject to the provisions of this chapter. Article 24 Section 2 stated that whenever the provisions of the Construction Law refer to a decision on building conditions and land development, it also means a decision to determine the location of a road.

The amendment made by the Act of October 18, 2006, amending the Act on special rules for the preparation and implementation of investments in the field of national roads and amending certain other acts,⁷ as of December 16, 2006, the scope of application of the Act was extended to the preparation of investments in the field of all public roads in meaning of the Act on Public Roads, i.e. voivodeship, district and commune roads. The changes were made taking into account the experience from the three – year period when the act was in force and the demands of local governments. These were expecting to extend the operation of the act to local government units implementing tasks with the participation

6 Act of 7 July 1994, the Construction Law, Journal of Laws of 2020, item 1333, further as: the Construction Law.

7 Journal of Laws of 2006, no. 220, item 1601.

of funds from the European Union, which was to facilitate the preparation of these tasks for implementation and accelerate the use of EU funds.⁸

The amendment in question also introduced one key change, in particular in the aspect of civil law effects – the amended Article 12 Section 4 of the Special Act stipulated that real estates separated by lines delimiting the area, indicated in the decision on determining the location of the road, shall by operation of law become the property of the State Treasury concerning national roads or the property of relevant local government units in relation to voivodeship, district and commune roads as of, in which the decision to determine the location of the road has become final. In connection with the above, the participation of the General Director for National Roads and Motorways in the procedure for issuing a decision on determining the location of the road was restricted to the extent that the purchase of real estate not owned by local government units by way of an agreement was planned. Thus, the amendment introduced an *ex lege* expropriation mechanism, which did not provide for any exceptions.

However, less than two years later, another significant amendment to the special act was adopted – utilizing the Act of 25 July 2008 amending the Act on special rules for the preparation and implementation of investments in the field of public roads and amending certain other acts,⁹ which entered into force on 10 September 2008.

The amendment accelerated the procedure aimed at implementing the road investment even more – it repealed chapter 2 of the Special Act, dealing with the location of roads, and replaced it with chapter 2a, entitled “Proceedings prior to the commencement of construction works”. Some provisions from Chapter 4 of the Special Act have also been repealed. In accordance with the justification to the draft

⁸ See: justification for the draft of the amendment.

⁹ Journal of Laws of 2008, no. 154, item 958.

amendment, the changes were aimed at simplifying the investment implementation procedure. Before the amendment, the procedure consisted of two stages:

- the first – location, ending with the issuance of a decision to determine the location of the road, replacing the acts in the field of spatial planning and development in the traditional investment process,
- the second – aimed at issuing a decision on a road construction permit.

By means of the amendment, an integrated, one – step procedure was created, determining all the conditions for the implementation of road investment. The previous two decisions: on establishing the location of the road and on the road construction permit, were replaced by one decision, issued according to Chapter 2a of the Special Act – the decision on the permit for the implementation of a road investment. Its elements were defined in Article 11f Section 1 of the Special Act. And so, according to it, the decision on the permit for the implementation of a road investment includes in particular:

1. Requirements for the connection of the road with other public roads, specifying their category.
2. A definition of the boundary lines of the area.
3. Conditions resulting from the needs of environmental protection, the protection of monuments and contemporary cultural goods, and the needs of the state's defence.
4. Requirements for the protection of the legitimate interests of third parties.
5. Approval of the division of real estate referred to in Article 12 Section 1.¹⁰

¹⁰ According to Article 12, Section 1, the decision on the permit for the implementation of a road investment approves the division of the real estate. According to Article 12 Section 3, the decision on the permit to implement a road investment constitutes the basis for making entries in the land register and in the real estate cadastre.

6. The designation of real estate or parts thereof, according to the real estate cadastre, which becomes the property of the State Treasury or the relevant local government unit.
7. Approval of the construction design.
8. If necessary, other arrangements.¹¹

Changing the Decision – Procedure and Administrative Law Effects

The last major change to the procedure that is the subject of this article was the amendment made by the Act of August 5, 2015, amending the Act on special rules for the preparation and implementation of investments in the field of public roads and certain other acts, which entered into force on October 27, 2015. This amendment added Section 8 to Article 11f of the Special Act, according to which to the change of the decision on the permit for the implementation of a road investment the Article 155 of the Code of Administrative Procedure¹² applies, with the proviso that consent is given only by the party that applied for a permit to implement a road investment.

This change, although editorial in – depth, was essential in nature. Article 155 of the Code of Administrative Procedure stipulates that the final decision under which the party acquired the right may be revoked or amended at any time with the consent of the party by the public administration body which issued it, provided that special provisions do not preclude the revocation or amendment of such a decision and it is justified by the public interest or the legitimate interest of the party.

In the amendment, the legislator decided to exclude the requirement to obtain the consent of all parties to the administrative procedure. It was a decisive move, bearing in mind, in particular, that the consent of

¹¹ These arrangements included, inter alia, conditions for securing the construction site or detailed requirements for supervision on the construction site.

¹² Act of 14 June 1960, Code of Administrative Procedure, Journal of Laws of 2020, item 256 further as: Code of Administrative Procedure.

the parties is a fundamental condition for the application of Article 155 of CPA, and its lack or defectiveness leads to a gross violation of the law.¹³ The jurisprudence stated¹⁴ that the consent of a party to revoke or amend a decision under Article 155 must be given explicitly and clearly – it cannot be presumed.¹⁵

Therefore, it can be assumed that the legislator resigned from the requirement to obtain the consent of all parties to the proceedings,¹⁶ intending to accelerate them. The above confirms the justification for the draft amendment, which indicates that in the case of the implementation of large road investments, due to the wide range of parties to the proceedings, obtaining the consent of all parties to amend the decision on the permit for the implementation of a road investment is very difficult, due to a large number of parties to the proceedings.

At this point, however, the question arises as to when it is permissible to change the decision on the permit for the implementation of a road investment. It should be recalled that under Article 12 Section 4 of the Special Act, the real estate marked in the decision becomes, by operation of law, the property of the State Treasury or the competent local government units on the date of obtaining the final property. According to Art. 12 Section 4a of the Special Act, a decision establishing the amount of compensation for the real estate referred to in Section 4 is issued by the authority that issued the decision on the permit for the implementation of a road investment. Article 12 Section 4b of the Special Act stipulates that the decision determining the amount of compensation shall be is-

13 See J. Borkowski, B. Adamiak, in: *Kodeks postępowania administracyjnego. Komentarz do art. 155*, ed. 17, 2020.

14 See: the judgment of Supreme Administrative Court of July the 15th 1999, I SA 314/99; the first thesis of the judgment of Supreme Administrative Court of November the 24th 1998, I SA 380/98; the judgment of Supreme Court, 14 March 1991, III ARN 32/90.

15 P. M. Przybysz, in: *Kodeks postępowania administracyjnego. Komentarz aktualizowany, Art. 154, Art. 155*, Gdańsk 2021.

16 Before the amendment, the investor was required to obtain such approvals under Article 11c of the Special Act, according to which the provisions of the Code of Administrative Procedure apply to the procedure in matters relating to the issuance of a decision on the permit for the implementation of a road investment subject to the provisions of the Special Act.

sued within 30 days from the date on which the decision on the permit to implement a road investment becomes final. Article 12 Section 5 of the Special Act indicates that for the determination of the amount and payment of the compensation referred to in Section 4a, the provisions on Real Estate Management Act shall apply *mutatis mutandis*, subject to Article 18 of the Special Act.

Therefore, it should be noted that the final administrative decision on the permit for the implementation of a road investment has significant effects in the civil and administrative spheres. When it becomes final, there are changes in the ownership sphere, and the decision itself is the basis for making entries in the land register and the real estate cadastre. Moreover, the act imposes an obligation on the competent authority to issue a decision determining the amount of compensation within 30 days of the decision being final.

Since the decision on compensation is a separate decision from the decision on the permit to implement a road investment, Article 132 Section 1a of the Act of August 21, 1997, on Real Estate Management,¹⁷ according to which in cases where a separate decision on compensation was issued, the payment of compensation takes place once, within 14 days from the date on which the decision on compensation becomes final. Therefore, it is not difficult to imagine a situation in which the final decision on the permit for the implementation of a road investment will be changed, which could have an impact on another final decision issued in connection with it – i.e. the decision to determine the amount of compensation for expropriated real estate. Interestingly, in this case, it would not necessarily have to be refunded for the expropriated property – following Article 132 Section 3a of the Real Estate Management Act, if the decision on the basis of which the compensation was paid was subsequently revoked or invalidated, the person to whom the compensation was paid or his heir shall be obliged to return the compensation after its indexation as of the date of its return. The repeal may take place,

¹⁷ Journal of Laws of 2020, item 1990, further as: the Real Estate Management Act.

inter alia, on the basis of Article 155 of the Code of Administrative Procedure, but in this case – contrary to the decision on the permit for the implementation of a road investment – consent must be expressed by all parties to whom the decision was addressed. The legislator did not stipulate the necessity to reimburse compensation in the event of a change in the decision on compensation or a change in the decision based on which the compensation was issued.

Changing the Decision – Significant Effects on the Basis of Civil Law

The very nature of the claim for compensation for expropriated real estate is not uniform, the doctrine and jurisprudence, however, take the position that it is dominated by civil elements, but with elements of administrative jurisdiction. As an example, the judgment of the Supreme Administrative Court can be mentioned: “In the opinion of the Supreme Administrative Court, the claim for compensation for the deduction of ownership or the acquisition of a real estate by operation of law is of a civil nature, although it is a consequence of a ruling (under a decision or by operation of law) deprivation of law) properties. The argument that the public entity, i.e. the State Treasury or a local government unit, is obliged to pay the compensation is irrelevant. These entities operate in civil law transactions on the same terms as private entities”.¹⁸

However, the question about the civil law consequences of real estate expropriated through a decision granting permission to implement a road investment remains valid. Earlier it was indicated that the final decision leads to the transfer of property ownership to public entities *ex lege*. This raises the question of whether, in the event of a change or revocation of the decision, it is necessary to conduct administrative proceedings for the return of expropriated real estate based on the Real Estate Management Act, or civil proceedings aimed at the return of owner-

¹⁸ Judgment of Supreme Administrative Court of January the 21st 2016, I OSK 1083/14.

ship to the previous owner of the real estate. It should also be considered whether the transfer of ownership based on such a decision does not lead to irreversible legal consequences.

This was the situation in the case examined by the Voivodeship Administrative Court in Opole¹⁹. In this case, the Mayor of the City of Kędzierzyn-Koźle applied for the revocation of the decision on the permit for the implementation of a road investment under Article 155 Code of Administrative Procedure. In the justification of the application, he indicated that the decision was not implemented by the investor – the possession of only one plot of land was taken over from the properties separated based on the aforementioned decision, and no construction works were commenced. The authorities of both instances (District Head of Kędzierzyn – Koźle and the Voivode) refused to repeal the decision, referring to the fact that the decision on the permit for the implementation of a road investment deeply interferes with the property ownership right, constitutes the basis for entries in the land and mortgage register and real estate cadastre, i.e. when it becomes final, the legal status and purpose of the above – mentioned properties are irreversible.

The Voivodeship Administrative Court in Opole, in its final judgment, did not accede to the arguments raised by the authorities of both instances, in particular as regards the irreversibility of the legal effects of the decision. The court stated: “The court fully agrees with the applicant’s opinion that the decision did not produce irreversible legal effects only because some plots in the demarcation lines of the road investment were expropriated to a local government unit. (...) In the resolution of 7 Justices of the Supreme Court of May 28, 1992, file ref. act III AZP 4/92, it was stated that the reversibility or irreversibility of the legal effect of the decision must be considered, taking into account the scope of competencies of public administration bodies and their competencies, i.e. empowerment to apply and unilateral legal forms of action. If

19 Judgment of Voivodeship Administrative Court in Opole of November the 14th 2019, II SA/Op 394/19.

the revocation, cancellation or reversal of the legal effects of a decision requires such actions for which the public administration body has no statutory authority, i.e. it cannot apply the form of an individual administrative act, and cannot use the administrative procedure, then the legal effect of the decision will be irreversible”.

Further, the Court stated: “To reverse the effect caused by the contested decision, consisting in the expropriation of the owners of plots from their property rights to a local government unit, it is enough to simply eliminate this decision from legal circulation by the administrative authority under its powers under Art. 155 of the Code of Administrative Procedure and no additional procedures are required before a common court under the provisions of private civil law governing the protection of property rights. It is also not necessary to initiate administrative proceedings under the provisions of the Act of August 21, 1997, on real estate management (Journal of Laws of 2018, item 2204, as amended), aimed at returning the expropriated property (Section III, Chapter 6), possibly initiated by the owners of expropriated real estate or their legal successors”.

When assessing the position of the Voivodeship Administrative Court in Opole, it is difficult not to deny it was right. Since the decision on the permit for the implementation of a road investment transfers the ownership of the real estate *ex lege* along the demarcation lines of the road investment, there are no grounds to conclude that changing the decision by modifying the demarcation lines could not introduce further ownership changes. Such a solution is also justified by considerations of equity – it is possible that, by mistake, in an architectural and construction design, the person preparing it will cover it with lines delimiting the property which was not the target of expropriation. Correcting such a decision should be as simple as possible – in particular, bearing in mind that only the party that applied for the permit for the implementation of a road investment expresses consent to the amendment of the decision.

Doubts of a Constitutional Nature

The aforementioned judgment does not include one more issue in its justification – the deadline for changing the final decision on the permission to implement a road investment. Article 11f Section 8 of the Special Act does not specify such a term.

It is also not indicated by other provisions contained in the act. Article 16 Section 2 of the Special Act provides that the decision on the permit for the implementation of a road investment specifies the time limit for the release of the property, or the release of the property and the emptying of premises and other rooms, respectively. This deadline may not be shorter than 120 days from the date on which the decision on the permit for the implementation of the road investment becomes final. Article 31 Section 1 of the Special Act provides that the final decision on the permit for the construction of road investment is not invalid if the application for annulment of this decision was submitted after 14 days from the date on which the decision became final and the investor started the construction of the road. Article 158 Paragraph 2 of the Code of Administrative Procedure shall apply accordingly.

Bearing in mind the above – mentioned regulations, the concept of ‘starting the road construction’ should be interpreted. According to the position of the doctrine, the moment of commencement of works should be assessed through the prism of Article 41 Section 1 and 2 of the Construction Law, according to which the construction starts upon the commencement of preparatory works on the construction site, which are: geodetic delineation of objects in the field, execution of land levelling, development of the construction site along with the construction of temporary facilities and execution of connections to the technical infrastructure network for construction purposes. Application of Article 31 Section 1 of the Special Act was conditioned by the occurrence of two cumulative circumstances: when the application for annulment of the decision was submitted after the expiry of the 14-day period, counted from the date of obtaining the final status

by the assessed decision, and when the investor started construction of the road.²⁰

Considering the above, it should be considered that the only limitations for changing the decision on the permit for the implementation of a road investment (and thus also for changes in the sphere of civil law and administrative law) are the general clauses contained in Art. 155 Code of Administrative Procedure – social interest or the legitimate interest of a party. It should be noted that it is not only the legitimate interest of the party that applied for the permit for the implementation of a road investment – the only modification introduced by the Special Act concerns the group of people agreeing to change the decision, while the public interest or the legitimate interest of the party should be related to each of the other parties to the proceedings.

It should be noted that although the decision on the permit for the implementation of a road investment is related, it may be changed in the manner provided for in Article 155 of the Code of Administrative Procedure. This position was expressed in the jurisprudence: “The court agreed with the appeal body that the decision on the permit for the implementation of a road investment is a related decision, which means that if the conditions provided for by law are met, the competent authority has an absolute obligation to issue a positive decision, i.e. to grant permits. However, the court did not share the view that for this reason alone, the investor’s application should be dealt with negatively. (...) It should also be emphasized that neither Art. 155 of the Code of Administrative Procedure or from Art. 154 of the Code of Administrative Procedure, it does not follow by any means that they were reserved only for the so-called discretionary decisions”.²¹ Although the jurisprudence also expressed a different view,²²

20 M. Wolanin, *Ustawa o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych. Komentarz do art. 31*, 2010.

21 Judgment of Voivodeship Administrative Court in Opole of October the 10th 2019, II SA/Op 225/19.

22 See the judgment of Supreme Administrative Court of August the 9th 2013, II OSK 756/12; the judgment of the Supreme Administrative Court of February the 25th 2011, I OSK 607/10.

this position approving the possibility of changing the related decision on the permit for the implementation of a road investment is supported *expressis verbis* by the wording of Article 11f Section 8 of the Special Act.

Summarizing the above remarks and observations, it is necessary to consider the compliance of the regulations contained in the Special Act with the Polish Constitution. Article 64 Section 2 of the Constitution stipulates that property, other property rights and the right of inheritance are subject to equal legal protection for all. In this context, it should be pointed out that the subject of the property right should have the means to request from the state authorities an unambiguous determination as to whether he is entitled to that right and to act to protect this right.²³

Because the change of the final decision on the permit for the implementation of a road investment, which *de facto* is also an expropriation decision, is not limited in any way in time, as well as the fact that the only party expressing consent to its change is the entity applying for it, edition, it should be stated that it is not conducive to the stabilization of private – law relations, as well as to the constitutional standards of the protection of property rights. Moreover, there is no claim on the part of the owners of expropriated real estate for the return of the expropriated real estate referred to in the Real Estate Management Act. Article 216 Section 1 of the Real Estate Management Act enumerates the acts to which the regulations on the return of expropriated real estate apply – the calculation does not include the Special Act. Such a position has been confirmed in the judicial and administrative judgments: “The Special Act in Article 23 states: “In matters not regulated in this chapter, the provisions of the Real Estate Management Act shall apply.” This provision is included in Chapter 3, entitled “Acquisition of Real Estate for Roads”. Therefore, it refers to the provisions of the Real Estate Management Act, but only in matters relating to the acquisition of real estate for roads. Therefore, there is no regulation in the special road act regarding the return of real estate or its part unused for

23 B. Banaszak, *Komentarz do art. 64 Konstytucji Rzeczypospolitej Polskiej*, 2012.

the implementation of road investment. (...) The enumeration in Article 216 of the Real Estate Management Act is closed. It is therefore unacceptable to apply the provisions on the return to real estate taken over by the State Treasury based on provisions other than those listed in Article 216 of the Real Estate Management Act”.²⁴ Therefore, concerning real estate taken over by public entities based on a special act, e.g. Article 137 Section 1 of the Real Estate Management Act will not be applied, according to which the real estate is considered redundant for the purpose specified in the expropriation decision, if, despite the lapse of 7 years from the date on which the expropriation decision became final, the works related to the implementation of this purpose have not started.

Conclusions – the Decision on the Permit for the Implementation of the Road Investment: a Good Example of the Borderline of the Branches of Law?

The decision on the permit for the implementation of road investment, although issued in a simplified and quick procedure provided for by the repeatedly amended special act, has significant civil and administrative effects. Its nature, as well as the exclusion of the application of many Real Estate Management Act provisions to it, do not favour constitutional standards of property protection. This can be seen, for example, when public authorities abandon the implementation of a road investment – the previous owner of the property is deprived of a claim for its return, and if such a decision is changed, it is only at the discretion of the public administration body, which may exclude individual fragments of the property covered by the decision from its return. And although the undoubted advantage of the procedure established by a special act is a decisive acceleration of the acquisition of real estate for roads (impossible under any other legal act), there are reasonable doubts

²⁴ The judgment of Supreme Administrative Court of July the 19th 2017, I OSK 2785/15.

as to whether the procedure sufficiently covers the protection of the property rights of individuals.

Further doubts as to the protection of individual rights are raised by the fact that similar solutions are also used in other special acts.²⁵ It seems that in the institution of the decision on the permit for the implementation of a road investment, agreements that determine the essence of public law prevail²⁶ (although the term “public” was not included in the name of the decision) because this decision serves the performance of public tasks, is issued by the public authority and concerns public property, which is predominantly roads. However, it must not be forgotten that – similarly to the classic expropriation decision – it has significant effects in the civil law sphere because the actual expropriation of real estate for roads takes place for compensation, which is a civil institution. In conclusion, the institutions included in the special investment and construction acts are a good example for presenting another point of contact between of public and private law.

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²⁵ The Act of 28 March 2003 on rail transport; the Act of 12 February 2009 on special rules for the preparation and implementation of investments in the field of public use airports; the Act of 24 April 2009 on investments in the liquefied natural gas regasification terminal in Świnoujście; the Act of 8 July 2010 on special rules of preparation for the implementation of investments in the field of flood protection structures.

²⁶ See Kokocińska K., *Problematyka*, p. 143.

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SUMMARY

Reflections on the Context of Public Law and Private Law on the Example of the Decision on the Permit for the Implementation of the Road Investment

The article aims to show the next points of contact between public law and private law by presenting the civil and administrative legal effects of the decision on the permit for the implementation of a road investment (including its amendment and repeal), referred to in the Act of April 10, 2003, on special rules for the preparation of and implementation of investments in the field of public roads. The reason for the author to analyze the topic was the fact that the author has noticed the increasingly stronger interpenetration of the areas of public law and private law and problems encountered in legal practice. The article is a synthesis of the civil and administrative legal consequences – sometimes unintentional – of issuing and changing the decision on the permit for the implementation of a road investment, which have their source in the

unilateral, imperative action of a competent public administration body. It is also another voice in the discussion on the advisability of the classic division into the two oldest branches of law.

Keywords: decision on the permit for the implementation of the road investment, the borderline of branches of laws, administrative procedure, expropriation, investment process

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