

## **A GROUND EASEMENT TO A PUBLIC ROAD WITH THE CONTRACTUAL USE SPECIFICATION OF A ROAD LANE**

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### **Abstract**

*An important matter in the field of real estate management in Poland is the rule that each land parcel should possess an access to a public road. Therefore, during a division procedure of any parcel, the licensed land surveyor has to set up such an access on a proposed division map. According to Polish regulations there are two main possibilities to establish an access to a public road. The first one is based on division of a new parcel which will be treated as a road parcel, while the second one is based on establishing "the ground easement" which gives opportunity of a road line. The ground easement serves not only as a road line for driving and walking, but also for providing access to media utilities. Utilities like electricity, water, sanitation, gas and others may be conducted through the road line of a ground easement and it also serves for its maintenance.*

*The local land development plan, shortly known as a "local plan", estimates development possibilities which depend on the area of the parcel. So called building intensity is estimated as a percentage of the area of the parcel in relation to the land category fixed in a local plan. Depending on how the access to a public road is provided, the development possibilities differ. The applied solution has economic impact on development possibilities and usage of a parcel. From technical point of view the Real Estate Management Act of 21 August 1997 imposed necessary regulations concerning parcel divisions but a ground easement may be established by a notarial act.*

**Keywords:** *easement to public road, real estate management, regulation of the legal status of properties, development capacity.*

### **Introduction**

The ownership of property constitutes the most extensive property right in Poland and is protected by the Constitution of Poland. The Polish Civil Code states that in case of the lack of the access to a public road, the owner of the parcel may demand at a cost the establishment of the appropriate easement. That rule creates an important task in the field of real estate management in Poland. Therefore, during a division procedure of any parcel, the licensed land surveyor has to set up such an access on a proposed division map. The decision approving a subdivision states that transferring ownership of the newly divided parcel must be done together with granting an access to a public road.

According to Polish regulations there are two main possibilities to establish an access to a public road. First one is based on division of a new parcel which will be treated as an internal private road parcel, while the second one is based on establishing "the ground easement" which may provide a possibility to conduct a road line and media utilities as well.

### **A separate ground parcel as a road line**

The first solution is the most popular in Poland, however the common knowledge about legal aspects of the possibilities of usage among co-owners is rather poor. Especially, the technical aspects of coping with snow or surface reparations often cause conflicts and disputes of co-owners

in fractions. The land and mortgage register maintained for such a road line parcel usually records in chapter II only the fractions of co-ownership without describing additional duties of co-owners. Therefore, some conflicts are caused by different usage intensity. For example, a person who drives heavy vehicle may be regarded as mainly responsible for the road line damages and such person may be considered by others as the one to repair that road line on their own cost. Such queries are often applied to the court for a decision about co-owners duties and privileges. The polish regulations state that each co-owner should participate collectively according to the co-ownership fraction assuming normal, typical use of a road line. As mentioned earlier, different intensity and method of use of road line parcel can be regarded by co-owners as a main factor of financial participation duty, instead a fraction of co-ownership.

Similar conflict situations may occur with regard to media utilities passage. According to law regulations each co-owner may use a road line for passing the media utilities like electricity, water, sanitation, gas and other utilities. It also concerns modernizations and reparations of already existing utilities, with care about causing the minimum of use disturbance for other co-owners. Providers of media utilities require a proof of co-ownership of a road line parcel recorded in chapter II of the land and mortgage register for processing application for new media utilities setting or modernizations, and reparations of utilities which already exist. Other co-owners should be informed in advance about planned works to avoid any conflict.

There is a question – can one of the co-owners stop such works concerning utilities. The answer is no, because each co-owner possesses right to pass new utilities, to repair and modernize the already existing ones. However, that is a legal point of view only. In reality, some co-owners disagree without any rational explanation why they oppose to the planned works. Then, a court verdict is the only solution to avoid an escalation of conflict.

There is also a technical aspect concerning a width of a road line parcel. It may be defined in a local plan and depends on a number of parcels linked to the public road by use of a road line parcel. Usually it is 5m to 6m for up to 3 parcels and 8m for more than 3 parcels.

### **A ground easement as an access to public road**

A second solution of an access to a public road is based on establishing "the ground easement" which gives opportunity of a road line for driving and walking, and media utilities passing as well. Description of a ground easement is usually done by notarial act and should be recorded in the mortgage register two times. Firstly, it should be described in chapter III (encumbrances) of the land and mortgage register of the realty encumbered with a ground easement. Secondly, it should be described in chapter I SP (capabilities linked with the parcel) of the land and mortgage register of the dominant realty.

Unfortunately, most often a ground easement is recorded in chapter III only. Moreover, the record is usually limited to walking and driving rights only. The Polish notaries do not care enough to advise to describe media utilities rights, as well. Therefore, later there is necessity to obtain an agreement from the parcel owner for any kind of works concerning utilities.

According to BACIOR et al. (2015) the obligation to maintain the equipment needed to perform the easement, the scope and the parties responsible, should be specified in the agreement establishing the easement. On the other hand, if these provisions are not sufficiently precise, the rules of social conduct are applied, taking into account local custom. The obligation to maintain the equipment needed to perform the easement usually burdens the owner of the dominant realty. However, the parties can make an appointment that it will burden the owner of the servient realty, in whole or in pieces.

Another matter concerning the ground easement is the method of description of its geometrical location and size. To avoid misinterpretation of such description the following principles should be applied concerning easement location, its parameters and proper reference to the mortgage and cadaster registers:

1. Ground easement location should be linked to a parcel number in a mortgage register, which must be consistent with the number in cadastre. It means that for the purpose of a notarial act both mortgage and cadastral records are necessary and it should refer to them.
2. Ground easement location can be referred to borders of a parcel defined according to points of the compass like northern, southern, etc.
3. Size of the ground easement should be stated in meters (its width and length).
4. Description of the rights concerning driving, walking and media utilities passing with reparation and modernization possibilities should list what kind of utilities are regarded to, e.g. water, electricity, sanitation, gas and others, or only some of them.

5. Description should clearly specify responsibility for coping with snow or road line surface reparations.

Summarizing these statements, careful applying of the above five principles by notaries would be very helpful for a clarity of notarial acts concerning a ground easement as an access to public road. Statistically, majority of notarial acts limit a ground easement to walking and driving rights. The media utilities passing, repairing and modernizing rights are usually neglected by notaries. Similar situation concerns snow fighting and road line surface reparations. There is no excuse for such an approach of notaries in Poland. The improvement of that situation is possible by education of society through the public media information or amendment of the Polish law regulations such as the Civil Code or Real Estate Management Act.

According to ŠNAJBERG (2015) while looking for a market value of an easement it is important to recognize that the easement will impact on the ownership title and may affect both current and future uses. Moreover, appraiser should firstly study all the qualities, cons and pros. However, unfortunately every valuation of real estate with easement is very individual and it is very important to know its all qualities.

### The development capacity of a parcel according to local plan specification

The local land development plan, in Poland shortly known as a "local plan", estimates development possibilities which depend on the area of a parcel. So called building intensity is estimated as a percentage of the parcel area in relation to the land category fixed in a local plan. Depending on the chosen method of providing an access to a public road, the development possibilities can be significantly different. The applied solution has economic impact on development possibilities and usage.

The commune or municipality council decide about the local plan specification. For example, single family housing capabilities in one of the communes located near Krakow is categorized in three levels (Table 1) of development intensity - DI, area biologically active - ABA, and minimal area of new parcel after division procedure - MANP.

**Table 1.** The sample land category in one of the communes located near Krakow

Land category	Development intensity [%]	Area biologically active [%]	Minimal area of new parcel after division [sqm]
M1	30	40	600
M2	25	50	1200
M3	20	60	2000

*Source: own work.*

Let us discuss two possible cases of a parcel development capability regarding different method of an access to public road:

- 1) separate ground parcel as a road line,
- 2) ground easement as an access to public road.

### The sample calculation of loss of development capacity

An area of our parcel located in category M1 is equal to exactly 700 sqm. As the intensity is 30%, it gives us 210 sqm of total usable area. The number of building stories defined in the local plan is two, so it means that it is possible to build a two stories house of 170 sqm of usable area (85 sqm for each floor) and a garage for two cars with about 40 sqm of usable area. Any ground easement set on that parcel does not decrease the parcel development capacity. However, in case of setting a separate ground parcel as a road line, it is necessary to deduct an area of road line parcel calculating the development capacity. Assuming the size of our parcel as 35 x 20 m and the location of a road line parcel with 5 m width and 20 m along border, it gives us 100 sqm as an area of road line parcel. Then, calculating total usable area for 600 sqm we obtain only 180 sqm of the total usable area, that is 30 sqm less than for the 700 sqm parcel. Distributing that 180 sqm of total usable area we obtain 140 sqm for a house and 40 sqm for a garage. So total usable area is 30 sqm less than in first case.

Trough many years of the co-author's personal experience in co-operation with Polish notaries, there cannot be pointed a single case that the parties signing the notarial act were informed about the impact of a separate line road parcel decreasing the main parcel development capacity. It is not surprising, because notaries usually work in co-operation with notarial applicants and assessors who prepare a notarial act in advance and use documents and maps received from licensed surveyors. Simply, it is too late to go back then.

Table 2 includes the sample calculation of loss of development capacity.

**Table 2.** The sample calculations

Parcel area [sqm]	Development intensity [%]	Total usable area [sqm]	2 stories house floor area [sqm]	Garage For 2 cars [sqm]
700	30	210	2 x 85	40
600	30	180	2 x 70	40
100 less	-	30 less	15 less for a floor	No difference

Source: own work.

It is strongly recommended that during the preparation of a preliminary plan of parcel division, a licensed surveyor should inform parties about consequences of choice between a separate road line parcel or a ground easement as an access to public road. As the calculations presented above show, the consequences of that choice are quite significant. The difference of 30 sqm in total usable area for a house cannot be neglected. It is a lost in usable area. Why to lose usable area of a house?

### **An usefulness of the cadastral orthophotomap for a ground easement conception and establishing**

The cadastral orthophotomap consists of two main components e.g. an orthophotomap and a cadastral layer. Its excellent clarity and accuracy cause that such map is very useful for almost every cadastral conception and visualization. FLOREK P. R. (2000, 2001, 2010). An easy access to the cadastral orthophotomap through the internet portals gives us opportunity for preliminary conception of a ground easement. Measurements and calculation possibilities on a virtual cadastral orthophotomap, together with an access to the boundaries of cadastral parcels and their numbering, creates a very useful tool for a licensed surveyor. Due to this fact, it can be highly recommended to use a cadastral orthophotomap not only for cadastral works but engineering surveying, as well.

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