

Doctoral dissertation by Łukasz Kroplewski

Summary

The right of way area of a public road is a public asset required to satisfy important social interests as well as strengthen the country's external and internal security. In view of the need to ensure proper management and protection of the right of way area, this aspect of the state's functioning has to be adequately regulated.

Protecting road traffic security and adequate road management relies on a statutory prohibition of any superfluous interventions into the right of way area. As a result, if a road manager issues a permit to occupy the right of way area for purposes other than its construction, redevelopment, repair, maintenance and protection, this has to be understood as lifting the general ban on using the right of way area to perform activities that may destroy or damage the road and its equipment or negatively affect road traffic security.

At the same time, however, the right of way area gives rise to a number of interests that are not related to the basic function of this public asset, but play an important role for meeting the social and economic needs of individuals and communities. These include, in particular, the need to place transmission infrastructure, structures and equipment as well as advertisements in the right of way area.

Statutory possibilities to lift the general ban on using the right of way area of public roads have been introduced in response to this panoply of conflicting interests. The ban may be lifted once a number of statutory conditions are met. Each such case required an objective assessment of whether occupying the right of way area will not result in a threat to other, more important effects, such as ensuring safety of life, health protection, road traffic safety or the road manager's ability to freely fulfil his tasks.

This subject has not been thoroughly researched in legal science before.

In my doctoral thesis, I have analysed the state's regulatory function with regard to the possibilities of using the right of way area for purposes other than road management. My research focused on finding a balance between two basic values: protecting public interests and protecting (securing) individual interests – the interests of an individual using public assets.

The dissertation aims to answer the question of whether particular protection granted to the right of way area as a public asset in fact implements the need to protect public interests in actions undertaken by public administration bodies. In my work, I present and analyse cases where such protection – understood in excessively formal terms – leads to an abuse of power or unjust favouring of the administrative body responsible for managing the right of way area

as an entity equipped with administrative power (Latin: *imperium*) at the expense of the individual.

Both in the case of issuing permits to occupy the right of way area and penalties for occupying it without such permit, the fee or penalty serves to compensate for lifting the general ban on occupying the public space of a right of way area or for occupying it without an appropriate permit. Penalties for occupying the right of way area also serve repressive functions. This is why the analysis also covered enforcement proceedings concerning said fees and penalties. I have emphasized the public-law character of penalties for occupying the right of way area, and to this end, the analysis was performed from the standpoint of substantive law and procedural law.

In my dissertation, I have employed the research method of legal analysis. The scope of research encompassed binding Polish legal regulations in the context of the relevant European law. The theoretical contribution of my dissertation involves listing the relevant principles of administrative law (public law). The research also encompasses the operational practice of public administration bodies responsible for managing public roads and analysing the case-law of administrative courts (which, however, occasionally issue contradictory judgments).

The research subject encompasses the regulations of substantive and procedural administrative law with an adequate use of constitutional law regulations. The specific research purpose and subject determined the research method and selection of useful research tools. Procedural law and substantive law can be analysed on a relational and situational level. On the relational level, the basic research tool is the administrative legal relationship. On the situational level, the research tool is the administrative legal situation. In order to define the procedural situation of the entity occupying the right of way area, the legal situation proved to be a useful research tool.

The research conducted enabled me to formulate the basic conclusion that the right of way area of a public road is a specific public asset (common good) that is subjected to particular protection because of its purpose. This protection involves the administrative regulation of access to the right of way area. On the one hand, it is based on a ban on infringing upon and using this public space for purposes other than road-related ones, on the other, on an access to this category of public assets being regulated based on certain statutory premises. The dissertation proved that this category of public assets enjoys particular protection owing to administrative regulation of access to the right of way area (both in the sphere of substantive and procedural law). These include the premises for issuing specific types of permits, which should be understood as lifting the general ban on occupying the right of way area in individual

cases and administrative financial penalties for occupying the right of way area – penalties imposed when there is a case of objective liability of the perpetrator of an administrative offence.

I have researched the actions taken by public administration bodies in that respect, both in terms of exercising their power and otherwise. In the case of certain exclusions from the general ban on occupying the right of way area, the principles allowing the given entity to occupy it may be drawn up in a civil law agreement rather than a decision. Nevertheless, the consensual form does not preclude the party from seeking an administrative decision to be issued where parties fail to reach and sign the aforementioned agreement. What should be underlined here is that even forms that do not rely on exercising power do not change the nature of permits to occupy the right of way area, which remain in the sphere of primacy of the public administration body. This results from the fact the public administration body is under no obligation to consent to signing a civil law agreement, and the fact such agreements have to follow a template adopted by public administration bodies.

It is important to justify the administrative regulation of access to the right of way area. In order to safeguard certain effects it deems valuable, the state decided to limit certain individual rights and freedoms, in fact in order to protect them. The norms of administrative law are of an imperative nature – their application may not be limited or excluded through the will of the parties. Whether a certain legal norm is applied or not may only rely on the existence of essential premises for doing so. Sometimes, public bodies are allowed to act based on their so-called administrative discretion, which gives law-exercising bodies independence in their judgment within the limits specified by the law.

In order to ensure that the orders and bans stipulated by public law are enforced, the performance of obligations has to be secured through sanctions. Public authorities have to be able to use coercive measures to ensure that the penalties for occupying the right of way area are paid. If the entity supposed to perform the obligations does not want to do so willingly, public administration bodies use coercive measures in the form of launching enforcement proceedings and administrative enforcement. However, even though it has an element of punishment, administrative enforcement does not have a repressive purpose. It is not meant to punish the entity under the obligation, but to ensure observance of the law – both in the function of its individual and general presence.

4/16/2014

Kropienki