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Environmental decision as an obligatory element of road investments in the Republic of Poland

<http://dx.doi.org/10.12775/PYEL.2019.002>

Abstract:

Analysis of the effective regulations on the territory of the Republic of Poland allows to assume that the requirements of environmental protection are one of the strategic requirements related to the implementation of road investments. In addition to technical knowledge, the investor must study the environmental protection regulations that arise directly from standard regulations. The aim of this article is to demonstrate the essence of the environmental resolution as an obligatory element in the implementation of road investments in Poland.

Keywords:

Implementation of the road investment, environmental protection, road Act, environmental decision

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1. Introduction

Overland transport is the basis of the integrated transport system in Poland. It cannot be denied that it is crucial, and will remain so, in Poland. It relates directly to the lack of sufficient connections between Polish airports and services provided by carriers, as well as the continuous modernisation and reconstruction of railway tracks, catenary network or related engineering facilities. Over 99% of the domestic transport requirements in Poland are secured by the overland transport¹. Therefore, modernization as well as implementation of new road connections in the Republic of Poland are important, as provided in the National Roads Construction Programme for 2014-2023 (with possible prolonging until 2025)². This document defines the objectives and priorities for the implementation of the investment and maintenance of the existing road network. Additionally, it refers to the priorities of road traffic safety, indicates funding sources and a list of investment tasks to be implemented³.

The implementation of road investments involves acquisition by the investor of a decision to permit the implementation of a road investment (hereinafter: ZRID). Application for this administrative act ought to contain a number of constituents, including the obtainment of a separate administrative decision required by law. One of the essential elements of ZRID application is the decision on environmental conditions (hereinafter: environmental decision). The purpose of this article is to show the indispensability of the environmental decision in the road investments implementation procedure and to indicate the effects of the annulment of the environmental decision on establishing the ZRID decision.

¹ J. Targosz, J. Wiederek, *Rozwój infrastruktury drogowej w Polsce*, [w:] *Autobusy 1-2/2019 r.*

² Annex to the Resolution No. 156/2015 of the Council of Ministers of 8 September 2015 National Roads Construction Programme 2014-2023 (with prolonging until 2025), access at <https://www.gov.pl/web/infrastruktura/program-budowy-drog-krajowych-na-lata-2014-2023-z-perspektywa-do-2025-r>

³ *Ibidem.*

2. Normative Basis

The implementation of investments in the construction of public roads in Poland should be based primarily on national legal acts, which include, among others, the following:

- 1) Law on public roads of 21 March 1985⁴ (hereinafter: u.d.p);
- 2) Act of 10 April 2003 on special regulations for preparation and implementation of investments in public roads⁵ (hereinafter: road law);
- 3) Nature Conservation Act of 16 April 2004⁶;
- 4) Act on Planning and Spatial Development of 27 March 2003⁷ (hereinafter: u.p.z.p);
- 5) Act on Real Estate Administration of 21 August 1997⁸ (hereinafter: u.g.n.);
- 6) Environmental Protection Act of 27 April 2001⁹ (hereinafter: p.o.s)
- 7) Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessments¹⁰ ((hereinafter: u.u.i.s) determines, among other things, the grounds for issuing a decision on environmental conditions.

In the further part of this article the author directly refers to the regulations indicated above.

3. Planning and construction of new public roads or reconstruction of existing ones

According to the applicable regulations, public roads on the territory of Poland are divided into categories by their function in the road network and are thus distinguished (art. 2 u. d. p.):

⁴ Journal of Laws from 2018, pos. 2068 with further amendments.

⁵ Journal of Laws from 2018, pos. 1474 with further amendments.

⁶ Journal of Laws from 2020, pos. 55.

⁷ Journal of Laws from 2020, pos. 293.

⁸ Journal of Laws from 2020, pos. 65.

⁹ Journal of Laws from 2019, pos. 1396 with further amendments.

¹⁰ Journal of Laws from 2020, pos. 283.

- 1) domestic roads;
- 2) voivodship roads;
- 3) administrative district roads;
- 4) municipal roads.

2a u. d. p. article is cardinal to determine the ownership of property located on public roads. As R. A. Rychter rightly points out, this provision directly states that public roads are, respectively, publicly or locally owned¹¹. Thus, domestic roads are the property of the State Treasury, and voivodeship, county and municipal roads are the property of the relevant self-government of the voivodeship, county or commune. Therefore, the prerequisite for the effective adoption of a resolution by the municipal council to classify a road as a municipal road will be that the municipality has the right of ownership of the land on which the road runs. Therefore, the prerequisite for the effective adoption of a resolution by the municipal council to classify the road as a municipal road will be that the municipality has the ownership right to the land on which the road runs (judicial decision of the Voivodship Administrative Court in Gliwice, 26th February 2019)¹².

The competent road administrator is obliged to draw up and periodically revise the road network development plans. Furthermore, they must immediately provide the drawn-up plan to the body responsible for drawing up the development plan. Construction of the regulation provided in Article 35 § 1 u. d. p. determines the variable nature of documents such as road network development plans. Necessity to verify these documents results from, as P. Zborniak points out, periodic road traffic measurements¹³. In accordance with the regulations in the voivodeship spatial development plans and local zoning plans, a strip of land, which width consults the safety of both road users and the adjoining ground from negative effect of the interplay, is intended for future road construction. The real estates, which are situated in the strip of land mentioned above, owned by the State Treasury and intended for the construction of the road in the future, cannot be disposed of without the approval of the relevant road administrator.

¹¹ R.A. Rychter, paragraph 2(a) [w:] Public Roads Act. Commentary, ed. II, SIP LEX, 2019, Lex/el.

¹² Verdict of the Voivodship Administrative Court in Gliwice of 26 February 2019, ref. II SA/G1 1021/18 LEX No 2637592.

¹³ P. Zaborniak, paragraph 35 [in:] Public Roads Act. Commentary, LexisNexis Legal Publishers, 2010, Lex/el.

Commencement of construction works consisting in the execution of a road investment precedes the procedure of issuing a decision on permitting the execution of a road investment- ZRID. The competent road administrator should request this administrative decision from the competent authority before starting work. For national and provincial roads, the competent authority, to whom the application should be submitted is the voivodship governor. Whereas, regarding the county and municipality roads, the ZRID decision is issued by the starost performing tasks commissioned in the field of government administration. Article 11a § 2 of the Road Act introduces a conflict-of-law rule relating to a situation where a road investment would be carried out in the area of two or more voivodships or counties, then the competent authority to issue a permit for the implementation of the road investment will be the voivode or starost competent locally for the area where the major part of the area designated for investment is planned to be located.

The entity entitled to apply for a decision on permitting the execution of a road investment is the public road administrator competent for planning, construction, reconstruction, overhaul, maintenance and protection of roads (Article. 19 pas.1 u. d. p.). On the territory of Poland, the following entities have the status of public road administrators¹⁴:

- 1) General Director of National Roads and Motorways – administrator of national roads and motorways built according to the rules set out in the u.d.p. until they are transferred to the company contracted for the construction and operation of the motorways or exclusively the operation of the motorways. This transmission shall take place based on an agreement (Article 19 pas. 3 u. d. p.);
- 2) Voivodeship Board – administrator of voivodeship roads;
- 3) Administrative District Board – administrator of administrative district roads;
- 4) Administrative officer of the commune (mayor, town president)- administrator of municipal roads;
- 5) President of the city with county rights- administrator of roads within the city limits with county rights, excluding express roads and motorways (art. 19 pas 5 u. d. p.);

¹⁴ B. Sagan, paragraph 11(a) [in:] *Act on special rules for preparation and implementation of investments in public roads*. Commentary, LexisNexis Legal Publishers, 2013, Lex/el.

- 6) The board of the metropolitan association – administrator of national roads, except for motorways and expressways, and voivodeship roads (art. 19 pas 5;5a;5b u. d. p.).

Administrators are entitled to develop draft plans for the development of the road network, as mentioned above, or to develop draft plans for financing the construction, reconstruction, repair, maintenance and protection of roads and road engineering facilities. In addition, the administrators act as investors or maintain road surfaces, pavements, road engineering structures, traffic safety devices and other road-related equipment (art. 20 u. d. p.).

The decision procedure should be initiated at the request of a party, which should contain a range of elements mentioned below. Nevertheless, it should be emphasized that the decision will be issued by the competent authority only after previously processed assessment for environmental impact, if it is required by the provisions of the u.u.i.s.

4. Elements of the motion for permission for implementation of road investment

The procedure for issuing a ZRID decision should be completed within 90 days from the date of submitting the application. If the competent authority fails to issue such decision on time, the higher authority ought to impose a fine of 500 Polish zloty for each day of delay. The 90-day period does not include the legal deadlines for carrying out certain activities such as suspension periods of proceedings, delay caused by a party or for reasons beyond the control of the authorities (Article 11h of the Roadworks). It is important to note that the definition of the statutory deadline, during which the authority should complete the proceedings and issue a decision on the permit for the execution of the road investment, guarantees protection of the investors rights to examine the application within a reasonable period of time. On November 17th 2017 the Voivodship Administrative Court in Warsaw issued judicial decision¹⁵ according to which the request filed by the parties should be dealt with without any undue delay, which would result from unjustified intervals between the various activities carried out

¹⁵ Verdict of the Voivodship Administrative Court in Warsaw of 17 November 2017, ref. VII SA/Wa 37/17 LEX No 2436520.

by the authority, whether the authority's erroneous actions would result in a protracted procedure or a state of total inaction from the authority, whether the authority's incorrect actions would result in a protracted procedure or a state of total idleness from the authority. Moreover, the decision emphasizes that the activities which are deductible from the statutory period of proceedings do not include ordinary procedural activities, which are the standard activities of the authority constituting this procedure and therefore do not require additional emergency action. Such activities include, for example, notice of initiation of proceedings pursuant with Article 61 pas.1 of the Code of Administrative Procedure of 14 June 1960 Act¹⁶. The deductible periods include the time allowed for the investor to take a position on the objections raised by the parties to the proceedings to the planned road investment¹⁷.

Construction of a new expressway or reconstruction of an existing public road requires listing the necessary documents with the application. Issuing the decision requires a prior, reliable verification of the submitted request and its annexes. The investment cannot be approved without providing complete documentation¹⁸. The authority examining the request is limited only to checking the compliance with provisions of the option represented by the requesting party. Therefore, they do not have the right to make any changes to the concept of the road route presented by the applicant¹⁹. Nevertheless, the authority's assessment will focus on the completeness of the application submitted or the investor's obtaining of the relevant arrangements, opinions and authorisations as well as the legality of the option presented by the investor²⁰. The formal assessment of an application for a ZRID decision focuses on the verification of mandatory annexes. The catalogue of elements that should be included in an application for a ZRID decision is not finite. The above-mentioned request should include (Road Construction Act; Article 11d pas. 1):

¹⁶ Journal of Laws from 2020, pos. 256.

¹⁷ Verdict of the Voivodship Administrative Court in Warsaw of 17 November 2017, ref. VII SA/Wa 37/17 LEX No 2436520.

¹⁸ Verdict of the Voivodship Administrative Court in Gdańsk of 23 October 2019, ref. II SA/Gd 414/19 LEX No 2736133.

¹⁹ Verdict of the Voivodship Administrative Court in Białystok of 8 August 2019, ref. II SA/Bk 216/19 LEX No 2713965.

²⁰ Verdict of the Voivodship Administrative Court in Bydgoszcz of 14 May 2019, ref. II SA/Bd 580/18 LEX No 2681705.

- 1) a map on a scale of at least 1:5000 showing the proposed road route, indicating the area indispensable for the buildings and the existing utilities;
- 2) analysis of the link between the road and other public roads;
- 3) maps containing draft division of real estate, prepared in accordance with separate regulations;
- 4) determination of real estates or thereof parts which are planned to be taken over by the State Treasury or a local government unit;
- 5) Identification of the real estate or thereof part which use will be restricted;
- 6) identification of changes in the existing land use infrastructure;
- 7) four copies of the construction project along with a certificate, valid at of the date of the project;
- 8) for trans-European road network:
 - a) the outcome of road safety audits;
 - b) the road administrator's justification;
- 9) the opinions of the competent entities referred to in Article 11d pas. 1 point 8(a) to (h);
- 10) separate administrative decisions required by law.

Separate administrative decisions include, among others, a decision on environmental conditions, which defines the environmental conditions of the project implementation.

5. Decision on environmental conditions and implementation of a road investment

In accordance with the u.u.i.s., obtaining a decision on environmental conditions is required for planned projects which may significantly affect the environment or projects which may potentially significantly affect the environment (Art. 71 u. u. i. s.). The environmental decision is preceded by a ZRID decision. It is an unquestionable proof of the essence of the environmental decision in the process of road investments in Poland. According to the Regulation of the Council of Ministers of 10 September 2019 on projects likely to have a significant impact on the environment²¹,

²¹ Journal of Laws from 2019, pos. 1839.

the projects that can always have a significant impact on the environment include, among others, motorways and expressways and other roads with not less than four lanes and a length of not less than 10 km in any one section and rerouting or extending an existing road with two lanes to not less than four lanes in any one section. On the other hand, projects which may potentially significantly affect the environment include, among others, hard surface roads with a total length of over 1 km. Therefore, the implementation of investments in the construction of e. g. the expressway requires an environmental impact assessment of the project. This evaluation should be carried out:

- 1) in case of projects which may always have a significant impact on the environment – always before the environmental decision is issued;
- 2) in the case of projects which may potentially have a significant impact on the environment – the assessment is optional, the so-called “environmental impact assessment” should be carried out when the competent authority determines such an obligation by order.

However, the legislator explicitly indicated that the environmental impact assessment of the project is carried out as part of the procedure for the issuance of the ZRID decision (Art. 61 pas. 1(2) u. o. c.), if the need to carry out an environmental impact assessment of the project has been identified by the authority competent to issue an environmental decision, and if the case referred to in Article 3(1)(a), (b) and (c). 88 pas. 1 u. u. i. s. occurs.

When planning a road investment, the road administrator should observe the precautionary principle. As indicated in the judgment of 10 September 2014, the Voivodeship Administrative Court in Warsaw²², the precautionary principle is also implemented through the obligation to take into account the risks arising from the principle of planning, because outlining the risks at the stage of planning a project and then following the precautionary principle, allows to take possible preventive measures. If the road administrator/investor cannot provide the environmental protection measures through their activities- the project cannot start.

The content of the decision on environmental conditions, issued after the assessment of the environmental impact of the project, should contain the elements provided for in Article 3(1)(a) and (b). 82 u. u. i. s.

²² Verdict of the Voivodship Administrative Court in Warsaw of 10 September 2014 ref. IV SA/Wa 1365/14.

As stated by B. Rakoczyn, it should be assumed that a mandatory part of each decision, including the one concerning the change of the decision on environmental conditions, is the characteristics of the project to which it relates²³. Elements referred to in the provision of Article 82 u. u. i. s. can be divided into those that should appear in any decision and those that may appear in the decision. The mandatory elements ought to be those listed in Article 1. 82(2) 1 point 1). However, the optional elements are set out in Article 82(2) 1 point 2). Moreover, in the case where the ecological review or the environmental impact assessment of the project or the post-execution analysis shows that despite the application of available technical, technological and organisational solutions, the environmental quality standards cannot be met outside the plant or other facility, the communication route creates the areas of limited use (Art. 135 pas. 1 p. o. ś.). The authority may in its environmental decision determine the need for such areas. If the need to create these areas is attested, the authority should impose an obligation on the party to carry out a post-actualisation study, specifying its scope and the deadline for its submission. The authority will also determine which other authorities should be provided with this post-implementation analysis. Moreover, in the environmental decision, the authority presents a position on the necessity to conduct an environmental impact assessment of the project and the procedure on transgenic environmental impact within the procedure for issuing the ZRID decision (Art. 82(2) 1 (4) u.i.i.s.). The authority may, within the framework of the decision, impose on the applicant an obligation to submit a post-execution analysis, specifying its scope as well as the time limit for its submission and indicating other authorities to which it should be submitted. In the case of road investments, provisions have been introduced to enable preparatory works to be carried out on the basis of the environmental decision. The environmental decision issued prior to obtaining the ZRID decision, which indicates the plots of land where it is necessary to carry out preparatory works, is the basis for carrying out works which consist of cutting down trees and shrubs, carrying out archaeological or geological surveys, as well as carrying out natural compensation on real estate owned by the State Treasury and managed by the National Forest Holding. The environmental

²³ B. Rakoczy, Art. 82 [in:] *Act on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessments*. Commentary, LexisNexis Legal Publishers, 2010, Lex/el.

decision entitles one to enter the site-free of charge, in order to carry out these works (Art. 82a u.i.i.s.).

6. Ending

Analysis of generally applicable regulations, and in particular standards concerning environmental decision, allows us to put forward a thesis that environmental decision in the procedure of realization of public roads plays an important role. The above is confirmed by a number of judgments of Administrative Courts relating to the issue of environmental decisions. Thus, authority competent to issue the ZRID decision is obliged to make the consent conditional upon the submission of an environmental decision by the investor only if such a project meets the characteristics of a project likely to have a significant impact on the environment²⁴. Therefore, environmental decision is a major administrative act to ensure that investments are made on an environmentally sound basis. The above is confirmed by the judgment of the Provincial Administrative Court in Olsztyn in 2017, indicating that the environmental decision sets the environmental framework for the implementation of the project, which aims to protect the environment during the implementation of the project²⁵.

Furthermore, the annulment of the environmental decision will affect the validity of the ZRID decision. As emphasised by the Supreme Administrative Court, the subsequent revocation or annulment of an environmental decision cannot be without prejudice to the findings of the ZRID decision. It cannot be accepted, in the light of the applicable national and Community law, that the ZRID decision continues to operate in law and to be implemented when the environmental decision, on the basis of which the ZRID decision has just been adopted, has been annulled. Thus, the annulment of an environmental decision makes it virtually impossible to carry out a judicial review of a ZRID decision based on an environmental

²⁴ Verdict of the Voivodship Administrative Court in Łódź of 27 June 2019, ref. II SA/Ed 1063/18 LEX No 2695864; verdict of the Supreme Administrative Court of 9 October 2019, ref. II OSK 2792/17 LEX No 2768996.

²⁵ Verdict of the Voivodship Administrative Court in Olszyn of 12 December 2017, ref. II SA/OI 836/17 LEX No 2419235.

decision which has been withdrawn from the legal market²⁶. To sum up, the execution of construction works is connected with the obligation to take into account environmental protection in the area of the works. An important role in the implementation of environmental protection rules has been assigned to environmental decisions, as these are administrative acts that precede the issue of ZRID decisions. This means that the construction of e.g. new expressways on the territory of the country should take place in accordance with the principles of environmental protection.

²⁶ Verdict of the Supreme Administrative Court of 1 February 2013, ref. II OSK 2520/12 LEX No 1354937.