THE ANALYSIS OF ACCESS TO LAND PROPERTY

Daiga Paršova
The Ministry of Environmental Protection and Regional Development

Abstract
The aim of the article is to discuss practical issues of establishing the access to land property during the land reform as well as today, and to propose solutions to the identified problems. The methods of research include the analysis of scientific literature and legal acts as well as the case study and the analysis of documents. In this article several proposals are made. It is proposed that the law should include the condition that the establishment of servitudes is allowed only in rural areas and only as an exception if the access from the state or municipal road cannot be granted. The legal solution must be found for the servitudes without the dominant property which have been established during the land reform. The right for local authorities to determine the dominant property should also be considered. The suggestions may be used to elaborate legislative proposals.

Key words: land reform, servitudes, public roads.

Introduction
Legal access to the real estate is one of the key factors determining the use and the value of the real estate. There are several possibilities to establish the access to a land plot. The most common way of the access is the municipal or state roads. The access can also be established from a private road belonging to an owner of the land plot benefiting from it. Servitudes of a right of way are widely used in Latvia to ensure the access to a land plot, both at the time of the land reform and today. The legal institution of servitudes has been taken from the Roman law meaning right by which the full ownership right is limited for the benefit of a certain person or certain real estate. Unfortunately, the issues connected to servitudes of a right of way often cause conflicts because the interests of a land owner to fully use his or her real estate clash with the interests of a road user. Therefore, this article will deal with the theory and practice of establishing the servitudes of a right of way in Latvia.

Methodology of research and materials
The methods used in this research include the analysis of scientific literature and legal acts as well as the case study and the analysis of documents. Several cases of the improper establishment of the access were examined and analysed in accordance with the relevant legal acts.

Discussions and results
1. Servitude rights of way during the land reform
All roads can be classified by their significance as state roads, municipal roads, enterprise roads, and residential roads (Law On Roads, 1992). The state and municipal roads are public and can be freely used by any person without a special agreement. The enterprise and home roads are in private property, so their owners can restrict the access or, in contrary, to grant the access to specific persons by establishing a special kind of servitude – a right of way.
Servitude of a right of way means that the servitude is established in favour of a certain dominant property and does not end with the change of an owner. Real servitude can be established if there are at least two properties – the dominant property which benefits from the servitude, and the servient property which is encumbered in favour of the dominant property.
Servitude of a right of way can be established by law or court judgement, or in the civil manner: by a contract or testament (Civil Law, 1937). Servitudes are rarely established by law. In the beginning of the land reform the laws on carrying out the land reform empowered the local governments and the land commissions to establish servitudes by their decisions (administrative acts) regarding the restoration of land ownership rights or allocation of land (Law On Land Use and Land Survey, 1991). In this case a note (non-binding remark) had to be made indicating what restrictions and encumbrances have been specified by the decision. This note had to be replaced with the entry (binding remark), if the land owner or the owner of dominant property submitted a request for corroboration (Law On Recording of Immovable Property, 1997). Unfortunately, the local governments and the land commissions often allotted the land which was under municipal roads. In other cases the dominant property was not specified in the decision of the local authority, thus servitudes were not established in accordance with the Civil Law and could not be regarded as legally established and binding.
It is essential that according to the Civil Law the servitude is fully binding to both sides only after it is
registered in the Land Register. Until then only personal obligations between both sides exist which are not binding to other persons. If an owner of dominant or servient property changes, the obligations expire unless the servitude is corroborated in the Land Register (Civil Law, 1937). In the described cases when the decision of the authorized institutions had not defined the dominant property, there was only an informative note in the Land Register that could not be replaced with an entry because of the lack of the dominant property.

A typical case of incorrect establishment of servitude will be examined further (Fig.1). In the beginning of the land reform the land commission restored the ownership rights to the previous owner and established servitude of a right of way without specifying the dominant property. As a result, a note was recorded in the Land Register. The local government stated that the absence of the dominant property meant that servitude was established for the benefit of general public and the road was marked as a municipal road in the spatial plan of the administrative territory. The ownership rights of the private owners of the land were violated as the local government also widened the road.

![Fig. 1. A servitude road as a part of municipal road (cadastral map).](image)

The court of the first instance and appellation stated that, despite the note of servitudes in the Land Register, the road was not a part of the real estate. However, the Supreme Court returned the judgement to new adjudication. It stated that the court did not consider whether, by the restitution of the ownership rights to the land, the local land commission also had intended to privatise the roads. According to the law On roads the complex of road includes also the land beneath it in the extent necessary for the road use and protection, thus court’s assumption that the landowners owned the land beneath the road while the local government was the owner of the road contradicted it (Judgement in case No.C240103204, SKC – 64/2013).

2. The development of new residential road network

The boom of the real estate market was followed by a tendency of urban sprawl. Many new villages were developed along with a new road network. In several cases the roads were formed as separate land parcels being in co-ownership of the owners of building plots. In some places these roads were called roads of common use (in Latvian – koplietošanas ceļi) in the detailed plans of new villages. To establish the procedure of road maintenance and use, owners of these plots signed mutual contracts. The problems arose along with the emergence of new villages also willing to use these roads, misleadingly called roads of common use.

The terms roads of common use and public roads are broadly used as synonyms and as opposites of private roads, although they are not defined in law. However, in the practice the roads of common use are not always public, i.e., publicly accessible without any restrictions and charge.

A typical case of conflict arose when the use of a street was restricted and a private person could not
access her property by using the shortest way (Fig.2). The local building inspection and the local
government adverted to the detailed plan on the basis of which the street had been built. As the
person’s property was located outside of the territory of the detailed plan, the plan did not solve the
access to it. The particular street was free to use only for the owners of the building plots in the
territory of the detailed plan, because the street still was in the private property.

Fig. 2. A private road in the village territory (cadastral map).

The claimant also complained to the Administrative Court stating that the servitude had been
established in favour of general public and that the local government had approved its public status by
approving the detailed plan which named the street as of *common use* in the detailed plan. All the
instances dismissed the claim, because according to the law *On roads* the street was a residential road,
not municipal one, thus it was not available for public use. Although the road was initially designed in
the local spatial plan and the detailed plan, yet it was located on the private land. The use of the public
property is not limited to particular persons, it can be used by anyone. Thus, if the street had been of
common use, there would have been no need to establish servitude of rights of way (*Decision in case
No.A420632910, SKA – 376/2012*). Therefore it could be concluded that the initial intention was
not to make the street available for public use.

3. The planning of the road infrastructure in the local spatial plan

The development of public infrastructure, including roads, is planned in the local spatial plan (Spatial
Development Planning Law, 2011). This plan is approved by local binding regulation which is a local
normative act. Although at present local authorities or other administrative bodies have no rights to
establish servitudes of a right of way, several local governments have rather an interesting
interpretation. Thus a local government demanded an owner of a forest land parcel to establish
servitude on this parcel as it was not sufficiently established during the land reform (Fig.3)

Fig. 3. A servitude on one side of road (cadastral map).
During the land reform the border of the forest land parcel was admeasured along the road axis. The servitudes were established on the other side of the road axis where dwelling houses were situated. Concerning that the servitudes were established just for one side of the road, this road as a whole was marked in the local spatial plan as traffic infrastructure territory and the local government claimed that herewith they established the servitude of a right of way. According to the Civil Law, servitudes can be established by law. It means that either a particular law establishes servitude or the law delegates the authority to establish servitudes under certain preconditions to other public persons. The current case law (Judgement in case No.2002-01-03) confirms that the term law means also the normative acts as local binding regulations that have been issued on the basis of delegation included in the particular law. In this case no law delegates the right for the local government to issue the local binding regulation on establishment of servitudes. Thereby the local government did not have the right to establish servitude of a right of way by the local spatial plan or by binding regulations.

**Conclusion and proposals**

Several conclusions can be made:

1. Improperly established servitudes cannot be treated as divided property. In the Latvian legal system such legal relations when the land owner and the owner of the building are different persons are known as divided property. Divided property was often formed in the process of the land reform and it usually affected dwelling houses. The Civil Law stated that in such cases the owners of the buildings and the owners of the land beneath them had mutual pre-emption right, but until then the lease agreement had to be concluded. However, in the first described case the local government, claiming to be the possessor of the road, had not concluded a lease agreement with landowners.

2. The Civil Law does not permit to establish servitude for public use. In order to decide whether the servitude is required, it is essential to determine whether the road is meant for public use. In this case servitude is not proper because the state and municipal roads are publicly available and the servitudes on the use of these roads are not necessary and are not admissible (Višņakova G., Balodis K., 1998). In turn, servitudes can be established only on enterprise and residential roads.

3. In case of the development of new settlement, the newly built roads are not always publicly available even if they are called roads of common use in the local spatial plans or detailed plans of the new villages. The Supreme Court has emphasized that in cases when the street is privately owned, there is no reason to a viewpoint that an owner of the land has to guarantee public use of the land plot underneath the road or has to build the road just because it was designed in the local spatial plan or in the detailed plan as a road of common use (Decision in case No.A420632910, SKA – 376/2012). Thus this is not the status of common use but the municipal ownership right that guarantees the public availability of a road.

When analysing the failures made during the land reform process in the establishment of servitudes, it becomes clear that an urgent state-level solution is required. Within the existing regulation the local governments can propose to buy a land plot beneath the servitude road or, if no agreement can be reached, the local governments can expropriate it according to the complicated procedure set in the law. Still, this solution cannot be used broadly both because of the financial resources needed and because of the significant limitation of the fundamental right of property set in the Constitution of Latvia. The shortages in the process of carrying out the land reform cannot justify massive expropriation of land beneath the roads across the country.

In view of these considerations, the author has several proposals:

1. Each local government must make an inventory of the servitude roads established during the land reform, and this task should be set in the national legislative act, such as Land Management Law (The proposal of Land Management Law, 2013).

1.1. If these roads are a section of a municipal road or they are used by a significant number of land properties, they should be defined as an infrastructure of public relevance. In this case the local governments must be given the rights to expropriate the land beneath the roads or to establish a new type of encumbrance that ensures the public availability of a road and at the same time allows the local authority to maintain it and a landowner to get a sufficient compensation. Being aware that these proposals are time and money consuming, each local
government should plan these measures according to the municipal budget in the long run.

1.2. In other cases, if dominant properties of the servitude could be detected, the local governments should be granted the rights to define them in a legally binding way so that they could be recorded into the Land Register as a legally binding remark.

2. It should be considered to introduce an obligatory condition that the road network in the newly developed villages or other densely populated areas must be handed over to the municipality. The amount and form of compensation could be an issue for discussions. While very common in other states, for instance in Finland (Land Use and Building Act, 1999), such practice is still unusual in Latvia.

3. Besides, it should be defined in legislative acts that in cases of dividing a land parcel the servitudes of a right of way are allowed only in the rural areas where new villages are not planned and only in case if it is not possible to ensure the access from state or municipal road. All the new roads should be formed as separate land parcels to facilitate their transfer to local authority in future if necessary. If the access to a new village is not included in the territory of the detailed plan, all the necessary measures to ensure the access (e.g., contracts with road owner or expropriation of the road) must be taken before the plan is approved.

References

Information about author
Daiga Paršova. Mag.env., senior expert at the Land Policy Division, Spatial Planning Department, Ministry of Environmental Protection and Regional Development, Latvia. Address: Peldu Str. 25, Riga LV-1494, Latvia. Tel: (+371) 66016512, e-mail: daiga.parsova@varam.gov.lv. Fields of interest: spatial planning, land management, land consolidation.