

The role of a court expert in the field of geodesy in the establishment of an easement of way

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Summary

According to Article 285 of the Civil Code [Ustawa 1964], a land servitude is a limited property right that encumbers a servient estate owned by another person, allowing the use of that estate to the extent specified by the type and content of the servitude in order to increase the utility of the dominant estate. A specific type of servitude is the easement of way (right of way). It is established by designating a passage leading to a public road through an adjacent property for the benefit of an estate lacking direct access to a public road or if such access is insufficient. This is a unique case because the owner of a property deprived of public road access is entitled to file a claim against neighboring property owners for the establishment of a right of way [Ustawa 1964].

The process of establishing an easement of way, despite its complexity, is becoming increasingly important in the context of residential construction development. Additionally, the constant evolution of judicial rulings in this area may facilitate future procedures.

The primary objective of this article is to discuss the role and responsibility of a court-appointed expert in geodesy in proceedings related to the establishment of a right of way. The author highlights the time-consuming and complex nature of preparing expert opinions and examines whether pursuing the status of a court expert in this field is worthwhile, considering the remuneration for the work performed as well as the required knowledge and commitment.

Keywords

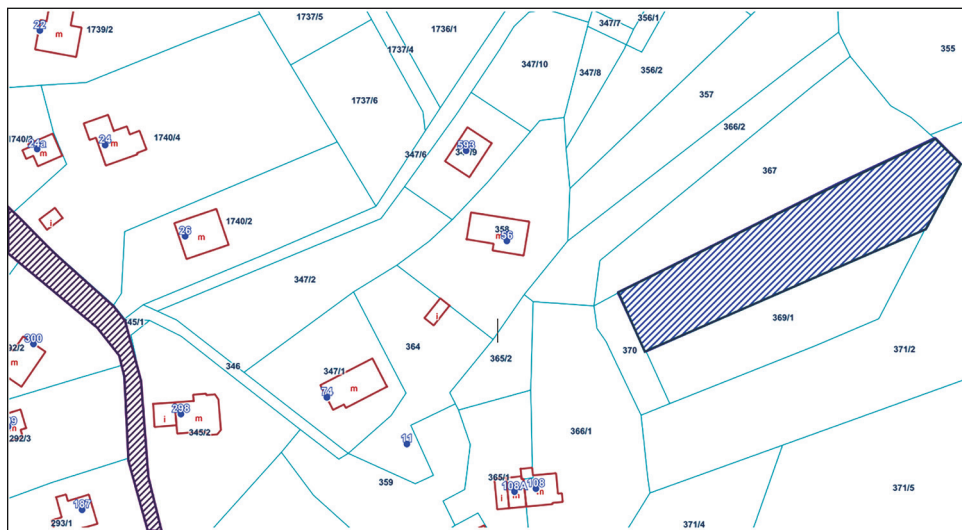
easement by necessity • right of way • land servitude • civil law • geodetic expert • court expert

1. Introduction

Easements play a crucial role in real estate management [Balwicka-Szczyrba 2021]. They are established to provide benefits to the dominant estate at the expense of the servient estate [Grela 2021, Ustawa 1964]. This happens for various reasons, the most common one being the lack of access to a property [Warcieński 2013, Zalewski 2020]. In such cases, an easement of way is established [Ustawa 1964, Warcieński 2019]. This grants the owner of the dominant estate the right to use the servient estate within a specified scope for passage to their property. The significance of land easements in geodetic and legal procedures, and throughout the investment process [Balwicka-Szczyrba 2021], is emphasized by the requirement to depict them on maps intended for legal and design purposes.

In proceedings concerning the establishment of an easement of way, the court typically appoints a court expert to prepare an opinion and issue an evidentiary order. This order should precisely and unambiguously define the scope of the expert opinion [Ustawa 1964]. The court expert's opinion is then provided to the parties for review, who must submit their comments within the deadline specified by the court.

This article analyzes a case concerning parcel no. 368, located in the Lednica Górna district, Wieliczka Municipality cadastral unit (Fig. 1), and the expert opinion prepared within its framework. The aim of the article is to highlight the role of the court expert in geodesy in proceedings for establishing an easement of way.



Source: Authors' own study

Fig. 1. Location of the analyzed area – parcel no. 368 is marked with blue hatching. The public road is marked with purple hatching

2. Document analysis

All documents received by one of the parties in the proceedings were examined, and the necessary documents were extracted, including the court expert's opinion in geodesy, procedural letters containing objections to this opinion, and the expert's responses to these objections. The analysis began with the following steps taken by the court expert in order to prepare the opinion:

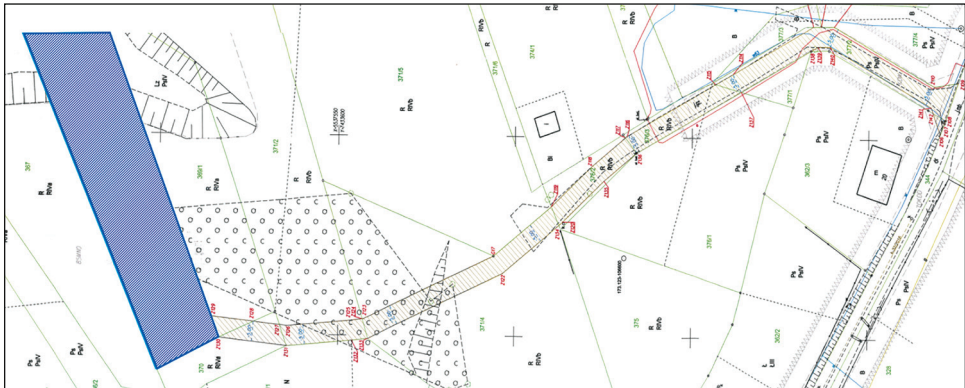
- retrieved the case files to familiarize themselves with the ongoing proceedings,
- registered the geodetic work at the County Center for Geodetic and Cartographic Documentation (ODGiK) in Wieliczka, the competent authority for the location of the parcels in question, to obtain the necessary materials for preparing the opinion,
- examined the land and mortgage registers of both the dominant and servient parcels,
- notified the parties of the planned on-site inspection,
- conducted a field inspection, comparing the master map with the actual situation on-site and preparing an inspection report,
- performed a control measurement,
- graphically processed the land easement on the existing digital master map obtained from ODGiK and on the land cadastre map,
- prepared the expert opinion along with attachments and made necessary copies,
- compiled and submitted the documentation to ODGiK and provided the opinion to the court.

In the opinion, the expert collectively analyzed how each of the seven proposed easement routes, presented in versions a and b (on the cadastral and master map), affected neighboring parcels. Additionally, the expert prepared a project of the road leading to the subject parcel for each version of the easement, marking it with brown hatching on both the cadastral and master maps. The geodetic court expert also conducted a site visit during the proceedings and prepared a report that included the positions of the parties present at the site.

Attachments to the expert opinion include: a sketch of the control measurement, the master map for easement determination, the cadastral map for easement determination, the GPS measurement log, information from the land registry for each parcel, an excerpt from the local spatial development plan, and the site inspection report. The expert also provided their professional opinion on the most optimal project, considering the dispute, compact development, and existing easements (Fig. 2).

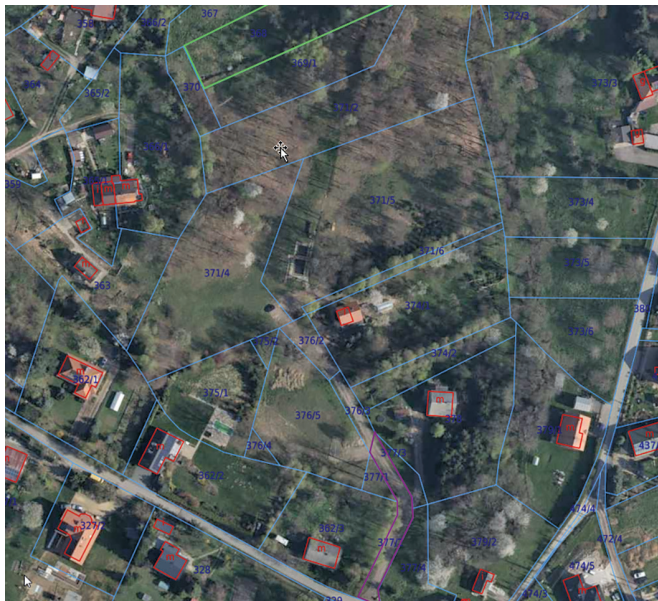
When preparing a geodetic opinion on the establishment of an easement of way, it is also crucial to thoroughly analyze the land and mortgage registers of all plots proposed for encumbrance in terms of existing easements [Ustawa 1982]. This information can be useful in designing an optimal project that minimizes the burden on other plots. Such an analysis also prevents a situation in which a plot might be encumbered with another easement, potentially rendering it unusable. Bearing this aspect in mind, the

court expert proposed, in one of the variants, routing the road through plot no. 377/2, which already has a land easement serving as access for other plots. By analyzing the current orthophotomap, it can be observed that it is indeed used as a road (Fig. 3). This plot was created as a result of the subdivision of plot 377, which, in turn, originated from old cadastral plot 375/13.



Source: Authors' own study

Fig. 2. The project deemed optimal by the expert. The subject parcel is marked with blue hatching



Source: <https://www.geoportal.gov.pl>

Fig. 3. The current orthophotomap showing how plot 377/2 is used – marked with a purple outline. The visible part of plot 368 is outlined in green

It is worth noting that the entry of an easement of way is declaratory in nature. The registration of this right in the land and mortgage register is not a prerequisite for its existence [Adamczyk and Bieda 2011]. A declaratory entry is one on which the effectiveness of acquiring, transferring, or extinguishing a property right does not depend. Such an entry is not necessarily mandatory [Benduch 2016].

1
OGRANICZONE PRAWO RZECZOWE ZWIĄZANE Z INNĄ NIERUCHOMOŚCIĄ
SŁUŻEBNOŚĆ DROGI DLA DZIAŁKI LKAT. 375/13 NA RZECZ KAŻDOCZESNYCH WŁAŚCICIELI PARCEL LKAT. 375/17, 375/10, 376/5, 376/6, 375/11, 375/12, 375/14, 375/15.
LK. 375/13 (UTWORZYŁA DZIAŁKĘ NR 377, KTÓRA PODZIELIŁA SIĘ NA DZIAŁKI NR 377/1, 377/2, 377/3 I 377/4)
KR1I/
2
KR1I/
1
KR1I/
1
W POLU 3.4.1.6 WPISANO KSIĘGĘ WSPÓŁOBCIĄŻONĄ NA SKUTEK ODŁĄCZENIA DZIAŁKI NR 377/3 Z KW KR1I/ DO KW KR1I/

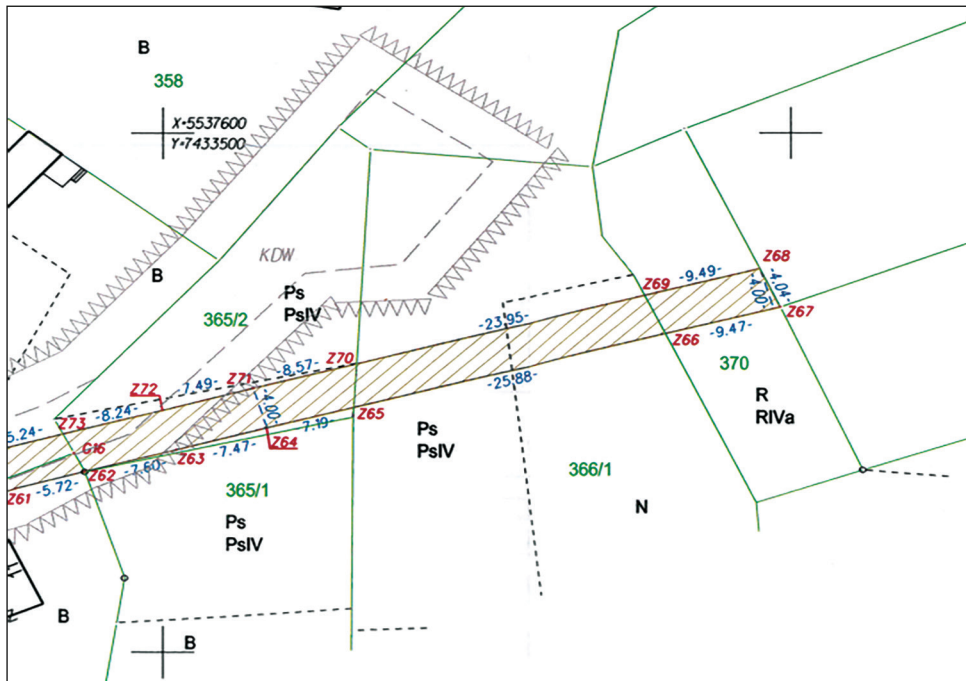
Source: <https://ekw.ms.gov.pl>

Fig. 4. Excerpt from section III of the land and mortgage register of one of the plots proposed for encumbrance with an easement of way

It is also essential to consider the local spatial development plan [Ustawa 2003], as a road planned under local law can significantly help to chart the easement of way. Moreover, such an analysis can prevent a situation where the easement project directly conflicts with the provisions of the local spatial development plan, ultimately leading to the plot being doubly encumbered – once due to the easement itself and again due to the local spatial development plan. This would pose a significant issue, as there is no legal basis for the local spatial development plan to take precedence over the terms of a land easement. However, it is important to emphasize that, according to Article 145 of the Civil Code, the establishment of an easement of way must take into account the socio-economic interests [Ustawa 1964]. The question arises: does this inherently mean considering the provisions of the local spatial development plan?

By analyzing both the arguments presented by the parties in legal proceedings and each concept in graphic form, it becomes evident that establishing an easement of way

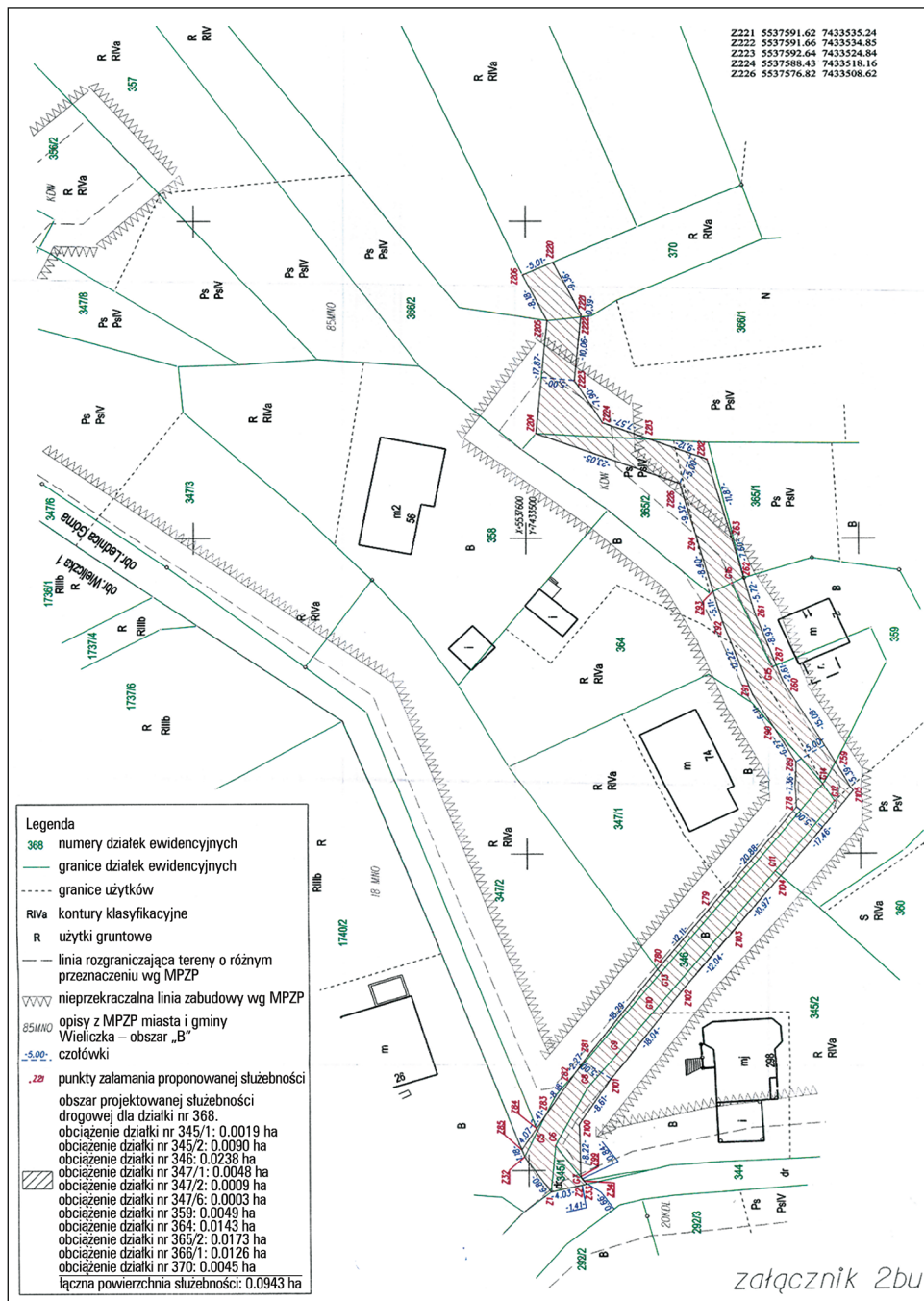
is a complex process, particularly when dealing with irregularly shaped plots. In such cases, it is relatively easy to create a situation where a portion of the land becomes practically unusable, adding another layer of difficulty for the expert. For example, if the easement were routed as shown in the illustration below (Fig. 5), a portion of plot no. 365/2 or 366/1 would become difficult to utilize effectively, while plot no. 370 would become practically useless. Here, usability is considered in the context of the local spatial development plan and its regulations, which designate these areas for residential development.



Source: Authors' own study

Fig. 5. A section of one of the proposed easement route projects

Ultimately, the District Court in Wieliczka issued a ruling establishing the easement of way following variants 2au and 2bu (Fig. 6), in accordance with the original request of the owner of plot no. 368. This option was deemed the best and imposed the least burden on neighboring plots, particularly due to the existing easements for passage and access, as well as long-established road routes in the area, which the Court emphasized in its justification.



Source: Authors' own study

Fig. 6. Map showing the final route of the easement of way

3. Geodetic aspect – is it worth becoming a court expert in geodesy?

Answering this question calls for consideration of several key aspects, primarily the workload involved in preparing such an opinion. This role is particularly suited to individuals who enjoy analyzing geodetic, land registry, and court documentation. The expert in this case likely worked approximately 100 hours (though possibly less), resulting in an estimated hourly rate of around 54 PLN, slightly above the national average. However, court experts can produce multiple opinions per month and run their own businesses, generating additional income.

Preparing an expert opinion is time-consuming and requires the ability to interpret and analyze diverse geodetic and legal data sources. It also demands keeping up with legislative changes and correctly citing legal provisions. This work carries significant responsibility, as the court bases its ruling on the expert's opinion.

Based on a single expert opinion in the field of geodesy, it is impossible to definitively answer the above question. Some court proceedings are significantly more complex due to their nature, requiring the expert to possess comprehensive knowledge not only in geodesy but also, in many cases, in history, construction, and various other disciplines. The decision on whether it is worthwhile to pursue the status of a court-appointed expert in geodesy is ultimately an individual matter for each surveyor. They must consider whether the extensive and meticulous analysis of documentation, participation in court hearings, preparation of expert opinions, and examination of numerous legal regulations align with their professional interests and capabilities.

4. Conclusion

Preparing a court expert opinion in geodesy requires extensive effort and expertise. The expert must possess comprehensive legal knowledge and analytical skills. This involves examining all the circumstances of the case, such as analyzing land and mortgage registers, conducting control measurements, and assessing multiple route options for a new road. It is also essential to analyze the case files, listen to the parties during the site inspection, and take their positions into account.

The establishment of an easement of way is often a lengthy, complex, and costly process. However, given the rapid growth of residential construction and the increasing demand for land suitable for development that often lacks public road access, such proceedings are likely to become more common [Zwolak 2017, 2020]. As court rulings on easements of way evolve, expert work in this field should become more efficient and systematized, making the process more accessible to property owners and investors.

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