Ius Novum
3/2020

PRE-EMPTION RIGHT IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

WIKTOR TRYBKA*

DOI: 10.26399/iusnovum.v14.3.2020.31/w.trybka

1. INTRODUCTION

The pre-emption right is not merely a theoretical issue but it also bears above-average normative relevance for legal practice, in particular for the everyday professional work of notaries. Its presence can be discovered in numerous substantive[1] and procedural[2] statutes. The right has been addressed in a number of purely academic studies,[3] including monographs,[4] as well as publications intended for practical use[5]. The pre-emption right is of considerable interest for civil law authors and

* notary public, PhD, Assistant Professor at the Institute of Legal Science of the University of Zielona Góra, non-staff member the Local Government Appeals Board in Zielona Góra; e-mail: w.trybka@wpa.uz.zgora.pl; ORCID: 0000-0003-2903-5226

1 For example, Article 3 of the Act of 11 April 2003 on agrarian system (Dz.U. 2019, item 1362, as amended); Article 147 § 2 of the Act of 16 September 1982: Law on cooperatives (Dz.U. 2018, item 1285, as amended); Article 37a of the Act of 28 September 1991 on forests (Dz.U. 2020, item 6, as amended).

2 Article 1069 of the Code of Civil Procedure of 17 November 1964 (Dz.U. 2019, item 1460, as amended); Article 110n of the Act of 17 June 1966 on enforcement proceedings in administration (Dz.U. 2019, item 1438, as amended), hereinafter EPAA.

3 For example, A. Kunicki, *Zakres skuteczności prawa pierwokupu*, Nowe Prawo 12, 1966; R. Czarnecki, *Prawo pierwokupu z uwzględnieniem przepisów szczegółowych*, Nowe Prawo 6, 1970; A. Banaszkiewicz, *Prawo pierwokupu jako forma ograniczenia swobody rozporządzania nieruchomością przez jej właściciela*, Acta Universitatis Wratislaviensis 68, 2005; M. Pazdan, *Bezwarunkowa sprzedaż nieruchomości wbrew umownemu prawu pierwokupu*, [in:] *Obrót nieruchomościami w praktyce notarialnej*, Kraków 1997.

4 W. Gonet, *Prawo pierwokupu nieruchomości*, Warszawa 2017.

5 For example, Z. Tuszkiewicz, *Prawo pierwokupu w świetle ustawy o gospodarce nieruchomościami*, Rejent 2, 1997; *idem*, *Prawo pierwokupu w świetle ustawy o gospodarce nieruchomościami*, Rejent 12, 1998; J. Górecki, *Wpis umownego prawa pierwokupu do księgi wieczystej i jego wpływ na ochronę tego prawa*, Rejent 9, 1999; G. Bieniek, *Dodatkowe zastrzeżenie umowne w praktyce notarialnej*, Nowy Przegląd Notarialny 2, 2009.

commentators. This is justified by the fact that the original concept of pre-emption as a legal institution is found in the Civil Code.[6] The analysis of detailed issues related to the pre-emption right in administrative enforcement proceedings is not possible without referring to the essence of pre-emption regulated in the Civil Code and the legal effects of entering into an unconditional sale.

The purpose of this article is to analyse and describe the essence of the pre-emption right in administrative enforcement proceedings. The article is intended to fill a significant gap, because no complete discussion of the essence of the pre-emption right in administrative enforcement proceedings can be found to date in legal literature, not even in studies of systemic nature.[7] The analysis will be conducted using analytical-legal and formal-dogmatic research methods. The research carried out will allow suggestions to be formulated for future legislation.

2. LEGAL CONCEPT OF THE PRE-EMPTION RIGHT IN THE CIVIL CODE

If a statute or a legal transaction reserves the right of first purchase of a particular thing to one of the parties should the other party sell the thing to a third party (pre-emption right), the regulations of Chapter IV of the Civil Code apply, unless superseded by specific provisions (Article 596 Civil Code). The legal concept of the pre-emption right as regulated by the Civil Code serves as a generic model for determining the legal nature of this institution in normative acts other than the Civil Code by establishing a general framework for their application.[8] Aleksander Kunicki rightly notes that 'reserving the right of first purchase of a particular thing results in a debtor-creditor relationship between the owner of the thing and the party for whose benefit the pre-emption is reserved by statute or contract. The entitled party in this relationship is the person on whose behalf the reservation is made (the obligee). The obliged party is the owner of the thing named in a statute or a contract (the obligor). The essence of this relationship are the rights of a person on whose behalf the pre-emption right has been reserved, i.e. the rights consisting in entering into a legal relationship resulting from the sale contracted between the obligor and a third party, and the obligations of the obligor consisting in notifying the obligee about entering into the contract of sale with the third party and formulating that contract in a manner that does not breach the rights of the obligee, i.e. inserting therein a clause that the effectiveness of the sale is conditional upon the obligee waiving their right of pre-emption.'[9] Establishing a contractual pre-emption right does not limit the obligor in disposing of the right of ownership of real estate encumbered with the pre-emption right, either legally or factually,

---

[6] Articles 596–602 of the Civil Code of 23 April 1964 (Dz.U. 2019, item 1145, as amended).

[7] J. Niczyporuk, S. Fundowicz, J. Radwanowicz (eds), *System egzekucji administracyjnej*, Warszawa 2004.

[8] M. Safjan, *Art. 596*, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny*, Vol II: *Komentarz. Art. 450–1099. Przepisy wprowadzające*, Warszawa 2018, p. 386.

[9] A. Kunicki, *supra* n. 3, p. 1527.

which means that such right may be encumbered with limited property rights and form the object of tenancy, lease, etc.[10] From the viewpoint of assessing the legal essence of pre-emption as regulated in the EPAA, an important reservation is that 'the pre-emption right remains closely connected to the institution of sale. It can be exercised only when the obligor enters into such a contract with a third party. If the obligor and the third party enter into a contract obligating the obligor to transfer ownership otherwise than through sale, the pre-emption right will depend on the nature of the source from which it has originated.'[11] If the obligor under a contractual pre-emption right sells real estate to a third party on condition that the pre-emption obligee waives their right, this means that the obligor has only and exclusively entered into a contract obliging them to transfer the ownership of real estate, and if the obligee subsequently waives their right, to transfer the ownership to the third party the obligor and the third party must enter into another contract providing for the unconditional transfer of the right of ownership of real estate.[12] The contractual pre-emption right may be reserved by inserting an additional clause into a nominate contract, as well as by concluding an entirely new contract, but its establishment by means of a unilateral legal transaction, for example in a will, cannot be excluded, either.[13]

3. PRE-EMPTION RIGHT IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS – INTRODUCTORY REMARKS

The legal concept of the pre-emption right has been set out in Article 110n EPAA. Pursuant to the said Article, if a piece of real estate is located in the area assigned to public purposes in the local zoning plan, an enforcement authority, before proceeding to describe and appraise the value of the real estate, requests the competent local government unit to declare its intention to exercise the pre-emption right within three months from the date of serving the request. If the local government unit waives the pre-emption right or the enforcement authority is not served with the relevant statement within the set time limit, the pre-emption right expires (Article 110n § 1 EPAA). If the statement on exercising the pre-emption right is served on the enforcement authority within the set time limit, the authority decides the purchasing price equal to the value of the seized real estate, as determined by a certified appraiser. A decision on the purchase price has the effect of a bid adjudication. Article 112 § 1 EPAA applies accordingly to the purchase price (§ 3). The decision on the value of the purchase price is served on the local government unit, the obligor, and the creditor. The decision is appealable (§ 4). If the local government unit has no right of pre-emption or such right has expired, the provisions of § 1–4 apply accordingly to the pre-emption right recorded in the land and mortgage register for the benefit of third

[10] J. Wasilkowski, *Znaczenie wpisu w księdze wieczystej według prawa rzeczowego*, Państwo i Prawo 5–6, 1947, p. 47.

[11] A. Kunicki, *supra* n. 3, p. 1528.

[12] R. Czarnecki, *supra* n. 3, p. 822.

[13] M. Pazdan, *supra* n. 3, p. 162.

parties (§ 5). If the local government unit has no right of pre-emption or such right has expired, the provisions of Article 110n § 1–4 EPAA apply accordingly, regardless of whether the pre-emption right recorded in the land and mortgage register results from a contract or from separate statutes.[14] Roman Hauser and Andrzej Skoczylas rightly note that 'it is inadmissible for a commune authority to make a statement on exercising the statutory pre-emption right (in the manner set out in Article 110n) for a price higher than that set out in a resolution or a statement of another commune authority. Such a statement would essentially be conditional, where the condition is the price determined by the enforcement authority (head of a tax office) within the bounds set by the commune.[15] The legislator does not specify expressly in what manner the local government unit statement is to be made. It appears that a simple written form would be sufficient. This is unlike the right of pre-emption which the commune can exercise pursuant to Article 109 REMA,[16] where the commune statement should be made in the form of a notarial deed. In the latter case, the commune statement form is dependent on the form in which the conditional contract of sale is entered into. This analogy is, however, not valid for administrative enforcement proceedings because no conditional contract of sale is entered into during the enforcement proceedings. Based on the text of Article 110n EPAA and using a linguistic interpretation alone, it is not possible to answer the question what local government unit is meant therein. The legislator does not answer the question how to determine in practice which local government unit is competent to make a statement on exercising or waiving the pre-emption right. In fact, nor does the local government unit know what amount is to be expended from its budget to purchase the right of ownership of real estate, because the statement must be made before the real estate is described and appraised.[17] Such a solution runs contrary to Article 46(2) of the Act on commune self-government[18] and its counterparts set out in other local government acts. When a competent local government unit makes a statement on exercising the pre-emption right, the commune treasurer cannot countersign it because they do not know what the real estate purchase price is and, consequently, whether it can be financed from the commune budget.

4. OBJECT OF THE PRE-EMPTION RIGHT

The pre-emption right applies to real estate. The legislator included a legal definition of real estate in Article 1a(5) EPAA, which states that real estate is also understood to mean a cooperative member's proprietary right to a residential unit, a cooperative member's right to commercial premises, a cooperative member's right to a single-

---

[14] R. Hauser, A. Skoczylas, *Art. 110n*, [in:] R. Hauser, A. Skoczylas (eds), *Postępowanie egzekucyjne w administracji. Komentarz*, Warszawa 2016, p. 504.

[15] *Ibid*.

[16] Act of 21 August 1997 on real estate management (Dz.U. 2018, item 2204, as amended); hereinafter REMA.

[17] Compare also M. Wolanin, *Prawo pierwokupu nieruchomości*, part V, Nieruchomości 3, 2003, Legalis.

[18] Act of 8 March 1990 on commune self-government (Dz.U. 2019, item 506, as amended).

family home, as well as a cooperative member's right to a residential unit in housing constructed by the cooperative to be conveyed to the cooperative member. As it turns out, while 'real estate' has been legally defined, the content of the definition is of no use in discovering how to understand that concept. From the viewpoint of principles of legislative drafting, the concept has been incorrectly defined. If the legislator wanted to specify what real estate is under the EPAA, a reference to the relevant statute would be sufficient. The absence of such reference gives rise to major doubts in practice because the concept in question is legally defined in more than one normative act. Introducing a legal definition not only overrides the colloquial meaning but also makes for well-ordered legislation and is helpful when construing legal provisions.[19] The legal definition of real estate does not match these assumptions. To discover the meaning of real estate in administrative enforcement proceedings, one must refer to Article 46 Civil Code[20] which stipulates that real estate consists of parts of terrestrial surface that constitute distinct property (land), as well as buildings or parts of buildings permanently attached to land if they constitute property separate from land under specific provisions. The Civil Code, therefore, posits the existence of three kinds of real estate: land, buildings and building units.[21] While each land that constitutes separate property is treated as real estate, a building or part thereof can form separate real estate only when this is stipulated in specific provisions. Instances in which buildings and building units can form separate property are exceptions from the Roman law principle of *superficies solo cedit*, according to which buildings and other structures permanently attached to land form its constituent parts, and therefore cannot be the object of ownership and other property rights in isolation from land.[22] Land real estate consists of land together with its constituent parts, except for buildings and building units, if they form separate property (Article 4(1) REMA). Land real estate may consist of one or more plots of land which can be conveyed together or separately.[23] Building real estate consists, by way of exception under specific provisions, of a building permanently attached to land. Building real estate owned by a perpetual usufructuary is a building situated on land leased under perpetual usufruct. It applies, however, only to buildings erected by the usufructuary or previously existing and acquired by them when entering into the lease contract.[24] In turn, building unit real estate consists of part of a building that forms separate property under specific provisions.[25] To conclude this part of discussion, it should be stated that real estate composed of land, buildings and building units can be

---

19 M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warszawa 2010, pp. 212–215.

20 W. Grześkiewicz, *Egzekucja z nieruchomości w postępowaniu egzekucyjnym w administracji*, Warszawa 2017, p. 50.

21 I. Ignatowicz, K. Stefaniak, *Prawo rzeczowe*, Warszawa 2003, pp. 18–19.

22 R. Świrgoń-Skok, *Art. 46*, [in:] M. Załucki (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, p. 140 et seq.

23 The Supreme Court judgment of 23 November 2004, I CK 261/04, LEX No. 589942.

24 T. Sokołowski, *Art. 46*, [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. I: *Komentarz. Art. 1–352*, Warszawa 2018, pp. 431–432.

25 E. Gniewek, *Art. 46*, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz*, Warszawa 2017, p. 106.

covered by the pre-emption right and may be subject to administrative enforcement proceedings. In addition, a share in real estate as well as the right of perpetual usufruct may likewise be subject to enforcement.

5. PUBLIC PURPOSE

A condition for exercising the pre-emption right by a local government unit is that the real estate must be situated in an area assigned for public purposes in the local zoning plan. In the EPAA, the legislator does not indicate to the authority applying the provisions what is meant by 'public purpose'. A notion of public purpose found in both legislative and legal language is a normative category.[26] A list of public purposes is found primarily in Article 6 REMA. Public purposes in the meaning of Article 6 REMA include:

1) designation of land as public roads, bike paths and waterways, the construction, maintenance and performance of construction works of or on such roads, facilities, and public transport infrastructure, as well as public communication and signals;
1a) designation of land as railways and their construction and maintenance;
1b) designation of land as airports, infrastructure and facilities to handle air traffic, including approach areas, and the construction and operation of such airports and infrastructure;
2) construction and maintenance of drainage systems, conduits and infrastructure used to transmit or distribute liquids, steam, gas, and electric energy, as well as of other facilities and installations necessary to use such conduits and infrastructure;
2a) construction and maintenance of carbon dioxide transport infrastructure;
3) construction and maintenance of public infrastructure used to supply the population with water, to collect, transmit, treat, and discharge sewage, and to recover and eliminate waste, including its storage;
4) construction and maintenance of infrastructure and facilities to protect the environment, cisterns and other water installations used for water supply, flow rate regulation and flood protection, as well as regulation and maintenance of waters and water improvement facilities owned by the State Treasury or local government units;
5) care for real estate classified as monuments in the meaning of regulations on monument protection and care;
5a) protection of the Holocaust Monuments in the meaning of provisions on the protection of former Nazi death camps and sites and monuments commemorating victims of the communist terror;
6) construction and maintenance of office premises for state authorities, administrative authorities, courts and prosecutor offices, federations of higher educa-

[26] G. Matusik, *Art. 6*, [in:] S. Kalus (ed.), *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2012, p. 55.

tion and scientific entities referred to in Article 165 para. 1(1) of the Act of 20 July 2018: Law on higher education and science (Dz.U. item 1668), public schools, state or local government cultural institutions in the meaning of provisions on organizing and conducting cultural activities, as well as public healthcare facilities, kindergartens, nursing homes, care and education facilities, and sport venues;

6a) construction and maintenance of premises necessary for the performance of obligations related to the provision of universal services by the designated operator in the meaning of the Act of 23 November 2012: Postal Law (Dz.U. of 2017, item 1418, and of 2018, items 106, 138, 650, 1118 and 1629), as well as other facilities and premises used for the provision of such services;

7) construction and maintenance of facilities and infrastructure necessary for the state defence and protection of the state border, and for ensuring public safety, including the construction and maintenance of detention centres, penal institutions, and juvenile penal institutions;

8) exploration, prospecting for and extraction of mineral deposits part of mining property;

8a) exploration or prospecting for underground carbon dioxide storage complexes and underground storage of carbon dioxide;

9) establishment and maintenance of cemeteries;

9a) establishment and maintenance of national memorial sites;

9b) protection of plant and animal species or natural habitats threatened with extinction;

9c) designation of areas for publicly available walkways, squares, parks, promenades, and boulevards owned by the local government, as well as their establishment, including construction or reconstruction;

9d) construction of installations or structures to prevent or combat infectious diseases in animals;

10) other public purposes provided for in separate statutes.

The above-mentioned public purposes allow one to determine how the public purpose concept is to be understood in the normative context. Article 6 REMA does not define any criteria or means to consider an activity as a public purpose and merely provides a list of various activities classified as public purposes, which is closed within the REMA itself but can be extended because of Article 6(10), which states that different (other) public purposes may be stipulated in separate statutes.[27]

A public purpose is an objectively defined state of affairs assumed by the public and viewed by it as desirable and worthy of achieving.[28] Wojciech Szydło is right saying that 'public purposes should be viewed in the light of the certainly wider concept of public interest, because they form the mandatory foundation of activities undertaken by entities owning public property to perform the tasks imposed on them in the interest of the public and to satisfy general needs. By

[27] E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2017, p. 43.

[28] W. Szydło, *Cele publiczne w gospodarce nieruchomościami skarbowymi i samorządowymi*, Kwartalnik Prawa Prywatnego 3, 2015, p. 145.

naming the essence of tasks of individual entities, public purposes are therefore used to pursue public interest, dictating the manner in which the tasks must be performed.'[29] Legal literature has on many occasions attempted to define the concept of public purpose that either matches or deviates from the above statement. Following the majority of legal theorists, a public purpose is everything which the purposes listed in Article 6 REMA are used to achieve.[30] According to Tadeusz Woś, public purposes cover four categories of activities: firstly, activities considered to be investments; secondly, activities aimed at maintaining completed investments; thirdly, protection and conservation activities; and fourthly, the separate activities of exploration, prospecting for and extraction of minerals. The author stresses that attempts to provide a concise definition of public purpose are devoid of any deeper meaning.[31] A public purpose may also serve as a justification for the sovereign interference of an authority into the administrative and legal situation of an entity in order to protect public interest.[32] A public purpose is also viewed as an activity undertaken to improve the safety and living conditions of the general public.[33] Basically, a standpoint narrowing down the public purpose concept can be adopted, according to which a public purpose can exist only when activities listed in Article 6 REMA and specific provisions are undertaken, hence public purposes not known to the statute but asserted to be such by reference to the meaning of public purpose are not allowed.[34] An activity not listed in any statute as a public purpose cannot be a treated as such.[35]

The enforcement authority, based on the prevailing actual and legal circumstances, is each time obliged to assess on its own whether the real estate is situated in an area assigned to a public purpose in the local zoning plan. If the real estate has been assigned to purposes listed in Article 6 REMA, this will not be difficult. If the authority is not certain whether specific real estate has been assigned to public purposes, two options are possible: either to request the commune authorities to provide such information in the manner specified under Article 36 EPAA, or to request that the respective statement be made by the city president, mayor or village head. If the competent authority discovers that the real estate is not assigned to public purposes, it must reply that it has no pre-emption right with respect thereto.

---

[29] *Ibid.*, p. 145.

[30] E. Bończak-Kucharczyk, *supra* n. 27, p. 45; G. Matusik, *supra* n. 26, p. 58; Z. Marmaj, *Art. 6*, [in:] G. Bieniek (ed.), *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2011, p. 45.

[31] T. Woś, *Wywłaszczanie nieruchomości i ich zwrot*, Warszawa 2011, p. 66.

[32] E. Drozd, Z. Truszkiewicz, *Gospodarka gruntami i wywłaszczanie nieruchomości. Komentarz*, Kraków 1995, p. 206.

[33] M. Horoszko, D. Pęchorzewski, *Gospodarka nieruchomościami. Komentarz*, Warszawa 2010, p. 25.

[34] T. Grossmann, *Pojęcie inwestycji celu publicznego w dziedzinie łączności*, Państwo i Prawo 9, 2005, p. 84.

[35] The Supreme Court resolution of 17 July 2003, III CZP 46/03, OSNC 2004, No. 10, item 153.

6. PRE-EMPTION IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS?

Pre-emption is a private and not a public law institution, nevertheless many public law provisions refer not only to the civil law concept itself, but even, as for example Article 109 et seq. REMA, directly to the Civil Code provisions. If a statute or legal transaction reserves the right of first purchase of a particular thing to one of the parties, should the other party sell the thing to a third party (pre-emption right), the regulations of this chapter apply, unless superseded by specific provisions (Article 596 Civil Code). Therefore, a question arises whether the Civil Code provisions can be applied to pre-emption mentioned in Article 110n REMA. Both in legal theory[36] and judicial decisions[37] there is no doubt that the pre-emption right can be exercised only when the owner or a person entitled to dispose of a thing has entered into a conditional contract of sale. On the other hand, in enforcement proceedings the ownership of real estate is transferred following a decision to grant ownership, and not a contract of sale. One should therefore accept the view of Czesław Martysz that the final decision to grant ownership has a constitutive nature, because it serves as grounds for transferring the ownership of real estate to the purchaser and as a title for recording the ownership right vested in the purchaser in the cadastral register and in the land and mortgage register or a documentation applicable to the real estate.[38]

Incidentally, one must not overlook the wording of Article 110w § 1 EPAA, which stipulates that seized real estate is sold by the enforcement authority through public bidding. Consequently, the sale of real estate is effected through enforcement proceedings. In a typical contract of sale, the transfer of ownership occurs when the contract is entered into, and an entry in the land and mortgage register has a declarative nature, as opposed to administrative enforcement proceedings in which the ownership transfer actually occurs later. Despite the wording of Article 110w § 1 EPAA in which sale is mentioned, it must be acknowledged that this is not sale in the meaning of Article 596 Civil Code, because the transfer of ownership of real estate occurs through a decision of the enforcement authority and not a contract. This stand has also been confirmed by judicial decisions in court enforcement proceedings.[39] Consequently, Article 599 § 2 Civil Code, stipulating that if the pre-emption right is statutorily vested in the State Treasury, a local government unit, a joint owner or a lessee, the sale made unconditionally is invalid, will not be applicable here, either.

---

[36] Compare K. Mularski, *Art. 596*, [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. II: *Komentarz. Art. 450–1088*, Warszawa 2016, p. 540 et seq. and the literature cited therein.

[37] The Supreme Court judgment of 18 April 1997, III CKN 39/97, LEX No. 50774.

[38] Cz. Martysz, *Egzekucja administracyjna z nieruchomości*, [in:] J. Niczyporuk, S. Fundowicz, J. Radwanowicz (ed.), *System egzekucji administracyjnej*, Warszawa 2004, p. 430.

[39] Compare the Supreme Court judgment of 9 August 2000, V CKN 1254/00, Monitor Prawniczy 2001, No. 11, item 595.

7. EFFECTS OF IGNORING PRE-EMPTION RIGHT IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

The consequence of a local government unit exercising the pre-emption right vested in it is that the unit becomes a participant of administrative enforcement proceedings. The legislator does not answer the question about the consequences of the enforcement authority failing to fulfil its statutory obligation to request the local government unit to make a statement on exercising the pre-emption right in cases where the real estate is situated in an area assigned for public purposes in the local zoning plan. Another question is whether a local government unit that wishes to interfere with the course of enforcement proceedings when the enforcement authority breaches the obligation stipulated in Article 110n § 1 REMA has legal remedies to do so. Obtaining an answer to these questions is important for at least two reasons. Firstly, the right of the local government unit to pre-empt the sale has a constitutive nature; secondly, the unit has a legal interest to interfere if it is not notified of its right to pre-empt. This interest is expressed as the will to acquire the right of ownership of real estate being the object of enforcement proceedings. The local government unit cannot raise objections against the description and appraisal of the real estate referred to in Article 110u EPAA. The right to raise objections against the description and appraisal of real estate is vested in all participants of the enforcement proceedings, namely the creditor and the obligor, as well as entities having limited property rights in the real estate, entities whose personal rights of claims have been secured by an entry in the land and mortgage register, and the authority that has previously entered a contract to lease the real estate as perpetual usufruct.[40] The local government unit is not included in the group of participants of enforcement proceedings.

The enforcement authority issues an appealable decision granting the ownership (Article 112b § 1–2 EPAA). Piotr M. Przybysz is right to note that 'an appeal against a decision granting the ownership cannot set out the deficiencies related to enforcement activities conducted before filing an appeal against the bid adjudication decision. Such deficiencies ought to have been set out at earlier stages of the proceedings and in an appeal against the bid adjudication decision.'[41] It appears, however, that despite this reservation of P.M. Przybysz, local government units should be awarded standing to appeal a decision granting the ownership because the legislator does not offer them a remedy which can be used to effectively demand the exercise of the pre-emption right vested in them at earlier stages of the proceedings.

---

[40] R. Hauser, A. Skoczylas, *supra* n. 14, p. 504.

[41] P.M. Przybysz, *Postępowanie egzekucyjne w administracji. Komentarz*, Warszawa 2015, p. 455.

8. CONCLUSIONS

The view presented by Marian Wolanin that 'Article 110n EPAA does not create a separate substantive law basis for exercising the pre-emption right but is a procedural norm for exercising the pre-emption right vested in local government units by other legal instruments' cannot be accepted.[42] Otherwise, the legislator would have expressly inserted a reference to substantive law provisions, and specifically to Article 109 EPAA, in this provision. It should be remembered that issues related to exercising the pre-emption right vested in the commune, should a sale occur when the prerequisites described in this provision are fulfilled, have been regulated by the legislator on a comprehensive basis. The Act on real estate management contains express provisions concerning the manner and method of exercising the pre-emption right.

A local government unit may exercise the pre-emption right vested in it by citing Article 110n EPAA alone. While this provision uses the word 'pre-emption', this is not a sufficient justification for applying the Civil Code provisions in this case. The legislator should consider abolishing Article 110n EPAA not only because of its numerous legislative defects, but also because the interest of a commune, as far as the transactions in ownership rights of real estate situated in an area assigned to public purposes in the zoning plan are concerned, is already secured due to the fact that the commune holds the pre-emption right (Article 109 para. 1(3) REMA) in such case.[43] In other cases, Article 110n EPAA itself should be amended, primarily through doing away with the use of 'pre-emption' in favour of allowing a commune (and not local government units) to exercise the pre-emption right when acquiring the ownership right of real estate. A commune should exercise its right to make the relevant statement after, and not before as in the currently effective Article 110n § 1 EPAA, the real estate is described and appraised. In addition, the legislator should put in place penalties for an enforcement authority that fails to comply with the obligation of requesting a local government unit to exercise the pre-emption right, and expressly name the form in which such a statement of the local government unit should be made.

BIBLIOGRAPHY

Banaszkiewicz A., *Prawo pierwokupu jako forma ograniczenia swobody rozporządzania nieruchomością przez jej właściciela*, Acta Universitatis Wratislaviensis 68, 2005.

Bieniek G., *Dodatkowe zastrzeżenie umowne w praktyce notarialnej*, Nowy Przegląd Notarialny 2, 2009.

Bończak-Kucharczyk E., *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2017.

Czarnecki R., *Prawo pierwokupu z uwzględnieniem przepisów szczegółowych*, Nowe Prawo 6, 1970.

Drozd E., Truszkiewicz Z., *Gospodarka gruntami i wywłaszczanie nieruchomości. Komentarz*, Kraków 1995.

[42] M. Wolanin, *supra* n. 17.

[43] Compare also P.M. Przybysz, *supra* n. 41, pp. 427–429.

Gniewek E., *Art. 46*, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz*, Warszawa 2017.
Gonet W., *Prawo pierwokupu nieruchomości*, Warszawa 2017.
Górecki J., *Wpis umownego prawa pierwokupu do księgi wieczystej i jego wpływ na ochronę tego prawa*, Rejent 9, 1999.
Grossmann T., *Pojęcie inwestycji celu publicznego w dziedzinie łączności*, Państwo i Prawo 9, 2005.
Grześkiewicz W., *Egzekucja z nieruchomości w postępowaniu egzekucyjnym w administracji*, Warszawa 2017.
Hauser R., Skoczylas A. (eds), *Postępowanie egzekucyjne w administracji. Komentarz*, Warszawa 2016.
Horoszko M., Pęchorzewski D., *Gospodarka nieruchomościami. Komentarz*, Warszawa 2010.
Ignatowicz I., Stefaniak K., *Prawo rzeczowe*, Warszawa 2003.
Kunicki A., *Zakres skuteczności prawa pierwokupu*, Nowe Prawo 12, 1966.
Marmaj Z., *Art. 6*, [in:] G. Bieniek (ed.), *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2011.
Martysz Cz., *Egzekucja administracyjna z nieruchomości*, [in:] J. Niczyporuk, S. Fundowicz, J. Radwanowicz (eds), *System egzekucji administracyjnej*, Warszawa 2004.
Matusik G., *Art. 6*, [in:] S. Kalus (ed.), *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2012.
Mularski M., *Art. 596*, [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. II: *Komentarz. Art. 450–1088*, Warszawa 2016.
Niczyporuk J., Fundowicz S., Radwanowicz J. (eds), *System egzekucji administracyjnej*, Warszawa 2004.
Pazdan M., *Bezwarunkowa sprzedaż nieruchomości wbrew umownemu prawu pierwokupu*, [in:] *Obrót nieruchomościami w praktyce notarialnej*, Kraków 1997.
Przybysz P.M., *Postępowanie egzekucyjne w administracji. Komentarz*, Warszawa 2015.
Safjan M., *Art. 596*, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny*, Vol. II: *Komentarz. Art. 450–1099. Przepisy wprowadzające*, Warszawa 2018.
Sokołowski T., *Art. 46*, [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. I: *Komentarz. Art. 1–352*, Warszawa 2018.
Szydło W., *Cele publiczne w gospodarce nieruchomościami skarbowymi i samorządowymi*, Kwartalnik Prawa Prywatnego 3, 2015.
Świrgoń-Skok R., *Art. 46*, [in:] M. Załucki (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019.
Tuszkiewicz Z., *Prawo pierwokupu w świetle ustawy o gospodarce nieruchomościami*, Rejent 12, 1997.
Wasilkowski J., *Znaczenie wpisu w księdze wieczystej według prawa rzeczowego*, Państwo i Prawo 5–6, 1947.
Wolanin M., *Prawo pierwokupu nieruchomości*, part V, Nieruchomości 3, Legalis.
Woś T., *Wywłaszczanie nieruchomości i ich zwrot*, Warszawa 2011.

PRE-EMPTION RIGHT IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

Summary

The pre-emption right to real estate is an important legal institution not only for legal theory, but also for legal practice. The pre-emption right has been regulated in substantive and procedural law. It also arouses considerable interest among representatives of the civil law doctrine. The aim of the study is to analyse a narrow issue, namely the pre-emption right in administrative

enforcement proceedings. The right of pre-emption of real estate in administrative enforcement proceedings is granted when the real estate has been used for public purposes in the local zoning plan. Use of this right by the local self-government during administrative enforcement results in the acquisition of ownership of this property. The analysis of the essence of the pre-emption right shows that the legal provisions concerning this right raise considerable doubts. The legislator did not specify precisely in which form the pre-emption right should be exercised. The understanding of the concept of public purpose is not clear, either. The author of the article seeks to resolve the doubts that may be related to the exercise of the pre-emption right during administrative enforcement proceedings.

Keywords: enforcement proceedings, pre-emption, real estate/property, local self-government

PRAWO PIERWOKUPU W ADMINISTRACYJNYM POSTĘPOWANIU EGZEKUCYJNYM

Streszczenie

Prawo pierwokupu nieruchomości jest instytucją prawną, istotną nie tylko dla teorii prawa, ale również praktyki prawniczej. Zostało ono unormowane w ustawach materialnych i procesowych, cieszy się także dużym zainteresowaniem doktryny prawa cywilnego. Celem opracowania jest analiza wąskiego zagadnienia, a mianowicie prawa pierwokupu w administracyjnym postępowaniu egzekucyjnym. Prawo pierwokupu nieruchomości w administracyjnym postępowaniu egzekucyjnym przysługuje, wtedy gdy nieruchomość w miejscowym planie zagospodarowania przestrzennego została przeznaczona na cele publiczne. Skorzystanie przez jednostkę samorządu terytorialnego z przysługującego jej prawa pierwokupu w toku egzekucji administracyjnej skutkuje nabyciem prawa własności tej nieruchomości. Analiza istoty prawa pierwokupu pokazała, że przepisy prawne odnoszące się do prawa pierwokupu w dużej części budzą wątpliwości. Ustawodawca nie określił precyzyjnie, w jakiej formie ma być wykonane prawo pierwokupu. Wątpliwości budzi również rozumienie pojęcia celu publicznego. Lektura artykułu pozwala wyjaśnić wątpliwości, jakie mogą wiązać się ze skorzystaniem z prawa pierwokupu w ramach administracyjnego postępowania egzekucyjnego.

Słowa kluczowe: postępowanie egzekucyjne, pierwokup, nieruchomość, samorząd terytorialny

DERECHO DE RETRACTO EN EL PROCESO ADMINISTRATIVO DE EJECUCIÓN

Resumen

El derecho de retracto de inmueble es una institución jurídica importante no sólo para la teoría de derecho, sino también para la práctica. Queda regulado en las leyes sustantivas y procesales y despierta un gran interés en la doctrina de derecho civil. El artículo tiene por objetivo analizar un aspecto muy detallado, o sea, el derecho de retracto en el proceso administrativo de ejecución. El derecho de retracto en el proceso administrativo de ejecución corresponde cuando el inmueble en el plano local de ordenación espacial está destinado para fines públicos. El ejercicio por la unidad de gobierno territorial de derecho de retracto durante la ejecución administrativa significa la adquisición de propiedad de tal inmueble. El análisis de natura-

leza de derecho de retracto demuestra, que la regulación legal relativa a derecho de retracto despierta dudas en su mayor parte. El legislador no ha determinado con precisión en qué forma hay que ejercer el derecho de retracto. Surgen dudas en cuanto al concepto de fin público. La lectura del artículo permite esclarecer dudas que pueden surgir a la hora de ejercer el derecho de retracto en el marco del proceso administrativo de ejecución.

Palabras claves: proceso de ejecución, retracto, inmueble, gobierno territorial

ПРЕИМУЩЕСТВЕННОЕ ПРАВО НА ПОКУПКУ В ХОДЕ АДМИНИСТРАТИВНО-ИСПОЛНИТЕЛЬНОГО ПРОИЗВОДСТВА

Аннотация

Преимущественное право на покупку объекта недвижимости является важным правовым институтом как с точки зрения теории права, так и с точки зрения юридической практики. Оно регулируется материальным и процессуальным правом и вызывает большой интерес в гражданско-правовой доктрине. В данной работе рассматривается сравнительно узкий вопрос, а именно: преимущественное право на покупку в ходе административно-исполнительного производства. Право преимущественной покупки недвижимости в рамках административно-исполнительного производства предоставляется в том случае, если генеральным планом развития населенного пункта предусмотрено использование данной недвижимости в общественных целях. При осуществлении органом местного самоуправления права на преимущественную покупку в рамках административно-исполнительного производства происходит приобретение права собственности на данный объект недвижимости. Анализ сущности права преимущественной покупки приводит к выводу, что действующие правовые нормы, касающиеся этого права, вызывают значительные сомнения. Законодатель не уточняет, в какой форме должно осуществляться право преимущественной покупки. Сомнения вызывает и понятие общественных целей. Данная работа призвана прояснить возможные сомнения, связанные с осуществлением права преимущественной покупки в рамках административно-исполнительного производства.

Ключевые слова: исполнительное производство; преимущественное право покупки; недвижимость; местное самоуправление

DAS VORKAUFSRECHT IM VERWALTUNGSVOLLSTRECKUNGSVERFAHREN

Zusammenfassung

Das Vorkaufsrecht ist ein Rechtsinstitut, dem nicht nur in der Rechtstheorie, sondern auch in der juristischen Praxis große Bedeutung zukommt. Es ist in den materiell- und verfahrensrechtlichen Gesetzen geregelt und in der Zivilrechtslehre von großem Interesse. Ziel der Studie ist die nähere Untersuchung einer eng gefassten Problematik – des Vorkaufsrechts im Verwaltungsverfahren zur Vollstreckung von Verwaltungsakten. Das Vorkaufsrecht an einer unbeweglichen Sache im Verwaltungsvollstreckungsverfahren steht dann zu, wenn die unbewegliche Sache im besonderen Flächennutzungsplan für öffentliche Zwecke ausgewiesen ist. Durch Ausübung des ihr zustehenden Vorkaufsrechts durch die Gebietskörperschaft im Zuge der zwangsweisen Durchsetzung von Verwaltungsakten durch Verwaltungsbehörden wird das Eigentum an dieser unbewegliche Sache erworben. Bei der Analyse des Wesens des Vor-

kaufsrechts wird deutlich, dass die gesetzlichen Bestimmungen zum Vorkaufsrecht in großen Teilen Zweifel aufkommen lassen. Vom Gesetzgeber wurde nicht präzisiert, in welcher Form das Vorkaufsrecht auszuüben ist. Es bleiben auch Zweifel, was unter dem Begriff „öffentlicher Zweck" genau zu verstehen ist. Durch Lektüre des Artikels lassen sich Unklarheiten ausräumen, die im Zusammenhang mit der Ausübung des Vorkaufsrechts im Rahmen eines Verwaltungsvollstreckungsverfahren entstehen können.

Schlüsselwörter: Vollstreckungsverfahren, Vorkaufsrecht, unbewegliche Sache, Gebietskörperschaft

DROITS DE PRÉEMPTION DANS LES PROCÉDURES ADMINISTRATIVES D'EXÉCUTION

Résumé

Le droit de préemption est une institution juridique importante non seulement pour la théorie du droit mais aussi pour la pratique juridique. Il a été réglementé par des lois de fond et de procédure et bénéficie d'un grand intérêt de la doctrine du droit civil. Le but de l'étude est d'analyser une question étroite, à savoir le droit de préemption dans les procédures administratives d'exécution. Le droit de préemption de propriété dans les procédures administratives d'exécution est dû lorsque le bien dans le plan d'aménagement du territoire a été destiné à des fins publiques. L'exercice du droit de préemption par la collectivité locale dans le cadre de l'exécution administrative entraîne l'acquisition de la propriété de ce bien. L'analyse de l'essence du droit de préemption a montré que les dispositions légales concernant le droit de préemption sont largement discutables. Le législateur n'a pas précisé sous quelle forme le droit de préemption doit être exercé. La compréhension du concept d'utilité publique soulève également des doutes. La lecture de l'article permet de clarifier les doutes, qui pourraient découler de l'exercice du droit de préemption dans le cadre d'une procédure administrative d'exécution.

Mots-clés: procédure d'exécution, préemption, immobilier, gouvernement local

DIRITTO DI PRELAZIONE NEL PROCEDIMENTO AMMINISTRATIVO DI ESECUZIONE

Sintesi

Il diritto di prelazione di un immobile è un istituto giuridico essenziale non solo per la teoria del diritto ma anche per la pratica giuridica. È stato regolamentato nelle leggi sostanziali e processuali e gode di grande interesse da parte della dottrina del diritto civile. L'obiettivo dell'elaborato è l'analisi di una ristretta questione, e in particolare del diritto di prelazione nel procedimento amministrativo di esecuzione. Il diritto di prelazione di un immobile nel procedimento amministrativo di esecuzione spetta quando l'immobile nel piano regolatore locale è destinato a finalità pubbliche. L'esercizio del diritto di prelazione spettantele da parte di un ente locale nel corso dell'esecuzione amministrativa determina l'acquisizione del diritto di proprietà di tale immobile. L'analisi dell'essenza del diritto di prelazione ha mostrato che le norme giuridiche riferite al diritto di prelazione in gran parte sollevano dubbi. Il legislatore

non ha stabilito con precisione in che forma debba essere esercitato il diritto di prelazione. Solleva dubbi anche la comprensione del concetto di finalità pubblica. La lettura dell'articolo permette di chiarire i dubbi che possono essere legati all'esercizio del diritto di prelazione nell'ambito del procedimento amministrativo di esecuzione.

Parole chiave: procedimento di esecuzione, prelazione, immobile, ente locale

Cytuj jako:

Trybka W., *Pre-emption right in administrative enforcement proceedings [Prawo pierwokupu w administracyjnym postępowaniu egzekucyjnym]*, „Ius Novum" 2020 (14) nr 3, s. 160–175. DOI: 10.26399/iusnovum.v14.3.2020.31/w.trybka

Cite as:

Trybka, W. (2020) 'Pre-emption right in administrative enforcement proceedings'. *Ius Novum* (Vol. 14) 3, 160–175. DOI: 10.26399/iusnovum.v14.3.2020.31/w.trybka