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ENGINEERING EXPERT RZECZOZNAWCA



Opinion of the industry commission (concerning the real estate appraisal report) as evidence in administrative and court-administrative proceedings

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Summary: The work analyzes the opinion of the committee of the industry team of the Association of Appraisers property appraisers, who might execute an opinion containing a conclusion saying whether the estimate performed by an expert (a property appraiser) in the administrative proceedings may or may not be the basis for determining the amount of compensation for expropriated property. The presence of such an opinion in administrative and administrative proceedings, as well as the criteria under which it should be subject to verification, were highlighted.

Keywords: opinion, an appraisal, administrative proceedings, administrative court proceedings.

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1. Introduction

The analysis concerns the opinion carried out by the commission providing opinions, acting within the framework of the trade association of property experts, which is evidence in administrative and judicial proceedings.

In administrative proceedings concerning the determination of the amount of compensation for expropriated real estate (for a public purpose), the leading role is played by an estimate performed by a person with appropriate powers, that is, a property appraiser. It is the basis for determining the amount of compensation determined by administrative decision. It should be noted that in the current legal state, the estimator does not lose the value of the document after finding its defect in the opinion issued by the review team within the framework of the activities of the Association of Property Experts.

The purpose of this work is to try to clarify the answer to the question of the assessment by the administrative authority or court—the opinion verifying the estimate made by the property appraiser in the course of administrative proceedings on behalf of the office—as evidence in the case.

2. Opinion of the Trade Commission in administrative proceedings before the authority and instance

In administrative proceedings conducted by the authority and instance, which are aimed at determining the amount of compensation for expropriated real estate, the office shall appoint a property appraiser who, as an expert in the same proceedings, will perform an opinion called an estimate in which he will determine the value of the property.

Although the authority does not have the expertise to verify the document in terms of expertise, this does not preclude verification of the document in other respects. Moreover, the authority should not accept uncritically the opinion of an expert (witness) in the proceedings, due to possible objections raised by the other party to the administrative proceedings (the payer, which is most often an exemplary budget unit). As a result, if there is any doubt, the investigating authority may summon the expert to provide explanations. The expert may also make adjustments to the property valuation operation.

Finally, the authority may order the verification of an estimation operation by an industry commission operating within the Association of Property Experts. In our country, there are a number of such associations covering certain areas of the country. At the same time, it does not matter whether the opinion comes from the association commission, which covers the seat of the body conducting the proceedings. This means that the opinion can be issued by the commission of any association in the country.

Where a party has doubts about an estimation operation, it may refer it to the Association of Property Appraisers for evaluation by the commission but is obliged to notify the administrative body conducting the proceedings. This is so important that when an opinion on an estimate submitted to the case file is being carried out, no administrative decision should be taken to determine the compensation on the basis of the verified estimate.

This is associated with a term that is not contained in the code of administrative procedure but in the act on the management of real estate, which specifies the deadline for the evaluation of the estimate operation (opinion), for no more than 2 months, and it is necessary to take into account, colloquially speaking, the circulation of documents, which extends the period of obtaining such an opinion.

Currently (in the current legal state), the estimator does not lose the value of the document as a result of a negative verification contained in the opinion drawn up by the evaluation team of the professional organization of property appraisers. Thus, an opinion issued by the panel is further evidence in the case that should be verified by the administrative authority and not conclusive evidence in the case.

Thus, in such a case, the provisions of the Code of Administrative Procedure as regards the assessment of the evidence in the case should apply.

With the problem of verifying an estimate made by an expert witness as evidence in the case (administrative proceedings), the administrative authorities have been struggling for many years.

One might be tempted to say that administrative courts have developed case law in the area of checking an operation by administrative bodies and by the administrative courts themselves.

Since the authority does not have the expertise indicated at the outset, there is a problem as to how far it can, or rather must, study such an opinion in the form of an estimate. This is a non-expert's verification.

Fifteen years ago, the Provincial Administrative Court in Warsaw expressed its opinion on this matter as to how an appraisal report should be analyzed (verified) by an administrative authority:

“The estimate is one of the pieces of evidence in the case and, like any other piece of evidence, shall be assessed by the administrative authority in accordance with Article 77 of the CPR. In particular, on the basis of Article 80 of the CPR, when considering a case, the administrative authority has the right and obligation to assess the evidentiary value of a complex estimation operation and to examine whether the opinion submitted to it is complete, logical, and reliable. An estimation operation submitted by a property appraiser must meet not only the formal requirements of such a document set out in the act on the management of real estate and the regulations of the executive rank but must also be based on correct data on the estimated real estate.” (CF. the judgment of the Voivodship Administrative Court of December 12, 2007, ref. act I SA / Wa 1484/07, available at CBOSA

In turn, the Supreme Administrative Court, one might say, decided on the choice of valuation method, which is a method that cannot be denied by the authority:

“It should be emphasized that, in accordance with the content of Article 154 (1) of the Act on Real Estate Management, the choice of the estimation method and the comparative base belongs to the property appraiser. It is his task, as a person with special knowledge, to analyze the real estate market and select an appropriate valuation method in the circumstances of the case, taking into account the purpose of the valuation, the type of property being valued, its location, and its purpose.

Evaluation of the special messages operation—an estimation method that is the exclusive domain of the property appraiser—may not be subject to evaluation by a court or authority. The choice of approach and method of property valuation is decided by the appraiser. Also, the appraiser decides on the selection of real estate, which he accepts for comparison.” (NSA judgment of February 5, 2015, ref. Act I, OSK 1224/13)

Both from case law and the rules of procedure (KPA), it does not follow that the authority should each time, in case of doubt about a party to the administrative proceedings, direct the operation performed in the course of the proceedings by an expert. It is on the side of the proceedings that the burden of undertaking the procedure leading to obtaining the opinion of the team of the Trade Commission of property experts rests.

“The fact that the appellate body independently assesses the regularity of an operation may raise objections in the present case. As a rule, an estimate is the opinion of an expert, i.e., a qualified professional with specialist knowledge, which the authority uses, provided that the estimate has been prepared and drawn up in compliance with the regulations governing this issue. However, if the authority had doubts about an operation, it could first ask the author of the operation to clarify the doubts and make a possible correction. The appellate body could have done so under Article 136 of the Code of Criminal Procedure, which regulates the so-called supplementary evidence procedure, but it did not do so.” (February 25, 2019, judgment, ref. IV SA / Wa 228/19)

However, this does not preclude the administration body from taking steps to obtain the opinion of the industry team; however, the administration body should first of all obtain explanations and corrections from the author of the operation, as well as make a possible correction. Only these actions, culminating in possible explanations and corrigenda, or their absence in the event of the operator's failure, open the way to taking steps to obtain the opinion of the Trade Commission.

3. Opinion of the Trade Commission in administrative cases before the body of the second instance

It should be noted that for proceedings before the administrative body of the second instance, the provisions of the Code of Administrative Procedure also apply:

“The principle of the two-instance procedure cannot be interpreted to mean that all relevant evidence should be obtained at the first instance and that the appellate body's role is limited to reviewing the first instance decision. Both the Proceedings of the first and second instance are fully substantive, which does not preclude the conduct of proceedings based on Article 136 of the code of civil procedure aimed at clarifying the doubts of the authority by an expert and possibly supplementing the expert's opinion with specific identified deficiencies or inaccuracies. It is therefore acceptable for the Court of First

Instance to accept that, under Article 136 of the Civil Code, the appellate body was entitled to obtain from the property appraiser an opinion on the comparison of real estate similar to the object of valuation,...” (NSA decision in the 12.4.2017 judgment, I OSK 1494/17)

Thus, in the event of doubts that the authority of the second instance has about the estimation operation performed by the expert at stage I of the instance proceedings, he (the authority of the second instance) is to blame. He should seek to clarify doubts and take appropriate steps to obtain explanations, inaccuracies, and additions from the expert, the author of the operation on the basis of which the authority of the first instance issued a decision determining the amount of compensation for the expropriated property.

The Regional Administrative Court in Kraków, in the grounds of its judgment of March 28, 2019 (II SA / Kr 34/19), indicated what should be the opinion on:

“The opinion drawn up by it constitutes only one of the means of proof and, as such, is subject to a free assessment of its evidentiary capacity. Since the public authorities have been assigned an active role in the taking of evidence, the indiscriminate acceptance of an expert's opinion constitutes an infringement of Articles 7, 77 1, 80, and 84 1e in the taking of evidence, the indiscriminate acceptance of an expert's opinion constitutes an infringement of Articles 7, 77 1, 80, and 84 1. (See, for example, the WSA in Poznan's April 13, 2011 (II SA) / Po 47/11, LEX no. 1097032, and the WSA in Lublin's September 30, 2015 (II SA) / Lu 127/15, LEX no. 1945054). Similarly, the WSA in Kielce pointed out that “the possibility for a public administration body to turn to an expert does not mean that the body uncritically accepts the expert's findings as its own.” The opinion must be consistent and include the conclusions reached. “The evidence at issue must not contain ambiguities, errors, or omissions, and in this respect the authority has not only the right but also the obligation to examine whether the opinion submitted to it is complete, logical, and reliable and, if necessary, to require an expert to supplement it.” (judgment of April 6, 2011, LEX no. 950520, CF. also the judgment of the WSA in Kraków of October 19, 2009, II SA / Kr 1292/09, LEX no 573752)

In conclusion, it should be noted that the doubts of the authority of the second instance regarding the expert's operation performed at the stage of the first instance proceedings cannot lead to the issuance of a cassation decision, as indicated by the administrative-court case law.

So, we're dealing with a set of circumstances that could lead the authority of the second instance to take steps to find out what the industry team thinks.

4. Opinion of the Trade Commission in the administrative court proceedings

Also, administrative courts verify the correctness of estimation operations:

“When it comes to putting in place judicial review of administrative decisions, the court can't put any limits on not only to refer to the conclusion contained in the expert's opinion, but is also required to investigate the basis for the expert's conclusion and the correctness of the expert's reasoning. The examination of the expert opinion therefore consists in checking the correctness, from the point of view of the principles of logic and life experience, of the reasoning carried out in the opinion that led to the expert's opinion of such and not other content. A statement of reasons is thus required for the court to make the aforementioned assessment (yes, the May 6, 1998 judgment in NSA (do 2003.12.31) in Katowice). I SA/Ka 1604/96, Lex no. 33410). It is clear that the authorities (nor the Administrative Court) do not have the expertise and cannot control the expert opinion from this point of view (although they can and should formulate questions and ask for verification of the conclusions or hypotheses that are presented to them). Therefore, the correct expert opinion issued in the case should indicate and explain the reasons that led to the conclusion presented by it in such a way as to enable the authorities and the court, that is, the decision-makers without expert knowledge, to assess its motives (cf. the judgment of the WSA in Rzeszow of March 28, 2012). II SA/Rz 1172/11, LEX no. 1145858). In other words, as the NSA judgment (do 2003.12.31) in Warsaw (IV SA 1061/97, LEX No. 47251) aptly sums up this issue, “the expert opinion should contain a justification that would allow an analysis of the logic and correctness of the conclusions without entering the sphere of expertise. It therefore cannot be reduced to the expert's opinion alone but must convince as a logical whole. The expert must therefore

indicate and explain the reasons that led him to his conclusions. The lack of professional justification for the final conclusions makes it impossible to assess their evidentiary value.” (March 28, 2019) WSA decision in Kraków (II SA/Kr 34/19)

As the case law of administrative courts indicates, the opinion (an appraisal) must be: consistent, logical, and correct in substance. It cannot be based solely on an expert's opinion.

Thus, the fact that the estimator has been approved as a means of evidence by both the first and second instance authorities does not mean that it will not be "derogated" by the Administrative Court through administrative court proceedings. It should be noted that it is no longer possible to obtain the opinion of the panel before the Administrative Court.

5. Evaluation of the opinion of the industry team in the course of administrative and judicial proceedings

In light of the no longer binding legal situation, the situation in which the authority obtained the Trade Commission's opinions, which stated the defect of the estimate made during the administrative procedure was clear, namely, the estimate lost the value of the document.

So we were dealing as if with a zero state before the execution of this operation. In a situation where it was at the stage of proceedings, for instance, the authority had to reorder the execution of the estimation operation.

If such a situation arose during the second instance proceedings, the case was, colloquially speaking, returned to the authority and instance with the effect described above.

However, in the light of the current legal situation, the opinion of the commission of the industry team is only one piece of evidence in the case. It no longer determines the annihilation (estimation) of an opinion issued by an expert in administrative proceedings before the authority or instance.

So, it's important to think about how to judge this kind of evidence in a case, which is the opinion of the Trade Commission panel.

This opinion is given by two people. They must also have the same powers as the contractor (expert) of the estimation operation performed at the stage of the procedure and instance. This is directly due to the law on the management of real estate.

So we are dealing with a situation in which we assume that the opinion will consider the estimation operator to be defective, which should be understood to mean that it cannot be the basis for making a decision when people with the same qualifications perform two opinions that differ from each other and specifically are in opposition to each other.

One might be tempted to say that the evidence from the opinion made by the industry commission team, in such a situation, should be attributed the value of "super-proof" due to the fact that it was made by 2 people (specialists in the industry), as opposed to the estimation operation, which was made by 1 specialist in the industry. Nothing could be more incorrect; such reasoning is prohibited by the law (KPA), which clearly states that the authority determines whether a given circumstance has been proven based on the totality of the evidence (Article 80 of the KPA).

The Judiciary has developed criteria for assessing opinions in the field of real estate valuation for the purposes of administrative proceedings. Since the opinion of an expert in administrative proceedings (the estimator) can be verified by the administrative body from a specific angle, namely: ambiguity, errors, shortcomings, completeness, logic, and reliability, there is nothing to prevent the opinion of the Trade Commission team from being evaluated using the same criteria.

One can be tempted to say that the opinion of the industry commission team is like a quasi-estimation operation with no determination of the value of the property.

The administrative authority, being free to assess the evidence, cannot accept on an ad hoc basis that the opinion of the panel of the Trade Commission is unverifiable or devoid of defects affecting its recognition as reliable evidence in administrative proceedings.

It is a mistake to rely without reflection on the opinion of the industry commission team and to derogate from the opinion made by an expert in administrative and instance proceedings, the result of which is the execution of the next opinion by an expert or the annulment of the decision of the first authority determining the amount of compensation for the expropriated property by the authority of the second instance.

Thus, the opinion of the panel of the Trade Commission should be subjected to the same analysis as the estimate made by an expert in the case in question. Moreover, there are no contraindications to the implementation of the second opinion of the panel of the Trade Commission by other associations.

Since the administrative authority has the opportunity to freely assess the evidence, and moreover, the party to the proceedings may request evidence of a circumstance relevant to the case (Article 78 §1 of the KPA), there is nothing to prevent a second (industry) opinion from being carried out either on behalf of the administrative authority or on behalf of the party to the proceedings. It remains a procedural issue whether the administrative authority will take such a request into account, given that it already has the opinion of the panel of the Trade Commission (Article 78 §1 of the KPA). As a result, such an opinion (industry) can still be carried out on behalf of the party in the administrative proceedings.

This is so important that failure to provide such evidence by a party to the administrative proceedings may result in the loss of an argument (the opinion of the panel of the Trade Commission) that would have to be considered by the administrative authority as evidence in the case.

The legislator did not foresee the possibility of verifying the opinion of the Trade Commission team by another commission but also did not indicate the "finality" of such an opinion without the possibility of obtaining another opinion with the opposite conclusion.

In administrative court proceedings, the administrative court also evaluates the evidence, which is the expert opinion. In this case, in terms of completeness, logic, and reliability.

Nothing prevents the opinion of the panel of the Trade Commission from being verified by the Administrative Court. It is also an opinion issued by persons with the same qualifications (powers) as the opinion of an expert (a property appraiser) in administrative proceedings. Therefore, it should be subject to the same evaluation criteria. In the analysis of industry opinions, logic and life experience should also be used.

It is wrong to assume, not only by the administrative authorities but also by the parties to the administrative proceedings, that the industry's opinion closes the way to complaining about the decision of either the first instance authorities to the second instance authority or complaining about the decision of the second instance authority to the Administrative Court.

No provision in the current legal status indicates the impossibility of verification by the administrative body during the ongoing administrative proceedings, according to the opinion of the team at the Trade Commission. Moreover, the administration is obliged to examine such an opinion as evidence in the case in terms of completeness, logic, and reliability, analyzed through the prism of logic and life experience. No less important is the analysis of the reasons for the opinion, which should give an answer to the question of why such an opinion was issued.

So, it's important to keep in mind that an administrative body conducting administrative proceedings (which would lead to a decision based on this evidence) or an administrative court in an administrative-judicial proceeding should not blindly adopt the conclusions in an industry opinion.

6. Final conclusions

The estimator on which an opinion is given by the review team should be analyzed for completeness and consistency and should not contain contradictions. This principle also applies to the opinion of the review team.

The opinion of the Advisory Panel shall include not only an analysis of the state of the estimated operation but also an analysis of the documentation collected during the Administrative Procedure. In order to assess whether the assessed operation is consistent, complete, and logical (i.e., whether logical conclusions follow from the premises), an analysis by the panel under the Administrative Procedure Act

is necessary, as far as the estimation operation is concerned. Only such an action by the review team gives guarantees of the correctness of the execution of the opinion, which will therefore be reliable in view of the analysis of all aspects of the estimate operation. It should be noted that the estimator is performed at the stage of administrative proceedings, and it is the expert (property appraiser) appointed by the administration body who comes into direct contact with the material collected in the case. Furthermore, he has the option of contacting the administrative proceedings' parties directly in order to obtain any information related to the estimated property, and thus can obtain documents or information that the collected material does not mention during the administrative proceedings, including this in the estimation operation.

The expert must explain how he arrived at his conclusions. The final conclusions should be based on a professional but accessible justification. It should be borne in mind that neither the administrative authority nor the Administrative Court have expertise.

The estimator shall not contain errors, ambiguities, or omissions. Its completeness and the completeness resulting from all documentation—both contained in the acts of administrative conduct and obtained by the expert in the loss of valuation—should testify to its reliability. The obligation to exercise not so much due diligence as special diligence in the performance of the estimated operation stems from the expert's professional nature as a contractor. In turn, the substantive correctness of an estimation operation cannot be identified with the choice of an estimation method or a comparative database (real estate), which is the prerogative of an expert.

Thus, there is no reason for the opinion of the review team to be assessed in a different way than the estimator, both by the administrative authority and by the Administrative Court.

References

- [1] Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego , Dz. U. 1960 Nr 30 poz. 168 , (<https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19600300168>)
- [2] Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi , Dz. U. 2002 Nr 153 poz. 1270 , (<https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20021531270>)
- [3] Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami , Dz. U. 1997 Nr 115 poz. 741 (<https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19971150741>)
- [4] Rozporządzenie Rady Ministrów z dnia 21 września 2004 r. w sprawie wyceny nieruchomości i sporządzania operatu szacunkowego . Na podstawie art. 159 ustawy z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (Dz. U. z 2020 r. poz. 1990 oraz z 2021 r. poz. 11 i 234) , <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210000555/O/D20210555.pdf>