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The normative significance of the valuation report in light of the resolution on disposing of real estate under a "premises in exchange for land" settlement

Normatywne znaczenie operatu szacunkowego w świetle podjęcia uchwały o zbyciu nieruchomości z rozliczeniem „lokal za grunt"

Нормативное значение отчета об оценке объекта оценки в свете принятия решения об отчуждении недвижимости в порядке расчета «помещение в обмен на землю»

Нормативне значення звіту про оцінку майна в світлі прийняття рішення про продаж нерухомого майна з розрахунком "приміщення за землю"

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Summary: With effect from 1 April 2021, the Act of 16 December 2020 on Disposing of Real Estate under a "Premises in Exchange for Land" Settlement entered into force. This act introduced a new model of trading in real estate owned by communes and districts, which allows for a non-monetary settlement of part of the transaction. Article 4 (1) of the act identifies the first step necessary to manage local government's real estate, which involves adopting a resolution by the competent constituting body on disposing of real estate under a "premises in exchange for land" settlement. However, crucial for the present study is paragraph 2 of the said article. According to this provision, a draft resolution specifying the rules for disposing of real estate under a "premises in exchange for land" settlement shall include a valuation report determining the value of such real estate, drawn up by a property valuator not earlier than three months before submitting this draft resolution to the council. In the author's opinion, two research problems are associated with the current content of Article 4 (2), pertaining to 1) the impact of the validity period and purpose of the valuation report on the defectiveness of the resolution; 2) the consequences of integrating the valuation report with the content of the draft resolution that lays down rules on disposing of real estate under a "premises in exchange for land" settlement in terms of copyright matters. The dogmatic method was used during the research.

Key words: premises in exchange for land, resolution on disposing of real estate, valuation report

Streszczenie: Z dniem 1 kwietnia 2021 r. weszła w życie ustawa z dnia 16 grudnia 2020 r. o zbywaniu nieruchomości z rozliczeniem „lokal za grunt". Akt ten wprowadził nowy model obrotu nieruchomościami stanowiącymi własność gminy oraz powiatu, który pozwala na niepieniężne rozliczenie części dokonywanej transakcji. W ust. 1 art. 4 tej ustawy wskazano pierwszy etap niezbędny do zagospodarowania nieruchomością samorządową, którym jest podjęcie przez właściwy organ stanowiący uchwały o zbyciu nieruchomości z rozliczeniem „lokal za grunt". Kluczowy dla niniejszego studium jest jednak ust. 2 tego artykułu. Jak stanowi ten przepis, do projektu uchwały określającej zasady zbywania nieruchomości z rozliczeniem „lokal za grunt" dołącza się operat szacunkowy określający wartość tej nieruchomości, sporządzony przez rzeczoznawcę majątkowego nie wcześniej niż na trzy miesiące przed dniem przedłożenia radzie tego projektu uchwały. W ocenie autora, z obecnej treści art. 4 ust. 2 wynikają dwa problemy badawcze dotyczące: 1) wpływu okresu i celu sporządzenia operatu szacunkowego na wadliwość uchwały; 2) prawnoautorskich konsekwencji zintegrowania operatu

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szacunkowego z treścią projektu uchwały określającej zasady zbywania nieruchomości z rozliczeniem „lokal za grunt". Na potrzeby przeprowadzonych badań posłużono się metodą dogmatyczną.

Słowa kluczowe: lokal za grunt, uchwała o zbyciu nieruchomości, operat szacunkowy

Резюме: С 1 апреля 2021 года вступил в силу закон от 16 декабря 2020 года об отчуждении недвижимости в порядке расчета «помещение в обмен на землю». Данный закон ввел новую модель реализации недвижимости, находящейся в собственности гмины или повята, которая позволяет осуществлять неденежные расчеты по части осуществляемой сделки. В пункте 1 статьи 4 данного закона указан первый этап, необходимый для управления имуществом местных органов власти – принятие компетентным учредительным органом решения об отчуждении имущества в порядке расчета «помещение в обмен на землю». Однако для данного исследования принципиально важным является пункт 2 данной статьи. Согласно этому положению, к проекту решения, устанавливающему правила отчуждения недвижимого имущества в порядке расчета «помещение в обмен на землю», должен быть приложен отчет об оценке объекта оценки, определяющий стоимость такого имущества, составленный оценщиком имущества не ранее чем за три месяца до даты внесения данного проекта решения в совет. По мнению автора, из нынешнего содержания статьи 4 (2) вытекают две исследовательские проблемы, касающиеся: 1) влияния периода и цели составления отчета об оценке на дефектность решения; 2) правоустанавливающих последствий интеграции отчета об оценке объекта оценки и содержания проекта решения, определяющего принципы отчуждения недвижимости в порядке расчета «помещение в обмен на землю». Для целей проведенного исследования использовался догматический метод.

Ключевые слова: помещение в обмен на землю, решение об отчуждении недвижимости, отчет об оценке объекта оценки

Резюме: 1 квітня 2021 року набув чинності Закон від 16 грудня 2020 року про продаж нерухомого майна з розрахунком "приміщення за землю". Цим законом запроваджено нову модель торгівлі нерухомістю, що належить громаді та району, яка дозволяє здійснювати негрошові розрахунки частини проводженої трансакції. У п 1 ст. 4 цього ж Закону було вказано на перший етап, необхідний для правильного освоєння нерухомого майна місцевого самоврядування, яким є прийняття уповноваженим органом рішення про продаж нерухомого майна із розрахунком "приміщення за землю". Однак ключовим моментом для цього дослідження є параграф 2 цієї статті. Згідно з цим законом, до проєкту постанови, що визначає правила продажу нерухомого майна із розрахунком "приміщення за землю", додається звіт про оцінку вартості нерухомого майна, складений оцінювачем не раніше, ніж за три місяці до дня внесення цього проєкту рішення на розгляд радою. На думку автора, із дійсного змісту ст. 4 розділ 2 виникають дві проблеми дослідження: 1) вплив періоду та мети складання звіту про оцінку на дефектність рішення; 2) юридичноавторські наслідки інтеграції звіту про оцінку до змісту проєкту постанови, що визначає принципи продажу нерухомого майна з розрахунком "приміщення за землю". Для досягнення цілей даного дослідження було автором використано догматичний метод.

Ключові слова: приміщення за землю, закон про продаж нерухомого майна, звіт про оцінку майна

Introduction

On 1 April 2021, the Act of 16 December 2020 on Disposing of Real Estate under a "Premises in Exchange for Land" Settlement (hereinafter: PFL Act) came into effect.[1] This legal act undoubtedly introduced a new model of trading in real estate

1 Consolidated text: Journal of Laws [Dziennik Ustaw] 2023 item 1525.

owned by communes and districts and real estate that constitutes their resources. Contrary to rules on trading in real estate stemming from the Act of 21 August 1997 on Real Estate Management (REM),[2] the new model of disposing of real estate allows the sale of real estate from communal or district real estate resources with the inclusion in the price of this real estate of the price of premises and buildings transferred by the real estate buyer to the commune or district. This innovative approach to cashless settlements of all or part of the price of sale of self-government real estate required the creation of an additional procedure which would provide a basis to shape the future content of the contract of sale for such real estate. Only in this way is the commune or the district able to model the sale relationship so that a cash payment is due only on the difference between the price of the real estate obtained through a public tender and the price of premises or buildings that the buyer (investor) commits to transfer to the commune or the district as part of a "premises in exchange for land" settlement. Hence, Article 4 (1) identifies the first step necessary to manage local governments' real estate, which involves adopting a resolution on disposing of real estate under a "premises in exchange for land" settlement. Pursuant to that provision, such a resolution shall be adopted by the following organs:

1) the commune council – for real estate from that commune's real estate resources, pursuant to Article 18 (2) (9) (a) of the Commune Self-Government Law of 8 March 1990 (hereinafter CSGL);[3]
2) the district council – for real estate from that district's real estate resources, pursuant to Article (12) (8) (a) of the District Self-Government Law of 5 June 1998 (hereinafter: DSGL).[4]

However, the key to this publication is Article 4 (2) of the PFL Act, stipulating that "The draft resolution specifying rules for disposing of real estate under a 'premises in exchange for land' settlement, hereinafter 'real estate disposal resolution,' shall include a valuation report that specifies the value of this real estate drawn up by a property valuator not earlier than three months before the date of submitting this draft resolution to the council referred to in subsection 1." The act drafters believed, and expressed it in the explanatory memorandum,[5] that attaching the real estate valuation – carried out by a property valuator not earlier than three months before the date of submitting the draft resolution to the commune council – is justified for two reasons, which must also be invoked directly:

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2 Consolidated text: Journal of Laws 2023 item 2029 as amended.
3 Consolidated text: Journal of Laws 2023 item 1688 as amended.
4 Consolidated text: Journal of Laws 2023 item 573 as amended.
5 https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=766 [access: 3.11.2023].

1) based on, inter alia, the presented valuation, the commune council shall set the price for 1 square metre of the usable surface for premises or buildings that will be given by the investor to the commune in the future as part of a "premises in exchange for land" settlement; this price is reflected in the content of the resolution and is applied in further settlement between the commune and the real estate buyer;
2) the limitation of validity of this real estate valuation procedure to three months before the date of bringing the draft before the commune council, laid down in this procedure with regard to general rules stipulated in provisions on real estate management, also results from the adopted model of settlement between parties to the contract of sale of the real estate (this valuation is, as has already been signalled before, one of the factors that affect the arrangements for the price of 1 square metre of the usable surface of premises and a building subject to the "premises for land settlement", in effect under the public tender and in the entire period of cooperation between the commune and the investor; additionally, it is a basis to set the starting price of the real estate transferred in the public tender).[6]

The author of this article believes that the assumptions presented in Article 4 (2) of the PFL Act have not been subsequently expressed in the normative content of this provision. It may be added, as will be presented later in this paper, that the current content of Article 4 (2) creates two research problems pertaining to:

1) the impact of the validity period and purpose of the valuation report on the act's defectiveness;
2) the consequences of integrating the valuation report with the content of the draft resolution that lays down rules on disposing of real estate under a "premises in exchange for land" settlement and its copyright subject matter.

1. Significance of the valuation report to the resolution adoption procedure that takes into consideration rules on disposing of real estate under a "premises in exchange for land" settlement

One must first turn to the linguistic wording of Article 4 (2) of the PFL Act from the perspective of § 6, § 8, § 29 and § 154 of the Regulation of the Council of Ministers

6 Ibidem, p. 12.

of 20 June 2002 on "Legislative Technique" (hereinafter: LT).[7] Two assumptions crucial to further discussion result from the provision analysed:

1) the valuation report that specifies the value of real estate drafted by a valuator shall be attached to the draft resolution on rules of disposing of real estate under a "premises in exchange for land" settlement;
2) the real estate value specification must be done by a property valuator not earlier than 3 months before the date on which the said draft resolution is submitted to a competent decision-making authority.

The first assumption means that one needs to answer the question of what role will the document prepared by the valuator play in the content of this act (resolution). Pursuant to LT, legal acts, regardless of their rank (§ 143 or § 141), should be worded so that they clearly and precisely express the legislator's intentions to the addressees of these norms (§ 6). Moreover, the drafters must use correct linguistic expressions in their basic and universally accepted meaning (§ 8 (1)). The term "attach" means to add a thing to another thing[8] and cause a thing to become larger by adding a certain element to it.[9] It is additionally pointed out here that the valuation report is a key element especially from the perspective of Article 4 (11) of the PFL Act, since the total price of premises and buildings allocated for transfer by the investor to the commune or district as part of a "premises in exchange for land" settlement cannot be higher than the value of the real estate which the resolution concerns, specified in the valuation report attached to the draft act. Also, one cannot avoid Article 6 (3) of the PFL Act either, pursuant to which the competent authority specifies the starting price of the real estate disposed of in the public tender as not lower than the value of this real estate specified in the valuation report attached to the draft resolution on disposing of the real estate. It needs to be stated in this context that this valuation report not only supplements the content of the resolution but also confirms the validity of solutions specified by this resolution. In this sense, the valuation report will constitute an attachment to the legal act within the meaning of § 29 of LT with all related implications. This conclusion also confirms a completely different approach to the valuation report in the REM, in which the legislator does not propose a similar method of using the valuation report as one of the elements of acts issued by executive and law-giving authorities, under their competence. In light of Article 67 of the REM, the value of the real estate resulting from the valuation report is the main criterion for setting the real estate's

7 Consolidated text: Journal of Laws 2016 item 283.

8 https://sjp.pwn.pl/sjp/dolaczyc;2453200.html [access: 3.11.2023].

9 https://wsjp.pl/haslo/podglad/2788/dolaczyc/3915395/do-akt [access: 3.11.2023].

price, which, as a rule,[10] should not be lower than its value. Moreover, the analysed construction of "attaching" the valuation report to the normative act of a competent authority was not applied during a similar procedure in its model, that is the non-tender sale of real estate at a discount (Article 68 (1) of the REM). A competent authority may give a discount on the set price not lower than its value (Article 67 (3) of the REM), based on a governor's ordinance or a resolution of the council or assembly. Apart from this, such a legal act will specify, in particular, the conditions for granting discounts and percentage rates. In turn, the absence of a clear reference to the use of a valuation report during the resolution-making procedure under REM in no way compromises its rank and significance for maintaining correctness when disposing of the commune's real estate.

The second assumption involves the valuation report having to meet a specific deadline. Pursuant to 4 (2) of the PFL Act, the valuation report should be prepared by a certified expert valuator, not earlier than three months before the date of submitting the draft of the analysed resolution to the competent decision-making authority. Special focus must be given to the fact that this timeframe will not be very significant at the time of adopting a relevant resolution. Such a solution must be given credit because it aptly accounts for the circumstances on which the executive authority has no impact, that is how the commune's decision-making authority is organised and donated to. In cases for the legality of these resolutions, especially those pending before a governor, the moment of submitting the draft resolution will be crucial even though a considerable amount of time may pass between that moment and the moment of adopting that resolution. Practical problems that may arise here are associated with rules on the validity of the valuation report under REM, which, pursuant to Article 1 (2) of the PFL Act will be applied in unregulated cases. This is why, contrary to the explanatory memorandum to the PFL Act referred to before, one needs to emphasise that this provision only points to the obligation of a specific validity of such a report and its being able to be used in this procedure not to its validity because this question results from provisions of the REM. Pursuant to Article 156 (3) of the REM, the valuation report may be, as a rule, used for the purpose for which it was created within 12 months from the date of its creation. It also needs to be taken into account that to set the price under Article 67 (1) and (2), the executive authority must also rely on the value of this real estate, which is confirmed by the valuation report. It is worth pointing out that after

[10] Exceptions to this assumption include a discount on the selling price (Article 68 of the REM) and the starting price for the second tender (not lower than 50% of the value, Article 67 (2) (2) of the REM) and negotiations with the buyer (not lower than 40% of the value, Article 67 (2) (4) REM).

those 12 months from the date of making the report, its further use is possible if a property valuator confirms that document's validity within the next 12 months of this confirmation. Naturally, all of this is on the condition that legal determinants or factors referred to in Article 154 of the REM have not changed. Therefore, it is vital to adhere to the maximum 24-month period for carrying out the entire procedure counted from the date of drafting the valuation report, to the adoption of the resolution that lays down rules for disposing of the real estate under a "premises in exchange for land" settlement, until the date of signing of a contract that transfers the ownership of the real estate under the "premises in exchange for land" scheme. One can use, analogically, the robust achievements of administrative courts in rulings on cases where the valuation report constitutes evidence detrimental to the settlement of the case in both instances.[11] Therefore, just like in administrative or court proceedings, where both instances must rely on up-to-date valuation reports, in this case of the disposal discussed here, each manifestation of the intent of the commune's body relating to the value of the real estate must be made within the period of validity of the valuation report.

2. The importance of the purpose and lapse of valuation report validity for the defectiveness of a "premises in exchange for land" resolution

The lapse of validity of the valuation report gives rise to two potential problems which may ultimately force the organiser of the tender to restart the entire process. It is crucial to expose the fact that pursuant to Article 156 (4) of the REM, a valuation report may be updated only by the valuator who has prepared it. It is crucial to

[11] See judgement of the Supreme Administrative Court of 1 March 2017, II OSK 1058/11, I OSK 1074/15, LEX no. 2316835; judgement of the Supreme Administrative Court of 2 October 2012, II OSK 1058/11, LEX no. 1234113, which directly prescribe that the date of validity of the valuation report also applies to the executive organ, because it is a competent authority in this case and its responsibility is not limited solely to reviewing the first instance ruling, but also involves re-examination of the case. Given the above, the case-related material, that is the valuation report, must be usable. See also judgement of the Supreme Administrative Court of 12 October 2017, I OSK 901/17, LEX no. 244037; judgement of the Supreme Administrative Court of 29 January 2019, OSK 608/17, LEX no. 2634376; judgement of the Supreme Administrative Court of 11 February 2010, I OSK 564/09, LEX no. 898206; judgement of the Supreme Administrative Court of 11 February 2010, I OSK 564/09, LEX no. 898206; judgement of the Supreme Administrative Court of 27 February 2018, I OSK 854/16, LEX no. 247888; judgement of the Supreme Administrative Court of 5 November 2020, II FSK 1943/18, LEX no. 30962887; judgement of the Supreme Administrative Court of 2 October 2012, II OSK 1058/11, LEX no. 1234113.

establish whether after the validity of the report is confirmed it may still be relied on for the purpose for which it was drafted. It is a material circumstance because the additional 12 months is counted not from the date of confirming the validity, but from the date of lapse of the period of the first 12 months counted from the date it is made. Therefore, the confirmation will have a retrospective effect from the date of loss of validity, for the next 12 months. In such a situation, a commune's executive authority must judge whether a later confirmation of the validity of the valuation report after cessation of reasons for it being impossible to be confirmed immediately after the lapse of the first 12 months will still allow it to finalise the procedure. Such a situation raises further doubts because a valuation report is to be attached to the resolution, which is a normative act. Amending the attachment – to confirm its validity – will require an amendment in the resolution itself by adding a new, second, attachment next to the existing one or a change in the original attachment. Pursuant to Article 156 (4) of the REM, the validity of a valuation report shall be confirmed by placing a relevant clause in this valuation report. Because this resolution is a foundation of the entire procedure related to disposing of real estate under the "premises in exchange for land" programme, the executive authority cannot put the matter in motion because it does not have an adopted and up-to-date version of this legal act. It must also be pointed out that confirming the valuation report is not an automatic process. A property valuator must take account of the changes in the legal determinants or essential changes in factors such as, e.g. purpose in the local zoning plan, the condition of the real estate and available information about the prices, incomes and characteristics of similar real estate. The very fact that the valuator believes that the value of the real estate does not change, cannot be taken as grounds to conclude that members of a competent decision-making authority will not request an assessment of the correctness of the drafting of the valuation report by a professional association of property valuators. The possibility of substantial verification of a valuation report results from Article 157 of the REM. The party's mere dissatisfaction with an expert's opinion or the party's subjective belief that the valuation of the real estate is incorrect is not sufficient to effectively challenge its reliability unless confirmed by objectively verified proof.[12] The content of Arti-

[12] E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz*, 2019 [LEX database], Article 157 [access: 20.10.2023]; see also: judgement of the Provincial Administrative Court in Łodź of 4 August 2016, II SA/Łd 456/16, LEX no. 2105357; judgement of the Provincial Administrative Court in Gorzów Wielkopolski of 12 February 2020, II SA/Go 848/19, LEX no. 2803950; judgement of the Provincial Administrative Court in Łodź of 9 December 2016, II SA/Łd 457/16, LEX no. 2175974; judgement of the Provincial Administrative Court in Warszawa of 11 February 2020, I SA Wa 1781/19, LEX no. 3085679.

cle 157 (1) of the REM does not introduce any personal limitations on requesting that the professional association of valuators assess the questioned report.[13] There is no doubt that the ordering party, like those directly concerned, will be able to raise a challenge on the grounds of an insufficient number of comparable transactions, defective description of the real estate that is the subject of valuation, calculating errors or the report lacking in internal cohesion (logic).[14] Therefore, even without holding specific professional qualifications, it is possible to challenge the valuation report in terms of formal correctness: completeness and usefulness for the purpose that it is to serve, particularly in terms of criteria set for generally applicable rules.[15] To confirm these arguments, one may use the generally proven line of judicial decisions which is most pronouncedly expressed in the judgement of the Supreme Administrative Court of 17 October 2014: "The authority that runs the proceedings, and an administrative court in particular, cannot go beyond substantive validity of the valuator's opinion because it does not have the special information that an expert does. However, it should assess the valuation report from the formal angle, that is examine whether it was prepared and signed by an authorised person, whether it includes elements required by law, whether it does not include ambiguities, errors, or shortcomings that should be corrected or supplemented, so that the document may have evidentiary value."[16]

Questions such as choosing an appropriate approach, method and technique for evaluating real estate, choice of real estate for comparison or setting adequate correction coefficients require specialist knowledge. This is why substantive verification of the content of the valuation report may only be performed by a professional association of property valuators.[17]

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13 E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany*, 2023 [LEX database], Article 157 [access: 20.10.2023]; see also: judgement of the Supreme Administrative Court of 28 April 2020, I OSK 557/19, LEX no. 2978263; judgement of the Supreme Administrative Court of 19 May 2021, I OSK 3148/18, LEX no. 3206234.

14 Judgement of the Provincial Administrative Court in Kraków of 9 March 2021, II SA/Kr 1367/20, LEX no. 3190636.

15 E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany*, 2023 [LEX database], Article 157 [access: 29.10.2023]; judgement of the Supreme Administrative Court of 15 May 2018, II FSK 2970/17, LEX no. 2504605; judgement of the Provincial Administrative Court in Bydgoszcz of 25 February 2020, II SA/Bd 75/20, LEX no. 3065473; judgement of the Supreme Administrative Court of 17 October 2014, I OSK 446/13, LEX no. 1598202.

16 Judgement of the Supreme Administrative Court of 17 October 2014, I OSK 446/13, LEX no. 1598202.

17 Judgement of the Provincial Administrative Court in Kraków of 10 February 2021, II SA/Kr 1319/20, LEX no. 3148517; judgement of the Supreme Administrative Court of 11 December 2020, I OSK 3142/18, LEX no. 3109555; judgement of the Supreme Administrative Court of 10 July 2020, I OSK 2659/19, LEX no. 3058554; judgement of the Provincial Administrative Court in Poznań of 19 February 2021, II SA/Po 378/20, LEX no. 3156540.

The presented valuation is a basis for competent decision-making authorities to set an appropriate price for 1 square metre of usable space for premises or buildings transferred to the commune by the investor as part of a "premises in exchange for land" settlement. The total price of premises or buildings allocated to be transferred by the investor to the commune as part of a "premises in exchange for land" settlement, set based on the content of this resolution, cannot be higher than the value of the transferred real estate. Moreover, the price of 1 square metre of usable space of premises or building allocated for transfer to the commune as part of a "premises in exchange for land" settlement cannot be higher than the value of the mean conversion factor of replacement cost for 1 square metre of usable space of residential buildings within the meaning of Article 2 (14) of the Act of 20 July 2018 on State Assistance in Bearing Housing Expenses in the First Years of Renting a Flat.[18]

Limitations to the values of rates proposed by the commune or district that have their grounding in statutes (Article 4 (8) and (11)) and in the content of the valuation report itself, will allow the commune council to design a maximum compensation algorithm for the due amount to be paid by the investor, expressed by the product of maximum usable space of premises and buildings transferred to the commune and the price for 1 square metre of usable surface area of these premises and buildings (these values are prescribed in the resolution on disposing of real estate). However, it is still worth remembering that in this procedure, one more rate will be applied, over which the commune council will have no influence – the price of the real estate established by the executive authority, which will by default be equal to or greater than the value of the real estate. Because the content of the resolution refers to the value of the real estate and the tendering procedure, and the final settlement with the investor refers to the price of the real estate, the commune council's calculations, especially in terms of proportion of the cash performance to the non-pecuniary performance, must be treated as a preliminary or even projected calculation.

Given the importance of the valuation report to this procedure of disposing of real estate under a "premises in exchange for land" settlement and the probability of the said problems associated with using this report, one must agree with the statement included in the explanatory memorandum that this valuation report will not only constitute a basis for amounts quoted in the resolution analysed but it will also serve as a basis to determine the starting price for tender purposes. For this reason, it is proposed that the objective of the valuation report be defined as broadly as possible by the ordering party, e.g. specification of the value of the real estate for

18 Consolidated text: Journal of Laws 2023 item 1463 as amended.

the purpose of disposing of it under a "premises in exchange for land" settlement. Such a framework will enable both the executive authority and the decision-making authority of the commune to use the valuation report.

The conclusion of the sale agreement in the event of a defect in the resolution due to an erroneously specified purpose in the valuation report or as a result of the outdating of the valuation report results in the application of Article 58 of the Civil Code, as the act performed will be contrary to the law, both in formal terms (breach of the procedure for the establishment of a legal relationship) and in material terms due to a defect in one of the most important components of the content of that legal relationship, i.e. the sale price of the real estate. It should be assumed that the provisions analysed here are *ius cogens* in nature and, therefore, a violation of the principles of sale of local government property regulated in the PFL Act will attract the sanction of absolute nullity indicated in Article 58 § 1 of the Civil Code.[19]

3. Valuation report and copyright of property valuators

As mentioned, a resolution on disposing of the real estate under a "premises in exchange for land" settlement is a normative act with a valuation report attached. However, given that the valuation report may be a work within the meaning of Article 1 of the Copyright Act[20] the moment it is integrated with the content of this resolution, a problem arises about the protection of the copyright of the author of this valuation report at the level not yet recognised in public real estate trading. Valuation reports had been one of the key events for managing real estate belonging to local government units (LGUs) or the State Treasury, which co-modelled how the price of the real estate was set. This price, as a rule, could never be set by competent authorities below the real estate's value resulting from this very valuation report. Also, the time-constrained nature of this document had to be accounted for, i.e. the time in which the entire procedure is supposed to close under the pain of having to obtain a new valuation report. Sometimes authorities that manage the

[19] Judgment of the Court of Appeal in Poznań of 26 March 2009, I ACa 66/09, LEX no. 1641247; judgment of the Supreme Court of 13 September 2001, IV CKN 381/00, OSNC 2002, no. 6, item 75; order of the Provincial Administrative Court in Rzeszów of 30 September 2016, II SA/Rz 225/16, LEX no. 2163910; judgment of the District Court in Gdańsk of 9 February 2016, I C 1751/15, LEX no. 1999410; order of the Supreme Court of 17 February 2004, V CK 86/04, LEX no. 1126892.

[20] Act of 4 February 1994 on copyright and related rights, consolidated text: Journal of Laws 2024 item 1254.

real estate belonging to LGUs or the State Treasury invoke the copyright protection of the person who drafted the valuation report to refuse access to the case file or deny requests for its copies. This problem was part of a broader issue of the use of works for implementing public tasks (such as urban, architectural, or planning documents). The Supreme Administrative Court has pointed out on many occasions that "public information includes documents not only directly written and created by a public authority, but also documents that the authority uses to implement responsibilities legally vested in that authority, even if another entity holds the copyright."[21] This is why in this light it is necessary to distinguish between the problem of qualification of the valuation report as a work in the understanding of the Copyright Act and the obligation to make it available to other entities without violating the interest of the author.[22] What needs only to be signalled here is that in 2007 subsection 1a[23] was added to Article 156 of the REM, under which a person may request that the copies of a valuation report made by them be certified or that certified copies of the valuation report be given to them, as long as it is justified by that person's valid interest. Currently, there are doubts in the established line of judicial decisions as to how to make the valuation report available to the interested person, because two opposing views emerge regarding the legal basis for authorising access to valuation reports.[24] There have been rulings that declared that it is the Freedom of Information Act[25] that solely applies in this matter, but there are also

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21 Judgement of the Supreme Administrative Court of 15 July 2011, I OSK 667/11 [Legalis database]; see also: judgement of the Supreme Administrative Court of 7 December 2010, I OSK 1774/10 [Legalis database] and judgement of the Provincial Administrative Court in Szczecin of 8 January 2015, II SAB/Sz 145/14 [Legalis database].

22 See a commentary by E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany*, 2023 [LEX database], Article 156, which concludes that "[…] the valuation report is not always equalled with a work within the meaning of the above-mentioned Act on Copyright and Related Rights, and besides, even if it does have features of a work, its character of a document does not allow for it to be treated solely as a work, without taking into consideration its function as evidence. This would be contrary to Article 156 (1a) REM since it would prevent public administration from performing its obligations imposed on them by this provision."

23 Article 156 (1a) was amended by Article 1 (54) of the Act of 24 August 2007 on amending the real estate management act and on amending certain other acts (Journal of Laws 2007 no. 173, item 1218) amending REM as of 22 October 2007, which was amended by Article 1 (26) (a) of the Act of 20 July 2017 on amending the real estate management act and certain other acts (Journal of Laws 2017 item 1509) effective as of 1 September 2017.

24 See C. Chabel, *Operat szacunkowy jako przedmiot udostępnienia w trybie ustawy o dostępie do informacji publicznej*, 2015 [LEX database].

25 Judgement of the Provincial Administrative Court in Kraków of 6 September 2021, II SAB/Kr 134/21, LEX no. 3227856.

those which claim that Article 156 (1a) of the REM lays down different rules and procedures for making information available.[26]

The situation looks entirely different in the issue analysed here because this report will form an integral part of the normative act which will be announced publicly, and thus the conflict over whether Article 156 (1a) of the REM is *lex specialis* towards provisions of the Freedom of Information Act loses its materiality. However, protecting the interests of this report's author remains an open question. One must point to Article 4 of the Copyright Act which excludes certain creative results of human activity from copyright protection. It is worth pointing out that this problem of the valuation report well illustrates one of the concepts expressed by copyright scholars and commentators who argue that the terms "are not subject to copyright" and "are not a work" are not the same.[27] Therefore, after meeting certain requirements, some creations under Article 4 of the Copyright Act, may be qualified as works within the meaning of copyright law;[28] however, "they will not enjoy protection afforded to works"[29] or "cannot become a subject of somebody's excluded rights."[30] In this sense, if a valuation report meets features of individual character and originality, it will be protected under copyright starting from the initiation of the process of adopting the resolution discussed here. After passing this act, in light of Article 4 of the Copyright Act, it loses this attribute and, thus, a valuator, as an author, is no longer entitled to pursue their personal and economic rights. However, it is worth looking from a perspective in which such exclusion is applied only if the creation analysed is to be used for the purpose and in the function defined in Article 4 of the Copyright Act.[31] Therefore, in the case of valuation reports, the focus will be on the methods of estimating the value of the real estate that this act concerns. Whoever wishes to use the content of such a valuation report to make

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26 Judgement of the Provincial Administrative Court in Szczecin of 29 September 2020, II SAB/Sz 89/20, LEX no. 3100139.

27 See more in G. Pacek, in: *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ed. A. Michalak, Warszawa 2019, Commentary on Article 4 line 4.

28 See the opposing view presented by A. Nowicka, in: *Komentarz do ustawy o prawie autorskim i prawach pokrewnych. Ustawy autorskie. Komentarze*, vol. 1, ed. R. Markiewicz, Warszawa 2021 [LEX database], Article 4 line 5, who claims that such creations "are not works, and thus are not subject to copyright protection, even if they are an expression of creative activity of an individual and have been somehow agreed. As non-works, they are beyond the scope of the statute and their authors are not entitled to personal copyrights or to author's economic rights."

29 Ibidem.

30 J. Barta, R. Markiewicz, A. Matlak, in: *System Prawa Prywatnego*, vol. 13. *Prawo autorskie*, ed. J. Barta, Warszawa 2017, p. 76.

31 See J. Błeszyński, *Ochrona opisów patentowych i ochronnych na gruncie prawa autorskiego*, Kwartalnik UPRP 2013, no. 5, p. 63.

a valuation of neighbouring real estate in terms of selecting an appropriate approach, method and technique for preparing a valuation of real estate and correction coefficients must now respect at least personal copyright.[32] However, this position is different from the one prevailing among copyright scholars, which assumes that this is an overall and definite exclusion.[33] As a result, intellectual creations identified in Article 4 of the Copyright Act are not entitled to copyright protection regardless of whether these materials are used in whole or in part and irrespective of the context of this use.[34]

What also needs to be pointed out is that the copyright protection of a valuation report used to pass a "premises in exchange for land" resolution may be excluded based on the second point of Article 4 of the Copyright Act as a project or as official materials. It will be treated as official material when this act is considered an act of internal law. On the other hand, remaining in the realm of assessment of the resolution is due to the position of copyright scholars who claim that the normative act identified in Article 4 (1) of the Copyright Act is understood materially, pursuant to the Constitutional Court's interpretation of this term,[35] and thus is involved here is a legal act that includes abstract and general norms.[36]

Conclusions

The linguistic wording of Article 4 (2) of the Act on Disposing of Real Estate under a "Premises in Exchange for Land" Settlement (PFL) from the perspective of § 6, § 8, § 29 and § 154 of the Regulation on "Legislative Technique" (LT) and other

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32 See the opposing view presented by A. Nowicka, in: *Komentarz do ustawy o prawie autorskim*…, Article 4 line 5.

33 R.M. Sarbiński, in: *Prawo autorskie i prawa pokrewne. Komentarz*, eds. W. Machała, R.M. Sarbiński, Warszawa 2019 [LEX database], Article 4, line 7; G. Pacek, in: *Ustawa o prawie autorskim*…, ed. A. Michalak, Commentary on Article 4 line 5.

34 See A. Szyszka, *Uwagi o operacie szacunkowym w świetle ustawy o prawie autorskim i prawach pokrewnych*, Przegląd Prawa Publicznego 2015, no. 11, p. 14; judgement of the Supreme Court of 13 January 2006, III CSK 40/05, LEX no. 176385; judgement of the Supreme Court of 31 March 2005, I ACa 83/05, LEX no. 535043.

35 Judgement of the Constitutional Tribunal of 3 December 2009, Kp 8/15, OTK-A 2016, no. 11, item 1.

36 J. Barta, R. Markiewicz, A. Matlak, in: *System Prawa Prywatnego*, vol. 13, p. 76; A. Niewęgłowski, *Prawo autorskie. Komentarz*, Warszawa 2021, Article 4, Nb. 3; A. Nowicka, in: *Komentarz do ustawy o prawie autorskim*…, Article 4, Nb. 15. A different view in: *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ed. E. Ferenc-Szydełko, 4th ed., Warszawa 2021, Nb. 2, who directly allows acts of internal law to be in this category.

provisions, in particular Article 4 (11) and Article 6 (3) of the PFL Act, leads to a conclusion that the valuation report is a key element of the real estate disposal procedure in the light of the PFL Act, which means that it is a document which does not only supplement the content of the resolution but also confirms the correctness of solutions specified by that resolution. This conclusion highlights doubts associated with the principles of validity of valuation reports resulting from the Act on Real Estate Management (REM). It needs to be highlighted that Article 4 (2) of the PFL Act only identifies the obligation of a specific validity of such a valuation report and its usability in this procedure. The validity of the opinion of a valuator results, however, from REM provisions. Pursuant to Article 156 (3) of the REM, a valuation report may be, as a rule, used for the purpose for which it was created within 12 months from the date of its creation. If one were to assume that the valuation report should be treated as a component of the real estate disposal resolution, there would be a question about the rules for updating this report. This would require an amendment in the main body of the resolution by adding a new, second, attachment next to the existing one or a change in the original attachment. Because this resolution is a foundation of the entire procedure related to disposing of real estate under the "premises in exchange for land" programme, the executive authority cannot put the matter in motion because it does not have an adopted and up-to-date version of this legal act.

Because this valuation report will be an integral part of a normative act, which will be publicly announced, it raises the issues of protection of the interest of the author of this valuation report. One must point to Article 4 of the Copyright Act which excludes certain creative results of human activity from copyright protection. If a valuation report meets features of individual character and originality, it will be the subject of copyright protection from the initiation of the process of adopting the discussed resolution. After passing this act, in the light of Article 4 of the Copyright Act, it loses this attribute and, thus, a valuator, as an author, will no longer be entitled to pursue their personal and economic rights. However, it is worth looking at from the perspective that such exclusion is applied only if the creation analysed will be used for the purpose and in the function defined in Article 4 of the Copyright Act. Ultimately, the resolution, with the valuation report as an annex forming its integral part, constitutes the basis for the entire procedure set out in the PFL Act. The defectiveness of this resolution consisting in an erroneously specified purpose in the valuation report or resulting from the announcement of a tender or the conclusion of a sale agreement after its validity has expired means a violation of the principles of real estate trading, which are regulated by mandatory provisions.

As a result, the legal act (the sale agreement) will be absolutely invalid as having been drawn up contrary to the law.

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