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PENALTY FOR 'LAWLESSNESS OF USE' OF A BUILDING OBJECT – COMMENTARY (GLOSS) TO THE JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT OF 11 MAY 2017, II OSK 2283/15[1]

Abstract

This commentary (gloss) to the judgment of the Supreme Administrative Court of 11 May 2017, file reference number II OSK 2283/15, concerns the issue of imposing a penalty for 'lawlessness of use' of a building object. In the opinion of the Supreme Administrative Court, the allegation that a public administration organ should impose a penalty for unlawful accession to only one investor, despite the fact that there are two of them, which indicates that an administrative penalty should be imposed on all investors. The basic issue to consider is the imposition of a penalty that should take into account the circumstances of the specific case, including the actual and legal use of real estate.

Keywords: completion of the construction, use of the building objects, lawlessness use, administrative penalty

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[1] LEX No. 2303846.

The judgment of the Supreme Administrative Court (hereinafter: NSA) concerns a case from a cassation appeal against the judgment of the Voivodeship Administrative Court in Gliwice (hereinafter: WSA) of 6 May 2015, II SA/GL 90/15[2] on the penalty for lawlessness regarding the use of a building object ('lawlessness use' or 'lawlessness of use'), which dismissed the cassation appeal. It should be noted at the outset of this glossa that it is of an approving nature. The aim of the deliberations is to clarify the legal solutions and to develop the material and legal assessment of the Court in relation to the examined matter.

Factual and legal status

The decision on the building permit for a single-family residential building was obtained by two investors, who at the same time were co-owners of the property covered by this permit. Under the building permit, the investors started to carry out construction works. In May 2014, the District Building Supervision Inspectorate (hereinafter: PINB) conducted an inspection of investors' real estate. During the inspection, PINB established that on the real estate a building has been constructed which bears the characteristics of use, but the investors did not express a formal willingness to use of this building object in the form of a notification to the building supervision authority with information about the completion of the construction work. During subsequent inspections, PINB stated that the ground floor of the building is finished (kitchen, bathroom, bedroom and living room), while the attic is in its raw closed state. During the control inspection it was also established that the ground floor of the building is used by the investor. Moreover, the investor, during the inspection of the building object presented a copy of the decision of the District Court in which he was granted security of the claim by giving him the right to exclusive use of the real estate developed with a residential building, obliging him at the same time to bear all fees related to the use of this real estate, until all civil proceedings will be finally concluded. Bearing in mind the identified factual and legal state, PINB issued a decision in which it confirmed the findings of the inspection that the use of the building had been commenced despite the lack of formal notice of completion of the construction and imposed an administrative penalty of 10 000 PLN on the investor for commencement of using of a single-family residential building with-

[2] LEX No. 1754369.

out the legally required formal notification of the completion of the construction. In the opinion of PINB, only one of the investors was guilty of lawlessness of use of the building.

Against this decision, the investor submitted a complaint to the Voivodeship Building Supervision Inspectorate (hereinafter: WINB). WINB upheld the decision, stating that PINB, as the first instance authority, correctly imposed the penalty for lawlessness of use of the building object in a situation where the investor used this building.

The investor then filed a complaint against the decision issued by WINB to the Voivodeship Administrative Court in Gliwice. The WSA issued a judgment in which it dismissed the complaint, thus confirming the correctness of the findings of the authorities of both instances. In the WSA's opinion, the imposition of the penalty specified in art. 57 section 7 of the Construction Law Act of 7 July 1994[3] is mandatory in each case when the party was obliged to file a notification or obtain a permit for use, and the investor has arbitrarily proceeded to have made use of the building objects. In addition, the WSA noted that the building supervisory authority has no possibility to waive the penalty due to lawlessness of use of the building object. The legislator, when using the phrase "imposes a penalty", does not give any freedom in the interpretation of the law in this respect. Therefore, in the WSA's opinion, the commencement of use of a building object within the meaning of the said provision justified the imposition of a financial penalty. The investor filed a cassation appeal against the WSA judgment with the Supreme Administrative Court, which, however, shared the position of the court of first instance and dismissed it.

NSA's decision and reasoning

The NSA shared the factual findings adopted by the WSA following the authorities of both instances, stating that it was clear from the evidence gathered in the case that the investor started using the building despite the lack of formal notice of completion of the construction. According to the NSA, the complainant's accusation that only one investor was fined for illegally using the building is unfounded, even though there are in fact two of them. Therefore, as the complainant argued, on the assumption that the use of the building has taken place at all, the penalty should be imposed on all investors.

[3] Consolidated text: Dz. U. (Journal of Laws) of 2009, item 1186, as amended.

The NSA stated that in this case it was fully justified to impose an administrative penalty on only one investor. The penalty for lawlessness of use of a building object should take into account the circumstances of the specific case. In the present case, it was undisputed that only the applicant in cassation, to whom the District Court, in its decision, granted the right to exclusive use of the real estate developed with a residential building, commenced using it. Therefore, knowing that the first investor was granted by the District Court the right to use the real estate in question, the second investor had neither the actual nor the legal possibility to use that building, and thus could not be the addressee of the order issued under art. 57 section 7 of the Construction Law.

Evaluation of the NSA position

For the purposes of the analysis of the NSA judgment in question, it should be noted at the beginning that the Construction Law does not contain a definition of the term "use of the building objects". However, in the light of the provisions of the Construction Law, in particular art. 5 section 2, 61, 71 and 71a thereof, it may be assumed that the understanding of this concept is similar to the "use of things" as commonly understood (also in terms of civil law), and in the case of the use referred to in art. 57(7), it does not to have the permanent or complete character,[4] since the legislature itself indicates that the basis for imposing the penalty for lawlessness in use is simply the commencement of use of the building object, even in its part. The jurisprudence of administrative courts often indicates that the notion of use of a building object should be understood in the sense of common language, as the use of a thing, with no meaning of its scope and duration, the scale of which would be anyway difficult to determine clearly.[5] The regulation for the commencement of use can be added to the mechanisms regulating the use of building object, as a preliminary activity in the process of using it. The law introduces an obligation to notify and obtain a permit to use the building object. The permit for use is needs-oriented in accordance with the general principles of

[4] Judgment of the Supreme Administrative Court of 18 November 2010, II OSK 1715/09, LEX No. 746749; judgment of the Supreme Administrative Court of 10 June 2010, II OSK 983/09, LEX No. 597984.

[5] Judgment of the Supreme Administrative Court of 27 February 2007, II OSK 386/06, LEX No. 927649; judgment of the Voivodeship Administrative Court in Gliwice of 11 January 2013, II SA/Gl 936/12, LEX No. 1296154.

the construction law. Permission for use has two forms, the first one is given by notification as a so-called tacit agreement by a competent administrative authority, while the second one takes the form of an administrative decision.

The notice of completion of the construction is an expression of willingness to start using the building object, which should be understood as a situation which corresponds to a specific factual state, consisting in the commencement of use of the object or its part, in particular in accordance with the provisions of Chapter 6 of the Construction Law regulating the maintenance of building objects.[6] The form of the notice of completion is a simplified administrative procedure where the authority does not issue an administrative decision in case of a positive settlement. The commencement of use, by way of notification, is the general rule applicable in the case of completion of a construction work for which a building permit or notification of construction referred to in art. 29 section 1, 1a and 19 is required, subject to art. 55 and art. 57 of the Construction Law. In order to put the building into use, the investor should submit a notice of completion at least 14 days before the intended date of entry into use. Completion of the construction in the technical and constructional sense requires that the investor meets the conditions provided by the construction law. The building object should be in a technical condition such that it can be accepted and put into normal use and service.[7] The notification of the intention to commence using of the building object should be made in writing, containing the investor's data and indicating the object concerning the notification. The notification in accordance with art. 57 section 1–2 of

[6] Judgment of the Voivodeship Administrative Court in Wrocław of 19 February 2013, II SA/Wr 793/12, LEX No. 1330371.

[7] See judgment of the Supreme Administrative Court of 20 June 1996, SA/Wr 2735/95, LEX No. 29545; Different way (without referring to the technical conditions) the scope of a completion of the construction was presented in the judgment of the Supreme Administrative Court of 21 August 1997, II SA/Kr 998/96, LEX No. 1691727; "As the completion of the construction of a building object within the meaning of art. 103(2) of the Construction Law shall be deemed such a state in which it is possible, even partially, to start using this object in accordance with its intended purpose. The recognition of the construction as completed shall not be hindered by a partial failure to carry out finishing, fitting-out or other works of a similar nature that may be carried out in the building in use." As a result, taking into account the very different views presented in the judgments of the Supreme Administrative Court (NSA), and accepting the rejection of the above contradictory positions, it would be worth considering a more general and accurate formulation contained in the judgment of the Supreme Administrative Court of May 7, 1997 (SA/Rz 538/95, CBOSA) that as the completion of the construction should be recognised such condition "in which it will be at least partially possible to start using the given building object in accordance with its intended purpose." Mzyk, E., *Orzecznictwo sądowo-administracyjne w sprawach budowlanych*, "Magazyn Prawniczy Ekonomiczny i Socjologiczny" 1998, No. 1, p. 21–22.

the Construction Law should also include documents required by law. The scope of documents which the investor is obliged to attach to the notice of completion of the construction is closely related to the conducted construction and enables a formal assessment of its correctness.[8] To the adopted principle, according to which the use of a building object can be commenced after the expiry of the deadline for the competent authority to object to the investor's notification of the completion of the construction work, the legislator introduced in art. 55 of the Construction Law three exceptional situations in which the completion of the construction process requires obtaining a permit for use. These situations have been identified by: 1) indication in the Act of the categories of building objects requiring a permit for use; 2) reference to the provisions of the Act providing for the creation of such an obligation; 3) indication of the possibility to start using the building object before all construction works have been completed. Moreover, the legislator gives the investor the opportunity to apply for a decision on the permission to use instead of making a notice of completion of the construction. All regulated possibilities of obtaining a permit to use a building object are not subject to recognition by the competent authority. Therefore, it can be said that the sole basis for imposing the obligation to obtain a permit to use a building object is a provision that boils down to a complete determination of three situations.[9]

If a building object is constructed and then used in lawlessness, then it is reasonable to impose a fine on the investor. The investor, at the stage of completion of a building object, has the status of the only one party who has the legal interest in bringing about the possibility of using such object.[10] Narrowing the party only to the investor is a result and a consequence of lawful conduct of the investor, who, when starting to use the object, is to show whether the constructed object was built in accordance with the approved construction design and conditions of the building permit, and therefore whether it is technically possible to allow it to

[8] Judgment of the Supreme Administrative Court of 27 March 2007, II OSK 520/06, LEX No. 503755.

[9] Serafin, S., *Prawo budowlane. Komentarz*, Warszawa 2006, p. 400.

[10] According to E. Radziszewski, it is possible to express significant doubts whether restricting the parties' participation in the proceedings for permission to use only to the investor's person will always be consistent with the rights serving other entities, including art. 4 of the Construction Law and art. 21, 31 section 3, 64 section 1 and 2 of the Constitution. Radziszewski, E., *Prawo budowlane. Przepisy i komentarz*, Warszawa 2005, pp. 165–166.

be used.[11] According to the judgment of the Supreme Administrative Court, the investor commenced the use of the building object without the legally required notification to the competent public administration authority, which resulted in the violation of the construction law and the application by the authority of art. 57(7). Such a factual situation is referred to in the jurisprudence as "lawlessness use" or "lawlessness of use" and concerning a building object, the use of which was commenced without obtaining the legally required consent from the authority. It is not a separate type of lawlessness of use or lawlessness use, on the contrary, it falls within the scope of this concept.[12] This means that lawlessness use of the building object or part of it will occur when the investor has not submitted a notice of completion of the construction of the building object or has commenced to use it before the expiry of the period within which the competent authority may effectively object, or despite such objection. It is also inadmissible to use a building object, which is subject to the obligation to obtain a permit to use, if the investor has not obtained a final decision authorising the use of this object. The finding by the competent authority of 'lawlessness use' of a building object or parts thereof shall lead to the imposition of penalty for unauthorised use. The imposed financial penalty shall be determined on the basis of the rules relating to the penalty for irregularities found during the compulsory inspection of the construction site, with the rate of the fee being increased tenfold. This penalty is a sanction which determines the liability for commence using of the building object or part thereof without legal completion of the construction process. It is a penalty for violation of the law, which is in fact a form of protection against the possibility of negative effects of such violation.[13] The penalty for so called "lawlessness use" can only be imposed once. The re-application of a penalty for the same violation, if it has already been legally imposed, is void.[14]

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[11] Małysa-Sulińska, K., *Administracyjnoprawne aspekty inwestycji budowlanych*, Warszawa 2012, p. 242.

[12] Cherka, M., Grecki, W., *Samowola budowlana w polskim prawie budowlanym*, Warszawa 2013, p. 33; The term "construction lawlessness" is understood by the NSA as the performance of construction or construction of building object without a valid building permit or notification, or despite an objection raised by a competent authority. Judgment of the Supreme Administrative Court of 7 June 2001, IV SA 952/99, LEX No. 54192.

[13] Judgment of the Constitutional Tribunal of 15 July 2007, P 19/06, OTK-A 2007, No. 1, item 2.

[14] Judgment of the Supreme Administrative Court of 7 September 2009, II OSK 1494/09, LEX No. 746583.

It should also be noted that the authority punishing the investor for lawlessness use of an object is not bound by the category assigned in the building permit and may determine it on the basis of its own findings, especially when the type of object and its parameters clearly do not correspond to the category defined in this permit.[15] According to the Constitutional Tribunal, the established penalty is a manifestation of State interference in the sphere of property rights of an individual, however, this interference is a sanction of illegal behaviour of such individual. In the absence of an appropriate sanction, the provision would be dead and therefore the failure to comply with the obligation could be commonplace.[16] According to the Constitutional Tribunal, the established fee is a manifestation of the state's interference in the sphere of property rights of the individual. The essence of the prohibition of excessive interference is that the legislator may not impose restrictions exceeding a certain degree of nuisance, between the degree of violation of the individual rights and the rank of the public interest that is to be protected. In this general view, the prohibition of excessive interference has a protective function in relation to all rights and freedoms of the individual, although in fact the criteria of excessiveness must be relativized, among others, due to the nature of individual rights and freedoms. Its addressee is a state that should act towards the individual in a way that is determined by real need. This prohibition becomes one of the manifestations of the principle of citizen trust in the state, and thus is one of the requirements that a democratic state imposes on its organs.[17]

In the context of the SAC judgment under analysis, the organ's interference in the entity's property rights sphere constitutes a sanction of the unlawful conduct of certain entities. In the absence of an appropriate penalty, the provision would be dead, and therefore failure to comply with the obligation could be common.[18] It should be noted that the need to apply the sanctions provided for by law

[15] Judgment of the Supreme Administrative Court of 8 April 2011, II OSK 602/10, LEX No. 992609.

[16] Judgment of the Constitutional Tribunal of 18 April 2000, K 23/99, OTK 2000, No. 3, item 89.

[17] Judgment of the Constitutional Tribunal of 26 April 1995, K 11/94, OTK 1995, No. 1, item 12.

[18] Judgment of the Constitutional Tribunal of 18 April 2000, K 23/99, OTK 2000, No. 3, item 89.

to investors starting to use the building object without the legally required permit is a consequence of the mere fact of a breach of the law, and this in turn, the basis for the application of sanctions. Such a formula of liability makes the principle of the presumption of innocence in such situations inapplicable, and the basic premise of liability is the lawlessness of the action understood as activities conducted contrary to the law and the rules of social coexistence.[19]

As a consequence of the authority's finding that the building object or part of it has been used in violation of the above-mentioned obligations, a penalty for 'lawlessness use' of the building object shall be imposed. According to the Constitutional Tribunal, administrative penalties are in fact measures aimed at mobilising entities to perform their duties for the state in a timely and correct manner.[20] Therefore, automatically applied administrative sanctions are primarily preventive in nature.[21] An administrative penalty is not a fee for an act committed, but a coercive measure to ensure the performance of executive and management tasks of administration aggregated by the concept of public interest.[22] The investor's obligation to notify the completion of construction or to obtain a final decision on the permission to use and the sanction provided for to ensure fulfilment of these obligations serve to protect important values distinguished by virtue of public interest, which include above all: the environment, safety of people and property, health and life of people, spatial order and respect for legitimate interests of third parties. The essence of the administrative penalty for a lawlessness use of the building object is to force the observance of orders and prohibitions.[23] The penalty referred to in art. 57 section 7 of the Construction Law is mandatory in each case when a party is obliged to submit a notification or apply for a permit to use, and the investor, in violation of such obligation, does not do so and arbitrarily starts to use the completed building object. The supervisory authority shall have no option but to impose such a penalty. The legislator,

[19] Judgment of the Constitutional Tribunal of 15 January 2007, P 19/06, OTK-A 2007, No. 1, item 2.

[20] Judgment of the Constitutional Tribunal of 5 May 2009, P 64/07, OTK-A 2009, No. 5, item 64.

[21] Judgment of the Constitutional Tribunal of 24 January 2006, SK 52/04, OTK-A 2006, No. 1, item 6.

[22] Judgment of the Constitutional Tribunal of 31 March 2008, SK 75/06, OTK-A 2008, No. 2, item 30.

[23] Judgment of the Constitutional Tribunal of 15 January 2007, P 19/06, OTK-A 2007, No. 1, item 2.

when using the phrase "imposes a penalty", does not give any discretion in this respect.[24] Administrative penalties – as stated by the Constitutional Tribunal – are in fact measures aimed at mobilizing entities to timely and properly perform their duties on behalf of the state.[25] Therefore, in view of the above, the Court held that the above provisions of the Construction Law Act oblige a competent authority to impose a penalty for lawlessness use of a building object whenever it is found that the building object or a part thereof is used in violation of art. 54 or 55 of this Act.[26]

In the light of the NSA's judgment, it was justified to impose an administrative penalty on only one of the investors, as a coercive measure aimed at creating a threat that is expected to affect the attitude of the addressee of the obligation.[27] The penalty for commencement of using a building object without the required permit cannot be imposed without taking into account the circumstances of the specific case. As a rule, the investor cannot claim that he/she is not the one who commenced the use of the building object, but it was another person. Only in situations where, without a shadow of a doubt, the commencement of use was against the investor's will, it will not be possible to impose a penalty for lawlessness use of the building object.[28] In the course of the case, it was undisputed that the investor who had the right to exclusive use of real estate developed with a residential building commenced to use it. Such a situation resulted in the fact that other investors, having no legal and even less actual possibility to use the object, could not start using it illegally, despite the fact of being the investors. In the case cited above, i.e. when the investor has commenced to use the building object without the will of another investor, there are no grounds for imposing a penalty for lawlessness use of the building object upon that other investor. The purpose of the administrative sanction must be invoked here. It is to enforce the application of art. 54 and 55 of the Construction Law. Therefore, imposing this

[24] Judgment of the Voivodeship Administrative Court in Gliwice of 6 May 2015, II SA/GL 90/15, LEX No. 1754369.

[25] Judgment of the Constitutional Tribunal of 1 March 1994, U 7/93, OTK 1994, No. 1, item 5.

[26] Judgment of the Voivodeship Administrative Court in Wrocław of 19 February 2013, II SA/Wr 793/12, LEX No. 1330371.

[27] Bojanowski, E., *Kara administracyjna. Kilka refleksji*, in: Jakimowicz, W., Krawczyk, M., Niżnik-Dobosz, I. (eds.), *Fenomen prawa administracyjnego. Księga jubileuszowa Profesora Jana Zimmermanna*, Warszawa 2019, p. 68.

[28] Kostka, Z. in: Gliniecki, A. (ed.), *Prawo budowlane. Komentarz*, Warszawa 2012, p. 530.

penalty on a third party, which could not comply with these provisions, would be contrary to the purpose of art. 57 section 7 of the Construction Law.[29] An administrative penalty requires a prior determination that the person punished has violated the law, in breach of certain obligations imposed by law. It should be noted that the penalty is always individualised, which means that the public authority, when imposing a penalty, should always take into account the assessment of the circumstances of the specific case. The point is that all circumstances affecting the level of the penalty are assessed only in relation to the specific person concerned. Where there are several investors, the circumstances that will affect the imposition of the penalty are assessed for each of them. As the Supreme Court points out, a specific and individualised punishment should ensure the internal fairness of the judgment, with due regard for the role of each of those involved in the violation of the law.[30] While analysing the above ruling of the NSA, it is worth emphasizing that the literal interpretation of art. 57 section 7 of the Construction Law does not give rise to the claim that only the investor may be penalised in a situation where he has handed over the documentation and premises for finishing to the purchasers, but has not given them permission to use these premises in any way.[31] Therefore, it should be fully accepted that the penalty for lawlessness use of the building object shall be imposed only upon the person who committed the offence.

In stressing the rightness of the decision of the Supreme Administrative Court, as in the opinion of the author of a fair approach to the case, one should bear in mind the view that states that the administrative penalty constituting a means of coercion and acting for the public interest falls under the so-called 'regime of objective responsibility.' This means that the imposition of administrative fines is detached from the necessity to state the guilt and other circumstances of the case. Such a position on this NSA ruling would clearly harm a second investor who actually had limited right to proceed to use the facility. Given that the administrative court should defend the rights and freedoms of the individual against excessive authority of administrative bodies, the decision of the Supreme Administrative Court seems to be correct.

[29] Ibidem, p. 530.

[30] Judgment of the Supreme Court of 8 February 1978, I KR 6/78, OSNKW 1978, No. 7–8, item 80.

[31] Judgment of the Voivodeship Administrative Court in Wrocław of 19 February 2013, II SA/Wr 793/12, LEX No. 1330371.

Conclusions

As a result of the analysis of the judgment in question, it should be concluded that it is only the formal completion of the investment and construction process commenced on the basis of a construction permit or notification that allows for the legal use of the building object. Generally speaking, it is possible to commence the use of a building object after notifying the building supervision authority of the completion of the construction or after obtaining a permit for use. In art. 54 and 55 of the Construction Law, the legislator has presented how construction should be formally completed, specifying the cases in which it is necessary to make a notification and obtain a permit for use. If the building supervisory authority determines that the commencement of use of a construction work or a part thereof was in violation of the provisions of art. 54 and 55 of the Construction Law, then the authority has no option but to impose a penalty on the investor for lawlessness use of the building object in accordance with art. 57 section 7 of this Law. The factual and legal situation presented in this case leaves no doubt that the building supervisory authority, acting on the basis and within the limits of the law, was obliged to impose a penalty for lawlessness of use, and this only on one investor. The cursory review of the construction law does not formulate a rule that would allow to impose a penalty for lawlessness use of a building object on any investor who was the addressee of the permit if it was found that the use of the building object was commenced without the legally required notice of completion of the construction. It should be borne in mind that the administrative penalty shall be individualised and applied only to the person who has actually committed the violation of the law. Therefore, I believe that the judgment of the Supreme Administrative Court is correct because, taking into account the fact that the District Court granted the right to use the real estate developed with a building to the first investor, no penalty can be imposed on the second investor due to his legal and factual limitations related to the use of the building object, which may have caused that the use of the building object was started in a lawlessness manner and against his will.

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