

Evaluating the Correctness of Evidence Theses Ordering an Expert Opinion from a Valuer in Compensation Proceedings Regarding RUAs

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ABSTRACT

The purpose of this publication is critical evaluation of the formulation of evidence theses ordering an expert opinion from a valuer with a view to establishing compensation for the value impairment of residential properties located in airport RUAs under Art. 129(2) in conjunction with Art. 135 ELA, in the context of the adopted assumptions of the state intervention.

The article contains considerations of theoretical nature, made in two areas: law and economy. The whole is summarized by the results of the empirical research carried out in the years: 2019-2020.

The results point to defective practice of the adjudicating courts in compensation matters for value impairment of properties located in airport RUAs as regards the formulation of evidence theses for expert witnesses, which precludes implementation of the adopted purpose of state intervention, that is reduction of transaction costs in the property market. The research was carried out for five national airports, namely: Gdańsk Airport (PL), Katowice AP, Cracow AP, Poznań AP, Warsaw AP, using the case study method. For the purpose of the research, the airports provided documentation for thirty-three court proceedings, covering, among others, the total of 49 evidentiary rulings.

The implemented research provides practical conclusions addressed to airports, courts adjudicating in compensation matters and valuers.

Keywords:	restricted use area; evidence thesis; formulation of evidence theses; expert opinion evidence; state intervention
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JEL codes:	K320, K110, D04
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Article type:	research article
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DOI:	10.14659/WOREJ.220.114.04
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INTRODUCTION

Establishment of a restricted use area for an airport is a form of intervention in the property market. This intervention has led to the commencement of numerous proceedings for compensation under Art. 129, Art. 135 and Art. 136 ELA in conjunction with the respective provisions of local legislation. The main disputed area in those proceedings were, among others, the following questions: specification of the harmful event and determination of the amount of due compensation. Because of the nature of the pending proceedings, the key piece of evidence in those cases was the opinion of an expert witness in the area of property valuation, which is why the courts were obliged to appoint expert witnesses, by evidentiary ruling comprising an evidence thesis, for the purpose of consultation in respect of value impairment of a property resulting from the state intervention. The main reason for undertaking the research were the results of the previous research on the methodology of appraising real estate (*Valuation Methodology*, 2018), which provided information on the amounts of compensatory claims asserted against five airports in Poland, and the results of the pilot research of evidence theses, which provided information on inconsistencies between the contents of evidence theses and the legal basis of the claim sought (including, for example, proper designation of the triggering event), which had an impact on the methodology of valuers' work and implementation of the assumptions of the state intervention. Another motive for the research was the research gap observable in that regard.

With the above in mind, the adopted research problem is the formulation of evidence theses in the context of the intervention made by the state, which translates into the implementation of the intended aims of the state intervention in the property market. The research deliberately omits the question of assessing the effectiveness of state intervention in connection with negative consequences of noise nuisance from airports (external effects).

The purpose of this article is critical evaluation of the formulation of evidence theses ordering expert opinion from a valuer for the purpose of determining the compensation for value impairment of residential properties located in airport RUAs under Art. 129(2) in conjunction with Art. 135 ELA, in the context of the adopted assumptions of the state intervention. Such evaluation is based on the following criteria: formal correctness, specification of the harmful event, indication of the restrictions relating directly to the assessed property, indication of the restrictions relating to the environment of the assessed property, date of the property's condition, date of the price level.

The evaluation criteria and the method of analysis were determined upon completion of preliminary research, necessary for the development of the target methodological principles. The research was carried out in the period 2019-2020 for five national APs, using the *case study* method. The scope of the analysis covered 49 expert opinions specifying the properties' value impairment, out of which: 16 related to the Warsaw AP RUA, 12 to the Cracow AP RUA, 8 respectively to the Gdańsk AP RUA and the Poznań AP RUA, and 5 to the Katowice AP RUA.

As a part of the research, the following research thesis was put forward: Set aside the law-making powers of the court, a properly formulated evidence thesis appointing an expert should follow the assumptions of the intervention made by the state in the property market and, in the same way, the court is required to include the following obligatory structural elements: (1) purpose of the evaluation – in this case, Art. 129(2) in conjunction with Art. 135 ELA, (2) indication of the harmful event - restriction on the property's use, and (3) specification of the restriction on property use for the assessed real estate by citing the use of the land as indicated in the resolution establishing the RUA.

The publication comprises an introduction and four parts. The first is an overview of the literature on state interventionism, including the state intervention consisting in the establishment of RUAs for selected APs in Poland and their consequences to the parties to the conflict. The theoretical considerations were made in the context of the transaction costs theory by R. Coase (2013, p. 86). The considerations were made against the background of disputes examined before the court. Special attention was paid to the problem of proper formulation of evidence theses. The second part presents the adopted research methodology. The third part covers the results of the implemented research and discussion. The article was summarized by conclusions.

LITERATURE REVIEW

Activeness of the state in the property market through the intervention consisting in the establishment of a restricted use area for an AP is a consequence of negative external effects in the operation of airports. As a result of the intervention, the state becomes as if the third party of contracts in the property market, whose purpose is to reduce the level of social costs relating to the transfer of rights to real estate (Williamson, 1998). To guarantee realization of such purpose, states use different types of instruments, such as statutory legislation or local legislative acts.

State intervention in the form of establishing RUAs, from the point of view of the neo-Austrian school, bears features of a triangular intervention (Kirzner, 1982, p. 178; Rothbard, 2008, p. 277). In foreign literature, also other intervention types are distinguished, i.e. autistic, binary (Kopsch, 2016), which are irrelevant in the context of this publication. As far as the methods of compensating for the consequences of state intervention are concerned, they are diversified on the global scale, which, so to speak, is a consequence of the characteristics of legal systems operating in specific countries. This problem has been addressed in many studies (Goulbourne, 2002; Pilsk, 2012; Migala, 2017; Bennett, 1982). It must be noted, in that regard, that the problems of environmental compensations has not been exhaustively presented in Polish academic literature (Kobryń & Bukanowicz, 2015, p. 81 et seq.).

The currently dominant justification of state intervention is R. Coase's theorem (Coase, 2013), adopting as its starting point the perspective of efficiency based on the criteria of social utilitarianism, where analysis is carried out from the perspective of equilibrium for both sides of the conflict. In the neoclassical approach, in the assessment of state intervention, the traditional equilibrium model of a competitive market is used, which presently defines the market value as the basis for valuation (1997 Act) and, in effect, determines the terms of valuation for the purpose of estimating compensations and fair value. Market value, used for property valuation in the conditions of triangular intervention, where the consequence of the intervention is understood as a change to the market equilibrium, results in conferring an abstract dimension on the assessment activities and, in the same way, may lead to a detachment of the results from the reality or impede the reflection of actual economic relations (Konowalczuk, 2017). Currently, state intervention is a normal aspect of ownership relating to real estate and, as a result, restriction of rights or imposition of obligations may trigger the need for compensation (in the form of damages) only in certain specific situations (e.g. as specified in the provisions of the resolution establishing a RUA), which means that currently a relative protection of real estate ownership is accepted.

State intervention in the form of establishing a RUA is a legal act of public authorities provided for in the ELA, comprising intervention instruments causing a transfer of rights (scope of compensation). Prior to the establishment of a RUA, the ownership of real estate was defined, among others, by the provisions of the Civil Code (Frańczuk, 2018, p. 31). The cited Act provides for different intervention instruments, to which different claims attach by the owners of properties located in the RUA against the AP. The intervention is made in a non-equivalent situation, and with the involvement of the state acting as a third party of the relationship, imposing the scope and the terms of

a non-market transfer of rights (Habdas & Konowalczyk, 2018, p. 7). Principally, RUAs are created if an environmental review or environmental impact assessment of an investment – required by the provisions of the Act on access to information on the environment and its protection, public participation in environmental protection and environmental impact assessments – or a post-implementation analysis indicates that despite the use of the available technical, technological and organisational solutions, it is impossible to comply with environmental quality standards outside the premises of the facility or another object. In such situations, under Art. 135(1) ELA, the legislator introduces an obligation to establish RUAs, among others, for airports. According to Art. 135(3) ELA, the resolution creating a RUA should cover the questions raised in the environmental impact assessment procedure, in the post-implementation analysis or in the environmental review: (1) restriction on the use of land, (2) technical requirements for buildings, (3) admissible use of land, which is an argument for recognizing the established area as zoning instrument (Zakrzewska, 2010, p. 89).

Taking into consideration the assumed purpose of this study, further considerations will be limited to the intervention provided for in Art. 129(2) in conjunction with Art. 135 ELA, namely the restriction on the use of properties as introduced in the resolution establishing the RUA, due to the requirements of environmental protection. As highlighted in literature of the subject, such restrictions may not be arbitrary but must correspond to the provision of Art. 135(3a) ELA and be purposeful in the context of the concluded environmental impact assessment procedure, post-implementation procedure or environmental review. In practice, they may assume different forms, including, for example, ban on development, change of the property's use for the indicated purposes (Czajkowska-Matosiuk, 2015, p. 62). In summary, the resolution establishing a RUA for an AP may introduce in respect of a specific property located within the RUA, limitations to the admissible use. In such situation, the owner may claim compensation for the damage suffered. However, it may happen that the said resolution does not impose any restrictions on the use of land. Then, it will not be possible to assert claims under Art. 129(2) in conjunction with Art. 135 ELA. As follows from the literal wording of the provision of Art. 129(2) ELA: *"in consequence of restriction on the use of a property, its owner may claim compensation for the damage suffered; the damage includes also the decrement in the property's value."* In consequence, compensation does not relate to the mere fact of adopting the resolution establishing the RUA, an actual excessive noise level or discomfort (even if they actually lead to a decrease in the property's value) but to the specific, normative restrictions on use, following from the provisions of the

local legislative act establishing the RUA which, at the same time, caused the damage. However, the practice in that regard is radically different, as confirmed, among others, by the defective case-law of the courts (SN 2010; SN, 2016; SN, 2017) and views presented in academic literature about the existence of a systemic error (Rakoczy, 2010; Gruszecki, 2019). On the other hand, publications appear pointing to erroneous interpretation – contrary to the textual, systemic and functional interpretation (Habdas, 2020, p. 15).

So defined state intervention, in case of bringing the dispute to court, necessitates the appointment of an expert valuer by an order with a view to determining the amount of compensation for the value impairment of residential properties located in airport RUAs under Art. 129(2) in conjunction with Art. 135 ELA.

In the light of the applicable legislation, the role of an expert witness has been limited to mere evaluation of the facts requiring specialist information and does not cover the presentation of factual findings in the case (Studzińska, 2016, p. 174). As a result, the expert witness's role is not to establish the facts of the case but to elucidate and to enable the court's explanation of the facts from the point of view of the specialist information held by the expert witness, taking into account the material collected in the case and provided to the expert witness (SN, 2006). In compensation matters relating to RUAs, there is a need to take evidence of both the property's inspection, for the purpose of determining the property's factual condition as on a specific date, and expert opinion with regard to the assessment of facts requiring specialist knowledge. Under Art. 278 CCP, an expert witness may not do the court's job as regards factual findings in the case since the subject matter of an opinion is not presentation of facts but their assessment in the light of specialist knowledge. Moreover, the role of an expert witness does not involve comments on the understanding of law, including the provisions of Art. 129 in conjunction with Art. 135 ELA or local legislation – in particular, resolutions of voivodeship assemblies establishing a restricted use area. In summary, it must be concluded that evidence in the form of expert opinion should be admitted only once the factual material has been collected in the case enabling the expert witness to deliver the opinion. Therefore, it is not the expert witness to decide about the basis for the expert witness's opinion.

As emphasized in academic literature, the ruling by which the court admits an expert opinion should contain: (1) specification of the evidence thesis, (2) specification of the means of evidence, (3) designation of the judge or court before whom the evidence is to be taken, (4) deadline and place of taking the evidence, (5) specification of the amount of advance to cover expenses (Studzińska, 2016, p. 164). A key factor, in the context of taking

evidence in the form of expert opinion is precise specification of the evidence thesis (Turek, 2007, p. 1361).

Proper formulation of the evidence thesis, so as to specify the expert witness's tasks in a manner which does not permit free orientation of the opinion's subject matter can be difficult (Kotakowski, 2016, p. 1107). It is all the more apparent in the proceedings for compensation for the purposes of valuation specified in Art. 129(2) in conjunction with Art. 135 ELA and the purposes of the state intervention in the property market as envisaged in those provisions. In the order addressed to the expert witness, the court should specify the subject matter and scope of assessment and the facts subject to the opinion, as well as already established facts on which the opinion is to be based (Ossowski, 1960, p. 1348). The evidence thesis formulated by the court should cover only facts which are relevant to the given case (Aleksandra, 2017).

When analysing academic literature, one can reach the conclusion that relatively little attention is paid to the problems of formulating the contents of evidence theses for the purpose of ordering valuation in the context of an implemented public intervention. Moreover, the completed pilot research on that matter provided information about serious systemic mistakes in the courts' formulation of evidence theses addressed to expert witnesses in compensation matters relating to RUAs. In consequence of the above, as a part of the undertaken research, the following research thesis has been formulated: A properly formulated evidence thesis appointing an expert witness should follow the assumptions of the intervention made by the state in the property market and, in the same way, the court is required to include the following obligatory structural elements: (1) purpose of the evaluation— in this case, Art. 129(2) in conjunction with Art. 135 ELA, (2) indication of the harmful event - restriction on the property's use, and (3) specification of the restriction on property use for the assessed real estate by citing the use of the land as indicated in the resolution establishing the RUA.

RESEARCH METHODOLOGY

The research was conducted for five national airports:

- Warsaw AP (P.P. "Porty Lotnicze" in Warsaw),
 - Cracow AP (MPL im. Jana Pawła II Kraków – Balice sp. z o.o. in Balice),
 - Poznań AP (MPL Poznań-Ławica sp. z o.o. im. Henryka Wieniawskiego in Poznań),
 - Katowice AP (GTL S.A. in Katowice),
 - Gdańsk AP (PL Gdańsk Sp. z o.o.).
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In the research, the materials provided by APs were used, including, for each airport, the following source materials in respect of several (5-9) court proceedings: suit, response to the suit, court ruling including the evidence thesis for the expert witness, expert opinion, objections to the opinion, supplementary opinion or/and opinion with oral explanations recorded in the minutes, and for the “second” instance – analogous materials. APs provided the documentation for thirty-three court proceedings brought against the respective airports. Nine suits were brought against the Warsaw AP, six against the Cracow AP, six against the Poznań AP, five against the Katowice AP and seven against the Gdańsk AP.

The empirical research of the courts’ evidence theses was carried out using the *case study* method for the proceedings chosen for analysis by APs for compensation for value impairment of residential properties located in airport RUAs.

The empirical part of the study was oriented to the effects of the courts’ activities in the form of evidence theses. For the implementation of the research, it proved necessary to systematize theoretical matters relating to the management of evidentiary proceedings in civil matters and the problems of evidence in the form of expert opinion, which, in case of damage covering value impairment relates to the professional group of valuers. To a necessary extent, the empirical research was expanded by the provisions of the resolutions establishing airport RUAs.

The purpose of the research is critical evaluation of the formulation of evidence theses ordering an expert opinion from a valuer for the purpose of determining compensation for value impairment of residential properties located in airport RUAs under Art. 129(2) in conjunction with Art. 135 ELA, in the context of the adopted assumptions of the state intervention. The analysis of evidence theses was carried out on the basis of interpretation of the provisions offering the possibility to seek claims in connection with the restriction on the use of properties under Art. 129(2) in conjunction with Art. 135 ELA. The holistic evaluation of regularity of the presented evidence theses was carried out also with regard to the provisions of local legislation establishing RUAs.

For the purpose of implementing the research on the formulation of evidence theses by the courts, each thesis was subject to analysis and assessment in terms of formal regularity, using the following assessment criteria:

- formal correctness,
 - specification of the harmful event,
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- indication of the restrictions relating directly to the assessed property,
- indication of the restrictions relating to the environment of the assessed property,
- date of the property's condition,
- date of the price level.

The point of reference for the assessment of regularity of the evidence theses according to the adopted criteria were legal provisions, namely of:

- the Environmental Law Act,
- the Act on real estate management,
- local legislation – resolutions establishing RUAs for particular APs or regulation establishing a RUA,
- the Regulation on valuation of properties and preparation of valuation reports.

The analysis of formal correctness of the court's evidence thesis was limited to the following classification: resolution establishing a RUA, Art. 129(2) in conjunction with Art. 135 ELA, other.

Three acronyms representing the result were used for the analysis of formal correctness:

- R_RUA, when the court, in the evidence thesis drawn up for the purpose of establishing compensation, cited the resolution (regulation) establishing the RUA for a given AP;
- ELA, when the court, in the evidence thesis, appointed the expert to establish the compensation referred to in Art. 129(2) ELA in conjunction with Art. 135 ELA;
- OTHER – in relation to other situations, when the court cited another legal or factual basis for the purpose of establishing compensation.

The analysis of the specification of harmful event was based on the evaluation of evidence theses and the event indicated by the court in such theses which, in the court's opinion, gave rise to the damage.

The following acronyms were used to represent the results of analysis in respect of the specification of harmful event:

- LOC_RUA, the court indicated as harmful event the physical factor of deteriorated location because of the property's location in a RUA;
 - RES, the court indicated as harmful event the restriction on the property's use (RU);
 - RES_NOISE, in the thesis, the court indicated as harmful event the restriction on use and noise, that is the increased noise level in the
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property's environment in relation to properties located further away from the airport;

- EST_RUA, the court indicated as harmful event the legal factor of establishing the restricted use area and its consequences for the conditions of the market's operation;
- EST_RUA & RES, the court recognized as harmful event the two joint circumstances referred to by the acronyms: EST_RUA & RES;
- EST_RUA & RES & NOISE, the court formulating the thesis recognized as harmful event the establishment of the restricted use area, restriction on the property's use and noise;
- EST_RUA & RES & NOISE & OTHER, the court recognized as harmful event the same as referred to by the acronym EST_RUA & RES & NOISE plus other events (e.g. other factors independent of the defendant's operation, trends relating to the formation of property prices in the local property market);
- EST_RUA & RES & OTHER, the court recognized as harmful event the same as referred to by the acronym: EST_RUA & RES plus other events indicated in the thesis (e.g. other factors independent of the defendant's operation, trends relating to the formation of property prices in the local property market).

The analysis of the specification of restrictions relating directly to the assessed property was carried out according to the following three criteria marked by the following acronyms:

- CONCR_IND, when the court indicated in the evidence thesis a concrete restriction on the property's use, following directly from the provisions of the resolution establishing the RUA;
- INCONCR_IND, when the court invoked in the evidence thesis a restriction on the property's direct use but failed to specify which restriction under the resolution establishing the RUA should be taken into account by the expert witness preparing the opinion, and when the court invoked a restriction on the property's use but did not establish if such restriction was in fact provided in the resolution establishing the RUA;
- NO_IND, when the court did not point at all to the restriction on the property's use.

The analysis of the specification of restrictions relating to the environment of the assessed property was also carried out according to a dichotomic criterion – IND, NO_IND. The lack of any indication of the

restrictions in the vicinity of the assessed property was classified as “no indication.”

The evaluation of dates of the property’s condition was carried out according to the following criteria: PRESENT, NONE, OTHER. The acronyms used were given the following meaning:

- PRESENT, factual condition of the property as on the date of establishing the RUA,
- NONE, no indication by the court of the date of the property’s condition,
- OTHER, factual condition of the property as on a date other than the date of establishing the restricted use area.

The analysis of dates of the price level (market condition) was carried out using the following criteria (covered by three acronyms: PRESENT, NONE, OTHER):

- PRESENT, when the court specified in the evidence thesis the price level on the date of preparing the opinion,
- NONE, when the court did not indicate in the thesis and price level date,
- OTHER, price level date as on a date other than the date of preparing the opinion.

RESULTS & DISCUSSION

Table 1 presents the results of the formal evaluation of regularity of the courts’ formulation of evidence theses in the context of determining the compensation amount for the purpose set out in Art. 129(2) in conjunction with Art. 135 ELA.

Table 1. Results of the formal evaluation

No.	Formal correctness	Harmful event	RU on the property	RU in the environment	Relevant dates	
					Property condition	Price level
1.	R_RUA	EST_RUA & RES & OTHER	INCONCR_IND	NO_IND	OTHER	OTHER
2.	R_RUA	EST_RUA & RES & OTHER	INCONCR_IND	NO_IND	NONE	NONE
3.	R_RUA	EST_RUA & RES & NOISE & OTHER	INCONCR_IND	NO_IND	OTHER	PRESENT
4.	R_RUA	EST_RUA & RES & NOISE & OTHER	INCONCR_IND	NO_IND	OTHER	OTHER
5.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
6.	R_RUA	EST_RUA & RES & OTHER	INCONCR_IND	NO_IND	OTHER	OTHER
7.	R_RUA	EST_RUA	NO_IND	NO_IND	OTHER	OTHER
8.	R_RUA	EST_RUA & RES & OTHER	INCONCR_IND	NO_IND	OTHER	OTHER

No.	Formal correctness	Harmful event	RU on the property	RU in the environment	Relevant dates	
					Property condition	Price level
9.	R_RUA	EST_RUA & RES & OTHER	INCONCR_IND	NO_IND	OTHER	OTHER
10.	R_RUA	EST_RUA & RES	INCONCR_IND	NO_IND	OTHER	OTHER
11.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	OTHER
12.	R_RUA	LOC_RUA	NO_IND	NO_IND	NONE	NONE
13.	R_RUA	EST_RUA & RES & OTHER	INCONCR_IND	NO_IND	PRESENT	OTHER
14.	R_RUA	EST_RUA & RES & OTHER	INCONCR_IND	NO_IND	NONE	OTHER
15.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	OTHER
16.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
17.	R_RUA	EST_RUA & RES	INCONCR_IND	NO_IND	NONE	NONE
18.	R_RUA	EST_RUA & RES	INCONCR_IND	NO_IND	NONE	NONE
19.	R_RUA	RES	INCONCR_IND	NO_IND	NONE	NONE
20.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
21.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	PRESENT
22.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	PRESENT
23.	R_RUA	EST_RUA & RES & NOISE & OTHER	INCONCR_IND	NO_IND	OTHER	OTHER
24.	R_RUA	EST_RUA & RES & NOISE & OTHER	INCONCR_IND	NO_IND	OTHER	OTHER
25.	R_RUA	EST_RUA & RES & NOISE & OTHER	INCONCR_IND	NO_IND	NONE	OTHER
26.	R_RUA	EST_RUA & RES & NOISE & OTHER	INCONCR_IND	NO_IND	NONE	OTHER
27.	R_RUA	EST_RUA & RES & NOISE	INCONCR_IND	NO_IND	NONE	NONE
28.	R_RUA	EST_RUA & RES & NOISE & OTHER	INCONCR_IND	NO_IND	NONE	NONE
29.	R_RUA	EST_RUA & RES & NOISE & OTHER	INCONCR_IND	NO_IND	NONE	NONE
30.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
31.	R_RUA	EST_RUA	NO_IND	NO_IND	PRESENT	PRESENT
32.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
33.	R_RUA	EST_RUA	NO_IND	NO_IND	PRESENT	OTHER
34.	R_RUA	RES	INCONCR_IND	NO_IND	NONE	NONE
35.	R_RUA	RES	INCONCR_IND	NO_IND	NONE	NONE
36.	R_RUA	RES_NOISE	INCONCR_IND	NO_IND	NONE	NONE
37.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	OTHER

No.	Formal correctness	Harmful event	RU on the property	RU in the environment	Relevant dates	
					Property condition	Price level
38.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
39.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
40.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
41.	R_RUA	EST_RUA & RES	INCONCR_IND	NO_IND	NONE	NONE
42.	R_RUA	EST_RUA & RES	INCONCR_IND	NO_IND	NONE	NONE
43.	R_RUA	RES	INCONCR_IND	NO_IND	NONE	NONE
44.	R_RUA	RES	INCONCR_IND	NO_IND	NONE	NONE
45.	R_RUA	RES	INCONCR_IND	NO_IND	NONE	NONE
46.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
47.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	NONE
48.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	OTHER
49.	R_RUA	EST_RUA	NO_IND	NO_IND	NONE	OTHER

Source: own research.

In all 49 analysed evidence theses, the courts pointed to the establishment of a restricted use area under the respective resolution (regulation) as the purpose of determining compensation (valuation). Such formulation of evidence theses must be considered incorrect and inconsistent with the purpose of the state intervention. Proper specification of the valuation purpose required the court to point in the evidence thesis to the legal provision from which that purpose follows, that is, in the examined cases, the provision of Art. 129(2) ELA in conjunction with Art 135 ELA. Such citation is a formal requirement of the court's evidence thesis. An evidence thesis formally correct in that regard should read as follows:

„(...) admit the evidence of opinion of an expert witness in the area of real estate valuation for the purpose of establishing the compensation referred to in Art. 129(2) in conjunction with Art. 135 of the Act of 27 April 2001 – Environmental Law, with regard to the valuer's ascertainment of value impairment of the property (...)".

Only in 6 theses (about 12%), the harmful event was restriction on the property's use. Proper specification of the harmful event in the examined cases required the court to refer to the legal basis of the claim sought, that is to the provision of Art. 129(2) in conjunction with Art. 135 ELA. This provision associates the liability of an AP with: *"(...) restriction on the use of properties (...)"*, and the restriction itself should be defined in the resolution establishing the RUA and be the cause of damage.

A properly formulated evidence thesis should specify the harmful event by referring to the cited provision and requires the court to examine the provisions of the resolution establishing the RUA in terms of the restrictions

imposed on the use of the relevant property. The missing reference by the court in the evidence thesis to a specific restriction in the property's use as set out in the resolution establishing the RUA gives rise to far reaching consequences in the process of the property's assessment as it implies erroneous specification of the valuation purpose and, as if, induces the expert witness to independently define the value impairment in isolation from the harmful event.

Restrictions on property use were imposed only for residential areas in the Z1 zone of the RUA around the WAW AP and in zone A of the RUA around the KRK AP. A specific restriction was introduced in the RUA around the KTW AP. As a consequence, only in those cases the courts formulating the theses could refer with success to a harmful event covered by the provisions of the resolution (regulation) establishing the RUA. In all other situations, that is with regard to the remaining airports subject to examination as well as WAW AP outside Z1 zone and KRK AP outside zone A – the resolutions (regulations) establishing RUAs do not impose any such restrictions on property use for residential areas, which leads to the conclusion that the references in the theses to restrictions on the property's use are not reflected in the provisions of the resolutions (regulations) establishing RUAs and shows that the adjudicating panel had not read the legislative acts establishing RUAs or did not understand their provisions.

In certain cases, the triggering event was described as combination of different harmful events, that is restriction on the property's use (without specifying or referring to any specific restriction laid down in the resolution establishing a RUA) and events which are not considered a source of the AP's liability under the applicable legislation.

Theses requiring the expert witness to determine the impact of several factors on the difference in prices or values should be considered incorrect in the context of the valuation purpose under Art. 129(2) ELA. However, an attenuating circumstance is the fact that in those theses the courts cited as coexisting harmful event: the restriction on the property's use, which, in the light of Art. 129(2) ELA, may be considered partly correct and heading in the right direction, however, dangerous from the point of view of evaluation. There are several causes of such danger, namely: non-specification of the harmful event in relation to the resolution establishing the RUA (the court formulating the evidence thesis should analyse the provisions of the resolution establishing the RUA, if the resolution imposes restrictions on the use of properties at all) and indication of harmful events inconsistent with the valuation purpose set out in Art. 129(2) ELA.

Only in 6 theses the restriction on the property's use was indicated as an independent harmful event, which does not mean, however, that the analysed theses may be considered methodologically correct. This is the case since the harmful event should be made specific and follow from the provisions of the resolution (regulation) establishing the RUA and cause damage in the form of value impairment of the plaintiff's property. Such condition was met only by properties located in the Z1 zone for the WAW AP and zone A for the KRK AP.

Moreover, in all the examined cases (except for Z1 zone for the WAW AP and zone A for the KRK AP and the RUA around the KTW AP) the resolutions (regulations) establishing the RUAs did not impose any restrictions on the use of properties for residential plots, which the courts failed to consider when formulating the evidence theses.

Further research related to the question of specification of the harmful event in the evidence theses. In none of the 49 analysed evidence theses the court made specific or pointed to the restriction relating directly to the assessed property or referred to a specific provision of the respective resolution (regulation) establishing the RUA.

In the thesis, no connection was identified between the harmful event and the provision of Art. 129(2) ELA mentioning a restriction under the resolution introducing the RUA, that is the restriction causing the damage, which should be considered a serious mistake. This mistake may also lead to critical conclusions in respect of the method of managing evidentiary proceedings. As a part of the evidentiary proceedings, the harmful event should be established which, in accordance with Art. 129(2) ELA caused the damage, whereas the wording of the examined theses reveals too general a specification of the harmful event without citing precisely the restriction pertaining to the directly assessed property.

Another problem is the presence in the analysed proceedings of situations in which the resolution introducing the RUA does not impose any restrictions relating directly to the property subject to dispute. This problem refers to the resolutions establishing RUAs for the POZ AP and the GDN AP, as far as residential properties are concerned (developed and non-developed), where there are no consequences of the RUA's establishment for the operation of the property market. In no case did the courts point in the evidence theses to any concrete restriction directly on the property's use although that is the event to which the law attaches the airport's civil liability.

In none of the examined evidence thesis did the court point to any restrictions relating to the environment of the assessed property.

In a vast majority of cases, the courts did not specify in the evidence theses the date of the property's condition, which necessitated a delegation of the obligation to ascertain that date to the expert witness. Such practice should be considered incorrect and posing procedural shortcomings in the course of the evidentiary proceedings. In civil proceedings, the court drafting the thesis should not only specify the date of the property's condition but also, as a part of evidentiary proceedings, the court should establish its factual condition as on the date of creating the restricted use area.

The implemented research points to the conclusion that courts, in a majority of cases, did not specify the price level date in the evidence theses. In certain evidence theses, the courts included several dates of the market's condition, which should be considered a defective practice in terms of methodology. Another defective practice of the courts observed in the formulation of evidence theses was the adoption of the price level in the period following the RUA's establishment for the designation of the relevant date of the market's condition.

CONCLUSION

The results of the implemented research point to the following conclusions:

1. A properly formulated evidence thesis appointing an expert witness should follow the assumptions of the intervention made by the state in the property market and, in the same way, the court is required to include the following obligatory structural elements: (1) purpose of the evaluation – in this case, Art. 129(2) in conjunction with Art. 135 ELA, (2) indication of the harmful event - restriction on the property's use, and (3) specification of the restriction on property use for the assessed real estate by citing the use of the land as indicated in the resolution establishing the RUA. In this context, none of the examined theses was correct. None of the analysed theses properly made specific the harmful event under Art. 129(2) ELA.
 2. Proper specification of the purpose of valuation by expert witness required the court to cite in the evidence thesis the legal provision from which that purpose follows, that is, in the examined cases, the provision of Art. 129(2) ELA in conjunction with Art. 135 ELA. In none of the examined theses the court properly formulated the purpose of valuation and, for that reason, those theses must be considered incomplete. The courts' mistakes in that respect lead to the adoption
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of an incorrect valuation purpose by the expert witness and further related consequences.

3. In none of the cases did the courts point in the evidence theses to a concrete restriction directly relating to the property's use or refer to a specific provision of the respective resolution (regulation) establishing the RUA, which is contrary to Art. 129(2) ELA, although that is the event to which the law attaches the airport's civil liability.
4. In none of the examined cases (except for Z1 zone for the WAW AP and zone A for the KRK AP) the resolutions (regulations) establishing the RUA imposed restrictions on property use for residential plots, which the courts failed to consider when drafting the evidence theses.
5. Dates relevant to valuation are missing, and their incorrect provision – consisting in the formulation of incomplete theses comprising several dates for the establishment of the property's value or theses in which the date of the property's condition is not distinguished from the date of the market's condition – is irregular and triggers the need of independent establishment of such dates by valuers, or their correction.

Improvement of the methodology and quality of the opinions prepared by expert witnesses may be achieved through formulation of complete evidence theses and citation in such theses of the provision of Art. 129(2) ELA, indicating the valuation purpose to the valuer, which will enable fulfilment of the assumptions of the intervention made by the state on the property market.

ACKNOWLEDGEMENTS AND FINANCIAL DISCLOSURE

Publication financed from the project "The Reduction of Negative Consequences of Noise Nuisance from Airports in Poland" (SOWA 2020), carried out in the Cracow University of Economics as a part of the basic task of pursuing scientific activities, rendition of research services and transfer of knowledge and technologies to the economy, under § 4(1) item 1 of the Charter of the University of Economics.

REFERENCES

- Act of 21 August 1997 *on real estate management* (Journal of Laws 2020 No. 1990, as amended).
- Act of 23 April 1964 – *Civil Code* (Journal of Laws 2020, No. 1740, as amended).
-

- Act of 27 April 2001 – *Environmental Law* (Journal of Laws 2020, No. 1219, 1378, 1565, as amended).
- Aleksandra, P. (2017). *Znaczenie tezy dowodowej i podmiot obowiązany do jej sformułowania*. System Informacji Prawnej LEX.
- Bennett, R., L. (1982). Airport Noise Litigation: Case Law Review. *Journal of Air Law and Commerce*, 47.
- Coase, R. (2013). *Firma, rynek i prawo*. Warszawa: Wolters Kluwer.
- Cracow RUA Resolution, Resolution XXXII/470/09 of the Małopolskie Voivodeship Assembly of 25 May 2009 *establishing a restricted use area for the Kraków-Balice Airfield, managed by Międzynarodowy Port Lotniczy im. Jana Pawła II Kraków – Balice Sp. z o.o.*
- Czajkowska-Matosiuk, K. (2015). Ograniczenie korzystania z nieruchomości w związku z wymogami ochrony środowiska. *Prawo i Środowisko*, 1.
- Dzierżanowska, J., & Studzińska, J. (2016). *Biegli w postępowaniu sądowym cywilnym i karnym. Praktyczne omówienie regulacji z orzecnictwem*. Warszawa: Wolters Kluwer.
- Frańczuk, M. (2018). *Hałas jako immisje sąsiedzkie, a prawo do spokojnego zamieszkiwania*. *Świat Nieruchomości*, 2(104), <https://doi.org/10.14659/worej.2018.104.05>.
- Gdańsk RUA Resolution, Resolution 203/XVIII/16 of the Pomorskie Voivodeship Assembly of 29 February 2016 *establishing a restricted use area around the Lech Wałęsa Airport in Gdańsk*.
- Goulbourne, S. (2002). Airport Noise and the Right to Family Life: A Legitimate Application of Article 8 of the European Convention?, *Liverpool Law Review*, 24.
- Gruszecki, K. (2019). *Prawo ochrony środowiska. Komentarz*. Warszawa: Wolters Kluwer.
- Habdas, M. (2020). Odszkodowania dla właścicieli nieruchomości zlokalizowanych w obszarach ograniczonego użytkowania dla lotnisk – wyzwania dotyczące prawidłowego ustalenia zakresu odpowiedzialności odszkodowawczej i podlegającej kompensacji szkody – część 1. *Przegląd Sądowy*, 5.
- Habdas, M., & Konowalczyk, J. (2018). Cele i warunki skutecznej interwencji Państwa w obszarach ograniczonego użytkowania portów lotniczych, *Świat Nieruchomości*, 105(3). <https://doi.org/10.14659/WOREJ.2018.105.001>.
- Judgment of the Supreme Court of 15 December 2016, II CSK 151/16, LEX No. 2241380.
- Judgment of the Supreme Court of 19 December 2006, V CSK 360/06, LEX No. 238973.
-

- Judgment of the Supreme Court of 21 March 2017, I CSK 440/15, LEX No. 2305911.
- Judgment of the Supreme Court of 6 May 2010, II CSK 602/09, LEX No. 585768.
- Katowice RUA Resolution, Resolution IV/53/12/2014 of the Śląskie Voivodeship Assembly of 25 August 2014 *establishing a restricted use area for the International "Katowice" Airport in Pyrzowice*.
- Kirzner, I. (1982). *Method, Process, and Austrian Economics: Essays in Honor of Ludwig von Mises*. Lexington Books.
- Kobryń, A., & Bakunowicz, K. (2015). Wielokryterialny model decyzyjny w wyborze lokalizacji lotniska pasażerskiego w województwie podlaskim. *Ekonomia i Środowisko*, 1(52).
- Kołąkowski, K., (2016). *Komentarz do art. 278 k.p.c.* In: K. Piasecki (Ed.), *Kodeks postępowania cywilnego. Komentarz do artykułów 1-505¹⁴. Tom I*. Warszawa: Wolters Kluwer.
- Konowalczyk, J. (2017). The Problem of Reflecting the Market in The Legal Principles of Real Estate Valuation in Poland. How to Eliminate the "Legal Footprint"?, *Real Estate Management and Valuation*, 25(2). <https://doi.org/10.1515/remav-2017-0012>.
- Kopsch, F. (2016). The Cost of Aircraft Noise – Does it Differ from Road Noise? A Metaanalysis. *Journal Air Transport Management*, 57, 138-142. <https://doi.org/10.1016/j.jairtraman.2016.05.011>.
- Methodology of valuation in the restricted use areas of airports in Poland* (2018). Unpublished manuscript, University of Economics in Katowice.
- Migala, S. J. (2017). UAS: Understanding the Airspace of States. *Journal of Air Law and Commerce*", 82(3). <https://scholar.smu.edu/jalc/vol82/iss1/2>.
- Ossowski, W. (1960). Uwagi o korzystaniu z biegłych w sprawach cywilnych. *Nowe Prawo*, 10.
- Pilsk, W. E. (2012). Airport Noise Litigation in the 21st Century: A Survey of Current Issues. *Issues in Aviation Law and Policy*, 11(3), <https://doi.org/10.1080/13698570601181631>.
- Rakoczy, B. (2010). Glosa do wyroku Sądu Najwyższego z dnia 25 lutego 2009 r., II CSK 546/08. *Przegląd Prawa Ochrony Środowiska*, 2(4).
- Regulation of the Council of Ministers of 21 September 2004 *on valuation of properties and preparation of valuation reports* (Journal of Laws 2019, No. 2250, as amended).
- Resolution XVIII/302/12 of the Wielkopolskie Voivodeship assembly of 30 January 2012 *establishing a restricted use area for the Poznań-Ławica airport in Poznań*.
- Rothbard, M. N. (2008). *Ekonomia wolnego rynku*, Tom 3. Chicago-Warszawa: Fijorr Publishing.
-

- Turek, J. (2007). Biegły sądowy i jego czynności. *Monitor Prawniczy*, 24.
- Warsaw RUA Resolution, Resolution 76/11 of the Mazowieckie Voivodeship Assembly of 20 June 2011 *establishing a restricted use area for the Frederic Chopin Airport in Warsaw*.
- Williamson, O., E. (1998). Transaction Cost Economics: How It Works; Where It Is Headed. *The Economist*, 146(1).
- Zakrzewska, M. (2010). *Ochrona środowiska w procesie inwestycyjno-budowlanym*. Warszawa: LexisNexis.
-