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Wypowiedzenie wysokości opłaty rocznej z tytułu użytkowania wieczystego

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Streszczenie:

Prawo użytkowania wieczystego jest uregulowane w art. 232-243 Kodeksu cywilnego oraz przepisach Ustawy z 21 sierpnia 1997 r. o gospodarce nieruchomościami. Jedną z cech charakterystycznych tego prawa jest obowiązek wnoszenia przez użytkownika wieczystego corocznej opłaty. Ustawa o gospodarce nieruchomościami przewiduje, że opłata ta może być aktualizowana przez właściwy organ administracji publicznej działający w imieniu właściciela nieruchomości. Analiza przepisów regulujących tryb postępowania wywołany wypowiedzeniem skłania do wniosku, że regulacja jest nieprecyzyjna i niejasna. Dodatkowe utrudnienie stanowi to, że ustawa nie określa skutków prawnych wadliwego wypowiedzenia opłaty. Niniejszy artykuł stanowi propozycję rozwiązania najbardziej istotnych problemów praktycznych związanych z wypowiedzeniem dotychczasowej wysokości opłaty.

Słowa kluczowe: użytkowanie wieczyste, aktualizacja, wypowiedzenie, opłata roczna, prawo rzeczowe

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Notice of adjustment of the annual fee for perpetual usufruct of real property

Abstract:

The title to perpetual usufruct is regulated under Articles 232 to 243 of the Civil Code and in the Act of 21 August 1997 on Real Property Management. One of the characteristic features of this right is the obligation, on the part of the perpetual usufructuary, to pay an annual fee. The Act on Real Property Management prescribes that this fee may be updated by the competent public administration body acting on behalf of the real property owner. An analysis of provisions regulating the proceedings initiated by the filing of the notice of adjustment of the existing fee leads to the conclusion that the regulation in question is neither precise, nor clear. An additional difficulty lies in non-specification of legal consequences for a defective adjustment of the existing fee. This article puts forward a proposal for a solution to the most important practical difficulties associated with adjustment of the existing annual fee for perpetual usufruct.

Keywords: perpetual usufruct, fee adjustment, notice of adjustment, annual fee, right *in rem*

1. Introduction

Perpetual usufruct constitutes right in rem regulated in the provisions of the Polish Act of 23 April 1964 – Civil Code² and the Polish Act of 21 August 1997 on Real Property Management³. It is established on the basis of an agreement between the owner of the real property (the State Treasury or territorial self-government unit) and the entitled entity (perpetual usufructuary) and consists in the possibility to use and to dispose of the real property with the exclusion of other persons. The manner of use of real properties is defined by acts, principles of social co-existence and agreement on establishing the right of perpetual usufruct (Article 233 of the Civil Code). Land is handed over for perpetual usufruct for a specific and relatively long period of time (99 years)⁴, and the basic obligation of the entitled entity (in addition to the manner of use of the real property specified in the agreement) is to pay the land owner an annual fee (Article 238 of the Civil Code). The amount of the annual fee depends on the purpose for which the real property is handed over for perpetual usufruct and the value of this real property. Both 'components' of the annual fee may be changed, due to which the legislator determined procedures for updating the amount of the annual fee. According to the Act on Real Property Management, it is possible to change the percentage rate of the fee (in the case of change in the purpose of the perpetual usufruct) or to change the amount (in the case of change in the value of the real property). In the latter case, if the increase in the value of the real property is stated, a competent public administration authority,⁵ acting on behalf of the owner, has the right to file the notice of adjustment of the existing fee for the perpetual usufruct⁶. The Act on Real Property Management prescribes that the fee may be updated at the request of the perpetual usufructuary (Article 77(3) of the Act on Real Property Management). The perpetual usufructuary may submit such a request if the value of the real property changed and the competent authority did not perform the update (Article 81(1) of the Act on Real Property Management). It may be concluded from the above-mentioned provisions that the basis of the perpetual usufructuary's request for the update of the annual fee may be both the decrease and the increase in the value of the real property⁷.

In the case of real properties constituting the property of the State Treasury, the update is performed by the head of the district in which the real property is located⁸. In relation to real properties of territorial self-government units or their unions, entities competent to perform this activity are: head of the commune (mayor, president of the city)⁹, board of the commune¹⁰, board of the province¹¹ or executive authority of the union of territorial self-government units.

In the scope of the assessment of the legal character of proceedings regarding the update of the fee

² Consolidated text: Journal of Laws of 2020, item 1740, as amended (hereinafter referred to as the Civil Code).

³ Consolidated text: Journal of Laws of 2020, item 1990, as amended (hereinafter referred to as the Real Property Management Act).

⁴ In exceptional cases it is allowed to hand over the land for a shorter period of time, but not less than 40 years (Article 236(1) of the Civil Code).

⁵ In this case, it acts as the owner's representative, not as a public administration authority within the meaning adopted in the administrative law – see more in: Ł. Dziamski, *Selected Issues concerning the Update of the Annual Fee for Perpetual Usufruct (Wybrane zagadnienia aktualizacji opłaty rocznej z tytułu użytkowania wieczystego)* [in:] M. Cherka et al., *Energy and Environmental Protection in the Investment Process (Energetyka i ochrona środowiska w procesie inwestycyjnym)*, Warsaw 2010, p. 294-295.

⁶ Article 77(1) in connection with Article 78(1) of the Real Property Management Act.

⁷ It is obviously difficult to assume that the perpetual usufructuary could be interested in the increase in charges. Nevertheless, *prima facie* such a situation cannot be excluded.

⁸ Pursuant to Article 23 of the Real Property Management Act, they represent interests of the State Treasury.

⁹ Article 25(1) of the Real Property Management Act.

¹⁰ Article 25b of the Real Property Management Act.

¹¹ Article 25d of the Real Property Management Act.

for perpetual usufruct, the prevailing view is that it is a special type of proceedings of a civil law nature conducted by public administration authorities¹². The course of the proceedings regarding the update is regulated by the provisions of the Real Property Management Act and – in a precisely determined scope – by the provisions of the Code of Administrative Procedure. The object of this consideration will be the problem of premises whose fulfilment conditions effective initiation of these proceedings and legal consequences related to defective (ineffective) notice of adjustment of the existing fee for the perpetual usufruct.

2. Characteristics of proceedings regarding the update of the fee for perpetual usufruct

Constructional elements of the right of perpetual usufruct are regulated in the provisions of the Civil Code (Article 232 of the Civil Code - Article 243 of the Civil Code). In the Real Property Management Act the legislator included the regulation concerning rules for the update of the fee for perpetual usufruct (Article 77 – Article 78 of the Real Property Management Act), proceedings related to questioning the notice of adjustment before the self-government board of appeal (Article 79 of the Real Property Management Act), mode of appeal against the ruling of the board of appeal (Article 80 of the Real Property Management Act) and proceedings regarding the 'reverse' update, i.e. conducted at the perpetual usufructuary's request (Article 81 of the Real Property Management Act). The above-mentioned provisions provide the basis for distinguishing three stages of the update. At the first stage, the validity of the update (increase in its value) is examined. Its completion entails delivery to the perpetual usufructuary of the notice of adjustment of the existing fee and offer of its new amount. This activity is regulated only by the provisions of the Polish Act of 14 June 1960 – the Code of Administrative Procedure¹³ (Article 78(1) *in fine* of the Code of Administrative Procedure). The exclusion of the possibility to apply other provisions of the code at this stage of the proceedings prevents determining the time of the initiation of the proceedings¹⁴, as well as eliminates the perpetual usufructuary's possibility to participate in activities related to the preparation of the appraisal report (e.g. the inspection of the real property). If the perpetual usufructuary does not accept the offer of the new annual fee, they may lodge with the self-government board of appeal competent for the location of the real property a request for declaring that the update of the annual fee is unjustified or that it is justified in another amount (Article 78(2) of the Real Property Management Act). It starts the second stage of the proceedings, at which the provisions of the Code of Administrative Procedure on the exclusion of the employee and the authority, on handling of cases, deliveries, calls, deadlines, fees, costs and proceedings, except for the provisions concerning appeals and complaints, are applied (Article 79(7) of the Real Property Management Act). It is completed when the ruling of the board of appeal becomes final or a settlement is concluded (Article 79(3) in connection with section 5 of the Real Property

¹² In the literature on the subject it has been referred to the stage of the proceedings before the self-government board of appeal, i.e. after filing by the perpetual usufructuary the request that the update is unjustified or that it is justified in another amount – see: T. Brzezicki, K. Śmigielski, *Permissibility of the Application of Extraordinary Modes of Administrative Proceedings to Rulings of Self-Government Boards of Appeal on the Update of the Annual Fee for Perpetual Usufruct of Land Properties (O dopuszczalności stosowania nadzwyczajnych trybów postępowania administracyjnego do orzeczeń samorządowych kolegiów odwoławczych w sprawie aktualizacji opłaty rocznej z tytułu użytkowania wieczystego nieruchomości gruntowych)*, 'Casus' 2012, no. 64, p. 20; A. Korzeniowska, *Proceedings before the Self-Government Board of Appeal (Postępowanie przed samorządowym kolegium odwoławczym)*, Zakamycze 2002, p. 222-228 as well as literature and case law cited there. However, this determination should be referred to the entire course of proceedings regarding the update, also if they are completed by the acceptance of the notice of adjustment of the fee.

¹³ Consolidated text: Journal of Laws of 2021, item 735 (hereinafter referred to as the Code of Administrative Procedure or the Code).

¹⁴ Compare judgement of the Provincial Administrative Court in Łódź of 18 December 2019, II SA/Łd 561/19, Lex no. 2768324.

Management Act)¹⁵. Each party to the proceedings may lodge an appeal against the ruling of the board of appeal within fourteen days from its delivery. Lodging the appeal causes the revocation of the ruling of the board of appeal and the commencement of the third stage of the update – proceedings before a common court.

The premise justifying the initiation of the update procedure is the change in the value of the real property established by a person with professional qualifications in the scope of real property appraisal (property appraiser – Article 174(2) and (3) of the Real Property Management Act). They prepare in writing an opinion on the value of the real property in the form of an appraisal report (Article 156(1) of the Real Property Management Act).

The statutory structure of the premise conditioning the update means that it concerns both the update performed *ex officio* (Article 78(1) of the Real Property Management Act) and the update at the perpetual usufructuary's request (Article 81 of the Real Property Management Act). Although the above-mentioned provision connects the request for the update of the annual fee only with change in the value of the real property and inaction of the competent authority, it should be assumed that the perpetual usufructuary's effective request for the update should be based on an appraisal report (see also Article 77(3) of the Real Property Management Act). In this scope, due to a separate regulation in the provisions of the Real Property Management Act constituting *lex specialis* in relation to the provisions of the Code, the permissibility of use of the non-exhaustive catalogue of evidence in order to demonstrate the change (*de facto* decrease) in the value of the real property should be excluded. In other words, the perpetual usufructuary cannot request the update referring to e.g. the decrease in prices of similar real properties located in the same area or ineffective attempts to sell the title possessed by them¹⁶.

3. Legal character of the notice of adjustment of the annual fee

The literature on the subject has pointed out that the notice of adjustment of the annual fee for perpetual usufruct of real property 'is in fact a notice of adjustment amending the agreement for letting real property for perpetual usufruct (in the part concerning the annual fee related to the exercise of this right)¹⁷. It results from the provisions of the Real Property Management Act that the notice of adjustment is a declaration of will with double effect made by the entity representing the real property owner¹⁸. First of all,

¹⁵ The expression 'the new amount of the annual fee determined [...] as a result of concluding the settlement [...]' (Article 79(5) of the Real Property Management Act) is imprecise. Pursuant to Article 118(1) of the Code in connection with Article 119(1) of the Code, which apply to Article 79(7) of the Real Property Management Act, a settlement requires the approval in the form of a decision issued by a public administration authority before which it has been concluded. It becomes enforceable on the day on which the decision on its approval has become final (Article 120(1) of the Code). Therefore, it should be assumed that this provision refers to the amount of the annual fee resulting from a settlement approved by a final decision.

¹⁶ A separate issue is the 'reaction' of the public administration authority to the request for the initiation of the update not supported by the submission of the appraisal report. Apart from the perpetual usufructuary's possibility to refer the case to the board of appeal (Article 81(1) of the Real Property Management Act), the possibility of submitting to the perpetual usufructuary the information about the premise conditioning the initiation of the update should be mentioned. Article 9 of the Code, establishing the principle of submitting information in the course of the proceedings, may constitute the basis for submitting this information. This provision constitutes a general principle of administrative proceedings. Nevertheless, due to the fact that it significantly strengthens the position of the entity putting forward a specific request, it should be also taken into account in non-judicial proceedings conducted by public administration authorities – compare: W. Piątek, *Position of General Principles of Administrative Proceedings in the Interpretation of the Provisions of the Administrative Law (Miejsce zasad ogólnych postępowania administracyjnego w wykładni przepisów prawa administracyjnego)* [in:] G.Łaszczycza (ed.), A. Matan (ed.), *System of the Administrative Procedural Law. General Principles of Administrative Proceedings (System Prawa Administracyjnego Procesowego. Zasady ogólne postępowania administracyjnego)*, Warsaw 2018, volume 2 part 2, p. 571-577.

¹⁷ T. Brzezicki, K. Śmigielski, *op.cit.*, p. 22; see also: Ł. Dziamski, *Update of the Notice of Adjustment of the Annual Fee for Perpetual Usufruct of Real Property. Procedural Issues (Aktualizacja opłaty rocznej z tytułu użytkowania wieczystego. Zagadnienia proceduralne)*, Warsaw 2013, p. 33. In other terms, it is a unilateral legal act (offer) – see: G. Bieniek, *Commentary to Article 78 of the Polish Act on Real Management Act (Komentarz do art. 78 ustawy o gospodarce nieruchomościami)* [in:] G. Bieniek (ed.), *The Polish Act on Real Property Management. Commentary (Ustawa o gospodarce nieruchomościami. Komentarz)*, Warsaw 2011, p. 431.

¹⁸ Compare: J. J. Zięty, *Procedure regarding the Update of the Annual Fee – Common Issues (Postępowanie w sprawie aktualizacji opłaty rocznej – zagadnienia wspólne)*, point 2.2.1. [in:] *Update of the Annual Fee for Perpetual Usufruct (Aktualizacja opłaty rocznej za użytkowanie wieczyste gruntu)*, [online] Lex/el., [access:

it cancels the amount of the fee, secondly – at the same time it includes the offer for acceptance of its new amount. The effective delivery of the notice of adjustment (together with the offer) to the perpetual usufructuary may lead to the amendment of the agreement for letting real property for perpetual usufruct or to the initiation of proceedings before the self-government board of appeal in order to demonstrate that the update is unjustified or that it is justified in another amount. Therefore, the notice of adjustment will not have the character of a ‘change’ in each case.

The issue of the legal character of the notice of adjustment of the fee is captured in a similar manner in the case law, which underlines that the notice of adjustment of the annual fee has a strictly ‘civil law’ nature and constitutes an expression of the owner’s will to change one of essential elements of the provisions of the agreement for letting real property for perpetual usufruct. Although it is performed by a competent authority representing the land owner, it does not fall within the concept of administrative ruling (decision, order) within the meaning of the provisions of the Code. The fact that this notice of adjustment is subject to control at the administrative level does not change its character or make it an administrative act¹⁹. As a consequence, the notice of adjustment is not subject to any appeal within the administrative instance and cannot constitute an object of verification within extraordinary modes provided for in the Code or within a complaint to the administrative court²⁰.

4. Premises for the effectiveness of the notice of adjustment of the annual fee

4.1. General issues

The analysis of the content of Article 78(1) of the Real Property Management Act allows formulating the conditions of the effectiveness of the notice of adjustment. The wording of this provision provides grounds for distinguishing ‘procedural’ and ‘substantive’ premises for this activity.

The ‘procedural’ premises concern the mode of the notice of adjustment, i.e. the form in which it should take place, the deadline and the delivery of the notice of adjustment to the perpetual usufructuary. The content of the notice of adjustment of the annual fee should be qualified as the ‘substantive legal’ premise. The Real Property Management Act does not provide guidelines in relation to legal consequences of lack of individual elements of the notice of adjustment. However, it is possible to distinguish elements conditioning its existence in the legal sense from elements whose lack does not cause such a far-reaching consequence.

4.2. Procedural premises for the effectiveness of the notice of adjustment of the annual fee

Pursuant to the content of Article 78(1) of the Real Property Management Act, the update is performed through a written notice of adjustment of the existence fee²¹. The notice of adjustment of the annual fee,

11/04/2021].

¹⁹ Judgement of the Provincial Administrative Court in Łódź of 18 December 2019, II SA/Łd 561/19, Lex no. 2768324; judgement of the Provincial Administrative Court in Łódź of 17 October 2019, II SA/Łd 568/19, Lex no. 2742283; judgement of the Provincial Administrative Court in Łódź of 6 October 2015, I SA/Łd 659/15, LEX no. 1929714.

²⁰ The literature has indicated that the notice of adjustment is not an administrative decision, and therefore it is not subject to appeal to the administrative court – A. Skibiński, *Update of the Fee for Perpetual Usufruct – Attempt of Assessment of the Mixed Mode of Verification (Aktualizacja opłaty za użytkowanie wieczyste – próba oceny mieszanego trybu weryfikacji)*, ‘Casus’ 2003, no. 27, p. 15; Ł. Dziamski, *Update of the Annual Fee... (Aktualizacja opłaty rocznej...)*, p. 62.

²¹ Similarly, the perpetual usufructuary requesting the update should deliver their request in written form (see Article 81(1) of the Real Property Management Act).

including at the same time the offer of its new amount, takes place within the proceedings whose purpose is to amend the agreement for letting real property for perpetual usufruct. This argues in favour of the location of this form of the public administration authority's action within acts from the scope of the civil law, as the notice of adjustment constitutes the entitled entity's declaration of will expressing their intention to change one of essential elements of a civil law agreement. Therefore, the manner of its submission and consequences related to it should be assessed in the context of regulations of the Civil Code concerning declarations of will. Sentence 1 of Article 61(1) states that a declaration of will, which is to be submitted to another person is submitted at the time when this person may become acquainted with its content. The legislator has adopted in this provision the construction of the so-called qualified theory of delivery, according to which it is sufficient if the declaration of will is delivered to the addressee in such a way that they have the possibility to become acquainted with its content, and therefore it is irrelevant whether they have really become acquainted with this declaration or not²². The civil law character of the notice of adjustment means that the regulation concerning the revocability of the declaration of will apply to it. Pursuant to sentence 2 of Article 61(1), revoking of the declaration is effective if it is delivered together with this declaration or earlier. Therefore, the competent authority will be able to effectively revoke the notice of adjustment of the existing annual fee if such revoking is delivered to the addressee together with the notice of adjustment or earlier.

For the initiation of the update, the Real Property Management Act requires the notice of adjustment 'in written form' (Article 78(1) of the Real Property Management Act), without specifying it. Pursuant to the provisions of the Civil Code, in order to maintain the written form it is sufficient to place a hand-written signature on the document including the content of the declaration of will (Article 78(1) of the Civil Code). At the same time however, the legislator has reserved that the submission of declaration of will in electronic form is equivalent to the declaration of will submitted in written form (Article 78¹(2) of the Civil Code). The electronic form of the declaration of will requires submitting the declaration of will in electronic form and signing it with a qualified electronic signature (Article 78¹(1) of the Civil Code). The declaration of will expressed in electronic form is submitted to another person upon entering it into the means of electronic communication in a way allowing this person to become acquainted with its content (Article 61(2) of the Civil Code).

In the studies on the civil law it is underlined that due to the limitation of availability of IT systems the use of electronic form of the declaration of will may be deemed effective only if the provision of law provides for the submission of the declaration by electronic means²³ or the addressee has granted their consent to this form of submitting declarations or it results from the previous cooperation between the parties²⁴. It is emphasised in this context that a declaration has an electronic form if it has been encoded in a form allowing its storage, processing and transfer on electronic carriers, due to which Article 61(2) of the Civil Code applies only to declarations of will sent over distance by means of electronic communication (in

²² R. Trzaskowski, *Commentary to Article 61 of the Polish Civil Code (Komentarz do art. 61 k.c.)* [in:] J. Gudowski (ed.), *Polish Civil Code. General Part. Commentary to Selected Provisions (Kodeks cywilny. Część ogólna. Komentarz do wybranych przepisów)*, volume 3, [online] Lex/el. and the case law cited there, [access: 18/03/2021].

²³ This is e.g. provided for in Article 30(3) of the Polish Act of 30 May 2014 on consumer rights, consolidated text: Journal of Laws of 2020, item 287, as amended.

²⁴ R. Trzaskowski, *op.cit.*, volume 30.

particular through websites, electronic mail, SMS or MMS), i.e. it does not apply to declarations of will in electronic form delivered to the addressee on such physical media as USB memory stick, micro SD memory card, CD or DVD²⁵.

Pursuant to the content of Article 78(1) of the Real Property Management Act, delivery of the notice of adjustment of the fee is regulated by the provisions of the Code. It means that the notice of adjustment of the existing fee for perpetual usufruct of real property may be delivered in the manner specified in Article 39 – Article 39³ of the Code.

Pursuant to these provisions, the public administration authority delivers letters against receipt via a postal operator within the meaning of the Polish Act of 23 November 2012 – Postal Law²⁶, its employees, other authorised persons or authorities or by means of electronic communication within the meaning of Article 2(5) of the Polish Act of 18 July 2002 on the provision of services by electronic means²⁷. The last of the above-listed manners of delivery requires the fulfilment by the future addressee of one of three conditions. In accordance with the content of 39¹(1) of the Code, a letter is delivered by means of electronic communication within the meaning of the above-mentioned act if the party or another participant of the proceedings fulfils one of the following conditions: 1) they submit a request in the form of an electronic document through the electronic inbox of the public administration authority; 2) they apply to the public administration authority for such delivery and indicate their e-mail address to the public administration authority; 3) they give consent to delivering letters in the proceedings through these means and indicate their e-mail address to the public administration authority. Taking into account that according to the applicable provisions of law the perpetual usufructuary learns about the initiated update after receiving the notice of adjustment, the use of electronic deliveries becomes an illusion. The fulfilment of the first two conditions is virtually impossible. It is difficult to assume that the perpetual usufructuary will submit the request in the form of an electronic document through the electronic inbox of the public administration authority or that they will apply to the public administration authority for such a delivery and indicate their e-mail address to the public administration authority as they do not know at all about the pending proceedings. The fulfilment of the third condition would require – before delivery of the notice of adjustment with the use of means of electronic communication – requesting for consent to delivery of letters in this manner²⁸. It leads to the conclusion that the use of electronic form of the notice of adjustment, due to the premise for permissibility of this form included in the Code, is virtually impossible.

The Code contains another important regulation concerning deliveries between public entities obliged to make available and handle the electronic inbox on the basis of Article 16(1a) of the Polish Act of 17 February 2005 on the computerisation of the business entities pursuing public tasks²⁹, i.e. mainly between public administration authorities. In such a case, delivery is performed to the electronic inbox of this entity

²⁵ *Ibidem*, volume 29.

²⁶ Consolidated text: Journal of Laws of 2020, item 1041, as amended.

²⁷ According to this provision, means of electronic communication are technical solutions, including ICT devices and software tools integrated with them, allowing individual communication at a distance with the use of data transmission between ICT systems, in particular e-mail (consolidated text: Journal of Laws of 2020, item 344, as amended).

²⁸ The inconsistency of the above-indicated regulations is likely to be removed after the entry into force of the amendment to the Code provided for in Article 61(5) of the Polish Act of 18 November 2020 on Electronic Delivery (Journal of Laws of 2020, item 2320).

²⁹ Consolidated text: Journal of Laws of 2021, item 670, as amended.

(Article 39² of the Code). This solution is all the more important that relatively often addressees of notices of adjustment of the fee are public administration authorities. They act on behalf of the State Treasury or territorial self-government units, being perpetual usufructuaries of real properties. The circumstance that they represent perpetual usufructuaries and act at the civil law level cannot constitute grounds for the exclusion of the application of Article 39² of the Code to deliveries of notices of adjustment. The legislator in Article 78(1) *in fine* of the Real Property Management Act has expressly indicated that delivery of the notice of adjustment is regulated by the provisions of the Code, which means that these provisions should be applied directly, not accordingly.

The above proves that the use of possibility to deliver the notice of adjustment of the existing fee through means of electronic communication is in principle limited to cases in which it will be addressed to public administration authorities. If the perpetual usufructuary is another entity, limitations included in the Code basically paralyse this possibility.

The legislator has included the modification of the discussed regulation in one of the latest amendments to the Code³⁰, introducing a type of conversion of the letter issued in the form of electronic document into a paper form. Pursuant to Article 39³(1) of the Code, in the case of letters issued by a public administration authority in the form of electronic document with the use of the ICT system with a qualified electronic signature, trusted signature or personal signature, advanced electronic seal or qualified electronic seal, the delivery may consist in delivering the printout of the letter obtained from this system, reflecting the content of this letter, if the party or another participant of the proceedings has not submitted the request in the form of electronic document through the electronic inbox of the public administration authority, has not applied to the public administration authority for such a delivery or has not given consent to delivery of letters in this manner³¹. Such a printout is delivered in a traditional manner, i.e. with the use of one of the manners indicated in Article 39 of the Code. Apart from specific circumstances justifying the use of this form of delivery³², the preparation of electronic documents in the case of delivery of their printouts appears as a pointless action. The printout of such a letter is only an official document and does not produce any effects related to delivery of the letter³³.

The assumption that the Civil Code regulates two separate forms (written and electronic) of the declaration of will would lead to the conclusion that there is no legal possibility to submit the notice of adjustment of the existing fee in electronic form in the light of the wording of Article 78(1) of the Real Property Management Act. The way that allows ensuring consistent interpretation of both regulations is the assumption that the written form of the notice of adjustment within the meaning of the above-mentioned provision refers to a letter recorded in paper or electronic form. In such a case, it will possible to use both

³⁰ Introduced by the Polish Act of 16 April 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus; Journal of Laws of 2020, item 695, as amended.

³¹ Obligatory elements of a printout include: information that the letter has been issued in the form of electronic document and signed with a qualified electronic signature, trusted signature or personal signature, with the indication of the first and last name and official position of the person that has signed it, or stamped with an advanced electronic seal or qualified electronic seal and labelled with the identifier of this letter assigned by the ICT system in which the letter has been issued (Article 39³(2) of the Code).

³² This provision was added in the act whose purpose was to prevent the spread of the SARS-CoV-2 virus. However, there are no reference to reasons for its introduction in the justification accompanying the draft act (see Sejm paper no. 330, 9th term Sejm of the Republic of Poland).

³³ A. Wróbel, *Article 39(3) Delivery of the Printout of a Letter Obtained from the ICT System (Art. 39(3) Doręczenie wydruku pisma uzyskanego z systemu teleinformatycznego)* [in:] M. Jaškowska, M. Wilbrandt-Gotowicz, A. Wróbel, *Updated Commentary to the Polish Code of Administrative Procedure (Komentarz aktualizowany do Kodeksu postępowania administracyjnego)*, [online] Lex/el. 2021 [access: 09/04/2021].

traditional manners of delivery and electronic deliveries, subject to the fulfilment of conditions for permissibility of using this mode of deliveries specified in the Code³⁴.

Meeting the deadline referred to in Article 78(1) of the Real Property Management Act also constitutes an element of the mode of the notice of adjustment of the existing annual fee. The notice of adjustment should be delivered by 31 December of the year preceding the year in which the new amount of the fee is to apply. The legislator has not determined the effects of delivery of the notice of adjustment after 31 December. Only if the perpetual usufructuary submits to the self-government board of appeal a request for establishing that the update is unjustified or that it is justified in another amount and the board of appeal issues a ruling on this case, then the amount of the annual fee determined in it is applicable as of 1 January of the year following the year in which the notice of adjustment of the existing fee was submitted. The application of the above rule by analogical reasoning to the situation in which the perpetual usufructuary has not submitted a request to the board of appeal would require us to assume that in such a case the new amount of the annual fee is applicable as of 1 January following the year in which the notice of adjustment of the existing fee was submitted. It allows assuming that the deadline for delivery of the notice of adjustment is only of a procedural nature, and the delivery performed after its expiry affects the validity period of the new amount of the annual fee³⁵.

The possibility to initiate the update constitutes a special kind of competence subject to time limitation. As a rule, the amount of the annual fee is subject to update no more often than once every three years (Article 77(1) of the Real Property Management Act). However, it is unclear how to understand the expression 'is subject to update no more often than once every three years'. There are doubts whether this provision should be understood as the right to submit the notice of adjustment of the existing fee no more often than once every three years or whether it concerns the update performed. According to solutions adopted in the Real Property Management Act, the amount of the fee is updated after the expiry of 30 days from delivery of the notice of adjustment of its existing amount, if the perpetual usufructuary does not submit the request referred to in Article 78(2) of the Real Property Management Act, or at the time when the ruling of the board of appeal or the decision approving the settlement becomes final (Article 79(5) of the Real Property Management Act). In the last case, there are two possible types of rulings of the board of appeal: rejecting the request of the perpetual usufructuary or establishing the new amount of the fee (Article 79(3) of the Real Property Management Act). The new annual fee established as a result of the final ruling of the board of appeal is applicable as of 1 January following the year in which the notice of adjustment of the existing fee was submitted (Article 79(5) of the Real Property Management Act). The time limitation concerning the possibility to perform the update, provided for in Article 77(1) of the Real Property Management Act, leads to the conclusion that the authority may initiate the next update after the expiry of 3 years from the time when the new amount of the annual fee became applicable.

The permissibility of the update in the situation when the board of appeal issues a ruling on the validity of the existing annual fee constitutes a separate issue. It will take place mainly in the case when the

³⁴ See also the amendment to Article 14 of the Code provided for in Article 61(1) of the Polish Act of 18 November 2020 on Electronic Delivery (Journal of Laws of 2020, item 2320).

³⁵ Compare Ł. Dziamski, *Update of the Annual Fee... (Aktualizacja opłaty rocznej...)*, p. 66.

administration authority submitting the notice of adjustment of the existing annual fee does not prove the increase in the value of real property e.g. due to defectiveness of the appraisal report. The legal grounds for issuing such a ruling can be found in Article 79(3) of the Real Property Management Act, which provides for the possibility to issue a ruling on establishing the new amount of the fee. The new fee is a fee whose amount is different from that proposed in the notice of adjustment³⁶. In the case-law it is assumed that establishing the amount of the fee at the existing level constitutes the new amount of the fee within the meaning of Article 79(3) and (5) of the Real Property Management Act and, at the same time, its update within the meaning of Article 77(1) of the Real Property Management Act. Taking into account that the updated fee is applicable as of 1 January of the year following the submission of the notice of adjustment, it should be assumed that this date indicates the beginning of the three-year period until the initiation of the next update procedure³⁷. It has been assumed in the justification of this position that connecting the update with the change in the value of real property imposes on the competent authority or the perpetual usufructuary the obligation to demonstrate this change and to verify the occurrence of this premise before the initiation of the update procedure. Failure to fulfil this obligation makes the notice of adjustment unjustified and the party that causes the initiation of the update against the statutory premise should take into account consequences of submitting an unjustified notice of adjustment. A contrary opinion would lead to the acceptance of permissibility of initiating the update procedure many times, which would affect the legal situation of the perpetual usufructuary, who in order to protect their interests would have to undertake actions in administrative and court proceedings and incur costs related to demonstrating lack of legitimacy of the notice of adjustment and the establishment of the new fee³⁸. The presented position should be supported. While taking the decision on initiating the update procedure, the competent authority should examine whether the premise of the 'increase in the value of real property' has really occurred and demonstrate it in a manner compliant with the applicable provisions of law. Bearing in mind the protective function of Article 77(1) of the Real Property Management Act, it should be stated that its basic purpose is to stabilise the legal situation of the perpetual usufructuary in a specific period of time³⁹. This stabilisation should be perceived not only as the prohibition on performing too often the update of the fee understood as its increase, but also as ensuring relief from burdens related to the defence of own legal situation and the necessity to repeat it frequently.

4.3. Substantive legal premise for the notice of adjustment of the annual fee

Elements of the content of the notice of adjustment of the annual fee are determined primarily by Article 78(1) of the Real Property Management Act. Pursuant to this provision, it should contain: 1) notice of adjustment of the existence fee; 2) offer of the new amount of the fee; 3) manner of the new fee calculation; 4) information about the value of the land property established by a property appraiser; 5) information about the place where it is possible to become acquainted with the appraisal report, and 6)

³⁶ The exclusion in the proceedings before the board of appeal of provisions concerning appeals (within the meaning of the provisions included in Chapter 10 'Appeals' of Part II 'Proceedings' of the Code) means that the board of appeal may issue a ruling on the new fee higher than that proposed in the notice of adjustment. The exclusion constructed in this manner covers also Article 139 of the Code containing the prohibition *reformationis in peius*.

³⁷ Judgement of the Supreme Court of 15 November 2016, III CSK 430/15, OSNC 2017/7-8/89.

³⁸ *Ibidem*.

³⁹ See Judgement of the Provincial Administrative Court in Łódź of 22 October 2019, II SA/Łd 566/19, Lex no. 2741047.

instruction regarding the manner of questioning the notice of adjustment.

The first two elements constitute structural grounds for the notice of adjustment. The letter initiating the update of the annual fee should clearly indicate the intention to cancel the existing fee⁴⁰ and contain the offer of the amount of this fee. The structure of Article 78(1) of the Real Property Management Act leads to the conclusion that the competent authority should clearly determine that it is the 'offer' of the new amount of the annual fee. The Real Property Management Act does not state it clearly, but there should be no doubt that the content of the notice of adjustment should also indicate the public administration authority, which performs this legal action⁴¹, and the addressee of this letter – the perpetual usufructuary.

In the case of natural persons it should be the first and last name, in the case of legal persons or organisational units – the indication of their form (name) and legal form (e.g. limited liability company, joint stock company) together with the address indicating the place of residence (registered office) or the correspondence address.

Due to the negotiable character of the right of perpetual usufruct, during the procedure concerning the update of the annual fee the competent public administration authority should take care of the verification of data that it possesses about the entity to which the authority submits the notice of adjustment. Data resulting from the land and property register should be considered as insufficient in this context. The addressee of the notice of adjustment should be determined on the basis of an excerpt from the land and mortgage register kept for a given real property by a district court competent locally. It is irrelevant in this regard whether such an excerpt will be obtained by the public administration authority, which intends to perform the update. There are no obstacles to the performance of this activity by a property appraiser in the course of the preparation of the appraisal report for a given real property. Moreover, the excerpt from the land and mortgage register should be attached to the appraisal report, and Article 56(4) of the Regulation of the Council of Ministers of 21 September 2004 on the property appraisal and preparation of appraisal report (Journal of Laws of 2004, no. 207, item 2109, as amended) constitutes grounds for this obligation.

The requirement to undertake actions necessary to update the fee in relation to the perpetual usufructuary is decisive when it comes to the fact that the specified addressee must be entitled to this status at the time of delivery to them of the notice of adjustment. The assessment of their identification should be carried out on the basis of data resulting from appropriate entries in land and mortgage registers. However, it is impossible to exclude the situation in which the initiated update will be addressed to a perpetual usufructuary that signed an agreement regarding the disposal of their right, and the purchaser has already filed the request for entry into the land and mortgage register. It has been assumed in the case law that the change of the perpetual usufructuary in the course of the update procedure constitutes a legal succession subject to the assessment according to the provisions of the Civil Code. As a consequence, the purchaser enters into the rights of the seller also in the scope of deadlines and rights related to the course of the update procedure. In such a case, the provisions of Article 29 of the Polish Act

⁴⁰ As a rule, public administration authorities use the following expression: 'I cancel the amount of the existing fee'.

⁴¹ See more in point 5 of this study.

of 6 July 1982 on land and mortgage registers and mortgage⁴² do not affect the course of activities related to establishing the new amount of the annual fee. Nevertheless, they are relevant for the effects of this procedure as they determine the time from which the purchaser became the perpetual usufructuary and is obliged to incur the annual fee.

The acceptance of the above opinion would mean that the 'new' perpetual usufructuary would be bound by the notice of adjustment and the offer of the new fee even if the notice of adjustment is not delivered to them. Moreover, their right to challenge the notice of adjustment would depend on obtaining the information from the 'previous' perpetual usufructuary about the notice of adjustment and meeting the deadline to which the seller of the right would be entitled for submitting a request questioning the notice of adjustment. The above position, however, raises doubts from the point of view of the certainty of transactions and the constitutional principle of equality of entities before the law (Article 32 of the Constitution of the Republic of Poland)⁴³.

The issue concerning the status of the purchaser of the right of perpetual usufruct was also the object of consideration in the case law of administrative courts. On the basis of solutions specified in the Act on land and mortgage registers and mortgage, it has been assumed that the date of occurrence or transfer of the right of perpetual usufruct should be connected not with the date of the entry, but with the date of submitting the request for it. It results from Article 29 of the Act on land and mortgage registers and mortgage that the entry in the land and mortgage register has a retroactive effect as of the time of submitting the request for the entry⁴⁴. However, in such a case the notice of adjustment directed to the 'seller' of the perpetual usufruct is addressed to the entity, which does not fulfil the statutory condition from Article 78(1) of the Real Property Management Act, i.e. the status of the perpetual usufructuary⁴⁵.

In the case of real properties let for shared perpetual usufruct, it is not necessary to submit the notice of adjustment of the existing fee simultaneously to all perpetual usufructuaries. Each of them is connected with the owner of the real property by a separate contractual relationship, and the submission of the notice of adjustment to one or some of them is not effective towards the rest of them⁴⁶.

The act does not indicate it, but the notice of adjustment should determine the real property (or share in the property) to which the update of the fee pertains. Depending on the adopted manner of real property designation, it may be performed by the indication of its address (city/town, street, building number) or the plot number and the precinct in which it is located.

We should share the view expressed in the literature on the subject that the written form of the notice of adjustment gives rise to the obligation of the person submitting the declaration of will on behalf of the real property owner to sign it⁴⁷. Due to the civil law character of the notice of adjustment, a signature should be understood as a graphic sign placed under the declaration of will, allowing the identification of the

⁴² Consolidated text: Journal of Laws of 2019, item 2204, as amended. (hereinafter referred to as the Act on land and mortgage registers and mortgage). The above-mentioned provision states that the entry in the land and mortgage register has a retroactive effect as of the submission of the request for the entry, and in the case of the initiation of the procedure ex officio – as of the initiation of this procedure.

⁴³ Journal of Laws of 1997, no. 78, item 483, as amended.

⁴⁴ Judgement of the Supreme Administrative Court of 4 August 2020, II FSK 2093/19, Lex no. 3091120.

⁴⁵ More about consequences resulting from it can be found in point 5.

⁴⁶ Judgement of the Court of Appeal in Warsaw of 28 July 2015, VI ACa 1255/14, Lex no. 1820929.

⁴⁷ Ł. Dziamski, *Update of the Annual Fee... (Aktualizacja opłaty rocznej...)*, p. 64-65.

person submitting this declaration. Initials or any mechanical form of recording the signature (e.g. facsimile) should be excluded⁴⁸.

The acceptance of permissibility of the notice of adjustment in the form of electronic document as a consequence of the application to deliveries of the provisions of the Code leads to the conclusion that this type of notice should be signed with a qualified electronic signature, trusted signature or personal signature, or stamped with an advanced electronic seal or qualified electronic seal (see Article 39³(1) of the Code).

The consequence of the notice of adjustment of the annual fee and the submission of the offer of its new amount is the indication of the deadline and manner of the fee payment. Pursuant to the content of Article 71(4) of the Real Property Management Act, annual fees are paid throughout the period of perpetual usufruct, by 31 March of each year, in advance for a given year. Including in the notice of adjustment the information about the deadline and manner of the payment of the new fee will allow avoiding any doubts whether the notice of adjustment also includes the deadline for the payment of fees.

The requirement to indicate the manner of the new fee calculation (point 3) includes the submission of information about the value of the land property determined by the property appraiser⁴⁹, the area of the real property (size of the share) and the adopted percentage rate. Additionally, if the updated fee is more than twice the existing annual fee, the notice of adjustment should indicate the amount and manner of calculation of the fees in subsequent years until the year in which the annual fee will be equal to the amount resulting from the update (Article 77(2a) of the Real Property Management Act)⁵⁰.

Another element of the notice of adjustment of the existing fee is the information about the place where it is possible to become acquainted with the appraisal report (sentence 3 of Article 78(1) of the Real Property Management Act)⁵¹. Apart from the indication of the place, it should be assumed obvious that the notice should also indicate days and time when the perpetual usufructuary can do this. The legislator has not specified conditions for the exercise of this right. However, it should be assumed that the indication of dates ought to ensure real possibility to become acquainted with the appraisal report in the ordinary course of activities. The reasons concerning the purpose would justify the assumption that this right can be exercised during the time specified for submitting the request referred to in Article 78(2) of the Real Property Management Act. This right constitutes a specific type of equivalent of the right in the administrative proceedings to become acquainted with evidence gathered in the case. The obligation of the competent authority to create conditions and ensure the possibility to exercise the right corresponds to this right of the perpetual usufructuary to become acquainted with the appraisal report. The scope of this right should be determined taking into account the provisions of the Code which concern making available the case files (Article 73 of the Code in connection with Article 79(7) of the Real Property

⁴⁸ *Ibidem*, p. 65.

⁴⁹ Therefore, it contains information about the value of the real property mentioned in point 4.

⁵⁰ The amount of the new annual fee is also affected by the value of not included expenditure incurred by the perpetual usufructuary for the construction of individual devices of the technical infrastructure and the value of necessary expenditure affecting technical and operational features of the land incurred by them, if they resulted in the increase of the value of the land property. Both values are counted towards the difference between the amount of the updated fee and the amount of the existing fee (Article 77(4) and (6) of the Real Property Management Act).

⁵¹ This place should be indicated by the inclusion of the address. If in the notice of adjustment the designation of the administration authority also includes the indication of its registered office address, the statement that it is possible to become acquainted with the appraisal report 'at the registered office of the authority' should be considered as sufficient.

Management Act. It means that the perpetual usufructuary has the right to inspect the content of the appraisal report, as well as to make notes, copies or excerpts. They may also request that the excerpts or copies of the appraisal report be certified or that they receive certified excerpts if this is justified by an important interest (Article 73(2) of the Code in connection with Article 79(7) of the Real Property Management Act). Nevertheless, it is impossible to derive from the content of the above-mentioned provisions a request effective towards the administration authority for delivering a copy or excerpt of the appraisal report to the perpetual usufructuary.

The last element of the notice of adjustment listed in Article 78(1) of the Real Property Management Act is the instruction regarding the manner of questioning the notice of adjustment. The content of the instruction should correspond to the wording of Article 78(2) of the Real Property Management Act. This provision determines the measure for questioning the notice of adjustment and indicates the manner and deadline for its submission. In relation to the deadline, it should be noted that the legislator in the above-mentioned provision has used the expression 'from the day of receipt of the notice of adjustment', determining the beginning of the period for submitting the request for establishing that the update of the annual fee is unjustified or that it is justified in another amount. This expression should be considered as the legislator's mistake as the moment of 'receipt' of the notice of adjustment does not produce any legal effects. These effects are connected exclusively with the delivery to which the provisions of the Code apply (see sentence 4 of Article 78(1) of the Real Property Management Act). Therefore, it is beyond doubt that the beginning of the period for submitting the request questioning the notice of adjustment should be connected with its delivery, not with its 'receipt'. Due to the fact that the Real Property Management Act at the first stage of the update provides for the application of the provisions of the Code exclusively to the delivery of the notice of adjustment, it should be assumed that the provisions of the Civil Code should be applied to the calculation of the deadline for submitting the request. Therefore, the 30-day period for submitting the request will start on the day following the day on which the notice of adjustment was delivered⁵². This period will end upon the lapse of the last day (Article 111(1) of the Civil Code), unless it falls on a public holiday or Saturday. In such a case, the period for submitting the request to the board of appeal will expiry on the next day that is not a public holiday or Saturday (Article 115 of the Civil Code).

The instruction should also include information about the form (written) and number of copies (two) required for the effective submission of the request. Although the Real Property Management Act requires the instruction regarding the manner of questioning the notice of adjustment, it ought to be assumed that the perpetual usufructuary should also be instructed on the effects connected with submitting the request as well as on the effects that will occur if they do not exercise the right to question the notice of adjustment. For this reason, the instruction should contain two more elements: information about the fact that the submission of the request does not release from the obligation to pay the fee in the existing amount and that in the case of non-submission of the request, the new amount of the fee proposed in the notice of adjustment is applicable (see Article 78(4) of the Real Property Management Act).

⁵² If the beginning of the period indicated in days is a specific event, the day on which this event occurs is not taken into account while calculating the period (Article 111(2) of the Civil Code).

5. Defects of the notice of adjustment and their consequences for the update of the annual fee

The Real Property Management Act does not provide for any specific procedure for determining the defectiveness of the notice of adjustment and does not specify legal effects resulting from it. Bearing in mind that it is a legal action aimed at the amendment of the agreement, as well as a declaration of will, it should be assumed that the correctness of its performance will depend on the fulfilment of requirements in the scope of the mode of its performance, and the maintenance of elements of this declaration of will provided for in the provisions of the act.

In relation to the mode, attention should be drawn to the time limitation of competences for performing the update, resulting from Article 77(1) of the Real Property Management Act. This provision specifies that the update of the annual fee may be performed no more often than once every 3 years. The expression 'no more often than once every 3 years' means that at least 3 years should pass between the time when the current fee started to apply and the initiation of the update procedure. Submitting to the perpetual usufructuary the notice of adjustment of the fee before the expiry of three years constitutes a violation of the above-indicated provision and leads to defectiveness of the 'new' notice of adjustment. In this regard it is irrelevant how the fee has been updated. Regardless of the fact whether the current amount of the annual fee results from lack of questioning the notice of adjustment or it has been established as a result of the ruling of the board of appeal or common court, the legal situation of perpetual usufructuaries should be the same. In each case, they are entitled to a kind of stabilisation of financial burdens and the guarantee resulting from it that the fee will not be increased for a specific period of time⁵³. However, the Real Property Management Act does not provide for a separate procedure that would allow questioning the notice of adjustment, which leads to the conclusion that the only legal measure, which can be used by the perpetual usufructuary, is the request referred to in Article 78(2) of the Real Property Management Act.

Additionally, the mode of the notice of adjustment entails the issue of correctness of its delivery. In the absence of different regulations in the Real Property Management Act, it should be assumed that in this scope all manners and types of deliveries provided for in the Code apply: delivery to the addressee (Article 40(1) of the Code and Article 45 of the Code), substitute delivery (Article 43 of the Code), delivery fiction (Article 44 of the Code) or delivery to the representative (Article 48 of the Code).

The notice of adjustment can be also delivered to the proxy (Article 40(2) of the Code) unless the appropriate authority performing this activity has the information who is the proxy of the perpetual usufructuary.

In relation to defects connected with the structure of the content of a declaration of will being a notice of adjustment of the existing fee, it should be noted that the legislator has not introduced in this scope any gradation of legal effects resulting from the omission of individual elements. Taking into account legal character of the notice of adjustment, it should be assumed that its constitutive elements include: the indication of the real property owner (entity representing them) and the perpetual usufructuary, declaration

⁵³ The literature on the subject has pointed out that the purpose of this provision is to protect perpetual usufructuaries against updates carried out too often – see: E. Bończak-Kucharczyk, *Article 77. Update of Annual Fees (Art. 77. Aktualizacja opłat rocznych)*, volume 2 [in:] E. Bończak-Kucharczyk, *The Polish Act on Real Property Management. Updated Commentary (Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany)*, Lex/el. 2021 and the case law cited there; T. Brzezicki, K. Smigielski, *op.cit.*, p. 23.

concerning the notice of adjustment of the existing fee, offer of the new fee and signature of the person authorised to make the declaration of will.

The indication of the real property owner consists in including the name identifying the owner and the public administration authority acting on its behalf. It should be assumed that in addition to the name (e.g. Head of the Gdańsk district, President of the City of Kraków) also the address of the given entity's registered office should be presented⁵⁴.

The indication of the addressee of the notice of adjustment should include in the case of a natural person – their first and last name and address, in the case of a legal person – its name and registered office's address. The act does not specify the place in which the perpetual usufructuary is to be indicated. However, it cannot be any place of the document. The legal construct of this letter leads to the conclusion that it should be indicated in a place, which would allow avoiding any doubts as to whom the expressions 'I cancel' and 'I propose the new amount of the fee' are addressed. It should be considered that the indication of the perpetual usufructuary only in the distribution list does not fulfil the above condition⁵⁵. If the perpetual usufructuary is the State Treasury or territorial self-government unit, they should be indicated as the addressee of the notice of adjustment. The indication as the perpetual usufructuary e.g. the 'District Office State Treasury' should be considered as defective. First of all, such an entity is not a perpetual usufructuary of real property, and secondly it does not exist at all in legal transactions. A district office is an authority, i.e. 'organised team of persons related to a public administration authority and assigned to support it in the performance of its functions and tasks'⁵⁶. Therefore, there is no possibility that the 'district office' could become a perpetual usufructuary of real property⁵⁷.

The notice of adjustment should indicate in its content the entity that has the right of perpetual usufruct – the addressee of the notice of adjustment⁵⁸. It should be an entity with legal capacity. Addressing the notice of adjustment to a non-existing entity excludes the possibility to assume that the update has been effectively initiated. The circumstance that the declaration included in it will be submitted to the current perpetual usufructuary does not change it⁵⁹.

As regards the issue of the correct determination of the perpetual usufructuary, it is necessary to refer to one more situation. The entitled entity may change after delivery to it of the notice of adjustment, and even after the submission of the request referred to in Article 78(1) of the Real Property Management Act. Article 79(7) of the Real Property Management Act states that the provisions of the Code on the exclusion of the employee and the authority, on handling of cases, deliveries, calls and deadlines and some provisions of Part II ('Proceedings' with the exclusion of Chapter 10 'Appeals' and Chapter 11 'Interlocutory objections') and provisions of Part IX ('Fees and costs in proceedings') apply accordingly to the proceedings before the board of appeal. It results from the scope of reference described in this way that

⁵⁴ The purpose of including the registered office is to make it easier for the perpetual usufructuary to exercise the right to become acquainted with the appraisal report, or to submit correctly the request questioning the update.

⁵⁵ In relation to the indication of the decision addressee in the distribution list – see J. Borkowski, *Administrative Decision (Decyzja administracyjna)*, Łódź-Zielona Góra, p. 56.

⁵⁶ J. Zimmermann, *Administrative Law (Prawo administracyjne)*, Warsaw 2008, p. 106.

⁵⁷ See ruling of the Self-Government Board of Appeal in Gdańsk of 20 May 2019, SKO Gd/1275/19, unpublished.

⁵⁸ Consideration about changes in the scope of the status of perpetual usufructuary – see point 4.3 of this study.

⁵⁹ Different position, which seems to be incorrect, in ruling of the Self-Government Board of Appeal in Gdańsk of 30 November 2010, file reference: 4359/09. Lex no. 1727738.

the provisions of Chapter 6 ('Party to proceedings') of Part I ('General provisions') are not applied in the update. The above results in the fact that also Article 30(4) of the Code, regulating the succession in proceedings in cases regarding transferable or hereditary rights, is not applied. Therefore, if the perpetual usufructuary after receiving the notice of adjustment transfers their right to another entity, it cannot be assumed that the purchaser of perpetual usufructuary will 'join' the proceedings in the seller's place. In other words, the notice of adjustment of the existing fee should be treated as ineffective⁶⁰, and the achievement of the intended purpose (increase in the annual fee) will depend on the submission of another notice of adjustment to the current perpetual usufructuary.

Another two elements of the notice of adjustment should be also included in constitutive parts of the declaration of will submitted on behalf of the real property owner. Both the expression 'notice of adjustment of the existing fee' and the expression 'offer of the new amount' make up the essence of this action. Lack of these elements causes that the notice of adjustment cannot produce the legal effect in the form of the update initiation.

The last of the constitutive elements is the signature of the person submitting the notice of adjustment. A signature is an element of the declaration of will submitted in written (electronic) form, which 'finalises' it in terms of formal requirements. It also allows the verification whether the person that submits the declaration of will is authorised to do it. Lack of the signature understood as handwritten first and last name is tantamount to a qualified defectiveness of the declaration of will. The same effect should be referred to a signature reproduced mechanically⁶¹.

Other elements of the notice of adjustment of the existing fee do not make up its essence, and their lack should not be qualified as a defect undermining the effectiveness of the declaration of will submitted. The manner of the new fee calculation, the information about the value of the real property as well as the information about the place where it is possible to become acquainted with the appraisal report are of an information nature. Their purpose is to convince the perpetual usufructuary that the update of the fee is justified and to allow them to verify the increase in the value of real property. The instruction regarding the manner of questioning the notice of adjustment of the existing fee also performs the informative function. Together with the notice of adjustment, the perpetual usufructuary receives the information how they can verify the position of the administration authority representing the real property owner. It should be emphasised that the right to question the notice of adjustment results from the act and, therefore, its lack or incompleteness does not have any impact on this right.

The Real Property Management Act does not provide for any legal effects in the case of lack of individual elements of the notice of adjustment. In the literature on the subject there is no uniform position. According to G. Bieniek 'it is impossible to accept [...] uniform effects. Undoubtedly, lack of the written form, the offer of the new fee, the indication of the manner of the new fee calculation and the required information about land estimation results in the ineffectiveness of the notice of adjustment'. Lack of the

⁶⁰ Nevertheless, it is problematic as the Real Property Management Act does not provide for this type of sanction. It should be emphasised that in the studies on the civil law the concept of ineffectiveness constitutes in principle sanction concerning actions undertaken in the relation between the obliged person and a third party or actions concerning disposal undertaken to the detriment of entitled persons – see M. Pyziak-Szafrnicka [in:] M. Safian (ed.), *Private Law System. Civil Law – General Part (System Prawa Cywilnego. Prawo cywilne – część ogólna)*, volume I, Warsaw 2007, p. 736-737; S. Grzybowski [in:] *Civil Law System. General Part (System prawa cywilnego. Część ogólna)*, Wrocław-Warszawa-Kraków-Gdańsk-Lódź 1985, p. 722-727.

⁶¹ Consideration about problems related to the signature to the declaration of will in electronic form – see point 4.3 of this study.

instruction regarding the manner of questioning the notice of adjustment constitutes a premise for reinstating the deadline for its submission⁶². In relation to lack of this instruction, it has been indicated that the substantive and legal character of this deadline causes that it would not start until the submission to the perpetual usufructuary the of information about this right. In turn, lack of any other element of the notice of adjustment could make the submission of this notice ineffective⁶³. Submitting the notice of adjustment by a person or authority not entitled to it means that this action does not produce legal effects, which at the stage of the proceedings before the board of appeal should lead to the discontinuation of the proceedings, if the notice of adjustment is not confirmed by the person/authority authorised to do it (Article 103(1) of the Civil Code)⁶⁴.

In the case law it is assumed that failure to fulfil the requirements referred to in this provision results in the ineffectiveness of the authority's actions aimed at establishing the new annual fee for perpetual usufruct of land property from the next year⁶⁵. Also the administrative case law refers to this legal construct, indicating that the notice of adjustment, which does not fulfil statutory requirements cannot be considered as legally effective⁶⁶.

Nevertheless, these positions may give rise to doubts. The Real Property Management Act does not contain any regulation regarding the mode of stating the ineffectiveness of the notice of adjustment, while the determination of the ineffectiveness *ex lege* is not possible. The acceptance of the possibility to issue a decision on discontinuation of the proceedings before the self-government board of appeal due to the ineffectiveness of the notice of adjustment assumes implicitly its effectiveness. Only such a notice of adjustment may initiate the update, which leads to challenging it by the request of the perpetual usufructuary referred to in Article 78(2) of the Real Property Management Act.

The structure of constitutive elements of the notice of adjustment proposed in this study could lead to searching for legal consequences of abandoning one of them to the situation corresponding to the construct of a non-existing decision⁶⁷ occurring in the studies on administrative proceedings. However, it would require the acceptance of the opinion assuming that the notice of adjustment of the existing annual fee and the submission of the offer of its new amount constitute *sui generis* decision. However, it contravenes the previous consideration, according to which a notice of adjustment constitutes a declaration of will aimed at amending a civil law agreement⁶⁸. Moreover, as there is no competence in the Real Property Management Act to state the non-existence of the notice of adjustment, the only entity that could state it is the perpetual usufructuary. Nevertheless, such a solution cannot be accepted due to the certainty of transactions and lack of any verification of this assessment.

⁶² G. Bieniek, *Self-Government Boards of Appeal vs. Real Property Management after the Public Administration Reform (Samorządowe kolegia odwoławcze a gospodarka nieruchomościami po reformie administracji publicznej)*. 'Casus' 1999, no. 11, p. 11.

⁶³ J.J. Zięty, *op.cit.*

⁶⁴ J.P. Tarno, A. Wrzesińska-Nowacka, *Proceedings regarding Fees for Perpetual Usufruct (Postępowanie w sprawach opłat za użytkowanie wieczyste)*, 'Local Authority' (Samorząd Terytorialny) 1995, no. 7-8, volume 5, Lex/el. This position is accepted by Ł. Dziamski, *Selected Issues concerning the Update... (Wybrane zagadnienia aktualizacji...)*, p. 303

⁶⁵ Judgement of the Court of Appeal in Szczecin of 24 October 2012, I ACa 227/12, Lex no. 1237833.

⁶⁶ Ruling of the Self-Government Board of Appeal in Gdańsk of 30 November 2010, file reference: 4359/09, Lex no. 1727738.

⁶⁷ B. Adamiak, *The Issue of Non-Existing Decisions in the Administrative Proceedings (Zagadnienie decyzji nieistniejących w postępowaniu administracyjnym)*, *Acta Universitatis Wratislaviensis Prawo*, no. 1022, Wrocław 1990. It should be, however, noted that the Code does not provide for any mode of stating the non-existence of an administrative decision.

⁶⁸ Compare: J.J. Zięty, *op.cit.*, point 2.2.1.

In the light of the above, it should be assumed that the only legal instrument for questioning the defectiveness of the notice of adjustment is the perpetual usufructuary's request to the self-government board of appeal stating that the update of the annual fee is unjustified. In such a case, the expression 'the update of the annual fee is unjustified' (Article 78(2) of the Real Property Management Act) should be understood in this way that the update is unjustified because the value of the real property has not increased (the update is 'entirely unjustified') or it is unjustified because the notice of adjustment initiating it has been prepared in violation of law.

The initiation of the second stage of the update (before the self-government board of appeal) allows the appropriate application of significant part of the provisions of the Code. The reference to their application (Article 79(7) of the Real Property Management Act) also includes the provisions on proceedings, including the chapter on decisions, in which rectifying modes are presented (Articles 111–113 of the Code). These modes concern the deletion of minor defects of decisions. Therefore, the permissibility of their application in relation to minor defects in the notice of adjustment, such as clerical, accounting or other obvious errors, cannot be excluded.

5. Summary

The update of the annual fee regulated in its basic scope in the Real Property Management Act, to which significant part of the provisions of the Code of Administrative Procedure should be applied, constitutes a particular example of civil procedure conducted by a public administration authority⁶⁹. Its civil law 'conditioning' results from the purpose to which it relates (amendment to the agreement) and manner of structuring the relation at the public administration authority-perpetual usufructuary level. Differently than in the case of administrative proceedings, the administration authority does not have the possibility to establish in a binding way towards the entity with legal capacity consequences resulting from generally applicable provisions of law in the established factual situation. In the first place, the 'decision is taken' by the perpetual usufructuary, who can accept or question the offer of the new annual fee. If they question it, the second stage of the procedure is initiated. Within this stage there is a dispute between the perpetual usufructuary and the owner's representative concerning the legitimacy of the change in the fee. This dispute is resolved by a public administration authority (board of appeal), but the rights of entities participating in it are the same. The above-presented consideration constitutes grounds for the conclusion that the existing regulation based on the Real Property Management Act and the provisions of the Code applied accordingly regulate procedural issues to a highly insufficient extent. Due to the 'mixed' character of the update, as early as at the stage of the notice of adjustment of the existing annual fee we face a number of problems⁷⁰, for which solutions should be searched in regimes of the civil law or administrative procedural law. The presented solutions of individual issues constitute only proposals and prove that the legislator's intervention is absolutely necessary. Lack of consistent and coherent regulation leads to discrepancies at the stage of the law application, which to a significant extent translates also to the public

⁶⁹ Self-government boards of appeal should be also included in this concept – see Article 5(2)(6) of the Code.

⁷⁰ Consideration undertaken in the publication concerns only one aspect, i.e. the notice of adjustment of the existing annual fee. A broader analysis of issues related to the proceedings before the board of appeal, rulings issued by this public administration authority or appeal against the ruling of the board of appeal has not been included in this study.

perception of law. Such an essential issue should be subject to a comprehensive regulation, which will take into account the specific nature of this procedure.

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