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Gloss to the Judgment of the Supreme Administrative Court of January 23, 2019 in Case Reference Number Act II OSK 386/17

I. Facts

By decision, the head of the commune determined the environmental conditions for consent for the implementation of an undertaking consisting in the exploitation of sand deposits located in the area designated for conducting mining activities. The environmental decision precedes the acquisition of a concession based on the provisions of the Mining and Geological Law. An appeal against the decision was lodged by the owner of the property located in the town where the project was to be carried out. The appellant argued in his appeal that he disagreed with the first-instance decision. In addition, he stated that the decision was issued with a breach of applicable procedural and substantive law. After examining the appeal, the Local Government Appeal Board[2] discontinued the appeal procedure, considering that the appellant did not have the status of a party, and therefore was not entitled to avail of this appeal referred to in the Art. 127 of the Code of Administrative Procedure[3]. Then the decision of the ap-

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[2] Hereinafter referred to as Board of Appeal.

[3] Act of 14 June 1960 Code of Administrative Procedure (Dz.U. 2020, item 256), hereinafter referred to as c.a.p.).

peal body was revoked by the judgment of the Provincial Administrative Court[4] in Lublin of December 2, 2014, reference number II SA/Lu 76/14. In the justification of the ruling issued, the court pointed out that in the light of the provisions of the Act of access to information on the environment, public participation in environmental protection and on environmental impact assessments[5], when analyzing the concept of impact on neighboring properties, it should be considered that this is all impact, not only those that exceed certain standards. Standards and their possible exceedances are important for the content of decisions on environmental conditions, but not for having the attribute of a party within the meaning of Art. 28 c.a.p. As indicated in the explanatory memorandum of the Court's decision, the party to the analyzed procedure is the owner of the property located in the area affected by the planned project. In this sense, the legal interest of this entity is also demonstrated by the right to uninterrupted use of real estate, resulting from Art. 140 and Art. 144 of the Civil Code[6] (Supreme Administrative Court[7] in judgments of 15 May 2013, II OSK 108/12 and 1 July 2014, II OSK 219/13, published in CBOSA). In the judgment, the Court also pointed out that since the Board of Appeal had not considered such an approach to the impact of the investment, limiting itself to a general reference to the report, this issue was not thoroughly explained and the position taken by the Court was premature. These circumstances constituted the basis for the annulment of the Board of Appeal's decision and the need to reconsider the case by the appeal body.

Considering the appeal again, the Local Government Appeal Board indicated that, having regard to the cited judgment of the VAC in Lublin in the case reference number II SA/Lu 76/14, again assessed the applicant's status of party, in particular considering his right to uninterrupted use of the property. The appeal body explained that the calculations made in the report on the impact of the planned project on the environment show that the exploitation of the mineral deposit will not cause significant deterioration of the quali-

[4] Hereinafter referred to as VAC.

[5] Act of 3 October 2008 access to information on the environment, public participation in environmental protection and on environmental impact assessments (Dz.U. 2020, item 283), hereinafter referred to as environmental act or e.a.

[6] Act of 23 April 1964 Civil Code (Dz.U. 2019, item 1145), hereinafter referred to as c.c.

[7] Hereinafter referred to as SAC.

ty of the environment in its immediate surroundings, and the environmental effects of the implementation of the project will be small. There are no housing developments in the immediate vicinity of the planned project, the surrounding area is arable and forest land. The calculations of pollutant and noise emissions indicate that the investment will not pose a threat to living conditions and human health in residential areas. The undertaking will also not cause any changes in the functioning of key ecological factors conditioning the development of natural elements. Even despite partial exploitation of the deposit from under water, there will be no disturbance of the groundwater regime in the immediate vicinity of the excavation, and it will not affect the level of the water table in the area of the deposit. The planned investment will not adversely affect the air purity, and the impact of the investment on air quality in the form of e.g. dusting will be small and limited only to the investment area. As evident from the evidence, the sources of pollution will be the movement of cars and the work of equipment at the mine, however, at this scale of the project, the maximum traffic will be 8 vehicles per day. In addition, it was found that despite the existence of a similar venture at a distance of approx. 680 m – a sand mine with an analogous profile, they would not interact with the air and other environmental components, and therefore there would be no accumulation of ventures

In the justification of the decision issued, the appeal body indicated that from the case file and from the findings, calculations and analyses presented in the report (which evidentiary value was not questioned by the authority, considering that it met the requirements specified in the applicable provisions), it follows that: the applicant's real estate is outside the area of impact of the planned project, the scale of the project and its functioning from the point of view of the existing housing development, also belonging to the applicant, is neutral and will not violate the current use of the property. In the position of the Board of Appeal, which resulted from the assessment of the evidence gathered, the applicant could not be granted the status of a party in the proceedings regarding the project which did not extend to the applicant's real estate and thus included him in the area of influence of that project. Referring to the reasoning of the appeal, as well as to the previous judgment of the administrative court, the appeal body indicated that the property is not included in the scope of the project and that the appellant will not lose the right to un-

interrupted use of this property, resulting in particular from the provisions of Art. 140 and 144 c.c. Consequently, the applicant could not be considered to have the status of a party to the case within the meaning of Art. 28 c.a.p. The statement of reasons for the decision of the appeal body indicated that, according with the provision of Art. 127 § 1 c.a.p. against a decision issued in the first instance, a party may appeal to only one instance. It follows from this provision that only the party to proceedings may appeal against an administrative decision. The appeal body after receiving the appeal is obliged to examine the admissibility of the appeal. The admissibility of an appeal is determined by objective and subjective premises. Subjective premises are an appeal by a legitimate entity: a party to the proceedings in the case. If the appeal lodged clearly indicates that the appellant has no legal interest, the appeal body shall declare the appeal inadmissible. However, if the determination of the legal interest requires taking evidence in the explanatory proceedings, it cannot be assumed that the body of these findings will be made outside the forms of administrative proceedings, without ensuring the participation of the unit invoking its own legal interest. In such a case, the appeal body is obliged to start the appeal proceedings, and if it determines that the appellant has no legal interest, it will terminate the appeal proceedings in the form of a decision to discontinue the appeal proceedings. This decision only decides on the appellant's legitimacy, it has no legal significance for the possibility of reconsidering and adjudicating the case in which the appeal was brought by a legitimate.

Against the decision of the Board of Appeal, the same applicant again lodged a complaint to the PAC in Lublin, accusing of violating Art. 28 c.a.p. through its misapplication in that the applicant is not entitled to the status of a party and, as a consequence, to issue a decision discontinuing the appeal procedure; Art. 7 and 77 § 1 c.a.p. by not explaining whether the applicant's property is in the area of impact of the planned investment. According to the complainant, who consistently argued that his property is in the zone of impact of the planned project, the environmental impact report is not a document by which any impact of the investment on neighboring properties, including his property can be determined.

The arguments raised in the complaint were not considered by the VAC in Lublin examining the case, which in the justification of the judgment of 18 August 2016, case number II SA/Lu 419/15, stated that it did not state that the

contested decision infringed the law to the extent that it had to be eliminated from legal circulation. According to the court of first instance, the applicant did not indicate a provision of universally binding law that would result in his legal interest. The applicant, for his legal interest, did not find support in the generally applicable legal provisions related to the subject of the pending proceedings. The applicant did not prove the existence of excessive arduous effects on his property, and the report on the environmental impact of the project showed without a doubt that the implementation of this project would in no way affect the applicant's property. This property is not in the vicinity of the planned investment. In the report on the environmental impact, an analysis of the project was carried out in relation to the functioning emission sources. According to the Court of first instance, the environmental impact report drawn up in the case is reliable, consistent and free from ambiguities and inaccuracies. The analysis it contains is comprehensive, complete, and takes into account all possible threats to the environment. The applicant's allegations about the impact of the intended investment on his property were not accepted. The report on the environmental impact of the project concerned contained all the elements listed in Art. 66 of the environmental act. This study analyzes the environmental impact of the entire project. The substantive scope of the report was sufficient to issue a decision on the environmental conditions for the planned project, and the appeal body explained in sufficient and required by the administrative procedure norms the scope of doubts as to the applicant's right to be a party to the proceedings in question. It also argued in the justification of the judgment of the Court that, contrary to the applicant's position, the report took into account the correctly calculated distance between the property owned by the applicant and the planned investment and the impact of the future investment on the applicant's property and the need to draw up a cumulative environmental impact.

The position expressed by the first instance court was not accepted by the applicant, who in the cassation complaint accused the judgment of violating the provisions of the procedure which had an impact on the issued decisions, including Art. 151 of the law on proceedings before administrative courts[8] in

[8] Act of 30 August 2002 Law on proceedings before administrative courts (Dz.U. 2020, item 2325, hereinafter referred to as administrative court's procedure or a.c.p.).

connection with Art. 140 c.c. and 144 c.c., by dismissing the complaint by the VAC in Lublin, despite the authority not considering all the circumstances of the case, and in particular not establishing the facts that would result in the recognition that the implementation of the project in question causes the applicant's property to be covered by the sphere of influence of that project, as a result of which the applicant loses his right for uninterrupted use. In addition, the cassation complaint alleged a violation of Art. 28 c.a.p. by its incorrect application, in which the applicant is not entitled to the status of a party and, consequently, to dismiss the complaint regarding the discontinuation of the appeal proceedings regarding the environmental conditions for consent to implement the project. The applicant took the view that the VAC unreasonably held that the applicant had not proved the existence of excessive nuisance on his property and that the report on the impact of the planned project on the environment did not show that the implementation of the planned project would not affect the applicant's property, which even has the applicant's property not remaining in the vicinity of the planned investment. According to the applicant, in a cassation appeal, the distance between the applicant's plots and the investment area is not decisive, which would determine the absence of any impact of the investment on the applicant's property. The applicant in his cassation considered that it was undeniably necessary to determine whether there was any real impact of the planned investment on his property, which required a particularly careful assessment of the evidence gathered in the proceedings and their possible supplementation. In addition, according to the applicant, in cassation, contrary to the claims of the first instance court, the environmental impact report gave grounds to establish that there was a real impact of the planned investment on the applicant's property. The applicant submitted that according to the report, inter alia the obtained minerals will be transported outside the field by existing roads, there will be a slight impact on the deterioration of the living conditions of people living near the mine excavation routes, the investment will increase the noise and the possibility of increasing the concentration of mineral dust in dry periods. The fact that the allowable values will not be exceeded during the implementation of the investment, the investment will not cause any danger, the investment will not cause significant deterioration of the quality of the environment, the investment will not have an excessive effect, it cannot, ac-

cording to the complainant, lead to the conclusion that the investment has no impact on its real estate, and he himself has no legal interest in deciding the matter as to its substance.

II. Decision

The Supreme Administrative Court found the complaint to be well founded. According to the Court, despite the wording of a number of allegations related to the violation of the provisions of the procedure and substantive law in the justification of the cassation appeal, the essence of the case boiled down to assessing whether the Court of first instance properly carried out a review of the proceedings regarding the discontinuation of the appeal proceedings regarding environmental conditions for consent to the implementation of the undertaking.

The SAC stated in the judgment that it was not possible to divide the position of the Court of first instance, which accepted the proceedings of the appeal body and indicated that the body considered the legal assessment expressed in the previously issued judgment. The authority's obligation, due to the lack of regulation of the legal interest in substantive administrative law, was to derive it using a systemic interpretation of national law and EU law, which give a full substantive basis for deriving the legal interest of property owners for protection of property against e.g. pollution or deprivation of value. It should have been assumed that, provided that there is a possibility of causing a harmful impact of the investment on the environment, taking into account the individual features of the planned investment, type, extent of nuisance and range of impact on the environment, as well as the way the area surrounding the investor's plot is developed, persons holding a legal title to plots situated in such designated "area of impact of the object" are a party to the broadly understood proceedings (covering the entire decision-making process) preceding the implementation of the investment. It was wrong to convince the VAC, which shares the assessment of the appeal body, that demonstrating a legal standing by an entity aspiring to recognize it as a party in administrative proceedings is to indicate by that entity the specific provision of substantive law from which this interest derives, because this

request does not have any legal basis. The administrative body has an obligation to assess the circumstances given by this entity as justifying its legal interest, and there is no reason for the authority to limit this analysis to the circumstances given. Clarification of the status of a given entity in administrative proceedings, whether it has the attribute of a party in it, if it derives its legal interest from Art. 140 and 144 c.c., in principle, it cannot take place outside this procedure. Although the Court of first instance correctly accepted that the environmental law system does not exclude civil law as an instrument to protect the owner of the property, which may be affected by a project implemented on another property, and that the preventive and compensatory function of the provisions of the environmental law has an important role here, it accepted a claim that this is not sufficient to consider the applicant as a party to the proceedings, since the extent of the impact of the planned project determined on the basis of the report does not indicate restrictions on the use of the applicant's property. It cannot be excluded a priori that the applicant relies on the protection of property rights in administrative proceedings, the subject of which is to determine the environmental conditions for implementing the project. Thus, it should be assumed that in the proceedings establishing the environmental conditions for the implementation of the project, there may be grounds for deriving the legal interest in the ownership of the property adjacent to the planned project. The court of first instance therefore correctly assessed that the applicant may derive the legal interest to participate in the case from the ownership of plots, but it wrongly accepted that the documentation gathered in the course of the proceedings (mainly from the report on the environmental impact of the project) shows that the investor showed that the planned project would not affect the applicant's real estate and, as a consequence, it does not give him legal standing to participate in the proceedings aimed at determining the environmental conditions for the implementation of the project.

The SAC further stated in its ruling that it was not possible to agree with the statement that the environmental impact report prepared in the case is reliable, consistent and free from ambiguities and inaccuracies, and the analysis it contains is comprehensive, complete and taking into account all possible threats to the environment. The court stated that the views of the appeal body and the court of first instance could not be divided, that in the pending

proceedings one could not be accused of accepting deficiencies in the content of the report. An analysis of this content indicates that it contains all the information provided for in the Art. 66 of the environmental act, elements of its content. According to the content of Art. 66 section 1 point 5 e.a., the report on the impact of the project on the environment should contain: a description of the variants analyzed, including: a) the variant proposed by the applicant and a rational alternative variant, b) the most favorable variant for the environment together with the justification for their selection. The descriptions of variants should include a clear indication of how the project will operate, according with the technical parameters describing the project. Variants of the project implementation are one of the most important instruments for assessing the project's impact on the environment. Therefore, the investor is obliged to submit such a report on the environmental impact of the project, which will thoroughly present an analysis of all variants referred to in Art. 66 section 1 point 5 e.a., and not only the variant which for obvious reasons the investor is interested in. The court of first instance wrongly accepted the assessment of the report carried out by the appeal body, and in the opinion of the cassation court it was not formally assessed, so it could not be concluded that the decision issued by the public administration body was preceded by correct findings made on the basis of evidence collected in administrative proceedings. In the opinion of the SAC ruling in this case, the findings made by the administrative body incorrectly assessed and incorrectly accepted regarding the finding that the applicant's real estate is outside the zone of impact of the planned project, since the report did not provide a description of any option of implementing the project (despite the formal separation in the content of names of three variants of the project implementation). If the report contains no description of project implementation options, then a comprehensive impact assessment of the project cannot be properly carried out according with the provisions of the Environmental Act.

Further in the judgment, it was stated that, therefore, the arguments contained in the justification of the SAC's judgment of 16 August 2012 should be divided, case II OSK 832/11, that in order to be a party to administrative proceedings it is sufficient that the proceedings concern the legal interest of a given entity, this interest need not even be violated. The mere possibility of the planned project's impact on the property may indicate a legal interest

within the meaning of Art. 28 c.a.p. An attribute of a party in proceedings then gives the entity the opportunity to participate in the proceedings and influence the shape of the decision within the framework of its legal interest, which should not be less protected than the legal interest of the investor implementing the project. To determine whether a given entity has a legal interest in the proceedings on issuing a decision on environmental conditions and, therefore, whether it has the attribute of a party in these proceedings, it does not matter whether the impact on its property will be within acceptable standards or will be excessive that the property is within the impact of the planned project. The extent of this impact is generally determined on the basis of data resulting from the environmental impact report for the project. The reference by the Board of Appeal and then by the Court of first instance to the fact that the environmental impact report shows that the applicant's legal interest is not infringed is not a sufficient argument, because only in jurisdiction proceedings involving the interested party it can be determined whether is indeed. At the stage of applying for an investor to issue an environmental decision, the actual area of impact of the planned project is not yet known, because it only results from theoretical assumptions and calculations presented in the report on the project's environmental impact. Therefore, it is not possible to expressly state that the data contained therein determine the area of impact of the project before admitting entities indicating the circumstances that are relevant to the assessment of the impact on their property, even after initial verification of the evidence which is the report[9].

The quintessence of the commented decision was that whether the applicant's real estate is in the area of impact of the project in question cannot result from unilateral, arbitrary findings of the authority, or solely from the findings of the report on the project's impact on the environment, without explaining this in administrative jurisdictional proceedings, carried out according with all the principles c.a.p. and with the participation of the parties. The mere statement that any excessive impact of the investment will be enclosed within the area of the plot on which the project will be carried out should result in the admissibility of this fact being assessed by the entity claiming that the impact has a greater range, affecting the way its property is used. In the

[9] SAC's judgment, January 29, 2014, case II OSK 2064/12, CBOSA.

light of the foregoing, it should be concluded that the case did not properly examine the applicant's status as a party to the proceedings in the aspect of infringement of the right to property and the fact that depriving the applicant of his status as a party did not allow the submission of evidence which, if carried out, could show a greater environmental impact of the project than that according to the report. According to the court of second instance, the investigation of objective truth in administrative proceedings cannot take place by eliminating from the proceedings entities that do not share the views of the investor and the author of the report on the environmental impact of the project, under the pretext of the lack of legal interest, which in fact has not been examined. The existence or absence of a legal interest on the part of a specific entity in such complex cases should be made during the administrative procedure initiated using all possible means of proof, and not outside of the pending proceedings. In this way, in its ruling, the SAC in principle questioned the probative value of the report as a source on the basis of which it is possible to make findings in proceedings that are to end with issuing a decision on the environmental conditions of the project.

III. Gloss

The environmental impact assessment of a project is a basic instrument of environmental policy in the EU, in which the principle of prevention comes to the fore. This assessment consists of a series of activities in which the authority examines the impact of a given project on the environment and people's health and living conditions, material goods and monuments, as well as the interaction between these elements, availability of mineral deposits, possibilities and ways of preventing and reducing the negative impact of the project. on the environment as well as the required scope of monitoring, which should be understood as direct and indirect impact on the environment.

The report on the project's impact on the environment was introduced into Polish law on the basis of the provisions of the Act of 9 November 2000 on access to information on the environment, its protection and on environmental impact assessments, which was subsequently replaced by the Act of 27 April 2001 Law of environmental protection. Then, due to the transfer of

regulations related to environmental impact assessments to a separate act, issues regarding the preparation of the report, its nature and scope are regulated by the provisions of the Environmental Act.

The report on the project's environmental impact is prepared in the case of proceedings regarding the issuance of a decision on environmental conditions, in which the need to carry out an environmental impact assessment results from the fact of implementation of the project that can always have a significant impact on the environment, or in the case of recognition of such necessity in relation to the project that may potentially affect the environment. In the case of a project that can always have a significant impact on the environment, assessment is a permanent part of the procedure and its preparation is obligatory, *ex lege*. However, in the case of projects that can potentially have a significant impact on the environment, the report is optional and results from the position of the authority conducting the proceedings on the way of a resolution after screening, based on, among others, data contained in the project's information card.

The report on the environmental impact of the project is one of the key documents appearing in the procedure for assessing the impact of the project on the environment. Its main purpose is to facilitate the determination of all potential threats related to the implementation of the planned project. The content of the report can be considered in the category of guidelines for the implementation of the project according with the requirements of environmental law. Carrying out a proper assessment of the project's impact on the environment is closely related to the choice between individual variants, which should include data on alternatives to its implementation. The word "variant" means working out, doing something; variety, modification, version. Practical issues related to the content of the report often refer to "variants". They include: project location, land development, solutions for external facilities, transport networks, power supply, organization of works, selection of materials, implementation time and others. The rational option should be an alternative to the option proposed by the applicant[10]. Although the report is a private document and has been developed by people with special information, it must be comprehensive, consistent and reliable. This means that the

[10] SAC's judgment, October 9, 2018, case II OSK 2533/16, CBOSA.

report should take into account all the requirements imposed by the legislator in the light of the provision of Art. 66 e.a., because it is the key evidence in this administrative proceeding. The variants of the project implementation are one of the most important instruments for assessing the project's impact on the environment. Therefore, the investor is obliged to submit such a report on the environmental impact of the project, which will thoroughly present an analysis of all variants referred to in Art. 66 section 1 item 5 e.a.[11] The purpose of the variant is to prevent activities that may have a negative impact on the environment. The effectiveness of preventive actions in the individual assessment of a particular project depends largely on the quality of the variants developed in the report and their correct assessment by the authority issuing the environmental decision. The principle of prevention in environmental impact assessment requires the use of appropriate technical and technological solutions, which should be included in the description of the variants. Project options should differ primarily in terms of how the project will impact the environment in each of these options, as their role is to identify alternative solutions to protect this environment to the fullest extent.

It should be further indicated that it is necessary for the investor to specify not only the nature and characteristics of the planned project, but also its impact on the environment, including a specific area, specifying the types and quantity of emissions, types and expected quantity of substances or energy released into the environment and indicating the risk major accidents or natural and construction disasters. In consequence, the investor should indicate the relevant technical data of each planned project. Information on anticipated impacts must also result from the report, provided that an environmental assessment has been carried out.

The environmental impact report is a private document, but it has been developed by people with special information. The environmental impact report for the project is of special probative value, which results from the comprehensive nature of the project analysis. There should be no doubt that the report's findings should be undermined by presenting an equally complete analysis of environmental conditions (the so-called counter-report), the conclusions of which would conflict with those contained in the investor's report.

[11] SAC's judgment August 2, 2018, case II OSK 85/18, CBOSA.

It should also be emphasized that each allegation and objections to the findings of the report may not be inaccurate, but should be comprehensively justified, with the largest counterweight to the report being evidence of equivalent species weight, which will indicate defects in the investor's report or the inaccuracy of the solutions adopted in it. In court and administrative proceedings, the court adjudicating in a case may not independently assess the content of the report, as this requires special information from specific branches of science. The assessment of the court of first instance regarding the report may only concern whether the report is complete and consistent, i.e. meets the statutory requirements as to its content within the meaning of the provisions of Art. 66 e.a. However, apart from the exceptions arising from the law on proceedings before administrative courts, the court does not conduct evidence proceedings alone, and therefore cannot submit substantive assessment of the factual findings of the report if that assessment requires special information, which in turn must be carried out in administrative proceedings before the bodies of I and II instance. If the adjudicating court leaves the indicated framework for assessing the report, it should be considered as having no legal basis.

The findings of the report on the environmental impact of the project allow to determine the group of entities that have the status of parties to environmental proceedings. The assessment of the legal standing of a given entity in the pending administrative procedure takes place at every stage of the proceedings, and thus also in appeal proceedings. The administrative body is obliged to examine the legitimacy of the entity requesting the initiation of proceedings, i.e. whether it can be a party to the administrative proceedings within the meaning of Art. 28 c.a.p., taking into account the substantive law applicable in the given case. Therefore, the party's claim that it possesses the status of a party to the proceedings is also verified by the second instance authority after conducting the explanatory proceedings. After all, if this verification is unsuccessful for the party, the authority is obliged to issue a decision to discontinue the appeal procedure, pursuant to Art. 138 § 1 point 3 c.a.p.[12] It should be emphasized that whether one is a party to a given administrative procedure is not determined by the will or the subjective conviction of the en-

[12] SAC's judgment, November 15, 2019, case II OSK 3280/17, CBOSA.

tity, but whether there is a provision of substantive law that allows to classify the interest of a given entity as a legal interest. The issue of having a legal interest that determines the existence of a party in a given proceeding depends on the circumstances of the specific case and the provisions applicable to it[13].

The legal structure of a party in administrative proceedings therefore requires the entity to demonstrate existence on its side of the so-called legal interest or obligation. The legal interest should be characterized by objectivity, individuality and concretism, and its existence should be legally protected and should be confirmed in the actual circumstances of the case being the premises for the application of a given substantive law. Meanwhile, the administered entity has a real interest if, in a situation, present or future, it benefits directly as a result of actions or omissions of the administrative body. An entity with an actual interest may require the administration to take appropriate action, however, this request is not based on legal provisions protecting the sphere of interest of that entity. However, there is no doubt that the factual interest is not legally protected and its disregard is legally permissible. Lack of grounds for binding the interest of a given entity with a substantive law provision means that the entity can be assigned only the actual interest, which, in turn, does not make that entity a party to the proceedings, and thus a party entitled to appeal.

The conditions for granting the party status to an entity are set out in Art. 28 c.a.p., being a "party is anyone whose legal interest or obligation relates to the proceedings or who requests actions of an authority because of their legal interest or duty". An entity has the status of a party if the case has a legal interest, which is established on the basis of substantive law[14].

The concept of legal interest has not been defined in the Code of Administrative Procedure, however, as it is assumed in the literature of the subject, it must be individual, specific, current and objectively verifiable, and its existence must be confirmed in the actual circumstances being the premises for the application of the substantive law[15].

It should be noted that the concept of the page used by Art. 28 c.a.p. and other provisions of the Code can be derived only from substantive law,

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[13] Judgment of the PAC in Gdańsk, case II SA/Gd 267/19, CBOSA.

[14] SAC's judgment, October 13, 2009, case II OSK 1936/08.

[15] J Borkowski, [in:] *Code of Administrative Procedure. Commentary,* eds. B. Adamiak, J. Borkowski, Warsaw 2009.

that is from a specific legal norm, which may form the basis for the formulation of an interest or legal obligation. Only the provisions of substantive law, constituting the basis of the legal interest, create a specific legal standing for a party, which – by submitting a request to initiate proceedings – should demonstrate this interest. A statement of legal interest boils down to establishing a substantive relationship between the applicable norm of substantive law and the legal situation of a specific legal entity, consisting in the fact that the act of applying this norm may affect the legal position of that entity in terms of its substantive legal position. On the other hand, if the act of applying this norm does not have a direct impact on the sphere of the legal situation of a given entity, then one cannot speak about the legal interest of the party, and thus – about the status of the party in the proceedings in which the given legal norm is concretized[16]. From the legal interest understood in this way a factual interest should be distinguished, i.e. a situation in which a given entity is admittedly directly interested in resolving an administrative case, but it cannot support this interest by law, which is the basis of the demand for taking appropriate actions by the administrative body[17].

The concept of "party" as a category of substantive law means, therefore, that the legal interest entitling to initiate proceedings and be a party to it must be based on generally applicable substantive law. It is not enough for the entity's internal conviction in this regard, which is usually associated with actual and not legal interest (as judgments SAC's, September 27, 2019, case II GSK 654/19 or judgments, September 26, 2019, case I OSK 178/18, CBOSA). It is important that adopted in Art. 28 c.a.p., a premise for granting a party status to an entity, a premise of legal interest requires the introduction of administrative substantive law. Civil law provisions, including Art. 140, Art. 144 and Art. 154 c.c. provide grounds for deriving the legal interest in the right of property only insofar as the provisions of administrative substantive law provide a basis for this. In the absence of grounds in the provisions of administrative substantive law to resolve in the form of an administrative decision requesting an individual, there are no grounds for civil interest in the provi-

[16] Judgment of the Supreme Court Administrative of April 14, 2000, reference number III SA 1876/99.

[17] SAC's judgment, September 19, 1999, case IV SA 1285/98, CBOSA.

sions of civil law[18]. Therefore, it is important for the assessment of a party's legal standing in administrative proceedings that the nuisance was determined by legal norms, as the impact must be verifiable. Only then is it possible to objectively determine the group of parties to proceedings. Therefore, in order to demonstrate a legal interest within the meaning of Art. 28 c.a.p., the right of ownership must be associated with a separate legal norm granting the owner specific rights or giving rise to obligations in connection with the planned development of the neighboring area. With this relationship between the violation of the legal interest of a particular entity and the legal provision from which it arises, it is not broadly understood in the sense that the source of this legal interest or right can only be one of the provisions of the Polish Constitution or of Art. 140 c.c., regulating the essence and content of the property right. The impact of the planned investment on the neighboring plot must be expressed in a detailed legal provision constituting the source of the party's interest. In order for the position of third parties to be effective in opposing the investor's interests, they must demonstrate that their specific legally protected interest may be affected by the investment in which the building conditions are set. These claims are to be real and not to constitute loose and often completely unfounded arguments of a very general nature.

The protection provided for in Art. 144 c.c., regarding nuisance related to the use of real estate, applies only to existing phenomena, not future and hypothetical ones. Basically, one can refer to it at the earliest at the stage of construction of the facilities. Therefore, the subject of assessment in the proceedings may not be issues related to the future and uncertain impact of the planned investment on the use of neighboring properties, and even more subjectively felt investment nuisance, or the expected decline in the attractiveness or value of the plot[19]. Nevertheless, the legal interest of the entity in environmental proceedings is also demonstrated by the right to uninterrupted use of real estate, resulting from Art. 140 and 144 c.c[20].

In the case to which the judgment in question relates, the project was to be located on the property intended in the local zoning plan for natural aggregate mines and agricultural area with the basic purpose for field crops and in-

[18] SAC's judgment, October 15, 2019, case II OSK 2879/17, CBOSA.

[19] Judgment of the PAC in Warsaw, July 4, 2019, case IV SA/Wa 287/19, CBOSA.

[20] SAC's judgment, April 18, 2019, case II OSK 1514/17, CBOSA.

land surface water area. The planned project was to launch a mine to exploit the sand deposit, open-cast method, longwall system with estimated annual production not exceeding 20,000 m^3. According to the §3 para. 1 item 40a of the Ordinance on projects that may have a significant impact on the environment, the investment in question has been included in the projects which may have a significant impact on the environment. The area of the planned undertaking is not covered by natural protection, and until now it has been of an agricultural nature. Impacts related to nuisance from the exploitation of the raw material will be of a periodic and local nature – limited to the investment area and transport roads. After the deposit is over, the area will regain its agricultural character and will be earmarked for fish ponds and partly forested by planting trees and shrubs on protective belts and on slopes. The planned method of land reclamation after the investment is completed will increase the biodiversity in this area. Species and ecosystem diversity will be relatively higher than it is the current case.

The calculations made in the report on the impact of the planned project on the environment show that the exploitation of the mineral deposit will not cause a significant deterioration of the quality of the environment in its immediate surroundings, and the natural effects of the implementation of the project will be small. There are no housing developments in the immediate vicinity of the planned project. The surrounding area is arable and forest land. The calculations of pollutant and noise nuisance indicate that the investment will not pose a threat to living conditions and human health in residential areas. The undertaking will also not cause any changes in the functioning of key ecological factors conditioning the development of natural elements. Even despite partial exploitation of the deposit from under water, there will be no disturbance of the groundwater regime in the immediate vicinity of the excavation, and it will not affect the level of the water table in the area of the deposit. The planned investment will not adversely affect the air purity, and the impact of the investment on air quality in the form of e.g. dusting will be small and limited only to the investment area. Sources of pollution will be car traffic and equipment operation on the mine site. At this scale of the project, the maximum traffic will be a lot of vehicles per day. Despite the existence of a similar venture in close proximity, they will not interact with the state of atmospheric air and other environmental components.

In terms of noise nuisance, it should be noted that the nearest residential buildings are located from the south-east at a distance of about 570 m and south-west at a distance of about 350 and 490 m. Farm buildings subject to acoustic protection are at a distance of 300 and 430 in south-westerly. On the basis of the analysis included in the report, it should be stated that the operation of the mine will not only pose no acoustic threat to the nearest residential buildings, but they will also be outside the acoustic impact of the project. The scale of acoustic nuisance will be limited to the area of the project, and the traffic of cars created on the roads will be nothing new compared to normal nuisance from a public road. The undertaking will not cause environmental standards to be exceeded outside the plant premises, therefore it will not have any impact on the neighboring areas at a considerable distance (residential areas), and its operation will be neutral from the point of view of impacts. This is additionally evidenced by the fact that the planned project does not require the creation of a limited use area or special protection zones. Due to the considerable distance from residential areas, mining operations will not affect the health of people living there.

Contrary to the court's view, the findings, calculations and analyses presented in the report showed that the applicant's property was outside the zone of impact of the planned project, and the fact that the investment was located in the same town did not in itself have consequences in the form of reasons for granting him status of a party to the proceedings. The arrangements in this respect on the basis of the attached documentation, including in particular the report, which, according to the applicable provisions, was compulsorily prepared by the applicant, did not raise any doubts. At the same time, from the calculations presented in the report, made by nature of things for the project that was yet to be carried out, it could be stated that the scale of the project and its functioning from the point of view of the existing housing development, also belonging to the applicant, would be neutral and in no way would it violate the current way of using the property. It should be pointed out in this regard that in the case of proceedings regarding the determination of the environmental conditions for the implementation of the project, the determination of the parties to the proceedings essentially amounts to determining the scope of the investment intent, as a result of which the

circle of persons whose rights to use the property may be violated[21]. The location of the planned investment would in no way infringe the applicant's rights to freely dispose of and use the property. Since the applicant's property was not included in the scope of the planned project, he could in no way be granted legal standing. Apart from the public road, the applicant's real estate is separated by many agricultural and forest areas and existing housing, and its distance from the planned investment is, as agreed on the basis of the commune's geoportal, over 1700 m. It would therefore be difficult to consider that the scale and nature of the project is so great to cause impact on an area that is beyond the reach of the project. After all, the undertaking in question did not constitute an investment with the impact in the form of dusts, gases, etc., and even the traffic generated by them on the scale that took place so far, would not be significantly increased.

Considering all the mentioned arguments and premises, the applicant cannot be granted the status of a party in proceedings concerning a project which does not involve the applicant's real estate in the zone of influence of that project. As a result of the project, the applicant, whose real estate is not covered by his scope, will not lose his right to uninterrupted use of this real estate, resulting in particular from the provisions of Art. 140 and 144 c.c. Consequently, the applicant could not be considered as a party to the present case within the meaning of Art. 28 c.a.p. Therefore, the far-reaching view of the Court should be considered erroneous, which in fact shows that based on the report, which contains theoretical but the only possible analyses and data, the scope of the planned undertaking cannot be determined. In addition, this position stated that the report is not a sufficient source in assessing the potential impact of the planned project. At the same time, the Court did not even indicate which source of evidence should be used, despite the fact that all available means of proof were used by the administration authorities of both instances.

In its ruling, the court omitted the nature of the report as a special source of evidence, in a situation in which well-established case law shows that it has a special probative value, which results from the comprehensive nature of the project analysis. The report's findings should be challenged by presenting

[21] SAC's judgment, May 19, 2010, case II OSK 917/09.

an equally complete analysis of the environmental conditions (the so-called counter-report), the conclusions of which would conflict with those contained in the report submitted by the investor. Counter-evidence introduced against a specialist report should represent substantive value at least on an equal level of comprehensiveness, and not just be not supported by a deeper analysis of comments negating the assumptions contained in it. The report is evaluated by the authority issuing the decision specifying the environmental conditions, and the participants of the procedure have the possibility to raise objections regarding this kind of evidence. These reservations, however, cannot be vague, but should be supported, for example, with expertise, which documented the defects of the report. Undermining the content of the report on the environmental impact of the project cannot be based on suppositions not based on appropriate specialist assessments (tests) or hypothetical occurrence of possible future nuisance to the environment[22]. If in a given case a report has been submitted on the environmental impact of the project, which in the opinion of the authority complies with the law and is consistent, logical and convincing, then it is not necessary to assess in detail the evidential value of this report when the public administration body has assessed that it is complete in both formal and substantive terms. The authority is not obliged to independently examine and set parameters on the basis of specialist knowledge when it has a report that it considers reliable and complete[23]. This should also apply to the court adjudicating in the case, which, after all, cannot control the factual findings of the report on the impact of the project on the environment, but only has the power to examine its comprehensiveness and consistency, taking into account during this control and assessment whether it meets the requirements imposed by the legislator in this provision[24]. The jurisprudence is unified view that the court cannot independently assess the

[22] A. Wilk-Ilewicz, *Decyzja o środowiskowych uwarunkowaniach realizacji przedsięwzięcia według wymogów prawa unii europejskiej,* "Zeszyty Naukowe Sądownictwa Administracyjnego" 2015, No. 4, pp. 52–80; SAC's judgment, June 5, 2012, case II OSK 464/11, CBOSA.

[23] PAC's in Bialystok, August 22, 2019, case II SA/Bk 431/19; SAC's judgment, March 5, 2019, case II OSK 965/17, CBOSA.

[24] PAC's in Warsaw judgment, April 10, 2018, case IV SA/Wa 1357/17; PAC's in Łódź judgment, February 13, 2018, case II SA/Łd 988/17; PAC's in Cracow judgment, March 30, 2018, case II SA/Kr 90/18, CBOSA.

content of the report, because it requires special information from specific branches of science[25].

Limited and this exceptional assessment should be made on the assumption that the report on the project's environmental impact is one of the key documents in the procedure for assessing the project's impact on the environment, and its main purpose is to facilitate the determination of all potential risks related to the implementation of the planned project. Therefore, if in a given case a project environmental impact report has been submitted, which complies with the law and is consistent, logical and convincing, it is not necessary to assess in detail the probative value of this report in a situation in which the administrative authority has assessed that it is complete both under formal and substantive terms. There is therefore no doubt that the authority conducting the proceedings was not obliged to independently examine and set parameters on the basis of expert knowledge, when it had a report that met the criteria of credibility and comprehensiveness[26]. Therefore, the Court's acceptance for certain of the applicant's assertions in cassation appeal, unsubstantiated by any actual and real evidence and presumptive argument could not be accepted. In this way, the court made an unauthorized questioning of specialist evidence, which, also in the light of the opinion of the coordinating authorities of a professional nature, contrary to the applicant's status, should not occur at all in the light of the provisions of the bills and executive acts. The result of the Tribunal's reasoning was the unauthorized undermining of the scope of the assessment, which determined the competence of the authorities conducting both the main and secondary proceedings. Such a broad definition of the applicant's legitimacy and de facto awarding him the status of a party only on the basis of arguments of justified credibility and in complete contradiction with the evidence gathered should not take place.

Considering all the evidence and the scope of the possible assessment in the course of administrative court proceedings, the court should accept the position of public administration bodies, which showed that, in particular, taking into account the right to uninterrupted use of real estate, and which

[25] SAC's judgment, March 1, 2013, case II OSK 2105/11, CBOSA.

[26] SAC's judgment, February 6, 2018, case II OSK 1048/16, CBOSA.

results from current court and administrative case-law also cited in the judgment[27], the applicant does not have a legal standing to appeal. In view of the fact that after the complainant's appeal had been received, the appeal body had begun proceeding in the case in order to establish the applicant's legal interest, including consideration and evaluation of the evidence presented in the case file, so it was justified to discontinue the appeal procedure. Such a decision resulted from the view established in the case-law, according to which depending on in which phase of the proceedings before the appeal body the possibility of examining the attribute of a party is assigned, and thus the need to search for and specify a substantive law norm from which a party may derive certain rights or obligations, such a procedure of exclusion from participation in the procedure should be used. If the examination of the attribute of a party is attributed to the first phase, then the procedure appropriate to exclude from further participation in the procedure will be the normed procedure in Art. 134 c.a.p. as its application is not related to the examination of the appeal in terms of substance. If, however, they are assigned to the second phase, then the normed mode in Art. 138 § 1 point 3 c.a.p., the implementation of which requires reaching substantive aspects of the appeal[28] should be applied. Therefore, the appellant's statement that the appellant is not a party within the meaning of Art. 28 c.a.p., should be made by means of a decision to discontinue the appeal procedure pursuant to Art. 138 § 1 point 3 c.a.p., not in the form of an order issued on the basis of Art. 134 c.a.p.[29]

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[27] SAC's judgment, May 15, 2013, case II OSK 108/12 and July 1, 2014, case II OSK 219/13.

[28] Cf. PAC's in Lublin judgment, October 10, 2008, case II SA/Lu 459/08.

[29] Cf. PAC's in Gdansk judgment, January 21, 2009, case II SA/Gd 747/08; SAC's judgment, July 15, 1999, case I SA 1620/98, CBOSA.