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The Transformation of the right of perpetual usufruct into ownership

I. INTRODUCTION

As early as in the second half of the 19th century, urban sprawl and the need to satisfy the housing needs of the population generated the need to develop legal forms for the transfer of land for residential construction by the state and urban municipalities¹. What occupied a particular position in the political and economic conditions at the time when law was created in Poland after the end of World War II was social property (in particular, state property)². This had an impact on the shape of and changes to the legal institutions satisfying the need for long-term use of state land by citizens. Perpetual usufruct³ was introduced into the system of Polish law by the

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¹ J. Ignatowicz, *Prawo rzeczowe*, Warszawa 1979, pp. 170–171.

² See: M. Bużowicz, *Ewolucja prawa własności w Polsce Ludowej w latach 1944–1956*, „Wrocławskie Studia Erazmiańskie” (Studia Erasmiana Wratislaviensia), Vol. X, *Wolność, równość i własność w prawie i w polityce*, M. Sadowski, A. Spychalska, K. Sadowa (eds.), Wrocław 2016, pp. 485–502; A. Machnikowska, *Nowe prawo własności – przekształcenia w stosunkach własności w Polsce w latach 1944–1950*, „Zeszyty Prawnicze UKSW” 2011, No. 11(2); Art. 8 of the Constitution of the Polish People’s Republic of 22 July 1952, Journal of Laws of the Republic of Poland Dziennik Ustaw No. 33, Item 232, stipulated that ‘National property [...] is subject to particular care by the state as well as all citizens’, and Art. 77(1) stipulated that ‘Every citizen of the Polish People’s Republic is obliged to protect social property and strengthen it as an unshakeable foundation for the development of the state [...]’.

³ On the concept and function of perpetual usufruct, including information about legal forms of land transfer primarily for residential construction in force in the Polish territory earlier, in a synthetic form, see: J. Ignatowicz, *Prawo rzeczowe*, Warszawa 1979, pp. 170–172, in a monographic form – from earlier literature – J. Wichniarz, *Prawo użytkowania wieczystego*, Warszawa 1970, from more recent literature, for instance; Z. Truskiewicz, *Użytkowanie wieczyste* [in:] *System Prawa Prywatnego*, Vol. 4, *Prawo rzeczowe*, E. Gniewek (ed.), Warszawa 2012. See also the literature indicated by: J. Górecki [in:] *Komentarze Prawa Prywatnego*, Vol. II, *Kodeks cywilny. Komentarz*, K. Osajda (ed.), Warszawa 2017, pp. 493–498. The legal character of perpetual usufruct was controversial (see, for instance: F. Dorożala, *Charakter prawny i istota wieczystego użytkowania terenów państwowych*, „Palestra” 1962, No. 12, pp. 59–66; S. Szer, *Użytkowanie wieczyste*, „Państwo i Prawo” 1964, No. 1, pp. 3–11; A. Kopff, *Charakter prawny wieczystego użytkowania*, „Studia Cywilistyczne” 1967, Vol. IX, pp. 3–39; S. Rudnicki, *Charakter prawny użytkowania wieczystego*, „Nowe Prawo” 1970, No. 12, pp. 1771–1777; T. Smyczyński, *Charakter prawny wieczystego użytkowania*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1971, No. 1, pp. 37–53; S. Wójcik, *Z problematyki użytkowania wieczystego*, „Nowe Prawo” 1977, No. 6, pp. 803–820. The view which prevailed prior to the entry into life of the Civil Code (Act of 23 April 1964 – Civil Code, in force from 1 January 1965, consolidated text: Journal of Laws of the Republic of Poland Dziennik Ustaw 2018, Item 1025 as amended), was that perpetual usufruct was a new type of a limited property right, in spite of the differences between this right and limited property rights, in particular between perpetual usufruct and usufruct (see, for instance: J. Wasilkowski, *Zarys prawa rzeczowego*, Warszawa 1963, p. 152). Following the entry into life of the civil code, which regulated perpetual usufruct in a separate title of Book Two ‘Ownership and Other Property Rights’, the Supreme Court declared that ‘[p]erpetual usufruct was shaped as an intermediate institution between the legal category

Act of 14 July 1961 on Land Management in Towns and Housing Developments⁴. This Act became effective on 31 October 1961 and remained in force until 1 August 1985⁵. It provided, among others, that the land development right, temporary ownership, long-term lease and other similar rights⁶ became the right of perpetual usufruct in cases and on conditions specified in the implementing regulation⁷.

According to the literature on the subject, systemic changes which took place in Poland at the end of the previous century are believed to 'have had their impact on the institution of perpetual usufruct'⁸, which was expressed not only in limiting elements of administrative and legal nature that co-shaped the right but also in the choice of perpetual usufruct as an instrument of the economic restructuring of the state sector. 'The development of entities belonging to the state sector and the municipal sector, which evolved from the former, depended, in the new systemic realities, among others, on conferring on them their own right'⁹.

Pursuant to Art. 1 of the Act of 20 July 2018 on Transformation of the Right of Perpetual Usufruct of Land Developed for Residential Purposes into Ownership of Land¹⁰, as of 1 January 2019 the right of perpetual usufruct of such land will be transformed into ownership of such land.

The principal object of this study is to present the regulations of the aforementioned Act. It, however, seems advisable to precede it with concise information about the basic regulations concerning perpetual usufruct contained in the Civil Code as well as possibilities of transforming it into ownership according to the laws in force prior to 1 January 2019.

In accordance with Art. 232 of the Civil Code now in force, the right of perpetual usufruct can be established on land owned by the State Treasury, situated within

of ownership and the category of the so called limited substantive rights. Thus, in cases not regulated in Articles 232–243 of the Civil Code as well as in the contract on letting state land for perpetual usufruct any interpretation difficulties should be solved by analogy to, first of all, the provisions contained in Section II Title I of Book Two of the Civil Code concerning the substance and exercise of ownership and thus, among others, also to Art. 145 of the Civil Code'. (And thus in the resolution of 9 December 1969, III CZP 95/69, OSNCP 1970, No. 10, Item 172 as well as in the decision of 17 January 1974, III CRN 316/73, OSNCP 1974, No. 11, Item 197). Thus also, for instance, J. Ignatowicz, *Prawo rzeczowe*, Warszawa 1979, pp. 172–173.

⁴ Journal of Laws No. 32, Item 139.

⁵ As of 1 August 1985 the Act on Land Management was replaced with the Act of 29 April 1985 on Land Management and Expropriation of Real Estate, Journal of Laws No. 22, Item 99. The new law did not have any essential impact on the shape of perpetual usufruct.

⁶ The land development right (known in the Polish territory earlier) was the subject of the Decree of 26 October 1945 on the right to land development (Journal of Laws No. 50, Item 280). The Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw (Journal of Laws No. 50, Item 279) introduced in Warsaw the right to emphyteusis. The Decree on the right to land development was repealed by the Decree of 11 October 1946 – Provisions introducing the Property Law and the Law on Land and Mortgage Registers (Journal of Laws 1946 No. 57, Item 321). The perpetual lease of land in the capital city of Warsaw was replaced by temporary ownership pursuant to Art. XXXIX of the Provisions introducing the Property Law and the Law on Land and Mortgage Registers, and perpetual lease and emphyteusis were abolished in Poland as a whole on the basis of Art. XXXVI of the same Provisions. Temporary ownership was introduced into Polish law in the Decree of 11 October 1946 – Property Law (Journal of Laws 1946, No. 57, Item 319); J. Szonert (*Własność czasowa*, „Palestra” 1959, No. 3/1 (13), p. 39) characterised temporary ownership as a combination of 'two institutions of property law, known already to Roman law, namely: emphyteusis and superficies. [...], with a certain innovation introduced which blur the picture of each of the original parts'. Z. Truszkiewicz, *Użytkowanie...* [in:] *System...*, p. 2 et seq., held that 'the institution of perpetual usufruct has a number of elements in common with the emphyteutic (perpetual) rights'.

⁷ That was the Decree of the Minister of Municipal Economy of 26 January 1962 on transformation of certain rights to land into the right of perpetual usufruct or usufruct, Journal of Laws No. 15, Item 67.

⁸ And thus: Z. Truszkiewicz, *Użytkowanie...* [in:] *System...*, p. 3.

⁹ Z. Truszkiewicz, *Użytkowanie...* [in:] *System...*, p. 3.

¹⁰ Journal of Laws 2018, Item 1716.

the administrative boundaries of towns as well as on land situated outside of their boundaries, covered by the plan for the spatial planning of towns and transferred for the implementation of urban management purposes as well as land owned by units of territorial self-government or their unions. In cases foreseen in specific provisions the object of perpetual usufruct can also cover other land owned by the State Treasury, units of territorial self-government or their unions. The land is let under perpetual usufruct for a period of ninety-nine years. In exceptional cases, where the economic aim of perpetual usufruct does not require letting the land for such a long period, it is admissible to let the land for a shorter period of time, however, not less than forty years. In the last five years of the term provided for in the agreement, the perpetual usufructuary can request its extension for another period of forty to ninety-nine years. The perpetual usufructuary can submit such a request earlier if the period of depreciation of outlays on developments on the used land is considerably longer than the residual term of the agreement. Refusal to extend the agreement is admissible solely due to important public interest (Art. 236 of the Civil Code).

The letting of land owned by the State Treasury or units of territorial self-government or their unions under perpetual usufruct is governed by the provisions on the transfer of the real estate ownership (Art. 234 of the Civil Code). Buildings and other structures erected by the perpetual usufructuary constitute property of the latter. The same applies to buildings and other structures which the perpetual usufructuary acquired pursuant to the pertinent provisions upon conclusion of an agreement on letting the land under perpetual usufruct. The agreement stipulates that ownership of the buildings and structures is a right linked to perpetual usufruct (Art. 235 of the Civil Code). The perpetual usufructuary will then pay an annual fee for the duration of this right.

Like the earlier rights, which it replaced (in particular, the right to land development, perpetual lease, temporary ownership), the right of perpetual usufruct originated in different economic and systemic conditions. Starting from the 1990s, following political, economic and systemic changes, Poland has been a market economy. The role of the rights of state and private property has changed, affecting also the perception of the right of perpetual usufruct. In 2000, the Constitutional Tribunal held¹¹ that – following the amendments made – the concept of perpetual usufruct complied with the European standards. As one of the legal forms of land possession, it promotes trade in real estate. This enables people to choose a legal relationship which would best suit their plans and financial abilities. This, however, was not a position either commonly or fully shared in the years which followed, because the concept of abolishing this right and transforming it into ownership had numerous adherents¹².

¹¹ Judgment of the Constitutional Tribunal of 12 April 2000, K 8/98, Journal of Laws No. 28, Item 352.

¹² Legal literature witnessed an on-going discussion on the advisability of maintaining the right of perpetual usufruct in market economy conditions. On this subject see: M. Bednarek, *Przemiany własnościowe w Polsce. Podstawowe koncepcje i konstrukcje normatywne*, Warszawa 1994; E. Drozd, *Uwagi do projektu ustawy o gospodarce nieruchomościami*, „Kwartalnik Prawa Prywatnego” 1997, No. 6.2, pp. 273–288; E. Gniewek, *Katalog praw rzeczowych w przyszłej kodyfikacji prawa cywilnego – refleksje wstępne*, „Rejent” 1998, No. 4, pp. 25–43; E. Gniewek, *O przyszłości użytkowania wieczystego*, „Rejent” 1999, No. 2, pp. 11–30; J. Majorowicz, *Uwagi na temat aktualności instytucji użytkowania wieczystego*, „Przegląd Sądowy” 1999, No. 9, pp. 59–67; A. Brzozowski, *Z problematyki przekształcenia prawa użytkowania wieczystego w prawo własności*, „Zeszyty Prawnicze UKSW” 2003, No. 3/2, pp. 63–92. What should be noted is the exceptional unanimity of MPs of the 8th term during the vote on passing the Act on Transformation of the Right of

II. THE POSSIBILITY OF TRANSFORMING THE RIGHT OF PERPETUAL USUFRUCT INTO OWNERSHIP ACCORDING TO LAWS IN FORCE BEFORE 1 JANUARY 2019

1. Introduction

Following the systemic changes of the 1990s, the possibility of transforming the right of perpetual usufruct ownership was introduced in cases and according to principles provided for in statutory law.

For the first time, such a possibility was opened as of 1 January 1998 by virtue of the Act of 4 September 1997 on Transformation of the Right of Perpetual Usufruct Enjoyed by Natural Persons into Ownership¹³.

The *ratio legis* of this law was to protect perpetual usufructuaries who acquired real estate in the so-called 'Recovered Territories' after World War II (in the north and west of Poland) against reprivatisation claims as well as to compensate for losses resulting from the nationalisation decrees issued after World War II.

The statute applies solely to natural persons. It assumed the transformation of perpetual usufruct into ownership through an administrative decision. In the original version, it provided for a very small fee for the transformation, which was challenged by the Constitutional Tribunal in its judgment of 12 April 2000, K 8/98. As a consequence of the position adopted by the Tribunal, Art. 4a, applicable from 28 July 2001, was added. It stipulated: '1. *The fee referred to in Art. 4 shall be determined pursuant to Art. 67(1), Art. 69 and Art. 70(2)-(4) of the Act of 21 August 1997 on Real Estate Management (Journal of Laws of 2000, No. 46, item 543), respectively.* 2. *Where the annual fee for perpetual usufruct was updated not earlier than in the period of the last two years prior to the date of the submission of the application for the right of perpetual usufruct to be transformed into ownership, the fee for the transformation shall be established on the basis of the value of the real estate determined for the purposes of such update.* 3. *Where the decision concerns real estate used or destined for residential purposes, the authority competent to issue the decision can grant a discount on the fee referred to in Art. 4 with respect to the real estate owned by: 1) the State Treasury – with the consent of the voivode; 2) territorial self-government units – with the consent of the competent council or local parliament*'.

This meant that the price to be paid for the transformation of the real estate was the price established by a qualified real estate appraiser, reduced by an amount equivalent to the value of the perpetual usufruct of the real estate on the date of the transformation.

The provisions of the Act of 4 September 1997 provided also for the possibility of gratuitous transformation, available to perpetual usufructuaries and their

Perpetual Usufruct of Land Developed for Residential Purposes into Ownership of Land (which will result in *ex lege* transformation as of 1 January 2019). None of the MPs was against adoption of the law, with 425 votes in favour of the law and 2 abstentions. (The work of the Sejm of the 8th term on the bill, Print No. 2673, <http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=2673>).

¹³ This Act, repeatedly amended (consolidated text: Journal of Laws 2001, No. 120, Item 1299), was the subject of two judgments of the Constitutional Tribunal of 12 April 2000, K 8/98, Journal of Laws No. 28, Item 352, and of 18 December 2000, K 10/2000, Journal of Laws No. 114, Item 1196.

legal successors: (1) to whom the real estate was let under perpetual usufruct in connection with the loss of property as a result of the 1939–1945 war or who left their property in the territory no longer in the present territory of the Polish State; (2) who were to receive an equivalent for the property left abroad where the value of said property was higher than the fee referred to in Art. 4 of the Act, in accordance with international agreements; (3) to whom real property was let under perpetual usufruct in connection with expropriation after 1494 and before 1 August 1985; (4) to whom real property was let under perpetual usufruct in exchange for real estate taken over by the State Treasury on the basis of any titles, prior to 5 December 1990; (5) who were granted the right to perpetual lease or the right to land development (right of perpetual usufruct) as owners or their successors, pursuant to Art. 7 of the Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw¹⁴, irrespective of the date of this right being granted or the date rent or fee payment.

The transformation into ownership was also free of charge also in the cases specified in Art. 1(4) of the aforementioned Act.

The right to a free-of-charge transformation of the right of perpetual usufruct of real estate owned by the State Treasury is established by the *starost* [head of *poviat*, in other words county] performing a task from the field of central administration and with respect to real estate owned by a territorial self-government unit by the head of village (mayor), *starost* or *voivodeship* marshal.

Another instrument concerning the subject in question was the Act of 26 July 2001 on the Acquisition by Perpetual Usufructuaries of Ownership of Real Estate¹⁵. What was at stake, however, was not a transformation but a claim (pursued in administrative proceedings) for free-of-charge acquisition of ownership to specific real estate.

Both of the aforementioned Acts (of 4 September 1997 and of 26 July 2001) were repealed by the Act of 29 July 2005 on Transformation of the Right of Perpetual Usufruct into Ownership of Real Estate¹⁶, which took effect on 13 October 2005 and has regulated transformation of the right of perpetual usufruct into ownership of real estate until 31 December 2018. It should be emphasised that the Act does not limit the transformation to natural persons, it covers also legal persons.

Pursuant to Art. 1(1) of the Act, natural and legal persons being on 13 October 2005 perpetual usufructuaries of real estate can submit applications for the right of perpetual usufruct of real estate to be transformed into ownership. Pursuant to Art. 1a, a request for the right of perpetual usufruct to be transformed into ownership can also be made by natural persons being on 13 October 2005 perpetual usufructuaries of real estate, provided that they acquired the right of perpetual usufruct either in exchange for the expropriation or take-over of land in favour of the State Treasury on the basis of other titles, prior to 5 December 1990, or on the basis of Art. 7 of the Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw¹⁷.

¹⁴ Journal of Laws No. 50, Item 279.

¹⁵ Journal of Laws No. 1459 as amended; at present: consolidated text: Journal of Laws 2012, Item 83.

¹⁶ Journal of Laws No. 175, Item 1459 as amended; at present: consolidated text: – Journal of Laws 2012, Item 83.

¹⁷ Journal of Laws No. 50, Item 279.

Paragraph 1 does not apply to real estate let under perpetual usufruct to the Polish Association of Allotment Gardens, to real estate let under perpetual usufruct to state or self-government legal persons as well as to commercial companies, in relation to which the State Treasury or a territorial self-government unit is the parent entity within the meaning of the Act of 29 July 2005 on Public Offer and Conditions of Introduction of Financial Instruments into an Organised Trading System, and on Public Companies¹⁸, to real estate with respect to which administrative proceedings are in progress, with the aim of acquisition of real estate or its part for a public-purpose investment.

The request for transformation of the right of perpetual usufruct referred to in paragraph 1 into ownership of real estate can also be made by natural and legal persons being owners of residential units the share of which in the joint real estate includes the right of perpetual usufruct and by housing cooperatives being owners of residential buildings or garages. The request for transformation of the right of perpetual usufruct can also be made by natural and legal persons being legal successors of the persons referred to in paragraphs 1 and 1a as well as natural and legal persons being legal successors of the persons referred to in paragraph 2.

Paragraph 1a(2) and paragraph 2(1) of the Act apply also to persons who were granted the right of perpetual usufruct or a share in this right after 13 October 2005.

Case law reveals major controversies as to whether the principle of public credibility of land and mortgage registers can protect the purchaser of the right of the perpetual usufruct on the basis of a legal act in the case of a faulty entry in the land and mortgage register of the State Treasury, a territorial self-government unit or a union of such units as the owner of the land. The divergent views were unified by the resolution of 7 Supreme Court Judges of 15 February 2011, III CZP 90/10¹⁹, according to which in case of a faulty entry in the land and mortgage register of the State Treasury or a territorial self-government unit as the owner of the real estate, the '[p]rinciple of the public credibility of land and mortgage registers protects the acquirer of the right of perpetual usufruct also in case of a faulty entry in the land and mortgage register of the State Treasury or a territorial self-government unit as the owner of land²⁰.

2. The group of entities eligible for transformation of perpetual usufruct into ownership

The possibility of the transformation concerns solely perpetual usufructuaries who had the right of perpetual usufruct on the day the Act took effect, i.e. on 13 October 2005. This means that the right of perpetual usufruct must have existed on the day the Act took effect. If the right was established after 13 October 2005, then no request for transformation can be submitted. This reservation concerns all categories of entities eligible to request transformation, with the exception of persons who obtained the right to a share in perpetual usufruct after the Act took effect.

Pursuant to Art. 27 of the Act of 21 August 1997 on Land Management²⁰, in order to let real estate under perpetual usufruct and to transfer this right through

¹⁸ Journal of Laws 2009, No. 185, Item 1439 as well as Journal of Laws 2010, No. 167, Item 1129.

¹⁹ OSN 2011, Nos. 7–8, Item 76 and LEX No. 693990.

²⁰ Journal of Laws 1997, No. 115, Item 741. Consolidated text of the Act on Land Management in Journal of Laws 2018, Item 121.

an agreement, it is necessary to make an entry in the land and mortgage register. The right of perpetual usufruct did not arise prior to the entry in the land and mortgage register even if the agreement for letting real estate under perpetual usufruct was concluded in the form of a notarial deed. The right of perpetual usufruct arises the moment an entry is made in the land and mortgage register. Pursuant to the principle of retroactive effect of the entry (resulting from Art. 29 of the Act on Land and Mortgage Registers²¹) the entry is effective from the date the application for the entry was filed. Consequently, neither a usufructuary whose right was established after 13 October 2005 nor a usufructuary who concluded an agreement in the form of a notarial deed prior to this date, but failed to file an application for the right to be entered in the land and mortgage register, were eligible for the transformation. Art. 92(4) of the Act of 14 February of 1991 – Law on Notaries²² in the version in force until 30 June 2016 stipulated that: ‘[i]f the notarial deed concerned a transfer, change or forfeiture of the right disclosed in the land and mortgage register or establishment of a right which can be disclosed in the land and mortgage register or covers the act of transferring the ownership of real estate, even if no land and mortgage register is kept for the real estate, the notary preparing the notarial deed is obligated to place in the notarial deed an application for the relevant entries to be made in the land and mortgage register and to send a copy of the notarial deed to the land register court within 3 days.’ That was the so-called deed application of the party in favour of which the entry was to be made and not an application of the notary, which is why in case some elements were missing it was the party that the court summoned to remedy the situation. The regulation was far from perfect and repeated transactions concerning the same real estate within those 3 days were not infrequent. Since 1 July 2016, pursuant to the new wording of Art. 92(4) and the new para 4¹ added to Art. 92 of the Law on Notaries²³, the notary preparing the notarial deed files an application for its entry to the land and mortgage register through the computerised system used for court proceedings not later than on the day of the deed.

3. The scope of transformation of the right of perpetual usufruct into ownership

The object of the transformation is the right of perpetual usufruct of the real estate as a whole. Though the right of perpetual usufruct can be shared by several persons in the form of shared usufruct, the transformation can involve solely the perpetual usufruct as a whole. In case of a transformation of a share where, for instance, two natural persons are perpetual co-usufructuaries, a situation would arise in which perpetual usufruct would be established on a real estate owned by an entity other than the State Treasury or a territorial self-government unit and would consequently be null and void.

²¹ Journal of Laws 1981, No. 19, Item 147. Consolidated text of the Act on Land and Mortgage Registers.

²² Journal of Laws 1991, No. 22, Item 91; consolidated text: Journal of Laws 2017, Item 2291 as amended.

²³ Consolidated text: Journal of Laws 2016, Item 1796.

4. The course of administrative proceedings concerning transformation of the right of perpetual usufruct into ownership

The request for transformation is granted in the administrative procedure. The authority competent to make a decision with respect to real estate owned by the State Treasury as well as real estate held in trust by the Agricultural Property Agency (since 17 September 2017²⁴ the National Centre for Agriculture Support), the Military Housing Agency and the Military Property Agency is the *starost* (or the mayor of a city with *poviat* rights). With respect to self-government real estate the decisions in question are made by the *voit* (mayor) and the board of *poviat* or *voivodeship*.

Pursuant to Art. 3(3) of the Act, the decision on the transformation 'shall not infringe the right of third parties'. A doubt arises as to whether it means that the transformation cannot take place if it infringes the rights of third parties or constitutes an obstacle to the third parties asserting their rights. In my opinion, what should then be assumed is that transformation is not possible²⁵.

Ownership is acquired on the day when the decision on transformation becomes final. This decision constitutes the grounds for disclosing the ownership in the land and mortgage register and does not infringe the rights of third parties, which means that encumbrances on perpetual usufruct, such as mortgage or usufruct, remain in effect. It should be pointed out that in accordance with the Supreme Court judgment of 16 May 2002, V CKN 1284/00²⁶, where the perpetual usufructuary submitted an application for transformation of the right of perpetual usufruct into ownership after the owners had instituted an action for termination of the perpetual usufruct agreement, then the administrative proceedings concerning the transformation should be suspended pursuant to Art. 97(1)(4) of the Code of Administrative Procedure²⁷ until the end of the court case.

The Act of 29 July 2005 on Transformation of the Right of Perpetual Usufruct into Ownership of Real Estate²⁸ does not define the notion of 'transformation'. Colloquially, transformation means a change of the appearance, form or organisation of something that already exists in a particular shape.

III. THE GENESIS AND LEGAL CHARACTER OF TRANSFORMATION OF THE RIGHT OF PERPETUAL USUFRUCT INTO OWNERSHIP ACCORDING TO THE LAWS IN FORCE SINCE 1 JANUARY 2019

1. Introduction

Work on the bill went on for over two years. The first bill on the transformation of the right of perpetual usufruct into ownership was prepared on 8 August 2016 by the Ministry of Infrastructure and Construction and presented by the government in December 2016. It met with criticism from various circles, in particular, territorial

²⁴ Journal of Laws 2017, Items 623 and 624.

²⁵ This position was also adopted by the Voivodeship Administrative Court in Cracow in their judgment of 6 March 2018, II SA/Kr 209/18, LEX No. 2464196.

²⁶ LexPolonica No. 379759.

²⁷ The Act of 14 June 1960 – Code of Administrative Proceedings (Journal of Laws 1960, No. 30, Item 168). Consolidated text: Journal of Laws 2017, Item 1257, amendments Journal of Laws 2018, Items: 149, 650, 1514, 1629.

²⁸ Consolidated text: Journal of Laws 2012, Item 83.

self-government units. The date of the introduction of *ex lege* transformation was postponed repeatedly at the requests of self-governments and the Government Legislation Centre. For many months, the bill was discussed with self-governments, also with respect to fees, so the municipalities had time to update them. In spite of that self-governments fear loss of revenue from fees for letting land under perpetual usufruct. They accuse the government of unlawfully depriving them of one of the main sources of income, assuming that the introduced transformation is illegal. They even warn of their intention to lodge a complaint with the Constitutional Tribunal as the Constitution allows to dispossess self-governments of land for public purposes and the Act's provisions dispossess them of land for private purposes²⁹. The point is, however, that even if the Constitutional Tribunal declares the Act non-compliant with the Constitution, it will not be possible to rescind the transformation anyway.

Yet, the law was expected by the general public, as indicated by numerous petitions addressed to central administration authorities as well as to the Parliament by perpetual co-usufructuaries of land on which multi-apartment (multi-family) buildings were erected and where separate ownership of individual apartments was distinguished. Wanting to pursue the claim granted to them by the Act of 29 July 2005 for transformation of the right of perpetual usufruct into ownership, this group of perpetual usufructuaries are forced to institute court proceedings due to the absence of consent from owners of other apartments and perpetual co-usufructuaries of the land. Court proceedings tend to be lengthy and there is no guarantee that the transformation will be effective. Thus, the law will strengthen stabilisation of the right to the land also of these owners of apartments and perpetual co-usufructuaries of the land. Besides, owners of apartments will have a homogenous right to the joint real estate. The hitherto existing problems with updating annual fees for perpetual usufruct of real estate developed for residential purposes will thus be eliminated. The aforementioned problems arose where only part of perpetual usufructuaries (apartment owners) appealed against the updated fee. Where the appeal was allowed, as a result owners of apartments in the same building paid different annual fees for the land under the building. This generated a feeling of injustice, social discontent and even neighbourly conflicts (which was pointed to in the reasons for the governmental bill).

The law definitely puts an end to the practice of periodically passing subsequent acts concerning transformation of the right of the perpetual usufruct of land developed for residential purposes into ownership. Enfranchisement of a specific group of entities due to the residential function of the real estate, the perpetual usufructuaries of which they are, does not constitute an unjustified or unfair privilege and, consequently, infringement of the principle of equality. It suffices to refer to the Constitutional Tribunal judgment of 10 March 2015, K 29/13³⁰, which declares this solution to be compliant with Art. 75 of the Polish Constitution³¹.

²⁹ See: R. Krupa-Dąbrowska, *Prawo użytkowania wieczystego zniknie*, „Rzeczpospolita” („Prawo co dnia”), 4 July 2018.

³⁰ Journal of Laws 2015, Item 373.

³¹ Journal of Laws Item 483 as amended. This provision stipulates that ‘public authorities pursue a policy which favours satisfying the housing needs of citizens, in particular, counteracting homelessness, supports the development of council residential construction as well as supports citizens’ actions aimed at obtaining their own flat and does not constitute a privilege but is a fair compensation, leveling of opportunities in gaining the right to a flat’.

According to the data of the Ministry of Justice relating to 2018, the number of beneficiaries of the Act will be no less than 2.400,000, because this is the number of land and mortgage registers opened for individual living quarters distinguished as separate with which a share in the perpetual usufruct of land is linked plus the number of land and mortgage registers established for land developed for residential construction.

It should be pointed out that the Act of 29 July 2005, in force until 1 January 2019, allowing owners of premises (buildings) used for residential purposes to lodge an application for the transformation, was not questioned by the Constitutional Tribunal in the scope concerning the claim allowed to natural persons occupying public land for housing purposes.

In the judgment of 10 March 2015, K 29/13³², the Constitutional Tribunal gave the legislator freedom in shaping the institution of property law and did not question the possibility of cancelling perpetual usufruct, this particular the form of using real estate belonging to another party, from the Polish legal order. It was this position of the Constitutional Tribunal that underpinned the adopted changes concerning the transformation of the right of perpetual usufruct into ownership. In compliance with the recommendations of the Tribunal, the legislator introduced to the Act in question solutions which made the scope of Act include all perpetual usufructuaries of land developed for residential construction and the accompanying structures making proper use of real estate for residential purposes possible³³.

Prevailing in the case law of the Constitutional Tribunal is the view that the principle of the protection of self-government property does not mean a categorical exclusion of a possibility of the interference of the legislator in the ownership rights of *gminy* (communes), including cancelation of ownership. The principal argument given to justify this view is that ownership is not an absolute right and – due to the public nature and origin of the municipal property – communes must be prepared for the limitation of the property rights given to them following the dismantling of the uniform fund of state property³⁴. This property constitutes financial coverage for the total of the necessary reforms and not only for the reform of public administration and thus communes have the obligation to bear a part of the costs of these reforms. It suffices to refer to the Constitutional Tribunal judgments: of 17 October 1995, K 10/95; of 9 January 1996, K 18/95; of 12 April 2000, K 8/98.

According to the reasons for the governmental bill, approximately 30.000 hectares of State Treasury land remain in perpetual usufruct (ca. 6% of all State Treasury land). Approximately 32.000 hectares of municipalities' land remain in

³² Journal of Laws 2015, Item 373.

³³ See: A. Bieranowski, *Uwagi do projektu ustawy o przekształceniu współużytkowania wieczystego gruntów zabudowanych na cele mieszkaniowe we współwłasność gruntów*, „Rejent” 2016, No. 10, p. 102 et seq. and F. Pietrzyk, *Modyfikacja zasad przekształcenia prawa użytkowania wieczystego w prawo własności po wyroku TK z 10 marca 2015*, „Rejent” 2016, No. 6, p. 22 et seq.

³⁴ Art. 128 of the Civil Code (repealed as of 1 October 1990 by the Act of 28 July 1990, Journal of Laws No. 55, Item 321) stipulated that ‘socialist national (public) property is the sole and undivided property of the State’. It was assumed that this provision verbalised the so-called principle of the unity of state property (a uniform fund of state property). Controversies arose whether what was involved was ownership within the meaning of civil law or ownership within the meaning given to this notion by the Constitution of the Republic of Poland. On this subject see, for instance: J. Majorowicz, *Commentary on Art. 128 of the Civil Code* [in:] *Kodeks Cywilny. Komentarz*, Vol. 1, Warszawa 1972, p. 334 et seq.; J. Gwiżdżomorski, *Zasada jedności państwowej własności socjalistycznej a osobowość prawną przedsiębiorstw państwowych*, „Państwo i Prawo” 1967, No. 4–5; pp. 591–610, S. Grzybowski, *Sytuacja mienia ogólnonarodowego*, „Państwo i Prawo” 1965, No. 4, pp. 527–539; W. Opalski, *Mienie ogólnonarodowe w świetle prawa cywilnego*, Warszawa 1975.

perpetual usufruct by natural persons and housing cooperatives, which accounts for ca. 43% of all municipalities' land let under perpetual usufruct.

The act is intended to mandatorily transform perpetual usufruct of land developed for residential purposes into ownership of land in favour of owners of single-family houses and apartments in multi-apartment buildings. Yet, fears arise whether the act may not create conditions for circumventing the law to the detriment of public property. Suspicions are voiced that perpetual usufructuaries might be likely to abuse the new regulation by changing the way part of real estate is used solely to be able to benefit from the transformation. Practice seems to support them as cases can be found where a perpetual usufructuary of commercial premises changes their use to residential purposes for the sole purpose of meeting the formal conditions for transformation. In the light of the Construction Law it is simple to make such a change as long as it does not cause changes to the conditions of fire protection, flood protection, labour, health, hygiene and sanitation, environment safety or the value and distribution of construction loads (Art. 71 of the Construction Law³⁵).

Practice will show how the provisions of the Act will be assessed by the real estate market. Even now not all perpetual usufructuaries who are investors and entrepreneurs are interested in acquiring ownership of land as they pursue their economic interests adequately using the right of perpetual usufruct.

2. The group of entities covered by the act

The first group of entities covered by the act are perpetual usufructuaries being owners of apartments in blocks of flats and single-family houses and owners of tenement houses unless they sublet flats, because then they would not be satisfying their housing needs. This group includes also perpetual usufructuaries of Warsaw land regained in reprivatisation proceedings even where the decision to return it was issued in violation of the law³⁶. The decision of the Reprivatisation Commission repealing the decision to return the property is the basis for striking off the land and mortgage register any entry made on the basis of the repealed reprivatisation decision, decision concerning perpetual usufruct, decision concerning transformation of the right of perpetual usufruct into ownership of real estate or on the basis of a notarial deed prepared taking into account the repealed reprivatisation decision, and provides grounds for entry of the capital city of Warsaw or the State Treasury, respectively, as the owner (Art. 40(1) of the Act of 9 March 2017 on Special Rules of Removing the Legal Consequences of Reprivatisation Decisions Concerning Real Estate in Warsaw Issued in Violation of the Law)³⁷.

³⁵ Consolidated text: Journal of Laws 2018, Item 1202.

³⁶ On 9 March 2017 a law was passed on specific rules of removing the legal consequences of reprivatisation decisions concerning Warsaw real estate issued with infringement of law, Journal of Law 2017, Item 718. On this subject see: M. Pytlewska-Smółka, *Usuwanie skutków prawnych decyzji reprivatyzacyjnych – próba analizy*, „Nowy Przegląd Notarialny” 2017, No. 3 (73), pp. 25–32; W. Chróścielewski, *Niektóre zagadnienia związane z funkcjonowaniem Komisji do spraw usuwania skutków prawnych decyzji reprivatyzacyjnych dotyczących nieruchomości warszawskich*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2018, No. 1, pp. 9–26.

³⁷ The Act of 20 July 2018 in Art. 18 gave a new reading to Art. 40(1) of the Act of 9 March 2017. It ensures a real influence of the work of the Commission on the legal status of the real estate a legal title to which was obtained in contravention of the law. It should be noted that the change of Art. 40(1) violates the public credibility of land and mortgage registers (Art. 5 and 6 of the Law on Land and Mortgage Registers), thus thwarting the acquired rights protected by this principle.

The subsequent groups, from the second to the fourth, are made up of persons eligible for the so-called ‘delayed transformation’, which means that they will become owners (co-owners) of the land at a later date having met the additional conditions specified below.

The second group includes persons who concluded an agreement on the establishment of perpetual usufruct or an agreement transferring the right of perpetual usufruct prior to 1 January 2019, but their application for entry was not examined prior to this date or was not made at all (Art. 24(1) and Art. 24(3) of the Act). These people will become perpetual usufructuaries, though not, as provided for in Art. 24(1) of the Act, from the date the entry is made, but pursuant to the principle of retroactive effect of the entry, which results from Art. 29 of the Act on Land and Mortgage Registers, on the date of submitting an application for the entry. With respect to these persons, the competent authority will issue a certificate confirming the transformation within 4 months of the receipt of a confirmation that this right was entered in the land and mortgage register.

The third group comprises perpetual usufructuaries who live in single-family houses or multi-family buildings erected and put into service pursuant to Art. 59 of the Construction Law after 1 January 2019. This group of perpetual usufructuaries will become owners (co-owners of land) from the day the residential building was put into service (Art. 13(1) of the Act).

The fourth group are perpetual usufructuaries being foreigners. They must satisfy an additional condition required under Art. 1(1) of the Act of 24 March 1920 on the Purchase of Real Estate by Foreigners³⁸, that is, obtain a permission of the minister in charge of home affairs to purchase real estate. This does not concern, however, foreigners being co-usufructuaries of land connected with the ownership of a particular apartment. It is so because the transformed share is a right of accessory nature in relation to the ownership of an independent apartment for the purchase of which the foreigner had had to obtain a permission from the minister in charge of home affairs earlier. The apartment and the share in the perpetual co-usufruct cannot be the objects of separate transactions. This means that in such a situation the share in perpetual co-usufruct will be transformed, also in favour of a foreigner, by virtue of the Act as of 1 January 2019.

It should be pointed out that where it is to be decided whether a foreigner who is a perpetual usufructuary must obtain a permission to acquire the ownership required under Art. 1(1) of the Act on the Purchase of Real Estate by Foreigners in order to transform the right of perpetual usufruct into ownership, positions vary. The provision in question introduces limitations in the acquisition by a foreigner of ownership (perpetual usufruct) of real estate situated in Poland without a prior permission for the purchase (administrative decision). The permission has to be obtained both to purchase the real estate as a whole and a share in co-ownership (resolution of the Supreme Court of 30 December 1992, III CZP 153/92³⁹). The permission is a ‘legal condition’, that is, a prerequisite of the validity of the purchase of real estate and thus an obligation agreement, for instance, concerning the sale of

³⁸ Consolidated text: Journal of Law 2017, Item 2278.

³⁹ OSNCP 1993, No. 6, Item 99.

real estate to a foreigner, becomes effective only upon obtaining the permission of the minister of home affairs. This means that a sale agreement will constitute legal grounds for transferring the ownership of real estate only after the legal condition referred to above (Art. 156 of the Civil Code) has been met. Yet, the sale agreement concluded 'on the condition of obtaining a permission' is not a conditional agreement referred to in Art. 157 of the Civil Code, but an obligation agreement of suspended effectiveness.

Pursuant to Art. 1(1) of the Act on the Purchase of Real Estate by Foreigners, the purchase of real estate by a foreigner requires a permission which is issued, by way of an administrative decision, by the minister in charge of home affairs unless an objection is lodged by the Minister of National Defence and in case of agricultural real estate unless an objection is lodged by the minister in charge of rural development.

Within the meaning of the Act, acquisition is neither transformation of the right of perpetual usufruct nor restoration of ownership by means of an administrative decision, for instance, return of expropriated real estate or obtaining the right of perpetual usufruct of real estate covered by the Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw⁴⁰. The scope of the Act on the Purchase of Real Estate by Foreigners covers the acquisition of ownership and perpetual usufruct by persons who have not had these rights before, and expanded interpretation is not admissible. This means that the act does not apply to acquisition of limited property rights or rights to real estate other than ownership and perpetual usufruct, such as preliminary agreements and agreements of purely obliging character, tenancy or lease agreements⁴¹. In Art. 2(2) of the Transformation Act, the legislator answered this question to the disadvantage of foreigners being perpetual usufructuaries of land. The regulation arouses doubts, particularly in the light of Art. 1(4) of the Act on the Purchase of Real Estate by Foreigners, pursuant to which the acquisition of real estate is the acquisition of ownership of real estate or the right of perpetual usufruct, on the basis of any legal act. The word 'any' means that the legislator used the notion of the 'legal act' in the broad sense. Thus, it concerns both the original acquisition and the derivative acquisition by way of acts in law, an acquisition by prescription as well as by inheritance, however with the exclusion of intestate succession or legacy *per vindicationem* for the benefit of persons who would be entitled to intestate succession. Thus, where a foreigner obtained a permission of the relevant minister to acquire perpetual usufruct of land and, in accordance with an agreement, built a single-family house, then in order to transform this right of perpetual usufruct he/she must institute administrative proceedings with the purpose of obtaining a permission from the relevant minister, and where he/she were only a perpetual co-usufructuary of the land and owner of a separate residential unit, he/she would get the transformation by operation of law. It is evident that the regulation causes an unnecessary differentiation of the situation of foreigners being perpetual usufructuaries and perpetual co-usufructuaries of land, and can jeopardise the fundamental ownership-related

⁴⁰ Journal of Laws No. 50, Item 279.

⁴¹ And thus correctly S. Rudnicki, *Nieruchomości problematyka prawna*, Warszawa 2013, p. 202. Conversely, F. Hartwich, *Nabywanie nieruchomości w Polsce przez cudzoziemców*, Bydgoszcz 2012, p. 79.

rights of the perpetual usufructuary of land. This is the situation we are dealing with in the interpretation of Art. 2(1) and – in my opinion – what we should strive to do is a teleological interpretation of this provision, assuming that it applies only when a constitutive entry of perpetual usufruct in the land and mortgage register has not yet been made.

3. The scope of application of the Act

The scope of application of the Act is determined by paragraphs 1 and 2 of Art. 1. Paragraph 1 provides that the object of transformation is the right of perpetual usufruct of land developed for residential purposes, while paragraphs 2 defines the notion of land developed for residential purposes, stating that the land developed for residential purposes should be understood as real estate with single- or multi-family buildings erected solely for residential purposes in which at least a half of the space is occupied by residential units or the buildings referred to in subparagraphs 1 or 2, together with outhouses, garages, other structures or constructions allowing for proper and rational use of residential buildings.

The transformation covered also perpetual usufruct acquired pursuant to Art. 7 of the Decree on Warsaw land.

The Act concerns solely land with residential development including single- or multi-family residential buildings where at least half of the units are residential ones. A definition of a single-family residential building is given in Art. 3(2a) of the Construction Law, stipulating that it should be understood as a detached building or a semi-detached building or a terrace or cluster of buildings serving to satisfy residential needs, constituting an independent whole in terms of construction, in which no more than two apartments or one apartment and business premises not exceeding 30% of the total surface of the building can be distinguished.

Due to the fact that in order for the residential building to be properly utilised it is often necessary to make use of an outhouse, garages or other structures, for instance, a perpetual usufructuary built, pursuant to an agreement, a semi-detached house which is partly a residential building and partly business premises in which the perpetual usufructuary conducts his/her business activity. The legislator decided that the transformation should also cover land with outhouses, garages, other structures or constructions allowing for proper and rational use of the residential buildings (Art. 1(2)(3)).

The thus defined objective scope of the transformation gives rise to no doubts. On the other hand, what cannot be deemed correct is the fact that the transformation should cover land with multi-family residential buildings in which at least half of the units are apartments. Obviously, it is not easy to describe precisely the object of the transformation in multi-family residential buildings not used exclusively for residential purposes. Nevertheless, the adopted solution will extend the group of eligible persons to those who (in accordance with agreements) acquired ownership of business premises in these buildings and do not meet their residential needs there at all. Irrespective of this, due to using the phrase ‘constitute’ (which is obvious on the transformation date), the provision contained in Art. 1(1)(3) does not, however, refer to compliance with an agreement. Consequently, even in case

where the change of the way part of the building is used is to be non-compliant with agreements on the purchase of the type of unit – it will anyway be covered by the transformation. As shown by practice, some perpetual usufructuaries of land who own business premises, knowing the bill, have applied for a change of the manner of use from business to residential so that on the transformation date they would satisfy the conditions of transformation⁴².

The object of the transformation can also include land developed with other structures specified in Art. 1(2), however then the so-called ‘subsequent enfranchisement’ can take place. Namely, such real estate must first be divided, with the real estate developed with structures meeting the conditions specified in Art. 1(2) being sectioned off from the original land and mortgage register and a separate land and mortgage register being established for it or the land not meeting the conditions specified in Art. 2(1) of the Act being excluded from the original land and mortgage register.

The legislator was right to introduce this solution, thus preventing a differentiation of perpetual usufructuaries. Otherwise, a perpetual usufructuary who only built a residential building (buildings) on the land would benefit from the act, while one who built also other structures would not.

Pursuant to Art. 1(5), structures and facilities located on the land and referred to in paragraph 2, become, as of the date of the transformation, a component part of the land. The provision does not apply to equipment referred to in Art. 49(1) of the Civil Code⁴³.

Pursuant to Art. 1(6), the encumbrances on the perpetual usufruct existing on the date of the transformation become encumbrances on the real estate while the encumbrances on the shares in the perpetual co-usufruct of land become encumbrances on shares in the co-ownership of the real estate. The rights connected with the perpetual usufruct become the rights connected with the ownership of the real estate. This concerns, in the first place, persons who have limited property or obligation rights towards the perpetual usufructuaries. As it has already been said above, the right of perpetual usufruct does not expire following the transformation, and thus, consequently, the encumbrances established on it do not expire either (Art. 241 of the Civil Code). Thus, where the right of perpetual usufruct or a share in this right was, for instance, encumbered with a mortgage or a right of way, then after the transformation into ownership, the real estate constituting ownership or a share in the co-ownership of the real estate are encumbered. The necessity of establishing these limited property rights anew after the transformation is thus eliminated.

Property rights encumber each and every owner of the real estate at any time, while personal rights (obligations) are inure to (apply against) a specific person.

Following the transformation, the perpetual co-usufructuary will become the co-owner of the land in the same share in which he/she was the co-usufructuary (Art. 1(4) of the Act).

⁴² See: F. Pietrzyk, *Kontrowersje wokół przekształcenia prawa użytkowania wieczystego gruntów zbudowanych na cele mieszkaniowe w prawo własności gruntów*, „Rejent” 2017, No. 12, p. 71.

⁴³ Art. 49(1) of the Civil Code: ‘Equipment serving to bring in or drain off liquids, steam, gas, electric energy as well as other similar equipment does not belong to the component parts of real estate provided that they are part of the enterprise’.

4. Mandatory exclusion from transformation

Pursuant to paragraphs 1–3 of Art. 1 of the Act, excluded from the transformation is land (owned by the State Treasury or municipalities and remaining under perpetual usufruct) under tenement houses, developer blocks of flats in which not even one apartment was separated. The transformation will become possible only after the building has been consigned for use (Art. 59 of the Construction Law and Art. 13 of the Act). An exclusion of this type does not constitute an omission on the part of the legislator. It was deliberate, because, as demonstrated by the reasons for the bill, authoritative interference into ownership rights of self-governments is a justified by the implementation of the constitutional value of satisfying the citizens' residential needs. It is impossible to share the view expressed by some authors that the transformation concerning land under tenement houses in which owners lease out apartments will be excluded by law, and thus they will be excluded from the transformation because they do satisfy their own housing needs in the whole building and it would be them that would benefit from the law. The benefit that they would derive from the transformation would not be transferred onto tenants, buyers of apartments or houses. Conversely, having a stronger right, the owner of a multi-family building (a tenement house) could raise rent. Moreover, a failure to exclude this land from enfranchisement would often thwart the actions of the Reprivatisation Commission vis-à-vis people who regained whole multi-family buildings as a result of incorrect reprivatisation decisions⁴⁴.

Such an interpretation of the provisions of Articles 1 and 2 of the Act, specifying the eligible persons and the scope of application of the Act cannot be justified. The exclusion from the enfranchisement of land under tenement houses in which the owners lease out apartments would have to result from an explicit wording of the Act, expressing such an intention of the legislator and which cannot be only presumed. Meanwhile, irrespective of the fact that such an intention of the legislator not only does not follow from any provision of the Act, but would be contrary to the aim of the Act, which was to transform perpetual usufruct of land developed for housing purposes, irrespective of whose housing needs are satisfied in these buildings: the owner's or the tenant's.

Sharing the view I am criticizing would lead to consequences contrary to those assumed by the legislator. This is illustrated, for instance, by the following facts: a perpetual usufructuary bought two residential buildings on one site. He/she lives in one of them with his/her family. The second is temporarily leased out until the children (minor) grow up. Then he/she will make the currently leased building available to his/her children to secure their housing needs and the families they will establish. If only it were possible to transform the land under the building inhabited by the perpetual usufructuary, it would be necessary to divide the land, to separate the site with the leased building. Then, part of the land would be excluded from enfranchisement which would thwart the legislator's plan to abolish the existing right of usufruct and significantly limit the establishment of new rights of usufruct.

⁴⁴ See: E. Świętochowska, *Likwidacja użytkowania wieczystego przesądzona*, „Gazeta Prawna”, 18 June 2018.

In Art. 1(7), land developed for housing purposes situated in the territory of sea ports and harbours within the meaning of Art. 2(2) of the Act of 20 December 1996 on Sea Ports and Harbours⁴⁵ were *ex lege* excluded from the transformation.

5. Certificate as a document confirming the transformation and constituting the basis for disclosure of ownership in the land and mortgage register

Pursuant to Art. 4 of the Act, it is a certificate⁴⁶ confirming transformation of the right of perpetual usufruct into ownership of the land, issued by the authorities that until now collected fees for its usufruct (the ‘relevant authority’ within the meaning of Art. 4(2)), that constitutes the basis for disclosing the ownership of land in the land and mortgage register as well as in the register of land and buildings.

In the case of land owned by territorial self-government units, these relevant authorities are the *voit*, mayor, board of the *poviat* or *voivodeship*, respectively (Art. 4(1)(3)), while in relation to real estate owned by the State Treasury – the *starost* performing tasks within the scope of government administration (Art. 4(1)(1)) or, alternatively, the director of the local branch of the National Centre for Agriculture Support or the director of the regional branch of the Military Property Agency or the director of the Board of Housing Resources of the Minister of Home Affairs and Administration in case of land in relation to which the owners’ rights are exercised by these entities (Art. 4(1)(2) and Art. 4(1)(4) of the Act).

These authorities issue a certificate *ex officio*, not later than within 12 months from the transformation date or at the request of the owner within 4 months from the day of the receipt of the request.

Where the usufructuary is a foreigner (Art. 2(2) of the Act), the certificate should be issued within 4 months after the foreigner presents the final permission.

Certificates issued *ex officio* should be sent to the hitherto perpetual usufructuaries at the address indicated in the register of land and buildings or to any other address to which correspondence concerning perpetual usufruct was delivered prior to the transformation date. Service of the certificate to such an address is deemed effective (Art. 2(6)).

In fact the certificate confirms a change of the type of right to land, which occurred by operation of law, but does not establish this right. The legislator deliberately refrained from confirming the transformation with an administrative decision so that in case of co-usufruct the problems encountered before would not arise. Namely, an appeal by even only one of the co-holders of the right could thwart the aim of the transformation, blocking the acquisition of ownership by the remaining eligible persons.

Pursuant to Art. 4(3) of the Act, the certificate contains a designation of the real estate, whether land or apartment/house, according to the register of land and buildings as well as land and mortgage registers kept for these properties. In the case of a foreigner, the certificate contains also the designation and date of the permission from the minister in charge of home affairs, as referred to in the Act of 24 March 1920 on the Purchase of Real Estate by Foreigners.

⁴⁵ Journal of Laws 2017, Item 1933.

⁴⁶ A stamp duty of 50 PLN is collected for the certificate confirming the transformation issued at a request (Sect. 20a of the Schedule to the Stamp Duty Act, Journal of Laws 2018, Item 1044).

The certificate confirms the transformation, informs about the obligation to pay annual transformation fees, about their value and the period for which they should be paid, about the rules for paying an aggregate fee. In addition, the certificate should also include information about the possibility the new owner has of lodging a request for determination of the value and period of paying the fees by way of a decision if the new owner does not agree with the relevant information provided in the certificate (Art. 4, paragraphs 3 and 4). The certificate provides grounds for entry in Section III of the land and mortgage register of a claim concerning annual transformation fees with respect to each owner of the property at any time.

The relevant authority passes the certificate to the court keeping the relevant land and mortgage register, within 14 days from the day of its issuance. In case where the transformation of the right of perpetual usufruct is made in favour of a foreigner, the certificate is sent also to the minister in charge of home affairs within 7 days from the day of its issuance (Art. 4(7)).

The certificate is not an administrative decision. The court is obligated to check whether it complies with the real estate designation in Section 'I-O' of the land and mortgage register and with the legal status resulting from the land and mortgage register. Where it is found not to be in compliance, three solutions are possible: the party may be requested to eliminate the defects within a week under the sanction provided for in Art. 130 of the Code of Civil Procedure⁴⁷; the application may be dismissed on the basis of Art. 626⁹ CCP due to an obstacle in the substantive law meaning or the case may be ended, with the authority which sent the certificate being notified of failure to make an entry explaining the cause.

In my opinion, the first solution seems to conform best to the construction of the land and mortgage register proceedings and the official procedure of making entries adopted by the legislator. Yet, given the number of cases that will come to land and mortgage register courts with the certificates (2,400,000 for the whole country) and the possible cases of non-compliance between certificates and the status of the real estate resulting from the land and mortgage register, courts are more likely to apply the third solution, which is used with respect to certificates from the Register of Land and Buildings on a change of data concerning the real estate.

The court enters ownership of the land in land and mortgage registers as well as enters the claim concerning annual fees for transformation of the right *ex officio*⁴⁸.

Where the transformation concerns a share in perpetual co-usufruct of land connected with a separate ownership of residential units, the entries referred to in paragraph 1 are made in the land and mortgage register kept for the residential unit. Pursuant to Art. 5(2), separating the ownership of residential units after 1 January 2019 in a building located on land covered by the transformation, the court *ex officio* discloses the claim for the fee in the land and mortgage register kept for the residential unit. Having disclosing the claim for the fee with respect

⁴⁷ Act of 17 November 1964 – Code of Civil Procedure (consolidated text: Journal of Laws 2018, Item 1360 as amended), hereinafter 'CCP'.

⁴⁸ The court sends the notification of the entry to the address indicated in the certificate. Service of the notification to this address is deemed effective. There is no court fee payable for making entries in the land and mortgage register (Art. 5(1) of the Act).

to all the shares in the co-ownership of land, the court acting *ex officio* strikes off the claim for the fee from the land and mortgage register kept for the plot of land.

In accordance with Art. 6, when the person in whose favour the right of perpetual usufruct was transformed does not agree with the information about the value and period of paying annual transformation fees contained in the certificate, it can apply to the relevant authority, within 2 months from the date of service of the certificate, a request for determining the value and the period of paying the fees by way of an administrative decision. Until completion of the proceedings, the fee is paid in the amount indicated in the certificate. The value of the fee determined in the proceedings is effective from the day of the transformation. In case of an overpayment the relevant authority credits it for future fees and informs the applicant about it. In case of an underpayment, the authority notifies the applicant of the obligation to make an additional payment. If a decision confirming lack of the obligation to pay the fee is issued, the relevant authority passes the decision to the court keeping the land and mortgage register within 14 days of the day when the decision became final. The decision constitutes grounds for striking off the entry of the claim for the fee in Section III of the land and mortgage register (Art. 6(4) of the Act).

6. Fees for transformation of the right of perpetual usufruct into ownership

The transformation has been and is in fact done for a fee. Annual fees have been and are a derivative of the value of the real estate. The hitherto practice has shown that the value of the updated annual fee keeps growing, in particular in large urban agglomerations in which the value of land grows considerably. This has generated the discontent of the owners of apartments, reflected in complaints, and constituted one of the reasons for the change of the right of perpetual usufruct (as a temporary right) into ownership, which is not being subject to temporary limitations. The principles and procedure of paying such fees are regulated by Art. 7 of the Act.

Persons who became owners (co-owners) of land by operation of law, are obliged to pay the sums due for the acquisition of ownership in the form of fees payable regularly every year for a period of 20 years. As to the principle, the value of the fee will equal the annual fee for perpetual usufruct which would be effective on the day of transformation. This principle was proposed as soon as in the bill prepared on 8 August 2016. Thus, the legislator guaranteed to self-government units an adequate period of time for planning and updating the fees even in 2018. If self-government units failed to benefit from the right to cyclically update the fees by the time the bill became law, the provisions of the Act do not interfere with their decisions in this area in any way.

The thus established principle of payment takes into account the recommendations resulting from case law of the Constitutional Tribunal on reconciling the interests of the hitherto owners of the land (the State Treasury and municipalities) with the interests of perpetual usufructuaries, while respecting the principle of financial independence of self-governments. The legislator's assumption was to ensure optimum revenues from transformation with a simultaneous benefit enjoyed by beneficiaries.

The fee for transformation of the right of perpetual usufruct into the right of ownership is to constitute compensation for the revenue from fees for the perpetual usufruct lost by the State Treasury and municipalities. The payment is to ensure revenues at a level comparable to the hitherto fee for transformation of the right of perpetual usufruct established on the principles, said fee determined according to the provisions of the Act of 29 July 2005. Its value will be, in principle, equivalent to that of the fee for perpetual usufruct which would be in force on the transformation date, with the exception of the situations: (1) in which on the transformation date the applicable annual fee is the fee set for the first or second year from the update, in accordance with Art. 77(2a) of the Act on Real Estate Management, equal to the annual fee for perpetual usufruct in the third year from the update (Art. 7(3) of the Act); (2) in which the right of perpetual usufruct was established or transferred in the period from 1 January 2018 to 31 December 2018, the value of the fee equals the annual fee for perpetual usufruct which would apply, in accordance with the provisions of the agreement, from 1 January 2019 (Art. 7(4) of the Act).

The legislator assumed that the total amount which paid for the transformation concerning a given real estate would not differ from the mean amount which public entities currently collect applying the principle resulting from Art. 69 of the Act on Real Estate Management. Pursuant to this provision, an amount equal to the value of the right of perpetual usufruct of the real estate, determined as at the date of sale (difference between the market value of the land and the value of the right of perpetual usufruct) is applied for the price of the land sold to the perpetual usufructuary. The thus established principle of payment does not constitute a novelty for perpetual usufructuaries as it follows existing practice. Until 1 January 2019 they paid annual fees for perpetual usufruct. Some of them will even benefit as the period of paying the fees will be shortened. In the majority of cases the 20-year period will be much shorter than the period left to the end of the perpetual usufruct period.

7. Discounts

The system of discounts which will be applied from 1 January 2019 is based on two sources of legitimacy: statutory, specified in paragraphs 1–6 of Art. 9 of the Act of 20 July 2018, concerning land owned by the State Treasury and resolution-based, concerning land owned by self-government units. To achieve the objective of the Act, the system came to cover in particular natural persons being owners of apartments and single-family houses, as well as housing cooperatives.

Pursuant to Art. 9(5) of the Act, the decree of the *voivode* (regarding land owned by the State Treasury) and the resolution of the board or the local parliament (regarding land owned by a territorial self-government unit) specify in particular the conditions of granting discounts and the percentage rates, taking into account, in particular: the use of the property solely for residential purposes, the period of paying the annual fees for perpetual usufruct of land, the household income, the family situation, the average unemployment rates in individual *poviats*.

A holder of a cooperative member's right to an apartment enjoys a discount in the form of a relief in the payments by virtue of a share in the costs of operation of the building. The value of the relief corresponds to the value of the discount on

the fee granted to the housing cooperative, pro rata the floor area of the apartment occupied by the persons entitled to the discount.

The act also provides for a possibility of granting discounts on the fee for a given year to natural persons who own residential single-family buildings or apartments or to housing cooperatives.

As for the land which, prior to 1 January 2019, was property of the State Treasury, this power rests with the *starost*, as part of discharging central administration tasks. With respect to real estate owned by territorial self-government units it rests with the *voit*, mayor, or boards of the *poviat* or *voivodeship*. A discount is given on the basis of a decree passed by the *voivod* or a resolution adopted by the municipal or *poviat* council or the *voivodeship* parliament.

A mandatory discount applies to natural persons who made a one-off payment of the fees, on the total amount of the fees with respect to the real estate which was, prior to 1 January 2019, property of the State Treasury (they are entitled to a 50% discount).

To solve the question of establishing separate ownership of apartments on land let under perpetual usufruct for development with multi-family buildings, where ownership of the apartment was separated after 1 January 2019, an obligation was established that the owner of the premises pay fees pro rata the share in the ownership of land (Art. 11(3)).

Incentives aim to encourage one-off payment of the fee. A system of mandatory discount was adopted for natural persons and housing cooperatives operating on land owned by the State Treasury prior to the transformation.

Pursuant to Art. 9(3) of the Act in point, in case where a one-off payment is made for the transformation of land owned by the State Treasury, natural persons who own residential single-family buildings or residential units, or housing cooperatives have the right to a discount of: 60% if the payment is made in the year in which the transformation took place; 50% if the one-off payment is made in the second year following the transformation; 40% if the one-off payment is made in the third year following the transformation; 30% if the one-off payment is made in the fourth year following the transformation; 20% if the one-off payment is made in the fifth year following the transformation; 10% if the one-off payment is made in the sixth year following the transformation.

An indirect incentive to make the one-off payment comes from the fact that the discount on the one-off payment is reduced in each subsequent year.

The person obliged to pay the fee has, at any time when the obligation to pay it exists, the right to apply to the relevant authority requesting a one-off payment of all fees in the amount remaining to be paid.

The buyer of the real estate can apply to the relevant authority for a certificate confirming the value and the remaining period when the fees are to be paid. The relevant authority can institute proceedings in this case *ex officio*. This means that possible disposal of the real estate by the beneficiary before the lapse of the period for which the beneficiary would be obliged to pay the transformation fees, where the hitherto owner (the State Treasury, a territorial self-government unit) has a claim for the fee entered in Section III of the land and mortgage register kept for the real estate with respect to each subsequent owner, will not diminish the revenues of the hitherto owners.

If ownership of the apartments in a building located on land covered by the transformation was separated after 1 January 2019, the obligation to pay the fee encumbers the apartment owner pro rate his/her share in the co-ownership of the land connected with apartment ownership.

The fees are subject to indexation, since over 20 years the real value of money as well as the value of the real estate covered by the transformation can change. This is intended to help avoid a situation in which the fees cease to be adequate to the value of the acquired right and no longer ensure due remuneration to the hitherto owners of the real estate.

The Central Statistical Office of Poland is not able to announce an index of changes in land prices which would prove helpful in indexation. Consequently, indexation will be made in accordance with the principle specified in Art. 5(4) of the Act on Land Management, i.e. by applying the index of prices of consumer goods and services announced by the president of the Central Statistical Office.

Pursuant to Art. 10(3), the relevant authority can refuse indexation only where it concludes that the indices referred to in Art. 5 of the Act on Real Estate Management did not change from the day of transformation or the last indexation to the day when the application was made.

8. Gratuitous transformation

Pursuant to Art. 8 of the Act, transformation of the right of perpetual usufruct of land with residential development can be gratuitous in case of national parks, natural persons, their successors and housing cooperatives which/who have paid annual fees for the whole period of perpetual usufruct or obtained perpetual usufruct on the basis of the Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw or other legal titles, in exchange for the expropriation or take-over of land in favour of the State Treasury before 5 December 1990.

There are legal reasons for the exemption of this group of entities, namely: national parks do not pay fees for perpetual usufruct and in case of the entities in the second group which paid the fees for the whole period of perpetual usufruct the obligation to pay the fees has already expired; as for the remaining entities, the former owners of land in Warsaw (prior to their municipalisation in 1945) or their legal successors were granted the right of perpetual usufruct; similarly, hitherto owners were granted perpetual usufruct of substitute real estate as compensation for the expropriation and the lost ownership of land if they were expropriated or their land was taken over in favour of the State Treasury prior to 5 December 1990. As a consequence, thanks to the transformation they regain the lost ownership. It should be pointed out that the quoted Art. 8 of the Act is nothing new, as similar regulations can be found in Art. 76(2) of the Act on Real Estate Management and Art. 5 of the Act of 29 July 2005.

9. 'Delayed' transformation of the right of perpetual usufruct into the right of ownership (short note)

Anticipating that in practice situations may occur in which land being in perpetual usufruct will be developed after 1 January 2019 with single- or multi-family

buildings, in accordance with local spatial development plans or a decision on the conditions of land development, the legislator rightly covered them with the regulation by introducing in Art. 13 of the Act the notion of the so-called delayed transformation. If the conditions described in this provision are satisfied, the right of perpetual usufruct is transformed into land ownership from the day the residential building is consigned for use⁴⁹.

10. The problem of giving the beneficiaries of the transformation the right to perpetual usufruct into the right of ownership 'assistance' in the context of EU law (short note)

The acquisition of ownership of real estate as a result of transformation of the right of perpetual usufruct according to the rules established in the act is undoubtedly an acquisition on concessory conditions. Thus, all perpetual usufructuaries benefit from state aid, the scope of which must comply with EU law. In order to maintain this compliance and to avoid the risk of violating the principles of granting aid laid down in European law, the legislator introduced in Art. 14 of the Act the obligation to take into account provisions on state aid in the context of transformation of the right of usufruct. Granting aid of this kind is possible provided the *de minimis* aid conditions specified in Commission Regulation (EU) No. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid are satisfied. *De minimis* aid amounts to 200,000 euro. As long as it is not exceeded, there is no need to notify the European Commission.

What is important in the context of the principle of extending state aid is the fact that the perpetual usufructuary uses the apartment or house in which he /she lives for work or for doing business. As a rule, the beneficiaries of the *ex lege* transformation are natural persons. Even if they are entrepreneurs within the meaning of the provisions on state aid, the value of the aid granted to them will not exceed *de minimis*.

Only if in single-family buildings built on land of substantial value business activity is conducted by a natural person or developers for whom a substantial share in the right to land is transformed, can the aid limit be exceeded. However, the legislator foresaw such a situation and, in order to eliminate the extension of aid, introduced in Art. 14(2) a possibility for the authority to determine an additional payment to the market value of the land covered by transformation as at the transformation date. The additional payment will correspond to the difference between the value of the extended aid and the value of *de minimis* aid. The value of the additional payment is set *ex officio* in an administrative decision on the basis of an appraisal report the cost of which is borne by the person obliged to make the additional payment.

⁴⁹ Due to the reference to the appropriate application of Art. 2(2) of the Act contained in Art. 13, the scope of application of the transformation will also cover the perpetual usufruct of land developed by a foreigner who must satisfy an additional condition required by Art. 1(1) of the Act of 24 March 1920 on the Purchase of Real Estate by Foreigners (i.e. Journal of Laws 2017, Item 2278), that is, obtain a permission of the minister in charge of home affairs for the acquisition of the real estate.

11. The possibility of choosing the legal regime of the transformation

In Art. 26, the legislator introduced a possibility of choosing the legal regime applicable to transformation of the right of perpetual usufruct by perpetual usufructuaries who submitted applications for the transformation pursuant to the provisions of the Act of 29 July 2005, and the cases were not finished by 31 December 2018. The condition for being given the choice of regime is that the land covered by the applications should meet the conditions for *ex lege* transformation. Since according to the laws applicable before 31 December 2018 some self-government units adopted resolutions granting a discount of over 50% on fees and it is not known whether any discounts will be granted on the *ex lege* transformation after 1 January 2019 and how high they will be, it is obvious that it is in the interest of the beneficiaries to be given the right to choose the conditions of the transformation. Pursuant to Art. 26(1), proceedings concerning transformation of the right of perpetual usufruct of land with residential development, within the meaning of Art. 1(2), instituted on the basis of the Act of 29 July 2005 and not ended with a final decision by 31 December 2018 are discontinued unless the perpetual usufructuary or co-usufructuaries, the total of the shares of whom amounts to at least half, submit by 31 March 2019 a declaration on continuing the proceedings on the basis of the Act of 29 July 2005. If the proceedings are not ended by 31 December 2021, the transformation takes place as of 31 January 2022.

Abstract

Helena Ciepla, Transformation of the right of perpetual usufruct into ownership

The article presents the most important provisions of the Act of 20 July 2018 on Transformation of the Right of Perpetual Usufruct of Land Developed for Housing Purposes into Ownership of Land. The transformation in question will take place ex lege as of 1 January 2019. This presentation is preceded by information about the possibility of transformation of the right of perpetual usufruct into ownership according to laws in force until 31 December 2018.

Keywords: *land, real estate, right of perpetual usufruct, ownership, transformation of a right, land registers, principle of public credibility of land and mortgage registers, reprivatisation, reprivatisation decision, appraisal report, fee, property right, civil law*

Streszczenie

Helena Ciepla, Przekształcenie prawa użytkowania wieczystego w prawo własności

W artykule zostały przedstawione najistotniejsze unormowania ustawy z 20.07.2018 r. o przekształceniu prawa użytkowania wieczystego gruntów zabudowanych na cele mieszkaniowe w prawo własności tych gruntów. Przekształcenie takie nastąpi ex lege z dniem 1.01.2019 r. Zostały one poprzedzone informacją o możliwości przekształcenia prawa wieczystego użytkowania w prawo własności według stanu prawnego obowiązującego przed wymienioną datą.

Słowa kluczowe: *grunt, nieruchomości, prawo użytkowania wieczystego, prawo własności, przekształcenie prawa, księgi wieczyste, rękojmia wiary publicznej ksiąg wieczystych, reprivatyzacja, decyzja reprivatyzacyjna, operat szacunkowy, opłata, prawo rzeczowe, prawo cywilne*

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