

New Regulations on Transforming the Right of Perpetual Usufruct into Ownership Title

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Received: 17 February 2019 / Accepted: 15 April 2019

Abstract: The objective of this research paper is to identify the surveying and legal problems occurring as part of the practical implementation of transforming the right of perpetual usufruct into ownership title in the context of the new regulations that have been in force since 1 January 2019. This is a consequence of the Act of 20 July 2018 on the transformation of the right of perpetual usufruct of the land developed for residential purposes into the ownership title to this land. The research problem of this study is the analysis of the real estate subjected to the transformation of the right of perpetual usufruct into the ownership title in the context of the new regulations in force since 1 January 2019. The conducted research has resulted in the identification of the problems related to the interpretation of these new regulations, also in defining the scope of real properties subjected to the transformation, issuing certificates confirming the transformation, and entering the effects of this transformation into land and mortgage registers. These problems may hinder the practical implementation of the transformation process as well as hamper the execution of real estate transactions. In order to illustrate the implementation scale of these new regulations, the author of this research paper has defined the purposes for which the real properties in the selected city were let into perpetual usufruct, the approximate scope of the properties subject to the transformation and the financial consequences of this process.

Keywords: transformation, ownership, perpetual usufruct

1. Introduction

The right of perpetual usufruct was established in the period when the principle of a consolidated, indivisible state-owned ownership fund was in force (former Article 128 [Act, 1964a]) and was conceived as a kind of a substitute for the ownership right. At that time, it was not possible to purchase state-owned lands. The establishment of perpetual usufruct was the only legal form permitting the use of state-owned land to meet social needs, especially with regard to construction. Therefore, the fact that after the collapse of the communism in Poland the legislator allowed to transform the right of perpetual

usufruct into the right of ownership, can be perceived as a kind of a pecuniary compensation from the state. The transformation of perpetual usufruct is the subject of numerous publications, including (Skwarło, 2007, 2008; Podleś, 2007; Wolanin, 2006; Gonet, 2012). Some authors (Hernik and Kijania, 2001) pointed to the need to change the rules of transformation. Although the area of the land remaining in perpetual usufruct has been decreasing (Żróbek, et al., 2014), this is one of the basic forms of public property management bringing systematic revenues to public entities (Trembecka, 2016). Since 1997, the regulations on the transformation of perpetual usufruct have been amended many times, both in the subjective and objective scopes, and they have also been subject to review by the Constitutional Tribunal. The Act of 20 July 2018 on the transformation of the right of perpetual usufruct of the land developed for residential purposes into the ownership title to this land has introduced radical changes to the rules of transformation. The Act has introduced a mechanism of normative transformation by virtue of law. It is the enfranchisement of a group of entities being the perpetual users of the real property resulting from its function (residential one).

The research problem of this study is the analysis of the real estate subjected to the transformation of the right of perpetual usufruct into the ownership title in the context of the new regulations in force since 1 January 2019. The thesis of this paper is the statement that the introduced regulations (Act, 2018) do not specify precisely the scope of the real properties subject to the transformation of the right of perpetual usufruct into the ownership title. The previous studies refer to the principles of transformation before the new regulations have entered into force. This research paper is therefore an innovative study presenting the surveying and legal problems associated with the ambiguous and incomplete regulations on normative transformation of the right of perpetual usufruct to residential properties as of 1 January 2019. These problems may hinder the practical implementation of the transformation process. The study has covered the previously existing legal regulations and those introduced on 1 January 2019, as well as the quantitative data defining the number of real properties remaining in perpetual usufruct in Krakow, the purposes of letting these properties into perpetual usufruct, as well as the approximate scope of the real properties covered by the transformation proceedings.

2. Historical aspects of transforming the right of perpetual usufruct into the ownership title

The first act allowing the transformation of the right of perpetual usufruct into the ownership title, adopted on 4 September 1997 (Act, 1997), was addressed only to natural persons. The second normative act regulating this issue was the Act of 26 July 2001 on the acquisition of property rights by perpetual users (Act, 2001). It referred to the territories recovered by Poland after the Second World War. The next Act of 29 July 2005 on the transformation of the right of perpetual usufruct into the ownership title (Act, 2005) allowed a specific group of entities to transform perpetual usufruct into ownership. Until 2011, this Act had been subject to a number of amendments; the legislator

consistently expanded the group of entities that were entitled to a claim for transformation. On 7 September 2007, the Act amending the Act on the transformation of the right of perpetual usufruct into the ownership title and some other acts was passed (Act, 2007). Under this Act, natural persons who were perpetual users on 13 October 2005 may also request such transformation if the right of perpetual usufruct had been granted in exchange for expropriation prior to 5 December 1990 and pursuant to Article 7 of the Act (Decree, 1945). The request for transformation could have been submitted before 31 December 2012.

Another amendment is the Act of 28 July 2011 (Act, 2011) which changed the objective and subjective scopes as well as the time of the transformation. All natural and legal persons that remained perpetual users on 13 October 2005 as well as their legal successors were eligible to demand such transformation, regardless of the intended purpose of the real property. The time limit for possible transformations was also annulled. Therefore, this Act no longer was a kind of compensation from the state granted to the entities who had been perpetual users prior to 1990, and allowed the entities who acquired the right of perpetual usufruct later, under a voluntary civil law agreement, to be able to transform that right into the ownership title as well. The amendment of 2011, with reference to Article 1 sections 1 and 3 of the Act (Act, 2011), was appealed to the Constitutional Tribunal by three municipalities. In the judgement of 10 March 2015 (Judgement, 2015), the Tribunal declared that the local self-government units were right by stating that this provision had created unjustified property privileges for selected groups of entities. The decision on unconstitutionality includes legal persons (with the exception of housing co-operatives) and natural persons who have been granted the right of perpetual usufruct – in principle – to conduct non-agricultural business activities. Such extension of the scope of the transformation of the right of perpetual usufruct into the ownership title was questioned as violating the principles of trust in the state, the law and the social justice (Article 2 of (Act 1997)) as well as the grounds for independence of municipalities (Article 165 section 1 of (Act 1997)).

Legal solutions which are similar to the Polish perpetual usufruct are applied all over the world, including most European countries, most frequently as the right of development or long-term lease. They carry various names, e.g. *superficie* (Italy), *bail à construction*, (France), *erfpacht* (the Netherlands), or *erdbarecht* (Germany). The Swiss Civil Code has shaped the right of development as the right-of-way (Głuszak, 2008). In Eastern and South-Eastern Europe, similar legal constructions may also be encountered. The right of development is also known in Lithuania, Slovenia, Croatia and Estonia. On the other hand, in Great Britain, a lease of the land intended for development is established for a period of 99 and even 999 years. In practice, however, contracts are usually concluded for shorter periods – 15, 25 or 50 years (Żróbek and Hłasko, 2003). In the Netherlands, public lands are let into a long-term lease for 50 years or for an unlimited period of time (Bourassa and Yu-Hung, 2003). In New Zealand, the most popular form is perpetual lease, most frequently for a period of 21 years (Jefferies, 1998).

In some countries, the laws similar to the Polish perpetual usufruct have gained a very strong position, and in Sweden they are even a dominant form. The legal solutions in European countries can be divided into two groups:

1. The owner of the land on which the building was erected remains the owner of the building (as in *leasehold schemes* in Scotland and *erfpacht* in the Netherlands).
2. The ownership of the building is detached from the ownership of the land for the time the contract is in force (most European countries).

Despite the differences in juridical terms, the socio-economic functions of such rights are similar in all countries. Such legal constructions are one of the world's known forms of land ownership, which allows both parties to pursue their economic interests.

3. Analysis of the problems related to determining the scope of real properties covered by the transformation

The Act of 20 July 2018 (Act, 2018) concerns an extremely important issue, namely the transformation of ownership rights and the formation of private property rights in Poland. Its entry into force resulted in radical changes regarding the rules of transformation of perpetual usufruct. The previous claim for such transformation implemented under the administrative procedure has been replaced by a normative transformation by virtue of law, without adjudication in the form of an administrative decision. This solution is favourable especially for multi-tenant buildings requiring the consent of all members of the community.

All perpetual users who use public lands to meet housing needs, i.e. both owners of single-family houses and owners of residential premises in multi-tenant buildings, are covered by this Act. The latter group of entities have encountered serious difficulties in transforming the right of perpetual usufruct under the existing rules, due to the adopted normative mechanism, i.e. the transformation based on decisions issued at the request of all authorized perpetual users. In the case of single-family houses, most of the interested parties have transformed their rights, mostly against preferential fees. However, the real properties being in the shared perpetual use encountered the problem with finishing the proceedings. The necessity to submit an application by the users holding at least 50% of the shares, the court proceedings for obtaining the consent of all entitled persons, the undetermined inheritance issues as well as the constant changes in the legal status, hindered the issuance of transformation decisions.

The new regulations introducing a possibility of the transformation without the need to issue decisions are undoubtedly a great simplification in this respect. However, the standards introduced raise problems in other areas, e.g. with regard to determining the scope of the transformation. Under the new act, the land developed for residential purposes, meeting this condition on 1 January 2019, is subject to transformation, provided that the land is developed with:

- 1) residential single-family houses, or
- 2) residential multi-tenant buildings in which at least half of the dwellings are residential units.

The third category of the real properties covered by the transformation proceedings comprises the land developed with residential buildings together with outbuildings, garages, other structures or facilities that enable proper and rational use of the residential

buildings. The aforementioned types of real properties are subject to the transformation as of 1 January 2019 (Figure 1).

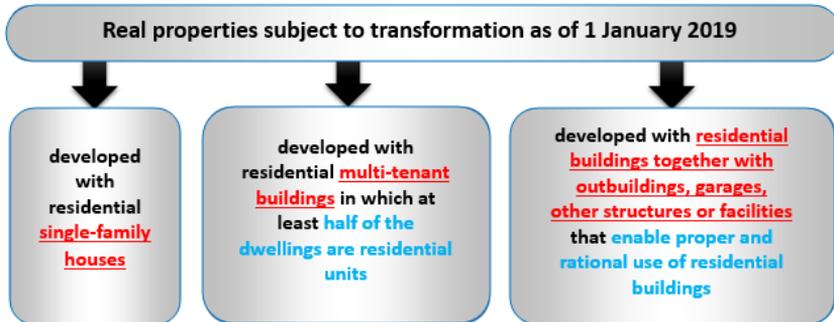


Fig. 1. Scope of real properties covered by transformation as of 1 January 2019
(Source: own elaboration based on Act, 2018a)

In the case of multi-tenant buildings, the first question concerns the approved criterion of the number of residential premises. The provision implies that the ratio of the total area of residential premises to other, for example, commercial ones, is irrelevant. The number of small commercial premises in the building may be greater than the number of residential premises with a large total area. Such a case will result in the real property being excluded from the transformation, which is a controversial issue.

At this point, a question arises as to how to treat single-family houses with two independent premises separated: a residential one and a commercial one. In such a case, the provisions of the Construction Law shall apply (Act, 1994). Under Article 3 section 2a of this Act, a single-family residential building is a detached, semi-detached, or terraced building, or a group of buildings, serving residential needs, constituting a constructionally independent whole, in which it is allowed to separate no more than two residential units or one residential unit and one commercial premise with a surface area not exceeding 30% of the total area of the building. Therefore, if the surface area of the commercial premises in a building does not exceed 30% of its total area, then it will still be a single-family residential building subject to the transformation.

Article 1 section 2 (Act, 2018) uses the terms “land developed for residential purposes” and “real properties”. Therefore, some doubts arise as to whether the real property should be understood as land property in terms of the civil law (Article 46 §1 (Act, 1964) and Article 4 clause 1 (Act, 1997)) or as real estate in terms of the land and mortgage register (Articles 1 and 21 (Act, 1982)). Another problem is whether the transformation shall occur only with respect to the real property on which the building is located or also in relation to adjacent properties such as courtyards, access roads or greeneries, separate from the premises in legal terms. In practice, there are frequent cases of real properties let into perpetual usufruct in order to improve the conditions for development of adjacent real estate, used for housing purposes (the so-called “complements” – Article 37 section 1 clause 6 (Act, 1997)). Nevertheless, many of these properties are undeveloped and unfit for development. A doubt arises at this point as to whether in the light of Article 1

section 1 clause 2 (Act, 2018), the right of perpetual usufruct of such real properties is subject to transformation into the ownership title.

There are also certain doubts about the definition of the properties subject to the transformation proceedings, constituting the land developed with residential buildings together with outbuildings, garages, other structures or facilities that enable proper and rational use of these residential buildings. Considering the fact that the definitions of both structures and facilities are extensive, qualifying the land for transformation may in practice pose numerous difficulties. Some properties will have the transformation proceedings moved to another date (Figure 2) for various reasons, e.g. the necessity to separate the land meeting the transformation criteria, obtaining the consent of the minister competent for internal affairs or because of the date of commissioning the building for use (later than 1 January 2019).

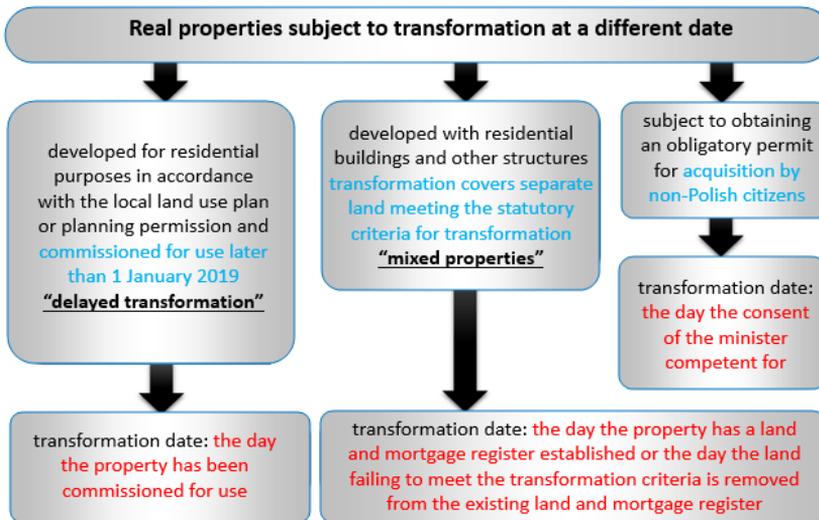


Fig. 2. Real properties subject to transformation at a different date
(Source: own elaboration based on Act, 2018)

One of the significant problems are the so-called “mixed properties”, i.e. those developed with residential buildings and other structures that do not meet the transformation criteria. If there are also structures other than those specified in Article 1 section 2 (Act, 2018) located on this land, the transformation covers the separated land that meets the statutory transformation criteria and is performed on the day of:

- 1) establishing a land and mortgage register for this real property, or
- 2) removing the land failing to meet the transformation criteria from the existing land and mortgage register.

This provision raises serious interpretation doubts and, as a consequence, it is extremely difficult to apply in practice. The legislator has not specified who (the owner or perpetual user) is authorized to take actions resulting in the legal division of the real property let into perpetual usufruct. The object of perpetual usufruct is not a record par-

cel but a real property as specified by the land and mortgage registry. Therefore, the consolidation of several plots of land, previously let into perpetual usufruct, in one land and mortgage register, or the subdivision of a real property and the separation of some plots, shall result in a change in the subject of perpetual usufruct.

In this respect, the Supreme Court's jurisprudence is of great importance, especially that contained in the Resolution of 13 March 2015 (Resolution, 2015), which states that the perpetual user is not allowed to subdivide the land let into perpetual usufruct, nor are they entitled to consolidate real properties for which separate land and mortgage registers are maintained.

Therefore, it will be problematic when there are objects other than those listed in Article 1 section 2 of the Act located on the property let into perpetual usufruct. These could be e.g. structures defined in Article 49 (Act, 1964) which are not constituents of the real estate, such as a high voltage transmission towers, not associated with the use of the property on which they are located, or the object of small architecture. Then, the condition for transformation will be the legal and surveying separation of that part of the land which is developed with a residential building. The geodetic subdivision should be performed independently of the settlements of the local land use plan or the planning permission in order to implement claims. An additional difficulty will be the need to obtain a consent of the owner (pursuant to (Resolution, 2015)), e.g. a municipality, to carry out a legal subdivision.

Another category of real properties is covered by the so-called "delayed transformation" and refers to the land in perpetual usufruct, developed for residential purposes in accordance with the local land use plan or planning permission, and commissioned for use after 1 January 2019 within the meaning of (Act, 1994). In such cases, the right of perpetual usufruct is transformed into the right of ownership as of the day the residential building is commissioned for use. The so-called "delayed enfranchisement" results in the Act significantly limiting the cases of establishing perpetual usufruct for residential purposes in the future.

4. Confirmation of transformation of the right of perpetual usufruct

The document confirming the statutory transformation is a certificate issued by the body representing the property owner. This certificate is only to confirm a change in the right to land and not to determine this right. It includes the denotation of the land or housing property according to the register of land and buildings and according to land and mortgage registers maintained for these properties.

The certificate confirms the transformation and informs about the obligation to pay the annual transformation fee (hereinafter referred to as the "fee"), the amount and period of its payment, as well as the possibility of paying a one-off payment. The certificate forms the basis for entering the ownership title into the land and mortgage register, into the register of land and buildings as well as for entering a claim in section III of the land and mortgage register on each and every current owner for the payment of the fee.

An important problem that occurs in the case of the so-called “delayed transformation” is when an application for an entry into the land and mortgage register in connection with the separation of the premises (or transfer of ownership rights to the premises) with the share in perpetual usufruct was filed before 1 January 2019, and such an entry has not been made prior to the date of the transformation. It is therefore controversial whether the certificate of transformation of perpetual usufruct should be issued in relation to the owners entered in the land and mortgage register on the day of the transformation, or whether the contracts that have been concluded should be taken into account even though they have not been entered into the land and mortgage registers.

The basic problem that arises at this point is that the Act does not stipulate if the certificate of transformation is a document necessary for the execution of transactions with the real properties covered by the transformation proceedings.

As a result of the consultations between the General Council of Notaries Public, the Ministry of Investment and Development and the representatives of land and mortgage register courts, the National Council of Notaries presented a standing on 11 January 2019 (www.krn.org), according to which the conclusion of a notarial deed for the sale of premises constituting a separate property does not require prior obtaining of a certificate. However, when establishing a separate ownership of premises and when selling land developed with single-family houses on land in perpetual usufruct prior to 1 January 2019, it is necessary to submit a certificate confirming the transformation to a notary public. There is no explicit standing of land and mortgage register courts in this respect.

In order to accelerate the issue of certificates, in the Act of 6 December 2018 (Act, 2018b), a period of 30 days has been specified to issue a certificate at the request of the owner, justified by the need to carry out a legal transaction covering the premises, or of the land owner, justified by the need to establish a separate property.

It seems that it would be reasonable to carry out transactions only after entering the effects of the transformation. However, such a large number of certificates to be issued may hinder the smooth implementation of entries in the land and mortgage registers

5. The scope of real properties covered by the transformation in the selected area

The practical application of the new rules has been presented on the example of the process of transforming the right of perpetual usufruct into the ownership title performed in the city of Krakow, with respect to the land owned both by the Municipality and the State Treasury. In order to assess the scope of the transformation, the first stage has analysed the purposes for which these real properties were let into perpetual usufruct and what the fees were. The results of the studies are presented in Tables 1 and 2.

When analysing the land owned by the Municipality of Krakow and by the State Treasury, it is noticeable that in both cases the dominant number of real properties that have been let into perpetual usufruct are intended for service and industrial purposes. In the case of the Municipality of Krakow, it is 2,812 properties with the total area of 189.3014 ha. As far as the land owned by the State Treasury is concerned, this number has reached 2,128 real properties with the total area of 2,663.1153 ha. Residential

Table 1. Purposes of letting the land owned by the Krakow Municipality into perpetual usufruct

Purpose of perpetual usufruct	Annual fee rate [%]	Area of real properties in perpetual usufruct [ha]	Number of real properties in perpetual usufruct
construction of sacral buildings, seats of church authorities and religious associations, charity and non-profit activities: custodial, cultural, medicinal, educational, scientific or R&D activities	0.3	14.5115	30
tourism	2	3.7257	13
services and industrial activities	3	189.3014	2,812
implementation of technical infrastructure and other public purposes as well as sports activities	1	356.1090	1,205
residential purposes	1	297.8270	2,269
real properties exempt from fees (for properties located out of the country, a one-off payment)	–	159.4050	246
Total		1,020.8796	6,675

Source: own elaboration based on the data derived from the City of Krakow Department of Treasury

Table 2. Purposes of letting the land owned by the State Treasury into perpetual usufruct

Purpose of perpetual usufruct	Annual fee rate [%]	Area of real properties in perpetual usufruct [ha]	Number of real properties in perpetual usufruct
construction of sacral buildings, seats of church authorities and religious associations, charity and non-profit activities: custodial, cultural, medicinal, educational, scientific or R&D activities	0.3	5.3118	14
tourism	2	6.8193	12
services and industrial activities	3	2,663.1153	2,128
implementation of technical infrastructure and other public purposes as well as sports activities	1	116.6824	485
residential purposes	1	235.3646	500
real properties exempt from fees (for properties located out of the country, a one-off payment)	–	314.0488	261
Total		3,341.3422	3,400

Source: own elaboration based on the data derived from the City of Krakow Department of Treasury

purposes occupy the second position with 2,269 properties occupying the total area of 297.8270 ha let by the Municipality of Krakow and 500 properties occupying the total area of 235.3646 ha let into perpetual usufruct by the State Treasury.

Around 35% of the real properties owned by the Krakow Municipality and 15% of the properties owned by the State Treasury, let into perpetual usufruct, will be subject to the transformation proceedings in Krakow (Table 3). The number of perpetual users covered by the transformation is different: it is estimated that it will be 50,000 people for the land owned by the State Treasury (on average, 100 perpetual users per one property), while for the land owned by the Municipality, it will be around 2,269 (about 36 people per one property). This is due to the fact that the land owned by the State Treasury is mainly occupied by multi-tenant buildings (development investments) with communities of more than 100 people. On the other hand, detached houses are mostly located on the municipal land.

Table 3. Data on real properties let into perpetual usufruct and scope of transformation in Krakow

	Municipality of Krakow	State Treasury	Total
number of real properties let into perpetual usufruct	6,675	3,400	10,075
number of real properties eligible for transformation	2,269	500	2,769
number of real properties subject to transformation	83,000	50,000	133,000
proceeds to the budget from perpetual usufruct fees [PLN]	32,000,000	87,000,000	119,000,000
proceeds to the budget from transformation fees (annually) [PLN]	17,000,000	10,000,000	27,000,000
		the amount does not include statutory bonuses	

Source: own elaboration based on the data derived from the City of Krakow, Department of Treasury

These data are only approximate because the assessment as to whether a given property is subject to transformation or not, will be examined in great detail in some cases, based on the entries in land and mortgage registers, registers of land and buildings, information obtained from property managers and the results of field inspections.

The proceeds to the budget from the fees for perpetual usufruct of the municipal land amount to PLN 32 million, and for the State Treasury – PLN 87 million. In financial terms, the negative consequences of the transformation process will occur after 20 years, in the case of both statutory and discretionary bonuses.

6. Summary and conclusions

The new rules for the transformation of the right of perpetual usufruct into the ownership title with respect to the real properties developed for residential purposes are part of the reconstruction of property relations in Poland. Therefore, it is crucial for these regulations to be precise and complete as well as interpreted uniformly throughout the country,

which will enable the efficient transformation process. The analysis of the provisions of the Act has demonstrated potential surveying and legal problems in the transformation process conducted according to the revised rules. The research carried out in this study has confirmed the thesis that the regulations regarding the transformation of the right of perpetual usufruct do not define clearly the scope of the real properties covered by the transformation process by virtue of law.

The results of the research have confirmed the need to supplement and clarify the regulations regarding the scope of the transformation, especially with respect to the following issues:

- definition of the land developed for housing purposes in the aspect of the transformation regulations,
- real estate transactions before the transformation is entered into the land and mortgage registers (especially significant for multi-tenant buildings),
- transformation of undeveloped real properties, let into perpetual usufruct in order to improve the development conditions of the owned property,
- definition of the land enabling the proper use of residential buildings subject to the transformation proceedings,
- performance of legal subdivisions of the property in order to separate the parts subject to the transformation proceedings (in the aspect of obtaining the consent of the owner).

Although the transformation occurs by virtue of law, as of 1 January 2019 it is necessary to confirm this fact in the form of a certificate constituting the basis for making an entry in the land and mortgage registers and in the register of land and buildings, which requires the verification of the data on the property. In large cities, it is not possible to issue such certificates for all transformed properties within the statutory term (until 31 December 2019). For example, in Krakow, it is 130,000 certificates that should be preceded by the verification of the intended purpose of the real property, the analysis of the conformity of the denotation, determination of the transformation fee. Around 35% of the real properties owned by the Krakow Municipality and 15% of the properties owned by the State Treasury, let into perpetual usufruct, will be subject to the transformation proceedings.

Acknowledgments

Work carried out within the statutory research of the Department of Surveying Engineering and Construction AHG, Krakow, No. 11.11.150. 005

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