

Research paper

Selected problems in the process of transformation of the right of perpetual usufruct into ownership title to real properties

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Received: 20 January 2020 / Accepted: 17 March 2020

Abstract: On 16 July 2019, another significant amendment to the provisions of the Act on the transformation of the right of perpetual usufruct to land built-up for residential purposes into the ownership title to that land was introduced. The purpose of this research paper is to analyse the influence of the amendments to the regulations on the scope of the real properties subject to the transformation of perpetual usufruct into ownership, to identify the problems and to assess the status of the implementation of the transformation process in practice. The conducted research has resulted in the presentation of the structure of land on the example of a selected city, in particular with reference to real estate let into perpetual usufruct for residential purposes. The author has also determined the status of the implementation of the transformation process in practice as well as the problems hindering the issuance of certificates for all transformed properties within the statutory period. The progress of the transformation process in a given area depends, inter alia, on the scope of real properties subject to this transformation, the requirement to perform additional analyses, including those regarding non-compliance of the legal and factual state of the property, and the assessment of the existence of public aid and related payments. This study is a continuation of the earlier research, extended by the effects of the regulations introduced in July 2019, as well as by the assessment of the progress in the transformation process in practice.

Keywords: transformation, real estate, perpetual usufruct

1. Introduction

Perpetual usufruct, established when the principle of a uniform, indivisible state property fund was in force, was the only legal form allowing the use of state land to meet social needs, in particular for construction purposes. Therefore, the possibility of transforming this right into ownership title, introduced by the legislator in Poland after the system



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changes, constitutes a kind of compensation from the State. The Regulations regarding the transformation of perpetual usufruct were included in several Acts (Act, 1997; Act, 2001; Act, 2005). The issue of the transformation of perpetual usufruct has been the subject of numerous publications (Podleś, 2007; Skwarło, 2008; Wolanin, 2006; Gonet, 2012; Hernik and Kijania, 2001). Despite the fact that the area of lands remaining in perpetual usufruct has been decreasing as a result of the transformation processes (Żróbek et al., 2014), this right is one of the basic forms of managing public property that brings systematic revenues to public entities (Trembecka, 2016). Legal solutions similar to the Polish perpetual usufruct are used in most European countries, most frequently as the right to development or long-term lease. They appear under various names (Głuszek, 2008), e.g. “superficie” (Italy), “bail à construction” (France), “erfpacht” (the Netherlands) or “erbba-recht” (Germany). The right to development is known in Lithuania, Slovenia, Croatia or Estonia, to name but a few. The Swiss Civil Code has shaped the right to development as the Right-of-way. The right to development in Germany is a transferable and hereditary right, established for a maximum of 99 years. This right enables the implementation of a construction investment on someone else’s land, and it may apply to both state, local government and private land. It is established as a result of a contract and an obligatory entry in the land and mortgage register (Dawid, 2016). In Great Britain, on the other hand, there are leases of land intended for development that are established for a period of 99 or even 999 years. In common practice, however, contracts are concluded for shorter periods of 15, 25 or 50 years (Żróbek and Hlasko, 2003). Despite the differences, the socio-economic functions of these rights are similar in all countries. Such structures are one of the world-known forms of land management, which allows both parties to the contract to pursue their economic interests.

On 1 January 2019, radical changes came into force, regarding the transformation of the right of perpetual usufruct to built-up land into the ownership title to this land. The regulations contained in the Act (Act, 2018b) have introduced the mechanism of a normative transformation by virtue of law. This is an enfranchisement of a group of entities being perpetual users of the property due to the function this real estate performs (a residential one). In the study (Grabowska and Wancke, 2019), an attempt has been made to resolve some legal problems that arise in connection with the analysis of the provisions of the Act on the transformation of the right of perpetual usufruct to land built-up for residential purposes into the ownership title to that land. The provisions of the Act were subject to three amendments, whose purpose was to specify, supplement and change the regulations, also as a result of numerous demands of administrative bodies obliged to implement the transformation process, as well as opinions of the communities associated with real estate management.

The purpose of this research paper is to analyse the influence of the amendments to the regulations on the scope of the real properties subject to the transformation of perpetual usufruct into ownership title, to identify the problems and to assess the status of the implementation of the transformation process in practice. This study is a continuation of the research presented in the article (Trembecka, 2019), extended by the

effects of the regulations introduced in July 2019, as well as by the assessment of the progress in the transformation process in practice. In addition to the legal acts associated with the issues discussed herein, including those amending the Act (Act, 2019), the research material included the quantitative data specifying the number of certificates issued on the transformation of the land owned by the Municipality and by the State Treasury in the city of Krakow, as well as determining the structure of land in perpetual usufruct in the city. The research thesis of the article is the statement that the transformation process, contrary to the intentions of the legislator, is not possible to be completed by the end of 2019, especially in large cities, due to the scale of the undertaking.

2. Change in the scope of transformation as a result of amendment to the Act

The Act (Act, 2018 b) entering into force has resulted in radical changes regarding the rules for the transformation of perpetual usufruct. They consist in the fact that the current transformation claim implemented in the administrative procedure has been replaced by a normative transformation, by virtue of law, without adjudicating in the form of an administrative decision. The Act covers all perpetual users who use public land to meet housing needs, i.e. both owners of single-family houses and owners of residential premises in multi-tenant buildings. Under the amended Act, the land built up for residential purposes is subject to the transformation, if it meets this condition on 1 January 2019. This includes real properties built-up exclusively with the following structures:

- 1) single-family residential buildings, or
- 2) multi-family residential buildings, in which at least half of the number of premises are residential premises;
- 3) the above-mentioned buildings, together with outbuildings, garages, other building structures or facilities, allowing the correct and rational use of residential buildings.

On 16 July 2019, there was a significant amendment to the provisions of the Transformation Act (Act, 2019). The introduced changes have significantly expanded the scope of its regulation and, importantly, gained effect since 1 January 2019, i.e. from the date of the transformation effect. The amendment has introduced the admissibility of transforming the land built-up with single-family and multi-family buildings on which other buildings, building structures or facilities are also located, provided that their total usable area does not exceed 30% of the usable floor space of all buildings located on this land (Figure 1). This allowed the transformation process to cover the land that had previously been excluded from transformation due to e.g. the location of small commercial and service facilities (kiosks, pavilions).

With regard to real properties covered by the amendment, the procedure and date of the statutory transformation of the right of perpetual usufruct in the land and mortgage register have changed. If there are other buildings located on the land built-up with residential buildings whose total usable floor space exceeds 30% of the usable floor area of

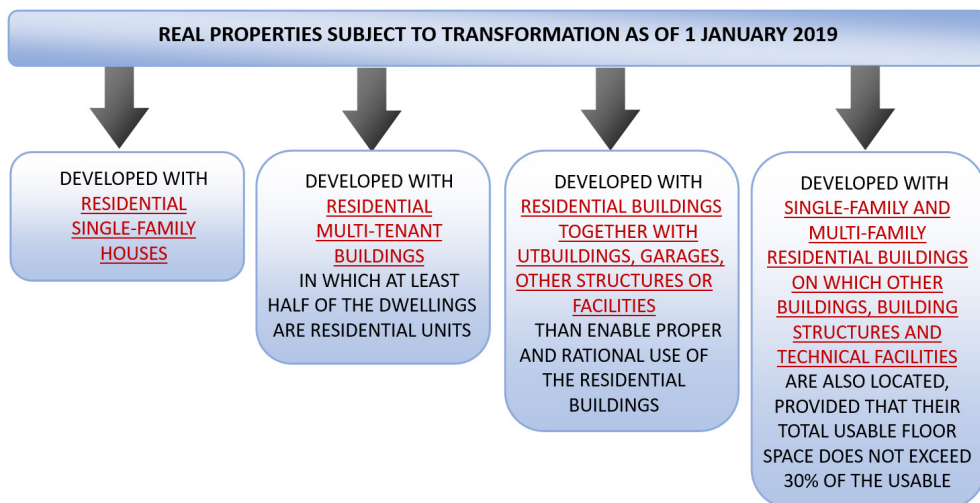


Fig. 1. Extended scope of properties covered by transformation as of 1 January 2019
(Source: own elaboration)

all buildings located on that land, the transformation of perpetual usufruct into ownership of the real estate built-up for residential purposes shall take place on:

- 1) the day the land and mortgage register for this property has been established, or
- 2) the day the plot of land built-up with other buildings whose total usable floor space exceeds 30% of the usable floor area of all buildings located on that land has been removed from the existing land and mortgage register.

The introduced changes have also determined the circle of entities authorised to take actions to legally parcel out the land that meets the transformation criteria. The previous provision used to raise doubts in interpretation and, as a consequence, it was extremely difficult to use in practice (Trembecka, 2019). The legislator failed to specify who (the owner or the perpetual user) was entitled to take actions resulting in legal subdivision of the real property let into perpetual usufruct. The jurisprudence of the Supreme Court is extremely important in this respect, in particular the one expressed in the Resolution of 13 March 2015 (Resolution, 2015), from which it follows that the perpetual user neither can subdivide the land let into perpetual usufruct, nor are they entitled to merge real properties for which separate land and mortgage registers are kept. In accordance with the (Resolution, 2015), there was a need to obtain the consent of the owner, e.g. a commune or municipality, to carry out a legal subdivision, which was a significant obstacle.

By the amendment of 13 June 2019 (Act, 2019), the circle of entities authorised to perform these activities was defined. Currently, an application for establishing a land and mortgage register or removing a plot of land from an existing land and mortgage register (except for real estate owners) may be submitted by: perpetual user, management of a housing cooperative, management of a housing community or an administrator entrusted with managing the joint property.

Figures 2 and 3 present the scope of real properties subject to transformation at a different date, taking account of the introduced changes.

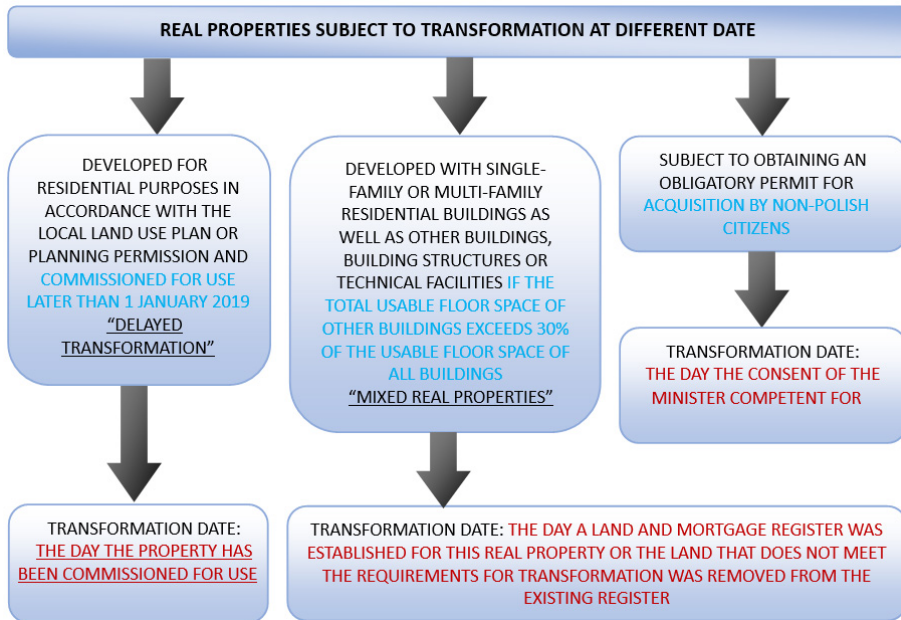


Fig. 2. The scope of real properties subject to transformation at a different date, taking account of the introduced changes (Source: own elaboration)

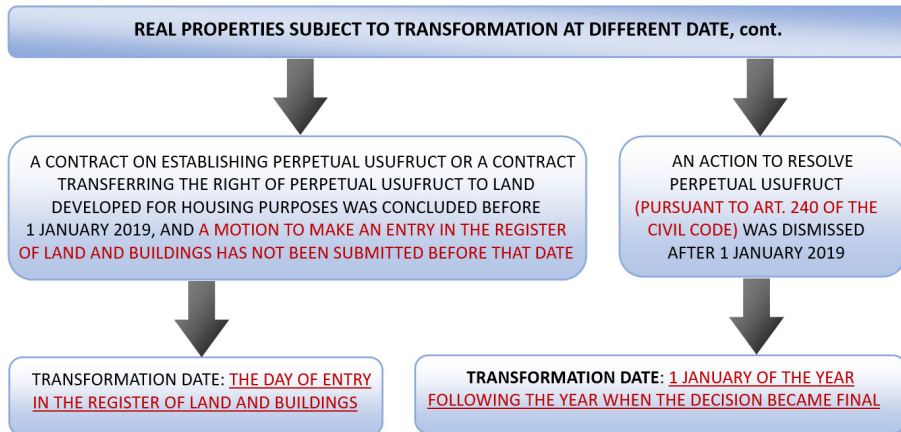


Fig. 3. The scope of real properties subject to transformation at a different date, taking account of the introduced changes, cont. (Source: own elaboration)

Due to the extension of the catalogue of land subject to transformation by virtue of law with legal effect since 1 January 2019, the number of certificates that will have to be issued by the authorities will increase.

3. Selected problems regarding the scope of real properties subject to transformation

The subsequent amendments to the Transformation Act partly specify and supplement its provisions, however, they do not eliminate all problems regarding the scope of real properties subject to the transformation of the right of perpetual usufruct into the ownership title. Some amendments to the Act even introduce additional interpretation doubts. In the current legal status, after expanding the scope of the transformation, an additional interpretation difficulty may arise from the problem of calculating the usable floor space of buildings indicated in this provision, as well as indicating which building structures are classified as buildings. The concept of usable floor space is defined heterogeneously and appears in several applicable legal acts, i.e. the Inheritance and Donation Tax Act (Act, 1983), the Act on Local Taxes and Fees (Act, 1991), the Act on the Protection of Tenants' Rights, Housing Resource of the Commune, and on the Amendment to the Civil Code (Act, 2001). For the real estate cadastre, the definition of usable floor space included in the Act (Act, 2001) is binding, pursuant to §63 section 3 (Regulation, 2001), but it refers to the usable floor space of premises and not the building.

Another problem is the issue of real properties in perpetual usufruct of public universities. Pursuant to article 256 of the Act (Act, 2005), the land of the State Treasury remaining in perpetual usufruct of a public university became its property as of 1 September 2005. The provincial governor's declaratory decision confirming the free acquisition of property by public universities on 1 September 2005 is the document constituting the basis for entering this right into the land and mortgage register and it means that the final decision is the sole proof of the acquisition of property.

As of 1 October 2018, article 256 of the Act (Act, 2005) has lost its binding force, as it was repealed (Act, 2018 a). At the same time, the legislator did not provide any provision which would be equivalent to article 256 in the Transformation Act (Act, 2018 b), nor did they introduce any interim regulations in this respect. Unfinished proceedings before the provincial governor regarding the confirmation of the acquisition of ownership title to land by public universities are discontinued as unsubstantiated. The above results in the fact that such lands are still in perpetual usufruct of public universities. As a consequence, a problem arises whether transformation under the Act (Act, 2018 b) also covered this category of real properties (if they are built-up with residential buildings), and on what terms of payment. Lack of statutory solutions may result in the need for public universities to obtain ownership title to land through civil court proceedings.

Another issue is related to the transformation of land built-up with building structures that enable proper and rational use of residential buildings. This problem applies e.g. to roads that are partly located on plots of land built-up with multi-family buildings and in the remaining part on undeveloped land entered into a separate land and mortgage register.

Pursuant to the (Act, 2018 b), land built-up for housing purposes should be understood as real property built-up only with residential buildings together with building structures and facilities enabling proper and rational use of these residential buildings. The building structures and facilities listed therein must be located on the same land as

residential buildings to be subject to the above regulation. This is confirmed by article 1 section 5 (Act, 2018 b), which explicitly states that, as of the day of transformation, the building structures and facilities become part of the land on which residential buildings are located. Therefore, if building structures and facilities constitute a separate property from residential buildings for which separate land and mortgage registers are established, they are not subject to the above-mentioned regulation even if they enable their proper and rational use. They do not share the fate of the residential building in such a case.

This means that the land developed with a multi-family building, together with part of the road, is subject to transformation, while the land on which the remaining part of the road is located is not subject to transformation and has remained in perpetual usufruct (Judgement, 2019). This issue needs to be regulated in order to harmonise the legal status of building structures and facilities serving residential buildings.

The amendment (Act, 2019 b) has also extended the scope of discounts in relation to real properties owned by the State Treasury and local government units. The regulations provide for the possibility for the competent authority to grant, on request, discounts on a one-off fee of 99% to entities indicated in article 9a (Act, 2018 b) who are owners of single-family residential buildings or residential premises serving solely to meet the housing needs of these people. A problem arises at this point, regarding the date on which the authority is to assess compliance with certain requirements: whether it should be the date of transformation (e.g. 1 January 2019) or the date of submission of the application by authorised persons. The lack of specific requirements provided by the legislator makes it difficult for administrative bodies to apply the provision uniformly.

In terms of applicable fees, another problem regards the payment by persons who purchased the premises together with their participation in the land from a housing co-operative, which paid the fees for the entire period of perpetual usufruct in the past. Pursuant to article 8 (Act, 2018 b), natural persons or their heirs as well as housing cooperatives are not obliged to pay the transformation fees if they have paid annual payments for the entire period of perpetual usufruct. The Act does not define, otherwise than in the case of natural persons, whether legal successors of housing cooperatives are obliged to make transformation payments. Taking into account the principles of rational management of public property, it seems that persons who have become legal successor by means of singular succession of a housing cooperative which has paid fees for the entire period of perpetual usufruct, cannot be treated on preferential bases.

4. Assessment of the process of transformation of the right of perpetual usufruct into ownership title in a selected area

In order to illustrate the scale and advancement of the process of transformation of perpetual usufruct into ownership, the author of this research paper conducted the analysis of the structure of land in the city of Krakow, in particular in terms of determining the scope of real properties let into perpetual usufruct and their intended use for housing purposes. The research was performed as for 1 January 2019, i.e. the date the new transformation regulations entered into force. According to the analysed data, the city's

cadastral area is 32,691 ha, of which almost half, i.e. 14,677 ha, is the land owned by natural persons. 3,329 ha of the land owned by the State Treasury, 1,019 ha of the land owned by the Krakow Municipality, 236 ha of the land owned by the city with county rights and 94 ha of the land owned by the self-governing province remained in perpetual usufruct (Table 1). Due to the small area of the land owned by the county and the province, further research covered the lands of the Krakow Municipality of and of the State Treasury.

Table 1. Structure of land in perpetual usufruct in Krakow

Landowner	Krakow Municipality	State Treasury	Total
Area of land in perpetual usufruct [ha]	1,019	3,329	4,348
Number of real properties in perpetual usufruct	6,675	3,400	10,075
Area of land let for housing purposes [ha]	297	235	532
Number of real properties let for housing purposes	2,269	ca. 500	2,769
Approximate number of perpetual users	80,000	50,000	130,000

Source: own elaboration

The analysis of the intended purposes for which real properties were let into perpetual usufruct (Trembecka, 2019) has demonstrated that in the case of the land owned by both the Municipality and the State Treasury, the greatest number of these properties were let for service and industrial purposes, i.e. 2,812 real properties with an area of 189.3004 ha and 2,128 real properties with an area of 2,663.1153 ha., respectively. These are followed by real properties intended for housing purposes, which include 2,269 properties of the Krakow Municipality with an area of 297 ha and approximately 500 properties of the State Treasury with an area of 235 ha.

The document confirming the statutory transformation is the certificate issued by the body representing the owner of the property. The analysis of the implementation status of the transformation process demonstrated (Table 2) that as for 1 July 2019, 14,923 certificates confirming the transformation had been issued. These certificates referred to the land of the Krakow Municipality, which accounted for about 19% of the expected number, while as for 1 October 2019, 25,111 certificates had been issued i.e. approximately 31%. In the case of the land owned by the State Treasury, as for 1 July 2019, 8,799 certificates had been issued, representing 17% of the total number, and as for 1 October 2019, 28,061 certificates had been issued, i.e. approximately 56%. As for 1 November, 34,909 certificates had been issued for the land owned by the Krakow Municipality (44%) and 38,171 for the land owned by the State Treasury (76%). As for 31 December, 46,471 certificates had been issued (Table 2, Table 3) for the land owned by the Krakow Municipality (58%) and 43,688 for the land owned by the State Treasury (87%). These are only estimates because the exact number of certificates confirming the transformation for all perpetual users is difficult to specify as a result of successive separation of premises (the

so-called “delayed transformation”) as well as a result of statutory changes resulting in an increased number of entities covered by the process.

Table 2. Status of implementation of transformation process in Krakow

Landowner	Krakow Municipality	State Treasury
Number of transformation certificates issued as for 1 July 2019	14,923	8,799
Number of certificates issued with reference to the number of all perpetual users as for 1 July 2019	19%	17%
Number of transformation certificates issued as for 1 October 2019	25,111	28,061
Number of certificates issued with reference to the number of all perpetual users as for 1 October 2019	31%	56%
Number of transformation certificates issued as for 1 November 2019	34,909	38,171
Number of certificates issued with reference to the number of all perpetual users as for 1 November 2019	44%	76%
Number of transformation certificates issued as for 31 December 2019	46,471	43,688
Number of certificates issued with reference to the number of all perpetual users as for 31 December 2019	58%	87%

Table 3. Number of certificates issued in relation to entities

Entities	Krakow Municipality	State Treasury
housing cooperatives	675	17
other legal entities	38	525
physical persons	45,758	43,146
total	46,471	43,688

Source: own elaboration

The estimated total number of expected certificates for legal entities (including housing cooperatives) regarding the land owned by the Municipality of Krakow accounts for approximately 800, and for natural persons – 79,200. As far as the land owned by the State Treasury is concerned, these numbers are approximately 600 and 49,400, respectively. Given the number of issued of certificates (Table 3), this allows for an estimated assessment that approximately 89% of certificates regarding the land owned by the Municipality of Krakow were issued for legal persons (including housing cooperatives) and

57% of certificates for natural persons. In the case of the State Treasury, it was 90% and 87%, respectively.

Although the purpose of the transformation certificate is to confirm the change in the type of right to land, and not to determine it, it is necessary to carry out a number of geodetic and legal activities before the certificate is issued, which make the process longer. These activities include:

- examination of land and mortgage registers and records of land and buildings;
- determination of the type of development, the number of residential premises;
- determination of the area of non-residential buildings;
- analysis of inconsistencies between the content of the land and mortgage register and the register of land and buildings regarding:
 - real estate denotation,
 - shares in the right of perpetual usufruct,
 - data on perpetual users;
- determination of transformation fees, including applicable discounts;
- examination of reasonable grounds for meeting the conditions for granting the *de minimis* aid, specified in particular in the Regulation of the European Union Commission (Regulation, 2013);
- determination of subsidies up to the market value of the real property in the event of exceeding the *de minimis* aid limit.

As part of the process, decisions on the amount of transformation fees are also issued if the owner of the property does not agree with the information on the amount and period of the payment of the fee.

5. Conclusions

Despite the fact that the Transformation Act (Act, 2018 b) has already been amended three times in order to clarify and supplement the regulations, there are still a number of problems hindering the completion of the process within the time limit anticipated by the legislator.

The amendment has introduced the admissibility of transforming the land built-up with single-family and multi-family buildings on which other buildings, building structures or facilities are also located, provided that their total usable area does not exceed 30% of the usable floor space of all buildings located on this land. This has caused an additional interpretation difficulty regarding the calculation of the usable floor space of buildings in terms of applying relevant standards.

The issue of transformation of land on which internal roads are located to allow proper and rational use of residential buildings requires to be regulated as well. This problem applies to roads that are partly located on plots of land built-up with multi-family buildings and in the remaining part on undeveloped land entered into a separate land and mortgage register, and therefore not subject to transformation.

The progress of the transformation process in a given area depends, *inter alia*, on the scope of real properties subject to this transformation, the requirement to perform additional analyses, including those regarding non-compliance of the legal and factual state of the property, and the assessment of the existence of public aid and related payments. A change in regulations resulting in the need to verify the already issued certificates regarding transformation fees is also significant. As for 31 December, 46,471 certificates had been issued for the land owned by the Krakow Municipality (58%) and 43,688 for the land owned by the State Treasury (87%).

The analysis performed in the selected area (the city of Krakow) does not allow to state that the process will end on December 31, which was the intended by the legislator. In particular, this applies to large cities in which a significant number of public real properties in perpetual usufruct were used for housing purposes and, as a consequence, have met the conditions for transformation.

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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