

PERPETUAL USUFRUCT AS A FORM OF REAL ESTATE MANAGEMENT

The issue of perpetual usufruct was introduced to the Polish legal system by the Act of 14 July 1961 about urban and residential areas management (harmonized text: Official Journal of 1969, No. 22, item 159 with further amendments). Primarily, it was rooted ideologically. Its main aim was to make rapid housing construction development easier, at the same time protecting interests of the state from dangers, present in these times, connected with final sale of grounds designed for urbanization purposes. Despite changes in political systems, the idea of perpetual usufruct has not lost anything of its significance. Nowadays, it enables a relatively cheap access to grounds owned by State Treasury, self-governmental units and their correlations.

Within this binding legal system, the phenomenon of perpetual usufruct is regulated by two legal acts. General legal norms are defined by the Civil Code (Articles: 232-243 of the Civil Code), whereas complex and detailed regulations concerning all matters connected with perpetual usufruct were included into the Act of 21 August, 1997 about real estate management (harmonized text: Official Journal of 2004, No. 261, item 2603 with further amendments), hereinafter called 'REMA' (Real Estate Management Act).

Legal character of perpetual usufruct has evoked various doubts almost from its very first appearance in Polish legal system. It is commonly accepted nowadays that perpetual usufruct is a special kind of property law. Its specificity derives from the fact that it has been situated between possessive right and limited property law by its legislator. The fact that perpetual usufruct is a right based on somebody else's property and its user is a dependable one is the element which connects perpetual usufruct with limited possessive rights. The range of perpetual user's endorsements and the method of shaping that law are the decisive factors on similarity of perpetual usufruct to a possessive right. In result, in cases non-defined by perpetual usufruct provisions, these on possessive right apply.

In accordance with Article 232 of the Civil Code, only and exclusively ground property belonging to State Treasury, self-governmental units and their correlations may be subject to perpetual usufruct. However, property belonging to State Treasury

must be located within administrative borders of urban areas or outside them, but included into a plan of spatial management for urban areas and designed for implementation of its tasks of economy. The code limitation of the types of ground that may be subject to perpetual usufruct, however, has become broader pursuant to Article 232 § 2 of the Civil Code, in which the legislator indicated that in cases defined by special provisions, other than the aforementioned, grounds of State Treasury, self-governmental units and their correlations may also be subject to perpetual usufruct. With regard to the above-described situation, Article 13, Section 1 of REMA, which allows the possibility of setting the perpetual usufruct right at all grounds belonging to State Treasury and self-governmental units, whatsoever, is a special provision. Albeit, perpetual usufruct right must not be settled to a share in a right to ground, and so to joint ownership with regard to subjects indicated in Article 232 of the Civil Code¹.

Both an individual person and legal entity may be users of perpetual usufruct. It is also commonly accepted that there is a possibility of settling perpetual usufruct for more than one person (tenants in common). Perpetual joint ownership can be formed as effect of an agreement for perpetual usufruct made by the owner of a particular ground with several subjects in result of inheritance or court decree. In order to define the rules of perpetual joint ownership enactment, additional provisions on joint tenants are applied. Mutual relations between perpetual tenants can be also defined by an agreement settling this type of joint property right. It should be indicated here that each tenant becomes a co-owner of buildings situated on the ground, and the amount of shares in perpetual usufruct determines also the amount of shares in co-ownership of these buildings or objects². However, in the event when the amount of shares in co-ownership has not been specified, in order to settle rights for particular building or object, it is acceptable and common practice to apply provisions of joint tenancy³.

Acquiring the right for perpetual usufruct may appear as a result of the following: by legal provisions, as an effect of civil law action, acquisitive prescription, inheritance or issued administrative decision. However, a rudimentary method for creating perpetual usufruct right is to sign an agreement for such a right. It is made by tender offer or in non-tender way – in a result of conducted talks. Detailed rules for such agreements were specified in REMA, particularly Article 37 and the following.

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- 1 Supreme Court Decree of 08 November 1977, reference number: IV CR 466/77, OSPIKA 1978, No. 7-8, point 144.
 - 2 S. Szer, Gloss to Resolution of Supreme Court of 08 July 1966, reference number: III CZP 43/65 NP. 1967, No. 3, page 428.
 - 3 By Resolution of Supreme Court of 08 July 1966, reference number: III CZP 43/66, OSNC 1966, No. 12, point 211.

The agreement for perpetual usufruct should, above all, include parties in the agreement, the purpose for which this perpetual usufruct right would be implemented, duration of perpetual usufruct, definition of method and date of property management and the way it would be used. In the event when perpetual usufruct is performed for the purpose of constructing buildings or buildings and other objects on this terrain, such agreement should also define date of commencement and finishing works, types of buildings and objects with the obligation to preserve them in adequate condition, condition and date of reconstruction of buildings and objects under the right of perpetual usufruct in case of their damage or demolition, any payment in favour of perpetual user due to buildings or appliance present on the perpetual usufruct area on the finishing date of the agreement. One should not forget that congruent to Articles 234 and 237 of the Civil Code, for settlement and transfer of perpetual usufruct right the provisions concerning real estate are to be applied.

Pursuant to Article 27 REMA, giving ground under perpetual usufruct requires entry into Land and Mortgage Register, which is of constitutive character. Entry into Land and Mortgage Register is a final stage in the procedure of establishing the right for perpetual usufruct. The user's endorsements for perpetual usufruct are created only at the moment of entry. Not only establishment of the right for perpetual usufruct is subject to entry into Land and Mortgage Register, but also general manner of its usage.

Article 233 of the Civil Code plays a key role in the perpetual usufruct phenomenon. It says that a perpetual user (tenant) may manage and use the ground with the exclusion of others. As it is easily noticeable, perpetual tenant's endorsements are similar to these of real estate owner. The boundaries for these endorsements are sole differences. The aforementioned boundaries are set by provisions of legal resolutions, rules of social coexistence and agreement for perpetual usufruct of grounds owned by State Treasury, self-governmental units and their correlations which limits its content and sets its user some obligations. Pursuant to Article 240 of the Civil Code if a perpetual tenant uses the ground in absolutely incongruent manner than primarily defined by the agreement, in particular when buildings were not constructed on a scheduled date, there is a possibility of dissolving the agreement before the initial date for which perpetual usufruct had been settled.

Among numerous endorsements of perpetual tenant of a particular ground, the right to use goods and items, which is physical and actual item management with exclusion of other people, plays the foremost role. A similar character of perpetual usufruct to possessive right also results in the ability of using so-called 'neighbouring rights'. We must not forget, however, that perpetual usufruct is limited by basic endorsements of real estate owner. The perpetual user of property must not during

binding agreement of perpetual usufruct violate owner's endorsements or replace him/her in making affidavit of will⁴.

Another endorsement of a perpetual tenant is the ability to manage perpetual usufruct right by *inter vivos* and *mortis causa*. Endorsements to property management are restricted to the ability of gaining by a perpetual tenant partial or complete range of endorsements for other "item" through agreement, as well as the possibility of burdening this right with various limited property rights, such as right of exploitation, easement appurtenant and mortgage right. Perpetual usufruct, due to transferability, is subject to execution. However, it should be indicated here that limited property right with regard to perpetual usufruct, pursuant to Article 241 of the Civil Code, loses its validity when a right to perpetual usufruct expires. A perpetual tenant has a right to waive his entitlement to perpetual usufruct.

Furthermore, perpetual usufruct is eligible to gain natural and civil benefits in the event when a particular property which is under perpetual usufruct right gains such benefits.

A separate matter that needs to be pointed out is the issue of a legal character of buildings located on the ground subject to perpetual usufruct. It should be indicated here that regardless of the fact whether these buildings or appliance were raised by a perpetual tenant after perpetual usufruct right had been settled or if they had already been built at the moment of settling this right, these buildings are the actual property of the perpetual tenant. And so the rule of *superficies solo credit* is hereby waived; buildings and other objects are not a compound part of ground owned by State Treasury or self-governmental units. Ownership right for buildings and appliance subject to perpetual usufruct right is not independent; it is strictly connected with perpetual usufruct – accessory right.

Perpetual usufruct right is the major law. Ownership right for objects and appliance situated on a property which is subject to perpetual usufruct is subject to the former one. Therefore waiving perpetual usufruct right has also its effect on buildings and appliance; ownership in itself for these buildings and appliance cannot be transferred to other person without perpetual usufruct⁵. Expiration of perpetual usufruct right results in expiration of property right for buildings and appliance.

Unlike property right, perpetual usufruct is a temporary right. According to Article 236 § 1 of the Civil Code a particular property is given under perpetual usufruct right for a period of 99 years. Only in extraordinary cases, when the economic purpose for perpetual usufruct does not require such long period of time, a shorter duration of at least 40 years for perpetual usufruct is acceptable. The period

4 C. Wodniak, *Użytkowanie wieczyste*, Warsaw 2006, p. 147.

5 J. Ignatowicz, R. Stefaniuk, *Prawo rzeczowe*, Warsaw 2006, p. 184.

of perpetual usufruct right should be clearly stated by the agreement, and such period should be counted commencing from the date of entry of such right into Land and Mortgage Register. A perpetual tenant may request extension of such period from forty to ninety nine years, which request, pursuant to Article 236 § 2 of the Civil Code, may be submitted within five consecutive years before expiration of perpetual usufruct right, and in the event when the period for amortization of costs scheduled for a particular area is significantly longer than the time for termination of a period of perpetual usufruct, the claim for the extension should be submitted within adequately prior time. The prolongation of perpetual usufruct right can be made by signing a specially prepared agreement exclusively. Such agreement should have an official form of notarial deed, and the extended period of perpetual usufruct begins at the time of prior period expiration⁶.

The legislator has not introduced any obstructions for multiple extension of perpetual usufruct period, and rejection of request for extended period for perpetual usufruct is acceptable only when it involves a serious social matter.

Perpetual usufruct is a chargeable right and therefore establishing it results in the obligation for payment in favour of the authority acting in the capacity of the owner of a particular ground who establishes such right. All issues, whatsoever, regarding fees for giving and, in consequence, using the right for perpetual usufruct are settled by Article 71 REMA. The legislator divides such fee into two parts. The first one – fee for giving ground under perpetual usufruct right – is paid as single entry, however, not later than until the date of signing the perpetual usufruct agreement. Its amount is a matter of an arrangement between a perpetual tenant and the authority acting in the capacity of the owner of the ground subject to perpetual usufruct. Pursuant to Article 72 REMA, the amount of this fee cannot be smaller than 15% and not higher than 25% of total value of the property provided by estate and property appraiser. The value of the property is established with regard to the value of its ownership right. Detailed rules of property value evaluation are described in Resolution of Council of Ministers of 21 September 2004 about property value evaluation and estimate evaluation preparation⁷. A perpetual tenant is also obliged to pay annual fee on the 1st day of January of every year of perpetual usufruct duration in the adequate amount, and its user is obliged to make this payment until the 31st day of March of each year. The amount of first annual fee is defined by the agreement, and every other is provided by the authority establishing perpetual usufruct right. Specific rules for establishing the amount of annual fee are presented in Article 72 Section 3 REMA, setting its boundaries from 03% to 3% of total value of the property calculated by estate and property appraiser, and not more. It should

6 Z. Truszkiewicz, *Użytkowanie wieczyste. Zagadnienia konstrukcyjne*, Kraków 2006, p. 211.

7 Official Journal 2003, No. 207, item 2109 with further amendments.

be mentioned here, however, that these factors can change with regard to a specific property under perpetual usufruct, however such a change can be only made in the agreement, and the rate of the factor defined in it is binding through the whole period of the agreement duration. It does not mean, though, that annual fees for perpetual usufruct are constant. The change in the property value results in the change in the amount of annual fee, as a result of so-called 'update mechanism'. It should be also noted here that updated property value evaluation can be performed once a year, and not more frequently. For efficient change in the amount of annual fee, the authority acting in the capacity of the owner of a particular ground is required to give notice and inform about the obligation of making actual payment. To summarize, the amount of annual fee is dependable on two independent factors: defining the percentage rate in the agreement for perpetual usufruct right and property value.

Determination of legal character of fees for perpetual usufruct is a separate issue. They are commonly perceived as civil law benefit as due to the fact that administrative authority acting in the capacity of the owner of a particular property does not perform administrative power, but civil power⁸. The fact that administrative authority possesses official power to decide on some issues connected with perpetual usufruct in the form of administrative decisions does not change much. In Article 78 Section 2 REMA, the legislator predicted the perpetual tenant's demand to determine that performed update of annual fee is unjustified or justified, but in different amount. A perpetual user may also apply for a change in the amount of annual fee in the event of changing the purpose for perpetual usufruct of the property.

Due to specifics of its legislation, perpetual usufruct uses two-level legal protection. Great similarity of perpetual usufruct right to possessive (property right) causes analogical legal provisions as in case of property right, applicable as far as protection of perpetual usufruct right is concerned. In effect of which, in the event of violation of this law, a perpetual tenant has a right to submit vindication, *action negatoria* or complementary claim. Furthermore, due to the fact that perpetual usufruct is a law based on somebody else's property, and its core touches upon the ability of using a particular ground or area by a perpetual tenant, he/she is also entitled to submit claims deriving from possessory protection⁹, which means self-protection of the property owner such as necessary self-defense, self-assistance and court legal protection in a sense of submitting a claim by a perpetual tenant for regaining power of property possession in case it is lost.

Expiration of perpetual usufruct right is performed as a result of termination of certain amount of time defined by the agreement, dissolution of the agreement by

8 E. Gniewek, *Obrót nieruchomościami skarbowymi i samorządowymi*, Kraków 1999, p. 435.
9 C. Wodniak, *Użytkowanie wieczyste*, Warsaw 2006, p. 162.

the authority which is the owner of the property due to causes on a perpetual tenant, expropriation and confusion.

The legislator bounded various legal effects to the phenomenon of perpetual usufruct right expiration. Termination of statutory obligations and termination of possessive right to buildings and appliance, for which a perpetual tenant should receive financial compensation adequate to their value, are some of them. On the other hand, a perpetual tenant is obliged to return the property to its owner. Moreover, the owner of such property preserves the right to claim against a perpetual tenant for compensation of damage arising in result of faulty or wrong usage of the property. Such claim loses its validity after three years, the same as the claim of a perpetual tenant for financial compensation for buildings and appliance existing on a particular property on the date of returning it to its holder.

Streszczenie

W artykule zostały przedstawione najważniejsze zagadnienia dotyczące instytucji użytkowania wieczystego w polskim systemie prawa. Przede wszystkim zaprezentowano problematykę charakteru prawnego użytkowania wieczystego, wskazano na przedmiot użytkowania wieczystego, a także podmioty na rzecz, których może zostać one ustanowione. Inne poruszane zagadnienia dotyczą m.in. możliwych sposobów nabycia użytkowania wieczystego oraz niezbędnych elementów, które prowadzą do jego ustanowienia, a także treści prawa użytkowania wieczystego, związanych z tym uprawnień i obowiązków użytkownika wieczystego oraz przysługujących mu środków ochrony prawnej. Osobnym omówionym zagadnieniem jest charakter prawny budynków i urządzeń znajdujących się na gruncie oddanym w użytkowanie wieczyste. W artykule przedstawione zostało także użytkowanie wieczyste jako prawo czasowe i odpłatne. Ukazano ramy czasowe, na jakie użytkowanie wieczyste może zostać ustanowione, możliwość przedłużania tego okresu oraz poruszono podstawowe kwestie dotyczące rodzaju opłat przewidzianych prawem za użytkowanie wieczyste i sposób ich wymiaru.