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## **Exclusion of Land from Agricultural and Forestry Production. Practical Problems of the Procedure\*\***

### **1. Introduction**

The process of excluding agricultural and forest land from production is a two-step procedure. The first step includes a change of property use in the local zoning plan. Formulation and conduct of spatial policy in the municipality belongs to the commune's own tasks. It includes, inter alia, adopting the study of conditions and directions of spatial development of the municipality, which specifies local principles of spatial development and local development plans – binding local acts of law. The *Act on Spatial Planning and Land Development* [5], imposed on all municipalities, which until the day of entry into force of this act (July 11, 2003) have not compiled a study, the obligation to prepare and adopt it within one year from date of this Act enacting into force. It is extremely important due to the fact that already in a study the municipality is obliged to identify areas requiring a zoning change from agricultural and forest lands into non-agricultural and non-forest ones. However, the actual change in the zoning of agricultural and forest lands into non-agricultural and non-forest ones shall be made in the local development plan, prepared according to the procedure defined in the provisions of the *Act on Spatial Planning and Land Development*, as defined in the study.

The second element of the process leading to the actual exclusion of land from agricultural or forestry production is an administrative decision allowing for such an exclusion. A detailed analysis of this procedure has been presented in [1].

This article presents practical problems associated with determining the area of exclusion. Difficulties associated with the disclosure of changes in land use in land and building register have also been highlighted here. Shortcomings of legal regulations in the subject matter have been pointed out and complementation of the normative acts has been proposed.

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## 2. Legal Conditioning Affecting the Determination of the Area of Exclusion

The basic normative act which regulates the process of exclusion of agricultural and forest land from production is the act on protection of agricultural and forest land [4]. Under its provisions, it is necessary to obtain a consent of the competent authority to exclude agricultural land of classes I–III, classes IV–VI derived from the soils of organic origin, as well as all forest land, from production. The entity who is entitled to request the initiation of such proceedings is: the owner, the perpetual user, spontaneous holder, manager, user or lessee.

Depending on the soil type, appropriate decision is issued by:

- the governor, with reference to land which constitutes arable agricultural land derived from the soils of mineral and organic origin, classified as class I, II, III, IIIa, IIIb (constitutive decision) and arable agricultural land of classes IV, IVa, IVb, V and VI derived from the soil of organic origin (declaratory decision);
- the director of the regional directorate of state forests in relation to forest land intended for non-agricultural and non-forest use (constitutive decision);
- the director of the national park with reference to land which is included in the national parks.

The person who was issued with a permission regarding the exclusion of land from agricultural production or forestry, is obliged to settle the dues and annual fees arising therefrom.

The charges resulting from the exclusion of land from agricultural production and forestry are divided into:

- dues – this is a one-off fee for the permanent exclusion of land from production,
- annual fees – these are fees for non-agricultural use or non-forest use of the land excluded from the production, amounting to 10% of the dues, payable in the event of permanent exclusion for 10 years, and in the case of non-permanent exclusion – for the duration of this exclusion, but no longer than for 20 years from the time of the exclusion of this land from production.

The amount of the dues is determined depending on the quality and type of the arable land, according to the table contained in article 12 section 7 of the act on protection of agricultural and forest land. It ranges from 437,175 PLN for the exclusion of one hectare of arable land of the first class, through 291,450 PLN for the exclusion of one hectare of grassland of class III, to 87,435 PLN for one hectare of

any arable land of class VI, derived from the soils of organic origin. The amount of compensation for the exclusion of one hectare of forest land (without forest stand) from the production is defined as a multiple of the price of 1 m<sup>3</sup> of wood in the amount announced by the Central Statistical Office. For example, for a fresh forest it is equivalent to 2000 m<sup>3</sup> of wood, for a mixed forest to 1150 m<sup>3</sup> of wood, and for dry forest – it is 250 m<sup>3</sup>. The due amount resulting from the permanent exclusion of land from production is reduced by the value of the land, determined according to market prices referred to in land trade for a particular location, on the day of the actual exclusion of the land from production.

Since 29th June 1997, it is possible to exclude land from agricultural and forestry production for housing purposes without any charges, with a determined area limit of: 0.05 hectares for single-family houses and 0.02 hectares for each flat in the case of multi-family buildings. It was also permitted to give rebates from dues and annual fees in the case of public investments aimed at meeting the needs of a local community, as mentioned in the act, provided that the area of the excluded land does not exceed 1 ha, and that there is no possibility to carry out the investment on the land which is not subject to the protection. In addition, since 1st January 2010, the catalog of the public purposes has been extended to all these which are set out in article 6 of the *Real Estate Management Act of 21st August 1997* (Journal of Laws of 2004, No. 261, item 2603, as amended).

### 3. Problems with Demarcating the Borders of Exclusion

The administrative procedure to obtain a decision permitting the exclusion of land from agricultural or forestry production is carried out by the relevant authorities as the tasks of government administration. Regarding the agricultural land, these proceedings are conducted under the surveying and cartographic administration at a county level, in the department of surveying and cartographic services [3]. Although this procedure is conducted by surveying administration authorities, it is not a surveyor who determines the area for exclusion, but the designer who is a participant in the investment process. The designer's task is to draw up a construction project on a map for design purposes. An essential element of the investment project is the concept of planning the utilities infrastructure and land development, together with determining the area of land intended for the exclusion from agricultural production or forestry. Unfortunately, neither the act on protection of agricultural and forest land, nor secondary legislation to it, specify any rules for demarcating the borders of the exclusion. Nor other normative acts have been identified, which the designer would have to be guided by while demarcating the area intended for the exclusion from agricultural production or forestry.

Due to both the high charges for the exclusion and the existence of limitations which allow for the exclusion without charges, the designers designate for exclusion a minimum area that sometimes runs along, or in close vicinity to the walls of a building or other permanent elements of land development, often with very complex shape and of small size. Most frequently, the authority issuing the decision permitting the exclusion approves the area proposed by the designer, not taking into account the fact that this is contrary to the provisions of *Geodesy and Cartography Law* [3] and the secondary legislation to this act, governing the issue of land and buildings register.

### 3.1. Determining the Area of Exclusion

From the surveying side, classification of land to particular land use is based on *Appendix 6 to the Regulation of the Minister of Regional Development and Construction of 29th March 2001 on the land and buildings register* [6].

For example, in accordance with that *Appendix*, the following lands are ranked as arable land (R):

- a) land subjected to constant mechanical cultivation aiming at the production of agricultural or horticultural crops, including land on which there are allotments as well as greenhouses and coldframes;
- b) land suitable for the cultivation of the above, but occupied by hop gardens, wicker plantation, trees (e.g. spruce trees), as well as nursery of ornamental trees and shrubs;
- c) fallows, uncultivated lands.

The grasslands (Ł) include land covered with dense perennial vegetation, composed of numerous species of grasses, legumes and herbs, systematically mown. The pastures (Ps) include land covered with similar vegetation as grasslands, usually grazed.

Furthermore, in accordance with article 68 section 5 of the act on land and buildings register – orchards of the area of less than 0.1000 hectares, as well as other land uses of less than 0.0100 hectares, are not included in the register.

Figure 1 presents an example of an area intended by a designer for exclusion and approved by the governor with a decision allowing for such an exclusion. As it can be seen, the proposed solution is in complete contradiction to the provisions of the regulation on land and buildings register. The designer demarcated the border of the arable land along the building, which clearly indicates that this area may not be subjected to constant mechanical cultivation. At the same time, the designer left a narrow strip of land between the entrance and the sidewalk as a pasture.

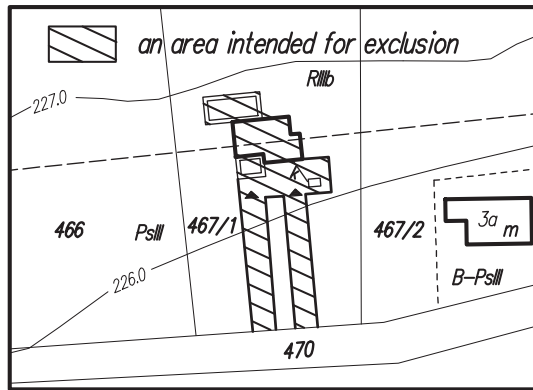


Fig. 1. An exemplary area intended by a designer for exclusion from agricultural production

In a situation where the surveyor determines the border of changing the zoning of land use, based on the criteria contained in appendix 6 to the regulation on land and buildings register rather than a graphic appendix to the decision authorizing the exclusion, there is a threat of a financial penalty for the investor, arising from the fact of the investment of land in a way other than specified in the decision. According to article 28 sections 1 and 2 of the act on the protection of agricultural and forest land [4], if it is proved that the land has been excluded from production in breach of its provisions, the offender shall be charged twice the fee due, and if it is found that the land intended in local development plan for non-agricultural or non-forest purposes were excluded from the production without a decision allowing the exclusion, such a decision is issued ex-officio, while increasing the amount of the fees by 10%. In practice, however, we often have to deal with a situation where the registration authorities refuse to disclose in a land and building register survey any new land use whose area has not been determined in accordance with the requirements of the regulation on land and buildings register, despite a decision authorizing such an exclusion.

Another problem the surveyors face in the field is that of investing land in other way than it is apparent from the decision allowing the exclusion. For example, an investor hardened the entire area in front of the house, instead of a three-meter entrance to the garage. The question arises therefrom, how in this situation a surveyor is supposed to inventory the borders of the changed land use when the indication of the facts will result in a financial penalty for the investor.

### 3.2. Urbanized Undeveloped Areas

Appendix 6 to the regulation on land and buildings register defines urbanized undeveloped areas (Bp) as the undeveloped land intended for development in the zoning plan, **excluded from agricultural production and forestry**. Consequently, an area of land which is excluded from agricultural production or forestry, upon

the decision authorizing this exclusion, according to the provisions of the regulation, should become a Bp land use – urbanized undeveloped areas. Additionally, the *Technical Instruction G-5: Land and buildings register* [9], introduced for use by the Surveyor General with ordinance No. 16 of 3rd November 2003, sets out in § 15 section 12 hereof, that the urbanized undeveloped areas include land satisfying jointly the following conditions:

- 1) they are undeveloped,
- 2) in the local development plan they are intended for development,
- 3) they are excluded from agricultural production or forestry subject to the provisions of article 4 section 11 of the act on the protection of agricultural and forest land.

According to the following clause of this section, the urbanized undeveloped areas include in particular the land on which an investment process was initiated, based on a valid construction permit, documented with an entry made in the construction logbook, or demolition of building structures was carried out, and no new buildings have been erected in their place. The introduction of changes in land and buildings register, according to the *Technical Instruction G-5*, should be based on surveying documentation of staking a building structure, to be submitted to the state geodetic and cartographic records, in accordance with § 13 section 2 of the *Regulation of the Minister of Regional Development and Construction of 16th July 2001 on the notification of surveying and mapping works, recording of systems and database backup storage, as well as the general terms of the agreements on accessibility of these databases* [7] stipulating that, if during the performance of the works which do not require to be reported (e.g. staking out the building), the performer of these works has identified any changes in the scope of land and buildings register, the master map, geodetic records of utilities network or the database of topographic objects, or performs stabilizing of surveying control network, such a work is partially subject to notification to the center of geodetic and cartographic documentation, and the surveying study developed from this work is subject to submitting to the state geodetic and cartographic records.

In such a case the surveying documentation should contain the following (§ 13 section 17 of the *Technical Instruction G-5*):

- 1) a copy of the cadastral map, which will include a draft of the revised borders of land uses, and in particular of the “Bp” land use,
- 2) a list of coordinates of the refraction points of the revised contours of the land uses,
- 3) a list of land changes specifying surface area of the changed land uses,
- 4) a technical report containing information about the contractor of a particular work, its scope and the documents used to determine the changed arable land.

In practice, these guidelines are not applied, even though the centers of geodetic and cartographic documentation may, under § 5 of the *Technical Instruction O-4: Principles of conducting the state geodetic and cartographic records* [8], issue guidelines to carry out the reported works, which includes obliging surveyors to use the *Technical Instruction G-5*, which currently does not have the importance of the geodetic technical standard. The borders of the changed land use are usually identified by the surveyor performing the as-built survey of the building structure.

### **3.3. Revised Contours of Land which Is Not Subject to the Obligation of Obtaining a Decision on Exclusion**

Revised contours of land uses not covered by the table of land classes (and such are building areas) of land which is not subject to the obligation of obtaining the decision on exclusion (land of classes IV–VI of mineral origin), are determined based on the results of surveying and cartographic works, defining the actual state of area development, according to the criteria set forth in Annex 6 to the regulation on land and buildings register [6]. In practice, at this point, a problem arises of how to determine the area of the changed land use, because, due to higher property tax rates for building land, the investor seeks to change the zoning of the smallest area possible.

For example, in accordance with *Appendix 6* of the regulation on the land and buildings register, residential areas constitute the land which is not used for agricultural production and forestry, occupied by residential buildings, facilities functionally associated with the residential buildings (courtyards, access roads, walkways, backyard playgrounds, etc.) as well as garden-plots. Garden-plots have been defined in the *Technical Instruction G-5*. According to § 15 section 11 of this instruction, the garden-plots should be defined as, in particular, flowerbeds, vegetable gardens located within the developed area for which the decision on exclusion from agricultural and forestry production has been issued. This instruction also provides guidelines as to the shape of the land use marked as B (§ 15 section 9). This should be a compact area, with borders as regular as possible, including the land occupied by buildings, internal communication, parking spaces and courtyards, backyard greenery (trees, shrubs, lawns), technical equipment associated with the residential function (wells, reservoirs, ground wires, electrical cabinets, wastewater treatment, equipment for wastewater collection and treatment), garbage containers, landfills, playgrounds and recreation areas, landscape architecture, sports facilities, gardens, ponds, rock gardens and other lands directly associated with the residential function.

As it can be seen from the above definition, residential premises is not only the land under the building, but also the area around it, serving the purpose of the proper use of the building. In such a situation, the authorities responsible for land register, require the zoning change for the entire plot, referring to the provisions of the regulation on land and buildings register. How in this case a surveyor is supposed to explain to an investor why a neighbor (who has a land of better quality and had to obtain a decision to exclude the land from agricultural or forestry production) has only changed the zoning of the land under the house and the access road to it – the area indicated by the designer and approved in the decision authorizing the exclusion.

#### 4. Conclusions

The problem of appropriate demarcation of the borders of land uses is widespread. It is largely due to the fact of a too general defining of the ways of classifying land into particular categories of land uses, hindering the application of these provisions in practice. Therefore, classifying land to particular categories of land uses should be defined more precisely, in the first place.

In the process of exclusion of agricultural and forest land from production there are no guidelines defining the method of determining the border of exclusion. Therefore, the manner of determining the area for exclusion should be clearly specified – preferably within the framework of drawing up secondary legislation to the act on the protection of agricultural and forest land, or unequivocal reference to the provisions governing the conduct of land and buildings register. The situation, as it currently is, should not exist, that the areas approved with the decision allowing the exclusion of the land indicated by the designer, are contrary to the binding regulations concerning land and buildings register. Other criteria in determining the area of land exclusion, subject or not subject to the administrative proceedings should not be applied, either.

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