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Data: 18/11/2026 17:12:12

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Territorial Utilitarian Protection of Agricultural Land in Areas within the Administrative Boundaries of Towns and Cities (Urban Areas)

Terytorialna ochrona użytkowa gruntów rolnych na obszarach położonych w granicach administracyjnych miast

SUMMARY

Sustainable development requires reconciling the requirements of agricultural land protection with increased investment needs in industry and housing, but also with respect for environmental protection requirements. These objectives should also be pursued in relation to agricultural land within the administrative boundaries of cities. However, with regard to agricultural land in cities, there is a clear conflict between the needs of investors and the resulting pressure to invest and the protection of agricultural land. The analysis of such determined research topic required a territorial approach to the protection of agricultural land, which is reflected in spatial planning. The purpose of this study is to analyze the Polish legislation from the point of view of the admissibility of change to agricultural land use in urban areas.

Keywords: biosphere protection; quantitative protection of agricultural land; sustainable development

INTRODUCTION

Protection of agricultural land, including also those located within the administrative boundaries of towns and cities, is not an axiologically neutral issue, dependent on the will of the landowner, although Article 1 (2) of the Act of 27 March 2003 on Spatial Planning and Development[1] stipulates the right of ownership as the value to be taken into account in spatial planning. Ownership cannot be treated as

[1] Consolidated text Journal of Laws 2018, item 1945 as amended, hereinafter: ASPD.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

dominant or exclusive. With regard to agricultural land, account should be taken of the area limitation of such land[2] and the specific physical and chemical as well as biological features in the land. This should be done in view of the productive characteristics of agricultural land which make it possible to ensure healthy and safe food, but also in view of the environmental aspect and the need to protect natural elements. The latter circumstance should be considered in view of the possible depletion of public goods such as high nature value landscapes, biodiversity, water quality and availability, soil functionality, climate stability and air quality. Sustainable development requires reconciling the requirements of agricultural land protection with increased investment needs in industry and housing, but also with respect to the requirements of environmental protection. These objectives should be pursued not only in rural areas, but also in relation to agricultural land within the administrative boundaries of cities, although in this case the emphasis should, in my opinion, be slightly different. With regard to agricultural land in cities, there is a conflict between the needs of investors and the resulting pressure to implement investments and the protection of agricultural land. Although the protective aspect of agricultural land within the administrative boundaries of cities should not be dominant, a balance should be found and a rational spatial policy should be pursued.

Territorial approach to the utilitarian protection of agricultural land use has been reflected in spatial planning. The basis for the implementation of spatial policy by the competent authorities is the principle of spatial order and the principle of sustainable development. In connection with the protection instruments provided for in the Act of 3 February 1995 on Protection of Agricultural and Forestry Land[3], these should be the determinants which constitute the basis for any protection measures relating to agricultural land, including administrative areas of towns and cities. It should be noted, however, that the aforementioned legal regulations are complemented by the provisions of the so-called "special acts", which provide for a significant relaxation of rigour in these Acts, make the planning system inconsistent, and also provide for its specific decomposition. Another systemic inconsistency consists in the exclusion of the application of the provisions of the Act of 11 April 2003 on Shaping the Agricultural System[4] in relation to agricultural properties located within the administrative boundaries of towns and cities, but only those intended for housing construction and accompanying investments.

[2] Opinion about the expansion inability, non-transferability and combination of natural elements with human impact was expressed by A. Stelmachowski ([in:] P. Czechowski, M. Korzycka-Iwanow, S. Prutis, A. Stelmachowski, *Polskie prawo rolne na tle ustawodawstwa Unii Europejskiej*, Warszawa 1994, p. 321), and then it was repeated in subsequent editions of the publications.

[3] Consolidated text Journal of Laws 2017, item 1161, hereinafter: APAFL.

[4] Consolidated text Journal of Laws 2019, item 1362, hereinafter: ASAS.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

The purpose of this study is to assess the legal status in terms of the admissibility of excluding agricultural land from agricultural production in urban areas and purposing it for non-agricultural use. In the context of protection of natural values of agricultural land, it should be taken into account that the legal regulation in the scope of protection of agricultural and forestry land is directly subordinated to the provisions of the Act on Spatial Planning and Management. Both acts indicate many solutions to counteract the negative processes of urban development and industrialisation, however, procedural issues related to the investment process, with poor protection and security of leaving sufficient amount of recreational areas in the city areas, raise doubts.

GENERAL RULES ON THE EXCLUSION OF AGRICULTURAL LAND FROM PRODUCTION

Legal protection of agricultural land is a part of the state policy and is designated as comprehensive protection, linked to spatial planning, which aims to protect land as the production input[5], but also to protect the lithosphere, which constitutes a part of the wider biosphere. Generally, the admissibility of a change in the way the property is developed is subject to spatial planning regulations. This principle applies on a full scale towards forestry and high quality agricultural land. Although the functioning of this principle is limited, as with regard to agricultural land with low bonitation class and come soils with I–III the procedure of changing the purpose is pursued by way of administrative act, the exclusion from the procedure of agricultural land located within the administrative boundaries of cities raise the greatest doubts.

Although the aim of the study is not to provide a comprehensive presentation of the issues of protection of agricultural land against the change of its purpose, but only its specific group, i.e. the land located within the administrative boundaries of cities, before proceeding to the main topic it is necessary to present the competing legal regimes concerning spatial development.

The first of the referred regimes is determined by the local order, and the provisions of Local Spatial Development Plan (LSDP) are its expression. In this order, the design of agricultural land areas, including for non-agricultural purposes, takes place in legal acts issued under the commune planning authority, i.e. in the study of conditions and directions of spatial development and the LSDP. It is the commune's own task within the framework of the so-called planning authority, and its aim is to decide independently on the purpose and principles of development

[5] Same, among the others, T. Kurowska, *Planowanie przestrzenne na obszarach wiejskich*, [in:] *Prawo rolne*, red. P. Czechowski, Warszawa 2017, p. 361 ff.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

of specific areas. These measures should be based on sustainable development and taking into account the requirements of environmental protection, including the protection of agricultural and forestry land[6]. However, this is not an absolute power, and its limitation is based on, i.a., obtaining the permissions, as specified in the APAFL, issued by the competent authorities to change the use of agricultural land for non-agricultural purposes[7]. Change of the use of land in I–III classes for non-agricultural purposes shall require the consent of the minister in charge for rural development affairs, and an exception to this principle is the possibility to change the use for non-agricultural purposes of agricultural land constituting agricultural land in I–III classes located in close proximity (not further than 50 m) to the border of the nearest building plot and to a public road, if at least half of the area of each compact part of the land whose use is to be changed is within the area of compact buildings, and their total area does not exceed 0.5 ha, regardless of whether they constitute a whole or a few separate parts (Article 7 (2a) APAFL). Article 7 (1) APAFL introduces a rule that the use of agricultural and forestry land for non-agricultural and non-forestry purposes that require the consent referred to in section 2, shall be provided in LSDP, drawn up in compliance with the procedure laid down in the regulations on spatial planning and development. In accordance with Article 4 (1) ASPD, LSDP, which is a generally applicable source of law, the designation of the site, the location of the location (arrangement) of a public benefit investment and the determination development methods and the conditions for the development of the site. It should be borne in mind, however, that already the study of conditions and directions of spatial development determines the directions of changes in the spatial structure of the commune and in the designation of areas for which the commune intends to draw up a plan, including areas requiring a change in the designation of agricultural and forestry land for non-agricultural and non-forestry purposes as well as directions and principles of shaping agricultural and forestry production space (Article 10 (2) items 1, 9 and 10 ASPD).

The findings of the study are binding for commune authorities when drawing up local plans (Article 9 (4) ASPD), which means that modification of development directions provided for in the study or their free interpretation is not allowed, but

[6] The role of local plans as a means of shaping spatial development, protection of agricultural land, as well as a measure of propagation of property rights was pointed out by W. Pańko (*Własność gruntowa w planowej gospodarce przestrzennej – studium prawne*, Katowice 1978) as early as in the 1970s. Then the subject matter was taken up by P. Czechowski (*Kształtowanie terenów budowlanych na obszarach wsi. Zagadnienia prawno-organizacyjne*, Warszawa 1980) and T. Kurowska (*op. cit.*, p. 361 ff.).

[7] Z. Niewiadomski, *Planowanie przestrzenne. Zarys systemu*, Warszawa 2012, pp. 86–87; judgement of the Supreme Administrative Court of 9 June 1995, IV SA 346/93, ONSA 1996, No. 3, item 125.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

only its detailing[8]. The local plan resulting in the change of the use of agricultural and forestry land for non-agricultural and non-forest purposes shall be drawn up for the entire area designated in the study (Article 14 (3) ASPD). Because the drawing up of local plans is in principle optional (and this principle also applied to areas for which a change in the use of agricultural land and forests for non-agricultural and non-forestry purposes is proposed), in the absence of a plan it is not possible to change the use and exclusion of agricultural land with I–III classes from the agricultural production and for other purposes.

As a consequence, it is assumed that in the case of an application for establishing land development conditions for agricultural land of the indicated classes and forest land the refusal due to the premise specified in Article 61 (1) (4) ASPD should be issued.

The second of the legal regimes concerns the situation when LSDP is absent and its adoption is not obligatory. As a preliminary point, it should be noted that the provisions of ASPD do not impose any obligations on communes to elaborate LSDP. Creation of plans is, in principle, optional[9]. A special situation arose with the entry into force of ASPD when the plans adopted before 1 January 1995, according to Article 87 (3) ASPD, became invalid. After that date, only an insubstantial area of the country was covered by LSDP, and plans for agricultural and forestry land were almost sporadic. As a consequence, the development of the area takes place on the basis of individual acts. In the absence of a local plan, the determination of land use and development conditions is made by way of a decision (a permit) on development conditions and land use (Article 4 (2) ASPD)[10]. The referred decisions partly serve as the plan. They offer the possibility of making decisions, although this is not linked to other functions of urban areas. Such interrelation can only be ensured by LSPD.

These decisions are, therefore, not a surrogate or substitute of LSDP for an area for which such a plan was not adopted[11]. The procedure and type of decision on land

[8] Cf. judgement of the Supreme Administrative Court of 19 May 2011, II OSK 466/11, Legalis.

[9] In accordance with Article 10 (2) (2) ASPD the obligation to draw up a local spatial development plan arises under separate regulations.

[10] The location of a public benefit investment is determined by a decision on the location of a public benefit investment (Articles 50–58 ASPD), and the land use and development conditions for other investments are determined by a decision on development conditions (Articles 61–67 ASPD).

[11] Such a position has been established in doctrine. See, i.a., S. Prutis, *Instrumenty planowania przestrzennego w rolnictwie (założenia modelowe a rzeczywistość)*, „Studia Iuridica Agraria" 2012, t. 10, DOI: https://doi.org/10.15290/sia.2012.10.02, p. 37; I. Bogucka, *Zagospodarowanie terenów rolniczych w przypadku braku planu miejscowego (zagadnienia wybrane)*, „Studia Iuridica Agraria" 2012, t. 10, DOI: https://doi.org/10.15290/sia.2012.10.08, p. 149. A different position was quite common in the case law on the basis of previously binding Act of 7 July 1994 on Spatial Development (consolidated text Journal of Laws 1999, No. 15, item 139 as amended), including the amendments and currently binding regulations. Cf. decision of the Supreme Administrative Court of 18 July 2005,

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

use conditions and land development is determined by the type of investment, not the land on which it is planned, or the investor's person. However, the type of land is important as, in the absence of LSDP, it is not at all possible to use land with I–III and forest land for non-agricultural and non-forest purposes. The issue of a decision on land development conditions is permissible only if the land does not require a consent to change the use of agricultural land for non-agricultural purposes, or is covered by a consent obtained when while drawing up LSDP, which has expired according to the Act on Spatial Planning of 7 July 1994 (Article 61 (2) ASPD).

Moreover, it should be borne that the decision on development conditions and spatial development is issued taking into account the premises specified in Article 61 ASPD[12], which are based on the continuation of solutions already existing and complementing the development, taking into account the urban, architectural and functional parameters. They should, therefore, not be issued in respect of areas that are not or only habitat built-up and such areas usually include agricultural land in urban areas.

EXCLUDING LAND FROM AGRICULTURAL PRODUCTION IN URBAN ADMINISTRATIVE AREAS

A significant limitation of territorial protection of agricultural land is the exclusion from the scope of protection consisting in limiting the allocation of agricultural land within the administrative boundaries of towns and cities for non-agricultural and non-forest purposes. Initially, with the amendment to the Act of 19 December 2008 on Protection of Agricultural and Forestry Lands[13], the protection of agricultural land with IV, V and VI classes was practically completely abolished, whereas the use of agricultural land constituting agricultural land with I–III classes for non-agricultural and non-forest purposes required the consent of the minister

II OPS 3/5, LEX No. 165134; judgement of the Constitutional Tribunal of 20 December 2007, P 37/06, LEX No. 322829.

[12] In accordance with Article 61 (1) ASPD, a decision on development conditions may be issued only if the following conditions are jointly met: 1) at least one adjacent plot, accessible from the same public road, is developed on such a way that it is possible to determine the requirements for new development in terms of continuation of functions, parameters, features and indicators for shaping the development and land use, including the size and architectural form of building structures, development lines and the intensity of land use; 2) the area has access to a public road; 3) the existing or designed provision of technical infrastructure, having regard to paragraph 5, is sufficient for the construction project; 4) the area does not require a consent to change the use of agricultural and forestry land for non-agricultural and non-forest purposes, or is covered by a consent obtained while drawing up local plans, which expired in accordance with Article 67 of the Act, referred to in Article 88 (1); 5) the decision is in compliance with the separate provisions.

[13] Journal of Laws 2008, item 1657.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

in charge of rural development only if the compact area of such land exceeded 0.5 ha. In addition, the provisions of the Act regarding agricultural land forming agricultural area within the administrative boundaries of towns and cities (Article 5b APAFL). The cited amendment concerned about 100,000 ha of agricultural land located within the administrative boundaries of towns and cities[14]. The changes introduced have, therefore, made the protection of agricultural land illusory as they created a risk of uncontrolled depletion of the agricultural area's resource. As a result of this change, uncontrolled divisions of real estate took place in a manner leading to the separation of plots of land with an area of less than 0.5 ha. Moreover, regarding agricultural land located within the boundaries of towns, the procedure of land use change for non-agricultural purposes provided for in the Act did not apply either. Certainly, agricultural land located within the administrative boundaries of towns and cities did not lose its character, but the application of the mode of their exclusion from agricultural production and the related administrative restrictions and financial burdens were repealed.

The situation has slightly improved owing to the subsequent amendment of APAFL[15], which repealed Article 5b APAFL and introduced a new Article 10a which only excluded the application of the provisions of Chapter 2 APAFL to agricultural land located within the administrative boundaries of towns and cities. As a result of this change, the land catalogue was extended to exclude the application of the provisions of Chapter 2 to all agricultural land, and not to arable land only. Therefore, the land has been incorporated back into the statutory regulation, albeit only partially. Currently, the procedure for the change of land use for non-agricultural purposes provided for in Article 7 APAFL does not apply to agricultural land located in towns and cities, but other provisions have not been restored, which means that it is necessary to issues a decision authorising the exclusion of land from agricultural production and fees are paid for it. It means that the change of agricultural land use in urban areas does not require the adoption or change of LSDP and does not require the consent of the minister in charge of rural development in the case the land is used for I–III class purposes of arable land. However, other provisions of the Act, including Chapter 3, concerning exclusion of land from agricultural and forestry production, apply to agricultural land. Therefore, before the decision on building permit is issued, it will be necessary to obtain a decision on the exclusion from production of arable land formed from soils of mineral and organic origin, classified in I, II, III, IIIa, IIIb classes and IV, IVa, IVb, V, VI arable land generated from soils of organic origin, as well as agricultural land referred to Article 2 (1) (2–10)

[14] Cited after W. Radecki, Radecki, *Komentarz do art. 5b ustawy o ochronie gruntów rolnych i leśnych*, LEX/el.

[15] Act of 11 July 2014 on the amendment of the Act – Environmental Protection Law and certain other acts (Journal of Laws 2014, item 1101).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

APAFL. The provision of Article 33 (2) (1) of the Act 7 July 1994 – Construction Law[16] provides for the obligation to attach to the application for a building permit a final decision permitting the exclusion of land from production.

The protection of agricultural land against its uncontrolled exclusion from agricultural production is also implemented through the nature of an administrative decision on exclusion. Only with regard to the agricultural land of lower bonitation classes (IV, IVa, IVb, V and VI) made from organic soils, the decision to set them aside is declaratory and the authority cannot refuse to set them aside. On the other hand, for soils of mineral and organic origin, included in classes I, II, III, IIIa, IIIb, the authority is not obliged to give consent to the exclusion, such as the obligation to remove and manage the humus layer of soil. Exclusion of agricultural land from production will also result in the necessity to pay a single fee or annual fees for the exclusion of land from production. These fees shall be set at the rates laid down in Article 12 (7) APAFL. It is even more important to reintroduce legislation to prevent land degradation and restore land within the administrative boundaries of cities. This means that in urban areas the qualitative protection of agricultural land is fully implemented.

OTHER FACILITATION OF INVESTMENT PROCESSES ON AGRICULTURAL REAL ESTATE LOCATED WITHIN THE ADMINISTRATIVE BOUNDARIES OF TOWNS AND CITIES

Urban lands, including agricultural land in the administrative areas of towns and cities, are also areas purposed for investments important from the point of view of public interest[17]. In relation to this type of investment, the efficiency of the investment process is important, and the implementation of this objective is reflected in the tendency to create a separate normative legal basis, the so-called "special

[16] Consolidated text Journal of Laws 2019, item 1186 as amended.

[17] Examples of such regulations are, i.a.: Act of 28 March 2003 on Rail Transport (consolidated text Journal of Laws 2019, item 710 as amended); Act of 10 April 2003 on Special Principles of Preparation and Implementation of Investment in Public Roads (Journal of Laws 2018, item 1474 as amended); Act of 12 February 2009 on Special Principles of Preparation and Implementation of Investment in Airports of Public Use (Journal of Laws 2018, item 1380); Act of 24 April 2009 on Investment in the Scope in the Liquified Natural Gas Regasification Terminal in Świnoujście (consolidated text Journal of Laws 2019, item 1554 as amended); Act of 7 May 2010 on Supporting the Development of Telecommunications Services and Networks (consolidated text Journal of Laws 2017, item 2062 as amended); Act of 8 July 2010 on Special Principles of Preparation for Implementation of Flood Protection Structures (consolidated text Journal of Laws 2019, item 933); Act of 29 June 2011 on Preparation and Implementation of Investments in Nuclear Power Facilities and Associated Investments (consolidated text Journal of Laws 2018, item 1537 as amended).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

acts", although it significantly affects the decomposition of spatial planning, and thus also the protection of agricultural land[18].

The provisions of special acts allow for accelerating and simplifying the procedure of investment execution, and often also for effective use of European Union funds[19]. In some cases, the classical mode of expropriation proceedings, but also the often accompanying mode of excluding agricultural and forestry land from production, turns out to be insufficient to efficiently determine the location, separation and acquisition of legal title to land. The provisions of the referred laws exclude the application of the provisions of APAFL. Therefore, investment on agricultural or forestry land indicated in the so-called "special acts" are not authorised for a change of use or an exemption decision and no financial compensation is granted for that reason. Other acts exclude the partial application of APAFL regulations. An example in this respect can be the provisions of the Act on Special Principles of Preparation for the Implementation of Investments in Flood Protection Structures, which, while excluding in Article 29 (1) the application of its provisions to agricultural and forestry properties covered by the decision on the implementation of the investment, should be considered imprecise, as the legislator intended to exclude the application of the provisions of APAFL concerning the "real estate necessary for the implementation of the investment" with regard to the provisions governing the restriction of the use of such land for non-agricultural and non-forest purposes laid down in Chapter 2 and the provisions governing the exclusion of land from agricultural and forestry production laid down in Chapter 3. The interpretation which would release agricultural producers from the obligation to use land for agricultural purposes or to protect them from degradation or devastation has to be regarded as irrational. However, it does not seem that the use of APAFL is excluded in relation to real estate "necessary for functioning of investment", as it will not become the subject of an investment process in the strict sense of the term[20].

The liberalisation of investment policy in relation to agricultural land in urban areas is also reflected in the provisions of the Act on Shaping the Agricultural System. In the original version of the draft amendment to ASAS the agricultural properties located within the administrative boundaries of cities and towns were to be entirely excluded from the operation of ASAS. This was justified by the fact that they were intended to be used for the so-called urban investment[21]. Finally, as

[18] It has been pointed out by S. Prutis (*op. cit.*, pp. 39–40).

[19] Cf. G. Dobrowolski, *Szczególne „substytuty" planowania przestrzennego*, „Studia Iuridica Agraria" 2012, t. 10, DOI: https://doi.org/10.15290/sia.2012.10.11, p. 198.

[20] Cf. M. Stańko, *Ochrona gruntów rolnych na obszarze realizacji inwestycji przeciwpowodziowych – wybrane zagadnienia prawne*, „Studia Iuridica" 2014, t. 59, pp. 263–274.

[21] Justification for the amendment of the Act of 26 April 2019 on Formation of the Agricultural System and Certain Other Acts (Journal of Laws 2019, item 1080).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

a result of the amendment, Article 1b[22] was added, the application of ASAS was not excluded with respect to all agricultural properties located within the administrative boundaries of towns and cities, but only to strictly defined categories of properties related to the implementation of residential investments and the so-called accompanying investments.

CONCLUSIONS

The presented system of protection of agricultural land in urban areas, although at present slightly tightened, must raise serious doubts as regards the utilitarian protection of lithosphere. It leads to an obvious collision between the objectives of APAFL, soil protection and the interests of investors who are interested in developing urban space in a manner that maximises the value of the property, i.a. by allocating agricultural land for housing purposes, but also other investment activities. The legislator resolved this conflict in favour of the urbanisation of urban space, with which we should agree in principle. However, the issue of the protection of natural values in these areas cannot be ignored. But the protection of the biosphere requires a holistic approach, including territorial protection. The proposal, which is general, allows for the formulation of specific comments.

Firstly, it seems reasonable to call for the change in the use of agricultural land, including land located in administrative areas of towns and cities, to take place on the basis of a local spatial development plan. Only a local gives a chance to fulfil all the functions of the given area.

Secondly, reconciling the interest of investors with ensuring utilitarian protection of the biosphere requires the introduction of certain simplifications in the procedure for changing the land purpose. In this respect, we should accede with K. Marciniuk's view on the need to strengthen the planning authority of the commune and resign from the need to obtain consent to change the purpose of agricultural land[23].

Thirdly, the implementation of investment of particular public importance should also respect the protection of natural values of agricultural land. This shall require at least a clear indication in the so-called "special acts" that the regulations on the qualitative protection of agricultural land and financial burden are applicable in all cases.

[22] Article 50 (1) of the Act of 5 July 2018 on Facilities in Preparation and Implementation of Residential and Accompanying Investments (Journal of Laws 2018, item 1496).

[23] Cf. K. Marciniuk, *Inwestycje budowlane na gruntach rolnych położonych w granicach administracyjnych miast*, „Studia Iuridica Agraria" 2011, t. 9, DOI: https://doi.org/10.15290/sia.2011.09.26, p. 374.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

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Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:12:12

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Case law

Decision of the Supreme Administrative Court of 18 July 2005, II OPS 3/5, LEX No. 165134.
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Judgement of the Supreme Administrative Court of 19 May 2011, II OSK 466/11, Legalis.

STRESZCZENIE

Zrównoważony rozwój wymaga pogodzenia wymogów ochrony gruntu rolnego ze zwiększonymi potrzebami inwestycyjnymi w przemyśle i budownictwie mieszkaniowym, a także z poszanowaniem wymogów ochrony środowiska. Cele te powinny być realizowane również w odniesieniu do gruntów rolnych położonych w granicach administracyjnych miast. W odniesieniu do gruntów rolnych w miastach dochodzi jednak do jaskrawego konfliktu pomiędzy potrzebami inwestorów i wynikającą z tego presją na realizację inwestycji oraz ochroną gruntów rolnych. Analiza tak zakreślonego tematu badawczego wymagała podejścia terytorialnego do ochrony użytkowej gruntów rolnych, co znajduje swój wyraz w planowaniu przestrzennym. Celem niniejszego opracowania jest analiza polskiego ustawodawstwa pod kątem dopuszczalności zmiany przeznaczenia gruntów rolnych na obszarach miast.

Słowa kluczowe: ochrona biosfery; ochrona ilościowa gruntów rolnych; zrównoważony rozwój