

## **Comments to the conclusion of the Main Scientific and Expert Administration (HNEU)**

**(1) HNEU thesis:** *provision on temporary suspension of preparatory or construction works until the entity takes all measures related to the elimination of violations in urban development based on a court's decision is incompatible with paragraph 2 of Article 246 of the Commercial Code of Ukraine that establishes the general rule to suspend economic activities on the basis of decisions of authorized executive bodies in the procedure prescribed by law.*

**Comment:** HNEU made an incorrect reference to the Commercial Code of Ukraine. In fact, according to paragraph 2 of Article 246 of the Commercial Code of Ukraine, if economic activities are conducted in violation of environmental requirements, the activity of the business entity can be suspended or stopped by the Cabinet of Ministers of Ukraine, the Council of Ministers of the Autonomous Republic of Crimea and other authorized executive bodies in the procedure prescribed by law.

However, the draft law is not related to the consequences of violation of environmental requirements because these consequences are regulated by the environmental law.

In addition to the above, the HNEU ignored the direct provision of the Law of Ukraine “On Basic Principles of State Supervision (Control) in the Sphere of Economic Activity”, which is directly related to the problem described. Thus, according to paragraph 5 of Article 4 of the aforementioned Law, the production (manufacturing) or selling of goods, performance of works or providing services by business entities can be suspended **only by court's decision**.

**(2) HNEU thesis:** *If these amendments are approved as proposed in the draft law, there is a number of unresolved procedural issues. In particular, amendments to Articles 35, 36 and 39 of the Law of Ukraine “On Regulation of Urban Development” don't determine what document will confirm the submission of the declaration to the State Inspection of Architecture and Construction Control or to the center of administrative services.”*

**Comment:** The HNEU conclusion is based on the idea that the issue of how to confirm the submission of the declaration should be regulated at the legislative level.

However, in fact, it is not the case. First of all, declarations have been in use for many years and there is no law that would regulate this issue. For example, all business entities submit tax declarations, but anyone is unlikely to face with problems because of the fact that the Tax Code of Ukraine doesn't regulate in what way the submission of this declaration is confirmed.

Secondly, submission of the declaration in construction has a significant legal effect even now, but it is not regulated at the level of the Law of Ukraine “On regulation of urban development”. If the problem of confirmation is really pressing for business entities, the draft law #4187 can be amended with relevant provisions in the course of preparing for the second reading.

Thirdly, in fact, the issue of confirming the submission of declarations is decided depending on the procedure of how the declaration is submitted. Sometimes it may require to be regulated at the secondary legislation level (for example, if documents are submitted in electronic form), sometimes it is enough to apply the administrative practice when the business entity submits documents in two copies, one of which is returned him immediately with a stamp confirming receipt. A receipt notice of postal or courier services can be a separate (and all sufficient) confirmation. However, in any case, all these issues are not among those ones, the resolution of which necessarily requires amending the legislation. If necessary, this regulation can be included in the Procedure of execution of preparatory and construction works approved by the resolution of the Cabinet of Ministers of Ukraine #466 as of April 13, 2011.

**(3) HNEU thesis:** *“The draft law doesn’t determine negative legal consequences for the customer, if the declaration doesn’t contain the data prescribed by law or if circumstances resulted in the suspension of his urban development activities arise, and the declaration, in its turn, should be abolished (for example, in case of getting the information about termination of the legal entity or business activities by the private individual).”*

**Comment:** The above-mentioned quotation includes several points, each of which should be considered separately.

First of all, it is stated that in case of the termination of business activities by the private individual, the declaration should be abolished (as specified by the current Law of Ukraine “On regulation of urban development”). However, in fact, the registration as a private individual is not a prerequisite to submit the declaration. Anyone can submit the declaration without conducting business activities, and hire a contractor and certified specialists to perform construction works. Accordingly, the termination of registration as an individual entrepreneur also shouldn’t affect the validity of the declaration.

Secondly, the declaration differs from the permit in that it takes only a notification function – the business entity announces his intentions and confirms the compliance of his activity with legal requirements. Contrary to permits in regulation of economic activities, the declaration can’t have a limited validity period or be abolished in case of circumstances that didn’t exist before the submission of the declaration.

To have a better example, imagine that the State Fiscal Service has abolished all declarations submitted by the entrepreneur during the whole time of his economic activity due to the termination of physical entity registration. It is clear that there is nothing clever in such abolishment.

Any further violations of the law or circumstances change should have legal consequences that are not related to the declaration.

**(4) HNEU thesis:** *“in fact, new versions of paragraphs 4 and 7 of Article 36 of this Law will make it impossible to control the accuracy and legality of the declaration on the beginning of construction.”*

**Comment:** The purpose of the draft law is shifting the focus of work of the State Inspection of Architecture and Construction Control: special attention should be paid not to the legality and accuracy of declarations, but to the legality and reliability of construction projects.

However, it is still unclear in what way the abolishment of the registration procedure for declarations will make it impossible to control their accuracy and legality.

**(5) HNEU thesis:** *“Amendments to Article 39 of the Law of Ukraine “On Regulation of Urban Development” proposed in the draft law transform the procedure of putting into operation of finished construction facilities of I-III categories of difficulty into a formality that doesn’t explain how to verify the readiness of a facility for operation and whether this verification will be conducted at all.”*

**Comment:** First of all, the current version of Article 39 of the Law of Ukraine “On Regulation of Urban Development” in connection with putting into operation of facilities of I-III categories of difficulty is exactly a formality and, moreover, was designed to be a formality.

Secondly, the draft law doesn't change the procedure of verifying the readiness of the facility for operation. Verifications will be carried out in the same manner and by the same procedure that exists now. The draft law doesn't remove any provision that regulates this verification from the text of the Law.

**(6) HNEU thesis:** *"In addition, the mentioned Article doesn't determine what date is considered to be the date of putting into operation of the finished construction facility of I-III categories of difficulty. It should be noted that the need to determine this date is explained by the fact that depending on it, the period for signing the contracts to provide the facility with resources necessary for its operation such as water, gas, heat and electricity, and include the date on this facility to the State statistical reporting and register its ownership (paragraph 9 of Article 39 of this Law)."*

**Comment:** First of all, the time to conclude contracts in accordance with paragraph 9 of Article 39 starts not from the day of putting into operation, but from the date of the customer's application.

Secondly, since according to the proposed version of Article 39, putting into operation is conducted by submitting the declaration, it is natural that the date of putting into operation is the date of submission of the declaration.

The current version of the Law justified the need to settle on "the date for putting into operation" with the fact that there are two "competing" dates: the date of submission of the declaration and the date of registration of the declaration. This "competition" of dates will disappear with the abolition of the registration procedure for the declaration.

**(7) HNEU thesis:** *"The Administration doesn't support the use of the evaluative term "major" when determining such a ground for suspension of preparatory or construction works as "the detection of major breach of requirements of the urban development documentation..." in paragraph 1 of Article 371 that supplements the aforementioned Law. We think that in this case, its use doesn't contribute to the improvement of legal regulation of relations in the area of urban development, since it is unclear what kind of breach is considered to be the major one, and moreover, it creates conditions for committing various offenses, including the corruption ones."*

**Comment:** Indeed, the term "major breach" is an evaluative term and its use is unlikely to be well-defined. However, we pay attention to the fact that the use of the evaluative term is "the lesser evil" compared to the current version of the Law. According to the current version of the Law of Ukraine "On regulation of urban development" (for example, paragraph 7 of Article 36), construction works can be suspended due to the abolition of the registration of the declaration in connection with breach (i.e. any kind of breach) of the city development documentation.. (remainder of text unchanged).

In other words, the current version of the Law creates the grounds for corruption offenses, since the declaration may be abolished (or may be not abolished) for every small detail.

It seems that a legislator has an alternative: either to remain the existing provision that can be clearly and simply used for corrupt purposes or introduce a provision that will reduce the potential of corruption to a limited number of cases, when a level of a major breach is questionable.

**(8) HNEU thesis:** *"we offer to determine in section II (Final Provisions) that persons who have a relevant qualification certificate may continue to carry out relevant works, provided they were admitted to the relevant higher education institution and successfully studying there within two years of the effective date of this Law."*

**Comment:** According to the DoingBusiness 2016 report, Ukraine is the only country in the world, where the project documentation for construction of facilities similar to the Ukrainian facilities of the third category of difficulty is not verified by external experts or a state agency. In this case, qualification requirements for the persons responsible for project planning and technical supervision acquire a special importance.

In addition to the above, in terms of public interests, it is no matter how a person received the qualification certificate is studying.

A special attention should be also given to the legislative technique of proposed amendments, such as varying interpretations of words “successfully study”.