

PROTECTION OF BUSINESS RIGHTS IN DISPUTES WITH PUBLIC AUTHORITIES



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The issue of relations with state and local authorities in obtaining various permits and approvals is increasingly important for business organisations. Despite the declared administrative, judicial and other reforms aimed at simplifying relationships in this area, obtaining permissive documents remains a rather complicated and bureaucratic procedure. Besides, often recourse to these bodies entails grounded refusal, since the authorities are not entitled to give a groundless refusal. Under these circumstances, the current procedural legislation provides the opportunity to appeal against decisions, acts or inactivity on the part of an authority or some of its provisions.

According to the results of a trial such decision, action or inactivity may be deemed illegal. The decision may also be revoked or declared void. Ukrainian procedural legislation also establishes that the defendant — even the authority — may be required to take certain actions.

The problem is that the court cannot take over the functions of a public authority and take a decision in its name, which is solely within the remit of this authority. For example, if the *Constitution of Ukraine* attributes a series of land issues to the jurisdiction of the subject of authority — in particular, a local council — a court may not take over these functions and solve the problem instead of the local council.

Therefore, a legal and logical conflict arises: if a court finds the decision of the authority unlawful and null and void, but does not stimulate this subject to take a correct and lawful decision, the court decision cannot be implemented because, in fact, it cannot be executed. The problem is that the authority is not prohibited from repeatedly refusing to satisfy a similar appeal — for example, with new arguments.

LEGISLATIVE REGULATION OF A PROBLEM

As long as the problem lies in the procedural field, its solution is governed mainly by the norms of the *Code of Administrative Legal Procedure of Ukraine* (CASU). According to Article 2 of the CASU, the task of administrative legal procedure is to protect the rights, freedoms and interests of individuals, the rights and interests of legal entities in the field of public and legal relations from viola-

tions by authorities of state power, bodies of local self-government, their officials and employees, other subjects in the exercise of the power managerial functions on the basis of legislation, including for fulfilment of delegated powers by means of fair, impartial and timely consideration of administrative cases. Any decisions, actions or inactivity on the part of subjects of authority, except for cases when such decisions, actions or inactivity are regulated in different order according to the Constitution or laws of Ukraine, can be appealed in administrative courts. Pursuant to Article 17 of the CASU, the jurisdiction of administrative courts applies to public disputes, in particular, disputes between individuals or legal entities with the subject of authority as to the appeal of its decisions (normative and legal acts or legal acts of individual effect), actions or inactivity.

On the other hand, if the dispute between a legal entity and an authority concerns the right of ownership, but not the exercising of managerial functions, it is the competence of economic courts based on Article 393 of the *Civil Code of Ukraine*, according to which the legal act of a body of public authority, the authority of the Autonomous Republic of Crimea or body of local self-government that does not comply with the law and violates the rights of the owner, shall be deemed as illegal and shall be cancelled by the court under a law suit brought by the owner of the property.

PRACTICAL EXAMPLE

The posed problem can be clearly illustrated with the example of consideration of land questions. Judicial practice explains both the issue of attribution of land disputes with public authorities and jurisdiction of courts in resolving such disputes. Such practice, even if formed by economic courts, acquires an unprecedented importance for resolving land disputes. It is, in particular, the Resolution of the Plenum of the Supreme Economic Court of Ukraine *On Certain Issues of Practice of Examination of Cases in Disputes Arising from Land Relations No. 6 of 17 May 2011*, restated 26 December 2011 (Plenum Resolution No. 6).

Pursuant to paragraph 2.14 of the Plenum Resolution No.6, upon consideration of the cases under law suits against executive authority or a body of local self-government concerning an appeal (recognizing illegal) the acts adopted on issues related to the provision of

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land plots into ownership or for use to the subjects of economic activity (on refusal to transfer a land plot in ownership or for use, to sell the land plot, to provide the permit and requirements for land plot allocation project developing, etc.) the economic court can, depending on the nature of the dispute, bind the mentioned bodies to fulfil certain actions as required by the instructions of applicable legislation, in particular, to consider the filed question in the manner established for the body in question. However, the court has no right to decide on matters within the exclusive competence of these bodies, such as on the provision of land plots in ownership or for use, conclusion of contracts of sale or lease of land plots, as well as to indicate which specific decision must be made.

COURT DECISIONS: COLLISIONS BEFORE AND AFTERWARDS

Earlier, before the issue of the mentioned Plenum Resolution No.6, judicial practice was different. Lawyers prepared law suits with two requirements:

(1) To recognize the decision, action or inactivity of the authority as illegal (null and void), and

(2) To bind the authority to make a decision that the claimant had to obtain at the stage of appeal to the authority for resolving the respective question.

However, satisfaction of the plaintiff's claims set out in such form entailed the occurrence of other conflicting effects. According to Article of the *Constitution of Ukraine*, bodies of power and bodies of local self-government and their officials are obliged to act only on the basis and within the limits of powers and in the manner provided by the *Constitution and laws of Ukraine*. Based on that, if legislation establishes that resolving the land issue is fulfilled step-by-step on the basis of well-established list of documents to which the judgment does not belong, the completion of the next stage of solving the land question based on the judgement is impossible. For example, frequently court decisions handled the issues of the exclusive competence of the authorities and decisions were made to grant land plots in ownership and for use.

Today the situation is somewhat different — lawyers usually prepare law suits with two claims:

(1) to recognize the decision, action or inactivity of the authority as illegal (null and void), and

(2) to bind the authority to consider the plaintiff's question "in accordance with valid legislation."

Indeed, the decision is declared unlawful, void and is cancelled. Certainly, the authorities must act only on the basis, within the limits of powers and in the manner provided by the Constitution and laws of Ukraine. However, the prohibition of repeated refusal to solve the issue with the new grounds after receiving a judgment about the wrongfulness of refusal is established nowhere in legislation.

Thus, the new judicial practice leads to conflicts, perhaps even stronger for the plaintiffs than previously, before the adoption of the Plenum Resolution No. 6. Earlier, the possibility of misusing legislation was broader for plaintiffs, who could bypass legal requirements to the package of documents that were submitted to the authority to resolve the issue by means of court decisions in some circumstances. Now, the possibility for misusing legislation is broader for the authorities, which may repeatedly deny the applicant in resolving his question, even if the applicant is armed with a number of court decisions on the recognition as invalid and unlawful prior refusals.

POSSIBLE HORIZONS

Taking into account the given situation, in case of receipt of refusal to satisfy the issue practically there is a necessity to prepare as fully as possible a law suit with a description of all the particulars of such refusal, indicating its wrongfulness. If the authority takes a principled stand as to refusal under any circumstances, it will sometimes make sense to get the position of such an authority and predict all the possible reasons for any future refusal. A full description of the wrongfulness of refusal set out in the legal suit, and in the motivating part of the court judgment on satisfying the plaintiff's claim will become a guarantee for receiving a positive decision to resolve this issue.

At the same time we can conclude, based on our own experience, that obtaining even a single court decision on recognition of the refusal as void and unlawful, and obligation to consider the issue in strict compliance with the law is enough for the issue raised to be resolved in the proper manner.

LEXFOR is Ukrainian law firm established in 2005 which provides comprehensive legal services for local and foreign clients. The LEXFOR team consists of ambitious professionals, led by three partners — Yuriy Semenyuk, Yuriy Chumak and Vladislav Shapoval who are highly-qualified experts recognized by the legal community.

Yuriy Semenyuk practices in mergers and acquisitions, securities, contract, corporate, antitrust and competition law. Besides, Mr. Semenyuk specializes in customs regulations.

Yuriy Chumak has significant experience of litigation representing clients in various Ukrainian courts.

Mr. Chumak also advises in land, agriculture and real estate matters, his practice includes taxation and licensing. Legal support of launching business in Ukraine is another skill asked for a great deal.

Vladislav Shapoval focuses on IP matters providing legal protection of copyrights and trademarks, handling various anti-piracy and anti-counterfeit campaigns in Ukraine. In particular, Mr. Shapoval is a local legal counsel of Business Software Alliance — international advocate of global software industry.

The firm's practice is not limited to consulting its own clients, LEXFOR is often engaged by international law firms as a local subcontractor for legal support of their clientele in Ukraine which is evidence of the firm's impeccable reputation.

The high standards of legal practice, an experienced team with fluent English and flexible fee policy allow LEXFOR to remain a law firm whose services are in strong demand in Ukraine. We are proud to serve our foreign clients (from private individuals to multinational corporations) by satisfying all their expectations in each case.