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**§§ FREE OF CHARGE
PROVISION OF LAND
PARCELS FOR HOUSING
CONSTRUCTION/SERVICE
COOPERATIVES:**

*THE AID TO PEOPLE IN
NEED OR A CORRUPTION
SCHEME?*





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The purpose of the study is to identify and analyze corruptogenic factors in the legislation governing the allocation of land for construction of apartment buildings in cities - regional centers for housing and service cooperatives, the practice of such legislation and related corruption risks. The results of this study will be included in the thesis, which is being written by Taisa Gaida.

This study will be useful for representatives of the legislature involved in the formation and implementation of state policy in the field of construction, local governments, which make decisions on the allocation of land free of charge for the construction of apartment buildings, public activists and journalists investigating corruption schemes in the field of land and will become the basis for the development of state anti-corruption policies..

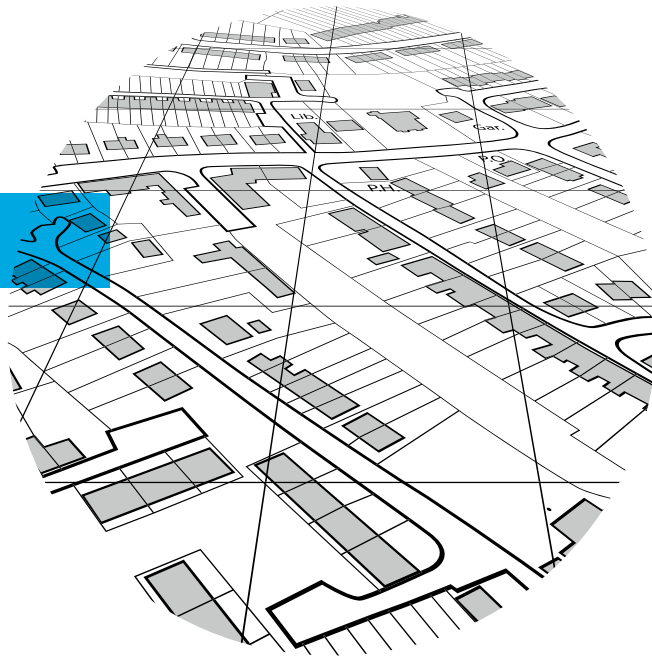
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- ▶ HCC – housing construction cooperative; is a legal entity formed by individuals and/or legal entities that voluntarily united on the basis of combining their property share contributions to participate in the construction or reconstruction of a residential building (buildings) and its (their) subsequent operation. A housing construction cooperative is a non-profit organization dedicated to meeting the housing needs of its members.
- ▶ HC UkSSR – Housing Code of the Ukrainian SSR (Housing Code of Ukraine); is the determining corpus of laws in the system of legislative acts that regulate housing relations in Ukraine. It was adopted by the Supreme Soviet of the Ukrainian SSR on June 30, 1983.
- ▶ LC – Land Code of Ukraine; adopted on October 25, 2001, effective.
- ▶ CCU – the Constitutional Court of Ukraine; is the body of constitutional jurisdiction that ensures the supremacy of the Constitution of Ukraine, decides on the compliance of laws of Ukraine with the Constitution of Ukraine and in cases provided for by the Constitution of Ukraine, compliance of other acts, carries out the official interpretation of the Constitution of Ukraine, as well as other powers in accordance with the Constitution of Ukraine.
- ▶ SC – service cooperative; is formed by combining individuals and/or legal entities to provide services mainly to members of the cooperative, as well as to other persons (legal entities) in order to carry out their economic activities. Service cooperatives provide services to other persons in amounts not exceeding 20 percent of the cooperative's total turnover.

§§ INTRODUCTION

According to the State Fund for Assistance to Youth Housing Construction, in 2017 in Ukraine 657,000 people were on the waiting list as citizens in need of better housing conditions¹.

Since Soviet times, the Housing Code of the Ukrainian SSR, which in accordance with Ukrainian legislation is still in force, provided for certain categories of citizens a number of conditions, according to which they could get their own housing below market prices on the primary real estate market. For such persons who need to improve their housing, the legislator has provided a number of preferential terms. To reduce the cost of square meters of housing for such associations of citizens in the form of housing and construction cooperatives, **Ukrainian legislators have provided in the Land Code of Ukraine a privilege in the form of the opportunity to get a land parcel for construction free of charge or on preferential terms without holding land tenders.** Allocation of land parcels free of charge at the expense of communal property for members of housing construction cooperatives, according to the logic of legislators, should reduce the cost of housing construction for certain vulnerable categories of the population who are in waiting list to improve their housing conditions, and encourage the creation of housing construction cooperatives. But instead, as our study shows, free of charge land allocation within settlements is mainly used by commercial developers who construct multi-apartment residential buildings for sale in the primary market.

Thus, the purpose of this analytical document is to analyze corruption-generating factors in the legislation governing the process of allocating land parcels for the construction of apartment buildings in cities – regional centers for housing construction and service cooperatives, to analyze the practice of applying such legislation and related corruption risks. This analytical paper was prepared based on the results of the study. The full text of the study can be found at the acre.org.ua website.

The presented analytical document will be useful for representatives of legislative bodies involved in the formation and implementation of state policy in the field of construction; local government bodies that make decisions on allocation land parcels free of charge for the construction of apartment buildings; public activists and journalists who investigate corruption schemes in the sphere of land relations; it will also become the basis for the development of state anti-corruption policies.

¹ У Кабміні розповіли, скільки українців стоїть у чергах на нове житло
// РБК-Україна: [Website]. URL: <https://www.rbc.ua/ukr/news/kabmine-rasskazali-skolko-ukraintsev-stoit-1511781671.html> (date of access: 19.11.2020).

I. ANALYSIS OF LEGISLATION IN THE FIELD OF HOUSING CONSTRUCTION AND SERVICE COOPERATIVES AND THE ALLOCATION OF LAND PARCELS BY LOCAL GOVERNMENTS FOR THEM WITHIN SETTLEMENTS

This section is devoted to the analysis of legal regulation and judicial practice in the field of allocation of land parcels by local governments for the construction of multi-apartment residential buildings to housing construction and service cooperatives.

After analyzing the Ukrainian legislation in accordance with the systemic, target, logical, grammatical methods of interpretation, we came to the conclusion that the Ukrainian legislation regulating the process of allocating land parcels for the construction of multi-apartment residential buildings in cities (regional centers) for housing construction and service cooperatives contains significant corruption-related factors. In particular, legal conflicts, broad discretionary powers of local self-government bodies, gaps significantly increase corruption risks in this area.

For example, here are just a few major collisions: 1. Conflict of laws between the Law of Ukraine “On Cooperation”, the Economic Code of Ukraine, the Law of Ukraine “On Local Self-Government” and the old Housing Code of the Ukrainian SSR regarding the definitions of organizational and legal forms of “housing construction” and “service cooperatives”, which allows commercial developers to avoid paying taxes and receive, free of charge or for rent without holding land auctions, land parcels in settlements for the construction of apartment buildings for sale; 2. The provisions of Article 138 of the Housing Code of the Ukrainian SSR on the control of government bodies over the activities of housing cooperatives consolidate the outdated powers of local self-government structures in the creation and control of housing construction companies, which are not reflected in the Law of Ukraine “On Local Self-Government” and may contradict the Economic Code of Ukraine and the Law of Ukraine “On Cooperation”.

At the same time, there are a number of cor-

ruption factors that, due to imperfect legislation and wide discretionary powers, provide an opportunity for local governments to abuse their powers and receive unlawful benefits when addressing the matters of free or preferential allocation of land parcels without holding land auctions. Let’s consider them in more detail.

In particular, this concerns information about the available free land parcels that can be provided for housing construction within settlements. The current legislation clearly states that local governments are the managers of such information and that such information is public and access to it cannot be limited.

According to Part 5 of Art. 24 of the Law of Ukraine “On the regulation of urban development”, “the authorized bodies for urban development and architecture and the central executive body that implements the state policy in the field of land relations, ensure the openness, accessibility and completeness of information on the availability on the territory of the corresponding administrative-territorial a land parcel of state and communal property not provided for use, which can be used for construction; on the presence of restrictions and encumbrances on land parcels, urban development conditions and restrictions in the Urban Development and State Land cadastre”².

Paragraph 2 of part 5 of Art 24 of the Law of Ukraine “On the Regulation of Urban Development Activities” stipulates that “until the relevant information is entered into the Urban Development and State Land cadastres, the executive body of the village, settlement, city council, the Kyiv and Sevastopol city state administrations or the relevant local executive and legal bodies must provide written in-

² Закон України «Про регулювання містобудівної діяльності» № 3038-VI від 17.02.2011 // Відомості Верховної Ради України (ВВР). 2011. № 34. Ст. 343. URL: <https://zakon.rada.gov.ua/laws/show/3038-17#Text> (date of access: 30.11.2020).

Free of charge provision of land parcels for housing construction/service cooperatives

formation on requests of individuals and legal entities on the availability of land parcels that can be used for construction”. Thus, local governments should have information about vacant land parcels. In accordance with Art 79 of the LCU, “a land parcel is a part of the earth’s surface with established boundaries, a defined location, with defined rights relative to it”.

That is, until the registration of a land parcel, as required by law, and the assignment of a cadastral number to it, it does not legally exist, which makes it possible for local governments to provide information on not duly formalized land parcels with assumed boundaries that are available for registration for the purpose of further residential development to certain interested parties and receive from this undue benefit.

But even if the land parcels are properly registered and are communal property, local governments do not always provide information about their availability in response to a request for information. For example, to get such a list, an ATO participant in the city of Vinnytsia had to go to court. This is stated in the ruling of the Vinnytsia City Court in the case of an ATO participant against the executive committee of the Vinnytsia City Council on the refusal to provide information on the list of vacant land parcels that can be used for construction in the city of Vinnytsia³.

Also, among the corruption factors, in our opinion, we should mention the gaps in the legislation, which provide local governments with discretionary powers to establish, at their discretion, the size of a land parcel that can be provided to housing construction cooperatives or service cooperatives on preferential terms without holding land auctions. Such decisions on the allocation of land parcels are made during the sessional meetings by the deputies of local councils. The current legislation has not developed standards for calculating the area of land parcels that can be transferred for use, depending on the number of members of the SC and HCC and their need for housing area. Such a gap creates the basis for the abuse of office by local government officials in order to obtain improper benefits for

themselves or for the benefit of third parties.

As mentioned earlier, decisions on the provision of land parcels for residential development are made during sessional meetings, subject to a positive vote of the deputies of local councils, who constitute the majority of the total number of elected deputies. The right to a “decisive vote” enshrined in the legislation creates a corruption opportunity for deputies to trade their votes when making decisions. Indeed, in order to agree on the allocation of a land parcels for housing construction for SC or HCC, even if all the requirements of the legislation in the field of land relations are met, there may simply not be enough deputies’ votes necessary to make a positive decision⁴.

Significant shortcomings of legal regulation are also confirmed by the ambiguity of the courts’ application of the provisions of legislation in this area. Indeed, courts of different levels made diametrically opposite decisions both in favor of the prosecutor’s office and in favor of the cooperatives. In addition, as of December 2019, an established judicial practice has developed in the courts on the allocation of land parcels free of charge or on preferential terms for housing construction cooperatives. Land parcels were provided only to HCC, whose members needed to improve their housing and were listed in a single state register of citizens in need of improving their living conditions. At the same time, local governments must check up the purpose of creating such HCCs before considering applications for the allocation of land parcels. However, after the decision of the Constitutional Court of Ukraine, all restrictions on the allocation of land parcels to certain categories of persons were cancelled, which actually allows local authorities not to conduct land auctions and provide land parcels within settlements even for commercial housing construction free of charge. Thus, the Decision of the Constitutional Court of Ukraine of December 20, 2019 in case No 12-p/2019 on ruling part two of Article 135 of the Housing Code of the Ukrainian SSR as unconstitutional created even greater legal uncertainty regarding the activities of housing construction

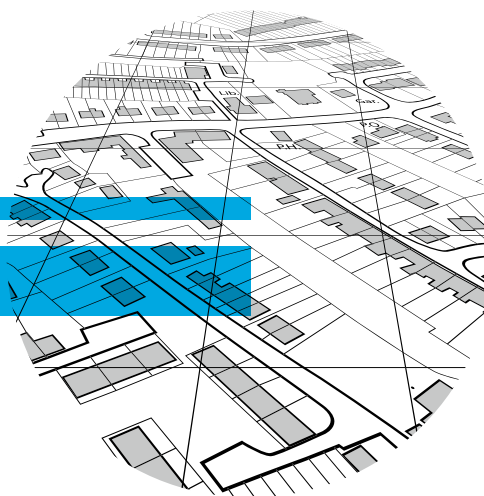
3 Постанова Вінницького міського суду Вінницької області у справі за № 127/5403/17 від 13.09.2017 // Єдиний державний реєстр судових рішень. URL: <https://reyestr.court.gov.ua/Review/68912600> (date of access: 30.11.2020).

4 Закон України «Про статус депутатів місцевих рад» від 11.07.2002 № 93-IV // Відомості Верховної Ради України (ВВР), 2002. № 40. Ст. 290. URL: <https://zakon.rada.gov.ua/laws/show/93-15#Text> (date of access: 30.11.2020).

cooperatives and unequal competitive conditions for housing construction cooperatives and business entities of other forms of economic activity, which is contradictory to the Constitution of Ukraine⁵.

That is why, in our opinion, the exclusion of Article 41 from the Land Code of Ukraine on the free of charge transfer of land parcels for housing construction cooperatives and conducting land tenders when allocating land parcels for housing construction of apartment buildings for HCC and SC would help to eliminate the above corruption risks and make the process of granting communal land for use more transparent. Indeed, according to Art. 135 of the Land Code of Ukraine, “land auctions are held in the form of an auction, as a result of which a contract of sale, lease, superficies, emphyteusis of a land parcel is concluded with a participant (winner) of a land auction, who offered the highest price for the land parcel to be sold, or the highest payment for its use, recorded in the course of land auctions”⁶.

In addition, before holding land auctions for communal and state-owned land parcels, an expert monetary valuation of the land parcel is carried out in accordance with the Law of Ukraine “On Land Valuation”, except for cases of sale of the lease right for it at land auctions. Also, the starting price of the sale of the land parcel is set, which in relation to state and communal property cannot be lower than the expert monetary value of the land parcel, or, in the case of leasing, the starting amount of the annual rent is set, which in relation to state and municipal property cannot be less than the rent, determined by the Tax Code of Ukraine⁷. Holding land auctions will not only eliminate corruption risks associated with discretionary powers of local governments, but will also replenish local budgets and promote the fair competition among developers.



5 Рішення Конституційного Суду України у справі за конституційним поданням 49 народних депутатів України щодо відповідності Конституції України (конституційності) положень частини другої статті 135 Житлового кодексу Української РСР : від 26 грудня 2019 року № 1-26/2018(2572/17) // Рішення Конституційного Суду України. 2019.

6 Земельний кодекс України // Відомості Верховної Ради України (ВВР). 2002. № 3-4. Ст. 27. URL: <https://zakon.rada.gov.ua/laws/show/2768-14#Text> (date of access: 30.11.2020).

7 Закон України «Про оцінку земель» від 11.02.2003 № 1378-IV // Відомості Верховної Ради України (ВВР). 2004. № 15. Ст. 229. URL: <https://zakon.rada.gov.ua/laws/show/1378-15#Text> (date of access: 30.11.2020).

§§ II. ANALYSIS OF THE PROPER USE OF LAND PARCELS ALLOCATED BY LOCAL GOVERNMENTS TO HOUSING CONSTRUCTION AND SERVICE COOPERATIVES IN CITIES – REGIONAL CENTERS OVER THE PAST 5 YEARS

Before starting the research, we formulated a hypothesis that business entities, using a conflict in the legislation on the right of housing construction and service cooperatives to acquire land parcels free of charge or lease without holding land auctions, receive land parcels for commercial construction of apartment buildings for the purpose of sale in the primary real estate market. In order to obtain communal and state-owned land parcels for housing construction, they carry out state registration in an organizational form of “housing construction and/or service cooperative”. And, as a result, they not only create unequal competitive conditions for other business entities, but also fail to achieve the goal of creating a housing construction cooperative, laid down by the legislator: providing housing for people in the waiting list and needing to improve their housing conditions.

For our study, we analyzed the responses to information requests in 23 cities – regional centers of Ukraine, except for the Luhansk, Donetsk regions and the Autonomous Republic of Crimea, regarding the list of HCCs and SCs, which local government bodies of cities – regional centers over the last 5 years (2015–2020) allocated land for construction free of charge or on a lease basis without holding land auctions and a list of cadastral numbers of land parcels. We also analyzed court decisions of courts of general jurisdiction related to the activities of HCCs and SCs, which, according to the responses to our information requests, received land parcels for construction without holding a land auction, reviewed advertisements on websites for the sale of real estate in the primary market from developers and monitored the regional press regarding the available journalistic investigations related to the allocation of land parcels by local government bodies to these business entities.

A total of 6 cities, which are the regional cen-

ters, during 2015–2020 allocated land parcels for housing construction on favorable terms, without holding land auctions, to housing construction and service cooperatives. These are Zhytomyr, Zaporizhzhia, Kyiv, Kharkiv, Khmelnytsky and Chernivtsi.

The leader in the allocation of land parcels for housing construction and service cooperatives is the Kharkiv City Council. Over the past 5 years, it has distributed almost 60 hectares of communal land for construction. A total of 13 land parcels were granted. Some of them were granted for rent, some for ownership at the expense of the communal lands of the Kharkiv community. But in connection with the allocation of 13 land parcels for construction, no land auction was ever held.

In Zhytomyr, according to the response to the information request, the Zhytomyr City Council, by its decision, has granted land to only 3 servicing housing construction cooperatives over the past 5 years.

Journalists of the Vgolos publication conducted a journalistic investigation and found that the City Council grants land parcels for construction to all other housing construction cooperatives exclusively on lease, in contrast to the “kvartalbudivtsi” and “ATO participants”, creating unequal conditions for the construction business in the city⁸.

In Kyiv, over the past 5 years, land was granted free of charge to only three housing construction cooperatives. Two of them were granted with the land after the housing projects were built. These are SC-HCC “Bulhakov” and SC-HCC “Nasha Perlyna”. Moreover, the Kyiv City Council was a party in the court proceedings to revoke the arrest imposed on the land parcels of the abovementioned housing construction

⁸ Житомир забудовують хмельницькі фірми, власниками яких є одні й ті ж особи // Вголос.ЗТ: [Веб-сайт]. URL: <https://www.vgolos.zt.ua/zhytomyr-zabudovuyut-hmelnytski-firmy-vlasnykamy-yakyh-je-odni-j-ti-zh-osoby/> (date of access: 30.11.2020).

cooperatives. According to the publication of the journalists of Nashi Skhemy, the land under the housing projects was arbitrarily seized by a group of companies “Ukogrup”, and the construction was carried out without any legal permits⁹.

In Zaporizhzhia, local governments also granted land parcels to SC and HCC for residential development, and housings were sold by the developer on the primary real estate market. In total, during the period from 2015 to 2020, the Zaporizhzhia City Council granted 3 land parcels to SC-HCC, which advertised the sale of apartments on the primary real estate market. These are SC “HCC Staryi Oleksandrivsk”, HCC “Kosmos Siti” and SC HCC “Sova”.

In Khmelnytsky, over the past 5 years, 4 housing construction cooperatives have been granted with land parcels for rent. These are SC HCC “Dobrobut”, SC HCC “Mriya-Luks”, HCC “Parkovy Bulvar-1” and SC HCC Nyzhniooberegovy and HCC Ozernyi-3. According to the decision of the Khmelnytsky City Council, land parcels were transferred without an auction. The basis, in accordance with the decision of the council, was the transfer “for an object of construction in progress (construction of a multi-storey residential building with built-in office and retail premises)”. That is, land parcels were leased out under houses that at the time of transfer already had the status of “construction in progress”. Apartments in the newly built residential compounds were sold on the primary residential real estate market.

In Chernivtsi, for 5 years, deputies of city councils have transferred only one land parcel to a SC-HCC, it is 0.34 hectares for the SC HCC “Komfort”. Apartments in apartment buildings provided by the above-mentioned SC-HCC are also sold in the primary real estate market from the developer.

The analyzed cases confirm the hypothesis that business entities, using a conflict in the legislation on the right of housing construction and service cooperatives to acquire land parcels free of charge or lease without holding land auctions, receive land parcels for commercial construction of apartment buildings for the purpose of sale in the primary real estate market. In order to obtain communal and state-owned land parcels for housing construction, they carry out state registration in an organizational form of “housing construction and/or service cooperative”. And, as a result, they not only create unequal competitive conditions for other business entities, but also fail to achieve the goal of creating a housing construction cooperative, laid down by the legislator: providing housing for people in the waiting list and needing to improve their housing conditions.



⁹ У Кличка почали узаконювати самобуди Войцехівського «Перлина Троєщини» та «Маргарита» // Наші гроші: [Website]. URL: <http://nashigroshi.org/2017/07/04/u-klychka-pochaly-uzakonyuvaty-samobudy-vojtsehivskoho-perlyna-trojeschyny-ta-marharyta/> (date of access: 30.11.2020).

§§ CONCLUSIONS AND RECOMMENDATIONS

1. There is a legal conflict between the Law of Ukraine “On Cooperation”, the Economic Code of Ukraine, the Law of Ukraine “On Local Self-Government” and the old Housing Code of the Ukrainian SSR regarding the definitions of organizational and legal forms of “housing construction” and “service cooperatives”, which allows commercial developers to avoid paying taxes and receive, free of charge or for rent without holding land auctions, land parcels in settlements for the construction of apartment buildings for sale.
2. The provisions of Article 138 of the Housing Code of the Ukrainian SSR on the control of government bodies over the activities of housing cooperatives consolidate the outdated powers of local self-government structures in the creation and control of housing construction companies, which are not reflected in the Law of Ukraine “On Local Self-Government” and may contradict the Economic Code of Ukraine and the Law of Ukraine “On Cooperation”.
3. The Decision of the Constitutional Court of Ukraine of December 20, 2019 in case No 12-p/2019 on ruling part two of Article 135 of the Housing Code of the Ukrainian SSR as unconstitutional created even greater legal uncertainty regarding the activities of housing construction cooperatives and unequal competitive conditions for housing construction cooperatives and business entities of other forms of economic activity, which is contradictory to the Constitution of Ukraine.
4. Over the past 5 years, in the cities – regional centers, land parcels that were granted by local self-government bodies to SCs and HCCs without holding land auctions did not solve the problems with housing for certain categories of citizens who needed to improve their housing conditions, but were granted to individual developers, which created unequal competitive conditions for business entities in the field of construction.
5. Article 41 of the Land Code of Ukraine, which provides for the granting of land parcels to housing construction cooperatives free of charge or for rent without holding land auctions, contradicts Article 13 of the Constitution of Ukraine, Article 6 of the Economic Code of Ukraine and Parts Two and Three of Article 134 of the Land Code of Ukraine, where legislators indicated an exclusive list of cases of granting land parcels without land auctions.
6. The broad discretionary powers granted by the current legislation to local governments in the field of land relations and unclearly defined norms for calculating the standards for the provision of land parcels by SCs or HCCs, depending on the number of members of such cooperatives and their need for housing, are corruption-generating factors and create opportunities for local authorities to abuse their position to obtain improper benefits for themselves or third parties. At the same time, in our opinion, holding land auctions for the granting of land parcels for multi-apartment residential development will help eliminate the above factors, increase the transparency of decision-making in the field of land relations and contribute to the establishment of fair competition among developers.
7. Taking into account the results of our study, we confidently recommend that legislators exclude Article 41 of the Land Code of Ukraine as contradicting other regulatory documents, the current Constitution of Ukraine and securing unequal conditions for business entities.

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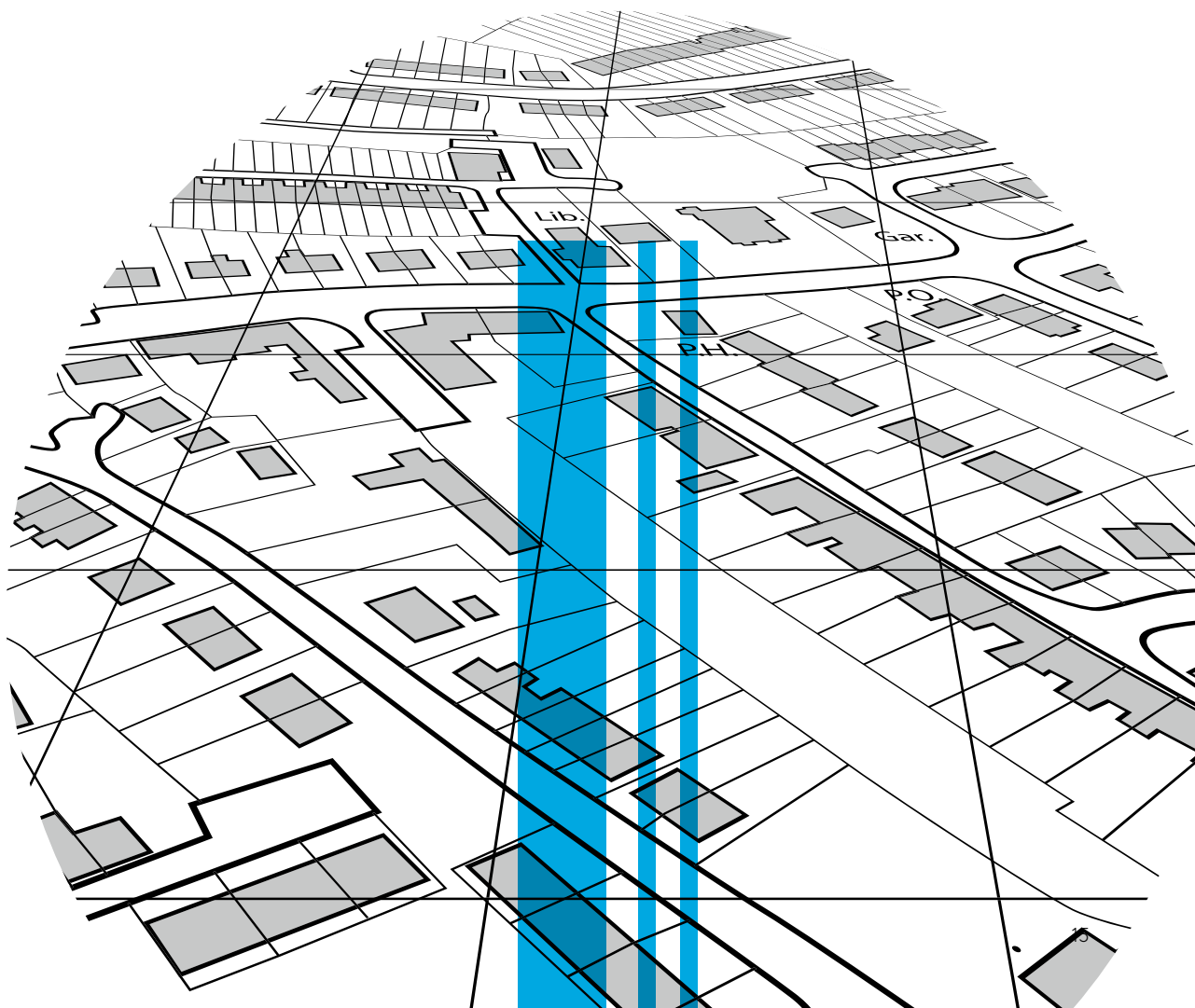
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