

**VIETNAM BUSINESS FORUM
LAND SUB-GROUP PRESENTATION
29 MAY 2012**

*Presented by
David Lim
Land Sub-group*

The real estate sector has seen some very difficult times in recent years. Investment in real estate has dropped dramatically in line with the global financial crisis and the strict fiscal policies introduced in the country.

The land law was first introduced in 2003. Over time, the real estate market has changed dramatically. This was a direct result of the rapid growth experienced by the country. As the economy grew, the need for commercially developed housing also increased. Foreign and domestic investors alike invested in real estate development to meet this need. At the same time, new legislation was also introduced to regulate the real estate market and ensure that real estate is developed in an orderly manner.

There have also been changes in other sectors which are directly and indirectly related to the real estate sector. Inevitably, this has led to inconsistencies between various pieces of legislation and the general policies relating to important issues. Since the land law will be amended in 2013, it is important that all the different strands are brought together and a cohesive piece of legislation is introduced and implemented to ensure that real estate continues to develop and meet the needs of the public.

For the purposes of this report, we have categorised the main issues faced by the real estate sector into 3 main principles which we would encourage the legislators to adopt when considering legislation to be introduced. The 3 main principles are as follows:

- (a) equal rights for all categories of lands users;
- (b) clear, consistent and transparent procedures for and implementation of procedures for land compensation, clearance and pricing; and
- (c) clear and simple procedures for all land transactions.

We set out below a summary issues which we hope the legislators will address swiftly. Details of each of the identified issues and our recommendations are set out in our report which is attached to this position paper (the "**Report**").

I. RIGHTS OF LAND USERS

There are various rights attached to land and real estate based on the status of land user and type of land. The variations relate to whether the land user is an individual or corporate entity; domestic or foreign; and also types of land use. We set out below examples of such variations further details of which are contained in the Report.

1. Leasing Rights

Foreign investors cannot lease land from households and individuals. Please see item 8 of the Report for further information.

2. Mortgage Rights

- a) Households and individuals are restricted to mortgaging land for borrowing for production or business purposes only. Please see item 9 of the Report for further information.
- b) Vietnamese entities, Vietnamese organisations residing overseas and foreign organisations and individuals are only entitled to mortgage land use rights to a credit institution. Please see item 9 of the Report for further information.
- c) Offshore lenders cannot take a mortgage over a land use right and assets attached to the land. The land use right and assets attached to the land can only be mortgaged to onshore lenders. Please see item 9 of the Report for further information.

3. Land Use Form of the Foreign Invested Enterprise

A local investor or overseas Vietnamese is entitled to receive stable and long term use of land but a foreign invested enterprise (other than land for the development of residential project which may be granted for a term of 70 years and extended several times without additional payment of land rental) is only granted a land use right with a definite term. Please see item 13 of the Report for further information.

4. Land Compensation - Land Use Right Certificate

Foreign investors in comparison to a local developer who carry out a project on a wholly owned basis have to go through 2 additional steps in order to acquire the land (they have to negotiate a land lease with the State and have to apply for an Investment Certificate). Please see item 14 of the Report for further information.

5. Right to 70 Years Leasing Term

Lease term of 70 years with unlimited extensions, each extension not to exceed 70 years with no requirement to pay for any extended duration is applicable to residential developments by a foreign investor only. Please see item 15 of the Report for further information.

6. Restrictions on Foreign Organisations and Individuals - Law on Real Estate Business

Foreign organisations and individuals may not conduct the following activities:

- (a) Purchasing houses or construction facilities for sale, lease, hire-purchase;
- (b) Leasing houses or construction facilities for sublease; and
- (c) Assuming transfer of land use right, investing in infrastructure for transfer or lease out of the same; leasing land use right in respect of land with attached infrastructure for sublease.

Please see item 22 of the Report for further information.

7. Restrictions on Non-Resident Foreign Organisations and Individuals in Purchasing or Leasing Property

Non-resident foreign companies and individuals are prohibited from purchasing and/or leasing property in Vietnam. Further, resident foreign organisations and individuals may only purchase one apartment unit if certain conditions are met. Please see item 23 of the Report for further information.

We would recommend that where possible, the variations set out above be removed. Some of the variations set out above are not necessary since in substance and practice, the variations are artificial or are no longer relevant since the real estate market has evolved dramatically. Certainly, in these cases, the variations can and should be removed to ensure that the land related legislation is easily and consistently implemented.

II. LAND COMPENSATION, CLEARANCE AND PRICING

Of late, a series of legislation relating to land compensation, clearance and pricing has been introduced with the intention of providing a workable framework to facilitate orderly growth in the real estate sector. For the most part, the policies are sound and demonstrate the intention of the legislators to deal with very difficult issues. Unfortunately, the inconsistent application of various mechanism for calculation of land prices and compensation and land clearance procedures has led to undue delays and difficulty to real estate developers. We set out below issues which require further thought and consideration.

1. Land Compensation Payable for Recovery of Leased Land

If land has been allocated by the State with the payment of land use fees from the State budget the land user will not be entitled to compensation. In contrast, if land is leased from the State no compensation is payable.

Recommendation

We recommend amending the Land Law so that compensation shall be payable to land users of leased land where the rental is paid in advance as a lump sum.

Please see item 4 of the Report for further information.

2. Land Compensation Deduction of Local Enterprises without involvement of the State Issue

Where there is a change of land use purpose, an investor is required to pay the difference between the land use levies for the old and new land use purposes and cannot set off such payments against advances for compensation, support, resettlement etc.

Recommendation

We would recommend amending the legislation so that the compensation of projects without involvement of the State for compensation and ground clearance shall be treated the same as for projects involving the State.

Please see item 10 of the Report for further information.

3. Land Pricing - Re-determination of Land Prices

Issue

Since the issuance of Decree No. 69, the lack of transparency and certainty in the processes of re-determining land prices for the calculation of land use fees and land rental payable to the State leads to inability of developers to price their projects.

Recommendation

We would propose that this provision be removed completely or a reasonable set of parameters should be provided to ensure that payments to be made are reasonable. For example, consider specifying that prices will only adjusted where there is a gross miscalculation in terms of the price list or set a maximum deviation of a certain percentage of the prices in the price list.

Please see item 17 of the Report for further information.

4. Land Compensation Deduction of Vietnamese Overseas and Foreign Invested Enterprise without involvement of the State

Developers who lease land from the State and have paid money for compensation and clearance, including those who reached agreement with the land users directly, can only deduct such

payments from land rental payable by the developers to the State where the compensation and clearance was conducted pursuant to an approved plan only.

There is now no legal framework for the deduction of expenses paid for land compensation and clearance where the developer (being overseas Vietnamese or foreign invested enterprise) directly negotiates and reaches agreement with the land users with the State not being involved in the compensation agreement process.

This distinction between State organised and privately negotiated compensation and clearance processes is artificial because the law recognises the right of such developers to directly negotiate with land users.

Recommendation

We would recommend that Circular 94 be amended so that all compensation payments should be available for deduction against any payments due to the State for the use of land however the compensation process is conducted.

Please see item 18 of the Report for further information.

Our general recommendation is that the legislators consider the difficulties faced by the authorities in implementing the measures and simplify procedures where possible. Further, there must be a greater emphasis on the consistent and timely implementation of the measures to ensure that the real estate sector is not held back by complicated and unclear procedures.

III. CONFUSING PROCEDURES

We would highlight a new procedure introduced recently which has caused some difficulty to investors and request that it be re-considered.

1. Decree 71/2010/ND-CP ("Decree 71") - Investment Approval

Issue

An investor must be issued an **Investment Certificate** outlining their business line(s) which include real estate development/investment. In order to obtain an Investment Certificate with the real estate business line, the investor must provide documents evidencing that they have met the condition(s) as stipulated in the Law on Real Estate Business and relevant guiding documents. Pursuant to Article 7 of Decree 71, such conditions include obtaining an **Investment Approval** from a competent authority.

To be issued an Investment Approval, the investor must have obtained a **Certificate of Recognition of Investor**. However, to be issued a Certificate of Recognition of Investor, the investor must have been issued an Investment Certificate outlining their business line(s) which include real estate development/investment.

Obviously, this circle of procedure and unnecessary requirements are impossible to be implemented in practice and have caused significant obstacles and delays to many residential projects.

Recommendation

We would propose that the law be amended so that the investor shall only have to go through an one-step procedure in order to qualify as meeting the conditions of real estate business line.

Please see item 3 of the Report for further information.

2. Further Guidance and Regulations Required

We set out below issues which require further clarification and guidelines on to ensure that the real estate sector continues to develop in a consistent and orderly manner.

3. Definition of "foreign investor" under the Land Law

Issue

There are inconsistencies between the Law on Investment and the Land Law regarding the concept of "foreign investor". Under the Land Law "foreign investors" are unofficially interpreted to refer to foreign invested enterprises. Under the Investment Law and its guiding legislation, "foreign investors" means either foreign individuals or entities (Article 3.5 of the Investment Law) or enterprises with foreign ownership of 49% or more (as provided by Decision No. 88/2009/QD-TTg).

Recommendation

We recommend amending the Land Law so that the concept of "foreign investor" and "foreign invested enterprise" is consistent with the Investment Law.

Please see item 1 of the Report for further information.

4. Conversion of Form of Land Use

We would suggest that clear guidance on the following issues be provided:

- (a) the level of foreign shareholding which causes a domestic enterprise to become a foreign invested enterprise;
- (b) in the case where land was not leased from the State, whether the enterprise on becoming a foreign invested enterprise is required to sign a land lease and to amend the form/status of the land in the land use rights certificate from being "land allocated from State" to a "land leased from State" accordingly; and
- (c) the procedural processes involved.

Please see item 19 of the Report for further information.

5. Land Dispute Resolution Process

Issue

Disputes relating to land must first be submitted to the relevant commune or ward or township People's Committee for conciliation. If one party disagrees with the result the dispute may then be referred to a court or the provincial/district People's Committee (depending on the type of case) for final resolution. This process can easily be disrupted by a party that does not co-operate.

Recommendation

We recommend amending the Land Law so that there is a clear mechanism for taking matters forward in the case where one party does not co-operate. Such a mechanism could be that where a party to a dispute fails to attend the conciliation session (having been served notice twice) the conciliation process shall be regarded as unsuccessful and the participating party (ies) may then refer the dispute to a court or the provincial/district People's Committee for settlement. This would be regardless of the absence of the non-participating party's signature to the minutes of the conciliation.

Please see item 6 of the Report for further information.

6. Industrial Zone Land - Subsequent Investors

There is some confusion on how an initial developer and a subsequent investor in industrial land acquire land in an industrial zone.

Recommendation

We recommend amending the Land Law by deleting references to an investor in an industrial zone having the right to choose to receive an allocation or lease of land from the State. Please see item 5 of the Report for further information.

7. New Urban Zone Projects - Assignment and Sub-Lease of Land

There are currently no implementing guidelines on the procedures to assign or sub-lease land. Please see item 16 of the Report for further information.

8. Water Surface Areas

The Land Law provides that inland water surface, coastal land with water surface and riverside and coastal alluvial land may only be used for agricultural, forestry, aquaculture and salt mining purposes.

We recommend amending the Land Law by supplementing the legal framework on use of water surfaces to include all a wider variety of purposes including for commercial and residential use. Please see item 20 of the Report for further information.

9. Partial Assignment of Projects not in a New Urban Zone Development

There are insufficient guidelines on partial transfer of projects in new urban zone developments although the right to do so is set out in the law. Please see item 21 of the Report for further information.

10. Priority of Use of Land Upon Termination of Capital Contribution

There is a lack of clarity in procedures for the cancellation of the registration of a capital contribution to a joint venture of a land use right. Please see item 7 of the Report for further information.

IV. OTHERS

1. Private Areas in Apartment Buildings

Issue

There are different rules for the use of private and common areas in real estate projects.

Recommendation

We would propose that the option of private or common ownership be extended to all parts of the development except for general amenities e.g. parking spaces for vehicles for the disabled. Developers should be given the right to determine what areas within a development should be treated as private and common areas. and guidelines be issued to clearly provide that separate ownership certificates be issued for such private areas.

Please see item 24 of the Report for further information.

**REPORT ON MEETING OF LAND SUB-GROUP
WITH REPRESENTATIVES OF VARIOUS MINISTRIES
29 MARCH 2012**

SEMINAR FOR FINALIZATION OF REPORT ON REVIEW OF THE LAND LAW

We have been given the opportunity to present to the Ministry of Natural Resource and Environment our comments on amendments to the Land Law 2003 ("**Land Law**"). We set out in this paper the points we intend to raise for discussion.

1. Definition of "foreign investor" under the Land Law

Issue

There are inconsistencies between the Law on Investment and the Land Law regarding the concept of "foreign investor". Under the Land Law "foreign investors" are unofficially interpreted to refer to foreign invested enterprises. Under the Investment Law and its guiding legislation, "foreign investors" means either foreign individuals or entities (Article 3.5 of the Investment Law) or enterprises with foreign ownership of 49% or more (as provided by Decision No. 88/2009/QD-TTg).

Recommendation

We recommend amending the Land Law so that the concept of "foreign investor" and "foreign invested enterprise" is consistent with the Investment Law.

Responses

The representative of the Ministry of Natural Resources and Environment agrees with the above recommendation and shall include such recommendation into the draft amendment of the Land Law;

The representative of the Ministry of Planning and Investment thinks that the concept of "foreign investor" and "foreign invested enterprise" stated in the Investment Law is also unclear. This Ministry is considering the percentage for foreign shareholding threshold for an enterprise to be considered as a foreign invested enterprises.

2. Definition of "economic organization" under the Land Law

Issue

Under Article 103 of the Civil Code 2005, an economic organization includes State owned enterprises, co-operatives, limited liability companies, shareholding companies, foreign invested enterprise and other economic organizations satisfying all of the conditions provided in Article 84 of the Civil Code.

Under the Land Law, there is no definition of "economic organization". However, the words "economic organization" when used in the Land Law are unofficially interpreted to refer to a local enterprise only which is inconsistent with the Civil Code.

Recommendation

We recommend amending the Land Law to clearly provide that the term "economic organization" refers to "local enterprise".

Responses

The representative of the Ministry of Natural Resources and Environment replies that in the Land Law the term "economic organisation" actually only refers to local enterprises. However, the Land Law has not defined what an "economic organisation" is. Therefore, the Ministry of Natural

Resources and Environment agrees with the above recommendation and shall include it in the draft amendment of the Land Law.

3. Decree 71/2010/ND-CP ("Decree 71") - Investment Approval

Issue

Pursuant to Article 29.1(e) of the Investment Law, to implement a real estate/residential project, an investor must be issued an **Investment Certificate** outlining their business line(s) which include real estate development/investment.

Pursuant to Article 11.2, Article 46 and Article 47 of Decree 108/2006/ND-CP which provides guidance on implementation of the Investment Law ("**Decree 108**"), in order to obtain an Investment Certificate with the real estate business line, the investor must provide documents evidencing that they have met the condition(s) as stipulated in the Law on Real Estate Business and relevant guiding documents. Pursuant to Article 7 of Decree 71, such conditions include obtaining an **Investment Approval** from a competent authority.

Pursuant to Article 6.1(a) of Circular 16/2010/TT-BXD, to be issued an Investment Approval, the investor must have obtained a **Certificate of Recognition of Investor** in accordance with Article 12 of Decree 71.

However, pursuant to Article 12 of Decree 71, to be issued a Certificate of Recognition of Investor, the investor must have been issued an Investment Certificate outlining their business line(s) which include real estate development/investment.

Obviously, this circle of procedure and unnecessary requirements are impossible to be implemented in practice and have caused significant obstacles and delays to many residential projects.

Recommendation

We would propose that Article 7 and Article 12 of Decree 71 be amended so that the investor shall only have to go through an one-step procedure in order to qualify as meeting the conditions of real estate business line.

Responses

The representative of the Ministry of Construction will consider the above recommendation.

4. Land Compensation Payable for Recovery of Leased Land

Issue

Under Article 42(1) of the Land Law, the general rule is that a land user subject to land recovery by the State shall be entitled to compensation except in certain specified cases. For the exceptions a distinction is made between a land user allocated land and a land user with a lease as set out in Articles 43(1)(d) and (dd).

Article 43(1)(d) & (dd) of Land Law

"The State shall recover land without payment of compensation in the following circumstances:

...

(d) Land which has been allocated by the State with collection of land use fees, or in respect of which use rights are assigned and the land use fees or payment for assignment of land use rights are paid from the State Budget;

(dd) Land leased from the State..."

Under sub-clause (d), if land has been allocated by the State with the payment of land use fees from the State budget the land user will not be entitled to compensation. By definition, this sub-clause means that if the land user has been allocated land by the State without the payment of land use fees from the State budget then that land user will be entitled to compensation. In contrast under sub-clause (dd) if land is leased from the State no compensation is payable.

If the land rental is paid in advance in a lump sum the amount is generally the same as the land use fees as if the land had been allocated. It therefore seems unfair for compensation not to be payable if land is leased from the State and the land rental paid in advance in a lump sum.

Recommendation

We recommend amending Article 43(1)(dd) of the Land Law so that compensation shall be payable to land users of leased land where the rental is paid in advance as a lump sum.

Responses

The representative of the Ministry of Natural Resources and Environment agrees with the above recommendation and shall include it in the draft amendment of the Land Law.

5. Industrial Zone Land - Subsequent Investors

Issue

Article 90(3) of the Land Law provides that the State shall allocate or lease land to a developer of an industrial zone. Thereafter Article 90(4) sets out how subsequent investors in the industrial zone may acquire their interest.

Article 90.4 of the Land Law

"Economic organizations, family households and individuals investing in business or production in industrial zones shall be entitled to select from the forms of allocation of land with collection of land use fees or lease of land from the State...;

Vietnamese residing overseas investing in business or production in industrial zones shall be entitled to select from the forms of allocation of land with collection of land use fees, lease of land from the State with one off payment of rent for the entire term of the lease or with payment of annual rent...;

Foreign organizations and individuals investing in business or production in industrial zones shall be entitled to select from the forms of lease of land from the State with one-off payment of rent for the entire term of the lease or with payment of annual rent..."

The underlined wording in Article 90(4) provides that investors in industrial zones may choose to be allocated or lease land from the State. This, however, conflicts with Article 90(3) which provides for allocation or lease to the initial developer. If the land has initially been allocated or leased to the original developer it cannot then be allocated or leased by the State to subsequent investors in the industrial zone. This interpretation is confirmed in Circular 01/2005/TT-BTNMT providing guidance on Decree 181 Guidelines on Implementation of Land Law which states that investors in industrial zones may assign, lease or sublease directly from the developer only and not from the State.

The inconsistency between Article 90(3) and Article 90(4) may result in a lack of clarity and cause difficulties in the interpretation and implementation of Articles 90(3) and 90(4).

Recommendation

We recommend amending the Land Law by deleting the provisions in Article 90(4) we have underlined so that there is no further reference to an investor in an industrial zone having the right to choose to receive an allocation or lease of land from the State.

Responses

The representative of the Ministry of Natural Resources and Environment clarifies that there is no inconsistency between Article 90(3) and Article 90(4) as presently there are two ways for investment in development of industrial zones. First, land fund developers of the State shall develop the industrial infrastructure and in this case the State shall lease out or allocate land with infrastructure to investors in the industrial zone. Secondly, private developers shall develop the industrial infrastructure and investors investing in the industrial zone shall accept assignment, lease or sub-lease land with infrastructure from the industrial zone infrastructure developers.

However, the representative of the Ministry of Natural Resources and Environment also agrees that the current provisions in Articles 90(3) and 90(4) are unclear and cause difficulties in interpretation and implementation of such Articles. Therefore, the Ministry of Natural Resources and Environment shall consider amending Articles 90(3) and 90(4) to clarify these provisions.

6. Land Dispute Resolution Process

Issue

Pursuant to Articles 135 and 136 of the Land Law, disputes relating to land must first be submitted to the relevant commune or ward or township People's Committee for conciliation. If one party disagrees with the result the dispute may then be referred to a court or the provincial/district People's Committee (depending on the type of case) for final resolution.

The result of the initial conciliation by the commune or ward or township People's Committee must be minuted and signed by the parties to the dispute. In practice, however, there may be instances where one of the parties does not co-operate and does not attend the conciliation session. This means there is no minuted decision to use as the basis for referring the dispute to a court or the provincial/district People's Committee for resolution. However, the law does not set out a procedure for such a situation.

Recommendation

We recommend amending the Land Law so that there is a clear mechanism for taking matters forward in the case where one party does not co-operate. Such a mechanism could be that where a party to a dispute fails to attend the conciliation session (having been served notice twice) the conciliation process shall be regarded as unsuccessful and the participating party (ies) may then refer the dispute to a court or the provincial/district People's Committee for settlement. This would be regardless of the absence of the non-participating party's signature to the minutes of the conciliation.

Responses

The representative of the Ministry of Natural Resources and Environment agrees with such recommendation and shall include it in the draft amendment of the Land Law.

7. Priority of Use of Land Upon Termination of Capital Contribution

Issue

Article 131(4) of the Land Law sets out the procedures for the cancellation of the registration of a capital contribution to a joint venture of a land use right.

Article 131(4)(a)

"..If the land use term has expired or if the party which made the capital contribution does not have a requirement to continue to use the land, the State shall permit the joint venture enterprise to continue to lease the land; if the joint venture enterprise terminates its operation, the State shall recover the land.

With this provision, it is unclear what happens in the situation where the land use term has expired and the party which made the capital contribution has a requirement to continue to use the land and, in such case, whose interest will prevail.

Recommendation

We recommend amending Article 131.4(a) by substituting the words "*and*" for the word "*or*" so that in the situation where the term has expired and the contributor no longer requires the land the procedure for continued use by the joint venture is clear. With the addition of such wording it will also mean that where the contributor does wish to continue to use the land its interest will prevail over the joint venture.

Responses

The representative of the Ministry of Natural Resources and Environment explains that the Land Law provides two ways of capital contribution by the land use right: first, capital contribution of land use right not forming a new legal entity and secondly, capital contribution forming a new legal entity; and Article 131.4(a) provides for both. The above recommendation is consistent with the second option but not the first. However, the representative of the Ministry of Natural Resources and Environment also agrees that the current provisions in Articles 134.1(a) are unclear and causes difficulties in the interpretation and implementation of such Article. Therefore, the Ministry of Natural Resources and Environment shall consider amending Article 134.1(a) to clarify this provision.

8. Restrictions on Foreign Investors Leasing Land from Households and Individuals**Issue**

Article 93(3) of the Land Law sets out the situations in which land on which production and business facilities are built can be leased. It makes a distinction between foreign investors and Vietnamese investors and prohibits foreign investors from leasing from households and individuals.

Article 93(3)

"Economic organizations, family households and individuals and Vietnamese residing overseas using land for construction of business or production facilities shall be entitled to select from the forms of allocation of land with collection of land use fees or lease of land from the State; lease or sublease of land from other economic organizations, family households, individuals and Vietnamese residing overseas; sub-lease of land attached to infrastructure from foreign organizations and individuals.

Foreign organizations and individuals using land for construction of business or production facilities shall be entitled to select from the forms of lease of land from the State with one-off payment of rent for the entire term of the lease or with payment of annual rent; lease or sub-lease of land from economic organizations and Vietnamese residing overseas; and sublease of land attached to infrastructure from other foreign organizations and individuals.

The second paragraph of Article 93(3) dealing with foreign investors is in contrast to the first paragraph which concerns Vietnamese entities. Under this second paragraph there is no right for a foreign investor to lease or sub-lease land from households or individuals.

Recommendation

We recommend amending the Land Law to allow the foreign investors to lease or sub-lease land from households or individuals because, as an every day civil transaction, there do not appear to be grounds for prohibition.

Responses

The representative of the Ministry of Natural Resources and Environment agrees with the above recommendation and shall include it in the draft amendment of the Land Law.

9. Mortgage of Land Use Right

Issues

There are restrictions on the circumstances in which land may be mortgaged:

(a) Vietnamese Households and Individuals

Currently under Article 113(7) of the Land Law households and individuals are restricted to mortgaging land for borrowing for production or business purposes only.

Article 113(7) of the Land Law:

"Family households and individuals using land which is not leased land shall have the following rights and obligations:

(7) *To mortgage or guarantee using the land use right with credit institutions authorized to operate in Vietnam or with a domestic economic organization or individual in order to borrow for production or business"*

However, a household or individual may wish to borrow for non-business reasons.

(b) Vietnamese Entities, Vietnamese residing overseas and foreign organizations and individuals.

Under Article 110(2) and Article 119(3)(d) of the Land Law, Vietnamese entities, Vietnamese organisations residing overseas and foreign organisations and individuals are only entitled to mortgage land use rights to a credit institution.

Article 110(2)

"Economic organizations to which the State allocates land...shall have the following rights ...:

..

(d) *To mortgage or guarantee using the land use right and assets owned by them attached to the land with credit institutions authorized to operate in Vietnam in order to borrow in accordance with the law."*

Article 119(3)(d)

"Vietnamese residing overseas and foreign organizations and individuals investing in Vietnam and being leased land by the State of Vietnam with one-off payment of rent for the entire term of the lease shall have the following rights:

..

(d) *To mortgage or guarantee using the land use right and the assets owned by them attached to the land with credit institutions authorized to operate in Vietnam during the term of the land lease.*

However, entities may wish to offer mortgages for reasons other than raising finance such as in order to be able to offer security for compliance with their contractual obligations.

Moreover, the offshore lenders cannot take a mortgage over a land use right and assets attached to the land. The land use right and assets attached to the land can only be mortgaged to onshore lenders. These provisions restrict a developer's ability to raise finance.

Recommendations

We recommend amending the Land Law as follows:

(a) Vietnamese Households and Individuals

The purposes for which Vietnamese households and individuals can mortgage land should be broadened to also include non-business purposes. This reflects the reality that households or individuals are likely to want to borrow for non-business purposes such as financing lifestyle, study abroad, construction or upgrading their home rather than business purposes. If there are concerns about households and individuals over-borrowing then restrictions can be placed in other ways, such as restricting the size of a mortgage an individual can take out.

(b) Vietnamese Entities, Vietnamese residing overseas and foreign organizations and individuals.

Economic organizations or Vietnamese residing overseas or foreign organizations and individuals should be permitted to mortgage land use rights to a domestic economic organization or individual and not just a credit institution. This creates a more flexible investment mechanism and reflects the reality that such a land user may wish to mortgage its land use right to an entity other than a credit institution. e.g. to act as security in a business arrangement where, for example, an entity wishes to mortgage its land use right to another domestic economic organization to provide that domestic entity with security that the entity will perform its contractual obligations.

(c) the land use right and assets attached to land can be mortgaged to offshore lenders. Any power of sale by that offshore lender may be exercised in favour of only persons under Vietnamese law eligible to receive such land use right and assets attached to land.

Responses

The representative of the Ministry of Natural Resources and Environment agrees with the above recommendation and explains that the Ministry has included the same in a Report on 11 points to be amended in the Land Law.

10. Land Compensation Deduction of Local Enterprises without involvement of the State

Issue

Under Article 28 of Decree 84/2007/ND-CP dated 25 May 2007 ("**Decree 84**"), where the investor receives an assignment of a land use right in order to implement an investment project and the land must be converted to be consistent with the land use zoning then after receipt of the assignment, the sum paid by the investor for the assignment shall be deducted from the land use fees on conversion of land or shall be deemed to be land rental which the investor has paid in advance to the State. The sum actually paid by the investor for the assignment of the land use right shall be accounted for as investment project expenses of the investor.

However, under Article 2.2 of Circular 93/2011/TT-BTC dated 29 June 2011 of the Ministry of Finance, the investor is not allowed to subtract but must pay land use levies based on the

difference between the land prices according to the new and old use purposes at the time of the change.

Recommendation

We would recommend amending the legislation so that the compensation of projects without involvement of the State for compensation and ground clearance shall be treated the same as for projects involving the State.

In particular, land use fees may be subtracted from advances for compensation, support, resettlement etc. If the advances paid are higher than the payable land use levies, only the amount equal to the land use levy may be subtracted. The remainder shall be a project investment expense.

It is also recommended that land use fees and compensation and clearance fees shall be calculated in the same manner e.g. based on the land price issued by the People's Committee of Province or market price.

Responses

The representative of the Ministry of Natural Resources and Environment replies that, in reality, for development of real estate projects, domestic investors would usually accept assignment of agriculture land then perform the procedures for converting the land use purpose to the purpose of the projects. As this is a project for which the State shall not approve the compensation plan and the investor shall accept assignment or reach an agreement on compensation with the land user, the land price shall be higher than the real price of agriculture land; therefore, both the land prices for the old land use purpose and the new land use purpose must be agreed upon by the provincial People's Committee. On this ground, Circular 93 has made the regulations on paying the difference between the land prices for old purpose and new purpose. In light of the above recommendations, the Ministry shall consider further.

11. Capital Contribution by the Rights in respect of Real Estate and the Rights to develop Project on Land

Issue

Under Article 2.1 of Decree 108, investment capital include the rights in respect of real estate comprising leasing rights, transfer rights, contribution rights, pledge rights or mortgage rights. In practice, we have been aware of a number of investment projects where the local partners are permitted to contribute "rights to develop projects on land" as capital contribution.

From a solely legal point of view, it is unclear the rights in respect of real estate or the "right to develop projects on land" are "assets attached to the land". There is lack of clarity under the Land Law on the contribution of these rights.

Recommendation

We recommend amending the Land Law to define the assets attached to the land to include the rights in respect of real estate and rights to develop projects on land and allow an investor to contribute these rights as capital contribution as set out in Decree 108.

Responses

The representative of the Ministry of Natural Resources and Environment states that the investors' contribution of the rights in respect of real estate and rights to develop projects on land is inconsistent with the spirit and the provisions of the Land Law and therefore is not legally recognized under this Law. The representative of the Ministry of Department of Planning and Investment thinks that this may be regarded as quite similar to enterprises' know-how and this

Ministry shall study and amend the Investment Law (if deemed necessary) to record the above rights of the investors.

12. Land Rental Tariffs

Issue

Pursuant to Circular No.94/2011/TT-BTC dated 15 August 2011 of the Ministry of Finance ("**Circular 94**"), annual land rental will be equal to 1.5% of the stipulated land price published by the relevant provincial People's Committee. In certain cases (e.g. land in urban areas, commercial hubs, that yield special profits or offer "outstanding advantage"), a higher rate will be applied but not exceed 3%. Without guidance on "special profits" and "outstanding advantages", the above stipulations leave a significant discretion for the local authorities to determine the land rental tariff.

Recommendation

We recommend further guidance needs to be provided regarding specific cases where a local authority may impose a rate which is higher than 1.5%.

Responses

The representative of the Ministry of Natural Resources and Environment states that the above terms are of a formative nature and not expressly and specifically quantitative. However, in reality, valuation organisations know quite well how to proceed with the valuation. The Ministry shall formulate more appropriate and more specific criteria and principles for price valuation to support local authorities in calculating prices which are higher than 1.5% mentioned in the above recommendation.

13. Land Use Form of the Foreign Invested Enterprise

Issue

Under the Land Law, the rights and obligations of land users in Article 110 and Article 119.3 being (i) a foreign invested enterprise paying land rental by way of a lump sum or (ii) a local enterprise allocated the land are almost the same in substance.

Further, under Article 13 of Decree 69/2009/ND-CP dated 13 August 2009 of the Government ("**Decree 69**"):

"where a person leasing land from the State makes one payment of land rental for the entire rental term, the amount of land rental payable in one payment for land use in this case shall be calculated as equal to the amount of land use fee payable for the case of land allocation with land use fee for the same land use purpose and of the same land use term"

However, regarding the term of land use, only the local investor or overseas Vietnamese is entitled to receive stable and long term (in the circumstances set out in Article 66 of the Land Law). The foreign invested enterprise (other than land for the development of residential project which may be granted for a term of 70 years and extended several times without additional payment of land rental) is only granted a land use right with a definite term.

Recommendation

We recommend amending the Land Law so that the foreign investor can choose to lease the land or to be allocated the land with the land use term the same as local investor.

Responses

The representative of the Ministry of Natural Resources and Environment agrees with the above recommendation and considers seriously to remove any difference between domestic and foreign investors in respect of land use. Specifically, the State shall allocate land to stable and long-term land users and shall lease land to other kinds of land users.

ISSUES RAISED IN THE PAST WHICH ARE STILL PENDING**14. Land Compensation - Land Use Right Certificate****Issue**

In respect of local developers, for small projects they are already negotiating directly with land users to clear land. In respect of larger projects, the compensation process as set out in Decree No. 84 in which the Government via the local People's Committee approves the compensation plan and carries out compensation is appropriate.

Foreign investors who carry out a project on a wholly owned basis are disadvantaged compared to a local developer after the land is cleared or negotiation with land user to clear land is completed because they cannot pay such land user compensation immediately. They have to go through 2 additional steps in order to acquire the land (they have to negotiate a land lease with the State and have to apply for an Investment Certificate). Since it could take from 6 months to a year to obtain an Investment Certificate, it is unlikely the land user will wait that long to receive payment via compensation for the land.

In today's economic condition where there is a lack of available credit, Vietnamese developers are increasingly inviting foreign developers to co-invest in not only new projects but also existing projects. Foreign developers are keen to assist in this manner but find it difficult to commit funds to any project without any certainty or security in respect of land use rights. This continues to be a hindrance to the participation of foreign investors in projects ranging from large township projects to single building developments.

Recommendation

We propose that the foreign developers should not be required to go through the process of negotiating a land lease with the State (as with local developers) and that the land use right certificate should be issued to the foreign developers after compensation is paid in order to give foreign developers equal rights with the local developers to carry out real estate projects.

Responses

The representative of the Ministry of Natural Resources and Environment notes the above recommendation but additionally explains that this process is only applied to foreign investors leasing land directly from the State.

15. Right to 70 Years Leasing Term**Issue**

Pursuant to Article 32 of Decree 84, foreign developers undertaking investment projects for the construction of residential housing for sale or lease enjoy a lease term of 70 years with unlimited extensions, each extension not to exceed 70 years and the foreign investor shall not be required to pay rent for any extended duration. Foreign developers undertaking investment projects for construction of residential housing for sale or lease will be entitled to such right if they lease land from the State in the form of payment of a lump sum rent or participate in a State held land auction applicable to land for an investment project for

construction of residential housing for sale or lease.

As a direct result of such positive developments, investors are now investing in larger amounts and also undertaking more sophisticated development projects. These days, investors are looking at mixed use and township developments. In these kinds of development, however, there is a lack of clarity as to what qualifies as a "residential" project. There are no clear guidelines as to what constitutes a "residential" project which would qualify for this Decree 84 right to 70 year lease terms. We would suggest that a "residential" project in this case should not exclude developments that have a commercial or other non-residential component. It is in the interests of the country for developers to construct amenities and facilities which include commercial, retail and recreational components. It serves as a disincentive to developers to include such components if they would be deprived of a 70 year lease right simply because they have included such components.

Recommendation

We would propose that guidelines be issued which allow for all developers with a residential component, regardless of whether there are other non - residential components involved, to enjoy the benefits of the Decree 84 lease term of 70 years. We would also propose that the Decree 84 lease term of 70 years with unlimited extensions, each extension not to exceed 70 years without a requirement to pay rent for any extended duration is extended to non - residential development projects as well. In addition to the reasons set out above, this will create a consistent approach to property development in general and eliminate any confusion in granting such right.

Responses

The representative of the Ministry of Natural Resources and Environment notes the above recommendation. However, the Ministry further explains that the 70-year term stipulated in Article 32 of Decree 84 is just a temporary measure. The Ministry of Natural Resources and Environment and the Ministry of Construction shall in near future consider to make uniform amendment of both Article 32 of Decree 84 of the Housing Law and the Law on Real Estate Business to implement the 70-year term to all types of real estate development.

16. New Urban Zone Projects - Assignment and Sub-Lease of Land

Issue

Pursuant to Article 12(1)(e) of the Regulations issued with Decree No 02/2006/ND-CP ("**Decree 02**") of the Government on New Urban Zones, an investor in a new urban zone has the right:

"to assign land use rights or to sub-lease land in compliance with the approved project and in accordance with the law on land".

Several developers have been licensed to invest in a new urban zone. Unfortunately, there are currently no implementing guidelines on the procedures to assign or sub-lease land. This has led to some confusion on what has to be done to fully exercise such right.

Recommendation

We would recommend detail guidance be issued on the procedures to assign and sub-lease the land from the first developer to the second developers e.g. whether the land assignment agreement or sub-leasing agreement must be notarized, whether the second developer who leases or sub-leases the land from the first developer can be issued with the land use right certificate.

Responses

The representative of the Ministry of Construction replies that at present new urban areas are still in good operation conditions and so far there is no complain from new urban area developers on this issue. However, the Ministry notes the recommendation and shall review the regulations on new urban area for amendment and supplementation of any unclear issues.

17. Land Pricing - Re-determination of Land Prices

Issue

Since the issuance of Decree No. 69 providing additional regulations on matters such as land use zoning, land prices, land recovery, compensation, assistance and resettlement, many investors have faced major difficulties in planning and implementing their investment projects. Specifically, the lack of transparency and certainty in the processes of re-determining land prices for the calculation of land use fees and land rental payable to the State leads to inability of developers to price their projects.

Article 11 of Decree 69:

"Where the State allocates land and collects land use fee not through an auction of land use right or puts into tender projects involving land use, land lease, approval of plans for compensation, assistance and resettlement upon land recovery by the State and where a State owned enterprise conducting equitization selects land allocation, and the land price decided by the provincial people's committee at the time of land allocation or land lease, the time the land recovery is decided or the time of calculating the land price as part of the value of the equitized enterprise is not close to the actual land use right assignment price in the market in normal conditions, the provincial people's committee shall, based on the actual land use right assignment price in the market, re-determine specific land prices as appropriate."

Essentially, Article 11 states that in certain situations where land prices set by provincial People's Committees at the time of allocation or leasing of the land, are less than the actual land use right assignment prices in normal market conditions, the provincial People's Committee will then re-determine the land prices based on the actual land use right assignment prices in the market.

The implementation of this provision is problematic as it may lead to lengthy delays, and place increased administrative burdens and regulatory uncertainty on property developers. Pursuant to Article 5 of Decree 188/2004/ND-CP dated 16 November 2004 (as amended by Decree 123/2007/ND-CP dated 27 July 2007 and Decree 69), the price of land determined by the State is already based on the actual market price, so it seems that such additional procedures are unnecessary and burdensome. Further, the current laws do not provide any objective parameters or a clear and transparent procedure for the calculation of the "market prices" but the figure shall be based on the sole discretion of the relevant authorities on a case by case basis. This will discourage property developers as it adds a further uncertainty as to costs of a property development project.

Recommendation

We would propose that this provision be removed. If this requirement cannot be removed, we would propose that a reasonable set of parameters should be provided to ensure that payments to be made are reasonable. For example, consider specifying that prices will only adjusted where there is a gross miscalculation in terms of the price list or set a maximum deviation of a certain percentage of the prices in the price list.

Responses

The representative of the Ministry of Natural Resources and Environment states that the provisions in Decree No. 69 are just a provisional solution and the State's present price valuation fails to meet the market price. The Ministry commented that currently there are 3 land price mechanism (one issued by the Government, one issued by the provincial People's Committee and one is the specific price of land) as stipulated by the applicable law which appears to be insufficient to deal with this as land prices vary greatly in different geographical regions. The representative further commented some other countries value land price by two methods, namely the general valuation method and the specific valuation method. The general valuation method is for formulating land price for several regions. When specific land prices are available for several regions using the general valuation method, the specific valuation of land price for each land plot appears to be easier. In the future, the Ministry shall consider how to formulate land price mechanism which are more specific, transparent and clearer.

18. Land Compensation Deduction of Vietnamese Overseas and Foreign Invested Enterprise without involvement of the State

Issue

Under Clause 3, Part II of Circular 141/2007/TT-BTC dated 30 November 2007 ("**Circular 141**"), developers who lease land from the State and have paid money for compensation and clearance, including those who reached agreement with the land users directly, were entitled to deduct such payments from land rental payable by the developers to the State.

Clause 3 of Circular 141 was repealed by Article 8(2) of Circular 94 which only allows for a deduction where the compensation and clearance was conducted pursuant to an approved plan only.

There is now no legal framework for the deduction of expenses paid for land compensation and clearance where the developer (being overseas Vietnamese or foreign invested enterprise) directly negotiates and reaches agreement with the land users with the State not being involved in the compensation agreement process.

This distinction between State organised and privately negotiated compensation and clearance processes is artificial because the law recognises the right of such developers to directly negotiate with land users.

Recommendation

We would recommend that Circular 94 be amended so that all compensation payments should be available for deduction against any payments due to the State for the use of land however the compensation process is conducted.

Responses

The representative of the Ministry of Natural Resources and Environment replies that the above payments shall be deducted when the State authorities approve amount for compensation and site clearance.

19. Conversion of Form of Land Use

Issue

As set out in Article 3.6 of the Law on Investment, enterprises with foreign owned capital or foreign invested enterprises comprise the following:

- (a) any enterprises established by a foreign investor in order to carry out investment activities in Vietnam; or
- (b) a local enterprise in which the foreign investor(s) purchase(s) shares or merge(s) with.

This provision does not mention any percentage threshold of foreign shareholding in the local enterprise in which the foreign investor acquires an interest. This is an issue because under Article 108 of the Land Law, the procedure for domestic enterprises and foreign invested enterprises to acquire land is different. In particular:

- (a) foreign invested enterprises or enterprises with foreign owned capital shall only be entitled to select the form of land leased from the State with payment of a lump sum rent for the entire term of lease or with payment of annual rent; and
- (b) in the case where land to a local enterprise was allocated from the State and the foreign investor acquire a stake in that company, whether the company is required to sign a land lease and to amend the form/status of the land in the land use right certificate from being "land allocated from the State" to "land leased from State" accordingly;
- (c) in the case where land of a foreign invested enterprise was leased from the State with payment of a lump sum rent for the entire term of lease and the local investor acquires 100% stake whether the company is required to amend the form/status of the land in the land use right certificate from being a "land leased from State" to a "land allocated from State"; and
- (d) the procedural processes involved.

Recommendation

We would suggest that clear guidance on the following issues be provided:

- (a) the level of foreign shareholding which causes a domestic enterprise to become a foreign invested enterprise;
- (b) in the case where land was not leased from the State, whether the enterprise on becoming a foreign invested enterprise is required to sign a land lease and to amend the form/status of the land in the land use rights certificate from being "land allocated from State" to a "land leased from State" accordingly; and
- (c) the procedural processes involved.

Responses

The representative of the Ministry of Planning and Investment is of the view that when enterprises are converted into foreign invested enterprises or domestic enterprises, the form of land use must also be converted accordingly.

The representative of the Ministry of Natural Resources and Environment replies that Decree No. 84 mentions that only in the case of the foreign party in a joint venture acquiring all the capital share of Vietnamese Party shall the land use form be converted into the land lease form; in other cases, land use form conversion is not required.

However, the Ministries also note the above recommendations and shall consider for amendment to make the provisions more appropriate and clearer.

20. Water Surface Areas

Issue

As stipulated in Articles 78, 79 and 80 of the Land Law, inland water surface, coastal land with water surface and riverside and coastal alluvial land may only be used for agricultural, forestry, aquaculture and salt mining purposes. However, investors in reality may need to use these kinds

of land for purposes other than those above, i.e. for a marina, eco-resort or other recreational, commercial and residential use. The lack of a complete legal framework governing the use of such land for other purposes makes it difficult for investors to plan developments on such land.

Recommendation

We recommend amending the Land Law by supplementing the legal framework on use of water surfaces to include all a wider variety of purposes including for commercial and residential use.

Responses

The representative of the Ministry of Natural Resources and Environment replies that this issue has been included the same in a Report on 11 points to be amended in the Land Law.

21. Partial Assignment of Projects not in a New Urban Zone Development

Issue

Article 6.2 of Decree 02 provides regulations on new urban zones which permits the primary investor of a new urban zone project to call upon a secondary level investor to invest in the construction works of that project by assigning part of the project to a secondary level investor only when the technical infrastructure works have been completed by the primary investor. The secondary level investor will then undertake to implement the remaining works in accordance with the approved plan of the project. Please note that Decree 02 only addresses projects in new urban zone developments.

Pursuant to Article 24 of Decree 84 and Part V of Circular 14/2008/TTLT-BTC- BTNMT dated 31 January 2008, economic organisations being joint venture between a domestic investor and a foreign investor or wholly-foreign-invested economic organisations may take a transfer of land being used for such a project (entirely or partially) from a domestic economic organisation in the following circumstances:

- (a) for investment in the infrastructure of an industrial zone, an export processing zone or a concentration business zone;
- (b) for investment in an economic zone or a high-technology zone;
- (c) for investment in the infrastructure in an urban area or a rural population area;
- (d) for investment for manufacture and business; and
- (e) for investment for construction and commercial operations of residential housing for which construction of infrastructure for common use has been completed.

Decree 84 also stipulates that such transfer shall be carried out in accordance with the legislation on real estate business. However, to date Decree 153/2007/ND-CP dated 15 October 2007 ("**Decree 153**") and the documents guiding the implementation of the Law on Real Estate Business only stipulate and provide guidance on the procedures for transfer of entire projects of new urban areas, residential houses or technical infrastructure in an industrial zone from existing investors (including domestic and foreign-invested companies) to new investors (including domestic and foreign-invested companies).

There is no legal framework governing other transfers as specified in Article 24 of Decree 84 meaning it is currently problematic to implement all the provisions on project transfer contained in Article 24 of Decree 84.

Recommendation

We recommend filling the current gaps in the law and issuing detailed regulations for all transfers provided for in Article 24 of Decree 84. This will reduce the number of projects which have been licensed but are unable to proceed through lack of guidance.

Responses

The representative of the Ministry of Construction notes the above recommendation and shall study for consistent amendment. Regarding transfer of a part of a project, the Ministry explains that this is not allowed for many reasons, such as: the desire to prevent projects from being split into several small projects, prevent land speculation.

22. Restrictions on Foreign Organisations and Individuals - Law on Real Estate Business

Issue

As stipulated in Articles 9 and 10 of the Law on Real Estate Business, foreign organisations and individuals may not conduct the following activities:

- (a) Purchasing houses or construction facilities for sale, lease, hire-purchase;
- (b) Leasing houses or construction facilities for sublease;
- (c) Investing in improvement of land and investing in infrastructure on the leased land for lease out of land with attached infrastructure; and
- (d) Assuming transfer of land use right, investing in infrastructure for transfer or lease out of the same; leasing land use right in respect of land with attached infrastructure for sublease.

By limiting the activities of foreign organisations and individuals the access to much needed funds for the development of the real estate sector in Vietnam is restricted. Further, despite Articles 9 and 10 governing real estate business, foreign-invested enterprises operating in Vietnam which need to purchase an office, commercial space or construction facilities for their own use are also restricted from doing so, despite the purpose being for their own use and not for real-estate business.

Recommendation

We recommend providing access to alternative sources of funding by removing the restrictions on foreign organisations and individuals set out above. We would also recommend providing a legal framework and clear guidelines permitting foreign-invested enterprises to purchase office, commercial space and construction facilities for their own use.

Responses

The representative of the Ministry of Construction notes the above recommendation and shall consider further this issue.

23. Restrictions on Non-Resident Foreign Organisations and Individuals in Purchasing or Leasing Property

Issue

Article 131 of the Law on Residential Housing provides that only foreign organizations and individuals allowed to enter Vietnam for the period of at least three months may lease residential property in Vietnam.

Further, Article 2 of Resolution 19/2008/NQ-QH12 dated 3 June 2008 provides that only foreign organizations and individuals within the following categories shall be permitted to purchase and own residential property in Vietnam:

- (a) A foreign individual with a direct investment in Vietnam in accordance with the law on investment, or who is hired by an enterprise currently operating in Vietnam in accordance

- with the law on enterprises (including both domestic enterprises and enterprises with foreign owned capital) to hold a managerial position in such enterprise;
- (b) A foreign individual whose contribution to Vietnam has been rewarded with a decoration or medal from the President of the Socialist Republic of Vietnam; and a foreign individual who has made a special contribution to Vietnam as stipulated in a decision of the Prime Minister of the Government;
 - (c) A foreign individual currently working in the socio-economic sector with a university or higher equivalent qualification and [being] a person with special technical knowledge [and/or] technical skills which Vietnam requires;
 - (d) A foreign individual married to a Vietnamese citizen; or
 - (e) An enterprise with foreign owned capital currently operating in Vietnam not conducting real property business and which has a need for residential housing for people working at such enterprise.

The above provisions do not permit non-resident foreign companies and individuals from purchasing and/or leasing property in Vietnam. Further, resident foreign organisations and individuals may only purchase one apartment unit.

Recommendation

We would recommend allowing all resident and non-resident foreign organisations and individuals to purchase and lease all types of property ranging from residential, commercial, office and industrial in Vietnam. This will again, provide access to alternative sources of funding and generate interest in the real estate sector which will benefit Vietnam greatly.

Responses

The representative of the Ministry of Construction notes the above recommendation and shall consider further this issue.

24. Private Areas in Apartment Buildings

Issue

Common areas and private areas in apartment buildings is a key topic for project developers, specifically with regards to parking space/area and ownership of such a space/area.

The use of and evidence of ownership of parking space/area in apartment buildings is currently governed under the Law on Residential Housing and its guiding legislation. Article 49.2(c) of Decree 71 provides that car parking spaces may either be under the common ownership of the apartment users or under the private ownership of the apartment user as determined by the developer of the apartment buildings.

Article 49.2(c) of Decree 71 further stipulates that parking space/area used for motorcycles, bicycles and vehicles for the disabled shall also be under the common ownership of the apartment users.

Recommendation

We would propose that the option of private or common ownership be extended to all parts of the development except for general amenities e.g. parking spaces for vehicles for the disabled. This means that the parking space/area for motorcycles and bicycles could be treated as private areas as well. This can be agreed between the developer and the apartment owners to ensure that the rights and obligations of all parties are fully realised.

A further issue arises as to how private ownership will be recorded when the developer determines that such areas will be private areas. The law does not current set out the actual mechanism in respect of this and currently it is not known whether an ownership certificate can be issued specifically for such private areas (including parking space/area). We would propose that guidelines be issued to clearly provide that separate ownership certificates be issued for such private areas.

Responses

The representative of the Ministry of Construction notes the recommendations and agrees that the above are quite controversial issues in practice. In the upcoming time, the Ministry shall consider drafting the Law on Condominiums to provide in more detail issues of condominium.