

REPORT OF LAND SUB-WORKING GROUP

*Presented by
Mr. David Lim
Head of Land Sub-Working Group*

I. INTRODUCTION

The new legislations have promulgated to facilitate the real estate market, including the Law on Real Estate Business 2014 (“**LREB**”) and the Law on Residential Housing 2014 (“**LRH**”) which all are effective as from 1 July 2015. Further, Decree No. 76/2015/ND-CP guiding the LREB (“**Decree 76/2015**”) and Decree No. 99/2015/ND-CP guiding LRH (“**Decree 99/2015**”) were officially issued on 10 September 2015 and 20 October 2015 respectively; together with issuance of the long-awaited Decree No. 01/2017/ND-CP (“**Decree 01/2017**”) amending three decrees guiding the law on land 2013 (“**Land Law**”) on 6 January 2017.

These new legislations have brought more investments to the real estate industry by reducing barriers for investment and effectively widening accessibility to properties in Vietnam. Notwithstanding that, there are still existing issues which make the implementation of the new legislations complicated and restrict competitiveness in the real estate industry.

Firstly, under the LRH and its guidance, the delay in issuing required documents have resulted in the delay in the implementation of the new provisions.

Secondly, there are uncertainties and ambiguity in overlapping concepts or definitions used in the legislations which affect the real estate industry. These inconsistencies lead to confusion and lack of confidence in the industry.

At the same time, there are also complicated approvals and licenses imposed by different legislations which result in further confusion in the implementation of the laws. In light of the VBF Midterm Meeting 2017 organised by the Vietnam Business Forum, we would like to highlight the above issues in respect of the implementation of the relevant laws and our recommendations to address such issues.

II. ISSUES

1. Delay in issuance of land use right certificate (“**LURC**”) for foreigners

The first issue relates to delays in fulfilling the implementation steps thereby affecting the issuance of LURC for foreigners purchasing residential housing in Vietnam.

Under Article 75 of Decree 99/2015, the Ministry of Defence and the Ministry of Public Security must send a written notice on the areas required for national defence and security in each locality to the relevant provincial People's Committee. The provincial People's Committee will then instruct the provincial Department of Construction to issue a list of residential housing developments where foreigners are not permitted to own residential housing (“**Foreign Ownership Prohibited Projects List**”).

As far as we are aware, the provincial Department of Construction has not issued the Foreign Ownership Prohibited Projects List. It is unclear at the moment what is holding back the issuance of such list. Due to the absence of such Foreign Ownership Prohibited Projects List, the provincial Department of Natural Resources and Environment delays the issuance of the LURCs for foreigners who signed residential housing purchase contracts. This delay has caused confusion for buyers and developers in terms of investment in the Vietnamese real estate market.

Recommendation: We propose that the Foreign Ownership Prohibited Projects List should be issued as soon as practicable so that the foreigners purchasing residential housing in Vietnam can obtain the LURCs in their name.

2. Definition of “foreign invested enterprise”

Secondly, there are uncertainties about the understanding of “foreign invested enterprise” between the current Law on Investment 2014 (“**LOI**”), the LREB and the Land Law.

Under the LREB and Decree 76/2015, currently, no definition of “foreign invested enterprise” is provided. Further, the Land Law provides that the foreign invested enterprise includes joint venture enterprises, 100% foreign invested enterprises and Vietnamese enterprises which foreign investors purchase shares, merge or acquire under laws on investment with no specific guidance on foreign ownership percentage. Under the LOI, an economic organisation with foreign investment capital means an economic organisation with a foreign investor being a member or shareholder, and investment conditions and procedures shall be applied to enterprises with foreign ownership of 51% or more. It is therefore arguable that enterprises with less than 51% of foreign ownership can be treated as local investors. In the absence of the definition, it follows that a foreign invested enterprise under the LREB and Decree 76/2015 can be understood to be real estate business enterprises with foreign shareholding of 51% or more.

Further, according to the LREB, there is a clear difference in treatment between foreign invested and domestic enterprises in conducting real estate business such as (i) foreign invested enterprise are not permitted to transfer the land use right in form of division of land into plots or purchase houses and buildings to sell, lease or offer a lease purchase, and (ii) foreign invested enterprise are permitted to collect up to only 50% of the value of the contract for sale and purchase or lease-purchase of real estate to be formed in the future whereas the applicable percentage to domestic enterprises is 70%.

Document No. 386/BXD-QLN dated 28 February 2017 (“**Document 386**”) issued by the Ministry of Construction (“**MOC**”) states that it is not necessary for the LREB to provide the provisions relating to foreign invested enterprise as the LOI has already provided the same. However, as mentioned above, there is uncertainty on the definition of “foreign invested enterprise” which is disruptive and causes uncertainty in the real estate sector. Further, as there are restrictions between foreign invested enterprises and domestic enterprises, a clear definition is required.

Recommendation: We would recommend that there should be a decree or circular to clarify that the 51% principle under the LOI above should also apply to all the relevant laws, e.g. the Land Law and LREB, i.e. real estate business enterprises with foreign ownership of less than 51% should be treated as domestic enterprises.

Further, we also recommend that, in the near future, any difference in treatment between foreign invested enterprises and domestic enterprises should be removed to ensure a fair and level playing field for all in the real estate sector in Vietnam.

3. Restrictions on sources of capital

The next issue is that we would refer to the restriction of sources of capital for residential housing projects under the LRH. Under the old Law on Residential Housing 2005, developers of residential housing projects can raise capital from all legal sources in accordance with the laws. This provision provided flexibility to developers in raising capital for their projects. However, the LRH limits the sources of capital for residential housing by removing “other legal sources in accordance with the laws” from the list of sources of capital for residential housing. This means that residential housing developers are limited to obtain loan from offshore credit institutions and non-credit institutions. This reduces the ability of residential housing developers to raise capital effectively and directly affects the competitiveness of such developers. There is no need to limit the ability of residential housing developers to raise capital from legitimate sources. If there is a concern about the sources of capital, measures should be introduced to ensure that the sources are legitimate. A blanket restriction is not the most efficient way to deal with this issue.

This issue was acknowledged by the MOC in Document 386 with a comment that the MOC will propose this as an amendment to the LRH at the appropriate time. The concern is that it is unclear when the LRH will be amended and this restriction continues to limit the ability of developers to utilise the most effective means of funding.

Recommendation: We recommend that immediate action be taken to rectify this restriction. Ahead of an amendment to the LRH, there should be a decree or circular to clarify that residential housing developers have the right to raise capital from offshore credit institutions and non-credit institutions; and capital from other sources which are not prohibited by laws.

4. Change of land user in case of acquisition of shares/capital contribution

Moving forward, there is also uncertainty under Decree 01/2017 relating change of land user in case of shares/capital contribution. Article 2.27 of Decree 01/2017 provides that where there is any change in the land user in case of acquisition of shares/capital contribution in enterprises that includes the value of land use rights, such enterprises must perform the procedure for assigning the land use rights, or registering changes in the land and assets attached to such land. Since the land will still be considered an asset of the same enterprises where there is an acquisition of shares/capital contribution, the enterprises need not perform the procedure for land use right assignment as there is no change in the ownership of the land. Further, if the enterprise performs the procedure to assign the land use right, there may be financial obligations imposed on the enterprises. This requirement is not necessary as it may cause difficulty to investors when they acquire shares/capital contribution in enterprises.

Recommendation: We suggest issuance of clarification that no change of land user has occurred in case of acquisition of shares/capital contribution.

5. Investment approvals

The last issue that I would like to highlight is the uncertainties relating to the required approvals for residential developments.

Under the laws, in general, the main approval for residential developments is either an investment in-principle decision (“**IID**”) or investment in-principle approval (“**IIA**”). Further, a foreign investor which wishes to establish an enterprise in Vietnam is also required to obtain an investment registration certificate (“**IRC**”), which is the document recording information registered by the investor about an investment project.

The LOI provides that the IID is required for projects to which the State allocates or leases out land without auction, tendering or transfer whereas the LRH provides that residential developments that do not fall under the circumstances of requiring the IID will require the IIA. We note that there are some uncertainties relating to the IID and the IIA as follows:

- **Circumstances requiring an IID**

Article 32 of the LOI provides that the IID requirement only applies to projects where the developers receive land use right from the State directly by way of allocation or lease of land without auction, tendering or transfer. This is confusing as the Land Law strictly provides that the only way a developer can receive land from the State is either by way of allocation or lease of land, not by way of transfer. It is unclear under which circumstances a developer can receive land from the State by way of transfer.

Recommendation: We suggest issuance of clarification as to what circumstances a transfer of land is covered by allocation and lease by the State.

- **Investment approval for capital contribution by way of land use right**

Under the LRH, an IIA can only be obtained by enterprises incorporated in Vietnam. As it is unclear on the circumstances where an IID is required as mentioned above, it is arguable that the IIA will be required where there is a joint venture to develop a residential housing project between a foreign investor and a domestic investor. Further, the domestic investor will contribute capital by way of land use right as such the land is not directly allocated/leased by the State.

We note that capital contribution by way of land use right must be completed within 90 days as from the date of incorporation of an enterprise whereas the issuance of 1/500 planning approval (which is required as a condition to obtain the IIA) will take at least 80 days. Therefore, it is unlikely that the developer can obtain the IIA before the land use right must be contributed.

Under the Law on Construction 2014, generally, a developer must obtain a construction permit before it can commence its project. Further, it is arguable that an IIA is required to obtain the construction permit. Therefore, the developer will not be able to develop the project if it fails to obtain the IIA for whatever reason. As such, there may be circumstances where the developers have the right to use the land but cannot develop projects on such land. If the IID is required for capital contribution by way of land use right, it is unlikely that such circumstances will arise as the IID can be obtained before the land use right is contributed. As such, the foreign investor will have more assurance that it can develop the project after the land use right is contributed.

Recommendation: We suggest amending Article 32.1(a) of the LOI as follows: “*Projects which the investors use the land without auction, tendering or transfer; and projects with a requirement for conversion of the land use purpose*”. The IID should be required for projects in which investors receive land use right by way of capital contribution from third parties as opposed to the IIA requirement. This will mean that developers which receive land use right by way of capital contribution can proceed with an IID.

- **Overlapping investment approvals**

As mentioned above, apart from the requirements of IID/IIA, the LOI also provides that a foreign investor who wishes to establish an enterprise in Vietnam is required to obtain an IRC.

For projects which require the IID, the IRC will be issued automatically within 5 working days from the issuance of the IID. As the contents of the IID and IRC are similar and no additional document is required for issuance of the IRC, the IRC is not necessary if the IID has already been issued.

For projects which require the IIA, the foreign investor shall first obtain the IRC, set up an enterprise and then obtain the IIA later. As mentioned above, without the IIA, the developer will not be able to develop the project. Therefore, there may be cases where a foreign developer has already been set up in Vietnam but is not able to develop the project if it fails to obtain the IIA for whatever reason. Further, from the date of issuance of the IRC, the foreign investor shall go through various steps which may take at least 153 days to obtain the IIA as follows:

- Step 1: obtaining the IRC - 15 days;
- Step 2: obtaining an enterprise registration certificate – 3 working days;
- Step 3: obtaining a decision on selection of developer – at least 30 days;
- Step 4: obtaining the 1/500 planning approval – at least 80 days;
- Step 5: obtaining the IIA – at least 40 days.

As both the IRC and IIA deal with authorities’ approval for the project and the IIA is issued based on the 1/500 planning approval, it is unnecessary to require the foreign investor to obtain the IRC for projects which require the IIA.

Based on the above, the requirement of IRC for residential developments (which require either IID or IIA) should be removed to lessen the procedural burden for foreign investors.

Recommendation: We would recommend that the IRC will not be required for real estate projects which are required to obtain either the IID or the IIA.

III. CONCLUSION

The points I have highlighted limit the rights of real estate enterprises, hence affecting the competitiveness in the real estate industry. The restrictions, onerous contribution obligation provided in the legislations and the lack of necessary guidelines on implementation of the laws create hurdles for investors seeking to invest in the real estate sector in Vietnam. The impact of the new laws, although increasing competitiveness in the real estate industry, is still keeping the full

extent of foreign investment opportunities at bay. In view of the issues above and the Government's commitment to ensure growth in the real estate industry, it is crucial for clear and consistent guidelines to be provided to eliminate any complications or confusion to the investors and real estate buyers. The administrative procedures should also be simplified to expedite the process and onerous requirements should be removed to provide more flexibility to the investors. These changes are critical to ensure that Vietnam continues to remain competitive in the region.