

LAND SUB-WORKING GROUP POSITION PAPER

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A. INTRODUCTION

Since the new Law on Real Estate Business 2014 (“**LREB**”) and the Law on Residential Housing 2014 (“**LRH**”) took effect on 1 July 2015, interest and activity in the nation’s real estate market has grown. Decree No. 76/2015/ND-CP guiding the LREB was officially issued on 10 September 2015 (“**Decree 76**”), and Decree No. 99/2015/ND-CP guiding LRH was officially issued on 20 October 2015 (“**Decree 99**”). The new legislations have provided more opportunities in the real estate industry by clearing the initial barriers for foreign investment, and improvements in the real estate market can be seen. However, the needs of foreign investors in access to properties and development of business are still not fully met, and there are restrictions in place which could be lifted to ensure a more balanced and sustainable market.

In light of the theme “Strengthening The Private Sector” for the Annual Meeting 2016 organised by the Vietnam Business Forum, we set out our comments in respect of key provisions in the relevant laws which continues to restrict competitiveness in the real estate industry and our recommendations to address such issues.

B. ISSUES

1. Restrictions on sources of capital

Article 69 of the LRH and Article 19 of Decree 99 provide a list of sources of capital for residential housing projects. This list limits the sources of capital for residential housing developers. This reduces the ability of real estate developers to raise capital effectively and directly affects the competitiveness of such developers. There is no need to limit the ability of property developers from raising 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.

Recommendation: We suggest inserting the right to raise capital from offshore credit institutions and non-credit institutions; and capital from other sources which are not prohibited by laws.

2. Definition of Foreign Invested Enterprises

There is currently no guidance on “enterprise with foreign owned capital” provided under the LREB and Decree 76. The law on land 2013 (“**Land Law**”) defined foreign invested enterprises as joint venture enterprises and enterprises wholly or partly owned by a foreign company, with no specific guidance on foreign ownership percentage. Under the Law on Investment 2014, an economic organisation with foreign investment capital means an economic organisation with a foreign investor being a member or shareholder, and investment procedures shall be applied to enterprises with foreign ownership of 51% or more. It is unclear whether enterprises with less than 51% of foreign ownership can be regarded as local investors. Given the lack of guidance on the definition of enterprise with foreign owned capital and foreign invested enterprises under the LREB and the Land Law, it can be understood to include real estate enterprises with any foreign owned capital and not just enterprises with foreign shareholding of 51% or more. The uncertainty on this issue is disruptive towards foreign investment transactions. As there are

restrictions between foreign invested enterprises and domestic enterprises under the LREB, a clear definition is required to avoid any confusion on whom the restrictions are imposed on.

Recommendation: We would recommend that enterprises with foreign owned capital be defined clearly under guiding legislations of the LREB, or for the government to provide an instruction on this issue.

3. Limited Scope of Investment for Foreign Developers

- Firstly, according to Article 11 of the LREB, foreign developers are not permitted to transfer the land use right in form of division of land into plots for sale whereas Vietnamese real estate developers are permitted to do so.
- Secondly, according to Article 57 of the LREB, enterprises with foreign owned capital are permitted to collect up to only 50% of the value of the contract for sale and purchase or hire-purchase of real estate to be formed in the future whereas the applicable percentage to Vietnamese real estate developers is 70%.
- Thirdly, according to Article 10 of the LREB, foreign developers are not permitted to purchase houses and buildings to sell, lease or offer a lease purchase, but can only rent to sub-lease. However, this form of real estate business is permitted for Vietnamese real estate developers.

There is a clear difference in treatment between foreign invested and Vietnamese real estate developers, and the need for this difference remains unclear. It is not beneficial for the growth of the real estate market as this inconsistent treatment creates inefficiencies within the real estate sector and impairs the competitiveness of the industry in general.

Recommendation: We would recommend that any difference in treatment between foreign invested and Vietnamese developers to be removed to ensure a fair and level playing field for all in the real estate sector in Vietnam.

4. Restrictions on Foreign Organisations

Article 14 of the LREB provides that foreign organisations and individuals are permitted to lease properties for use and to purchase or lease-purchase residential houses in accordance with the LRH. Article 160 of the LRH sets out foreign organisations permitted to own residential houses in Vietnam. These foreign organisations must establish and maintain its presence in Vietnam. Foreign individuals, on the other hand, are not required to reside in Vietnam to own residential houses. They are only required to have valid passports affixed with entry stamps. It is unclear why foreign organisations are imposed with a stricter requirement to own residential houses than foreign individuals. As the LRH has opened up for foreign individuals to own residential houses in Vietnam, the same mechanism should also be applicable to foreign organisations.

Recommendation: We would recommend amending the LRH to allow foreign organisations without a presence in Vietnam to own residential houses.

5. Notarization of Contracts for Sale and Purchase of Residential Houses

According to Article 93.3(b) of the law on residential housing in 2005, contracts for residential houses to which a party is a real estate business enterprise shall not be required to be notarized. However, pursuant to Article 122 of the LRH, all contracts in relation to the sale and purchase of residential houses are required to be notarized/ certified. This implies that contracts for sale and purchase of residential houses entered into with the seller being a real estate business enterprise are also required to be notarized/certified. However, this Article is not consistent with Article 17.2 of the LREB which provides that the notarization/certification of contracts for real estate business shall be subject to the agreement between the parties, while it is mandatory for the real

estate agreements entered into between individuals/households to be notarized/legalized. It is not clear if the intention is to require all contracts in relation to the sale and purchase of residential houses to be notarized including contracts in which one of the parties are the real estate business enterprises.

Recommendation: We suggest clarifying this point in the guiding documents by providing clearly that “*contracts for sale and purchase of residential houses entered into with the seller being enterprises having function of doing real estate business need not be notarized/certified*” to be consistent with the provision under the LREB.

6. Capital Reserve

According to Article 108.1(b) of the LRH, the developers are required to contribute 2% of the value of apartments which are not sold at the time of commissioning of the apartment building for maintenance of parts under common ownership of the apartment building. Such value is calculated based on the highest selling price of the apartment in an apartment building. As there are many categories of apartments with different designs or floor areas in an apartment building, there are significant differences in the prices of the apartments. Therefore, this requirement is not practical and causes much difficulty to developers. Further, there is no mechanism to deal with payments made for this purpose where the apartments are sold at a later stage.

Recommendation: We suggest amending such provision as follows: “*...this value is calculated based on the highest selling price of the apartment in the same category within the apartment building*”. Further, there should be a mechanism for the capital reserve paid by the developers to be refunded or retained by the developer when the apartment is sold to the buyer.

7. Foreigners Buying Real Estate in Vietnam

Article 161.2(a) of the LRH allows foreign individuals/organisations to own a maximum number of 250 individual residential houses in a ward, comprising villas and terraced houses. We note however that Article 76.4 of Decree 99 introduces an additional restriction whereby foreign organisations/individuals may own no more than 10% of the total number of individual housing in each residential housing project. We are of the view that the number of maximum units which the foreign individuals and organisations are allowed to own are further limited and not consistent with the LRH.

Further, according to Article 159.2(b) of the LRH, foreign individuals and organisations are only prohibited to purchase houses in national defence and security area. However, according to Article 75 of Decree 99, foreign individuals and organisations are not entitled to own residential houses in areas where foreigners are prohibited or restricted from residing or travelling as provided under the law on residence and travel. Article 75 of Decree 99 has introduced a wider restriction for areas which foreign individuals and organisation are allowed to purchase houses.

Moreover, Articles 77.1(b) and 77.2(b) of Decree 99 provide another additional restriction in the one-time extension of residential housing ownership requested by foreign owners. Such restriction will cause concerns to foreign buyers and may cause negative impact to business development of developers. We propose that unlimited extensions should be provided except where foreign individuals and organisations are not allowed to own such residential houses for national defence and security reasons only.

Recommendation: We suggest removing such additional restrictions under Decree 99 as such restrictions may deter the foreign investors from purchasing real estate in Vietnam and affect the ability of real estate enterprises to conduct business. These restrictions also cause Vietnam to

lose competitiveness in comparison to other countries which have fewer restrictions on foreigners owning real estate.

C. CONCLUSION

The points we have highlighted limit the rights of real estate enterprises hence affecting the competitiveness in the real estate industry. The additional restrictions, onerous contribution obligation provided in the legislations and the delay in introducing necessary guidelines 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 that clear and consistent guidelines are 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.