

## EXECUTIVE SUMMARY

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We set out below the key issues arising from the new laws and related draft decrees.

- 1. Legal capital:** Article 3.1(a) of the third draft decree of law on real estate business (“**LREB**”) stipulates that real estate projects which are required to obtain the investment in-principle decisions or investment in-principle approvals shall have a minimum legal capital of VND50 Billion. In addition, Article 3.1(c) of the third draft decree of LREB provides that the current enterprises conducting real estate business will have one year to **increase** their legal capital to VND20 Billion/VND50 Billion in accordance with the LREB. It is recommended that the requirement on legal capital is only applicable to **new** real estate construction and development projects which, in any event, shall not be more than VND20 Billion.
- 2. Timeline for Capital Contribution:** Articles 48.2 and 74.2 of the Law on Enterprise 2014 require that capital in limited liability company are contributed in full within 90 days from the issuedate of the enterprise registration certificate. We propose incorporating provisions which allow capital to be contributed according to the implementation of the project.
- 3. Transitional provisions:** There is no transitional provision to deal with implementation of agreements which have already been signed under the old LREB and law on residential housing (“**LRH**”), except for provisions in relation to method of calculation and record of the residential housing area, the warranty period of residential housing and parking plot. We suggest adding the following provision to the third draft decree of LREB and the fourth draft decree of LRH: “Agreements which have already been signed before the Law on Real Estate Business/Law on Residential Housing takes effect shall continue to be implemented in accordance with the law at the time when they were signed.”
- 4. Bank Guarantees For Residential Presales:** Provisions for this have not yet seen issued. We suggest providing necessary provisions and detailed guidelines before 1 July 2015.
- 5. Foreigners buying property in Vietnam:** Articles 67, 68.4, 69.2(b) and 69.3(b) of the fourth draft decree of LRH introduces additional widerrestrictions whereby foreign organisations/individuals (i) are prohibited to purchase houses at areas where foreigners are prohibited or restricted from residing or travelling,(ii) may own no more than 10% of the total number of individual housing in each residential housing project, and (iii) can only have one-time extension of residential housing ownership. We suggest removing such additional restrictions which were not in the LRH.
- 6. First Time Foreign Investors:** Article 15.1(d) of the third draft decree of LREB provides that the application files for project transfer shall include the enterprise registration certificate which investors being foreign individuals and organisations which invest in Vietnam for the first time do not have. We therefore suggest adding the phrase “except for investors being foreign individuals and organizations who make investment in Vietnam for the first time” to the second paragraph of Article 15.1(d).

## LAND SUB-WORKING GROUP POSITION PAPER

### A. INTRODUCTION

From 1 July 2015 onwards, pursuant to the new Law on Real Estate Business 2014 (“**LREB**”) and the Law on Residential Housing 2014 (“**LRH**”), it is anticipated that the demand in the nation’s property market and the investment into the real estate industry will grow rapidly within the short term future. Whilst the new LREB and LRH have been well received at face value, some additional requirements and restrictions may be considered as too onerous. The delay in introducing necessary guidelines can also cause major barriers to investors.

As the theme for the Mid Term Forum 2015 organized by the Vietnam Business Forum is “Enhancing Enterprise Competitiveness for Global Integration”, the Land Working Group has reviewed the third draft decree guiding implementation of the LREB and the fourth draft decree guiding implementation of the LRH and prepared this position paper to address competitiveness in the real estate industry. In this position paper, we set out our comments in respect of the key provisions in the relevant laws which may restrict the competitiveness in the real estate industry and our recommendations to address such issues.

### B. ISSUES

#### 1. Increase of legal capital

Article 3.1(a) of the third draft decree of LREB stipulates that real estate projects which are required to obtain the investment in-principle decisions or investment in-principle approvals shall have a minimum legal capital of VND50 Billion. We note however that such minimum requirement of legal capital is not consistent with Article 10.1 of LREB which provides that the enterprises conducting real estate business must have a minimum legal capital of VND20 Billion.

The minimum requirement of legal capital of VND20 Billion is already too high for small scale projects. Even companies with strong financial resources will reconsider if it is commercially reasonable to contribute a high amount of capital for a project that has very low total investment capital. A possible outcome of this policy is that it will discourage real estate companies from undertaking small scale real estate projects. This will seriously impact the real estate sector negatively. The amount of legal capital should not therefore be increased to VND50 Billion. We would propose that a percentage of total investment capital be used instead. This will ensure that only companies with sufficient financial resources undertake large scale projects and will not penalize developers who undertake small scale projects.

Further, the minimum requirement of legal capital applies to all real estate business activities including activities which do not require a high amount of capital e.g. lease and sublease of space. The requirement for legal capital should only apply for real estate construction and development projects whereby high investment capital is required. The requirement for such high legal capital will lead to inefficient use of capital and inhibit business competitiveness in the real estate industry.

**Recommendation:** The requirement on legal capital is only applicable to real estate construction and development projects according to the value and scale of the projects which, in any event, shall not be more than VND20 Billion. If a higher legal capital is required, a percentage of total investment capital shall be applied.

In addition, Article 3.1(c) of the third draft decree of LREB provides that the current enterprises conducting real estate business will have one year to increase their legal capital to VND20 Billion/VND50 Billion in accordance with the LREB. This requirement will cause serious implications to projects which have already been licensed and are currently

being implemented. There are currently many projects which are being implemented smoothly and it is difficult to understand why this is necessary. This also sends out a very negative signal to the business community that rules and laws which have been implemented can be changed at any time.

**Recommendation:** We would recommend that the new provisions should not be applicable to projects which have already been licensed under the existing laws.

## 2. Timeline for Capital Contribution

It is provided in Articles 48.2 and 74.2 of the Law on Enterprise 2014 that the members of a limited liability company are required to contribute the capital in full within 90 days from the date of issuance of the enterprise registration certificate. This means that the investors are required to contribute the capital within such a short period of time notwithstanding that the implementation of the project may be conducted over an extended period of time. This requirement is unrealistic as such high amount of capital contributed may not be required at the beginning of the project. An example of this is large scale projects e.g. township developments and infrastructure projects. This requirement disincentives developers from undertaking large scale projects which are necessary for organised and coordinated development. This requirement will also lead to inefficient use of capital and inhibit business competitiveness in the real estate industry.

**Recommendation:** We propose incorporating provisions which allow capital to be contributed according to the implementation of the project. Flexibility is also required for extended period for contribution of capital in large scale projects.

## 3. Transitional provisions

There is no transitional provision to deal with implementation of agreements which have already been signed under the old LREB. Further, Article 74.7 of the fourth draft decree of LRH provides a transitional provision for contracts which have been signed before 1 July 2015 in relation to method of calculation and record of the residential housing area, the warranty period of residential housing and the parking plot. We note however that the fourth draft decree LRH is silent on the transitional provisions for other contents of the residential housing contracts which have already been signed under the old LRH. There are numerous agreements which have already been signed before the new LREB and LRH comes into effect e.g. sale and purchase agreements, sale and purchase of assets to be formed in the future, contracts for mobilization of capital, hire purchase agreements, lease and sub-lease agreements, project transfer agreements. Note that there are substantial changes to terms and conditions for the conduct of real estate business which may affect all these agreements. It is not immediately clear to what extent any existing agreements must be amended to comply with the LREB and the LRH. This will cause a lot of uncertainty and difficulty to both business entities and also individuals who have entered into real estate transactions. In order to prevent any negative impact to the real estate sector and the economy, in general, we would propose that all existing agreements continue to be implemented according to the existing laws and no changes are required.

**Recommendation:** We suggest adding the following provision to the third draft decree of LREB and the fourth draft decree of LRH:

“Agreements which have already been signed before the Law on Real Estate Business/Law on Residential Housing takes effect shall continue to be implemented in accordance with the law at the time when they were signed.”

#### **4. Bank Guarantees For Residential Presales**

According to Article 56.1 of the LREB, it is stated that the sale and lease-purchase of residential houses must be guaranteed by a commercial bank of Vietnam (which is included in the list of commercial banks published by the State Bank of Vietnam) prior to selling or lease-purchasing such residential houses. This has been introduced to provide more protection to retail buyers who may be left without any recourse in the case where a real estate developer runs into financial difficulty.

We note however that provisions on the implementation of such requirement have not yet been issued. There is a grave concern that the developers may be deprived of the right to sell the residential houses if such provisions are not issued in a timely manner.

**Recommendation:** We therefore suggest providing necessary provisions and detailed guidelines before 1 July 2015 so that this scheme will be implemented in an orderly and efficient manner to fully achieve this objective.

#### **5. Foreigners buying property 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 68.4 of the fourth draft decree of LRH 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 67 of the fourth draft decree of LRH, foreign individuals and organizations 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. We note however that according to Article 159.2(b) of the LRH, foreign individuals and organizations are only prohibited to purchase houses in national defense and security area. Article 67 of the fourth draft decree of LRH has introduced a wider restriction for areas which foreign individuals and organization are allowed to purchase houses.

In addition, Articles 69.2(b) and 69.3(b) of the fourth draft decree of LRH introduces another addition restriction on 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 the developers, including Vietnamese developers. In order to be consistent with Article 159.2(b) of the LRH, we propose that the extensions will be granted unless foreign individuals and organisations are not allowed to own the commercial residential houses for national defence and security reasons only.

**Recommendation:** We suggest removing such additional restrictions under the fourth draft decree of LRH as such restrictions may deter the foreign investors from purchasing property 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 the property.

#### **6. First Time Foreign Investors**

Article 15.1(d) of the third draft decree of LREB provides that the application files for project transfer shall include the enterprise registration certificate. We note that these conditions can apply to transferees being domestic investors and foreign investors who already have existing projects in Vietnam; however they cause many difficulties to investors being foreign

individuals and organisations who make investment in Vietnam for the first time with the investment project being the transferred project.

Pursuant to the laws on investment, a foreign investor which invests in Vietnam for the first time must have an investment project to be entitled to establish an enterprise and obtain an investment registration certificate and an enterprise registration certificate. However, these provisions require foreign investor which invests in Vietnam for the first time to set up a company before it can be engaged in a project as required by the laws on investment. This overlapping and conflicting regulation has restricted the rights to receive transfer of real estate projects of foreign investors who make investment in Vietnam for the first time.

**Recommendation:** We therefore suggest adding the phrase “except for investors being foreign individuals and organizations who make investment in Vietnam for the first time” to the second paragraph of Article 15.1(d).

### **C. CONCLUSION**

The points we have highlighted limit the rights of real estate enterprises hence affecting the competitiveness in real estate industry. The additional restrictions, onerous contribution obligation and delay in introducing necessary guidelines provided in the draft decrees create the impression that the investors will face many hurdles to invest in Vietnam. The impact of the new laws would therefore be diminished. In view of the issues above and the government’s objective 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. 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.