

LAND SUB - GROUP POSITION PAPER

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1. INTRODUCTION

The Land Working Group has been reviewing and commenting on various drafts of the Law on Real Estate Business (“LREB”) and the Law on Residential Housing (“LRH”). In this position paper, we set out our comments and recommendations on the key provisions in the two draft laws.

2. ISSUES IN BOTH DRAFT LREB AND DRAFT LRH

a. Conditions for Real Estate Business Entities

There is currently consideration on raising the legal capital requirements for companies undertaking real estate business. At the same time, companies undertaking real estate business are required to contribute between 15% and 20% of the total investment capital as charter capital for the property development. There is also a proposal that investors place a deposit to an account to carry out and invest in a project.

Since there is already a requirement for charter capital contribution which is proportionate to the capital required for a project, there is no need to specify any further requirements relating to capital for a company undertaking real estate business. A fixed amount of capital which does not take into consideration the nature of the property development project discriminates against small and medium sized developers and projects and may not be relevant to the property project.

Recommendation: Maintain charter capital requirements being a percentage of capital required for a property project and remove legal capital and other requirements relating to capital.

b. Foreign Investors

Whilst efforts have been made to increase the rights of foreign investors to undertake real estate businesses in Vietnam, foreign investors are still not permitted to do the following:

- i) lease out land without infrastructure;
- ii) purchase houses and buildings for sale, lease or lease-purchase; and
- iii) be allocated land by the State, in receive the transfer of land use right;
- iv) make investment in infrastructure for transfer or for lease land with infrastructure;
and
- v) lease the land use right with infrastructure for sub-lease.

The participation of foreign investors in the real estate industry allows the real estate market to mature further. Over the years, we have seen domestic investors gain in experience and capabilities arising from a thriving real estate market which includes the contributions of foreign investors. It is not uncommon today to see many iconic developments undertaken by domestic developers. The risk therefore that domestic investors will be disadvantaged by allowing foreign developers more rights in Vietnam continue to diminish over time. Further the granting of additional rights to foreign developers is not completely at the expense of domestic investors.

Recommendation: Extend the rights of foreign investors to undertake real estate business in Vietnam.

c. Land Fund for Social Housing

According to Article 21 of the draft LREB and Article 32.4 (i) of the draft LRH, property developers are required to transfer part of the land in their project for construction of social housing. The objective of requiring property developers to contribute to social housing is a noble one. The State clearly has the interests of the people in mind where this requirement is concerned. We would propose however that the property developer be given the option of contributing funds, arranging for other land or collaborating with other property developers to jointly contribute to social housing.

Land in a certain location or project may not be suitable for social housing especially where there is no technical or social infrastructure in place for the benefit of the social housing users. The flexibility will also allow state officials the ability to implement city/town planning initiatives for the benefit of all who reside in the area.

Recommendation: Provide flexibility regarding social housing obligations including the right to contribute monetary funds, other land or collaboration with other developers with regards to social housing.

d. Transfer of Ownership & Use Rights

Article 26.3 (c) of the draft LREB and Articles 13 and 150.3 of the draft LRH provides different times for when ownership and use rights will pass for different types of transactions. For instance:

- i) In case of sale and purchase, the time of transferring residential housing ownership shall take effect from the date of notarization or certification of the sale and purchase contract (or from the time when the purchaser is issued with the certificate of land use right, ownership of residential house and other assets attached to the land (the “**Certificate**”) if notarization or certification of the contract is not required);
- ii) In case of purchase, receipt of donation, receipt of exchange of individual's or household's residential house, the time of transferring residential housing ownership shall take effect from the date of notarization or certification of the sale and purchase, donation, exchange contract (or from the time when the purchasers is issued with the Certificate if notarization or certification of the contract is not required);
- iii) In case of exchanging residential houses between enterprises operating in real estate business, the time of transferring ownership shall take effect from the date of handover of the residential house to the exchanging recipient as agreed in the house exchange contract;
- iv) In case of lease-purchase of residential houses, the time of transferring ownership shall take effect from the date of issuance of the Certificate in respect of such house to the lessee-purchaser;
- v) For purchasing residential house with deferred payment or payments by instalments, the time of transferring ownership shall be from the date the purchaser fully pays the purchasing price to the seller and is issued with a Certificate over that house, unless otherwise agreed by the parties; and
- vi) In case of bequeathal of residential houses, the time of transferring ownership shall be counted as from the time of commencement of a bequeathal in accordance with civil laws.

Note that these provisions are not consistent with the provisions of the Land Law and Civil Code which provide that the transfer of ownership rights shall occur upon completion of registration of ownership. This creates confusion and lack of transparency. This lack of transparency and certainty is a hindrance to the development of the real estate industry since proof of ownership and use rights are the basic foundation of a strong real estate sector. It is understood that over time, different times for transfer of ownership and use rights were used because there were difficulties and delays in issuances of certificates for ownership and use rights. With the increasing efficiency of the land registries and provisions in laws relating to issuance of ownership and use rights certificates, it is no longer necessary to maintain the different stages of transfer of ownership and use rights.

Recommendation: Provide that ownership and land use rights will be transferred upon the issuance of ownership and use rights certificates.

e. Forms & Sources of Capital

Article 18 of the draft LREB and Articles 69, 70 and 72 of the draft LRH set out approved forms and sources of capital for real estate business. In the current economic conditions, real estate developers are facing many difficulties in raising capital for their developments. There is also other legislation restricting lending to real estate developers in place. It is therefore unnecessary to introduce any further restrictions on real estate developers in the draft LREB and draft LRH.

Recommendation: Remove all provisions relating to form and sources of capital.

f. Guarantors

Article 27 of the draft LREB and Article 4.21 of the draft LRH contains provides for the use of guarantors for residential housing. The objective of this requirement is to protect purchasers and ensure that their rights are preserved if there is any problem faced by the developer.

This is a good initiative and should be developed further. It will be more beneficial if clearer and more detailed provisions are inserted regarding how this scheme will be implemented.

Recommendation: Insert more information on the scheme including eligible guarantors, how much the guarantee fee is, terms regarding responsibilities of the guarantor and investor, how it is performed.

3. ISSUES IN THE DRAFT LREB

a. Specific Contents for Real Estate Contracts

Article 53 of the draft LREB states that the Government will provide specific regulations on the content of each type of real estate contracts which includes contracts for real estate brokerage; contracts for real estate valuation; contracts for real estate consultancy; contracts for auction of real estate; contracts for advertising real estate; and contracts for management of real estate. Specifying detailed content may not be a good strategy since it is not always possible to specify every single provision relevant to real estate contracts. This can create confusion especially in cases where the provisions do not cover every type of scenario contemplated for real estate contracts which are constantly changing according to the needs of people using real estate.

Recommendation: We would recommend that principles be provided instead of detailed provisions since it is not possible to cover all scenarios at any given time. With clear principles, we can ensure that the real estate market develops consistently regardless of any new developments in the future.

b. Assignment of Projects

Articles 49, 50 and 51 of the draft LREB provides that projects can only be assigned when “an investor faces certain difficulties, is unable to continue carrying out the project or no longer has demand in continuing with the project implementation”. There are many reasons why an investor may wish to assign a project so it is unnecessary to specify when a project can be assigned. Investors should be given the right to assign projects according to their discretion.

There is also a requirement that an approval letter from a competent State authority must be obtained for the assignment. Unfortunately, there are no provisions on what the criteria for such approval or which State authority shall grant this approval. This creates confusion and may cause unnecessary delays for assignments of projects.

Further, there are currently no provisions relating to existing approvals and consents granted to the assigning investor and whether the assignment receiving investor will inherit the approvals or be required to obtain new approvals and consents. This adds to the delays and difficulties faced by the assignment receiving investor post project assignment.

Recommendation: We would recommend that the circumstances whereby a project can be assigned be removed and requirement for approval be replaced with an automatic approval granted after the expiry of a certain number of days from submission of an application. We also recommend that all approvals/permits/consents which have already been granted for the project and to the assigning investor shall automatically be assigned and may be utilized by the assignment receiving investor without any further action required by any party.

4. ISSUES IN THE DRAFT LRH

a. Ownership of Housing by Investors

Currently under the LRH, investors will not be issued with ownership certificates upon completion of construction. Ownership certificates will only be issued to purchasers. This requirement is useful in the situation where the majority of units have been sold prior to completion of construction works. This creates problems for developments where there are a lot of unsold units. It prevents the investors as owners of the unsold units from exercising all its rights as owners for example to mortgage unsold units for capital raising purposes.

Recommendation: We would recommend that owners be issued with ownership certificates over unsold units at the request of the investor.

b. Common Areas in Villa Developments

Currently, the LRH states that land area, construction works and infrastructure for common use in apartments buildings will be owned under multiple ownership and common use rights. In recent days, there are increasing villa development projects which have land area, construction works and infrastructure for common use as well but there are no clear provisions relating to multiple ownership and common use rights. This has caused difficulties to owners of villas and investors as well.

Recommendation: Insert provisions stating that land area, construction works and infrastructure for common use in landed (villa) development projects will be owned under multiple ownership and common use rights at the request of villa owners and investors.

c. Ownership Term for Apartment Units

The draft LRH currently has provisions seeking to limit the term of ownership of apartment units. The draft LRH contemplates differing terms for different types of land eg land allocated/leased for construction of apartment buildings, land leased and land received by way of assignment. There is also a further requirement for ownership of apartment units to be handed over to the State for demolition whilst the owners are resettled.

The consequence of these provisions is that it creates several different classes of residential ownership which discriminates against apartment owners.

It is understood that one of the reasons for seeking to limit the ownership term is the concern over the quality of the apartment building over a period of time. This is very positive and shows that the State looks after the needs and safety of its citizens. This can however easily be viewed as removing the rights of apartment owners unfairly. An alternative which can be considered for achieving the same objective of protecting the interests and safety of apartment owners would be to require apartment buildings to comply with strict construction safety standards. If the apartment no longer complies with the safety standards, the owners can be given the right to decide what to do with the apartment building including demolition. This will ensure that the apartment owners will not be deprived of any of their rights.

Recommendation: Remove provisions limiting ownership terms of apartment units and impose strict safety standards for the apartment building. At the same time, allow apartment owners to decide what course of action to be taken with regard to the apartment building including demolition.

d. Rights of Foreigners

Provisions have been inserted to expand the right of foreigners to purchase and use residential property. This is a very positive development that benefits the real estate industry, investors (domestic and foreign alike) and owners of real estate. There continue to be limitations to the rights of foreigners who are not permitted to do as follows:

- i) to lease-purchase;
- ii) to own residential houses other than residential houses in commercial residential housing project;
- iii) to lend residential houses or to permit others to reside with them;
- iv) to make capital contribution by residential houses;
- v) to exchange residential houses;
- vi) to request to recognise the ownership over residential houses which are lawfully created; and
- vii) to own residential houses on a long-term and stable basis.

Recommendation: We would recommend that foreigners be given the same rights as Vietnamese to purchase, lease and use property in Vietnam.

e. Official Residential Houses

Articles 47 and 60 of the draft LRH set out requirements relating to commercial residential houses to be used as official residential houses or residential houses for resettlement. The provisions are not clear on whether and to what extent developers are compelled to sell houses to the State for official residential or resettlement use. It further states that the purchasing price will be determined by independent price evaluation organisations.

Recommendation: Clarify what the full obligations of developers are in this regard and specify that the independent price evaluation organisations shall be appointed with the agreement of the developer.