

ISSUES ON LICENSING PROCESS

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

Last year, a new Land Law which consolidated many of the different developments related to land use over the years was passed. On 26 November 2014, we have also seen the passing of the revised Law on Residential Housing and Law on Real Estate Business with provisions which address some of the inequalities between foreign and domestic individuals and corporations. These changes are critical to ensure that Vietnam continues to keep up with trends in the region and to continue to attract foreign investment.

With the passing of the above laws, this position paper is focused on the licensing process faced by domestic and foreign investors seeking to undertake real estate development projects.

1. PRE –REQUISITES FOR INVESTMENT CERTIFICATE

It is a requirement under the Law on Investment that investors have to obtain an Investment Certificate with the business line in real estate development/investment to implement a real estate project. However, prior to obtaining an Investment Certificate, investors are also required to obtain the following:

- (i) Decision on the appointment of investor – A decision issued by the People’s Committee upon verification on the capability and experience of the investor as well as feasibility and effectiveness to implement the project. The application file for such decision includes documents proving the legal status, expert capacity, experience and financial capacity of the investors; explanatory statement and preliminary plan on eco-technical solutions; capacity; and other advantages of the investor if assigned to act as the developer (if any).
- (ii) Basic design – A document comprising the description and basic drawings of a project. The application file includes the explanation on basic design and basic design drawings.
- (iii) 1/500 Masterplan Approval– A detailed plan of the project which includes criteria of the project, all parameters required for land, construction and technical infrastructure, supply sources, and environmental protection measures. The application file includes explanation about contents of the plan, including miniature colour drawings; colour drawings of prescribed scale; and information on construction planning issued by Department of Planning and Architecture; and
- (iv) Investment Approval– A document which sets out project scale, requirement on technical infrastructure, implementation schedule of the project, basic rights and obligations of the investor, and the plan on product sale. The application file includes project explanation, basic design, decision on appointment of the investor and 1/500 Masterplan Approval.

The documents set out above are in relation to the implementation of a real estate project and are required before an investor even knows if it is permitted to undertake a real estate project. Investors have to incur a lot of time and costs for the purpose of preparing applications for and obtaining such documents. It can take up to 160 days to obtain these documents not including preparation time. These requirements cause unnecessary delays and difficulties to investors seeking to undertake real estate development projects. Further, notwithstanding that the above documents have been issued, an investor may still fail to obtain an investment certificate subsequently to undertake a real estate development project.

Recommendation: Remove the requirements in items (i) to (iv) above to obtain the Investment Certificate. The only pre-requisite necessary at the early stage is confirmation on the parameters for the project to be developed on the site. All other approvals can be finalised at a later stage. An investor should only have to go through a one-step procedure in order to obtain the Investment Certificate.

2. FIRST TIME FOREIGN INVESTORS

According to Article 34 of the current Law on Residential Housing, foreign investors seeking to undertake development of commercial residential housing for the first time are required to have an Investment Certificate in accordance with the Law of Investment.

Similarly, according to Article 8 of the Law on Real Estate Business, investors (both foreign and domestic) seeking to receive assignment of a project are required to establish an enterprise registered for real estate business. Hence, a foreign investor is also required to possess such Investment Certificate for the purpose of receiving assignment of a project.

However, pursuant to the Article 50 of the Law on Investment, a foreign investor who undertakes investment in Vietnam for the first time must have acquired or been assigned an investment project in order to obtain an Investment Certificate to undertake a real estate project. In short, an Investment Certificate is required for the purpose of an investor acquiring or being assigned an investment project whilst an investor must have acquired or been assigned an investment project to obtain an Investment Certificate.

Such contradicting and overlapping requirement between the abovementioned laws has made it impossible for the first time foreign investors to undertake any real estate project. It is unclear why the Law on Residential Housing and the Law on Real Estate Business require an investor to secure an investment project prior to obtaining an Investment Certificate when the licensing authorities would have examined the capability of an investor when evaluating the investor's application for an Investment Certificate. The licensing authorities would be provided with the necessary information on the financial capability, experience and expertise of the investor during the application procedure for the Investment Certificate.

This requirement merely adds unnecessary procedures which hinder real estate developers and adds to the confusion of the licence issuing authorities.

Recommendation: We suggest that the requirement for an investor to possess an investment certificate prior to being permitted to conduct a commercial residential housing project and to receive assignment of a project be removed.

3. LAND USE RIGHTS CERTIFICATE (LURC) FOR PART OF CONSTRUCTION WORKS

Pursuant to Article 32 of Decree 43/2014/ND-CP making detailed provisions for implementation of a number of articles of the Law on Land, the investors shall be issued an LURC upon the completion of sale and purchase of residential property and the whole of construction works. It is not clear whether an LURC will be issued for parts of the construction works, e.g. part of a floor or an entire floor and not the entire construction works, except in the case of individual apartments in a high rise apartment building. The law does not however prohibit the sale of part of construction works. There appears to be some confusion on the part of the authorities as to whether an LURC can be issued in such circumstances leading to uncertainty and inconsistent application.

Recommendation: We recommend that an instruction be given to all provincial authorities confirming that LURCs can be issued for part of an entire construction works which is to be implemented according to the request of the rightful parties.

4. SUBSEQUENT PROJECT LICENSING

According to the Law on Investments, an investor is required to obtain an Investment Certificate for each project that an investor undertakes. For foreign invested companies, they are required to amend their existing investment certificate to take into consideration the new project. This is complicated as it involves combining the capital requirements, investment timelines and other investment requirements of multiple projects. This makes it very difficult for investors to have

clear and specific requirements for a new project which do not affect other projects of an investor. It also creates complications where a developer wishes to transfer one or more but not all the projects that it is licensed to undertake under its Investment Certificate.

Recommendation: Provide the option to investors to receive separate investment certificates for each project it undertakes. An investor can then choose the most efficient method of managing the licensing requirements of multiple projects.

We have set out above some of the main licensing issues encountered by investors seeking to undertake real estate development projects in Vietnam. Notwithstanding the recent changes in the new laws, the issues set out above continue to limit the growth of the real estate sector in Vietnam in general. As the issues identified are administrative in nature, we would respectfully request that due consideration be given as to whether they are necessary.