

## LAND SUB-WORKING GROUP POSITION PAPER

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### **A. INTRODUCTION**

With the new Law on Real Estate Business 2014 (“LREB”) and the Law on Residential Housing 2014 (“LRH”) taking effect on 1 July 2015, we have seen renewed interest and activity in the nation’s real estate market. Decree No. 76/2015/ND-CP guiding the LREB was officially issued on 10 September 2015 (“Decree 76”). It is encouraging to note that some of the key comments on the draft Decree 76 raised at the Vietnam Business Forum Meeting held on 9 June 2015 were incorporated. At the same time, Decree No. 99/2015/ND-CP guiding LRH was officially issued on 20 October 2015 (“Decree 99”).

In light of the theme “Enhancing Enterprise Competitiveness for Global Integration” for the Annual Meeting 2015 organized by the Vietnam Business Forum, we set out our comments in respect of the key provisions in the relevant laws which may 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. Restrictions Affecting Foreign Developers**

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. Further, 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%. It is not clear why this difference in treatment for foreign invested and Vietnamese real estate developers is necessary. 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.

**3. 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 Draft Decree 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.

**4. 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.

**5. Foreigners Buying Real Estate in Vietnam**

Article 161.2(a) of the LRH allows foreign individuals/organizations 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 Draft Decree 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 Draft Decree, 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 Draft Decree has introduced a wider restriction for areas which foreign individuals and organization are allowed to purchase houses.

Moreover, Articles 69.2(b) and 69.3(b) of the Draft Decree 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 the Draft Decree 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.

### **6. 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 capital in full within 90 days from the date of issuance of the enterprise registration certificate. Investors are required to contribute capital within 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 a substantial amount of capital 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. These 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.

**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 and delay in introducing necessary guidelines provided in the draft decrees create the impression that the investors will face many hurdles to invest in the real estate sector in Vietnam. The impact of the new laws to increase competitiveness in the real estate industry 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 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.