

REFORMS TO LAW ON RESIDENTIAL HOUSING AND LAW ON REAL ESTATE BUSINESS

In the last 10 years, the passing of two laws, in particular, marked a significant milestone in the development of real estate legislation in Vietnam. Law No. 56/2005/QH11 on Residential Housing was passed by the National Assembly on 29 November 2005 (**Current Housing Law**) and Law No. 63/2006/QH11 on Real Estate Business was passed by the National Assembly on 29 June 2006 (**Current Law on Real Estate Business**), and jointly, these two laws have contributed to a more transparent regulatory framework for real estate transactions in Vietnam. However, with increasing demand in the market for further development of real estate business, the Current Law on Real Estate and the Current Housing Law were in need of an update.

Accordingly, on 25 November 2014, the National Assembly passed Law No. 66/2014/QH13 on Real Estate Business (**New Law on Real Estate Business**) and Law No. 65/2014/QH13 on Residential Housing (**New Housing Law**), which will come into effect as from 1 July 2015, replacing the Current Law on Real Estate and the Current Housing Law.

We set out below certain significant changes provided in these new two laws.

A. NEW LAW ON REAL ESTATE BUSINESS

REAL ESTATE BUSINESS AND REAL ESTATE SERVICES BUSINESS

Notwithstanding the revision of the definition “real estate services business” to a more general definition of “real estate business”, the New Law on Real Estate Business maintains the scope of these businesses. In particular:

- (i) real estate business means spending investment capital in order to conduct any of the following real estate activities for profit-making purposes:
 - to implement construction, purchase or receipt of a transfer of real estate to sell or transfer such real estate; and
 - to lease, sub-lease or grant a hire-purchase¹ of real estate;

¹ Hire purchase of a house or building is a form of real estate business whereby the lessee becomes the owner of such house or building as is currently the subject of the hire purchase after the lessee has made full payment of the lease payments under the hire purchase contract.

- (ii) real estate business also includes real estate business services which comprises any of the following services²:
- real estate brokerage;
 - real estate trading floor;
 - real estate consultancy; and
 - real estate management.

CONDITIONS APPLICABLE TO ENTITIES CONDUCTING REAL ESTATE BUSINESS

Conditions for an entity conducting real estate business under the New Law on Real Estate Business comprise³:

- (i) establishment of an enterprise or cooperation; and
- (ii) having legal capital of at least VND20 billion (approximately equivalent to US\$1 million), which is much greater than the current threshold of VND6 billion.

It should be noted that the two conditions above do not apply to organisations, households and individuals who sell, transfer, lease or grant a hire purchase of real estate irregularly on a small scale. Such exceptions will be clarified by the Government. This means that, the New Law on Real Estate Business distinguishes between the activities of an entity simply engaging in the selling, transferring and leasing of real estate on a small scale and the activities of a property developer.

The New Law on Real Estate Business is, however, silent on the required ratio of charter capital (or equity) over the investment capital (equity and debt) applicable to the developers of residential housing, new urban and infrastructure projects. Under the current legislation, it is required that such developers must have charter capital of not less than 15% or 20% of the total investment capital, depending upon each type of property project.

PERMITTED SCOPE OF REAL ESTATE BUSINESS

The New Law on Real Estate Business distinguishes between the permitted scope of business activities applicable to domestic enterprises and individuals (**Domestic Entities**), Vietnamese residing overseas (**Overseas Vietnamese**) and foreign invested enterprises (**FIEs**), especially the business activity of leasing houses and buildings for sub-lease.

In particular, a domestic enterprise is entitled to conduct real estate business activities in the following forms⁴:

- (i) to purchase houses and buildings for sale, lease or hire purchase;
- (ii) to lease houses and buildings for sub-lease;
- (iii) in the case of land allocated by the State, to invest in the construction of residential houses for sale, lease or hire purchase; to transfer the land use right in the form of a division of land into plots for sale in accordance with the law on land; and to invest in the construction of technical infrastructure of cemeteries and graves for the purpose of transferring land use rights attached to such technical infrastructure;
- (iv) in the case of land leased from the State, to invest in the construction of residential houses for lease; and investing in the construction of houses and buildings other than residential houses for sale, lease or hire purchase;

² Article 60 of the New Law on Real Estate Business.

³ Article 10 of the New Law on Real Estate Business.

⁴ Article 11.1 of the New Law on Real Estate Business.

- (v) in the case of land in respect of which the land use right is recognised by the State, to invest in the construction of houses and buildings for the purpose of sale, lease or hire purchase;
- (vi) to invest in the construction of houses and buildings on land received as a transfer from organisations, family households or individuals, for sale, lease or hire purchase;
- (vii) to invest in the construction of houses and buildings on the land leased from organisations, households or individuals, for lease in strict accordance with the land use purposes;
- (viii) to receive via transfer an entire real estate project (or part thereof) from an investor in order to construct houses and buildings for sale, lease or hire purchase; and
- (ix) to receive via transfer or to lease land use rights from organisations, households or individuals to invest in the construction of technical infrastructure for the purpose of transferring or leasing land with such technical infrastructure.

In comparison with the Current Law on Real Estate Business, the New Law on Real Estate Business has added activities to the scope of business activities entitled to be engaged by Overseas Vietnamese and FIEs. Specifically, an Overseas Vietnamese is entitled to conduct real estate business activities in the following forms⁵:

- (i) to lease houses and buildings for sub-lease;
- (ii) in the case of land leased from the State, to invest in the construction of residential houses for lease; and to invest in the construction of houses and buildings other than residential houses for sale, lease or hire purchase;
- (iii) to invest in the construction of houses and buildings on land leased from organisations, households or individuals, for lease in strict accordance with the land use purposes;
- (iv) to receive via transfer of an entire real estate project (or part thereof) from an investor in order to construct houses and buildings for sale, lease or hire purchase;
- (v) to invest in the construction of residential houses on land allocated by the State for sale, lease or hire purchase; and
- (vi) to invest in the construction of houses and buildings on the transferred or leased land in industrial zones, industrial complexes, export processing zones, high-tech zones or economic zones for trading, in strict accordance with the land use purposes.

An FIE is entitled to conduct real estate business activities in the following forms⁶:

- (i) to lease houses and buildings for sub-lease;
- (ii) in the case of land leased from the State, to invest in the construction of residential houses for lease; and to invest in the construction of houses and buildings other than residential houses for sale, lease or hire purchase;
- (iii) to receive via transfer an entire real estate project (or part thereof) from investors in order to construct houses and buildings for the purposes of sale, leasing out or granting of hire purchase;
- (iv) to invest in the construction of residential houses on land allocated by the State for sale, lease or hire purchase; and
- (v) to invest in the construction of houses and buildings on leased land in industrial zones,

⁵ Article 11.2 of the New Law on Real Estate Business.

⁶ Article 11.3 of the New Law on Real Estate Business.

industrial complexes, export processing zones, high-tech zones or economic zones for trading in strict accordance with the land use purposes.

REAL ESTATE TRADING FLOOR

Under the Current Law on Real Estate Business, any entity conducting real estate business must sell or lease real estate via a real estate trading floor.⁷ In the nine years since this Law was implemented, the requirement of trading via a real estate trading floor has proven unnecessary and expensive for enterprises. Therefore, in the New Law on Real Estate Business, the requirement to sell and lease real estate via a real estate trading floor is no longer applicable.

REAL ESTATE TO BE FORMED IN THE FUTURE

Houses and buildings which are under construction and not yet ready for use are also known as real estate to be formed in the future (**Future Real Estate**). Under the New Law on Real Estate Business, investors of a real estate business project are entitled to sell, lease and hire purchase Future Real Estate.⁸

Notwithstanding the Current Law on Real Estate Business entitling the sale of Future Real Estate⁹, there has been no further legislation providing a legal basis or mechanism for such transactions or protection of the buyer of each housing unit from developers who violate their commitments.

Conditions of Future Real Estate

To address this issue, the New Law on Real Estate Business provides a clearer basis for enhanced protection of house purchasers and greater responsibilities and requirements applicable to developers. In particular, developers must satisfy the following conditions for Future Real Estate¹⁰:

- (i) have a qualified Land Use Right Certificate, project files, and design plans approved by the relevant State authorities;
- (ii) have a qualified construction permit (if any); and
- (iii) have documents on acceptance of the completion of the construction of the technical infrastructure in accordance with the approved project schedules; minutes on the acceptance of the completion of the construction of the foundation of the building with respect to Future Real Estate being an apartment building or mixed-use building with a residential function.

Conditions for selling

Prior to selling or hire purchasing Future Real Estate being residential housing:

- (i) investors must send a notice to the municipal residential housing State management authorities on the satisfaction of conditions for selling/hire purchasing such residential housing; and
- (ii) the sale and hire purchase must be guaranteed by a qualified commercial bank as provided by the State Bank of Vietnam (**Guarantee Bank**), noting that the term of a guarantee contract must extend up to the time when the residential housing is handed over to the purchaser. Accordingly, where the developer fails to hand over the Future Real Estate to the purchaser in accordance with its committed schedule, the Guarantee Bank shall, as requested by such purchaser, refund the advance payment made by the purchaser to the developer in accordance with the sale contract and guarantee contract.

⁷ Article 22.2 of the Current Law on Real Estate Business.

⁸ Article 54 of the New Law on Real Estate Business.

⁹ Article 14.1 of the Current Law on Real Estate Business.

¹⁰ Articles 55, 56 and 67 of the New Law on Real Estate Business.

Payment

Payment must be made on a multiple instalment basis, noting that:

- (i) the first instalment must not exceed 30% of the contract value;
- (ii) subsequent instalments shall be in accordance with the approved project schedule;
- (iii) prior to hand-over of Future Real Estate, the payment of instalments must not exceed 70% of the contract value where the seller is a Domestic Entity; or 50% of the contract value where the seller is an FIE; and
- (iv) prior to issuance of the certificate of land use right and ownership of assets attached to land to the purchaser, the payment of instalments must not exceed 95% of the contract value.

Application for issuance of ownership certificate

For the avoidance of a situation where a developer delays applying for the issuance of the ownership certificate for the purchaser subsequent to handover, it is required that within 50 days from the date of handover of a house or building to a purchaser, procedures must be carried out for the relevant State agency to issue a certificate of land use right and ownership of residential house and other assets attached to the land (single house ownership certificate) to the purchaser, except where the purchaser or the hire purchaser makes a written request to implement such procedures himself or herself.

PARTIAL TRANSFER OF REAL ESTATE PROJECTS

One significant change of the New Law on Real Estate Business relates to the transfer of a part of a project among developers, which is unclear under the current legislation, noting that the transfer of a project must be approved by the Prime Minister (**PM**) or relevant Provincial People's Committee (**PC**) upon satisfaction of the following conditions:

- (i) the project has been approved by a competent State agency and its detailed zoning on a scale of 1/500 or zoning of the whole site has already been approved;
- (ii) the compensation or site clearance work of the project (or the part of the project to be transferred) has been completed. With respect to the transfer of an entire investment project for construction of infrastructure, the construction of technical infrastructure facilities must be completed corresponding to the schedule stated in the approved project;
- (iii) there is no dispute over land use rights and the project is not being restrained for judgment execution;
- (iv) it is not subject to any land use rights dispute, land revocation, requisition;
- (v) the transferring investor already has the land use rights certificate in respect of the entire project (or part thereof) to be transferred; and
- (vi) the investor receiving the transfer of an entire real estate project (or part thereof) must be a real estate business enterprise, have adequate financial capability, and undertake to continue to implement the investment, construction and business in accordance with the law, ensuring compliance with the schedule and the contents of the project.

We note that in the case of transferring the project to an FIE, the transferor must carry out an additional procedure to return the land to the State before such land is subsequently allocated or leased to the transferee.

These new provisions of the New Law on Real Estate Business are proposed to facilitate a revitalisation of the real estate market by paving the way for investment and mergers and acquisitions, pending restructuring projects, as well as increasing protection over purchasers of property development projects.

B. NEW HOUSING LAW

There are two major changes under the New Housing Law which significantly impact upon the residential housing market, being the loosening of foreign ownership of residential housing and the requirements for the sale of residential housing.

FOREIGN OWNERSHIP OF RESIDENTIAL HOUSING IN VIETNAM

Eligible owners of residential housing

Similar to the Current Housing Law, the New Housing Law classifies the eligible owners of residential housing in three categories being Vietnamese Entities; Overseas Vietnamese; and qualified foreign individuals and organisations (**Foreign Entities**).

As compared to the Current Housing Law, the New Housing Law provides newly favourable conditions for owning residential housing in Vietnam, especially applicable to Overseas Vietnamese and Foreign Entities. In particular:

- (i) All Overseas Vietnamese who are permitted to enter Vietnam are eligible to own residential housing. It is also noted that qualified Vietnamese residing overseas are now entitled to the same rights and obligations of Vietnamese individuals, households and organisations¹¹.
- (ii) The pilot scheme under Resolution 19/2008/QH12 permitting Foreign Entities to purchase and own one condominium in Vietnam (**Resolution 19**) has concluded with unexpected results, failing to improve the housing market for Foreign Entities. The New Housing Law has addressed this issue by easing conditions for Foreign Entities to purchase and own houses in Vietnam. Accordingly, Foreign Entities are required to satisfy fewer conditions to own residential housing in Vietnam. In particular, the following entities are entitled to residential housing ownership¹²:
 - (1) Foreign Entities investing in the construction of residential housing in accordance with the relevant property project (**Foreign Investors**);
 - (2) foreign-invested enterprises, branches, representative offices of foreign enterprises, foreign investment funds and branches of foreign bank operating in Vietnam, other than the Foreign Investors (**Foreign Organisation**);
 - (3) foreign individuals who are permitted to enter Vietnam, other than Foreign Investors, and who do not fall within the category of persons entitled to diplomatic or consular immunity and privilege (**Foreign Individuals**).
- (iii) We note that Foreign Investors are entitled to the same rights and obligations of house owners as those applicable to Vietnamese individuals, households and organisations, except if they construct residential houses on leased land, in which case they are only entitled to lease such residential houses.

¹¹ Article 10 and 11 of the New Housing Law.

¹² Article 159.1 of the New Housing Law.

Eligible houses owned by Foreign Entities

Whereas Resolution 19 entitled Foreign Entities to own one condominium only, under the New Housing Law, Foreign Entities are entitled to own all types of commercial residential housing, including condominiums and separate residential houses (e.g. villas, townhouses) (**Separate Houses**) in residential housing projects¹³;

Duration of ownership

Similar to Vietnamese Entities, Overseas Vietnamese can enjoy housing ownership on a stable and long term basis.

However, a Foreign Individual will only be permitted to own a house for a period of up to 50 years as from the date of issuance of the certificate on ownership of such house; the actual duration is set out in the certificate on ownership and may be extended if permitted by law. In addition, a Foreign Individual who is married to a Vietnamese citizen is entitled to an indefinite ownership term of their houses with the same rights and obligations as those applicable to Vietnamese citizens.

A Foreign Organisation may own a house for a duration not exceeding the term of its Investment Certificate or establishment license.¹⁴

Conditions on the number of houses owned by Foreign Organisations and Foreign Individuals

The number of condominiums to be owned by Foreign Organisations and Foreign Individuals shall not exceed 30% of the total number of condominiums in one single condominium building.

The number of Separate Houses to be owned by Foreign Organisations and Foreign Individuals shall not exceed 250 Separate Houses in an area having the population equivalent to an administrative level of a ward (or *cap Phường* in Vietnamese).

Ownership rights

Overseas Vietnamese will have the same ownership rights as those of Vietnamese Entities. For example, they will be permitted to sell or mortgage their residential property.

A Foreign Individual may also have the same ownership rights as Vietnamese individuals, except that before leasing out their house, a Foreign Individual shall notify the relevant State agency of the leasing transaction and pay the relevant taxes in accordance with the applicable law.

Foreign Organisations are only entitled to use their houses as a residence for their employees and are not allowed to lease out nor use it for office use or any other purpose.

Payment for purchase of residential house

For the purpose of controlling housing transactions of Foreign Entities, the New Housing Law strictly requires all payments for purchase and hire-purchase be made through a licensed credit institution in Vietnam.

¹³ Article 161.2 of the New Housing Law.

¹⁴ Article 161.2 of the New Housing Law.

RESIDENTIAL HOUSING TRANSACTIONS

Residential housing projects

In practice, investors typically develop a real estate project not only for residential housing purposes but for mixed use such as parks, commercial centres and offices. The New Housing Law provides a clear definition of residential housing projects which is subject to this law, and comprises:

- (i) construction or renovation projects in relation to an independent house or a block of houses;
- (ii) construction projects in relation to residential housing with technical infrastructure and social infrastructure in remote areas;
- (iii) construction projects in urban areas or mixed use property projects which have a land area for residential housing purposes; and
- (iv) construction projects in relation to construction works with mixed use including residential housing and commercial use.

Conditions for residential housing transactions

Under the current legislation, in order to be able to be the subject matter of a residential housing transaction, a residential property must have an ownership certificate and must not be subject to any dispute, seizure (or other realisation), or any relocation/demolishment decisions.

However, in order to facilitate the current residential housing market, the New Housing Law excludes the “ownership certificate” from the conditions for undertaking the following residential housing transactions, among others:

- sale and mortgage of residential housing to be formed in the future;
- leasing of houses; and
- assignment of sale and purchase contracts of commercial houses constructed in a residential housing development project (including houses which have been handed over by the developer but have not been issued with an ownership certificate).¹⁵

Thus, we note that this new provision provides an incentive to purchasers to buy commercial houses in Vietnam given the issuance of an ownership certificate is usually delayed by the relevant licensing authority and/or the developers.

Mortgage of residential housing

Under the New Housing Law, a developer may mortgage a residential housing project, or the residential houses on the project site, with credit institutions operating in Vietnam as security for loans for development of the residential housing. The New Housing Law also permits buyers/owners of residential housing to be formed in the future to mortgage future houses with credit institutions as security for loans.¹⁶

However, for the avoidance of any potential issue whereby one property might be double mortgaged by both the developer and the purchaser buying a housing unit, the New Housing Law expressly requires that prior to entering into a sale and purchase contract of any housing unit with the buyer, the developer must release the house from the mortgage of their property project, unless otherwise agreed by the buyer and the developer’s credit institution.

¹⁵ Article 118 of the New Housing Law.

¹⁶ Article 147 of the New Housing Law.

Condominiums

The New Housing Law stipulates that condominium buildings will have a period of use to be determined according to the grade of construction work and the outcome of a quality inspection by the relevant provincial authority. Upon expiry of its period of use, the relevant provincial authority will examine the quality of the condominium building. If the condominium building is still fit for use, the owners of the condominium building may continue to use the building in accordance with the period specified in the examination conclusion. If the condominium building is no longer fit for use, the building will have to be demolished.

As Vietnam embraces increasing interest in foreign investments across a wide range of industries, demand for the facilitation of conditions on real estate business and housing ownership for foreign investors is intensifying. Foreign real estate investors are optimistic about the future of Vietnam's investment environment, and with the passing of two new laws, investors can continue to embrace the numerous investment opportunities that Vietnam has to offer.

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