

DRAFT DECREE ON IMPLEMENTATION OF LAW ON REAL ESTATE BUSINESS

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In an attempt to reform the licensing procedures for real estate (“RE”) projects in Vietnam as part of the overall amendment of the conditions and procedures for investment in Vietnam, the National Assembly passed the new Law on Investment in 2020 (“LOI”), which also amends the Law on Residential Housing 2014 (“LRH”) and the Law on Real Estate Business 2014 (“LREB”). This year, the Vietnamese government has promulgated Decree 31/2021 on the implementation of the LOI and Decree 39/2021 amending Decree 99/2015 on the implementation of the LRH and will soon issue a third decree to implement the LREB as amended (“Draft Decree”). This Draft Decree will replace Decree 76/2015 on the implementation of the LREB (“Decree 76”).

In this article, we will discuss the key changes in the Draft Decree (latest draft announced for public comments in July 2021) as compared to Decree 76.

Conditions for conducting RE business

According to the Draft Decree, to conduct RE business in Vietnam, an organization or individual must satisfy the following conditions:

- i) Establish an enterprise having RE business as one of its registered business activities;
- ii) Publicly disclose information on (A) the enterprise and (B) the RE that the enterprise intends to sell or lease on the websites of the enterprise and the provincial housing management authorities (e.g., Department of Construction) where the enterprise registered its business activities and where the RE is located); and
- iii) Only trade in RE that fully meets the conditions for being sold or leased specified in the LREB.

As compared to Decree 76, additional conditions are added to the Draft Decree to ensure strict compliance with the LREB. This reflects the Government’s intention to restore order in the RE market, which has been in a state of disarray in the past few years as many developers/agents have unlawfully received a substantial amount of pre-payments from buyers or placed unqualified RE for sale in the market. The Draft Decree also stipulates that the subject enterprises must meet these new conditions within 12 months from the date of the new decree.

Apart from the aforesaid conditions, if the enterprise is a developer of an RE project, it must have owner’s equity amounting to no less than 20% of the total investment capital of the RE project (for land area of less than 20 ha) or no less than 15% of the total investment capital (for land area of 20 ha or more). This requirement is not a novel one for RE developers as it is already stipulated under the land laws.

The Draft Decree also abolishes the requirement to have charter capital of at least VND20 billion, which is applicable to enterprises conducting RE business, to reflect the amendments to the LREB made under the LOI.

Sample contracts and other forms

While Decree 76 has six sample contracts, the Draft Decree introduces nine sample contracts, as below:

- Contract for sale and purchase of apartment unit
- Contract for lease-purchase of apartment unit
- Contract for sale and purchase of individual residential house
- Contract for lease-purchase of individual residential house
- Contract for sale and purchase/lease-purchase of house/construction works¹

¹ The sample contract specifies that “non-residential construction works” may include tourist villas, tourist apartments, officetels, office buildings, hotels, etc.

- Contract for lease of a house/construction works
- Contract for transfer of land use rights
- Contract for lease/sublease of land use rights
- Contract for transfer of all or part of an RE project

Unlike Decree 76, the Draft Decree does not differentiate between existing housing and housing to be constructed in the future, rather it distinguishes between apartment units and individual housing. This time the Draft Decree provides sample contracts to be used in both cases.

Importantly, the Draft Decree appears to require strict compliance with the content of the sample contracts by stating *“Contracts in relation to real estate business [...] must be made in accordance with the sample contracts annexed to this Decree”* and *“The parties may add other content to the contract to suit each specific case but such content must not contradict the terms and content set out in the sample contract [...]”*. This language suggests that the parties must follow the terms and conditions set out in the sample contracts and may not substantially amend the sample contracts.

The Draft Decree also includes other sample forms, such as those for the assignment of contracts (i.e., assignment documents) and transfer of RE projects (i.e., application, progress report and approval).

Procedure for transferring RE project

Under the Draft Decree, the transfer of all or part of an RE project must follow new procedures, as below.

- RE projects for which an investment policy decision/approval (collectively, “IPA”) was made before the effective date of the LOI (i.e., 1 January 2021) must follow the procedure set out under the LREB.
- RE projects for which an IPA was made after 1 January 2021 but that have not been issued an investment registration certificate (“IRC”) and/or “investor approval”² also must follow the procedure under the LREB.
- For RE projects that are issued an IPA after 1 January 2021 and have obtained IRC and/or “investor approval”, the parties shall comply with the procedure under the LOI.

Although this provision seems to comply with the general rule set out in the LOI and the LREB, it will likely cause confusion among investors since the procedure under the LOI is different from the procedure under the LREB.

Under the LREB procedure, the parties must first obtain approval for project transfer from the provincial People’s Committee (“PC”) or the Prime Minister (as applicable) and then sign a project transfer agreement (“PTA”) (using the sample contract discussed above) and close the transaction within 30 days from such approval. Thereafter, although not mentioned in the LREB and the Draft Decree, the parties will likely need to amend the IPA and IRC to reflect the investor change in accordance with the LOI. As for the LOI procedure, the project company will amend the IPA and IRC and submit the PTA to the competent authority for review (as discussed below) without the need to obtain an approval for the project transfer.

As a notable change, the Draft Decree indicates that under both procedures, the parties must submit a draft PTA to the PC or the Ministry of Construction (if the project falls under the Prime Minister’s authority) for review in accordance with the LREB and its implementing decree. On the basis of the written opinion of the relevant authority, which may include certain required changes to the PTA, the parties must amend the PTA accordingly. This requirement is not stipulated under Decree 76.

Conclusion

The Draft Decree reflects the intention of the Vietnamese Government not only to reform the licensing procedures for RE projects as originally contemplated and regulated in detail under the LOI but also to tighten State management over RE business activities (including the transfer of RE projects).

² The circumstances for receiving “investor approval” are prescribed under Articles 29.3 and 29.4 of the LOI. Under these articles, “investor approval” may be issued in combination with an IPA or separately.

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