

Comments on Draft on Law on Real Estate Business – Part 1

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In May 2023, Ministry of Construction and VCCI jointly held a [Seminar](#) on Draft of new Law on Real Estate Business (**Draft Real Estate Business Law**) to collect opinions and comments from enterprise community and experts. The Draft Real Estate Business Law appears to be the latest version having been published before it is submitted to the National Assembly. The new Law on Real Estate Business is scheduled to be adopted by the National Assembly in November 2023. We will try to highlight some notable changes introduced by the Draft Real Estate Business Law in this post and subsequent posts.

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1. EXPANDED SCOPE OF “REAL ESTATE PROJECTS”

1.1. The Draft Real Estate Business Law defines a “**Real estate project**” to mean a project having land use approved by the competent authority in order to invest to construct residential houses, construction works, and technical infrastructure, including

1.1.1. investment project of developing residential houses, urban area, and mixed-use function construction;

1.1.2. investment project of developing infrastructure, industrial zones, industrial clusters, export processing zones, high-tech zones; and

1.1.3. investment projects of developing other **civil construction works** (*công trình xây dựng dân dụng*).

1.2. Under Circular 12/2022 of the Ministry of Construction, civil construction works cover a broad range of construction works including hospital, schools, theatre, airport and train stations, and office. Accordingly, the Draft Real Estate Business Law now can regulate all kinds of construction projects (except for industrial or defense construction works). This could make the Real Estate Business Law overlap with

other law (like Law on Education) and create inconsistency. Preferably, the Draft Real Estate Business Law should limit to certain types of real estates which are usually traded in the market.

2. RULES ON APPLICATION OF LAW ON REAL ESTATE BUSINESS AND RELATED LAWS

2.1. The Draft Real Estate Business Law sets out some rules regarding application of the Law on Real Estate Business in relation to other relevant laws. The key takeaways are as follows:

2.1.1. Real estate business activities in Vietnam must comply with the Law on Real Estate Business and other relevant laws. The Law on Real Estate Business will prevail if there is any conflict, except for the case of transferring equity interest where such transfer will follow the regulations of Enterprise Law, Investment Law, Securities Law, and Cooperative Law. This provision implies that the transfer of equity interest in a real estate developer will not be deemed as transfer of real estate or real estate project under the Law on Real Estate Business;

2.1.2. If new laws are issued after the effective date of the Law on Real Estate Business need to contain specific regulations on real estate business different from those of the Law on Real Estate, then such laws must clearly set out which matters will follow or not follow the Law on Real Estate, and which ones will follow such new laws. In case of the new laws fails to do so, then the Law on Real Estate Business will be applied; and

2.1.3. The resolution of legal relations of real estate business must be based on the law on real estate business and relevant laws applicable at the time of act of real estate business.

2.2. If the scope of the Draft Real Estate Business Law is not unnecessarily expanded as discussed above, then this could be a welcome change and could address unnecessary conflicts between the applicable laws.

3. TYPES OF REAL ESTATE ASSETS BEING CAPABLE OF TRADE

3.1. Under the Draft Real Estate Business Law, an existing residential house or construction work is now defined to mean residential house or construction work which have been accepted for operation. Under the previous regulations, existing residential house or construction work is residential house or construction work which has been put into operation. Accordingly, the scope of existing real estate assets will be expanded to include assets which have not been handed over to the customers but which have been accepted for operation.

3.2. Regarding land use right, in addition to the conditions under the land law, the land use right in real estate project which could be put up for sale must be those having infrastructure to be developed according to masterplan, design, objectives of the investment project as approved by the competent authority.

3.3. The Draft Real Estate Business Law refers to “construction works having tourism function” or “construction works having function of tourism purpose” in several provisions without clarifying this type of real estate. It is not clear if the draftsman’s intention is to refer to certain types of tourist accommodation establishments under Article 48 of the Tourism Law 2017.

4. PUBLIC DISCLOSURE OF INFORMATION ABOUT REAL ESTATE PUT INTO BUSINESS

4.1. In addition to those currently provided under the Law on Real Estate Business 2014, the real estate developers are required to make public disclosures about the following:

- 4.1.1. information as to mortgage of house, construction works, and real estate project made available for trading (if any);
- 4.1.2. information as to quantity, type of (1) real properties available for trading, (2) real properties that have been sold, transferred, leased, and remaining real properties available for trading; and
- 4.1.3. information as to the contract for real estate business used for real estate transactions.

4.2. Some of the above information appears to be codified from current Decree 2/2022. While we think that the requirement on publicizing information of real estate is always necessary to enhance the transparency of real estate market, we also consider that the requirement should only to certain types of real estate products (not all) where the customers are usually incapable of doing investigation against the developer and the real estate projects.

5. THIN CAPITAL RULE FOR ALL REAL ESTATE DEVELOPERS

5.1. Under current Decree 2/2022, real estate developers must have its own capital for implementation of the real estate project equal to at least 20% of the total investment in case of project using less than 20 hectares of land; or to at least 15% of the total investment in case of project using 20 hectares of land or more. This requirement is also planned to be codified under the Draft Real Estate Business Law. There are several issues with this requirement.

5.2. First, it is not clear if this requirements applies to the sponsor/shareholder of the real estate project or the project company which is established by the sponsor/shareholder to implement the real estate project. Under the investment regulations, both the sponsor/shareholder or the project company could be considered as the investor of the real estate project;

5.3. Second, it is not clear when the equity capital condition is considered to be satisfied. There are three possible interpretations as follows:

5.3.1. the equity capital condition could be considered satisfied when the sponsor/shareholder applies for the Investment Registration Certificate (IRC) of the real estate project and demonstrates to the licensing authority that its equity capital exceeds 20% of the total investment capital of the project. In this interpretation, if the sponsor/shareholder fails to contribute the required equity capital, the sponsor/shareholder will be considered to be in breach of the IRC but not the equity capital condition under the Real Estate Business Law.

5.3.2. the equity capital condition could be considered satisfied when the

sponsor/shareholder contributes at least 20% of the total investment capital of the project to the charter capital of the project company. This interpretation is consistent with the thin capital rules under the land law; and

5.3.3. the equity capital condition could be considered satisfied when the sponsor/shareholder maintains the equity capital of the project company to be at least 20% of the total investment capital of the project at all times. This is the most aggressive (and unreasonable) interpretation of the condition. Since under this interpretation, even if the investor has completed construction of the project and sold all its products, the investor still has to maintain sufficient equity capital.

5.4. In practice, it is likely that the second interpretation will be adopted. But it would be much better if the draftsman of the Draft Real Estate Business Law could fix this issue before November 2023.

6. MODEL CONTRACTS FOR TRANSACTION INVOLVING REAL PROPERTIES

6.1. The Draft Real Estate Business Law again codifies the current requirements on using model contracts for real estate transactions. While the purpose of this requirement is not clear and could impose significant restrictions on how a real estate developer conducts its business. In our view, except for the sale of residential houses where the purchasers are individuals, all other model contracts should only be used as a non-binding reference source only.

For more further discussion on this issue, please click [Here](#).

7. SCOPE OF DOING REAL ESTATE BUSINESS OF FOREIGN-INVESTED ECONOMIC ORGANIZATIONS

7.1. The Draft Real Estate Business Law now makes clear the scope of doing real estate business of foreign-invested economic organizations to include the development of infrastructure on land via a real estate project in order to transfer, lease, sub-lease land use right having ready-built infrastructure.

7.2. Various provisions of the Draft Real Estate Business Law refer to the term “foreign-invested economic organization” (*tổ chức kinh tế có vốn đầu tư nước ngoài*)

which appears to mean the same concept as provided in the Investment Law 2020. However, the Draft Real Estate Business Law also refers to the term “foreign-invested enterprise” (*doanh nghiệp có vốn đầu tư nước ngoài*) in several provisions without providing a legal definition. Hopefully, this is only a drafting mistake and the draftsman’s intention is to refer to the concept of foreign-invested economic organization.

8. SALE OF EXISTING HOUSE OR CONSTRUCTION WORKS WITHOUT SALE OF THE UNDERLYING LAND USE RIGHT

8.1. Similar to the Real Estate Business Law 2014, the Draft Real Estate Business Law provides that sale of existing houses or construction works must be “attached” with land use right. It is not clear if this requirement that the sale of the house/construction work must always be conducted with the sale of the underlying land use right. If this is the case then this is contrary to the Land Law 2013 which allows the owner of a house or construction work could be different from the user of the underlying land. In addition, there are cases under the Land Law 2013, the underlying land use right cannot be sold (e.g., leased land with annual rental).

9. SALE AND LEASE-PURCHASE OF SEPARATE FLOOR AREA OF CONSTRUCTION WORKS IS PERMITTED

9.1. The Draft Real Estate Business Law now follows the land law’s approach when expressly recognizing the sale and purchase of each separate floor area of a construction works if it satisfies certain conditions. Among the conditions, the Draft Real Estate Business Law requires the construction work having the transferred floor area must be constructed in the land having use form of land assignment from State or leasing land from State with one-off rental payment for the whole lease term. This regulation gives rise to the following issues:

9.1.1. This regulation appears to not be in line with the new land law under which it is likely that the cases land users can lease land with form of one-off rental is very limited. Whereas, the land used for developing the construction work having transferred floor area may be land leased with annual land rental (e.g., land for commerce, service); and

9.1.2. The Draft Real Estate Business Law already sets out a condition that the parties under the sale contract must specify the financial obligation on the land applicable to the transferred floor area. Accordingly, the rental payment form of the underlying land should not be relevant.

10. SALE OF PRODUCTS OF DELAYED REAL ESTATE PROJECTS IS NOT PERMITTED

10.1. Existing houses or construction works belonging to a real estate project can only be sold if the real estate project, among other things, complies with the approved implementation schedule. Accordingly, a real estate developer of a delayed real estate project may not be able to its products under the Draft Real Estate Business Law.

11. ENTITIES ENTITLED TO PURCHASE, RECEIVE, RENT, OR LEASE PURCHASE REAL ESTATE

11.1. Under Article 16 of the Draft Real Estate Business Law, foreign entities may purchase or rent houses for their use. It is not clear why the Draft Real Estate Business Law is silent on foreign entities' right to lease other types of real estate for their use (e.g., factory or office building). This appears to be a drafting mistake given that under the current Law on Real Estate Business 2014, foreign entities may rent real estate for use.

11.2. Like Article 14 of the Law on Real Estate Business 2014, Article 16 of the Draft Real Estate Business Law also fails to clarify whether a foreign-invested economic organization is entitled to lease construction works for use. This also appears to be a drafting mistake. See further discussion on this issue [Here](#).

12. REAL ESTATE DEVELOPER MUST HAVE NO PENDING ADMINISTRATIVE VIOLATION IN ORDER TO MAKE ITS HOUSE AVAILABLE FOR TRADING

12.1. According to Article 20 of the Draft Real Estate Business Law, if the developer is subject to administrative sanction against violation of laws on investment, construction, land, housing, real estate business, tax with respect to the house made available for trading, then such developer may only sign the contract for sale, lease, and lease-purchase of such house upon it has fulfilled all relevant administrative sanction decisions. It is not clear what happens if the developer has signed the sale

contracts before being imposed the relevant administrative sanctions.

13. LANDLORD'S RIGHT TO UNILATERALLY TERMINATE THE LEASE

13.1. Similar to the current Law on Real Estate Business 2014, the Draft Real Estate Business Law allows landlord to unilaterally terminate the lease contract in case the tenant fail to pay the rent after 3 months from the deadline as specialized in the agreement without approval of the landlord. In our view, this arrangement may only be feasible if the monthly rental amount is not substantial. In many high-value commercial lease, the landlord cannot wait for three consecutive months in order to terminate the lease. Perhaps, the Draft Real Estate Business Law should allow the parties to agree otherwise on such case.

14. CONDITIONS FOR OFF-PLAN REAL ESTATE TO BE MADE AVAILABLE FOR TRADING

14.1. The Draft Real Estate Business Law introduces some new conditions applicable to off-plan real estate in order to be put into trading. Among these new conditions, Article 25.5 of the Draft Real Estate Business Law requires that the separate floor areas of construction works must also satisfy the conditions set out in Article 15.2 of the Draft Real Estate Business Law. One of the conditions under Article 15.2 is that the construction works must have documents evidencing that such construction works have been accepted and qualified for operation in accordance with the construction law. While the draftsman's intention is not clear, we consider that this condition is not practical given that if a real estate has been accepted and qualified for operation, then such real estate should be a ready-built property rather than an off-plan real estate.

15. TRANSFER OF REAL ESTATE PROJECT

15.1. Under the Draft Real Estate Business Law, transfer of a whole or part of real estate project means that the investor assigns a whole or part of the real estate project and rights, obligations, responsibilities, lawful interests of such investor and of other related parties (if any) toward the transferred real estate project or transferred part of real estate project to the transferee via a written contract in accordance with this Law". While the Investment Law 2020 fails to provide a legal definition for the

concept of “transfer of investment project”, the Draft Real Estate Business Law appears to clarify what are the subject matters of a transfer of real estate project.

15.2. Article 40.1 of the Draft Real Estate Business Law provides that a developer of a real estate project may transfer a whole or a part of the project to other investor(s) in order to continue the construction, business when the project is still within implementation time limitation (*trong thời hạn thực hiện*) approved by the competent authority. The wording of this new provision appears to suggest that regulations on transfer of real estate project will only be applied if the transfer is exercised during the construction of the project. Accordingly, the transfer of ready-built construction works under relevant real estate projects should not be considered as a transfer of real estate project. This interpretation is in line with the Ministry of Construction’s guidance in an [Official Letter](#).

16. REQUIREMENT FOR REAL ESTATE TRADING EXCHANGE IS REINTRODUCED

16.1. The Draft Real Estate Business Law reintroduce the requirement that sale of future real estate products or sale of land use right only by a real estate developer must be conducted through a real estate trading exchange.

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