Business

Shifting ground

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Foreign developers will be substantially affected by the new land law recently coming into effect.

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The new Land Law was ratified by the National Assembly on November 29, 2013 and came into effect on July 1 this year (the 2014 Land Law). It replaces the previous Land Law of 2003 (the 2003 Land Law). Following the 2014 Land Law, the government issued Decrees No 43, 44, 45, 46 and 47, which also came into effect on July 1. In guiding some of these decrees, the Ministry of Natural Resources and Environment and the Ministry of Finance issued several guiding circulars. The new Land Law may well bring about love-hate feelings for foreign developers in Vietnam.

More equal footing

Under the 2003 Land Law, the most common form of land acquisition by foreign investors was direct lease from the government. Foreign investors paid rentals either on a yearly or upfront basis. In contrast, local investors were allowed to acquire land via land allocation (i.e., land grants from the government for agricultural, commercial, or residential land, etc.) under which they paid a land use fee (the legal term for the payment for land allocation by local investors to the government) on a definite- or indefinite-term basis. In addition, local investors were also able to lease land from the government and pay rentals on a yearly basis.

The 2014 Land Law removes all of these differences between local and foreign investors. Now, both can lease land from the government and pay rentals on a yearly or upfront basis. They can also acquire land via land allocation. It is worth noting that land allocation is now available for residential land for the sale of houses or apartments constructed on the land only.
However, foreign investors are still not able to directly acquire land via land transfer or land lease from local individuals or companies (except for those who are industrial zone developers).

More Conditions for Land Acquisition

The 2014 Land Law sets out new strict requirements for developers (both local and foreign) who want to lease or obtain land allocation from the government. These new requirements include:

The lease (or allocation) of the land must have been provided for in the annual land use plan (the plan for using each specific piece of land, such as for commercial or residential purposes, within the district) issued by the district-level people's committee on January 1 each year. In other words, foreign developers must ensure that the land they intend to acquire has been specified in the annual land use plan or else they are unable to obtain it.

Developers must also meet a minimum level of statutory equity capital (i.e., their pocket money, or retained profit). In particular, for a project whose land area is less than 20 hectares, the developer's equity capital must be at least 20 per cent of the total estimated investment capital of the project. For a project of 20 hectares or more, the equity capital must be at least 15 per cent. This requirement is inherited from the Law on Real Estate Business of 2006. However, the 2014 Land Law takes it a step further. The requirements on equity capital are applicable to all corporate land users who wish to obtain land in Vietnam - not just real estate companies, as contemplated under the current Law on Real Estate Business.

Developers must pay deposits to the government to ensure that they will pay the land rentals (or land use fees) and develop the projects in a timely manner. The 2014 Land Law refers the deposit requirement to the investment laws of Vietnam. However, the Law on Investment of 2005 does not mention anything about the deposit requirement. The most recent draft of the revised Law on Investment also fails to mention this requirement. This raises the question as to how the requirement will be implemented.

Uncertainty Over Price

Under the 2003 Land Law, the land price (i.e., the land rentals or land use fees) for a specific piece of land could be calculated based on the table of land prices published annually by provincial people's committees, except for cases where a people's committee thought that the price of a land plot under the table did not reflect the market price. However, the 2014 Land Law requires the land price be determined on a case-by-case basis by the provincial people's committee, except for land plots valued at less than approximately $1.4 million located in the central area of the province. The provincial people's committee may hire land valuation firms to determine and advise on the land price. In determining the land price of a certain plot of land, a land valuation board is set up, headed by the chair of the provincial people's committee. Members of the valuation board include representatives of the provincial Department of Natural Resources and Environment and Department of Finance, and the relevant land valuation firm.

However, in major cities and provinces such as Hanoi, Da Nang, Ho Chi Minh City, and Binh Duong, at least several hundred applications for leasing or allocating land are submitted by investors to the relevant people's committee each year. Given this fact, and considering their limited resources and personnel, how will the land valuation boards ensure that applications are addressed appropriately?

It seems this new land price determination method leaves much uncertainty about the land price as well as the timing issue of the local government in determining land prices.

More Restrictions on Land Withdrawal

Under the 2003 Land Law, the grounds for land withdrawal (akin to eminent domain) by the government for the development of a commercial or residential project were very broad. Developers had been able to ask the government for land withdrawal from individual land users for their development of a three-star hotel or any residential project. This is no longer the case under the 2014 Land Law. Land withdrawal for a commercial or residential project must satisfy two conditions: (i) it must be for a significant project such as the construction of a new township or the improvement of an urban area; and (ii) it must have prior approval for land withdrawal from the provincial people's council.

More Options for Residential Projects

For the first time, the 2014 Land Law allows a developer of a residential project to transfer part of its project to another developer, though the law fails to define what it means by "transfer part of a residential project". However, this definition is given under the draft revised Law on Real Estate Business (albeit in an ambiguous manner).

The conditions for such transfers include: (i) the land price has been fully paid by the selling developer and the land has been issued a land use right certificate (akin to the title deed); the project has been fully constructed; and (iii) the new buyer is licensed for real estate business and entitled to acquire land in Vietnam (see above for the conditions on land acquisition). Regrettably, thus far it is still unclear as to the procedures and documentation for the transfer of part of a residential project.

Also for the first time, the 2014 Land Law allows the developer of a residential project to transfer individual plots of land in the project (without any houses constructed on them). Previously, this form of transfer was strictly prohibited for fear that if the developer failed to construct the houses in its project in a timely manner and following an approved design, then the entire city would look unsightly. However, in response to the recent downturn of the real estate market in Vietnam, the 2014 Land Law allows a developer to transfer bare land to buyers as long as the following conditions are met: (i) the developer must have fully paid the land price for the project land; (ii) it has constructed the infrastructure of the project; (iii) the project is not located in the central districts of a city or province; and (iv) the provincial people's committee where the project land is situated agrees to the transfer.

More Requirements for Industrial Zone Developers

Under the 2014 Land Law, developers who pay land rentals on an annual basis may only sublease the land on the same basis (i.e., the land rentals paid by tenants are also on an annual basis). If they already subleased certain land plots to the tenants on the basis of upfront payment for the entire lease term (before the effective date of the 2014 Land Law), they must pay the government their unpaid land rentals for such subleased land plots.

There are some signs that Vietnam's real estate market in Vietnam has been warming up recently in certain segments. It seems too early to judge if the new Land Law may further thaw the market with its liberal provisions on land transfer or whether it will worsen the situation with its new strict criteria for land acquisition and pricing .

* The article reflects the author's own views. it does not reflect the firm's views or position.

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