

Vietnam : Notable Aspects of Recently Passed Law on Housing and Law on Real Estate Business

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On 27 and 28 November 2023, after more than a year of extensive preparation and development, the new Law on Housing (“**New LOH**”) and new Law on Real Estate Business (“**New LOREB**”), finally were adopted by the National Assembly; both laws will take effect on 1 January 2025.

The Law on Land was not adopted during last session of the National Assembly as originally scheduled due to unsettled discussions on certain points, but it might be adopted soon during the interim session of the National Assembly in January 2024. We need to continue watching the amendment to the Law on Land, because the New LOH and New LOREB may be revised if the amended Law on Land contains any provisions that contradict the New LOH or New LOREB.

I New LOH

The following are key points of which investors should be aware, by descending order of significance.

1. Flexible options for social housing obligations

The obligation of commercial housing developers to contribute to social housing development is generally commendable and supported by persons in all walks of life, but in practice it has been challenging for developers to fulfill this obligation, due to inflexible regulations. Under the Law on Housing 2014 and Decree 49/2021/ND-CP (as amended), commercial housing developers are required to allocate 20% of their project land for social housing development, if the project has a land use scale of 2 hectares or more in special class and class I urban areas, or a land use scale of 5 hectares or more in class II and class III urban areas. Developers frequently encounter challenges in complying with this policy, for various reasons; one notable concern is disruption of the uniformity and planning of urban zones, when developers are required to place low-cost social housing blocks alongside commercial buildings.

However, the New LOH no longer automatically requires developers to integrate social housing blocks into commercial housing projects. Instead, the New LOH takes this practical issue into account and introduces more flexible alternatives. Depending on the class of urban area, the provincial-level People’s Committee (“**PC**”) can decide whether a developer must:

- set aside a residential land area in the project to build social housing; OR

- arrange a social housing land fund in a location other than within the scope of the commercial housing construction investment project in the relevant urban area; OR
- pay money, equivalent to the value of the land fund invested in building the technical infrastructure system, for purposes of constructing social housing.

Thus, investors in commercial housing projects now have more flexible options for social housing development, subject to the decision of provincial-level PC.

2. Term of ownership of apartment buildings

While it seems peculiar to report on a point for which there has been no significant change, we feel it imperative to emphasize that limiting the apartment ownership period was a focal discussion point in the revision of the Law on Housing.

In the end, the National Assembly decided not impose a uniform term limit on apartment ownership, which understandably could have had a huge impact on property rights. Instead, the New LOH relies on a mechanism that facilitates demolition of apartment buildings that have deteriorated. If (i) the design life set forth in the technical documents for an apartment building has expired, or (ii) even if the design life has not expired, the apartment is subject to severe damage or at risk of collapse, the provincial PC must arrange for inspection and assessment of the apartment building and consider whether or not to order demolition.

These regulations also are expected to provide the authorities with comprehensive mechanisms, policies, and measures by which to carry out renovations or other plans upon expiration of the designated use term of apartment building or when the durability or safety of the building is seriously jeopardized. For the private sector, the most significant impact of maintaining the status quo is a sigh of relief for commercial developers, who have had a genuine worry that imposing restrictions on ownership of buildings would damage market demand for new apartments, influence prices, and create other negative burdens.

3. More incentives for renovation and rebuilding of end-of-life apartments

The New LOH introduces a number of new incentives for developers to undertake renovation and rebuilding of end-of-life apartment buildings. The most notable is an exemption from land use fees and land rents for areas inside the renovation projects. In addition, the selected developers are exempt from the procedures for land price determination, land use fee calculation, and application for land-related financial liability exceptions, which could be considered an advantage, considering that these administrative processes are usually time-consuming. On the whole, the New LOH encourages developers to be more involved in the renovation and reconstruction of apartment buildings.

4. Clearer regulations on bonds for commercial residential housing projects

While Decree 99/2015/ND-CP expressly mentions that developers may issue corporate bonds to raise capital for housing development, the Law on Housing 2014 does not permit the use of bonds as a source for financing commercial residential housing projects. This has raised concerns about whether or not an issuance of bonds under the decree is valid, as it clearly falls outside the permitted financing sources set

forth in the Law on Housing 2014, and thus could be deemed illegal.

The New LOH ended the controversy by clearly providing forms of capital mobilization for commercial residential housing projects, which include (among other things) capital mobilized through the issuance of bonds, stocks, and fund certificates in accordance with laws and regulations. Thus, it now is clear that commercial residential housing developers are allowed to issue bonds to mobilize capital for project development purposes.

5. Conditions for appointment as developer of a commercial housing project

A significant number of commercial housing developers have encountered deadlocks due to the requirement that they own the residential land or other land that is approved for conversion for commercial housing investment projects. In practice, a significant portion, if not all, of the land owned by potential developers is acquired in areas originally designated for purposes other than residential housing developments, such as agricultural land. In these cases, it is necessary to obtain the approval of the state authorities for conversion of the land use purpose, but in order for developers to be qualified to apply for this approval, the nearly-universal position of the state authorities is that the developers first need to be appointed by the state authorities as the official project developers/owners. However, in order for developers to be appointed as project developers/owners, they must convert the land use purpose to residential housing. In recent years, efforts have been made to solve this chicken-and-egg dilemma, starting with the revision to the Law on Investment in 2020.

The New LOH apparently continues these efforts, and states, among other basic conditions, that a developer may be appointed if it already owns land use rights, or acquires land use rights through an agreement to receive land use rights, for the “type of land permitted for a commercial housing construction investment project” in accordance with the Land Law. Compared with the Law on Housing 2014, the open wording in the law may provide flexibility for permitting various types of land to be used for commercial housing construction investment projects, which might not be limited only to residential land or to land that is approved for conversion to residential use. However, the specific criteria for eligibility needs to be identified and determined in the much-anticipated revisions to the Law on Land. In other words, it is up to the amendment of the Law on Land whether developers can be appointed as project owners and thereafter apply for land purpose conversion, instead of being stuck in a loop in which the procedure comes first.

II New LOREB

The following are the significant changes introduced by the New LOREB that could impact business activities in Vietnam, particularly the activities of foreign-invested enterprises (“**FIE(s)**”):

1. Unification of definition of FIE and expansion of the scope of real estate business

The existing law on Real Estate Business (“**Current LOREB**”) does not contain a definition of FIE. As a result of conservative interpretation, all FIEs, regardless of the foreign capital ratio, are subject to strict restrictions on the scope of real estate business, when compared with domestic companies. This has

created generally unfavorable conditions for real estate business investments by FIEs. The New LOREB clearly categorizes FIEs into two groups:

- (a) Companies subject to conditions and procedures applicable to foreign investors under the Law on Investment; and
- (b) Other companies, outside group (a).
Group (a) supposedly refers to companies in which foreign investors hold more than 50% of the total ownership, either directly or via subsidiaries, per Article 23 of the Law on Investment. Accordingly, group (b) likely refers to all other companies, mainly FIEs with 50% or less foreign ownership and their subsidiaries.

This classification in the New LOREB means that FIEs with 50% or less foreign ownership now will enjoy the same treatment as domestic entities with regard to real estate business. The New LOREB also slightly relaxes the scope of “real estate business” for FIEs with majority foreign ownership, because FIEs are now permitted to engage in the following activities (among others):

- sale of land lots with completed infrastructure to individuals and households for construction of their own houses, or for leasing or subleasing to other individuals and organizations for lawful uses;
- leasing of certain floor areas in buildings for sublease;

However, because the wording of the law currently is quite succinct, we expect to see further guidance from the competent authority on these newly allowed activities in the future.

These amendments are expected to trigger an influx of foreign capital into certain real estate business activities, which previously were exclusively available to domestic entities. Moreover, the clear classification of FIEs into two groups based on foreign ownership ratio and scope of activities makes it easier for foreign investors to modify their investment structures through M&A transactions or the establishment of new enterprises. For instance, it would be less complicated to acquire a minority capital interest in an existing real estate business company, because the business of the target company would continue to be treated as a domestic business with the same scope of real estate activities.

2. New rules on deposits in off-plan real estate transactions

There have been no express regulations or conditions on receiving deposits from purchasers of off-plan real estate, which has resulted in disputes, fraud, and misuse of these deposits.

To address these issues, the New LOREB introduces clearer rules on deposits, which notably restrict developers from collecting deposits of more than 5% of the sale price of off-plan buildings from purchasers. Additionally, a written deposit agreement between the developer and the purchaser is mandatory in such transactions, and the developers are strictly prohibited from delegating execution thereof to any proxy or agent.

This regulation is commendable, as it introduces (1) better protection for consumers, (2) fair and equal competition in the market for developers, and (3) resolves the long-debated question of whether deposits are treated the same as advanced payments in these transactions, possibly stopping

widespread circumvention of advanced payment rules. We need to watch this closely to determine its effectiveness in practice.

3. Other noteworthy points:

- (a) Bank guarantees for developers' obligations to deliver off-plan real estate become optional, in contrast to the requirement as provided under the Current LOREB;
- (b) Restrictions on land plot division for sale have been extended, and essentially encompass most urban areas, by comparison with the Current LOREB's limitation to special and Class-I urban areas only; and
- (c) The New LOREB introduces new contract forms for real estate business activities, which we expect the government to issue soon; developers or enterprises engaging in real estate business must adhere strictly to these forms.

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