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## **LEGAL ALERT**

### **Newly Enacted Housing Law and Real Estate Business Law Relaxes Foreigner's House Ownership Restriction**



The new Law on Housing (LOH) and Law on Real Estates Business (LOREB) were adopted by Vietnam's National Assembly on November 26, 2014. Both laws will take effect on July 1<sup>st</sup>, 2015. By that time their implementing Decrees and/or Circulars will also be ready.

These laws aim to defreeze the real estate market by allowing foreigners to buy commercial houses and condominium in Vietnam, and further liberalise the concept of project transfer by allowing partial project transfer. Both reforms hopefully create a new wave of foreign investment into Vietnam's real estate market. This special review highlights the most important changes in these two laws, as well as the pitfalls that may hinder investments, by descending order of significance.

#### **1. Foreigners allow to buy project houses and condominium**

In the past, only three types of foreigners are allowed to buy houses in Vietnam. The new LOH allows all foreigners who has visa to enter Vietnam, as well as foreign invested enterprises (FIEs) to buy project houses in Vietnam. The ownership rights include the right to use, sell, mortgage or contribute houses as capital to an entity. Project house means condominium and houses in a real estate project.

There are four significant restrictions for foreigners still exist (but see section 2 for exceptions):

- (i) Foreigner' house ownership beyond projects (e.g., a townhouse or villa built by individuals but not in a real estate project) is not allowed.
- (ii) The total foreigner's house ownership may not exceed 250 separate houses in a ward or 30% condominium in an apartment building.
- (iii) The time of ownership is 50 years from the date of obtaining the Land Use Right and Property Ownership Certificate (LURPOC) and may be extended (but see exception in section 2 below).
- (iv) Foreigners who buy houses or condominium from leased land may only lease houses.
- (v) Payment must be made by bank transfer.

It is also not clear whether the project house ownership condition means foreigners can only buy houses from developers or they can buy houses from individual owners living in those project

houses. Experience in many real estate projects show that foreigners may buy houses from individual owners and not only developers. However, in some seminars about foreign house ownership, officials express their intention that they aim to defreeze real estate markets and allow foreigners to buy houses from developers rather than individual owners. This point need to be further confirmed by implementing decree of the LOH. With the restriction of house and land speculation (see point 3 below), it remains to be seen how these two regulations can coincide.

## **2. House Ownership for Viet Kieus and Foreigners Married to Vietnamese or Viet Kieus**

Viet Kieus (Vietnamese residing abroad) are allowed to own houses in the same manner as Vietnamese, provided he/she has entry visa into Vietnam (Art 7.2 LOH).

Art 161.1.c, second paragraph allows foreigners who are married to Vietnamese or Viet Kieus to obtain freehold house ownership and other rights as Vietnamese citizens. That means for those foreigners, they may own townhouse or villas beyond real estate projects as if they are Vietnamese citizens, at least in the event that both husband and wife co-own such houses or villa.

The law is not clear as to whether the right of foreigners being Vietnamese's bride or groom only exist while the marriage sustains and not after divorce, or whether the house ownership of a foreigner before marriage (which is restricted as per section 1 above) would now be upgraded (to the right in this section 2) after marriage without having to co-own the house with his wife/husband. This point would need to be further clarified under the implementing Decree of the LOH.

## **3. Prohibition of Land and House Speculation**

While the Government encourages foreigners to buy and own houses, they do not allow foreigners to speculate (i.e., to keep land bank or house bank). The LOREB only allows foreigners or foreign invested enterprises (FIE) to engage in the following businesses:

- (i) lease houses or premises for sub-lease purpose (i.e., not for resale purpose);
- (ii) develop residential houses for lease (i.e., not for resale) if the land is leased from the State, or develop non-residential premises for sale, hire purchase or lease; and
- (iii) purchase whole or part of a real estate project for sale, hire purchase or lease (no restriction).

It is unclear how the policy to restrict land speculation and the sanctitive ownership right of the owner (including the right to sell the real estate) could coincide. One way to interpret is that once an Investment Certificate and LURPOC are obtained, the owner is allowed to sell the property upon liquidation of the enterprise/offices or to relocate its office.

Also, the definition of the FIE under LOREB is not clear as the Law on Investment (LOI) and does not have a minimum foreign shareholding threshold to be considered as a FIE.

## **4. Foreign Ownership to Non-Residential Premises**

The new LOREB allows FIE or Viet Kieus to buy non-residential premises for their own use. This law also allows them to purchase part of the premise (e.g., a floor in a complex building) and guarantee that they will obtain LURPOC in relation to such premise or partial premise.

## **5. Raise the Legal Capital of Real Estate Enterprise to 20 billion VND**

Under the new LOREB, the minimum equity (i.e., legal capital) of a real estate enterprise is 20 billion VND (approximately 1 million USD), raised from 6 billion VND under the current law. The law also is not clear as to what is the minimum debt/equity ratio (i.e., the thin capitalisation rule) under the new LOREB – which may be regulated again under its implementing Decree. Under the old law, the minimum debt/equity ratio is 80/20 for new urban projects or large projects, or 85/15 in other projects.

## **6. Partial Transfer of Project Allowed**

In the past, a project may be transferred as a whole to the transferee. The new LOREB allows the transferor to transfer part of a project. That means in a tower that has multiple use (retail, hotel, serviced apartment and offices) could be repackaged and sold into different pieces following their functions or otherwise. The project owner can also sell a separate floor or basement in a tower, or a section in a real estate project.

Please note that the transfer of a project could be subject to Principle Approval under the LOI. The LOREB re-states this principle. The timeline to obtain Principle Approval is 30 days for a provincial level project and 45 days for a government level project.

To reduce bureaucracy, the transferee does not have to reapply for project approval, construction permit or zoning if there is no change in parameters of the pre-approved project (prior to the transfer).

To transfer a project, the project of the transferor must be at least obtained site approval, 1/500 masterplan and have land compensation completed. If the project includes technical infrastructure (internal roads, water and electricity lines, canalisation) then such infrastructure must be completed (in full or in part in accordance with the project schedule). The transferred project (or its part) must be free from dispute and obtained the LURPOC.

The transferee must be a real estate enterprise (established in Vietnam), having sufficient financial or expertise capacity to develop the transferred project. The FIE being transferee would receive the new land lease decision within 30 days from the receipt of the Principle Approval.

## **7. Real Estate Presale and Project Guarantee**

In order for the developer of a new real estate project to pre-sale future premises in a building, the piling of the building must be completed. In addition (for complex building and other projects) the land must be obtained the LURPOC, the project's construction certificate has been issued, and the technical infrastructure surrounding the building or the project (in a housing project) must be completed. Before launching the presale, the developer must notify to the provincial authority to approve that all conditions for presale in accordance with LOREB has been fulfilled. Other limits to resell under the old LOREB still apply: the first mobilisation may not exceed 30% of the purchased price, the total mobilisation may not exceed 70% of the purchased price (or 50% if the developer is an FIE) before premise delivery. After delivery, the premise owner may still withhold 5% until the LURPOC of this premise is obtained.

The developer who wants to presell future premises must obtain a bank guarantee for its obligation to complete and hand over the future premises. In the event of default, the bank is obliged to guarantee the developer's obligation to refund the amounts mobilised from the future

owner.

The owner of the future premise has the right to transfer its contractual rights (of the ownership of the future premise) to a secondary owner, by a contract, witnessed by the developer. Such contract may not be notarised, as LURPOC is not yet present.

## **8. Social Housing**

The government provides incentives to building social housing for low income people and government officials (the “qualified owner”). The developer for social housing will be provided tax incentives and land lease exemptions, preferential borrowing conditions from banks, as well as support from local government as to technical infrastructure development.

Owners of social houses may not resell such houses within 5 years from the full payment for such houses, unless sold to the developer or other qualified owners, at the price equivalent to the price for social housing at the same level in the market at the time of sale, and would enjoy exemption of personal income tax from such sale. Violation of this condition would lead to avoidance of the sale contract and re-claim of the houses to the government authority that control the social houses.

## **9. Passing of Ownership; and Other changes**

The LOH requires that any transfer of commercial houses (i.e., not being social houses or government houses) must be executed at a public notary. While the law states that the contract is valid at the time of notary, it does not state that the ownership is passed at the time of notary (as it was under the old LOH). The time of passing house ownership will be the time of full payment and hand-over the house, unless otherwise agreed. An exception to this rule is in a project housing development, the time of passing of ownership will be the time of either full payment or hand-over of the house. In any event, this regulation is contradictory to the Civil Code, i.e., ownership passed at the time of new owner’s registry at the LURPOC. According to the principle *lex specialis derogat legi generali*, the LOH should prevail the Civil Code.

## **10. Lease of Under-Construction Properties Allowed**

Under the previous LOREB, the owner cannot enter into lease contract while the property is under construction. This is changed in the new LOREB.

The LOH also provides further regulations for houses belong to the government, house management, house transfer contracts, demotion of houses, apartment building’s owners’ meeting, apartment building’s management committee, maintenance services.

The LOREB provides more conditions to control real estate services such as real estate agents, real estate exchange centre, real estate management.

*This Legal Alert is not a Legal Advice.*

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