

Legal news

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REAL ESTATE BUSINESS LAW

Opening the door to a more transparent market

By Nghiem Viet Anh

The matter of mobilizing capital for real estate projects and for residential housing projects in particular always attracts special attention from project owners, buyers and relevant authorities.

In practice, to create legal grounds for mobilizing capital for residential housing projects and effectively protect buyers' basic interests, a series of legal documents was issued providing provisions related to the time when the project owner can sale a product and collect money from the buyers, among which Article 39 of the Law on Residential Housing stipulates that: *"An investor may only raise capital by way of payments made in advance by people who wishes to purchase or lease residential housing in the case where the design of residential housing has been approved and the construction of the foundation has been completed"*. In the view of legislators the time of completion of foundations should be a point of time appropriate for both the project owner's raising capital from advance payment by buyers and guarantee of the buyers' interests.

However, in the context of a boom in residential housing markets, with respect to a number of potential projects buyers expect to buy houses at a low price and sell them at a much higher price in the future. In the meantime, a project owner who always has the demand for raising capital to service a project has to grasp buyers' expectation. Therefore, an alternative raising capital method, which satisfies the needs of the project owner and buyers and is not in contradiction with the Law on Residential Housing has been proposed. In fact, instead of signing a purchase contract with the buyer, the project owner offers the buyer another kind of contract named a "cooperation agreement", "capital contribution agreement" or "loan agreement" (Hereinafter collectively referred to as "cooperation agreement"). Under the cooperation agreement, the buyer shall become a partner of the project owner who shall contribute a certain amount to the project and shall be granted with "buying right". The buying right as mentioned herein is the right entitling the partner to buy a house of the project at a preferential price upon the project owner selling the houses in accordance with prevailing regulations. The partner under the cooperation agreement has a chance to convert its role into the buyer under the house purchase contract, according to which the amount that has been paid under the cooperation agreement shall be deductible to the payable amount under the purchase contract. Despite the fact that the above mentioned transaction implies certain potential risks for the buyer, especially when the project owner cannot implement or delay the project, many buyers still agree to enter into this kind of cooperation agreement in order to obtain such buying rights with a hope that they can sell the houses in the future at a price much higher than the price agreed with the project owner in the cooperation agreement.

Catching up this reality, the Law on Real Estate Business (LOREB) was issued and took into effect from January 1, 2007, which provides in Articles 11 and 22 that the

investors are obligated to publish information related to the real estate before trading and they must sell the houses and construction works via real estate trading floors. The said provisions create a legal basis for the publicity of information and the transparency in sale activities. However, as the period and the method of publicizing the information as well as the way to sell the project's products via real estate trading floors are not clearly specified, the above mentioned provisions have yet to be implemented.

After nearly one year from the effective date of LOREB, the government has issued Decree No. 153/2007/ND-CP guiding the implementation of LOREB. This decree has addressed some issues related to capital of real estate business enterprises, real estate brokerage certificates, real estate valuation and certificate for management of real estate trading floor, etc., but detailed guiding provisions in connection with the publicity of information and the sale of project products via real estate trading floors is still pending.

The issue is only regulated thanks to the Ministry of Construction's issuance of Circular 13/2008/TT-BXD guiding the implementation of LOREB and Decree 153, under which a trading floor must publicize information regarding the real estate available for sale, transfer, lease and/or hire purchase on such trading floor to give information to clients and to enable transaction registrations. The time-limit for publicity of information shall be a minimum of 7 days on the trading floor. Within such a time-limit, the following information including project name, type and quantity of real estates and the location and time for holding the sale, transfer, lease and/or hire purchase, must be publicized in a minimum of three consecutive editions of one locally-issued newspaper, at least once on local television in the location of the project and on any website of the trading floor. At the expiry of the said time-limit for publicity of information, the investor (or the trading floor if so delegated with authority) shall be permitted to hold the sale, transfer, lease and/or hire purchase of the publicized real estate item. If two or more clients register for the same real estate item, or if the number of registered clients is more than the quantity of real estate items, then the investor (or the trading floor if so delegated with authority) must select a client by casting lots or by holding an auction.

Based on such provision, in a case where a product has more than one client registered to buy, the project owner must select a client by casting lots or by holding an auction. As a result, the client who has the buying right via the cooperation agreement may lose his/her right. Therefore, the client shall not be interested in signing this kind of cooperation agreement for obtaining the buying right, because there is no guarantee to ensure that they can execute such rights in the future. In theory, from the effective date of Circular 13 the said cooperation agreement is not a good method for mobilizing capital from the buyer and for overcoming the barrier as stipulated in the Law on Residential Housing.

However, some people have doubted the enforceability of the new regulations. In cases where the project owner violates the regulations related to real estate business, which sanction shall be applied? In practice, there is not any legal instruments issued to provide detailed sanctions against administrative violations in real estate business. Hence, if a real estate business enterprise violates relevant regulations, the state authorities have no legal ground to deal with such violations.

The Ministry of Construction said that it will submit a new decree to the government to replace Decree 126/2004/ND-CP providing sanctions against administrative violations in the fields of construction, management of urban infrastructure and housing. The new decree is expected to create a complete legal frame for real estate business activities, which will help the markets become more transparent and the buyer shall not easily pay money for obtaining the buying right as is the case at present.

Other Sectors

Finance

- On November 27, 2008, the Government issued Decree No. 118/2008/ND-CP providing the functions, duties, authority and organizational structure of the Ministry of Finance.
- Decree No. 114/2008/ND-CP, dated November 3, 2008 providing detailed guidelines for implementation of the Law on Bankruptcy regarding enterprises operating business in the insurance, securities and other financial fields.
- On November 13, 2008, the Ministry of Finance stipulated Decision No. 104/2008/QD-BTC on the amendment of and supplement to the Regulation on the management and use of the Fund for Enterprise Arrangement Assistance at the Groups, State corporations and mother companies accompanying Decision No. 09/2008/QD-BTC of the Minister of Finance, dated January 31, 2008.
- Circular No. 111/2008/TT-BTC of the Ministry of Finance, dated November 24, 2008 on the amendment of and supplement to Circular No. 82/2007/TT-BTC of the Ministry of Finance, dated July 12, 2008 guiding the regime of State financial management regarding foreign non-refundable aids in the category of collection source for State budget.
- On November 18, 2008, the Ministry of Finance issued Circular No. 108/2008/TT-BTC providing guidelines for handling the State budget at the end of year, and making reports on annual finalization of State budget.
- Circular No. 107/2008/TT-BTC of the Ministry of Finance, dated November 18, 2008 providing additional guidelines for certain points on the management and regulation of State budget.
- On November 18, 2008, the Ministry of Finance stipulated Circular No. 106/2008/TT-BTC providing guidelines for the accounting upon conversion from enterprises with 100% State-owned capital into joint-stock companies.

Banking

- Decision No. 2635/QD-NHNN of the State Bank of Vietnam, dated November 6, 2008 promulgating a number of regulations related to transactions in foreign currencies of credit institutions permitted to carry out foreign exchange operations.
- On November 3, 2008, the State Bank of Vietnam issued Decision No. 2561/QD-NHNN on the interest rates of re-granting loan, interest rates of re-deduction and interest rates of overnight loans for inter-bank electronic payments, and loans

compensating for capital lackness in counterbalance payment between the State Bank of Vietnam and banks.

- Decision No. 2560/QD-NHNN of the State Bank of Vietnam, dated November 3, 2008 on the adjustment of obligatory reserve for credit institutions.
- On November 3, 2008, the State Bank of Vietnam stipulated Decision No. 2559/QD-NHNN on the basic interest rate in Vietnamese Dong.

Taxation

- Law No. 27/2008/QH12 adopted on November 14, 2008 by the National Assembly on the Special Sale Tax.
- On November 28, 2008, the Ministry of Finance issued Decision No. 109/2008/QD-BTC on the adjustment of export tax rates for woods and items of wooden goods in the list of export tariff.
- Decision No. 107/2008/QD-BTC of the Ministry of Finance, dated November 18, 2008 on the adjustment of preferential import tax rates for certain groups of items in the list of preferential import tariff.
- On November 17, 2008, the Ministry of Finance stipulated Decision No. 2538/QD-BTC correcting Circular No. 61/2007/TT-BTC of the Ministry of Finance, dated June 14, 2007 providing guidelines for dealing with breaches of laws on tax.
- Decision No. 102/2008/QD-BTC of the Ministry of Finance, dated November 12, 2008 promulgating standard forms for collection of personal income tax.
- On November 10, 2008, the Ministry of Finance issued Decision No. 100/2008/QD-BTC on the adjustment of preferential import tax rate for the item of liquefied petroleum gas in the preferential import tariff.
- Decision No. 99/2008/QD-BTC of the Ministry of Finance, dated November 7, 2008 on the adjustment of preferential import tax rates for a number of items under Group 2710 in the list of preferential import tariff.

Insurance

- On November 14, 2008, the National Assembly passed the Law No. 25/2008/QH12 on the Health Insurance.
- Circular No. 29/2008/TT-BLDTBXH of the Ministry of Labour, War Invalids and Social Affairs, dated November 28, 2008 guiding the grant, management and use of payment free disease examination and treatment card for children under 6 years old in public medical establishments.
- On November 10, 2008, the Ministry of Labour, War Invalids and Social Affairs stipulated Circular No. 26/2008/TT-BLDTBXH on the amendment of and supplement to a number of points in Circular No. 09/2007/TT-BLDTBXH, dated

July 13, 2007 guiding a number of articles of Decree No. 67/2007/ND-CP, dated April 13, 2007 on the assistance policy in favour of community-sponsored subjects.

Trade

- Decision No. 153/2008/QD-TTg of the Prime Minister, dated November 28, 2008 providing the functions, duties, authority and organizational structure of the Department of Power Regulation under the Ministry of Industry and Trade.
- On November 19, 2008, the Ministry of Industry and Trade issued Decision No. 43/2008/QD-BCT approving a program on production of woven fabrics for export to 2015.
- Decision No. 42/2008/QD-BCT of the Ministry of Industry and Trade, dated November 19, 2008 approving the planning on development of Vietnam's textile and garment industry until 2015 with orientation to 2020.
- On November 17, 2008, the Ministry of Finance stipulated Decision No. 106/2008/QD-BTC providing the collection level and the regime of collection, submission, management and use of fee for registration of franchising activities.
- Decision No. 103/2008/QD-BTC of the Ministry of Finance, dated November 12, 2008 promulgating the Regulation on auction of goods from national reserve directly managed by the Department of National Reserve.
- On November 7, 2008, the Prime Minister issued Decision No. 1601/QD-TTg on the establishment of the Management Board of economic zone of border gate Dong Dang – Lang Son, Lang Son Province.
- Circular No. 14/2008/TT-BCT of the Ministry of Industry and Trade, dated November 25, 2008 guiding the implementation of a number of regulations in Decree No. 119/2007/ND-CP, dated July 18, 2007 on the cigarette production and business.

Transport

- On November 13, 2008, the National Assembly adopted the Law No. 23/2008/QH12 on Land Traffic.
- Decision No. 1686/QD-TTg dated 20 November, 2008 of the Prime Minister approving a Strategy for development of rail way transportation until 2020 with orientation to 2050.
- On November 12, 2008, the Ministry of Finance and the Ministry of Transport jointly stipulated Interministerial Circular No. 103/2008/TTLT/BTC-BGTVT guiding the management of fee prices for inland aviation transportation and prices of aviation services in the aero ports and airports of Vietnam.

- Interministerial Circular No. 100/2008/TTLT-BTC-BGTVT-BCA-BTP-NHNNVN dated November 6, 2008 of the Ministry of Finance, the Ministry of Transport, the Ministry of Justice and the State Bank of Vietnam guiding the implementation of Clause 2 Article 47 of Decree No. 146/2007/ND-CP, dated September 14, 2007 sanctioning administrative violations in the field of land traffic.

Land

- On November 10, 2008, the Ministry of Natural Resources and Environment issued Decision No. 08/2008/QD-BTNMT promulgating the standards and specifications for setting up cadastral maps at 1:200, 1:500, 1:1000, 1:2000, 1:5000 and 1:10000 scales.
- Circular No. 110/2008/TT-BTC of the Ministry of Finance, dated November 21, 2008 guiding the regime of collection, submission, management and use of fees for exploitation and use of survey and mapping material.

Science - Technology

- On November 13, 2008, the National Assembly passed the Law No. 21/2008/QH12 on High Technologies.
- Decision No. 64/2008/QD-BLDTBXH of the Ministry of Labour, War Invalids and Social Affairs, dated November 27, 2008 promulgating the national technical specifications on labour safety in relation to boilers and pressure cylinders.
- On November 24, 2008, the Ministry of Industry and Trade stipulated Decision No. 6215/QD-BCT promulgating the Regulation on organization and operation of the Board for Standard Techniques, Technical Specifications and the process of drafting Standards and Technical Specifications of Vietnam under the Ministry of Industry and Trade.
- Decision No. 50/2008/QD-BTTTT of the Ministry of Information and Communication, dated November 12, 2008 promulgating "National technical specifications for postal services of public use".

Judiciary

- On November 14, 2008, the National Assembly passed the Law No. 26/2008/QH12 on Civil Judgment Enforcement.
- Decision No. 1858/2008/QD-BCA(A11) of the Ministry of Public Security, dated November 5, 2008 on the list of State secrets at "Secret" level of Vietnam News Agency.

- On November 5, 2008, the Ministry of Public Security issued Decision No. 1857/2008/QD-BCA(A11) on the list of State secrets at “Secret” level of the Government and the Government’s Office.
- Decision No. 2101/QD-BTP of the Ministry of Justice, dated November 4, 2008 providing the functions, duties, authority and organizational structure of the Department for General Issues on Legislation.
- On November 7, 2008, the Ministry of Justice and the Ministry of Interior Affairs jointly stipulated Interministerial Circular No. 08/2008/TTLT-BTP-BNV guiding the organization and personnel of the Centre for State Legal Assistance.

Interior Affairs

- Law No. 22/2008/QH12, dated November 13, 2008 on Public Officials and Servants.
- On November 28, 2008, the Prime Minister issued Decision No. 1727/QD-TTg on the non-business professional units under the Ministry of Justice.
- Decision No. 04/2008/QD-BNV of the Ministry of Interior Affairs, dated November 17, 2008 promulgating the standards of public official ranks of inspectorate branch.
- On November 13, 2008, Hanoi People’s Committee stipulated Decision No. 47/2008/QD-UBND providing the functions, duties, authority and organizational structure of Religion Section under Hanoi Department of Interior Affairs.

Agriculture

- Decree No. 119/2008/ND-CP, dated November 28, 2008 on the amendment of and supplement to a number of articles of Decree No. 33/2005/ND-CP, dated March 15, 2005 detailing the implementation of a number of articles of the Veterinary Ordinance.
- On November 28, 2008, the Ministry of Agriculture and Rural Development issued Decision No. 113/2008/QD-BNN amending contents of a number of items in the list of plant protection agents permitted to be used accompanying Decision No. 49/2008/QD-BNN, dated March 27, 2008 and certain items added to the list of plant protection agents permitted to be used accompanying Decision No. 93/2008/QD-BNN, dated September 18, 2008 of the Ministry of Agriculture and Rural Development.
- Decision No. 112/2008/QD-BNN of the Ministry of Agriculture and Rural Development, dated November 19, 2008 promulgating the economic – technical norms of forest allocation, forest lease and grant of land use right certificate for the purpose of forestry associated with making the forest management dossier.

- On October 29, 2008, the Ministry of Agriculture and Rural Development stipulated Decision No. 106/2008/QD-BNN promulgating the regulations on assignment and management of sample collectors, analyst, analysis laboratory and organizations certifying the quality of varieties and plant products; and fertilizers.

Investment

- Decision No. 77/2008/QD-UBND of the People's Committee of Ho Chi Minh City, dated October 29, 2008 promulgating the regulations on cost rates for the preparation and evaluation of the planning and adjustment of the overall planning on socio - economic development, planning on development of branches and planning on essential products in the area of Ho Chi Minh City.
- On November 20, 2008, the Ministry of Construction issued Circular No. 19/2008/TT-BXD guiding the implementation of preparation, evaluation, approval and management of construction planning for industrial zones and economic zones.
- Circular No. 13/2008/TT-BCT of the Ministry of Industry and Trade, dated November 5, 2008 providing guidelines on implementation of support for investment in infrastructure construction for industrial and craft clusters in the Central Highlands, and Central midlands and Northern mountainous regions.

Miscellaneous

- On November 13, 2008, the National Assembly passed the Law No. 24/2008/QH12 on Vietnamese Nationality.
- Law No. 20/2008/QH12, dated November 13, 2008 on Biological Diversity.
- On November 12, 2008, the Ministry of Information and Communication stipulated Circular No. 05/2008/TT-BTTTT guiding a number of articles of Decree No. 97/2008/ND-CP, dated August 28, 2008 on the management, provision and use of internet services and electronic information on the internet with respect to internet services.

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