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THE LAND LAW 2003

Revisions to improve the business environment and land market for the private sector

The passage of the Land Law of 2003 and its accompanying guidance was a positive step towards synchronizing the various regulations on land and creating the legal framework to deal with emerging issues in relation to the land market. However, after four years of implementation, the regulatory framework under the Land Law of 2003 has shown several shortcomings that need to be rectified.¹ In this Business Issues Bulletin, we consolidate recent comments on the Land Law revisions from experts, lawyers, business associations, and government officials, in order to contribute to the improvement of business access to land in Vietnam. The analysis and discussion focus on the issues of land use planning, property rights associated with land, land transactions and pricing, and procedures on land allocation. Some of these comments have also been posted on “vibonline” the online business forum of the VCCI.²

Land use planning should be transparent and stable in the long term

Currently, land use planning (LUP) is a hot issue that is considered by many to be the weakest link in the overall land use policy. A lack of access to information and opportunities to contribute to the process of LUP formulation is a serious issue often raised by private enterprises.³ One explanation for this lack of transparency is that the current planning mechanism has not been designed to meet the needs of businesses and citizens, but instead to fit the needs of four administrative levels. As a consequence, there is a risk that demands for land could be manipulated by personal interests. Land use plans often lack practicality and are incompatible with other plans on construction and urbanization. The position held by the business community is that it is necessary to stipulate measures to acquire contributions on LUP from the business community and experts, as well as measures to improve the availability and transparency of land information.

Apart from requirements on information transparency, enterprises want the

government to ensure detailed, consistent and long-term planning. Therefore, it is necessary to introduce regulations to ensure that planning for future periods does not conflict with planning for previous periods in order to ensure consistency and avoid uncertainty. In the case where changes in LUP do occur, the regulations should provide safeguards to prevent individuals with inside information from taking advantage of planning changes to unfairly take over land and to reduce the number of “suspended planning projects”, which interrupt and negatively affect business activities and livelihoods.

Land regulations should extend the property rights and land transfer rights of businesses

Currently, businesses, including foreign-invested enterprises, are saying that the Land Law should be amended to include more property rights associated with land use rights and land transfer rights, in order to facilitate the development of an active and healthy real estate market. In particular, enterprises have made the following recommendations:

- Extend the coverage of the law to

include the right to use “land use rights” as mortgage and guarantee to secure loans, open Letters of Credit (L/Cs), pay or execute obligations agreed in commercial contracts instead of limiting usage to “collateral for bank loans only” as currently stipulated;

- Allow leaseholders who pay yearly rent to transfer, sub-lease, contribute capital or mortgage the land use right of leased land; and

- Allow foreign economic organizations to directly lease land from organizations and households who are allocated the land use right by the state, or to transfer the land use right, as domestic economic organizations do. This will encourage foreign investors to participate in the land market, and ensure the principle of indiscriminate treatment in the spirit of the Unified Enterprise Law and Common Investment Law.

Regulated land price and cost for land recovery should be true and fair for enterprises

One of the difficulties of the current land recovery and compensation process is the large discrepancy between prices before and after recovery. In addition, the language in the present regulation stating that “Land compensation is based on market price in normal conditions” is not clear enough to

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The Business Issue Bulletin provides those interested in business issues with a short summary and analysis of a particular topic affecting the business environment in Vietnam, and exposure to different opinions held by various stakeholders on the topic.

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(1) See paper entitled “Revisions of Land Law 2003”, prepared by MONRE and submitted to the Government in July 2008. The main shortcomings identified are: inefficient and impractical land use planning, inconsistent system of land financial management, complicated land disputes, and ambiguous land regulations.

(2) <http://www.vibonline.com.vn>

(3) A recent study conducted by IFC on land issues provides statistical evidence for this statement. Nearly 60% of SME respondents said that they have no information on local land use planning, and only 3% said that they had an opportunity to discuss or comment on LUP. More information on this issue can be found in the report entitled “Vietnam SME Land Policy: Summary and Analysis of Survey Research”, Stephen Butler, January 2007.

The land use plan should be transparent and stable in the long term



- Previous studies of land use planning in Vietnam have identified issues calling for special attention, but most of these issues have not been clearly addressed in the current revision of the Land Law. One such issue has to do with how to ensure various socio-economic sectors' participation in LUP. It is vital to legislate the right of people and

enterprises to comment on local land planning or plan changes. All interested parties must be allowed to participate in and contribute ideas to any investment project which may change the land use purposes of a large area or make a significant impact on normal residents' life and business activities in the area. These rights should be ensured in a provision on information dissemination and procedures for collecting community feedback on LUP. In addition, the Land Law should provide an administrative procedure for people's complaints and proposals for planning modifications. Further, the criteria for LUP approval and LUP revision should be clarified and made available to local people.

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- The Land Law should have a provision which clearly stipulates the responsibility of land management authorities to provide information on LUP and a cadastral map. This provision will nominate which state entity or authorizing level (on land management) is liable to conduct the task, and by

which conditions, procedures and service fees the information on land should be released to applicants. Such regulation would help to improve LUP transparency and reduce administrative red tape and abuse of power in state-managed works. Another problem to focus on is the situation of "suspended planning", which currently exists throughout the country. In our opinion, the Land Law should allow the original land holders to recover their rights on land if the LUP on the land is suspended after a certain period of time, and penalties should be applied to authorities and officials who are responsible for suspension of LUP.

*Lawyer Nguyen Minh Thang
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Land regulations should extend the property rights and land transfer rights of businesses



- According to current regulations, organizations that pay an annual land lease are not entitled to transfer, lease, or contribute capital according to the value of the leased land. In reality, the form of annual payment for the land use right does not have a significant legal effect on land investment and development rights upon termination of

the lease. Legally, the land use right can be considered a type of property in a civil transaction. Therefore, the "annual payment" should not be the basis for denying the property rights attached to land. Transferring taxes on land use rights can be accomplished through a progressive tax (the highest rate may reach up to 42% of the rent). Allowing sub-leases or the transfer of this land will increase incomes for the state budget and prevent tax evasion by land users. It is time for the state to carefully study and consider expanding land users' rights. The state should not impose limitations on lessees' rights, as difficulties in limiting land speculation work against vital market demand.

*Lawyer Do Trong Hai
Head - BIZLINK Law Office*



- At present, households are allowed to mortgage their land use rights under civil law (i.e. to use mortgages to borrow capital not only for business activities, but also for everyday necessities). Otherwise, economic organizations can only use their land use right as collateral for "bank loans" under the regulations of the Land Law. A

question to be asked is why this collateral could not be used for other sorts of secured transactions, such as a guarantee to open a Letter of Credit, or a guarantee for payment on contractual obligations. The same question can be asked for assets associated with land such as buildings or other value added structures or infrastructure. In addition, the Land Law presently provides complicated guidance on the types of land permissible for mortgage use, making it difficult to distinguish which land types may be used for mortgages and which may not. In my opinion, the Land Law should expand land owners' rights associated with land and clearly specify the types of land that are mortgageable.

*Lawyer Truong Thanh Duc
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● Foreign organizations and individuals who lease land from the state are offered seven rights related to land, similar to the rights enjoyed by Vietnamese organizations and individuals. However, foreign organizations and individuals are not allowed to lease land from other organizations or households, and are not entitled to transfer their land use right, even in the case of termination of the land use. In addition, if a joint venture is dissolved, goes bankrupt or is converted, it will face obstacles in transferring land. According to Article 26 of the Land Law, once an organization is closed or goes bankrupt, the state will recover such enterprise's allotted land. On the contrary, Article 40 of

Decree 17 states that when an organization is closed, the land use right, as contributed capital, will be treated in accordance with the joint venture parties' agreement. We think that the Land Law should be revised to be more consistent with principles of non-discrimination and that foreign investment should be recognized as an integral part of Vietnam's multi-sector economy. The solution provided by Decree 17, which considers the land use right as a normal contributed property (capital) of joint venture, is reasonable.

Mr. Vu Duy Thai

Chairman - Hanoi Association of Industry and Commerce

Regulated land price and cost for land recovery should be true and fair for enterprises



To ensure fair compensation, the state must publicize the land use plan and price frame for recovered land as early as possible. The price applied need not follow administrative boundaries. The valuation for each land lot should be fixed by an independent evaluation organization according to the "price frame" or "stable rate" of the area (locality) where the recovered land is

located, and with the mutual agreement of concerned parties. In addition, the valuation should be made public before recovery. Only when compensation amount is reasonable and agreed to by at least 80% of indemnitees, (specialized) authorities in charge of land development shall implement the land compensation and recovery process. After that, cleared land can be allocated to investors and enterprises by auction, depending on the land use purpose and the business needs. If it is strictly applied, this procedure will ensure the legitimate rights and interests of all stakeholders, including the original land holders, enterprises needing land, and the state as representative of the public owners and ultimate manager of land. In addition, to facilitate the development of a transparent land market, the state should not deny the rights of organizations and individuals in transferring land and converting the land use.

Mr. Vu Duy Thai

Chairman - Hanoi Association of Industry and Commerce

The main issues for land pricing are implementation and application of existing regulations. Calculations must be made on a consistent and transparent basis. Currently, the government-set land price does not reflect the market value. Although the law requires land rental and land use fees as well as other land-related payments owed to the government to be calculated on the basis of price lists, in practice, each locality makes its own determination on the land price on a case-by-case basis. Consequently, there is no clear and consistent way for investors to determine what the price will be from the outset. As for land compensation, the full amount of compensation paid via direct negotiation by the local or foreign investor must be deducted from any land rental or land use fee the developer has to pay. Currently such deductions are capped at the "price the state would have paid for compensation" (generally determined by the land price lists issued by each province and which do not currently reflect the true market value). Therefore, the amount that is deducted from any land payment to the government is often only a portion of and not the full value of the compensation actually paid.

Mr. David Lim

Senior Associate - Mayer Brown JSM

Land allocation procedures should be simplified and made compatible with other regulations in the whole investment process



In general, current procedures on land are rather complicated, especially in regard to the cycle of enterprises' investment procedures (including site survey, preparation of investment documents, and application for investment license, compensation for land recovery, leasing land from the

state, and acquiring construction license and environment license). Even at the first step, the site survey procedure is applied differently in different localities. From the first step of the site survey to the last step of receiving a land allocation decision from the Provincial People's Committee, enterprises must undertake many procedures at various state management offices and administrative levels. According to the Land Law, the fundamental administrative procedure for each individual

► step in allocating land, leasing land and converting land use purpose should be simple, but in fact it is a very complex process. The whole process takes a great deal of time and the final decision depends largely on the attitudes and viewpoints of the relevant state management offices. Meanwhile, each state management office has its own approval criteria to apply under “sector planning” barriers and many conflicts occur in regard to laws applied and decisions made by the various authorities. If the Land Law is to “evade” this issue of incompatible laws, the execution of land procedures will remain impracticable. Therefore, administrative land procedures should be strictly regulated to define the priorities of each step in the entire land allocation and investment process, in accordance with other regulations on investment, environment, construction, and conditional business activities. Better guidance for coordination among relevant state management agencies is also required, so project documents and approval processes can be synchronized.

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● For small projects, local developers are already negotiating on their own with land users to clear land. For larger projects, the compensation process as set out in Decree 84 in which the government via the local People's Committees approves the compensation plan and carries out compensation is appropriate. Foreign investors who carry out a project on a wholly owned basis are disadvantaged compared to local developers after the land is cleared or negotiations with land users to clear land are completed, because they cannot pay land users compensation immediately. They have to complete two additional steps in order to acquire the land (i.e. they have to negotiate a land lease with the state and apply to obtain an Investment Certificate). It can take from six months to a year to obtain an Investment Certificate, and it is unlikely that land users will wait this long to receive compensation for the land. Therefore, it is our view that foreign developers should not be required to negotiate on land leases with the state (just like local developers) and that land use right certificates should be issued to foreign developers after compensation in order to give foreign developers the same rights as local developers.

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be properly applied. Therefore, in order to facilitate better conditions for enterprises to negotiate with landholders on land compensation, the state should establish a transparent and detailed land price range for each phase of the recovery process, such as: land price for the current use purpose, land price after the land has been planned for new purposes, and land price after infrastructure has been developed. The land price range should be established on the basis of the “stable transaction price” in the local area where the land is recovered, with the agreement of related parties. In addition, the state should support the creation of favorable conditions for free negotiation on land transactions and conversions between enterprises and citizens in accordance with free market principles.

Regarding the determination of the amount payable for the land use right, enterprises recommend that other compensation costs, in addition to the compensation amount on the main land area to be recovered, should be deducted in the payment for leased land.⁴ These costs include compensation on land for access to the main land area and other investment in public infrastructure. Obviously, spending on these sorts of infrastructure contributes to an increase in land values after investment. Investors, who must pay for the land use right according to the land value after investment, should be allowed deductions for expenses that create added value to this land. In addition, investors should also be allowed deductions for other sums of money such as asset compensation, support for employment creation, and resettlement of original land holders.

(4) Under the guidance of Decree No 198/2008/ND-CP, land developers can only deduct the compensation for the main planned land area, but can not deduct the cost of outside land used for access to the main land or the cost of other infrastructure developed outside the main planned land area.

Land allocation procedures should be simplified and made compatible with other regulations in the whole investment process

In most cases, the application for land allocation from the state accompanies a specific investment project. Therefore, the land allocation procedure is usually interrelated with other legal procedures relating to the whole investment process. In addition to procedures on investment and environment, if the project is approved on a conditional business, the investor has to meet specific requirements and conditions for private sector involvement. For example, to apply for land allocation to construct houses for sale, the investor must comply simultaneously with the Land Law, the Investment Law, the Real Estate Business Law and the Regulations on Auction and Bidding. In order to complete all related procedures, enterprises must go through many complicated and time-consuming processes, some of which overlap with or contradict one another. In addition, completion of each procedure largely depends on the attitudes and viewpoints of specialized management authorities, who may choose to erect barriers in the form of “business conditions,” “sector planning” and others. According to comments from the business community, presented in a consultation workshop by CIEM in May 2008, the Land Law should clearly define the relationship between procedures, the order of land access, and other processes and procedures when implementing the Investment Law, the Construction Law, the Environment Law, the Real Estate Business Law, and Regulations on Auction and Bidding, in order to unify and harmonize the whole investment process.