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LEGAL ALERT

NEW LEGAL FRAMEWORK FOR REAL ESTATE BUSINESS UNDER DECREE 02/2022/ND-CP



On 06 January 2022, the Government issued Decree 02/2022/ND-CP (“**Decree 02/2022**”) detailing the implementation of a number of articles of the Law on Real Estate Business. Decree 02/2022 will take effect from 01 March 2022, replacing Decree 76/2015/ND-CP.

1. The legal capital of at least VND 20 billion is no longer a requirement for real estate enterprises

According to Article 4.1 of Decree 02/2022, organizations and individuals trading in real estate (*except for organizations, households and individuals that sell, transfer, lease, lease-purchase real estate irregularly on a small scale*) must meet the following 3 groups of conditions:

- (1) Must establish an enterprise in accordance with the law on enterprises or establish a cooperative in accordance with the law on cooperatives, with a business line related to real estate;
- (2) Must publicize the enterprise's information (including name, head office address, contact phone number, name of the legal representative) on its website, at the headquarter of the Project Management Board (real estate investment projects), at the real estate trading floor (in case of doing business through a real estate trading floor), and also information about the properties that are put into business as prescribed in Article 6.2 of the Law on Real Estate Business, information on mortgage of houses, construction works, real estate projects (if any), information on quantity and type of real estate products being traded, quantity and type of real estate products sold, transferred, leased and purchased and the remaining quantity and

types of products being sold. If the information that has been made public is subsequently changed, it must be promptly updated immediately after the change; and

- (3) Only trading in the real estate that meets the conditions specified in Article 9 (real estate put into business) and Article 55 (real estate formed in the future and put into business) of the Law on Real Estate Business.

Thus, compared to Decree 76/2015/ND-CP, Decree 02/2022 has removed the condition that real estate enterprises must have a legal capital of not less than VND20 billion and added the condition of information disclosure.

2. Equity of the investor who is selected as the investor of a real estate project

Article 4.2 of Decree 02/2022 stipulates that if an investor is selected as the investor of a real estate project in accordance with law, that investor must have an equity of at least 20% of the total investment capital for projects with a land use area of less than 20 hectares, at least 15% of the total investment capital for projects with a land use area of 20 hectares or more.

In which, the equity is determined based on the most recent audited financial statements or the independent audit report made in the year of engaging in real estate business or the year preceding the year of engaging in real estate business. In particular, in the case of a

newly established enterprise, the equity shall be determined according to the actual contributed charter capital instead of the committed amount of charter capital.

3. Real estate business contract

According to Decree 76/2015/ND-CP, the contract forms in real estate business issued under the Decree are only for reference by the parties during the contract negotiation process, but now according to Decree 02/2022, the parties must use the contract forms specified in this Decree. These contract forms include:

- Contract for sale, or lease-purchase of condominium units;
- Contract for sale, or lease-purchase of condotel units, accommodation-combined office apartments;
- Contracts for sale, or lease-purchase of individual houses;
- Contracts for sale, or lease-purchase of houses and other construction works;
- Contracts for leasing houses and construction works;
- Contract for transfer of land use rights;
- Contract for transfer of the whole (or part) of the real estate project.

4. Conditions and procedures for transferring contracts for sale, or lease-purchase of houses formed in the future and lease-purchase contracts for existing houses and construction works

According to Article 7 of Decree 02/2022, the transfer of contracts for sale, or lease-purchase of houses formed in the future and lease-purchase contracts for existing houses and construction works (*except for contracts for sale, or lease-purchase of social housing*) must meet the following 4 conditions:

- (1) Having a sale or lease-purchase contract made in accordance with regulations; in case the parties have signed the contract before 01/03/2022, the signed contract must be included;
- (2) Falling into the category in which applications have not been submitted to a competent state agency for a certificate of land use rights and ownership of houses and other land-attached assets;
- (3) Contracts for sale or lease-purchase of houses or construction works that must be free from disputes or legal actions; and
- (4) Houses or construction works under the sale or lease-purchase contracts are not subject to distraint or mortgage to secure the performance of obligations as prescribed by law, unless otherwise agreed by the mortgagee.

Note that the transfer of contracts for sale or lease-purchase of houses and construction works is done for the entire contract. In case of sale or lease-purchase of many houses or construction works under the same contract and the parties wish to transfer each house or construction work separately, the transferor must negotiate with the investor to amend the contract for sale, or lease-purchase of houses or

construction works or sign an appendix to the contract before transferring the contract.

management agency for supervision and records.

Regarding procedures, the parties should note the following new points:

- The transfer document must be made in 06 copies, instead of 04 as prescribed in Decree 76/2015, including 02 copies kept by the investor, 01 submitted to the tax authority, 01 submitted to the agency to apply for the Certificate, 01 copy kept by the transferor of the contract, and 01 copy kept by the transferee of the contract. In case notarization is required, one additional copy must be provided for the notarial practice organization.
- One of the documents in the application file for certification of the transfer contract by the notarial practice organization is: the original contract or the contract appendix showing the transferred house or construction work signed with the investor in case of transfer of one or several houses or construction works out of the total number of houses and construction works that have been lease-purchased under the contract; papers proving the amount of money the transferor has paid to the investor; the original or a certified true copy of the minutes of handing over the house or construction work (if any)
- For a real estate enterprise that accepts transfer of a contract, within a maximum of 5 days from the date of completion of the transfer, it must send a written notice of contract transfer to the central housing

5. Principles for transferring the whole or part of a real estate project

According to Article 9 of Decree 02/2022, the transfer of all or part of a real estate project must follow the following principles:

- (1) The transfer of the whole or part of a real estate project shall be effected when it meets all the applicable conditions specified in Article 49 of the Law on Real Estate Business in case the project is being implemented according to the approved project schedule and contents.
- (2) For real estate projects in which investors are approved and real estate projects which are granted with investment registration certificates in accordance with the Law on Investment 2020, the transfer shall be carried out in accordance with the law on investment.
- (3) For real estate projects not specified in item (2) above, the transfer shall be carried out in accordance with the Law on Real Estate Business and Decree 02/2022.

In particular, Decree 02/2022 clearly defines:

- *Transfer of the entire real estate project* is the case when the investor transfers the entire real estate project, lawful rights, obligations and interests of the investor and related parties (if any) to the transferee through a contract made in writing

according to Decree 02/2022 and approved by the competent State agency.

- *Transfer of part of a real estate project* is the case when the investor transfers to the transferee part of a real estate project that he is permitted to transfer, and lawful rights, obligations and interests of the investor and related parties (if any) for such part of the project through a contract made in writing according to Decree 02/2022 and approved by the competent State agency.

6. Detailing the procedures for transferring the whole or part of a real estate project of which the investment is decided by the provincial People's Committee or the Prime Minister

Accordingly, Articles 11 and 12 of Decree 02/2022 details the procedures for transferring all and part of real estate projects, notably:

- The transferor and the transferee must complete the signing of a transfer contract within a maximum of 30 days from the date of the decision allowing the transfer of the real estate project or part of the project. The contract for transfer of the project or part of the project is concurrently the contract for the transfer of land use rights of the project or part of the project (except for the case of annual land rental payment).
- After signing the contract, the parties must pay taxes and fees and hand over the project documents. The handover must be made in writing and signed by the parties. The transferee is entitled to continue implementing the project or part of the project after fulfilling its tax and fee payment obligations and receiving the handover of the project or part of the project;
- At least 15 days before the handover procedure, the transferor must notify in writing all customers and related parties and publish the notice at least 03 consecutive times in a local newspaper or on a television channel (central or local) about the transfer of the project or part thereof. In case the customer or related parties make claims about the transferred project or part thereof regarding their interests, the transferor must settle the issue before carrying out the handover procedures.



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