

# Special Alert

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## New Decree on Real Estate Business Issued

### Background

On 6 January 2022, the Government issued Decree No. 02/2022/ND-CP (“**Decree 02**”), regulating some regulations of the 2014 Law on Real Estate Business (the “**LoReB**”), which replaces Decree 76/2015/ND-CP (“**Decree 76**”). Real estate developers have been anticipating this decree as there are many new contents affecting activities in the real estate market of Vietnam.

### Enterprises no longer need charter capital (paid-up capital) of at least VND20 billion

Previously, Decree 76 only stipulated the charter capital of real estate enterprises must be at least VND20 billion and grounds for determining this charter capital. However, the 2020 Law on Investment, which was effective from 1 January 2021 (the “**Investment Law**”) removed this requirement.

Article 4.1(a) of Decree 02 also removes the provisions regarding charter capital in Decree 76 to conform with the Investment Law. It does supplement the provisions on the equity level of real estate project developers based on the scale of land use (not less than 20% of the total investment capital for land use projects of less than 20 hectares, not less than 15% of the total investment capital for land use projects of 20 hectares or more) as well as how to determine this level of equity.

### Conditions for conducting real estate business

According to Article 4, organizations and individuals conducting real estate business must satisfy the following conditions:

1. They must establish an enterprise or corporation with a real estate business.

2. Information about the enterprise (name, address of head office, contact phone number, name of legal representative), information about real estate used, information on the mortgage of houses, buildings, real estate projects used (if any), information on the quantity and type of real estate products sold, information on real estate used as prescribed in Article 6.2 of the LoReB; information on the mortgage of houses, buildings, real estate projects used (if any); information on the number and type of real estate products to be sold, quantity, type of real estate products sold, transferred, leased purchased and quantity, type of remaining products are continuing to do business, etc. must be made public on the website of the enterprise, at the headquarters of the project management board.

If the information made public is changed, it must be updated in a timely manner as soon as there is a change. This newly-issued regulation under Decree 02 cements the provisions in Article 6 of the LoReB on the disclosure of information about real estate and will help to increase the transparency of information in real estate business in general.

3. Decree 02 only allows the trading of eligible real estate as prescribed in Article 9 and Article 55 of the LoReB.

Decree 02 stipulates that organizations, households and individuals selling, leasing, lease purchasing and purchasing or transferring real estate invested by themselves and not investment projects to build real estate for business in accordance with law will not be required to meet the above three conditions.

### Capital required of a developer of a real estate project

As mentioned above, depending on the land size, a property developer shall be required to have at least 15% or 20% of the total investment capital. It is however important to note that the determination of capital is based on the results of the most recently audited financial statements or the results of the independent audit report of the project company / developer of real estate project (made in the year or the year preceding). In case of newly established company, the capital is determined according to the actual charter capital contributed by the members / shareholders of such project company / developer of real estate project in accordance with law<sup>1</sup>.

### Conditions for the transfer of contracts of purchase, lease purchase of houses to be formed in the future and transfer of lease contracts for purchase of existing houses and buildings

Article 7.1 of Decree 02 also stipulates that the transfer of contracts for sale and lease purchase of houses to be formed in the future and the transfer of lease purchase contracts and buildings do not apply to contracts for sale and lease purchase of social housing.

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<sup>1</sup> Article 4.2, Decree 02.

The transfer of contracts for sale, lease and purchase of houses and buildings must ensure four conditions according to Article 7.2 of Decree 02. Specifically, (i) they are contracts for sale and lease purchase made in accordance with regulations; in case the parties have signed a contract before the effective date of Decree 02, they must have signed contracts; (ii) not yet submitted a dossier requesting a competent state agency to issue certificates of land use rights, ownership of houses and other properties attached to land (Certificate); (iii) contracts for sale, lease and lease purchase of houses and buildings must be subject to no disputes or complaints; and (iv) houses and buildings under contracts of sale or lease purchase are not subject to distraint or mortgage to ensure the performance of obligations as prescribed by law, unless mortgagee agreements say otherwise.

### Templates for tourist apartments (“condotel”) and office apartments combined with accommodation (“officetel”)

Decree 02 has issued a form of contract for sale/ lease purchase of condotels and officetels to unify the application process, in which very clear and detailed regulations related to “Public Ownership Section”, “Private Ownership Section”, “Maintenance Fund”, “Warranty”, “Characteristics of condotel / officetel combined with purchased / lease purchased”, “Rights and obligations of the parties”, etc. are included. This is indeed a major legal breakthrough for these real estate products.

With these new provisions in Decree 02, officetels and condotels will have a clearer legal status and be recognized as permitted real estate products in accordance with the law. However, the legal framework related to these “hybrid” real estate products will not be completed only by Decree 02 but will have to wait until the Land Law and other related laws are amended to clarify the mechanisms for granting “Certificates”, form of land allocation/lease, and determination of financial obligations for land use fee/land rent.

### Compulsory application of real estate business contracts

Article 7.1 of Decree 76 regulates that the templates of contracts for real estate trading are used for reference during the process of negotiating and concluding contracts. Article 6 of Decree 02 replaces this. Specifically, activities of selling, transferring, leasing, lease purchasing, sub-leasing real estate, as well as transferring real estate projects must “be made in contracts in accordance with the forms” issued together with Decree 02.

### Rules for transfer of real estate projects

The rules for transferring real estate projects are specified in Article 9 of Decree 02. Particularly, (i) Article 9.2 provides that investment projects that have obtained the approval of the investor (or *chấp thuận nhà đầu tư* in Vietnamese) or the Investment Registration Certificate (the “**IRC**”) in accordance with the Investment Law, the transfer shall be implemented according to regulations relating to

investment; and (ii) the transfer of other real estate projects<sup>2</sup> which are not specified under Article 9.2 shall be carried out in accordance with the LoReB and Decree 02<sup>3</sup>.

Another notable point is that compared to Decree 76, Article 9.1 of Decree 02 emphasizes a condition for the project to be transferred is that it is an “on schedule according to the approved project content”. This is a new condition which increases the requirements for real estate projects to be transferred. The previous regulations only required the project “to complete the corresponding technical infrastructure works according to the progress of the project stated in the approved project”.

Decree 76 also provides documents required and the procedures for transfer of part or entire of real estate project of which the investment decision is granted by the Prime Minister or the provincial people’s committee.

### Rules for dealing with projects during transitional period

Decree 02 reserves the entire Article 14 to provide rules for dealing with real estate projects of which the implementation has been made prior to the effectiveness of Decree 02. Depending on the implementation status of each project as at the effective date of Decree 02, the relevant investor / developer may be required to proceed with the next steps, procedures as regulated under Decree 02 or to proceed as per the previous rules, as the case may be.

Decree 02 will take effect from 1 March 2022.

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<sup>2</sup> In specific, projects that already have investment policy decisions, investment decisions, approval of the investment project or any other document with equivalent validity under the 2005 and/or 2014 Investment Law or projects for which the investors are chosen by auction or tendering without conducting the procedure to issue an IRC shall apply the regulation relating to real estate business when transferring the projects.

<sup>3</sup> Article 9.3, Decree 02.

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