

Legal Updates & News

Legal Updates

New Regulations on Land Conservation in the People's Republic of China

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Arable land, one of the most important non-renewable resources in China today, is rapidly shrinking due to the rapid, dramatic expansion of real estate development. The Chinese government, at various levels, has recently enacted new laws and regulations in an effort to conserve undeveloped land, increase the efficiency of land already in use, and clarify procedures concerning land registration.

In this update, we summarize five such rules: (a) the Circular on Promoting Land Conservation and Improving the Efficiency of Land Use; (b) the Urban and Rural Planning Law; (c) the Land Registration Regulations; (d) the Shenzhen New Rules on Industrial Land; and (e) the Procedures on the Administration of Land Reserve. Those considering investing in PRC real estate may wish to familiarize themselves with these rules as they will likely have a significant impact on future real estate development in China.

Part A - Land Planning Related Rules

Circular on Promoting Land Conservation and Improving the Efficiency of Land Use

On January 3, 2008, the State Council of the People's Republic of China ("PRC") issued the *Circular on Promoting Land Conservation and Improving the Efficiency of Land Use* (关于促进节约集约用地的通知) ("the No. 3 Notice"). The No. 3 Notice is generally a collection of existing land-related policies adopted by national or local governmental agencies. Its purpose is twofold: (i) to protect farm land by prohibiting unauthorized development; and (ii) to enlarge the supply of land for development by increasing the land use efficiency of land earmarked for development. The highlights of the No. 3 Notice include:

Examination and Adjustment of Land Planning and Land Use Standards

The No. 3 Notice requires that all land-related planning be consistent with general land use planning specified by the central government and that any inconsistencies be modified and adjusted to conform to such specifications. In its efforts to conserve land — a critical and dwindling resource — the No. 3 Notice requires that all infrastructure improvements must be reasonably planned prior to construction. In addition, city planning standards must be created or modified so as to ensure land conservation and efficiency of land use.

Adequate Use of Existing Land and Improvement of Land Use Efficiency

To ensure the optimal use of land already set aside for development, the No. 3 Notice restates certain rules established by the *Circular on Reinforcing Disposition of Unused Land* (关于加大闲置土地处置力度的通知) ("MOLAR Circular")^[1], including enhancements to the following requirements: (i) land that meets certain forfeiture conditions e.g., land that has been left idle for more than two years

may be forfeited without compensation; and (ii) owners of land that have left the property idle for over one year but less than two years will be charged a penalty fee equal to 20% of the land grant/allocation fee. In addition to the previously mentioned penalty, the No. 3 Notice establishes an additional land premium surcharge for idle lands and authorizes MOLAR to formulate regulations to implement such surcharges.

Land Planning Requirements

The No. 3 Notice also requires that prior to any land grant, the government must set out planning requirements for the construction area, foliage area, building density, etc., of the land parcel in the land grant contract. To ensure that the construction on the parcel complies with the law and the land grant contract requirements, a compliance inspection must be conducted by the relevant MOLAR authority during the completion acceptance procedure. No approval for construction completion will be granted if such inspection by MOLAR is not satisfactory.

Land Supply Control

In the last few years, housing prices have increased dramatically in China. The central government has come to recognize the need to rein in unauthorized development in order to ensure adequate housing for low-income families. Accordingly, the No. 3 Notice re-emphasizes that industrial and commercial land must be granted through a process of competitive bidding, public auction, or public tender and strictly prohibits land users from entering into agreements with rural collective economic organizations or individuals that evade the aforementioned requirements. Additionally, the government has indicated that it will continue the ban on the approval of land petitions for high-end villa development projects.

Under the new rules, the land grant contract must specify the minimum plot ratio, number of units on each land parcel, size of the unit, etc., when supplying land for residential projects. The new rules also require that no less than 70% of the land designated for residential use be earmarked for the construction of low rent, affordable housing, and units of less than 90 square meters.

Utilization of Rural Land

The difficulties experienced by the central government to regulate land development in rural areas have led to the illegal development of significant tracts of rural agricultural land throughout China. To address this problem, the No. 3 Notice emphasizes the importance of land use planning in rural towns and villages and states that rural land must be brought into the overall land planning regime. In addition, the use of rural, collectively owned land must comply with planning and approval requirements. The No. 3 Notice also re-emphasizes the fact that it is strictly prohibited to convert farm land into construction land without proper approval from the government or to use farmland for non-agricultural purposes, whether through an actual disposition or through "land leasing in lieu of acquisition" (以租代征).

Financing Control

Since real estate development nearly always requires external financing, the No. 3 Notice emphasizes that financial institutions have a role to play in land conservation and in improving the efficiency of land use. The No. 3 Notice requires financial institutions to take a prudent attitude when providing or extending loans or revolving credit for real estate projects where:

- the commencement of construction has been delayed for one year or more;
- the proposed developed area is less than one-third of the entire land parcel; or
- the actual investment in the project is less than one-fourth of the total investment for the project.

Urban and Rural Planning Law

On October 28, 2007, the Standing Committee of the Tenth National People's Congress of the People's Republic of China promulgated the *Urban and Rural Planning Law* (城乡规划法) (the "Planning Law"). The Planning Law supplanted the previously issued *City Planning Law* (城市规划法) effective as of January 1, 2008.

Of note is the fact that, for the first time, the Planning Law extended the planning regime to encompass rural land; i.e., as with urban land, any use of rural land must now comply with planning requirements. The Planning Law provides for detailed requirements and approval procedures with respect to the formulation and amendment of urban and rural planning. To maintain the stability of

urban and rural planning, the Planning Law requires cities and towns to develop plans that factor in development over a twenty-year period. Moreover, once these plans are adopted, they cannot be amended unless certain conditions are satisfied and even then, only through appropriate legal procedures.

Although the Planning Law generally maintains the previous approval procedures with respect to construction projects (i.e., before any construction can begin, the owner must obtain a land use right certificate, construction land planning permit, construction project planning permit, and construction commencement permit), the new law has changed some specific requirements, including:

- The letter of opinion approving the location of the construction site from the planning authority is no longer required for construction projects unless the land is assigned by, as opposed to granted by, the government.
- Prior to any land grant, the government will establish the planning requirements for the parcel, such as the construction area, foliage area, building density, etc. Land grants cannot be issued prior to the determination of these planning requirements. The planning requirements must be included in the land grant contract and any land grant contract without planning requirements is null and void.
- A rural construction planning permit must be obtained for the construction of county collective enterprises, infrastructure, and public facilities within the relevant rural planning area. No land will be granted or assigned without the rural construction planning permit.
- Developers must construct projects strictly in accordance with the planning requirements specified in the land grant contract. The planning authority will inspect and ensure compliance with the planning requirements. Without the issuance of an inspection and verification opinion from the planning authority, or if the inspection identifies non-compliance, the construction project will not be approved.
- A permit holder may be eligible for compensation from the government for any losses suffered by such permit holder due to a change in government planning after the issuance of the construction site approval opinion letter, the construction land planning permit, construction project planning permit, or the county construction planning permit to such permit holder.

The Planning Law also provides additional penalties for unauthorized construction projects. For example, any construction project without a valid construction project planning permit, or in violation of a valid permit, will be halted by the planning authority. If the violation can be cured, the developer will be required to do so within a specified timeframe and he or she will be required to pay a fine of 5% to 10% of the relevant construction contract value. If the violation cannot be cured, the developer will be required to dismantle the property, or expose its illegal income to a forfeiture if the property cannot be dismantled, and pay a fine of up to 10% of the relevant construction contract value. If the developer fails to halt construction or to dismantle a property as required by the planning authority, in accordance with the Planning Law, the competent local government may seize the construction site and enforce its order to halt construction or dismantle the property, as the case may be.

Footnotes:

- [1] Promulgated by the Ministry of Land and Resources (“MOLAR”) on September 13, 2007.