

# Latest regulations relating to the Provisions on Grant of State-owned Construction Leaseholds

Since the promulgation of the *Regulations on the Granting of State-owned Land Use Rights through Bidding, Auction or Listing* (Decree No. 11) in April 2002 China has witnessed a ten-fold increase<sup>1</sup> in the amount of land granted for construction purposes through bidding, auction or listing. Over the last few years, the Chinese government has made further attempts to ensure more land use rights are granted in this way. What will be the impact of the latest regulations – will they clarify the meaning of construction land use rights, and provide clear direction for local authorities?

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In August 2006, Decision No. 31 was adopted by the State Council. Aimed at strengthening the control of land for specified usage the legislation imposed mandatory bidding, auction or listing procedures on land use rights for industrial use. Prior to this, such mandatory procedures merely applied to the granting of land use rights for commercial, entertainment, tourism and residential purposes only under Decree No. 11. The introduction of land for industrial use into the bidding, auction and listing system was further reinforced when the National People's Congress passed the Property Law which came into force on October 1 2007.

Accordingly, Decree No. 11 was amended to reflect both changed provisions for bidding, auction and listing, and other newly-adopted concepts, in the Property Law. This was achieved through the promulgation of Decree No. 39 by the Ministry of Land and Resources on September 28 2007.

## LAND OWNERSHIP AND LAND USE RIGHTS

Previously, China's legal regime had been unable to fully regulate property rights or accommodate property related projects in China. Before the passing of the Property Law, many of the relevant rights and issues were addressed in a piecemeal manner by miscellaneous national laws and administrative regulations. The Property Law, which regulates both public and private property rights, now reinforces the concept that all land in China is publicly owned. Depending on location, land remains owned either by the state or by rural collective organizations or villages. As such, private investors do not have access to land ownership in China.

However, private investment in Chinese real estate has been possible

since 1988, when the PRC Constitution was amended to allow investors to acquire "land use rights" over real properties owned by the state or rural collective organizations or villages. Land use rights – a form of property tenure where a party obtains or buys the right to occupy land for a given length of time from the state – may be obtained from the state by way of grant, allocation, or lease. Upon payment of a land granting price, granted land use rights may be obtained from the state through listing, bidding or auction procedures. Although land use rights can still be granted through negotiation in a limited number of cases, this method is not applicable to land intended for industrial use.

## A NEW FRAMEWORK FOR CONSTRUCTION LAND USE RIGHTS

In accordance with the Property Law, Decree No. 39 adopts the new concept of "construction land use rights," replacing the former term "land use rights," for the purpose of specifying the use of different dimensions of a plot of land. A "construction land use right" may now be created on:

- (i) the surface of the land;
- (ii) the space above the land; or
- (iii) the underground space respectively.

The "construction land use right" required for each dimension of a plot of land may be granted accordingly.

## EXTENDING THE SCOPE OF BIDDING, AUCTION AND LISTING

Following the introduction of land for industrial use into the scope of mandatory bidding, auction and listing procedures in the Property Law, Decree No. 39 re-defines the scope for mandatory bidding, auction and listing as follows:

- (i) Construction land use rights for operational purposes such as industry, commerce, tourism, entertainment and residence shall be granted through bidding, auction or listing; and
- (ii) where there are two or more interested users for the same parcel of land other than land for the purposes as listed above, the grant thereof shall also be made through bidding, auction or listing.

Decree No. 39 also specifies that land for industrial use shall include land for warehousing purposes, but shall exclude land for mining use.

## MORE SPECIFIED PROCEDURES FOR LISTING

Since the adoption of Decree No.11, land authorities have been able to specify and improve the procedures for listing land use rights in

China. This was also a main goal of Decree No. 39 and the following improvements or clarifications relating to the listing procedures are worth noting:

- The listing period<sup>2</sup> shall be no less than 10 days;
- The application deadline for participating in the listing procedures shall be two (2) days prior to the expiry of the listing period; and
- Upon the expiry of the listing period, the president of the listing procedure shall announce the highest offer by a bidder and then ask other bidders whether they are willing to offer a higher price, if yes, an "on-site competition" (which is essentially an auction) shall be held to determine the winner. It implies that the listing procedure is not completed even upon the expiry of the listing period if the president of the listing procedure decides to continue with an "on-site competition."

#### **ADDITIONAL CONDITIONS ON GRANTING INDUSTRIAL LAND USE RIGHTS**

In order to achieve effective control over the granting of land use rights for industrial purposes, the central government of China promulgated Circular No. 307 in December 2006, imposing a range of minimum granting prices for land use rights for industrial use in different areas of China. These are divided into 15 grades. Following this requirement, Decree No. 39 also expressly stipulates that the listing price or base price for an auction or bidding shall not be less than the national statutory minimum granting price.

In addition, Decree No. 39 explicitly prohibits any unfair conditions or qualifications for participants in any bidding, auction or listing. Such a prohibition is mainly intended to end some local practices in which conditions for participants are formulated that can only be met by one specific interested bidder, restraining any other possible bidders.

#### **STRICT REGULATION OF CONSTRUCTION LAND USE RIGHT CERTIFICATES**

Despite the current legal requirement on payment of the land granting price before the issuance of a land use right certificate, in practice there are still many cases where land use right certificates are issued to land users who fail to pay the full price. In other circumstances, a

land use right certificate pertaining to a parcel of land is divided into several separate certificates, each of which is issued to the land user when the corresponding proportion of land granting price is paid to the land authorities. Such a practice allows a great number of real estate developers to obtain the land use right certificate and then start construction without paying the full amount of the land granting price, which definitely contributes to the ongoing overheating of the Chinese real estate market.

In a bid to prevent these situations, Decree No. 39 explicitly indicates that:

- (i) a construction land use right certificate shall not be issued if the land granting price has not been fully paid in accordance with the construction land use right granting contract; and
- (ii) a construction land use right certificate shall not be divided into separate certificates in proportion to the paid land granting price.

#### **MAIN IMPACTS OF THE NEW REGULATIONS**

Implemented on November 1 2007, Decree No. 39 is expected to have numerous effects. Firstly, more specified listing procedures in Decree No. 39 will deliver clearer directions to local land authorities and the local real estate exchange centers where listings of land use rights usually take place. In particular, it will unify the different or even contradictory practices in different real estate exchange centres. In addition, the new concept of "construction land use right" will make it more explicit and clearer to identify the right to use which dimension of land: surface; area above the land; or underground. Finally, the strict regulation of the issuance of construction land use right certificates will restrain land users (in particular real estate developers) from obtaining the said certificate without paying the full price, and thus may cool investments in the real estate development market in China.

#### **Endnotes**

- 1 According to information disclosed by the Ministry of Land and Resources, the area of land that was granted through bidding, auction or listing has increased from 66,000,000 m<sup>2</sup> in 2001 to 665,000,000m<sup>2</sup> in 2006.
- 2 A listing period refers to a period during which any qualified bidder is entitled to offer a price, which shall be higher than other bidders and of course also higher than the listing price, at a qualified place for listing