

Challenges for Investors When Applying the Regime of Voluntary Land Conversion in Vietnam: A Case Study at Can Tho City

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Abstract:

According to Vietnamese Land law in 2013, if investors demand land for their business purposes, there may be two ways for them to approach the land use rights. First of all, if the local authority has clear ground areas for use for proper production and business purposes, the investors may have such land through auction of land use rights. Secondly, the investors may have land through purchase of land-attached assets, receipt of transferred or leased land use rights or receipt of land use rights contributed as capital (this way is so-called voluntary land conversion). The voluntary land transfer regime has been applied from 1st July 2004, at the first time; it brought a lot of advantages for investors and land users as well as local authorities. However, just some years later, variety of problems such as land value market, some of land users offer unreasonable price, land disputes among land users arise and create many obstacles for stakeholders involved... Notwithstanding, the pass and current Vietnamese land law does not have much effective solutions for the drawbacks, even though up to now. This paper analyzes the advantages as well as disadvantages of voluntary land transfer between investors and land users in Vietnam, and then suggesting solutions and recommendations on such issues.

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1. Conditions for applying the voluntary land conversion under Vietnamese law

In the extent that investors would like to use land for production and business purposes through purchase of land-attached assets, receipt of transferred or leased land use rights or receipt of land use rights contributed as capital such investors have to fulfill the following principles:

Firstly, the project must be conformable with approved and publicized district-level annual land use plans.

Subject to Article 16(1) of the Decree 43/2014/ND-CP (hereafter Decree 43) which regulates that the investor could only have right to negotiate for transferring land use rights only when the project must consistent with the

approved district-level annual land use plans. It means that, if the intended area is planned for agricultural purpose the such investor could not be able to transfer such land for business purposes. The idea of the law-makers in this regulation is to encourage using the clear sites and for food security purpose.

Secondly, there is no land fund already cleared for use for production and business purposes. Under this condition, even though the investment project is in line with the land use plan of the district level, if the land area has been cleared for use for production and business purposes If the land fund is developed by the Land Development Fund, the investor will rent or auction the land use right for the land fund without being able to reach

agreement with the land user. This regulation is intended to prioritize the maximum use of cleared land, avoiding the availability of a land fund which the investor negotiates with the villagers in other places, leading to the inability to use it.

Thirdly, other conditions subject to Article 16 of Decree 43

i) In cases where the investor applies the method of receiving the land use right transfer and must change the land use purpose, the land use right shall only be effected after the competent People's Committee issues a document permitting the change of land use purpose and allow the land use duration to be adjusted to suit the land use for production and business.

(ii) Where the land area used for the production or business of a part of the land is owned by a person who is using the land, the land use right shall not be transferred, leased or contributed as land use rights in accordance with the law. the land owner is allowed to agree on the purchase of assets attached to the land of the current land user, the State shall recover the land, change the land use purpose and lease the land to the investor. project. The content of the contract on sale and purchase of assets attached to land must clearly indicate that the seller of the property voluntarily returns the land to the State for land recovery and to the buyer of the leased property.

2. Advantages of applying the voluntary land conversion mechanism

Officially recognized and applied over the past 15 years (from the Land Law 2003), the mechanism allows the investor to negotiate the transfer of land use rights, sublease or receive capital contribution using the right to use. The land has brought many advantages for the State, people and investors:

First of all, the land price offered by the investor is often higher than the price list promulgated by the provincial People's Committee and the proposed transaction price

based on the purpose of use of the land plot, not the purpose of use. At present, it is relatively easy to negotiate with current land users.

Secondly, the voluntary transfer mechanism helps investors to be more flexible, more active in managing and deciding investment projects, people receive money quickly. Through this mechanism, the investor soon approached the ground to implement the investment project. Investors who put their production and business projects into operation soon will create new jobs, and that is the chance for local people to work and contribute to welfare activities. , taxes, local fees.

Thirdly, as this mechanism is basically a civil transaction, the people have the psychology of equality, comfort when dealing, negotiate with investors on the principle of "buy and sell" and self-responsibility. The risk of the transaction should limit the status of the dispute later.

Fourthly, through these transfers, state agencies can collect data to build a price database. In addition, the state budget can be collected when it is possible to collect income tax, land use tax, tax on production and business activities of the enterprise. the burden of land acquisition, compensation, support and resettlement, as well as limitation of land complaints and grievances

3. Challenges in the application of the voluntary land conversion mechanism

In addition to the advantages gained from applying the voluntary land conversion mechanism, in the process of implementing this regulation, difficulties and obstacles have been encountered. effective solutions ...

Firstly, land users are offering unreasonably high transfer rates. In the period of about 10 years applying the voluntary land conversion mechanism, the investor in the first period often encounters many advantages, but the more difficulties are encountered in the end, the most difficult of which is when some people the land price is too high, the investor can not meet and the

investor can hardly get the land needed to build the project. This has delayed the project, investors can not "return" because of the transfer of a large part of the land of other households, in addition, because it is civil transactions investors and Land users should be able to intervene in this process.

Secondly, the problem of determining the market price as a basis for agreement on land prices. When studying land prices, there is a great deal of difficulty for both scientists and practitioners of market prices. The land price applied in the compulsory land conversion mechanism (the State recovers) and in the voluntary transfer mechanism are required to be commensurate with the market price of the land use right transfer. So how is the market price?

Understandably, the actual market price of land use right transfer in normal conditions at a specified time is the amount of Vietnam calculated per unit of land area for each lawful use purpose. Formed from the results of actual transactions completed, common among transferors and transferees under normal trading conditions, not affected by the factors causing the price increase or decrease. Unreasonable variables, such as: speculation, natural disasters, enemy sabotage, economic crisis, financial crisis, change of planning, transfer of forced, blood relations or preferences and the other case...

However, since Vietnam has not yet established a price database, it is difficult to determine what is the typical transfer price. In addition, due to the regulation on income tax when transferring land use rights, to avoid tax, most parties in the transaction usually agree on the price stated in the transfer contract at the price specified in the price table issued by the provincial People's Committee. In addition, the transfer price also depends on the law of supply and demand, the rule of value... Therefore, it is difficult to determine what is the price of land in the market (Jonathan Mills Lindsay, 2012).

Third, land users benefit from the voluntary land conversion mechanism may be lower in the compulsory land conversion mechanism. Another point to consider is that if the State recovers land, people whose land is recovered in addition to land compensation will be entitled to some additional allowances (support for job change, vocational training, life and resettlement if the conditions of the law are met, that is, besides land, people may have another amount of money. However, in the voluntary land conversion system, only two issues are raised for landlords and land users to negotiate the price of land and assets attached to the land. There will be no question of resettlement when transferring land use rights and there will be no "supportive policies", if there is a form of land "exchange" between the land private and public or extra to "lubricate" the negotiation process.

By these reasons, when the voluntary land conversion mechanism is applied, it may lead to the situation in which the current land users agree on the land price with the investor, they also include "supports and resettlement"; thus, the price of land transferred by the transferor may be much higher than the price of land in ordinary market. This problem may arise due to one of the conditions for the investor to agree with the current land user that the land must be included in the land use plan and the land use plan has expired. was cleared. This means that if the same project area, which the State recovers under the planning or the Land development organization stands to receive transfer to exploit and develop the land fund, besides compensation land price According to the market price (currently applying the two land price indexes - the land price and specific land price), people who have land recovered can receive compensation for assets attached to land and some allowances, resettlement. But the same land, if the local has not recovered (the local area has run out of clean land fund), the investor will make an agreement

and then land users can only receive land and assets attached to land. Summary:

- i) Under the state land recovery mechanism, current land users may receive:

$\text{Total amounts} = \text{Land} + \text{Assets attached to land} + \text{Allowances} + \text{Resettlement}$

- ii) Under the voluntary land conversion system, land users can receive

$\text{Total amounts} = \text{Land money} + \text{Assets attached to land}$

Note: In both cases, in theoretically, such the two prices of land and assets attached to land are determined on the basis of corresponding fair market value.

Fourth, the price of assets attached to land. In addition to land, assets attached to land play a very important role in determining the success or failure of the investor when agreeing with the land user in the transfer, lease or capital contribution by the right using land.

Based on the construction structure of the building, the dwelling and the price of construction materials, the unit price of the construction work or the price list of the plant, the parties can easily calculate the value of the assets attached to the land. However, the problem will be more complex if the asset attached to the land is a house, works of traditional value, the history of a family, their families over generations. It is possible to calculate the value of building a new house or building, but it is difficult to determine the historical value of a house that has nurtured many generations or is located in a specific location (*Kelo v. City of New London*, 545 U.S. 469 (2005)) At present, Vietnamese law does not have any regulations on this issue, unless the houses or works are recognized historical or cultural relics or villas and architecture should be preserved.

Fifth, the land user is not present at the locality or land under dispute at the time when the investor agrees to receive the assignment, sublease or capital contribution using the land use right. The issue is that in the project area where the investor agrees, there is one or more land users who are not using or using it directly and are living or working elsewhere (maybe in the countryside in big cities looking for work or going abroad for labor, study, work abroad...) or the land is in dispute. When falling into one of the above cases, the investor and the land users will face many difficulties in negotiating, agreeing to transfer, lease or contribute capital using the land use right.

In the case of compulsory land conversion, where the current land user is absent or non-cooperative or the land is in dispute, the competent authority may apply the compulsory counting or opening procedure a temporary custody at the State Treasury Article 69 and 70 of the 2013 Land law, but in the voluntary land conversion mechanism it is difficult to apply similarly to this provision.

Sixth, although the present system of land conversion itself is regulated by Article 73 of the Land Law in 2013 and Article 16 of Decree 43, these provisions are too vague and there is no legal basic to guide the clarification of whether the investors have land by negotiation with the current land users or by signing an agreement with the local authority, through a compulsory land acquisition procedure. In other words, there is no clarification on the conditions for application of the land fund development mechanism of Land Development Organization and the condition that there is no land fund in the locality for the investor to apply the mechanism of agreement, transfer, lease or receive capital contribution using land use rights.

Seventh, experts are controversing that whether or not recognize the participation of State agencies in the negotiation process, especially

when the investor has successfully transferred most (80%) of the area. Due to the lack of guiding documents from the central government, each locality has different interpretations, applications and solutions. Some common views are:

(i) State agencies only participate at the time when the investor and the people hold consultations on prices and transfer transactions. Accordingly, the State organs act as witnesses, intermediaries to confirm the parties' commitments and not to interfere in other matters.

(ii) In cases where the investor has transferred between 70% and 80% of the land area, the remaining area can not be transferred due to some unreasonable request by some households. The remaining area will be recovered by the state under the compulsory land conversion system (opinion of Mr. Vu Hong Khanh - Vice Chairman of People's Committee of Ha Noi city in a meeting with Ministry of Resources and Environment).

(iii) In cases where a project using foreign direct investment capital is of large scale, it must organize the resettlement for a population community in which the investor can not apply the self-sufficiency mechanism. The land use right shall be applied by the State if it is approved in writing by the People's Committee of the province (experience at Phu Yen province, Vietnam).

(iv) When the investor has agreed on most of the area, the rest of some households do not agree to transfer, the State agency will recover with the price of land is applied is the highest common average price has traded successfully of the previous households belonging to the project; or the developer will hire an independent valuation company and the parties will transact at the price offered by the valuer (valuation deed); or the parties will bring the case to the Court for adjudication and then respect the decision of the Court...

However, all such the five mentioned viewpoints have not resolved the current problems and some views that have not complied with the Constitution, the Land Law and some other relevant regulations.

4. Practical application of voluntary land conversion in Can Tho city

The choice of form of transfer, lease or capital contribution using land use rights depends on the agreement between the investor and the land user.

Investors and land users prioritize the form of land use right transfer agreement without giving preference to the form of leasing or contributing land use rights for the following reasons:

i) The level of legal knowledge of the people in the planning area is not high, so the method of receiving land rent, the method of calculation, the way of dividing the profits... with the investor encountered many difficulties when choosing the form of leasing or contributing capital by the right using land;

ii) Most of the people have to transfer the area. If the form of leasing land use rights is chosen, people will receive land rent from time to time, as determined by the contract. If the form of capital contribution using land use rights is chosen, the people will receive the money divided by the year, according to the agreement (if the enterprises operate effectively). Therefore, there is no source of money to worry about the current life of moving to find new housing, assets attached to land, employment, plants, animals...

According to survey results in Phong Dien commercial center project (phase 2) and My Khanh tourist village project in My Khanh commune, Phong Dien district, Can Tho city; with a total of 50 interviewed households, with results as follows:

First, about the mode of transaction

Most households choose the method of transferring the land use right to the owner without choosing the form of lease of land use rights or capital contribution using land use rights. The reason is that people only choose the method of land use right transfer due to the following reasons:

Firstly, the investor to facilitate their business investment, so they only offer the transfer method without asking for a lease or receiving capital contribution using land use rights, as the land can be used for longer, more stable and more autonomous than the other two.

Secondly, people want to receive money fastly, compact, full once for easy management and use. In addition, due to the mechanism of leasing land use rights, there are many inconveniences in the application process and the management mechanism. In addition, in the form of capital contribution, households said that because they do not have knowledge about management and operation of production and business, it is unclear how the enterprise will operate, the mechanism of profit sharing. The reason for this is that most of the cases are in the form of transferring the land use right to the investor.

Through the survey, only one case did not choose the form of transfer completely but the form of "land conversion", such as 200m² of agricultural land transversed 100m² of non-agricultural land. This is a special case where the land user initially owns a "favorable location" and has a stable financial status. In addition, the investor falls into the case of transferring land in front of the land plots. On the inside, if it is not possible to transfer the land plot outside, it will be difficult to implement the project (My Khanh Tourist Village expansion project). Therefore, it should be passive and obliged to agree upon the proposal by the land user.

Second, the factors that are most interested in the deal

The land price was the most chosen by the households with 68%, followed by the relocation of the graves (14%) and the ability to settle down (12%). The factors of business location, education of children, technical and social infrastructure are only at 2%.

Thirdly, how do people do if most of the surrounding households have finished trading

According to the survey, 68% of people interviewed still continue to trade normally with the investors at the common price of neighboring households have transferred, because they think it is a general price, reasonable. In addition, the option to offer higher prices than previous households or ask for additional "support" in addition to land is accounted for 8%, and up to 16% choose other options will depend on the location of the land and the economic situation that continues to normal agreement or raise prices or ask for additional support.

One point to note is that most households transfer land to investors are in debt or need a large amount of money to cover some of the needs of the family should look forward to ending the transaction to receive money.

Fourthly, the amount of money gained from the transfer of land use rights is largely used for what purpose

After the land use right transfer, 40% of the surveyed people used the money to rebuild the house, 22% used it to invest in production and business, and 16% used it to buy another plot of land. production and 10% for debt repayment.

5. Proposing solutions to perfect the mechanism the investor negotiates with the land user

With regard to the difficulties and problems mentioned above, on the basis of studying related legal provisions as well as

through field surveys, the authors propose some solutions as follows:

First, the elaboration of land use plannings and plans, especially the annual land use plans of the district level, must be scientifically and feasible and take into account the stability and long-term development. This is a prerequisite for solving almost all difficulties and shortcomings in the land field in general, in the application of voluntary land conversion in particular. Because most of the issues related to land are derived from the planning and land use planning. If the planning is well implemented, the problem of land use, management and coordination will be made easier, more transparent, bringing economic, social and security benefits. For example, the investor may access the land through the auction of land use rights, by doing this way, the value of land is optimized, select the house real estate investment, land coordination is transparent, promoting real estate market...

Second, the land price, by agreement on the transfer, lease or contribution of capital using land use rights, is essentially a civil relationship, which is a meeting of the will of the parties on a free and voluntary basis, contrary to the provisions of law. Therefore, it is not possible to apply the price of a large number of households that have agreed to make the basic price for households not agreed. In addition, the value of each parcel of land will also vary depending on the location of the parcel of land, the assets attached to the land, the price of land depends on the investment project, the profitability of the project when completed ... the investor can not use the land price table issued by the Provincial People's Committee as a benchmark for negotiating land prices. On the other hand, it is more difficult for the parties to take the case to the Court for settlement, because when the people have the right to use the land legally, the agreement does not agree they do not agree to

transfer the investor based on For this reason, the approach and problem solving should not be based solely on the land law, but should be extended to the law of price and law, civil and commercial law.

Third, to solve the problem when the owner comes to the agreement, if the household is not present in the locality (possibly by going to work, studying... in the distance), it is possible to get help from relatives of the person or of the authorities to contact the "owner" of the land plot to facilitate the negotiation or transaction. In cases where the land is in dispute, it is impossible to carry out the transaction according to law, therefore, the only solution is that the investor gives the appropriate transfer price, in combination with the local authority to mobilize the concerned households to settle the dispute soon to conduct the transaction normally. In cases where land parcels have not yet been issued with land use right certificates (if they are eligible), investors may assist the land current users with the expenses so that they can quickly fill in the procedures for applying for deed and the trade will be normally conducted. If the current land user does not have a certificate of land use rights due to ineligibility to be issued in accordance with the land legislation, the investor may provide some assistance in order for them to accept relocation and termination. With the local government to recover the land area, then the investor can access through the form of land allocation with payment or land lease.

Fourth, to solve difficulties due to the lack of specific regulations to identify and apply the State land recovery mechanism and compulsory land conversion mechanism. Central authorities should review, synthesize local and foreign scientists' opinions, consult international experiences and other information sources for transparent and specific guidance in order to create transparency in management, using and

regulating of land and also minimizing the corruption in land sector.

Fifth, on whether or not to allow State agencies to participate in voluntary land conversion. Although the subject matter of this transaction is land use rights, a particular type of property, it is still a civil transaction, therefore, State agencies should not participate in such the transaction. The State agency should only act as the "person intermediaries" to confirm transactions and provide public services to the parties, create a legal framework, build a database of land price... Additionally, in order eliminate risks, the investor should have a thorough investigation of the investment area to determine the potential, the ability to implement the project. This may help to minimize the difficulties and shortcomings mentioned.

Sixth, for the difficulty of the investor when he has bought most of land in the area but some households who do not agree to transfer or offer too high transaction prices. In such the circumstance, the investor does not need to buy all the necessary land, as he may still access the remaining land through the lease of land use rights or receiving land use rights from the current land users. By doing this, with the flexible application of three forms of voluntary land conversion, the investor can access 100% of the total area according to the needs of the project without the intervention of local authorities.

In sum, the voluntary land conversion mechanism is a progressive mechanism that is consistent with the general trend and contributes to Vietnam's full market economy. Therefore, through these proposals, it is hoped that this will contribute to the improvement of the application of the voluntary land conversion mechanism. The benefits of land are settled harmoniously between the state, the people and investors. Thus, the economy has developed steadily, security and

social order are maintained, people's life is improved./.

References

- [1] Vietnamese Land law of 2013
- [2] Decree 43/2014/ND-CP
- [3] Decree 01/2017/ND-CP
- [4] J. Bruce et. al. (2006), *Land law reform: achieving development policy objectives*. (World Bank Law, Justice and Development Series).
<http://documents.worldbank.org/curated/en/786221468175470235/Land-law-reform-achieving-development-policy-objectives>, accessed 15 November, 2019.
- [5] Jonathan Mills Lindsay (2012), *Compulsory Acquisition of Land and Compensation in Infrastructure Projects*,
<https://ppp.worldbank.org/public-private-partnership/library/ppp-insights-compulsory-acquisition-land-and-compensation-infrastructure-projects-0>, accessed 5 January, 2020.
- [6] *Kello vs. City of New London case*,
<https://supreme.justia.com/cases/federal/us/545/469/>, date of accessed 24 January, 2020.
- [7] S. Keith, P. McAuslan, R. Knight, J. Lindsay, P. Munro-Faure and D. Palmer (2008), *Compulsory acquisition of land and compensation*. (FAO Land Tenure Series, 2008),
<http://www.fao.org/3/i0506e/i0506e00.pdf>, accessed 12 December, 2019.
- [8] Tran Vang Phu (2015), *Difficulties regarding the enforcement of voluntary land transfer mechanism in Vietnam and some solutions*, State and Law Review, Vol. 12/2015.