



# Legal Framework on the Rights of Investors to Transfer Commercial Housing Construction Investment Projects

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## ABSTRACT:

Based on the analysis of regulations on the transfer of commercial housing construction investment projects from the perspectives of recent changes in investment law, land law, and real estate business law, the author highlights the strengths and limitations of the legal framework. This serves as a foundation for further development and refinement of the legal provisions governing the transfer of commercial housing construction investment projects by investors, aiming to protect the rights of all parties involved and to create flexibility in investment replacement to meet project timelines.

*Keywords: Investment, Construction, Project, Commercial Housing*

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## Introduce:

When receiving land with paid land use rights or leasing land with a one-time payment for the entire lease period, investors are not always able to maintain sufficient economic resources to ensure that the investment processes are carried out according to their commitments and the intended land use purposes. To prevent project delays and minimize the responsibilities of investors when they fail to complete assigned projects, the law permits investors to transfer part or all of the project to another investor with the necessary resources to continue the project.

In practice, investors may transfer a project due to financial difficulties, mergers and acquisitions, division or separation of enterprises, share transfers, limited capacity to execute the project in terms of expertise or personnel, changes in business direction, or simply because they no longer wish to continue the project, among other reasons. An investment project is considered the property of the investor (Nguyễn Thị Kiều Oanh, 2014). This raises the issue that investors should be allowed to transfer the project regardless of the reasons.

By comparing previous and current regulations in land law, investment law, and real estate business law related to the transfer of commercial housing construction projects, this analysis identifies the strengths and limitations of the legal framework, contributing to the improvement of the law on the right of investors to transfer projects when granted land by the State with paid land use rights or with a one-time payment for the entire lease period.

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## 1. Laws on Transfer Rights of Investors in Commercial Housing Construction

Investors in Commercial Housing Construction (CHC) are also land users (LU). Therefore, CHC investors share the general rights of LUs. Additionally, entities assigned land for CHC have specific rights, including:

The entity assigned land for commercial housing construction has the right to transfer part or the entire project (Point b, Clause 1, Article 33 of the Land Law 2024; Clause 4, Article 38 of the Housing Law 2023; Articles 39 to 43 of the Real Estate Business Law 2023). Land law stipulates the rights and obligations of LUs based on the form of land use and the purpose of land use (Nguyễn Ngọc Minh, 2014). The right to transfer the project originates from the fact that the investor is assigned land with a payment or leases the land with a one-time payment for the entire lease period to obtain the right to use the land. In other words, the investor's land use rights are acquired through a corresponding payment for the land assignment or lease for the entire specified period. Therefore, considering the ownership rights related to land use rights, the legal provision allowing this entity to engage in transactions concerning land use rights, including transferring part or the entire project (Phạm Thị Hương Lan, 2018), is appropriate within the scope of the land use rights owner's authority.

Based on this, it can be seen that the law has created a flexible mechanism in the real estate business in general and in commercial housing specifically through civil agreements between investors assigned land with payment or leasing land with a one-time payment for the entire lease period and new investors with economic potential who can continue the CHC project. This also relieves the former investor in cases of financial incapacity to complete the project according to the original land use purpose. Generally, the aforementioned project transfer can be manifested through two methods:

1. Transfer to another entity regarding the enterprise implementing the commercial housing construction project: This method can be understood as transferring the investment project by transferring the enterprise, thereby injecting capital into the enterprise executing the project. The transfer in this case can occur in two forms: partial or full transfer of capital, following the procedures stipulated in enterprise law.
2. Project transfer through changing ownership: By transferring the entire or part of the CHC project or the CHC investor proceeding with subdividing the land for sale.

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## 2. Conditions for Transferring a Commercial Housing Construction Project

Land and investment laws include provisions that stipulate conditions to ensure the proper transfer of investment projects, in line with the approved plans and schedules. These conditions also aim to facilitate the transferee in completing the projects and create a legal framework to protect the transferee's rights. In this research scope, the author focuses on analyzing two cases of transferring commercial housing construction projects: i) Transferring an enterprise assigned land to invest in CHC; ii) Transferring part or the entire CHC project.

First, regarding the transfer of an enterprise assigned land for CHC investment: In principle, except for private enterprises, other types of enterprises such as limited liability companies, partnerships, and joint-stock companies, when transferred, do not alter the rights and obligations towards third parties. Therefore, in the case where an investor is assigned land to build CHC projects and transfers the entire or part of the project to another individual or organization according to the Enterprise Law, the parties involved are not bound by the conditions stipulated in the Land Law and Investment Law. Consequently, the transferee of the enterprise inherits the rights and obligations of the transferor, including continuing to implement the CHC project.

Second, regarding the transfer of part or the entire CHC project: In this case, the law prescribes strict conditions and procedures. These conditions fall into two categories: conditions for the project being transferred and conditions for the transferring and receiving investors.

According to Clause 1, Article 46 of the Investment Law 2020, the investor must meet the following conditions when transferring the entire or part of an investment project to another investor: i) The investment project or part of the project being transferred must not be subject to termination under Clauses 1 and 2, Article 48 of the Investment Law 2020; ii) Foreign investors receiving the transfer must meet the conditions specified in Clause 2, Article 24 of the Investment Law 2020; iii) Conditions stipulated by the Land Law in cases where the project transfer involves the transfer of land use rights and assets attached to the land. Accordingly, Article 45 of the Land Law 2024 stipulates the conditions for transferring land use rights as follows:

- Holding a land use right certificate, or a certificate of house ownership and land use rights, or a certificate of land use rights, house ownership, and other assets attached to the land, or a certificate of land use rights and ownership of assets attached to the land.
- The land must be free of disputes, or any disputes must have been resolved by a competent state authority, with a legally effective court judgment, decision, or arbitration award.
- The land use rights must not be subject to seizure or other measures to ensure the enforcement of judgments according to civil judgment enforcement laws.
- The land use rights must still be within the land use period.
- The land use rights must not be subject to emergency temporary measures as stipulated by law.

Additionally, according to Clause 2, Article 45 of the Land Law 2024, the investor must also meet the conditions stipulated by housing law, real estate business law, in cases of transferring a housing construction project or real estate project, and the conditions stated in the investment policy approval document, investment registration certificate, or other relevant legal provisions (if any).

The Real Estate Business Law 2023 prescribes conditions for transferring part or the entire project as follows:

1. The project to be transferred must meet the following conditions under Clause 1, Article 40 of the Real Estate Business Law 2023: i) The project must have been approved for investment or have had investment policy approval by a competent state authority; the investor must have been selected or recognized if the project requires an investor recognition procedure. Compared to the Real Estate Business Law 2014, the new law adds that for projects requiring an investor recognition procedure, the investor can only transfer the project after receiving recognition from the competent state authority, and the condition regarding the 1/500 detailed plan or approved general site plan has been removed. Thus, once the necessary investment approval procedures are completed, the project can be transferred regardless of the site planning progress.

- ii) The transferred project or part of the project must have completed compensation and resettlement support. For transferring the entire infrastructure construction project, the corresponding technical infrastructure works must be completed according to the approved schedule, design, and detailed planning as stipulated by construction law, urban planning law, and the approved project content under construction law. According to Point b, Clause 1, Article 49 of the Real Estate Business Law 2014, the law has been amended to ensure the rights and interests of the subjects entitled to compensation and resettlement support during planning. Previously, once compensation obligations were fulfilled, the investor could transfer the corresponding project part. The current law adds the obligation to provide resettlement support as a transfer condition, while removing the condition regarding site clearance from the previous regulations. It can be seen that before allowing project transfer, the law emphasizes compensation and resettlement support obligations for individuals and organizations within the project planning area, reflecting the state's humanistic approach to land recovery policies.

iii) The project's or part of the project's land use rights must not be under dispute or subject to a legally effective court judgment, decision, or arbitration award, and must not be seized to ensure judgment enforcement; it must not be involved in any prohibited transactions or be temporarily suspended from transactions as stipulated by law. If compared to Points c and d, Clause 1, Article 43 of the Real Estate Business Law 2014, the law does not separate the limits on transferring when land use rights are seized to ensure judgment enforcement or comply with administrative decisions of competent state agencies; when the project or land is subject to a state agency's decision to revoke the project or land, or if there is a violation during project implementation, the investor must comply with the penalty decision. Therefore, if any part of the investment project is in dispute, the investor is not allowed to transfer the entire project. The Real Estate Business Law 2023 has more lenient regulations on project transfer, ensuring flexibility in transferring investment projects and avoiding unnecessary delays. Specifically, the investor is only prohibited from transferring disputed parts of the project, while the undisputed parts can still be transferred to another investor.

In addition, under the new provisions of the Real Estate Business Law 2023, the investor must meet the following conditions to transfer an investment project: If the project is mortgaged to ensure the fulfillment of obligations as stipulated by law, it must be released from the mortgage; the project must still be within the implementation period; for real estate projects where only part of the project is transferred, the construction works or the purpose of use and business of the transferred project part must be able to operate independently from other parts of the real estate project.

2. According to Clause 2, Article 49 of the Real Estate Business Law 2014, the transferring investor must have a land use right certificate for the entire or part of the project being transferred. However, under the Real Estate Business Law 2023, the investor is not required to have a land use right certificate according to land law for the entire or part of the project being transferred, but only needs a decision on land allocation, land lease, or permission to change land use purpose for the project by a competent state authority; the investor must have fulfilled financial obligations regarding land use, including land use fees, land lease fees, and taxes, fees, and charges related to land (if any) for the state regarding the project or part of the project being transferred.

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### 3. Conclusion

The removal of unnecessary conditions and the addition of responsibilities in the transfer of commercial housing investment projects in real estate business aim to create a flexible mechanism that allows investors to seek alternative resources when they are unable to continue a project. At the same time, the law emphasizes and binds the responsibilities and obligations towards third parties when transferring investment projects to prevent situations where investors acquire a project only to resell it for profit without considering the interests of customers.

On the other hand, the partial transfer of a project can lead to a lack of uniformity or difficulties in the construction of the project's technical infrastructure system between the transferred project parts. A noteworthy point is that, in the case of commercial housing construction projects, the transfer of the entire or part of the project always affects the interests of a third-party group, namely the customers—those who have paid for apartments. This is because, after the project transfer, customers' interests may be affected by various factors (Nguyễn Thị Kiều Oanh, 2014). Therefore, to enable the release of the investor in cases where they cannot continue the project and to quickly replace them with a new investor to continue the investment project, while still ensuring the interests of third parties, it is crucial to complete the regulations on the transfer of commercial housing construction investment projects at the present time.

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