

养老地产—法律简讯

全国范围内 首部关于养老行业土地立法

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自近几年中国养老产业受到越来越多的关注以来,关于养老产业的土地定性问题一直比较混乱和难以理解。对民营资本投资者而言,这样的环境对于已经挑战重重的养老行业而言无疑是多了一道屏障。

北京作为中国的首府,是第一个引入关于养老项目供地机制的城市,然而最引人注目的还是最近在深圳市通过土地招投标的方式成交的二宗土地。本月初,在深圳市被定性规划为养老服务设施用地的二宗土地,分别由二家企业获得:一家为保险公司,另一家为私营投资公司。该两项目的土地使用权是在经过数轮出价后,由这两家公司竞得。正如行业内人士的评论,由于竞争非常激烈从而急剧地推高了土地价格,这将对养老机构的后期运营如何获利等带来了很大的挑战和困难。

而且,国家土地和资源部(“国土资源部”)在很多场合再三重申养老产业项目和房地产项目的区别,而后者经常被包装粉饰成养老项目,以获取当地政府的一些优惠政策。

很显然,国土资源部已经意识到只依靠一些解释不能防止市场的混乱,迫切需要一次系统性的重新区划来防控市场上养老地产用地的混乱,并能够区分真正实施养老地产项目和以期通过养老功能达成其取得优惠目的的房地产项目。有鉴于此,2014年4月17日国土资源部及时地出台了《养老服务设施用地指导意见》(“指导意见”),以此建立一个相对稳定的市场体系,并给一些已经过度开发所谓养老项目的城市降降温。

讲座信息:

为帮助更多的企业经营者和管理者了解合规,上海恒为律师事务所特举办“合之有道,规以方圆——公司合规体系的构建”主题讲座,供大家共同学习和交流。本次讲座语言中文,将由恒为律师事务所合伙人和特邀嘉宾共同主讲(语言:中文)。

内容大纲:(a)了解合规“真面目”;(b)反商业贿赂、反垄断及反不正当竞争的合规管理;(c)劳动和就业保护;(d)企业并购的合规管理

讲座时间:2014年5月23日(星期五)下午14:00-16:30

讲座地点:上海市黄浦区江滨路99号上海绿地万豪酒店3楼

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Senior Housing—Legal Alert

The First Nation-wide Land Use Right Legislation on Senior Housing

By Michael Qu & Flora Lu

Law View Partners Law Office, Shanghai, China

Ever since the emergence of the senior housing industry in China several years ago, land use right regulations for senior housing are always fuzzy and hard to understand, and therefore makes this challenging business even more difficult for private investors.

Beijing is the first municipal government that introduces pilot approach on land acquisition procedure for senior care projects, but the most highlighted cases are the recent land biddings in the city of Shenzhen. Early this month, two plots in Shenzhen for the special purpose of senior care facility were acquired by two companies—an insurance company and a private investment company, after rounds of bids. The bidding was over-heated, as many industry insiders comment, that the land grand price as a result has been too high for a typical senior care business to perform profitably in the operation.

Moreover, the Ministry of Land and Resource (“MLR”) has in many occasions reiterated the difference between a senior living project and a real estate project, the latter of which is always being developed in disguise of a senior care project in order to receive some preferential policies from local government. Apparently, the MLR has realized the chaos market needs more than just some clarifications, but a systematic reform, to differentiate “real” senior housing projects from those disguised ones, is urged to be implemented sooner better than later. In light of this, *the Guiding Opinion on Utilization of Land Use Right for Senior Care Facility* (“Guiding Opinion”) was timely published on April 17, representing itself as a market stabilizer to cool down reckless development of senior housing projects in some cities.

Corporate Compliance Seminar

In order to help more business operators and managers to better understand the Corporate Compliance, Law View Partners organizes this Compliance Seminar to share our experiences in this area. This seminar is consisted of the below four parts which will be lectured by Partners of Law View Partners Law Office and Special Guests (language: **Mandarin**):

(a) Understanding the nature of “Corporate Compliance”; (b) Compliance Managements on anti-commercial bribery, anti-monopoly and anti-unfair competition; (c) Prevention and Control of legal risks on labor issues during enterprises operations; (d) Compliance Management for Merger and Acquisition deals

Seminar time: 14:00-16:30 May 23, 2014 (Friday)

Seminar address: Floor 3, Shanghai Greenland Marriott Hotel, No. 99 JiangBing Road, HuangPu District, Shanghai

For more information of the Seminar, please click:

<http://www.lawviewer.com/index.php?m=en&a=newsview&id=272>

让我们来分析一下指导意见的内容及其会给养老产业带来什么样的影响。

清楚地界定了养老服务设施用地的土地性质

根据指导意见规定，养老服务设施用地仅限于取得当地民政部门颁发的从事养老服务资质的机构。与之相反，其他的规划为老年酒店、宾馆、会所、商场、俱乐部等商业性设施则都不属于指导意见中的养老服务设施用地，即使这些物业在很多情形下已经被规划设计为提供养老服务的建筑。换句话说，就是严格区分房地产项目和养老服务项目，因为后者是政府所鼓励的产业，而前者不是。

受限于当前的土地分类体系，单独区划一类“养老用地”仍不具备可行性。从而，指导意见明确地指明只有一类用地，即公共设施用地中的医卫慈善用地可以通过出让或租赁方式用于养老服务设施项目。通过其他方式取得的养老服务设施只存在于大型的城区和小区配套项目（值得注意的是，这种情况只适用于新建项目，重新规划现有物业用途的不受指导意见此项规定的限制）。

土地租赁将逐渐代替土地出让

通过租赁方式取得土地使用权，相较于传统招拍挂出让土地机制，更能有效控制日涨船高的土地价格。在一般招拍挂出让土地的体制下，土地竞得人一般需在竞得土地后支付全额土地出让金从而获取 50 年的土地使用期限，这就意味着想从事养老行业的投资者先期就需要投入一大笔资金取得土地，但养老行业却是一个产生利润较慢的行业。为了鼓励更多的私营资本投资养老产业，国土资源部更愿意通过租赁方式代替出让方式将土地供给从事养老服务设施的机构使用，而且通过在租赁期限（租期最长不超过 50 年）、租金支付和土地指标等方面的灵活操作，使养老机构可以降低先期土地成本的投资，将有限的资金更多地投入到实际运营中。同时，为了吸引更多的私营投资者参与营利性养老机构经营，养老用地的竞买程序还规定了当地相关部门不得设置任何限制公平竞争的条件，比如竞拍人的资质、资格和信用等。

还有一点值得注意的是，上述的土地出让或租赁程序只适用于营利性养老服务项目。对于非营利性的项目，土地可以采取无偿划拨方式给使用人使用。当然，这对私人投资者来说并不常见。

加强土地利用的监管力度

相比以往的土地规划、利用和开发等方面，指导意见在以下方面加强了监管力度：

- 1、为了更好的控制社区规模，养老服务设施用地通常控制在 3 公顷以下，配有医疗、保健、康复等的设施用地，不得超过 5 公顷；
- 2、用地文件应明确配建的面积、容积率、开发投资条件和开发建设周期，以及建成后交付、运营、管理、后续监管的方式等。此规定事实上已经在一些城市开始实施，例如在本文开头提到的深圳的土地出让案例。在此案例中，受让人还须与当地民政部门订立承诺性文件作为用地文件的补充，以确保其按政府的规定建造和运营养老机构；

Let's therefore take a brief look at the Guiding Opinion and analyze what impacts it might make on the industry.

A clear definition of land use right for senior care facility

Pursuant to the Guiding Opinion, land use right for the special purpose of senior care facility is limited only to those facilities that Establish License is to be granted by the local Ministry of Civil Affairs ("MCA"). In contrast, other commercial facilities with the planning of senior resident's hotel, clubhouse or malls are falling out of the definition of senior care facilities in this Guiding Opinion, even though in many cases they are functioning as aged-care service premises. In other words, real estate projects will be treated differently from senior care projects—the latter is encouraged by the government but the former isn't.

Restrained by the current land system, it is still impossible to create a stand-alone category of "senior care land". However, the Guiding Opinion clearly provides only one category where land for senior care facility can be acquired or leased for the construction and operation of senior care facility—it is the land purposed for public infrastructure with the function of medical care or social welfare. Other options to acquire new places for senior care facilities will only be available in scattered community-based infrastructure premises (however, it only applies to new acquisition of plots, repurposing of existing properties falls out of this limitation).

Land leasing will take place of land granting

Leasing could be a workable way to control the increasing price through traditional bidding mechanism. In a typical land granting, a bidder shall pay in advance of 50 years' land premium so to enjoy the land use right during the term, which means a huge amount of investment should be in place for real assets, in a business profits are generated very slowly. In order to encourage more private capital to invest in the sector, the MLR now prefer to provide land for senior care facilities by means of leasing instead of granting, and therefore, with more flexible arrangement of lease terms (50 years at most), payment arrangement of rent, and usage parameters, the land users can save more money at the first stage of investment so to put their capital in a right way on the operation stage. To attract more private investors to participate in the construction of for-profit senior care facilities, the new procedure of land provision will be implemented in a non-discriminated way that local authorities cannot set aside any pre-condition, e.g. qualification or credit level, upon the bidders who are willing to acquire or lease the land..

One thing to be noted is that the above procedure is only applied to land granting or leasing for for-profit senior care projects. For those not-for-profit ones, land can be allocated with no fees or price to be paid. However, that will be rare cases for private investors.

Tightening administration on the utilization of land

Administrative rules in planning, utilizing and development of land provided through the procedure in accordance to the Guiding Opinion are more tightened than before, reflecting in the below aspects:

- (a) In order to control the size of communities, master planning of a senior living community normally shall be within 3 hectares, with some exceptional of 5 hectares where hospitals or rehabilitation facilities are built along with the senior houses;
- (b) Land Utilities Conditions shall explicitly provide the construction area, ratio, investment conditions and construction period, even the handover, operation, management and further supervision methods after completion of the construction. This actually has been implemented in some cities, for example the land grant case in Shenzhen we mentioned in the beginning of this article. As a supplementary document of the Land Utilities Conditions, the bidder has signed an agreement with the local MCA to guarantee senior care facilities will be constructed and operated in accordance to the requirements from local authority;

3、建设用地使用权可以整体转让和转租、不得分割转让和转租。如此限制是为了防止土地使用者通过土地交易获利。在那些整体转让和转租的情形下，虽然指导意见没有明确规定，但通常地方的国土或民政部门会设定一个以事先约定好的价格优先回购的权利；

4、不得改变规划确定的土地用途，改变用途用于住宅、商业等房地产开发的，由市、县国土资源管理部门依法收回建设用地使用权；

5、为拓展融资渠道，指导意见规定出让或租赁的建设用地使用权可以设定抵押权；

6、指导意见中的另外两项规定是：(a) 养老服务设施用地内建设的老年公寓、宿舍等居住用房，可限定在 40 平方米以内；(b) 向符合养老申请条件的老年人出租老年公寓、宿舍等居住用房的，出租服务合同应约定服务期限一次最长不能超过 5 年，期限届满，原承租人有优先承租权。(a) 项规定不难理解是为了更优化养老公寓的设计和使用，但 (b) 项的规定却令人费解。如果从立法者的角度理解这样限制出租和服务期限是为了规范运营者的融资行为并保护消费者的话，那么地方国土部门有多大的权力来监管执行这样的规定呢？这一点有待相关部门给出进一步的解释。

毋庸置疑，指导意见的出台是一项规范养老特殊供地的举措，用以杜绝利用低价获取的土地进行商业房地产项目开发的行为。然而，还有许多利用住宅、商业、工业甚至是教育用地进行养老项目的行为有待立法的规范，而这些还将涉及许多其他政府的职责。更重要的一点是，地方政府是否积极执行指导意见也有待进一步观察。例如，如果有投资者在养老用地上仅开发部分养老机构设施并获取民政部门的养老机构设立许可，但却利用剩余部分的房产开展类似于房地产开发的商业行为——例如销售会员卡。这样的行为是否合法呢？根据指导意见的精神，我们对其合法性深表怀疑，但是由于我们没有在指导意见或其他法律文件中发现明令禁止的相关条文，我们尚无法得出肯定的结论。类似的问题可能不是一个政府部门的一项立法可以解决的。养老行业还仅仅是个新兴产业，尚需经历数十年的发展和完善，立法上是这样，行业自律层面也是。

- (c) Land Use Right can be entirely transferred or leased, but cannot be separately transferred or sub-leased. This restriction is to prevent speculation of users from getting profit from the transaction of the land acquired. In those entirely transferring or lease of land use right, although it is not explicitly expressed in the Guiding Opinion, usually local MLR or MCA will reserve a priority right to buy-back with a pre-set price;
- (d) The Land Planning cannot be changed. Local MLR has the right to take back the land use right without any compensation to the user in case it is developed for residential or commercial purpose, which is contrary to the approved planning;
- (e) In order to stimulate the financing approaches for investors, it is stipulated in the Guiding Opinion that the land use right granted or leased can be mortgaged;
- (f) Another two requirements in respect to the design and operation are (i) it is recommended single room space of senior houses to be within 40m²; and (ii) lease and service agreement between operators and senior residents should not exceed a period of 5 years, and residents will have priority rights of renewal upon expiry of the lease term. It is easy to understand that point (i) is a reasonable requirement to optimize the design and utilization of senior houses, but the point (ii), in our views, is hard to understand. It might be from the legislator's perspective to behave the financial activities of the operators and protect consumer's rights by limiting very long-term leasehold and service arrangement. However, to what extent such a requirement is enforceable by the local MLR is really questionable. We expect relevant authorities will have further clarification to this point.

Undoubtedly, the Guiding Opinion is just to govern the land provision territory for the special purpose of senior care service in order to prevent commercial development of senior housing with those land acquired at a lower price. There are still many senior living projects constructed on the land acquired for residential, commercial, industrial or even educational purpose, the development of which are yet to be regulated. Moreover, it has to be responsible to many other governmental departments as well. More important thing is, the enforcement effects of the Guiding Opinion by local authorities are yet to be tested. For example, what if one user of the special purposed land constructs only portion of the properties as senior care facilities which is in compliance with the administration of MCA but develops the remaining portion with a more commercial approach close to real estate development, such as selling membership card to perspective residents? We doubt the legitimacy of this approach under the context of the Guiding Opinion; however, we are hesitated to jump into that conclusion as there is no expressly prohibition we can find in the Guiding Opinion or other relevant regulations. Problems like this will not be solved by single legislation from one governmental department. The senior housing is still a nascent market that could take decades to get matured, from both the regulatory and self-discipline sides.

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