

About the Author



Steven Wright is a partner in Kaye Scholer's Shanghai office. Prior to joining the Shanghai office, Steven practiced with the firm's Los Angeles office for several years. He focuses his practice on mergers and acquisitions and foreign direct investment and has advised US and European multinational corporations on a range of issues relating their China-based operations, including acquisitions, Sino-foreign joint ventures, establishment of wholly foreign-owned enterprises and representative offices, regulatory compliance, corporate governance and employment matters. In addition, he regularly supervises legal work for the Asia Pacific region in connection with major international transactions. He can be reached at steven.wright@kayescholer.com

This article originally appeared in *Law360* on September 18, 2012.

Snapshot Of China's Changing Land Use Laws

In late June 2012, two real estate developers based in Ningbo and publicly listed in the People's Republic of China (PRC), Yinyi Real Estate Development Co. Ltd. and Rong'an Property Co. Ltd., reportedly entered into agreements with land authorities to terminate previous land-use right grant contracts and return to the authorities pieces of land that they had acquired but had not developed for more than two years.

Some reporters speculated that these two developers returned their land in order to avoid a potential application of the Measures for Disposal of Idle Land (New Measures), which were promulgated by the Ministry of Land and Resources (MLR) and became effective on July 1, 2012. The New Measures effectively amend and restate the previous measures that the MLR issued in April 1999 (1999 Measures).

The New Measures come on the heels of various government policies intended to increase usable land supply and curb housing prices, and seem to signal further national attempts to rein in the Chinese real estate market. The New Measures may (and are certainly intended to) persuade developers to accelerate land development and increase the national housing supply, which could ultimately help make housing more affordable.

Users of land in the PRC, and especially developers and companies that have acquired land-use rights for construction purposes, including residential, commercial or other usages, may face stricter scrutiny under the New Measures and run the risk of significant fines and/or

the confiscation of land if their failure to comply with construction and investment deadlines results in their land being deemed "idle land."

"The New Measures come on the heels of various government policies intended to increase usable land supply and curb housing prices, and seem to signal further national attempts to rein in the Chinese real estate market."

Therefore, current and prospective land users should pay close attention to certain important changes that the New Measures make to the regulation of idle land, some of which are described below.

A Revised Definition of Idle Land

The definition of idle land under the New Measures appears to be more specific than it was under the 1999 Measures. Idle land is now defined as state-owned land that has been designated for construction use, but on which construction and development have not been commenced by the land user for more than one year after the construction “commencement date,” as agreed to or specified in the land-use contract or written decision for land allocation.

The New Measures also provide specific criteria for the determination of the “commencement of construction and development,” which were not included in the 1999 Measures. For example, land users can no longer argue that fences surrounding a piece of land evidence the commencement of construction and development on such land.

“Idle land is now defined as state-owned land that has been designated for construction use, but on which construction and development have not been commenced by the land user for more than one year after the construction ‘commencement date.’”

Under the New Measures, state-owned land designated for construction use will also be deemed idle land if construction thereon has been suspended for more than one year and either the area of land on which construction has been completed is less than one-third of the total area of the land on which construction should have been completed or the amount of investment by the land user is less than 25 percent of the approved total investment amount with respect to the project.

In an apparent effort by the MLR to limit the discretion of local authorities, the New Measures do not include provisions allowing land to avoid the idle land classification if relevant authorities approve the suspension of construction thereon, as the 1999 Measures did.

The New Measures also clarify that neither the “amount of investment” nor the “total investment amount” may include the land-use right grant fee, allocation fee or applicable taxes paid by the land user, which effectively means that the land user must expend actual construction/development funds to achieve relevant thresholds in order to avoid having its land deemed idle land.

An Emphasis on the Equal Standing of the Government and the Land User

According to the director of the Department of Policies and Regulations of the MLR, Shouzhi Wang, the New Measures are intended to reflect the equal standing of the government and the land user as contractual parties. Several provisions in the New Measures seem to support this characterization.

For instance, the New Measures establish formal procedures for the investigation and determination of whether a piece of land may qualify as idle land, allowing land users to apply for a hearing, administrative review and/or administrative litigation with respect to the disposition of land that is determined to be idle land.

Additionally, if a piece of land remains idle for any reason attributable to government authorities, such land should be disposed of upon mutual agreement between the authorities and the land user, rather than at the authorities' discretion.

Furthermore, the New Measures provide that applicable local authorities should be held responsible for their breach of a land-use contract or written decision for allocation. This provision may at least give land users leverage in negotiations with the authorities, though, practically speaking, it may be difficult to enforce, especially if land users seek to maintain good relationships with the authorities in question.

“If a piece of land remains idle for any reason attributable to government authorities, such land should be disposed of upon mutual agreement between the authorities and the land user, rather than at the authorities' discretion.”

Strengthening Measures to Prevent Land from Becoming Idle

It is also worth noting that the New Measures include additional provisions designed to prevent land from becoming idle, which were not included in the 1999 Measures. Land supplied to land users for construction purposes must satisfy certain basic conditions that will allow the land user to proceed with construction, e.g., clear title, no related legal disputes, etc.

Furthermore, the date for commencement of construction, the scheduled date for the completion of construction and liabilities for breach of contract, must all be specifically provided in the applicable land-use contract or written decision for allocation.

The New Measures also impose stricter rules for the disposal of idle land. If it is determined that the commencement of construction and development has been delayed for more than one year for reasons not attributable to government authorities, the land user will be assessed a penalty equal to 20 percent of the land grant fee or allocation fee for the land, and this penalty cannot be treated as an operational cost for tax purposes.

Additionally, if it is determined that the commencement of construction and development has been delayed for more than two years for reasons not attributable to government authorities, the applicable land will be taken back by the authorities without compensation.

Summary

The New Measures give land users more substantive and procedural rights to protect their interests with respect to land designated for construction purposes. However, the stricter rules for the determination and disposal of idle land contained in the New Measures should encourage land users, and especially developers and companies that have acquired land for construction purposes, to be mindful of requirements relating to the efficient use of their land.

Furthermore, some small and medium-sized developers may even need to consider exiting the Chinese real estate market if they are unable to comply with the requirements of the New Measures, due to a shortage of funds available for land development.

“The stricter rules for the determination and disposal of idle land contained in the New Measures should encourage land users, and especially developers and companies that have acquired land for construction purposes, to be mindful of requirements relating to the efficient use of their land.”

Practically speaking, the New Measures are also designed to impose stricter controls on local land authorities, as the MLR’s own studies indicate that government authorities are at least partially to blame, e.g., through failure to timely deliver land, in most cases of idle land.

The New Measures may aid in the efficient administration of the real estate market in the PRC. Yet, since there is a general consensus that the 1999 Measures were often not strictly enforced at the local level, the extent to which the New Measures, which appear to emphasize form over substance, will actually be implemented remains to be seen.