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Memorandum to: Our Clients and Friends

**Re: Circulation of Collectively-Owned Land Use Rights
for Construction Purpose – Current Status and Future Trends**

Under applicable PRC laws, circulation¹ of the right to use² collectively-owned land for construction purpose (the “Construction Purpose COL”) is subject to strict restrictions. Generally speaking, the right to use Construction Purpose COL is not allowed to be sold, leased, mortgaged, transferred or otherwise circulated to any person who is not a “member”³ of the collective economic organization owning such land, subject only to very few exceptions. On the one hand, this results in the inefficient utilization of the Construction Purpose COL and a notable disparity between the prices of the Construction Purpose COL and the construction purpose state-owned land. On the other hand, due to the high price and the limited supply of the construction purpose state-owned land, quite a lot of entities (*especially private companies in relatively more developed areas of the country*) have been trying to use Construction Purpose COL to build factories, register companies or engage in business operations through various *grey area practices*, which may not only jeopardize both the land users and the land suppliers, but also discourage the establishment of an organized platform for circulation of the Construction Purpose COL.

During the last decade, various PRC government authorities at both central and local levels (*as represented by the Ministry of Land and Resources or “MLR”, and its local counterparties*) have been exploring some pilot reforms to permit limited circulation of the Construction Purpose COL on regional basis, which process was started in certain areas in Jiangsu and Guangzhou provinces, and has now been expanded to many major cities and provinces in China, such as Chongqing, Chengdu, Shanghai, Zhejiang, Anhui, Hubei, Hebei, Henan, Dalian and Nanjing. MLR has repeatedly showed its support to local pilot reforms with respect to the circulation of the

¹ Circulation of a piece of collectively-owned land usually refers to sale, transfer, lease, mortgage or assignment of the right to use such land.

² Under applicable PRC law, unless it is converted into a piece of PRC state-owned land, ownership of any collectively-owned land is prohibited to be sold or otherwise transferred.

³ A member of a collective economic organization (which in most cases is a village in China) usually refers to a villager living in such a collective economic organization based on Chinese residential registration system (or *Hukou* system), or a rural or township enterprise established and controlled by such collective economic organization or a group of its members.

Construction Purpose COL in its multiple rules, notices, circulars and regulations, in an effort to improve the utilization efficiency of the Construction Purpose COL, to revitalize land resources in rural areas and to facilitate the *new countryside construction campaign*/新农村建设运动.

In this memorandum, Han Yi lawyers have summarized and briefly analyzed several typical cases where a person who is not a member of any collective economic organization (the “Non-Rural Member”) is allowed to use the Construction Purpose COL based on existing PRC laws and practice, and provided some observations on the regional reforms and future development trends in connection with circulation of the Construction Purpose COL for your general reference.

I. Legislative Overview

In China, the purpose of use for a piece of land (*including collectively-owned land and state-owned land*) is under the state’s stringent control. Pursuant to the state’s overall land utilization planning, land in China is generally classified into the following three categories in terms of purpose of use: (a) land for agriculture purpose of use (*or agricultural land*), (b) land for construction purpose of use (*or construction land*), and (c) unutilized land. According to the *PRC Land Administration Law*, construction land refers to the land, whether owned by the state or collective economic organizations, used for building up all kinds of constructions, including without limitation, residential houses, office buildings, public infrastructures, manufacturing and mining plants, transportation and water resource facilities, tourism sites and military facilities. The Construction Purpose COL refers to construction land owned by rural collective economic organizations. Conversion of any agricultural land into construction land is strictly limited.

Pursuant to applicable PRC laws and regulations, under most circumstances the Construction Purpose COL can only be used by rural collective economic organizations and/or their members for limited purposes. To be more specific, in accordance with the *PRC Land Administration Law* and its implementing rules, no one can use any Construction Purpose COL except for the following circumstances: (i) subject to approvals of the competent government authorities at county or upper level, a rural community can use the Construction Purpose COL owned by the rural collective economic organization to which it belongs, to set up a township enterprise; (ii) members of a rural collective economic organization can use the Construction Purpose COL owned by such rural collective economic organization to build up self-use residential houses upon approvals of the competent government authorities; (iii) the Construction Purpose COL can be used for building up public infrastructures and/or constructions for public welfare undertakings subject to approvals of the competent government authorities at county or upper level; or (iv) an entity or individual may obtain the land use right of a piece of the Construction Purpose COL that was legally owned by a township enterprise as a result of the bankruptcy or mergers and acquisitions of such township enterprise or due to other reasons permitted by law. Except for the aforesaid circumstances, no one is allowed to use any piece of collectively-owned land for non-agricultural purpose unless such piece of collectively-owned land is legally converted into state-owned land.

II. Common Practice for Utilization of Construction Purpose COL by Non-Rural Members

1. Conversion of Construction Purpose COL into State-Owned Land

As mentioned above, in most cases, if a Non-Rural Member wishes to use a piece of Construction Purpose COL, such land should firstly be converted to a piece of state-owned land upon approval of competent government authorities. The

Non-Rural Member may then apply to use the converted land according to applicable procedures (*most probably through a public invitation for bid, auction or listing procedure*).

Under the current PRC legal framework, conversion of a piece of Construction Purpose COL into state-owned land is the most traditional way for Non-Rural Members to use Construction Purpose COL with the least legal risks and uncertainties. Particularly in some emerging industrialized areas, it is widely seen that local governments expropriate collectively-owned land from relevant rural collectives, convert it to the state-owned construction land and then grant such land through applicable procedures to a Non-Rural Member for the construction of public infrastructures, factories, commercial facilities, cultural and educational facilities, commercial real estate projects, among others. However, for most land users, the aforesaid practice seems rather costly and time-consuming as it involves multiple governmental approvals as well as complicated and high economic compensations to the land owners.

2. Lease of Buildings Situated on Construction Purpose COL

Under applicable PRC laws, generally speaking, when a building situated on a piece of state-owned granted land with a legal, transferable and clean title is transferred, leased or otherwise disposed of, the use right of the underlying land should be transferred, leased or disposed together with such building. The aforesaid principle (*usually called "House and Land Integration Principle/房地合一原则"*) nowadays is also applied to the lease of buildings situated on the Construction Purpose COL by Non-Rural Members.

In many rural areas, leasing buildings on the Construction Purpose COL had been recognized by local courts as a legally feasible approach for Non-Rural Members to use the Construction Purpose COL. For instance, the Higher People's Court of Guangdong Province has expressly provided in its *Guiding Opinions on Several Issues Concerning Disputes Arising from Grant, Transfer and Lease of Rural Collectively-Owned Land for Non-Agricultural Construction Purpose (Yue Gao Fa Fa [2001], No. 42)* that lease contracts with respect to buildings or other structures situated on the Construction Purpose COL could generally be upheld so long as such buildings or structures are legally constructed with all applicable registrations and approvals obtained from competent government agencies. As this approach is more straightforward and cost and time efficient for Non-Rural Members to use the underlying Construction Purpose COL and the legal risks associated therewith are relatively controllable especially when expressly supported by local courts, it is quite popular in practice for the time being.

3. Other Attempts

In some more developed rural areas, there is another commonly seen attempt where a Non-Rural Member typically enters into an investment or cooperation agreement with the rural collective economic organization owning the relevant Construction Purpose COL, under which agreement, (i) with all funds provided by the Non-Rural Member, the rural collective organization will construct buildings on the underlying Construction Purpose COL in the name of a township enterprise and in accordance with the Non-Rural Member's requirements; (ii) once the desired buildings are completed, the Non-Rural Member will be entitled to use such buildings for a relatively long time period (*normally between 30 to 50 years*); and (iii) upon expiration of the agreed time period, the township enterprise will usually have the right to take back such buildings as well as the underlying Construction Purpose COL for free.

Compared with the approach of directly leasing completed buildings on the Construction Purpose COL as described under Section 2 of Part II above, arrangements under this cooperation/investment approach will provide more flexibility to both the land suppliers and the land users, as it greatly relieves the land supplier's financial pressure in terms of providing qualified buildings. Moreover, the buildings concerned could also be designed to meet the land user's specific requirements. On the other hand, however, parties using this cooperation/investment approach will probably face more legal risks, since in order to obtain the relevant legal title certificate for the desired buildings, the land supplier needs to go through multiple government approval procedures which are quite time-consuming and may have uncertainties. If the land supplier finally fails to obtain the relevant title certificate for the desired buildings, the underlying investment or cooperation agreement will highly likely be deemed as a disguised form of leasing Construction Purpose COL instead of buildings situated thereon by Non-Rural Members, which as introduced above, is forbidden by applicable PRC laws and therefore may not be upheld by the competent courts.

In addition to the above-mentioned common practices, Non-Rural Members may also indirectly use the Construction Purpose COL by setting up township enterprises with rural collective economic organizations who may invest the land use right of the underlying Construction Purpose COL to the township enterprises as their capital contributions. However, since there are quite some apparent disadvantages associated with township enterprises (*such as the township enterprises are required to be controlled by the rural collective economic organizations pursuant to applicable PRC laws, while rural collective economic organizations are often characterized with unclear ownerships and inefficient administrations*) which in turn make them difficult to succeed, Non-Rural Members rarely choose to establish joint ventures with rural collective economic organizations nowadays. Besides, where an enterprise legally owning the use right of a piece of Construction Purpose COL goes bankrupt, or is merged or consolidated with another entity, the Non-Rural Member taking over such enterprise's assets or equity interest through legal procedures may also acquire the land use right of the underlying Construction Purpose COL as long as there are buildings or structures with legal titles situated thereon.

It is also noteworthy that while lacking nationwide laws or regulations governing the use of the Construction Purpose COL by Non-Rural Members, the demand for circulation of the Construction Purpose COL remains strong in practice. As a result, illegal circulation or use of the Construction Purpose COL is quite common in many localities, although such practice will unlikely be upheld by the courts.

III. Pilot Reform in Guangdong Province

Since late 1990s, some areas in such provinces as Guangdong, Jiangsu and Anhui started to explore pilot reforms with respect to the land use right circulation of the Construction Purpose COL to Non-Rural Members. In October 2004, the State Council issued the *Decisions on Deepening Land Reform and Strengthening Land Administration (Guo Fa [2004] No. 28)* and explicitly showed its support to the legal circulation of the land use right of the Construction Purpose COL as long as such circulation complies with the relevant land utilization planning. Encouraged by the supports from the State Council and other government authorities at the central level, regional pilot reforms with respect to circulation of the Construction Purpose COL have gradually been adopted by most major provinces and cities in China, including among others, Zhejiang, Hebei, Hubei, Henan, Shanghai, Chongqing, Nanjing, Chengdu and Dalian. Under such regional pilot reforms, a Non-Rural Member is allowed to lease, purchase or otherwise obtain the use right of the Construction Purpose COL to engage in various business operations by entering into private agreements with the relevant land owners or through a public invitation for bid,

auction or listing process. Set forth below is a brief introduction of the regional pilot reform adopted by Guangdong province for your general reference.

(a) Major Contents of the Reform

Guangdong province is among the places firstly adopting pilot programs that allow the Construction Purpose COL circulation to Non-Rural Members, and its pilot rules could be deemed as a representative sample of other pilot areas. The *Administrative Measures of Guangdong Province for Circulation of the Right to Use of Collectively-owned Land for Construction Purposes*, serving as the major legislative basis for Guangdong's pilot reform, has covered most major aspects of the land use right circulation with respect to the Construction Purpose COL, including among others, the permitted purpose of use for the land to be circulated, the permitted maximum term of the land to be circulated, circulation procedures and distribution of circulation proceeds:

- (i) Permitted Purpose of Use: In addition to be used pursuant to the *PRC Land Administration Law* as introduced under the second paragraph of Part I above, in accordance with the Guangdong pilot program, the Construction Purpose COL is also allowed to be used by Non-Rural Members (*including without limitation, state-owned entities, urban collectively-owned organizations, private companies, domestic individuals and foreign invested enterprises*) for business operation purposes, but in no event such land may be used for commercial or residential real estate development. This has significantly lifted the restrictions on the use of the Construction Purpose COL by Non-Rural Members as provided under the *PRC Land Administration Law*.
- (ii) Circulation Methods and Restrictions: According to the Guangdong pilot program, the owner or user of a piece of the Construction Purpose COL may circulate the use right of such land to Non-Rural Members by way of grant or lease (“Initial Circulation/初次流转”), transfer or sublease (“Secondary Circulation/再次流转”), or mortgage (together with the Initial Circulation and the Secondary Circulation, collectively, the “Circulation”). However, no Circulation is allowed in any of the following situations: (i) the proposed purpose of use of the land contradicts with the overall land utilization planning or any urban or rural zoning plans; (ii) the legal title of the land is in dispute; (iii) the land is subject to judicial or administrative procedures; or (iv) the land is designated to build up self-use residential houses for the members of the rural collective economic organizations (*except that the land is circulated as a result of legal transfer, lease or mortgage of the buildings or structures situated thereon*).
- (iii) Circulation Procedures: Pursuant to the Guangdong pilot program, with respect to a piece of Construction Purpose COL, the Initial Circulation and mortgage of the underlying land use right should be approved by at least 2/3 members of the villagers' committee (*or 2/3 representatives of the villagers*) of the collective economic organization that owns such land. If anyone intends to use the Construction Purpose COL through Initial Circulation for commercial purposes such as constructing shopping malls, hotels, restaurants, tourism sites or entertainment projects, such Initial Circulation must be conducted by reference to the land granting procedures applicable to the state-owned land with the same purpose of use (*i.e., through a public invitation for bid, auction or listing procedure*).

Unlike the Initial Circulation, procedures for a Secondary Circulation are quite straightforward. In order to obtain the relevant land use right

certificate, the parties to a Secondary Circulation only need to enter into a land use right transfer or lease contract in writing and go through relevant registration procedures with competent land administration authorities. Neither approval from villagers' committee or villager representatives of the relevant collective economic organization, nor public auction or listing procedure is mandatorily required in the case of a Secondary Circulation.

- (iv) Circulation Term: The maximum term of the right to use the Construction Purpose COL achieved in an Initial Circulation is essentially the same as that applicable to a piece of granted state-owned land with the same purpose of use. The term of the land use right with respect to the Construction Purpose COL achieved in a Secondary Circulation should be no more than the remaining term of the land use right concerned (*i.e., the term obtained in the Initial Circulation minus the term that has lapsed from the Initial Circulation through the Secondary Circulation*). Upon expiration of the circulation term, the land owner is entitled to take back the underlying land for free and the disposal and/or distribution of the buildings and other constructions situated thereon should be dealt with in accordance with the relevant land use right grant or lease agreement entered during the Initial Circulation.
- (v) Distribution of Circulation Proceeds: The proceeds derived from Initial Circulation of a piece of Construction Purpose COL should be treated and managed as the property collectively owed by the members of the relevant collective economic organization. A minimum of 50% of such proceeds should be deposited in a special bank account opened with the relevant rural credit cooperative bank and should only be used to improve social welfare conditions for the members of the underlying rural collective economic organization.

We noted that most of the above-mentioned aspects with respect to the pilot reform of Construction Purpose COL circulation in Guangdong province have also been covered by regional reform schemes in other pilot provinces or cities. For matters described under items (i), (ii) and (iv), other pilot areas adopted similar policies as Guangdong province does while they also introduced some different practices on matters such as land circulation procedures, distribution of circulation proceeds, among others. For example, in some pilot areas, approvals from competent government authorities are also required for Initial Circulation of the Construction Purpose COL in addition to consent from villagers' committee or villagers' representatives of the relevant rural collectives; and some pilot areas allow local government to share a portion of the proceeds derived from the Construction Purpose COL circulation with the rural collectives owing the underlying land.

Pilot reforms allowing land use right circulation of the Construction Purpose COL significantly speed up China's land supply market transition from a "double-track system" to a uniformed and streamlined land supply market. Thanks to such pilot reforms, in the pilot areas, the use right of the Construction Purpose COL has gradually been integrated into a market-oriented land supply system, and Non-Rural Members are able to use the Construction Purpose COL in a way almost the same as they use the state-owned granted land for construction purpose.

(b) Conflicts Between Regional Pilot Schemes and Applicable PRC Laws

Since most of the pilot schemes are formulated and implemented by local government authorities on regional basis, theoretically speaking, the legal effect

of such local rules would be challenged if they conflict with applicable laws or regulations promulgated by upper level legislation authorities (e.g., the *PRC Land Administration Law* promulgated by the Standing Committee of the National People's Congress). However, from a practical perspective, it seems that legal risks associated with such local pilot rules are generally remote, because as mentioned above, both the administrative and judicial authorities at the central level have publicly expressed their supports to the local pilot reforms for several times in the past years. For example, as mentioned above, the State Council has showed its support in its *Decisions on Deepening Reform and Strengthening Administration of Land* to the legal circulation of the Construction Purpose COL in villages, towns and organic counties as long as such circulation complies with applicable land utilization planning and zoning plans. Further, to support the pilot land reforms, the Supreme People's Court, the state's highest judicial agency, issued the *Several Opinions on Providing Judicial Guidance and Legal Service to Promote Reforms and Developments of Rural Areas* (Fa Fa [2008] No. 36) in December 2008 and required local courts to properly balance the legislative innovation and the stabilization of currently effective laws and regulations with higher legal effect when hearing cases involving the Construction Purpose COL circulation and try to avoid negative impacts that their judicial practices may cause to the reforms of the Construction Purpose COL circulation. It is also noteworthy that China has recently initiated another round of amendments to the *PRC Land Administration Law*. Restrictions on the Construction Purpose COL circulation under current legal framework are expected to be significantly lifted by the proposed new amendments.

IV. Overview of Future Trends

Regional pilot reforms with respect to the Construction Purpose COL circulation are an important part of the overall collectively-owned land reform and new countryside construction campaign in China. Based on the supportive attitudes of competent administrative and judicial authorities expressed in the last decade and the favorable developments of the regional pilot programs launched in many places in China, it is fair to expect that a unified nationwide construction purpose land supply market across both urban and rural areas will be established in the near future and circulation of the collectively-owned land will gradually be consistent with the state-owned land. Major breakthroughs in this connection may include, among others:

- (a) A nationwide legal system allowing circulation of the Construction Purpose COL will probably be formulated based on the experiences obtained from the regional pilot reforms. Although many provinces and cities in China have adopted regional pilot reforms to permit Non-Rural Members to use the Construction Purpose COL under certain circumstances, the *PRC Land Administration Law*, the state's fundamental law dealing with the overall land supervision and administration still restricts the Construction Purpose COL circulation to Non-Rural Members for the time being. It is reported however that the aforesaid situation may be changed by the proposed amendments to the *PRC Land Administration Law* by lifting or removing such restrictions. It is also predicted that MLR and other competent government authorities may further formulate implementing rules after the *PRC Land Administration Law* is amended to provide explicit guidance on the Construction Purpose COL circulation in the near future, which point had already been mentioned by MLR in its *Several Opinions on Promoting Steady Development of Agriculture, Sustainable Growth of Farmers' Income and Enhancing Balanced Development of Urban and Rural Areas* (Guo Zi Fa [2009] No. 27) in March 2009.
- (b) A registration system is likely to be established and implemented as to who has the ownership and use right of relevant collectively-owned land. MLR, the

Ministry of Finance and the Ministry of Agriculture have jointly required in the *Notice on Accelerating Works Concerning Identification, Registration and Licensing of Relevant Rights of Collectively-Owned Land* issued in May 2010, that local governments at various levels should ensure the ownership of each piece of collectively-owned land to be clearly identified and confirmed by the end of 2012, and the land use right of the Construction Purpose COL is not allowed to be circulated unless its legal title has been clearly confirmed. In November 2011, MLR, the Central Rural Work Leading Group, the Ministry of Finance and the Ministry of Agriculture further issued the *Several Opinions on Identification, Registration and Licensing of Relevant Rights Concerning Collectively-Owned Land*, providing detailed guidance on the scopes, subjects, applicable rules, techniques and standards with respect to the identification and registration works on the ownership and land use right of rural collectively-owned land.

- (c) An appropriate and streamlined mechanism on profit sharing will need to be established to balance the interests of the rural collective economic organizations and the local government authorities when allocating proceeds derived from the Construction Purpose COL circulations. Many local governments are known to heavily rely on the proceeds derived from granting state-owned land. If the current restrictions on the Construction Purpose COL circulation are ever lifted or removed, the demand for state-owned land will probably be significantly decreased which in turn will definitely affect the share of local governments' income contributed by granting state-owned land. From this point of view, a well-designed proceeds distribution system would be one of the critical aspects that the legislative authorities may need to carefully consider in order to win local governments' support and cooperation on the forthcoming reforms of the Construction Purpose COL circulation throughout the country.

* * *

The above is a brief summary of several PRC legal issues with respect to the circulation of the land use right with respect to Construction Purpose COL based on applicable PRC laws and certain local practice. Please note that this memorandum is only a general introduction of our observations on the current situations and potential future trends in connection with the Construction Purpose COL circulation and is not intended to be a conclusive or accurate analysis thereof. Since the regulatory regime on circulation of the Construction Purpose COL is quickly involving and the local pilot reform practice varies quite a lot in different localities, it is strongly recommended that when dealing with any specific case involving the Construction Purpose COL circulation, most updated rules and local practice be always consulted. Again, this memorandum is prepared for your general reference only and should not be relied on as any formal PRC legal opinion in any aspect.

If you have any questions, please feel free to contact us at inquiry@hanyilaw.com.

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浅析集体建设用地使用权流转的现状和发展趋势

在中国现行法律法规下，一方面，集体建设用地使用权的流转受到诸多限制，除一些特殊情况之外，集体建设用地使用权一般不得向本集体成员之外的第三方流转，从而导致了集体建设用地的利用效率低下，与国有土地相比“同地不同价”。另一方面，鉴于国有土地价格高昂、供应有限，在实践中，大量企业（尤其是在经济发达地区的民营企业）通过一些“灰色操作”寻求在集体土地上建设厂房、开办企业、从事相关生产和经营活动。这些“灰色操作”不仅将用地企业和供地的集体组织置于法律风险之下，同时也不利于规范化的集体土地流转市场的建立。

近十几年来，以国土资源部为主的相关中央政府部门、各地政府主管部门逐步探索允许集体建设用地适度流转的改革试点。该等改革试点从江苏、广州等部分地区开始并已逐步覆盖了重庆、成都、上海、浙江、安徽、湖北、河北、河南、大连、南京等多个主要省市。国土资源部也多次发布规范性文件，鼓励各地开展集体建设用地使用权流转改革试点，以使一些闲置或低效利用的集体建设用地得到充分利用，盘活农村存量土地资产，并促进新农村体制改革。

本备忘录根据相关中国法律法规和实践，对当前非集体经济组织成员利用农村集体建设用地的几种典型情形进行了分析，并以广东省为代表，对集体建设用地使用权流转的地方性改革进行了简要的介绍，供阁下参考。

二、与集体建设用地流转相关的基本法律规定

我国实行土地用途（包括国有土地和集体土地）管制制度。国家编制土地利用总体规划，规定土地用途，将土地分为农用地、建设用地和未利用地。根据《土地管理法》，建设用地是指建造建筑物、构筑物的土地，包括城乡住宅和公共设施用地、工矿用地、交通水利设施用地、旅游用地、军事设施用地等。国家严格限制农用地转为建设用地。集体建设用地是指相关农村集体所有的建设用地。

根据相关法律法规，集体建设用地的使用权人和具体用途均受到严格的限制，在大多数情况下，只有农村集体组织成员才有资格使用本集体组织所有的建设用地。根据《土地管理法》及其实施条例，任何单位和个人进行建设，需要使用集体建设用地的，只能是以下情况：(i) 村民集体兴办乡镇企业，经县级以上相关地方政府依法批准，使用本农民集体组织所有的土地；(ii) 村民建设住宅，经依法批准使用本农民集体组织所有的土地；(iii) 从事乡（镇）村公共设施和公益事业建设，经县级以上相关地方政府依法批准，使用农民集体所有的土地；或者(iv) 因依法取得相关集体建设用地的企业（主要是指乡镇企业）破产、兼并等情形取得该等企业拥有的土地使用权。除此之外，任何其他个人或组织利用集体土地从事非农建设，必须依法申请将集体土地征为国有后才能使用。

三、非农村集体组织成员利用集体建设用地的几种常见途径

1. 将集体建设用地征为国有后加以利用

如前所述，一般情况下，农村集体组织成员之外的企业和个人如需利用集体建设用地从事生产经营活动，须首先将集体土地征为国有，然后再按照取得国有土地的程序办理相关用地程序（一般需通过招拍挂程序取得）。

在目前的法律环境下，这种方式是非集体组织成员取得集体建设用地（实际上已转为国有土地）使用权最为传统和普遍的一种方式。尤其是在一些新兴的工业化地区，政府征用农村集体土地，再出让给用地企业或个人用于基础设施、工业、商业、文化教育、房地产开发等建设的现象非常普遍。但是，对于用地企业而言，通过这种方式取得土地使用权涉及到复杂的政府审批程序和对农民的征地补偿，用地成本高，时间周期也较长。

2. 租赁集体建设用地上的房屋

在“房地合一”的基本原则下，如果建筑物、构筑物及其附属设施发生转让、租赁等情形，该建筑物、构筑物及其附属设施占用范围内的建设用地使用权一般也将一并转让或出租。实践中，这一原则一般也适用于租赁集体建设用地上所建设的房屋。

通过租赁使用集体建设用地上合法建设的房屋，从而一并取得使用相关房屋所对应的集体建设用地使用权的理论在很多地方都得到了当地法院的认可。比如，广东省高级人民法院在其发布的《关于审理农村集体土地出让、转让、出租用于非农业建设纠纷案件若干问题的指导意见》（粤高法发〔2001〕42号）中指出：“当事人（指集体土地的合法使用权人，如集体经济组织）出租在已经县级以上人民政府批准为建设用地的集体土地上建成厂房、仓库、办公楼、商业铺位等建筑物的，经工程质量验收和消防验收合格的，可认定租赁合同有效”。在实践中，租赁集体土地上依法建成的房屋的情形也颇为多见。

3. 另一种常见的变通作法

在一些经济发达的农村地区，经常会出现这样的情形：由集体经济组织出地，投资人出资金建设厂房，厂房建设完毕后交付给投资人使用一定的期限，并由投资人按期支付使用费，到期后相关集体土地使用权和地上建筑都归集体组织所有。在前述情形下，一般需要集体组织以兴办乡镇企业的名义申请使用相关集体建设用地，在取得县级以上人民政府的审批后，依法办理建设房屋所需的相关证照。

相对于单纯租赁集体建设用地上依法建设的房屋的方式，本方案下的房屋建设及出租安排既能够缓解集体组织建房所需的资金压力，又能使出租的房屋满足投资人的具体要求。但相应的，这种方案的法律风险也比较大。当事人之间需要明确约定双方在用地审批、房屋建设和房屋租赁等多个法律关系中分别的权利义务，并确保相关土地上所建房屋可以取得完备的用地审批并能通过各项房屋验收手续。否则，该等房屋建设及租赁安排很可能被认定为变相租赁集体土地（而非集体建设用地上依法建设的房屋），从而导致相关租赁合同或者合作合同被认定为无效。

除了上文所述的几种实践中常见的利用集体建设用地的情形，在《土地管理法》下，农村集体组织也可以将集体建设用地使用权通过入股、联营等方式，成立乡镇企业，实

现用地目的。但因为在乡镇企业中农民集体需占控股地位，而农民集体经济组织经常产权不清，又缺乏有能力的企业家，乡镇企业很难真正意义上实现盈利。因此，非集体经济组织成员与集体组织合作兴办乡镇企业的情况在目前的实践中已非常少见。除此之外，在合法拥有相关集体建设用地的企业破产、兼并等情形下，如果等集体建设用地上拥有依法建成的房屋或其他建筑物的，则合法取得破产企业或被兼并企业的资产或股权的非集体经济组织，在一定条件下，也能取得该等企业拥有的集体建设用地的使用权。

另需注意的是，在目前集体建设用地流转的全国性规范缺失，而同时市场对集体建设用地又有较大需求的情形下，实践中存在很多违法违规利用集体土地的情况。比如非法转让集体建设用地，非法置换土地，利用集体土地进行房地产开发，甚至通过各种方式利用农用地或变相利用农用地等。这些情况下，相关协议的效力在很多时候无法得到相关法院的认可。

四、农村集体建设用地使用权流转的地方性试点简介 – 以广东省为例

自上世纪 90 年代末本世纪初开始，广东、江苏、安徽等地逐步开始摸索农村集体建设用地使用权流转相关的改革试点。2004 年 10 月，国务院在《关于深化改革严格土地管理的决定》（国发[2004]28 号）中提出，在符合规划的前提下，村庄、集镇、建制镇中的农民集体所有建设用地使用权可以依法流转。目前，该等地方性试点已经覆盖重庆、成都、上海、浙江、湖北、河北、河南、大连、南京等多个主要省市。在该等地方试点之下，非集体组织成员可以通过招拍挂、签署协议等方式，以出让、出租、转让、转租等多种途径，取得集体建设用地用来兴办各类工商企业。下文以广东省为例，对农村集体建设用地使用权流转的地方性政策作简要介绍。

1. 试点的主要内容 – 以广东省为例

广东省是最早开展农村集体土地使用权流转改革的试点省市之一，其所实施的农村集体建设用地使用权流转试点政策也较为典型。《广东省集体建设用地使用权流转管理办法》（广东省地方试点的主要政策依据）对农村集体建设用地的用途、流转方式、程序、以及在不同流转方式下的土地使用权期限、土地流转收益处置等事项作出了比较全面的规定：

(1) 土地用途：除了可以传统地用于兴建农村村民住宅和兴办公设施和公益事业，农村集体建设用地被明确允许用来兴办各类工商企业，包括国有、集体、私营企业，个体工商户，外资投资企业（包括中外合资、中外合作、外商独资企业、“三来一补”企业），股份制企业，联营企业等（但不得用于商业房地产开发和住宅建设），大大突破了《土地管理法》的限制。

(2) 流转方式和限制：农村集体可以通过出让和出租（即初次流转）、转让和转租（即再次流转）将集体建设用地提供给非集体组织成员的用地企业或个人，也可以在集体建设用地上设定的抵押（初次流转、再次流转和抵押，统称为“流转”）。但有下列情形之一的，集体建设用地使用权不得流转：(i) 不符合土地利用总体规划、城市规划或村庄、集镇规划的；(ii) 土地权属有争议的；(iii) 司法机关和行政机关依法裁定、决定查封或以其他形式限制土地权利的；或(iv)

村民住宅土地使用权（因转让、出租和抵押地上建筑物、其他附着物而导致住宅用地使用权转让、出租和抵押的除外）。

- (3) 流转程序：初次流转和抵押集体建设用地使用权，须经本集体经济组织成员的村民会议 2/3 以上成员或者 2/3 以上村民代表的同意。集体建设用地使用权初次流转用于商业、旅游、娱乐等经营性项目的，应当参照国有土地使用权公开交易的程序和办法，通过土地交易市场招标、拍卖、挂牌等方式进行。

再次流转集体建设用地使用权的，由相关当事方签署相关集体建设用地使用权转让、转租的书面合同，到市、县人民政府土地行政主管部门申请办理土地登记和领取相关权属证明，但不涉及任何审批、招拍挂程序，也无需村民会议或村民代表的另行同意。

- (4) 土地使用权期限：集体建设用地使用权初次流转的最高年限，不得超过同类用途国有土地使用权出让的最高年限。集体建设用地使用权再次流转的年限为原土地使用年限减去已使用年限后的剩余年限。集体建设用地使用权出让、出租合同约定的土地使用年限届满，土地使用权由农民集体土地所有者无偿收回，其地上建筑物、附着物按照集体建设用地使用权出让、出租合同的约定处理。

- (5) 流转收益处置：集体土地所有者出让、出租集体建设用地使用权所取得的土地收益应当纳入农村集体财产统一管理；其中 50% 以上应当存入农村信用社专户，专款用于本集体经济组织成员的社会保障安排。

各地试点政策基本都对以上与集体建设用地流转改革相关的重点事项作出了规定。其中，对土地用途、流转方式和限制、土地使用权期限等内容，各地政策比较接近，而对于具体的流转程序和流转收益处置等问题，则可能根据各地的具体情况有所不同，比如部分地方要求初次流转还需取得相关乡、镇人民政府的批准，而关于流转收益的处置，部分地方要求提取一部分收益给当地政府。

集体建设用地流转试点是土地供应市场“双轨制”向统一市场迈进的重要一步。借助该等试点改革，集体建设用地在很大程度上得以实现市场化，用地单位在很多情况下可以像取得国有土地使用权一样取得集体建设用地的使用权。

2. 地方政策与《土地管理法》的冲突

目前允许集体建设用地流转的地方性规定基本上都属于地方政府规章或者地方政府规范性文件，立法层级较低。因此，严格来说，这些地方性规定中与《土地管理法》可能发生冲突的条款的效力是应当受到质疑的。但实际上，国务院和国土资源部已多次下发文件，允许地方政府开展农村集体建设用地流转的试点。比如，前文提及的《国务院关于深化改革严格土地管理的决定》中明确允许村庄、集镇、建制镇中的农民集体所有建设用地使用权在符合规划的前提下依法流转。最高人民法院在《关于为推进农村改革发展提供司法保障和法律服务的若干意见》（法发〔2008〕36号）中也要求各级法院在审理涉及集体建设用地的纠纷时处理好法律、行政法规与政策和体制机制创新之间的关系，促进城乡统一的建设用地市场的形成，不能因

审判工作影响农村土地管理制度改革的规范推进。从立法层面上，目前《土地管理法》的修订也已经提上日程，允许集体建设用地流转很可能也是其重点修改内容之一。综合以上，相关司法、行政部门均比较认可目前的集体建设用地流转的地方性试点，根据地方性规定取得集体建设用地的使用权的实际法律风险相对较低。

五、集体建设用地流转的未来发展方向

农村集体建设用地流转改革是农村土地改革、体制改革的重要部分，社会影响重大。纵观这十年来的相关司法、行政部门的态度，以及地方性试点的进展情况，逐步促进全国城乡统一的建设用地市场的形成，确认集体经营性建设用地与国有土地享有平等权利，是集体建设用地流转政策的整体发展趋势。未来几年，集体建设用地的流转政策很可能得到突破性的进展。具体而言，未来几年集体建设用地流转的几个主要发展趋势包括：

- (1) 总结地方试点经验，制定允许集体建设用地流转的全国性立法。目前，集体建设用地流转试点已经覆盖全国多个主要省市（尤其是经济发达地区），但还没有全国性的法律依据。近期，相关立法部门正在酝酿修订《土地管理法》，其中允许集体建设用地的适度流转应该是本次修订的重点内容之一。另外，在扫除上位法障碍后，国土资源部等相关政府部门也可能出台全国性的《农村集体建设用地流转办法》，对集体建设用地流转的相关问题进行系统性的规范，这一点在国土资源部在《关于促进农业稳定发展农民持续增收推动城乡统筹发展的若干意见》（国土资发[2009]27号）中也已经明确提及。
- (2) 明确流转主体，逐步建立并完善集体建设用地的所有权和使用权确权登记制度。该项工作目前已取得了较大进展，并有望在近年内完成。国土资源部、财政部和农业部在2010年5月发布《关于加快推进农村集体土地确权登记发证工作的通知》，要求各地方在2012年底基本完成把农村集体土地所有权证确认到每个具有所有权的农民集体经济组织的任务，且未经确权登记的集体建设用地使用权不得流转。2011年11月，国土资源部、中央农村工作领导小组办公室、财政部、农业部联合下发《关于农村集体土地确权登记发证的若干意见》，对农村集体土地确权登记发证的范围、主体、政策依据、技术手段和标准等均做出了详细规定。
- (3) 设计合理的集体建设用地流转收益分配制度，在保护农民利益的原则下，减少建设用地流转改革对地方财政的冲击。集体土地的征地收入是地方财政的重要组成部分。鉴于集体建设用地的存量远高于国有建设用地，集体建设用地实行自由流转之后，在很多情况下其无须被征为国有就可以直接被用地单位利用，因此集体建设用地流转改革将对地方政府的财政带来较大影响。如何分配集体建设用地时的流转收益，减少对地方财政的冲击，也是相关政府部门在集体建设用地使用权流转改革中需要考虑的一项重要问题。

* * *

以上是我们根据现行有效的中国法律和地方法规以及实践对与集体建设用地流转相关的法律问题的简单总结，希望对阁下有所帮助。需注意的是，本备忘录仅对目前集

体建设用地流转相关的现状和未来发展作一般性的介绍，并未对集体建设用地流转的相关实践和地方性规定作全面、深入的分析。此外，集体建设用地流转方面的法律、法规和政策正处于较快的变化中，且很多情况下是地方性的试点规范，如果相关法律法规的规定与本备忘录不一致的，应以该等法律法规为准。本备忘录仅供阁下用作一般性参考，并不能视为我们就相关事项出具的任何正式法律意见。

如阁下对于本备忘录所述之内容有任何疑问，敬请随时与敝所联系 (inquiry@hanyilaw.com)。

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