

**立法會**  
**Legislative Council**

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**Panel on Housing and  
Panel on Planning, Lands and Works**

**Minutes of joint meeting  
held on Monday, 2 February 2004, at 2:30 pm  
in Conference Room A of the Legislative Council Building**

**Members present** : Members of the Panel on Housing

- Hon Albert HO Chun-yan (Chairman)
- Hon CHAN Kam-lam, JP (Deputy Chairman)
- \* Dr Hon David CHU Yu-lin, JP
- Hon LEE Cheuk-yan
- Hon Fred LI Wah-ming, JP
- Hon NG Leung-sing, JP
- \* Hon James TO Kun-sun
- Hon LEUNG Yiu-chung
- Hon Andrew WONG Wang-fat, JP
- Hon Howard YOUNG, SBS, JP
- Dr Hon YEUNG Sum
- Hon YEUNG Yiu-chung, BBS
- Hon SZETO Wah
- \* Hon Abraham SHEK Lai-him, JP
- Hon Tommy CHEUNG Yu-yan, JP
- \* Hon Albert CHAN Wai-yip
- Dr Hon LO Wing-lok, JP
- Hon Frederick FUNG Kin-kee
- \* Hon IP Kwok-him, JP

Members of the Panel on Planning, Lands and Works

- Dr Hon TANG Siu-tong, JP
- # Hon LAU Ping-cheung (Deputy Chairman)
- Ir Dr Hon Raymond HO Chung-tai, JP
- Hon Timothy FOK Tsun-ting, SBS, JP

(\* Also members of the Panel on Planning, Lands and Works)  
(# Also member of the Panel on Housing)

**Member attending** : Hon Audrey EU Yuet-mee, SC, JP

**Members absent** : Members of the Panel on Housing

Hon CHAN Yuen-han, JP

\* Hon WONG Sing-chi

Members of the Panel on Planning, Lands and Works

Hon James TIEN Pei-chun, GBS, JP

Hon WONG Yung-kan

Hon LAU Wong-fat, GBS, JP

Hon TAM Yiu-chung, GBS, JP

(\* Also member of the Panel on Planning, Lands and Works)

**Public officers attending** : Agenda item II

Mr Patrick LAU, JP

Director of Lands

Mr Tom BERRY, JP

Deputy Director of Lands

(Legal Advisory and Conveyancing Office/Headquarters)

Mr Gary YEUNG

Principal Assistant Secretary for Housing, Planning and  
Lands (Planning and Lands)<sup>1</sup>

**Clerk in attendance** : Miss Odelia LEUNG  
Chief Council Secretary (1)<sup>4</sup>

**Staff in attendance** : Ms Sarah YUEN  
Senior Council Secretary (1)<sup>6</sup>

Ms Christina SHIU

Legislative Assistant

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**I. Election of Chairman**

Mr Albert HO Chun-yan was elected Chairman of the joint meeting.

**II. System for Pre-sale of Residential Properties: Review of the Consent Scheme**

(LC Paper No. CB(1)859/03-04(01) -- Information paper provided by the Administration)

2. The Director of Lands (D of Lands) briefed members on the Administration's paper on the outcome of the review of Lands Department (Lands D)'s Consent Scheme (the Scheme) for the sale of uncompleted properties and the proposed improvement measures. The Deputy Director of Lands (Legal Advisory and Conveyancing Office/Headquarters) (DD of Lands (LACO/H)) supplemented that the measures were the outcome of eight meetings of the Working Group convened for the above purpose (WG) as well as numerous meetings with the relevant professional and trade organizations.

**Safeguarding purchasers' legal ownership**

3. Noting that no pre-sale consent would be approved in respect of land subject to a mortgage in Guangzhou, Dr TANG Siu-tong opined that to better safeguard purchasers' legal ownership, it might be desirable to apply the same measure to Hong Kong, especially in situations where the land titles were unclear. In reply, DD of Lands (LACO/H) pointed out that an important function of the Scheme was to facilitate cash flow of developers in the development of projects. The measure in Guangzhou was not practicable in Hong Kong where more than 50% developments were financed by building mortgages. To adopt the same measure would be an inappropriate intervention. Moreover, since banks in Hong Kong were regulated by the Hong Kong Monetary Authority and had to act within the relevant control system, they could be relied upon to properly check the relevant title before they provided finances to any development. In addition, the Hong Kong Association of Banks had already confirmed that if a buyer had paid up the full purchase price of a unit, the mortgagee bank concerned would unconditionally release that unit upon completion of the development if the entire sale proceeds had been paid into the stakeholder account opened with the mortgagee bank for the development. This undertaking, to be included in a building mortgage in future, should suffice to enhance protection for purchasers' legal ownership.

4. In reply to Dr TANG Siu-tong on any protective measures to purchasers in the event of delayed completion of a development due to insufficient fund, DD of Lands (LACO/H) said that the Agreement for Sale and Purchase (ASP) contained provisions on expiry of the Building Covenant (BC) Period and the contractual date of completion. Purchasers could rescind the ASP concerned if they did not want to

wait in the event of completion delay. In this regard, Lands D had already tightened up the conditions for approval of applications for BC extension by requiring the developer concerned to inform flat purchasers of such applications and the terms of extension granted within 30 days of each application and approval, and to provide a copy of the relevant notice to the Legal Advisory and Conveyancing Office of the Lands D. The purpose of the new requirement was to ensure purchasers would be aware of any completion delay so that they could decide for themselves whether to wait for the delayed completion.

5. Dr TANG Siu-tong enquired whether purchasers could get back their money if they decided to rescind the ASP because of delayed completion. In reply, DD of Lands (LACO/H) confirmed that purchasers' right to rescind the ASP in the event of completion delay was an existing provision in the standard ASP to facilitate recovery of purchase money by purchasers who exercised such a right.

6. While welcoming the proposed improvement measures, Mr CHAN Kam-lam enquired whether a purchaser who made payments by instalments could likewise recover his purchase money should he opt to rescind the ASP in the event of completion delay. In response, DD of Lands (LACO/H) confirmed that the purchaser concerned would be able to secure a refund of the instalments paid under the circumstance.

7. Notwithstanding the improved measures, Dr TANG Siu-tong and the Chairman were still concerned about how purchasers' legal ownership could be safeguarded in the event of default as in the case of Villa Pinada. D of Lands and DD of Lands (LACO/H) assured members that the likelihood of fraud should be small for the following reasons -

- (a) Under the Scheme, the developer had to demonstrate that it had adequate financial ability to complete the development before Lands D gave consent to the pre-sale of uncompleted properties. As such, the possibility that developments could not be completed due to financial problems of the developers concerned was remote unless there was fraud in the disbursement of funds held in the stakeholder account;
- (b) The risk of cost overrun would be reduced by the new arrangement under which the developer would be required to notify the Authorized Person (AP) of any cost overrun of 10% or more of the total construction cost. The AP would also notify LACO, the mortgagee bank and the stakeholder solicitor of the amount of overrun and the revised total construction cost. LACO would then require the developer to confirm within six weeks that it had adequate finance to complete the development. Meanwhile, AP would not certify any payment out of the stakeholder account in respect of the cost overrun. If additional finance was not made

available, pre-sale consent would also be suspended to prevent any further pre-sales until the future of the development was clarified; and

- (c) As understood from the industry, cost overrun rarely occurred because normally 10% contingency fund would be built into the construction cost estimate. Moreover, building contracts in Hong Kong were mostly fixed-price contracts.

8. Mr CHAN Kam-lam and the Chairman expressed concern about the impact on the stakeholder account and hence the purchasers' legal ownership should the developer go into liquidation. DD of Lands (LACO/H) stressed that even in such a case, money in the stakeholder account could still only be spent on the construction of the development or in repayment of amounts drawn down under the building mortgage. Since funds could be drawn from either the stakeholder account or from the relevant building mortgage arrangement to cover construction costs, there should be sufficient money to complete the project to safeguard the purchaser's legal ownership of the units he purchased. However, if the purchaser wanted a refund instead, he would have to prove his debt as an ordinary creditor.

#### Improved management of the stakeholder account

9. Mr CHAN Kam-lam sought to ascertain if there were sufficient measures to ensure proper disbursement of funds held in the stakeholder account, so that a purchaser could always be refunded should he rescind the ASP because of completion delay. In response, DD of Lands (LACO/H) highlighted the following measures which could help ensure proper disbursement of funds in the stakeholder account -

- (a) There would be a new requirement for the stakeholder account to be opened in the name of the solicitor with the mortgagee bank and for the specific property development;
- (b) The stakeholder account and the mortgage account of the developer would be kept as two distinct legal accounts that would not be merged;
- (c) Written consent of the mortgagee bank would be required for any drawdown of the stakeholder account for any purpose; and
- (d) The solicitor would be required to make periodic returns to the mortgagee bank with details of units sold, full payment cases, proceeds received and paid into the stakeholder account and amounts paid out to the developer or contractors.

#### Disclosure of conflict of interests

10. The Chairman considered the proposed measures regarding the disclosure of personal and financial relationships among the concerned parties insufficient to deal with conflicts of interests among the developer, the AP, the solicitor and the superstructure contractor. In his view, an officer or a shareholder of the developer's company should be prohibited from acting simultaneously as the AP of developments of the company, or as the solicitor holding the stakeholder account. Mr Albert CHAN Wai-yip shared his view. In response, DD of Lands (LACO/H) reported that the WG had discussed this proposal but found it not practical because of the relatively small size of the relevant professions and the property market in Hong Kong. Flat purchasers were expected to exercise freedom of choice after assessing all relevant risks.

11. The Chairman found the above answer unsatisfactory. He pointed out that purchasers who were usually laymen might not be fully aware of the implications of conflict of interests as they were expected to. In his view, professionals should be prohibited from acting in a certain capacity where apparent conflict of interests existed. D of Lands opined that purchasers had the responsibility to make careful judgement because their decision involved a substantial investment. Moreover, the risk of fraud could easily be seen in the event of apparent conflict of interests.

12. Mr James TO Kun-sun sought details of the WG's considerations in deciding not to accept the restriction as proposed by the Chairman. D of Lands and DD of Lands (LACO/H) reported that the issue had been debated heatedly in the WG. However, it was considered inappropriate to impose a complete ban on professionals who had some relationships with the developer to carry out their normal professional duties for the following reasons -

- (a) Some representatives of professional bodies sitting on the WG felt that it would be an infringement upon human rights to prevent professionals from taking part in a project simply because it was a family business. The professionals also felt that the restriction would be an unreasonable intrusion into the normal business practice in Hong Kong;
- (b) With disclosure of the interests concerned in the relevant sales brochures and advertising material, and improved management of the stakeholder account, there should be sufficient safeguards against any problem that might arise from conflict of interests; and
- (c) Professionals were already regulated by their own professional bodies for their professional conduct, and had to comply with professional codes of conduct governing conflict of interests.

13. DD of Lands (LACO/H) further advised that the Administration would follow up with the various professional bodies to review their codes of conduct on

conflict of interests. More precise guidelines for solicitors and APs on the circumstances and level of disclosure would be drawn up where appropriate.

14. Mr James TO sought to confirm whether existing professional codes of conduct would prevent a professional who was a director of a developer's company from taking part in the company's development projects. In reply, DD of Lands (LACO/H) opined that since the professional concerned still had to perform his professional obligations, there should be no inherent problem with him taking part in his company's projects. The WG's stance was that the professional should not be banned from such involvement. He however stressed that the Administration had reserved the right to follow up with the individuals concerned should there be any potential difficulty in relation to conflict of interests. In fact, in the past six months the Administration had obtained undertakings from individuals not to personally involve in certain projects. Mr James TO maintained that apparent conflict of interests should be avoided. The Chairman also urged the Administration to note some members' strong views in this regard.

15. Mr Abraham SHEK Lai-him agreed that efforts should be made to improve the Scheme but since no system could be perfect and fraud in residential property developments was rare, he considered the proposed improvement measures both effective and acceptable. Notwithstanding, he also saw room for improvement where disclosure of interests was concerned. He urged the WG to consider tightening up the relevant requirements by referring to Rule 15.06 of the Guide to the Professional Conduct of Solicitors 1999 issued by the Law Society of England and Wales. The Rule imposed restrictions on solicitors to act where either the solicitor or a partner, employer, employee or relative of the solicitor held some office or appointment as a result of which conflict of interests or a significant risk of conflict arose.

16. In relation to conflict of interests, Mr Albert CHAN expressed concern about the common practice under which the solicitor appointed by the developer represented both flat purchasers and the developer. He said that purchasers were very often required to sign a document which expressly provided that where conflict of interests arose between the purchasers and the developer, the solicitor would not be able to protect the purchasers' interests. In reply, D of Lands pointed out that purchasers were entitled to separate legal representation. They however normally opted to use the same solicitor appointed by the developer in order to enjoy waiver of legal fees usually offered by the developer.

#### Risk of cost overrun

17. The Chairman welcomed the proposed requirement for the stakeholder account to be opened in the name of the solicitor with the mortgagee bank and for the specific property development. He however opined that despite such improved management of the stakeholder account, there was still a need for additional measures to reduce risks associated with cost overrun, which might be substantial

should there be any change to the piling design as a result of unknown ground conditions. He proposed that pre-sale consent should not be given before the completion of piling works, and that phased consent commensurate with the progress of the superstructure works should be given.

18. In response, D of Lands and DD of Lands (LACO/H) explained that it was already a long standing practice that pre-sale consent would not be given until all formation and foundations works had been completed and the developer had obtained the consent of the Building Authority to commence building works on the superstructure. As to the proposal for phased consent, such an approach had already been adopted for very large developments which were completed by phases. There was however difficulty in extending the approach to smaller developments which were normally financed as a whole project.

19. To reduce risks associated with cost overrun, the Chairman called upon the Administration to require all developments to be covered by bank undertaking in which the bank would undertake to provide money for construction. In response, D of Lands and DD of Lands (LACO/H) pointed out that this form of financing was only available to developers who were considered to have good commercial standing by the banks.

20. Whilst welcoming the proposed improvement measures, Mr LAU Ping-cheung was concerned whether they were viable and whether similar schemes existed overseas. DD of Lands (LACO/H) reported that there were one or two similar schemes in the United States and Canada. No research however had been conducted because a statutory scheme was not being contemplated in Hong Kong and the proposed improvement would be implemented through administrative measures. As to whether the Department of Justice (D of J) had been invited to comment on the viability of the measures, DD of Lands (LACO/H) confirmed that in-house legal advice had been sought. He informed members that Lands D's interpretation of the relevant provisions which empowered it to implement the measures was believed to be consistent with that by The Hong Kong Association of Banks.

21. Mr Albert CHAN considered the proposed improvement measures barely adequate to protect purchasers' interests. Pointing out that professionals were associated with developers in many ways, he doubted if the WG, comprising mainly of professionals, would be able to make any substantial recommendations for improving the Scheme. In reply, D of Lands advised that there were representatives from the Consumer Council on the WG. Moreover, representatives of the Independent Commission Against Corruption were also in attendance to advise on measures to prevent conflict of interests.

22. Dr YEUNG Sum enquired whether the Hong Kong Government could handle problematic uncompleted residential properties in the Mainland. In reply, D of Lands confirmed that the matter was outside the purview of Lands D.



**III. Any other business**

23. There being no other business, the meeting ended at 3:40 pm.

Council Business Division 1  
Legislative Council Secretariat  
19 March 2004