

## **Residential Properties (First-hand Sales) Bill**

### **Administration's Response to Issues Raised by Members at the Bills Committee on 30 March 2012**

At the meeting of the Bills Committee on the Residential Properties (First-hand Sales) Bill (the Bill) held on 30 March 2012, Members raised enquires on a number of issues relating to the Bill. The Administration's responses are set out below.

**(1) To set out in tabular form the differences between the provisions of the White Bill and the Blue Bill.**

2. We have tightened the drafting of various provisions in the Bill to make the policy intention more specific, concrete and clear. For easy reference, we set out those differences, which are non-textual, between the Bill put up for public consultation and the gazetted Bill in the table at [Annex](#).

**(2) To advise if vendors could include both saleable areas (SA) and gross floor areas (GFA) of flats in the sales brochures for reference of prospective buyers, particularly when management fees are calculated using GFA.**

3. We propose in the Bill that vendors may only quote property size and property price per square foot/metre in SA in the sales brochures, price lists and advertisements of first-hand residential properties. The reason is that the measurement methodology to be prescribed in legislation has to be clearly defined. There is at present a standardized definition of SA per property, but not a commonly-adopted definition of GFA per property. Without such a commonly-adopted definition of GFA for a property, it is at present not possible to prescribe GFA in precise term in the proposed legislation.

4. Allowing the use of GFA for a property, which currently does not have a standardized definition, for quoting property size and property price per square foot/metre will cause confusion rather than enhance the

comprehensiveness of information to prospective purchasers.

5. While property size and property price per square foot/metre will not be allowed to be quoted on the basis of GFA under the Bill, vendors will be required under clause 19 of Schedule 1 to the Bill to provide area information on common facilities (e.g. resident's clubhouse) on an aggregate basis in the sales brochures. Also, vendors are required under clause 14 of Schedule 1 to the Bill to provide information on the number of undivided shares assigned to each residential property in the development, and the basis on which the management expenses are shared among the owners of the residential properties in the development.

**(3) To advise whether it is the policy intent to extend the use of SA in price quotation for flats in the secondary market and if so, relevant supporting infrastructure (such as a central database) should be put in place to facilitate compliance by estate agents.**

6. The objective of the Bill is to regulate the sale of first-hand residential properties. We consider enhanced protection should be accorded to first-hand residential property buyers as in most of the cases of the sale of first-hand residential properties, the vendors and individual purchasers are not on an equal footing. The former are always in a much stronger position vis-a-vis the latter in terms of resources and bargaining power. Not only do vendors hold first-hand residential properties in bulk, they also possess and control the release of information relating to those properties and their sales arrangements.

7. It is a common misperception that properties in the second-hand market do not have readily available measurements in terms of SA and that estate agents are not required to provide information on SA of a property at all. The fact is that information on SA of all assessed second-hand residential properties in Hong Kong (except village houses) is readily available from the Rating and Valuation Department, and it is a statutory requirement under the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation (Cap. 511C) that an estate agent must, where applicable, provide information on SA of a property, including a second-hand property, to a prospective purchaser.

8. We note that, due to long-established market practices, it is a norm that sellers, buyers and estate agents cite property size and property price per square foot/metre in terms of GFA even though SA for a property is readily available. The proposed change to the use of only SA in the first-hand residential properties is however also likely to bring about changes along this direction in the second-hand residential market. The Estate Agents Authority is considering issuing a practice circular to stipulate the adoption of SA in the sale and purchase, and the leasing, of second-hand residential properties.

**(4) To consider including in the sales brochures, apart from a location plan, additional information on the design of a development such as the location of the podium floor.**

9. In order to further enhance the transparency of information on the difference in levels between the lowest residential floor of a building and the adjacent streets, we have added in a new provision when refining the Bill that the sales brochure must, in relation to every building in the development, set out a plan showing a cross-section of the building in relation to every street adjacent to the building, and the level of every such street in relation to a known datum and to the level of the lowest residential building (i.e. clause 18 in Schedule 1 to the Bill). This will help the public to visualize the relationship between the lowest residential floor of a building and the street level, regardless of how that lowest residential floor is named.

**(5) To clarify the interpretation on vendor as it may include a company and its subsidiary companies, executive arms or contractors and whether the provisions of the Bill would apply to them. To also advise how to prevent circumvention of criminal liability through shifting of responsibilities among different parties.**

10. The definition of “vendor” is set out in detail in clause 7 of the Bill. As provided under clause 7(1), the owner of the residential property is the “vendor.” However, where that owner engages a person to co-ordinate and supervise the process of designing, planning,

constructing, fitting out, completing and marketing the development or phase (the person so engaged), the term “vendor” also applies to the person so engaged as appropriate. Whether the owner has engaged such person is a question of fact and such person may or may not be a subsidiary, executive arm or contractor of the owner. This is to ensure that, where appropriate, both the owner of the residential property and the person so engaged can be held responsible for offences relating to sales practices<sup>1</sup>.

11. In addition, any person, not the “vendor” alone, who publishes advertisements containing information that is false or misleading, makes a fraudulent misrepresentation or reckless misrepresentation or disseminates false or misleading information commits an offence.

**(6) To advise how the Administration could ensure that estate agents/vendors would not be unnecessarily caught by the Bill in the absence of a specific definition on misrepresentation/dissemination of false or misleading information.**

12. In drafting the provisions concerning the prohibition of “misrepresentation” and “false or misleading information”, we have made reference to various existing ordinances such as the Securities and Futures Ordinance (Cap. 571) and the Estate Agents Ordinance (Cap. 511). Where the concept of “misleading” appears in these ordinances in similar context, the word “misleading” is not defined. Whether a piece of information is “misleading” should depend on the actual context. It will also be impossible to give an exhaustive list of what information might be construed as “misleading” and trying to do so will only create loopholes. According to the Bill, the prosecution will need to prove that the person knows that, or is reckless as to whether the information is false or misleading as to a material fact. On the above basis, we consider a general prohibition provision without being too specific on the meaning of “misleading” is appropriate.

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<sup>1</sup> Sales practices cover matters relating to sales brochures, price lists, show flats, viewing of residential properties in completed development or phase of development, Preliminary Agreement for Sale and Purchase, and Register of Transactions.

**(7) To advise the application of the time limit for prosecution of three years to various offences under the Bill and when the time limit starts to run.**

13. Clause 73 of the Bill states that “despite section 26 of the Magistrates Ordinance (Cap. 227)<sup>2</sup>, proceedings in respect of an offence under this Ordinance, other than an indictable offence, may be brought within 3 years after the commission of the offence”. Major offences under the Bill, such as misrepresentation or dissemination of false or misleading information, are indictable offences and there is no time limit for prosecution. For summary offences under the Bill, such as contravening the requirements on sales brochure, price lists, show flats, viewing of flats in completed developments or phase, and Register of Transactions, the “three year” prosecution time limit is to be counted from the date of commission of the offence. For illustration, a few examples on when an offence is committed are quoted below -

<b>Clause</b>	<b>Offence</b>	<b>The time point from which the “three year” prosecution time limit is to be counted</b>
20 (2) and (5)	Contravening the requirement that the information set out in the sale brochure for the development must be accurate in every material respect as at the date on which the sales brochure is printed.	When the sales brochure was made available for public consumption (which is also the date when the sales brochure was made available to the proposed enforcement authority).

<sup>2</sup> If no prosecution time limit is proposed in the Bill, section 26 of the Magistrates Ordinance will apply to the summary offences in the Bill. Section 26 of the Magistrates Ordinance stipulates that “*In any case of an offence, other than an indictable offence, where no time is limited by any enactment for making any complaint or laying any information in respect of such offence, such complaint shall be made or such information laid within 6 months from the time when the matter of such complaint or information respectively arose*”.

28	Contravening the requirements on the information to be set out in the price lists.	When a price list was made available for public consumption (which is also the date when the price list was made available to the proposed enforcement authority).
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**(8) To advise whether consideration would be given to injecting additional funding into the Consumer Council to provide financial assistance to civil proceedings in relation to sales of first-hand residential properties.**

14. We understand that, upon receipt of complaints from first-hand residential property purchasers, the Consumer Council (CC) will look into the complaint cases and assist the parties to resolve their disputes as far as possible. Consumers may apply to the Consumer Legal Action Fund (CLAF) for assistance. The CLAF will provide financial support and legal assistance to meritorious cases which relate to consumer transactions and involves significant public interest or injustice. For example, in 2009, the CLAF assisted a group of consumers who purchased flat units of a residential development project, the completion of which was delayed, in lodging legal proceedings against the developer concerned.

15. Upon the establishment of the CLAF in 1994, the Government injected \$10 million into the Fund. Subsequently, in May 2010, an additional \$10 million was injected. As at end February 2012, the balance of the CLAF stood at \$19.83 million. To ensure that sufficient resources are available under the CLAF to assist consumers with meritorious claims, the Government will closely liaise with its trustee, i.e. the CC, and monitor its financial position.

16. Separately, the Home Affairs Bureau has proposed expanding the scope of the Supplementary Legal Aid Scheme (SLAS)<sup>3</sup> under the Legal Aid Ordinance (Cap. 91) to cover monetary claims exceeding \$60,000 against vendors in the sale of first-hand completed or uncompleted residential properties. Buyers of first-hand residential properties who are eligible may apply. The Secretary for Home Affairs has given notice to move a motion at the Legislative Council (LegCo) for the passage of a resolution under the Legal Aid Ordinance to effect the expansion of the scope. The proposed resolution is now being considered by a LegCo Subcommittee. Subject to the passage of the proposed resolution by LegCo, and the approval of subsequent subsidiary legislation amendments, it is expected that the expanded scope could take effect in mid-2012.

Transport and Housing Bureau  
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<sup>3</sup> SLAS came into operation in 1984 and aimed at providing legal assistance to people whose financial resources exceeded the upper limit allowed under Ordinary Legal Aid Scheme (i.e. \$260,000 at present), but below a prescribed amount (i.e. \$1.3 million at present). SLAS is a self-financing scheme which draws its funds from contributions from aided persons on the basis of the damages awarded, the costs recovered in successful cases and the application fees payable by applicants.

**Differences between the Bill put up for public consultation and the gazetted Bill<sup>1</sup>**

<b>Changes</b>	<b>Gazetted Bill</b>	<b>Bill put up for public consultation</b>
<b>Extend the definition of “vendor” to include “the person engaged by the owner of the residential property to co-ordinate and supervise the process of designing, planning, constructing, fitting out, completing and marketing the development or phase”.</b>	Clause 7	Clause 5(1)
<b>“Whether assignment has ever been made” is added as an additional determinant on whether a residential property is a first-hand residential property.</b>	Clause 10(1)	Clause 4(1)
<b>Added a provision to the effect that in ascertaining whether an agreement for sale and purchase has been entered into in respect of a residential property (i.e. for the purpose of determining of whether the property is a first-hand residential property), an agreement for sale and purchase between a company (or a statutory corporation) and its associate company or holding company is to be disregarded.</b>	Clause 11(3)	--

<sup>1</sup> This table only sets out the more significant differences between the Bill put up for public consultation and the gazetted Bill. Minor changes (including textual changes) are not included.

<b>Changes</b>	<b>Gazetted Bill</b>	<b>Bill put up for public consultation</b>
<p><b>Exclude an undertaking by the Urban Renewal Authority (URA) to an eligible person under the Flat-for-flat Scheme, or an act by URA to ascertain whether or not an eligible person intends to accept such an undertaking, from the scope of a sale of a residential property.</b></p>	<p>Clause 13(3)</p>	<p>--</p>
<p><b>Qualify that the requirement on the provision of accurate information in sales brochure refers to accuracy “in every material aspect”.</b></p>	<p>Clause 20(2)</p>	<p>Clause 12(2)</p>
<p><b>Reservation of Unit (expression of intent)</b></p> <ul style="list-style-type: none"> <li>● Clarify the meaning of “reservation” as an expression of intent to purchase.</li> <li>● Two options were proposed for public consultation. Taking into account the consultation feedback, we adopted “issuance of price list” as the cut-off date after which reservation is allowed.</li> <li>● Add the requirement that reservation of a particular unit (specific expression of intent) is not allowed even after the issuance of price list.</li> </ul>	<p>Clause 30</p>	<p>Clause 21</p>

Changes	Gazetted Bill	Bill put up for public consultation
<p><b>Deposit on entering into Preliminary Agreement for Sale and Purchase (PASP)</b></p> <p>Add that if there is any conflict or inconsistency between the clause stipulating 5% as the preliminary deposit (i.e. clause 48(1)) and another clause in the PASP, clause 48(1) prevails over that conflicting or inconsistent” provision in the PASP.</p>	Clause 48(2)	--
<p><b>Mandatory provisions for PASPs and Agreement for Sale and Purchase (ASP)</b></p> <ul style="list-style-type: none"> <li>● Clause 50 of the gazetted Bill makes it an offence for entering into a PASP or ASP without the mandatory provisions. In the Bill put up for public consultation, the mandatory provisions are to be impliedly incorporated into a PASP or ASP.</li> <li>● Add that any contravention of clause 50(1) or (2) does not affect the validity or enforceability of PASP or ASP.</li> </ul>	Clause 50	Clause 40
<p><b>Extend the scope of “related party” of vendor for the purpose of disclosure of transaction information</b></p> <p>The following has been added to the definition of “related party”-</p>	Clause 52(7)	Clause 42(8)

<b>Changes</b>	<b>Gazetted Bill</b>	<b>Bill put up for public consultation</b>
<p>(i) an associate corporation or holding company of a corporate vendor;</p> <p>(ii) a director (including an immediate family member of a director) or manager of the association corporation or holding company of a corporate vendor;</p> <p>(iii) a private company of which a director (including an immediate family member of a director) or manager of a corporate vendor is a director or shareholder; and</p> <p>(iv) a private company of which an immediate family member of an individual vendor is a director or shareholder.</p>		
<p><b>Add a provision that the section providing for offences in connection with misrepresentations does not affect, limit or diminish any right conferred on a person, or any liability that a person may incur, under common law rules or equitable principles or under any other Ordinance.</b></p>	<p>Clause 65(3)</p>	<p>--</p>
<p><b>Extend the scope of the provision to an officer of a statutory corporation, and to an officer of a holding company of a company or statutory corporation.</b></p>	<p>Clause 72(1)</p>	<p>Clause 62(1)</p>

<b>Changes</b>	<b>Gazetted Bill</b>	<b>Bill put up for public consultation</b>
<b>Add a provision that the Secretary for Transport and Housing may give directions to the enforcement authority</b>	Clause 78	--
<b>Add a confidentiality clause in respect of information obtained in investigation.</b>	Clause 81	--
<b>Add a provision on cross-section plan</b> Sales brochure must contain a cross-section plan which shows a cross-section of the building in relation to every street adjacent to the building, and the level of every such street in relation to a known datum and to the level of the lowest residential building.	Clause 18, Schedule 1	--
<b>Elaborate on the meaning of “resident’s clubhouse”, “communal sky garden” and “covered and landscaped play area”</b>	Clause 19, Schedule 1	--
<b>Remove “any other facilities” from the areas to be excluded for calculating “saleable area” to avoid ambiguity.</b>	Clause 8(1)(c) and Part 1, Schedule 2	Clause 3(1)(c)
<b>Remove “Lands Department”, “Consumer Council” and “Estate Agents Authority” from the entities to whom a vendor is required to provide with sales brochure, prescribed changes to the sales brochure, and price list.</b>	Schedule 3	Schedule 2