

Residential Properties (First-hand Sales) Bill

Administration's Response to Issues Raised by Members at the Bills Committee Meeting held on 18 April 2012

At the meeting of the Bills Committee on the Residential Properties (First-hand Sales) Bill (the Bill) held on 18 April 2012, Members raised enquires on a number of issues relating to the Bill. The Administration's responses are set out below.

(1) To review the Chinese rendition of the phrases “no agreement for sale and purchase has ever been entered into” and “no assignment has ever been made” in the long title as well as in clause 10(1).

2. We have reviewed the Chinese rendition of the phrases “no agreement for sale and purchase has ever been entered into” and “no assignment has ever been made” in the long title as well as in clause 10(1). We will submit Committee Stage Amendment (CSA) to improve the drafting of the phrases for the Bills Committee's consideration.

(2) To advise whether the “company” in clause 2 includes companies incorporated or registered overseas with subsidiaries in Hong Kong, and whether the Bill applies to these companies.

3. Most of the requirements under Part 2 (i.e. sales practices including sales brochure, price list, show flats for uncompleted development or phase, viewing of property in completed development or phase, preliminary agreement for sale and purchase, register of transactions) and Part 3 (i.e. advertisement) of the Bill are imposed on the vendor, regardless of whether the vendor is a registered company in Hong Kong or not. As regards the offences under Part 4 (i.e. misrepresentation, and dissemination of false or misleading information) of the Bill, any person who makes misrepresentation, and disseminates false or misleading information commits an offence. There are references to “company” in the Bill (e.g. clauses 11(3) & (5), 52(7), 63(3) and 72). We have reviewed them and will submit CSA to expand them to cover a company incorporated outside Hong Kong.

(3) To consider deleting clause 2(2) regarding a "note" located in the text of the Bill, and the two relevant "notes" in the Bill.

4. We have further examined the need for a “note” located in clause 18(1) of and section 28 of Schedule 1 to the Bill. As set out in paragraph 9.4.3 of “A Guide to Styles and Practices” issued by the Law Drafting Division, the use of notes in legislation is a widely adopted plain language technique. In providing signposts or other factual information, notes help the reader to understand the legislation more quickly and get a clearer picture of it. Clauses 18(1) and section 28 of Schedule 1 contain broad requirements on certain information to be set out in a sales brochure. The intention is that the Authority will issue under clause 76 guidelines on the operation of these provisions. It would therefore be useful for the “notes” to draw the reader’s attention to clause 76 of the Bill under which such guidelines are issued.

(4) To review the need for the phrase "without contravening the land grant and the occupation permit" in clause 6(1), lest this might be exploited say through illegal conversion of commercial/industrial units to residential units.

5. The phrase “without contravening the land grant and the occupation permit” in clause 6(1) of the Bill is to qualify that only first-hand properties that are lawfully used for residential purpose will be subject to the proposed legislation. Residential properties which are in breach of the Buildings Ordinance (Cap. 123) or land grant conditions (e.g. illegal conversion of commercial/industrial units to residential units) will be dealt with by the Buildings Department in accordance with the Building Ordinance or by the Lands Department as appropriate. It will put the cart before the horse if the Bill applies to the sale of first-hand residential properties which are in breach of the Buildings Ordinance or land grant conditions. We therefore consider the phrase “without contravening the land grant and the occupation permit” in clause 6(1) should be retained.

6. The enforcement authority to be set up to enforce the proposed legislation will engage an agency to establish an electronic database which provides information on the sales of first-hand residential properties which are subject to the regulation of the Bill. Prospective purchasers may check against the information in the database to ascertain whether a residential development is subject to the regulation of the Bill.

(5) Exemptions

7. At the meeting of the Bills Committee on 18 April 2012, Members sought clarification on whether clause 10(6) of the Bill will cover Private Sector Participation Scheme (PSPS) flats. Clause 10(6) of the Bill as currently drafted will only cover developments constructed by the Housing Authority (HA). New and residual Home Ownership Scheme flats are constructed by HA. According to our understanding, flats previously built under PSPS are not constructed by HA.

(6) To explain with illustration the date on which the Bill becomes applicable to a residential property in the case where an agreement for sale and purchase has been subsequently terminated or declared void by the court.

8. In the case of termination of agreement, our intention is that the date on which the agreement is terminated will be the date on which the Ordinance becomes applicable to the relevant residential property, whether it is terminated in accordance with a provision in the agreement or, where one party has a right of election to avoid the agreement after a breach by the defaulting party, by the election of the innocent party. In the case where an agreement is declared void and of no legal effect by the court, it is intended that the Ordinance becomes applicable to the relevant residential property on the date of the court order. We note that the current drafting of clause 11(6) has not clearly set out our intention. We will improve the drafting of this clause and will submit CSA for the Bills Committee's consideration.

(7) To seriously re-consider expanding the scope of Part 4 (clauses 65 and 66) to misrepresentation and dissemination of false or misleading information in relation to the sale of overseas residential properties conducted in Hong Kong. To also advise the difference between the provisions in the Bill and the Theft Ordinance (Cap. 210) in dealing with misrepresentation and dissemination of false or misleading information.

9. The objective of the Bill is to regulate the sale of first-hand residential properties situated in Hong Kong. The Bill has been drawn up after an extensive and detailed discussion over the past one and a half years and based on the provisions under the Lands Department Consent Scheme and the guidelines issued by the Real Estate Developers Association of Hong Kong. The Bill provides a holistic and effective framework to regulate the sale of first-hand residential properties situated in Hong Kong. Regulating the sale of overseas residential properties conducted in Hong Kong is a completely different subject, with different issues, that will require careful consideration. This is a matter best pursued separately.

10. We have carefully considered the proposal for expanding the scope of Part 4 (clauses 65 and 66) of the Bill to misrepresentation and dissemination of false or misleading information in relation to the sale of overseas residential properties conducted in Hong Kong. Our view is that it will involve more than just adding a provision to stipulate that clauses 65 and 66 of the Bill will also apply to non-Hong Kong residential properties, as we need to define “first-hand residential properties” in the context of non-Hong Kong residential properties which is not likely to be straight-forward. Also, we will need to give a full examination of all the possible issues relating to the sale of overseas residential properties conducted in Hong Kong and cater for those scenarios in the Bill. It is an exercise which will take considerable time and it is not possible for us to carry out such an exercise given the time available. We maintain our view that it is inappropriate to single out two clauses from the Bill and apply them to other types of residential properties. Taking into account that the public would like to see the early enactment of the proposed legislation, we should focus on regulating the sale of first-hand residential properties situated in Hong Kong.

11. The charges of "theft", "fraud", and "obtaining property by deception" under sections 9, 16A and 17 of the Theft Ordinance (Cap. 210) respectively may be applicable where a sale of overseas property in Hong Kong involves misrepresentation or false or misleading information. The elements of the offences under clauses 65 and 66 of the Bill are essentially the same as that of, for example, the offence of fraud under section 16A¹ of Cap. 210. The scope of "deceit" as defined in section 16A(3)² of Cap. 210 is a wide one and will encompass the acts of contravention under clauses 65 and 66 of the Bill, including the making of reckless misrepresentation and dissemination of false or misleading information. Further, the aim of the proposed legislation is to regulate the sale of first-hand residential property. In this respect, the scope of fraud under Cap. 210 is wider as it will suffice if a person practicing the deceit obtained benefit for himself or for another person or if there is prejudice or substantial risk of prejudice to any person.

(8) To provide, at a later stage, a paper setting out the initial ideas on the establishment of the proposed enforcement authority.

12. We noted Members' request.

Transport and Housing Bureau
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¹ Section 16A(1) of Cap. 210 provides that "if any person by any deceit (whether or not the deceit is the sole or main inducement) and with intent to defraud induces another person to commit an act or make an omission, which results either- (a) in benefit to any person other than the second-mentioned person; or (b) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person, the first-mentioned person commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years".

² Section 16A(3) of Cap. 210 provides, inter alia, that "deceit" means "any deceit (whether deliberate or reckless) by words or conduct (whether by any act or omission) as to fact or as to law, including a deceit relating to the past, the present or the future and a deceit as to the intentions of the person practising the deceit or of any other person".