

Residential Properties (First-hand Sales) Bill

Administration's Response to Issues Raised by Members at the Bills Committee Meeting held on 15 May 2012

At the meeting of the Bills Committee on the Residential Properties (First-hand Sales) Bill (the Bill) held on 15 May 2012, Members raised enquires on a number of issues relating to the Bill. The Administration's responses are set out below.

- (1) To advise the requirements under the Bill which cannot fit squarely into the mode of sale of Home Ownership Scheme (HOS) flats, and the rationale for the Bill to cover Private Sector Participation Scheme (PSPS) flats which adopt the same mode of sale as HOS. To also advise if the exemption for the Hong Kong Housing Authority under clause 10(6) could apply to private developers if the latter adopt the same mode of sale as HOS in disposing of their residential flats.**

2. Some of the information required to be provided in the sales brochure as prescribed under the Bill has to be based on approved building plans as approved by the Building Authority for the purposes of section 14(1) of the Buildings Ordinance (BO) (cap. 123). Also, some of the information required to be provided in the mandatory provisions in the Agreement for Sale and Purchase has to be certified by the Authorised Person (AP). Moreover, the Bill has adopted the issuance of Occupation Permit (OP) as a cut-off point for vendors to fulfill various requirements under the Bill. Pursuant to section 41(1)(aa) of the BO, buildings upon any land vested in the Housing Authority (HA) or over which HA has control and management are exempt from the provisions of the BO. Buildings constructed by HA do not require prior approval and consent from the Buildings Authority and therefore do not have approved building plans as such. Also, HA does not have and does not appoint AP for the design and construction of HA developments. Developments constructed by HA do not have OP. As a result, there are technical difficulties in applying various requirements under the Bill to HA.

3. The Government has discontinued with the Private Sector Participation Scheme (PSPS). In the past, PSPS developments were constructed by private developers. Unlike HOS developments constructed by HA, those PSPS developments have to comply with the Buildings Ordinance. Also, those PSPS developments had APs and OP.

4. At present, the mode of sale of first-hand residential properties by private vendors is totally different from and is far less transparent than that of HA. The public is of the view that regulation by legislation is the only way to further enhance the transparency and fairness of the sale of first-hand residential properties in the private market.

(2) To advise if there is provision in the Bill which prohibits the inclusion of important information (such as rider or proviso) in the footnote (the font size of which is 8 point Times New Roman/新細明體), which can qualify or restrict the main context (the font size of which is 10 point Times New Roman/新細明體).

5. Having noted Members' comments that footnotes should be of an explanatory nature, we will propose Committee Stage Amendment (CSA) along this direction for the Bills Committee's consideration.

(3) To further consult the Consumer Council and the trade on clause 43(3) to ensure that this will not unduly affect the actual operation of the trade.

6. We propose under clause 43(3) of the Bill that the specified residential property must not be sold, or offered to be sold, before the date and time which are made public in the vendor's designated website three days before the commencement of sale of those specified residential properties, in compliance with clause 43(1)(a) of the Bill. Consumer Council reconfirmed that it supported this proposal which would enhance the transparency of the sales arrangements.

7. Vendors are allowed to make changes to the sales arrangements, but they have to make public the revised arrangements in its designated website and wait for three days before the commencement of sale of those specified residential properties which the revised sales arrangements will

apply. This is not clearly spelt out in clause 43 of the Bill as currently drafted. We will propose CSA to make this clear.

(4) To review clause 44(1)(b) to avoid confusion as "gross floor area (GFA)" is used in building plans for property which is different from "saleable area" for flats under the Bill. To this end, consideration should be given to formulating a standardized definition of GFA.

8. We require that a copy of the approved building plans be put at the sales office for inspection because the sales brochure has made reference to the approved building plans here and there. The approved building plans will not show the GFA of each residential property because under Regulation 23(3)(a) of the Building (Planning) Regulations (Cap. 123F), GFA is the area contained within the external walls of the building measured at each floor level. The Regulations have not stipulated the method of calculating the GFA for each residential property.

9. We explained in details the rationale for requiring the use of saleable area only as the basis to present floor area and price per square foot/metre for a residential property in our previous responses to questions raised at other Bills Committee meetings. We will not repeat the arguments here.

(5) To provide overseas regulation and experience on the cooling period and forfeiture of deposit in the event of rescission of agreement for sale and purchase, as well as the arrangement for these matters under HOS and Tenants Purchase Scheme. To also consider extending the cooling period to five days and reducing the preliminary deposit from 5% to 2%.

10. Different economies have their unique characteristics of the residential property market and have formulated different "cooling-off" arrangement (if any) and forfeiture policy to suit their needs. For example, in Singapore, if a purchaser who has been granted an "Option to Purchase" chooses not to proceed with the transaction within 3 weeks upon his receipt of the relevant document, a booking fee (which amounts to 1.25% to 2.5% of the purchase price) will be forfeited. In the Idaho State of the United States, there is no mandatory cooling-off arrangement.

11. What is suitable to other economies may not be suitable to Hong Kong. At present, the forfeiture amount is set at 10% of the purchase price of a first-hand residential property in the case of Lands Department Consent Scheme projects. We propose in the Bill that a purchaser must sign the Agreement for Sale and Purchase (ASP) within 3 working days after the signing of the Preliminary Agreement for Sale and Purchase (PASP) (to be revised to five working days through CSA as explained in paragraph 12 below), otherwise the preliminary deposit which amounts to 5% of the purchase price will be forfeited. The lowering of the forfeiture amount from the existing 10% to 5% of the purchase price has taken into account the particular characteristics of the residential property market in Hong Kong, including the volatility of the market and the exuberance of speculative activities, as well as the need to deter abuse by speculators or hasty purchase decisions by prospective purchasers. We consider it not advisable to further lower the forfeiture amount.

12. In view of the practical difficulties envisaged by the Law Society of Hong Kong and the Hong Kong Conveyancing and Property Law Association Limited for conveyancing solicitors to complete advising their clients on and arranging them to sign the ASP within three working days counting from the date of the client's signing of the PASP, we will propose CSA that purchaser should sign the ASP within 5 working days (instead of 3 working days) after the signing of the PASP.

13. We wish to point out that, given the HOS/Tenants Purchase Scheme (TPS) flats are subsidized housing, there should not be a direct comparison between the forfeiture arrangements for the sale of HOS/TPS flats by HA, and flat sale in the private residential market. When HA sells HOS flats/TPS flats to eligible purchasers, they enter into ASP direct without having to enter into PASP first. For HOS flats, in the event that a purchaser requests and HA agrees to cancel an ASP, HA shall be entitled to retain not more than 5% of the purchase price as consideration for cancellation of the ASP. For other cases where no agreement has been given by HA to cancel the ASP, HA shall forfeit all the deposit paid by the purchaser i.e. 10% of the purchase price for White Form applicant and 5% of the purchase price for Green Form applicant. For TPS flats, purchaser will submit a Letter of Offer (equivalent to ASP) to HA together with Intention Money of \$2,500. After an offer is accepted by

the HA, any application for changes in the terms and conditions, including termination of the purchase, will lead to forfeiture of the Intention Money.

- (6) To review the threshold for non-application of the Bill under clause 10(3) in consultation with the trade.**

14. The proposed exemption under clause 10(3) of the Bill takes into account the views of the real estate sector that first-hand residential properties which a vendor leases out for a reasonably long period rather than sells upon completion are akin to second-hand properties and their sales should not come under the same regulatory regime as first-hand properties. That said, we see the need to set a higher threshold to ensure that a vendor will not simply withhold the sale of a development for a relatively short period of time in order to circumvent legislative control. We consider the proposed exemption threshold appropriate.

- (7) To advise with illustrations the application of "owner" under clauses 48, 49 and 50 in the sale and purchase agreement for specified residential properties in different situations, including sale by the agent of an owner, sale under a power of attorney, sale by the liquidator of a developer company, and sale by the person/representative of the estate of a deceased owner. For the sake of clarity, consideration should be given to replacing the term "owner" with "vendor" under these clauses with proper adaptation.**

15. We will respond to this item separately in due course.

- (8) To advise the rationale for using different time limits for clauses 52(2) (within 24 hours) and 52(3) (within one working day), and the circumstances if the specified day falls on a Sunday, public holiday or a day when the black rainstorm signal/typhoon signal number 8 is hoisted.**

16. Under the Bill, vendors will have one working day to enter into the register of transactions: (i) the particulars of an ASP after the ASP is being entered into; (ii) the information that a purchaser has not yet entered into the ASP after three working days (to be changed to five working days as explained in paragraph 12 above) counting from the date

of signing the PASP; and (iii) the information that an ASP is terminated. However, vendors will be required to enter into the register of transactions within 24 hours after the owner has entered into a PASP. The time requirement for vendors to disclose information on a PASP is more stringent than that for the disclosure of other transaction information. This takes into account that vendors are allowed to seek and accept general expression of intent on the residential properties after the issue of the price list covering those residential properties and may publicise general expression of intent to boost sale. It is in the interest of the public to know as soon as possible the actual number of PASP signed.

17. According to clause 2 of the Bill, a working day means a day that is NOT – (a) a general holiday; or (b) a black rainstorm warning day or gale warning day as defined by section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1). If a specified day falls on a Sunday, a public holiday or a day when the black rainstorm signal/typhoon signal number 8 is hoisted, such a day will not be counted as a working day.

(9) To consider requiring the provision of additional particulars (including unusual date of completion and cancellation clauses) in clause 52(2). To cater for the situation where no preliminary agreement for sale and purchase is entered into before the signing of an agreement for sale and purchase, consideration should be given to including the particulars required under clause 52(2)(a) to (e) in clause 52(3).

18. We have considered Members' suggestion that vendors should be required to enter into the register of transactions additional particulars (including unusual date of completion and cancellation clauses). Taking into account that it will be very difficult to define the meaning of "unusual" date of completion or cancellation clause, that members of the public who wish to know the date of assignment of a specified residential property may have access to that information by conducting land search at the Land Registry and to find out the cancellation clause of an agreement by obtaining a copy of the agreement from the Land Registry, and that it is reasonable to expect the vendors can only provide the most basic information within the prescribed time requirements, we do not

suggest adding those additional requirements in the Bill.

19. As regards Members' suggestion that the Bill should cater for the situation where no PASP is entered into before the signing of an ASP, we will propose CSA for Members' consideration.

(10) To consider reviewing clause 56(2)(b) such that it applies to any sitting tenant so long as the specified residential property has been leased out for a continuous period of at least one year (regardless of the number of tenants involved).

20. The rationale behind the exemption arrangement set out under clause 56 of the Bill is that a sitting tenant, who has continuously lived in the residential property for a period of 12 months, should be quite familiar with the property and therefore some requirements on the sale of first-hand residential properties (in particular the provision of sales brochure and price list) may be waived. The proposed scenario does not serve this purpose.

(11) To consider providing a definition of "advertisement" in the Bill. To review clause 59 as the purpose of all advertisements is to promote the sale of the related specified residential properties.

21. Under Part 3 of the Bill, "advertisement" is to be construed according to the natural meaning of the word. Clause 60 is drafted with reference to section 9 of the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation (Cap. 511C), and section 86B of the Education Ordinance (Cap. 279). We note that the two pieces of legislation do not contain a definition of "advertisement" that explains the meaning of the word. We understand that the Securities and Futures Ordinance (Cap. 571) and the Banking Ordinance (Cap. 155), which contain provisions on "advertisement" also do not give a definition on "advertisement".

(12) To advise the rationale for requiring a person under clause 61(1) to state in an advertisement that the information set out in that advertisement is provided by the vendor, and how to deal with the circumstances where part of the information in the advertisement is provided by the vendor and part of it is not.

22. People other than the vendor may place advertisements on the sale of a first-hand residential development/property. The reliability and trustworthiness of an advertisement which is published by or published with the consent of the vendor may differ from the one which is not. The rationale for having clause 61(1) is to facilitate the prospective purchasers to ascertain whether an advertisement is published by the vendor, or published by another person with the consent of the vendor. Clause 61(1) of the Bill as currently drafted may not bring out this intention clearly. We will propose CSA to improve the drafting of this clause.

(13) To consider applying all the provisions in the Securities and Futures Ordinance (Cap. 571) in relation to misrepresentation to clause 65, inter alia, full disclosure of material information and instigation of civil proceedings by the enforcement authority on behalf of consumers.

23. The securities market and the property market are not the same in every respect. The requirements imposed on the securities market may not be applicable to the property market.

24. Under the Bill, vendors are already required to provide comprehensive information on the development in the sales brochure. Also, it is an offence if the vendors knowingly or recklessly omit a material fact in the course of disseminating information on the sale of first-hand residential properties. That said, we note Members' views and will give further thoughts on whether there is room for improvement under the Bill in this respect.

25. The Securities and Futures Commission confirmed that it does not help investors to take civil action. We remain of the view that it is not appropriate for the proposed enforcement authority to help purchasers to take civil action against the vendors.

(14) To consider including in the Bill a requirement for vendors to update the sales brochures (say in the form of corrigendum) in the event of changes in material facts (such as change in building plan).

26. We will respond to this item separately in due course.

Transport and Housing Bureau
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