



立法會 LEGISLATIVE COUNCIL  
石禮謙議員 Hon Abraham Shek Lai-him J.P.

11 June 2012

The Honourable CHAN Kam-lam, SBS, JP  
Chairman, Bills Committee on  
Residential Properties (First-hand Sales) Bill  
Legislative Council Secretariat

Chairman,

**Comments on the Administration's Response (the 2<sup>nd</sup> Response)(CB(1) 2120/11-12(03))**

I am writing in response to the Administration's 2<sup>nd</sup> Response released on 6 June 2012 to my letter dated 31 May 2012 (CB(1) 2086/11-12(04)).

As expected, the responses given by the Administration are colored with bias and highly selective in nature. While the Counsel for REDA have reiterated their legitimate concerns about the bill including "provision of minimum number of properties in price lists" and "provision of information on gross floor area for a property", and they have illustrated in detail in their legal opinion a number of fundamental principles, particularly the concept of "fair balance" test and "freedom of commercial speech", the Administration, however, have either disregarded them or answered them in a fragmented manner instead of giving direct responses to the crux of these subjects. Obviously, the Administration are doing a disservice to good governance.

In the attachment of this letter, I will pinpoint how the Administration have dodged those reasonable claims that are pivotal to justifying the Bill. A brief summary of the key legal principles raised by the Counsel for REDA and justifications in support of their views are also set out in the attachment.

Yours sincerely,

Abraham SHEK Lai-him  
Member of Bills Committee on Residential Properties (First-hand Sales) Bill

Encl.

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

**Comments on Administration's Response (the "2nd Response") to the  
Letter of 31 May 2012 from the Hon Abraham Shek (CB(1) 2120/11-12(03))**

**Provision of minimum number of properties in price lists**

**Failure to explain the "fair balance" test**

1. In paragraph 4 of the 2nd Response, the Administration claimed that the Opinion did not explain why the above requirement was to be subject to the "fair balance" test in the first place in the absence of any local court decision that BL 6 and BL 105 impose such a test.
2. The so-called "fair balance" test was not introduced in the Opinion. This test was in fact introduced by the Administration itself in the Administration's Response to Issues Raised by Members at the Bills Committee Meeting held on 22 May 2012 (Part II) (CB(1) 2066/11-12(02)) (the "**1st Response**")<sup>1</sup>. It was the Administration which claimed that for cases involving interference with property rights which fall short of deprivation, there is the issue of whether the "fair balance" test developed under the European jurisprudence would apply as an implicit requirement under BL 6 and BL 105. The Administration then went on to criticise the Opinion that, in the absence of local court decision that BL 6 and BL 105 imposes the implicit requirement of the "fair balance" test, it is arguable that the "interferences" (i.e. the requirement to cover a minimum number of properties in the price lists) are not required to satisfy the "fair balance" test.
3. Since the "fair balance" test was only raised by the Administration in its response to the Opinion, how would the Counsel be expected to explain in the Opinion the test which was raised only after the Opinion is issued?
4. In any event, as a matter of good public governance, is it fair and reasonable for the Administration to blame the Opinion for failing to explain the "fair balance" test introduced by the Administration itself and then use this to attack the credibility and value of the Opinion?

**Detailed reasoning given in the Opinion disregarded by the Administration**

5. The Administration's criticism also shows the Administration's failure to give a fair and objective assessment as to *why* and *how* the Opinion concluded that the requirement would be held unconstitutional by the Courts :-
  - (a) The "fair balance" test was not relied on by Counsel in the Opinion as the reason to explain why the requirement would be held unconstitutional by the Courts.
  - (b) The relevant legal principles duly endorsed and approved by the Courts in Hong Kong to assess whether a piece of legislation is unconstitutional are summarised in paragraphs 35 to 40 of the Opinion as summarised in (c) to (e) below.
  - (c) The general approach approved by Hong Kong Courts to assess whether a piece of legislation is unconstitutional is as follows<sup>2</sup> :-
    - (i) **First, has a right protected by the Basic Law or the Bill of Rights (the ICCPR) been infringed?**

<sup>1</sup> See paragraphs 7 to 9 of the 1st Response.

<sup>2</sup> As set out by the Court of Appeal in *Leung v Secretary for Justice* [2006] 4 HKLRD 211

- (ii) Secondly, if so, can such infringement be justified?
- (d) To determine whether the infringement is justified, the relevant test is the "**proportionality test**" which was formulated by the Hong Kong Court of Final Appeal<sup>3</sup> in the following terms :-
- (i) The restriction must be rationaly connected with one or more legitimate purposes.
- (ii) The means used to impair the right must be no more than is necessary to accomplish the purpose in question.
- (e) The Opinion did also acknowledge, at paragraphs 41 to 47 of the Opinion, that, in assessing the justification and proportionality of a particular measure, the decision-maker is granted a wide "margin of appreciation".
- (f) The Opinion then analysed whether, according to the above legal principles endorsed and approved by the Courts in Hong Kong, the requirement would be held unconstitutional by the Courts :-

	Tests/ legal principles	Analysis in the Opinion	Para. in the Opinion
(i)	Has a right protected by the Basic Law or the Bill of Rights been infringed?	<ul style="list-style-type: none"> <li>Yes, the requirement would constitute a breach of BL 105 because it places a restriction on the vendor's right to dispose of its property.</li> </ul>	53 to 54
(ii)	Any legitimate purposes?	<ul style="list-style-type: none"> <li>It is likely that the Court would find the aim (i.e. to further enhance the transparency and fairness of the sales arrangement and transactions of first-hand residential properties) to be a legitimate aim.</li> </ul>	55 to 56
(iii)	Any rational connection to the legitimate purposes?	<ul style="list-style-type: none"> <li>The Administration's purported aim of the requirement is to "<i>enable prospective purchasers to get a fuller picture of the prices of a considerable number of properties</i>".</li> <li>It is open to doubt whether the requirement will actually achieve such aim, because it is strongly arguable that <u>a price list would only give purchasers a "fuller picture of the prices" if the properties on the list were in fact going to be offered for sale at the prices stated in the price list.</u></li> <li>But the Administration repeatedly contends that <b>vendors do <u>not</u> need to offer all properties in the price lists for sale.</b></li> <li>It is therefore <u>difficult to see how the objective of</u></li> </ul>	57 to 62

<sup>3</sup> *Leung Kwok Hung v HKSAR* (2005) 8 KCFAR 229

		<p><u>giving customers a fuller picture of prices will be met by providing them with "prices" of properties which are not for sale.</u></p> <ul style="list-style-type: none"> <li>• Further, since a price list may be amended prior to sale, the <u>price list could create confusion and obfuscation rather than transparency</u> which the Administration says is its aim.</li> </ul>	
(iv)	Is the requirement proportionate?	<ul style="list-style-type: none"> <li>• The Administration will still need to satisfy the hurdle of showing that the requirement is proportionate and that would depend in part on the detail of the justification relied on, and the nature of the rational connection between the requirement and the stated aim.</li> </ul>	63

### Subjective, biased and misleading responses from the Administration

6. The above summary clearly shows that the Administration's responses are subjective, biased and misleading :-
- As a matter of fact, the "fair balance" test was not even referred to in the Opinion nor relied on by Counsel to analyse why the requirement would be unconstitutional.
  - As a matter of fact, the relevant legal principles relied on in the Opinion to explain why and how the requirement would be unconstitutional were endorsed, approved and/or formulated by the Courts in Hong Kong.
  - However, the Administration's responses disregarded these facts and gave a wrong impression to Members of the Bills Committee that :-
    - the "fair balance" test was introduced by the Opinion;
    - the Opinion failed to explain why the requirement was to be subject to the "fair balance" test in the absence of any local court decision that BL 6 and BL 105 impose such a test.
    - the legal analysis given in the Opinion were not supported by any local court decision in Hong Kong.
7. Further, on the question of whether the requirement is rationally connected to its stated aim, the Administration, at paragraph 7 of the 2nd Response, claimed that *"the Administration has explained in the Administration's Response that the requirement is rationally connected to its stated aim since the vendors would unlikely set prices arbitrarily on the price lists (even for those properties which are not intended for sale immediately)"*.
- According to the Administration, the requirement is connected to its stated aim (i.e. to enable prospective purchasers to get a fuller picture of the prices of a considerable number of properties) is because the vendors would unlikely set prices arbitrarily on the price lists.
  - However, in the Opinion (summarised in the table in paragraph 5(f) above), Counsel have given detailed and comprehensive analysis as to *why* and *how* the requirement fails to connect to such stated aim (see in particular paragraph 5(f)(iii) above).

- (c) Regrettably, so far, none of the Administration's responses gave any *substantive* response to the comprehensive analysis given by Counsel as to *why* and *how* the requirement fails to connect to such stated aim.
- (d) The Administration has only repeated its assertion, namely, that the requirement is rationally connected to its stated aim without providing any substantiation at all.
- (e) In any event, as a matter of logic and common-sense, it is difficult to understand why the fact that vendors "*would unlikely set prices arbitrarily on the price lists*" could be used as a reason to justify that the requirement itself is connected to the Administration's stated aim.

### **Provision of information on gross floor area for a property**

#### **Selective responses from the Administration**

8. After being criticised that the Administration failed to give a full and complete picture of the Court of Final Appeal's decision in the case *Fok Chun Wa v Hospital Authority* (FACV 10/2011), the Administration tried to argue that the purpose of the Administration's response was only to respond to the Opinion and therefore should be read together with the Opinion. The Administration then argued that, because the Opinion "*does not further explain how the Court would apply the concept of margin of appreciation in these cases [i.e. cases involving social and economic policy]*", the Administration therefore sought to give Members of the Bills Committee a "*better understanding of the concept of margin of appreciation in the context of socio-economic policies by summarising the Court's views in paragraphs 61 to 76 of the judgment*".
9. With respect, the Administration's reasons given above are not factually correct :-
  - (a) Paragraph 42 of the Opinion has recognised in clear terms the wide margin of appreciation in cases involving social and economic policy in the following terms: "*The scope of the margin of appreciation depends on the subject under consideration. Courts have recognised that there is a particularly wide margin in cases involving social and economic policy: see in particular the recent judgment of the Court of Final Appeal in Fok Chun Wa at paragraphs 61-76*".
  - (b) Paragraphs 61 to 76 of the Court of Final Appeal's judgment in *Fok Chun Wa* case which were cited by the Administration, were also expressly referred to in the Opinion.
10. Is it good public governance for the Administration to adopt such a selective approach to :-
  - (a) disregard the balanced views and analysis given in the Opinion that the Administration has a wide margin of appreciation as mentioned in paragraph 9 above, and then give an impression to Members of the Bills Committee that the Opinion failed to give a balanced views on the question of margin of appreciation?
  - (b) only highlight those paragraphs in the Court of Final Appeal's judgment which are suitable to meet the Administration political agenda?
11. After recognising such wide margin of appreciation offered to the Administration in cases involving social and economic policy, the Opinion went on to explain that the Courts in Hong Kong have recognised and endorsed the following principles :-
  - (a) The existence of such wide margin of appreciation does not mean that the court will never interfere.

- (b) The courts have the ultimate responsibility of determining whether acts are constitutional or lawful.
- (c) It would be appropriate for the courts to intervene, and would be duty bound to do so, where, even in the area of socio-economic or other government policies, there has been any disregard for core-values.

See paragraphs 43 to 47 of the Opinion.

### Proportionality - Commercial speech is constitutionally protected

12. Based on the above legal principles endorsed and approved by the Courts in Hong Kong, the Opinion then went on to analyse whether the requirement would be held unconstitutional by the Courts :-
  - (a) The Opinion in fact is in line with the Administration's position that the requirement that only the Saleable Area shall be disclosed has a rational connection to the stated legitimate aim, i.e. to avoid confusion among prospective purchasers. See paragraphs 66 to 71 of the Opinion.
  - (b) However, the Opinion went on to suggest that, even if there were a rational connection to a legitimate aim, the requirement would still have to satisfy the criterion of proportionality.
13. On the question of proportionality, the Administration argued that the freedom of commercial speech generally warrants a lesser degree of protection than the freedom of political or other speech. However, the Administration did not refer the following important legal principles formulated and established by the Courts in Hong Kong to Members of the Bills Committee (which were provided in details in paragraph 73 of the Opinion) :-
  - (a) *"Free speech is a constitutional freedom even when it is only commercial speech. And I say "only" not to diminish the importance of free commercial speech but to acknowledge the even greater importance of free political speech."*<sup>4</sup>
  - (b) *"Freedom of expression is an important principle even where the intention behind the expression is personal financial gain."*<sup>5</sup>
  - (c) Disclosure of information should be permitted if the relevant information is *"to be able to provide the same objective, accurate and basic information ..."*<sup>6</sup>
  - (d) There is a public interest in permitting advertising: *"The public interest as far as advertising is concerned lies in the provision of relevant material to enable informed choices to be made."*<sup>7</sup>
14. The Opinion then went on to apply the above principles to explain *why* and *how* the requirement to prohibit disclosure of GFA related information would be unconstitutional :-
  - (a) The Court of Appeal's decision in *Kwok Hay Kwong* case stresses the **importance of free speech, even in a commercial context**.

<sup>4</sup> Bokhary PJ in *Medical Council v Helen Chan* (2010) 13 HKCFAR 248 at paragraph 75

<sup>5</sup> Ma CJHC in *Kwok Hay Kwong v Medical Council of Hong Kong* [2008] 3 HKLRD 524 at paragraph 29

<sup>6</sup> Ma CJHC in *Kwok Hay Kwong v Medical Council of Hong Kong* [2008] 3 HKLRD 524 at paragraph 32

<sup>7</sup> Ma CJHC in *Kwok Hay Kwong v Medical Council of Hong Kong* [2008] 3 HKLRD 524 at paragraph 32(1)

- (b) Similar to the applicant in *Kwok Hay Kwong*, **vendors do not want the freedom to provide misleading information.** All that they seek is the right to **provide accurate GFA information.**
- (c) There is **no suggestion whatsoever that the GFA is deceptive or intended to mislead.** In fact GFA information can be objectively and accurately verified by reference to the approved general building plans and certification by the authorised persons registered under the Buildings Ordinance.
- (d) Further, REDA has put forward an **alternative, less-restrictive alternative, namely the standardised approach to the calculation of GFA** and such alternative proposal would strengthen the case.
- (e) In conclusion, freedom of expression is of fundamental importance, and the restriction to disclose GFA information would prevent the transmission of information which is an established part of the market.

See paragraphs 75 to 81 of the Opinion.

#### **Alleged lack of standardised definition of GFA**

- 15. Regrettably, the above legal principles and analysis have not been addressed or responded, with justifications, in any of the Administration's responses.
- 16. So far, the only argument raised by the Administration to disallow the disclosure of GFA information is the absence of a commonly adopted definition of GFA for a property. See paragraph 11 of the 2nd Response.
- 17. However, this disregards the fact that, according to REDA's proposed standardised GFA (i.e. the relevant GFA apportioned to the common areas serving exclusively to the residential portion of the building), the relevant GFA allocated to a particular unit can be objectively and accurately verified by reference to the general building plans approved by the Building Authority and are required to be certified by the authorised persons.
- 18. More importantly, even the Administration did not argue that such proposed standardised GFA is deceptive or intend to mislead. One of the possible reasons is that such GFA can be objectively and accurately verified by reference to the general building plans approved by the Building Authority.

#### **Only one consideration given by the Administration to prohibit disclosure of GFA information**

- 19. The Administration also argued, at paragraph 12 of the 2nd Response, that the lack of a standardised definition of GFA for a property is only one of the reasons, but not the sole reason, why they propose that Saleable Areas should be the only basis for presenting the floor area and price per square foot/ metre for a property. According to the Administration, "*There are other considerations including the consideration that the use of GFA for a property is not a suitable way of showing the public and the prospective buyers the floor area of a residential property*".
- 20. With respect, such "other consideration" mentioned by the Administration in the said paragraph 12 (i.e. the use of GFA is not a suitable way of showing the floor area) is in essence **the same as** the purported reason that there is a lack standardised definition of GFA :-

- (a) From the responses given by the Administration so far, there is only one reason that the Administration considers that GFA is "*not a suitable way*" to show the floor area, namely, there is a lack of commonly standardised definition of GFA.
  - (b) No other reason has ever been provided by the Administration to explain why the use of GFA is "*not a suitable way*" to show the floor area of a property.
21. In other words, there is only one consideration (and not "other considerations" as claimed in the 2nd Response) by the Administration to prohibit disclosure of GFA information, that is, the alleged lack of commonly standardised definition of GFA. Apart from the repeated assertion that there is a lack of commonly standardised definition of GFA, the Administration fails to offer any other genuine "reason" or "considerations" to justify the Administration's position that GFA should not be disclosed.
22. However, since the relevant GFA apportioned to a particular fact can be objectively and accurately verified by reference to the building plans approved by the Building Authority and by the certification of the authorised persons, it is not entirely correct for the Administration to continue to use this as a reason to prohibit the disclosure of GFA information.