

**Bills Committee on
Residential Properties (First-hand Sales) Bill 2012:**

Response to Hon Abraham SHEK's Letter of 11 June 2012

The Administration responded to the Hon Abraham SHEK's letter dated 31 May 2012 in its paper to the Bills Committee (LC Paper No. CB(1)2120/11 – 12 (03)) (the Administration's Paper). In the attachment to his letter dated 11 June 2012 ("the Attachment"), the Hon Abraham SHEK set out his comments on the Administration's Paper. The Administration sets out below its responses to the Attachment.

Provision of minimum number of properties in price lists (paras 1-7 of the Attachment)

(a) *Whether the Opinion applied the "fair balance test"*

2. The Attachment claimed that the joint legal opinion by Lord Pannick, QC, Tristan Jones and Wilson Leung dated 19 April 2012 submitted by the Real Estate Developers Association of Hong Kong ("REDA") to the Bills Committee on 20 April 2012 ("the Opinion") applied the "proportionality test" but not the "fair balance test". It was therefore inappropriate for the Administration's Paper to state that the Opinion did not address the question of whether the requirement to cover a minimum number of properties in the price lists was subject to the "fair balance test" in the first place.

3. While the Opinion did not expressly mention the "fair balance test", Hon Abraham SHEK's letter dated 31 May 2012 stated that the "fair balance test" was in essence the same as the "proportionality test". As appears from the relevant case law, whether applying the "fair balance test" or the "proportionality test", the courts would consider the following factors:

- (a) Whether the restriction seeks to pursue a legitimate aim;
- (b) Whether the restriction could achieve the legitimate aim (i.e. whether there is a "rational connection")

- between the restriction and its stated aim);
- (c) Whether the restriction is no more than necessary in achieving its stated aim.

4. As such, the Administration does not consider there to be any substantial difference in essence between the “fair balance test” and the “proportionality test”.

(b) *Whether BL 6 and BL 105 impose the “fair balance test”*

5. The Attachment further referred to *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 in which the Court of Final Appeal (“CFA”) applied the “proportionality test” in determining whether there was a breach of the relevant provisions of the Basic Law.

6. It should be noted that *Leung Kwok Hung* concerned the right of peaceful assembly but not property rights. The rights protected by the Hong Kong Bill of Rights do not include property rights. Property rights are guaranteed by Articles 6 and 105 of the Basic Law (“BL 6 and BL 105”) and not Chapter III of the Basic Law which provides for the residents’ fundamental rights.

7. Hence, our courts are yet to decide on whether the “fair balance test” developed under the European jurisprudence constitutes an implicit requirement under BL 6 and BL 105. The possibility that BL 6 and BL 105 do not impose such an implicit requirement cannot be ruled out. For instance, BL 6 and BL 105 only expressly provide for the requirement of “in accordance with law” but not the “fair balance test”. Further, there has not been any local court decision that BL 6 and BL 105 impose the implicit requirement of the “fair balance test”.

(c) *Whether the requirement to cover a minimum number of properties in the price lists is consistent with BL 6 and BL 105*

8. The Attachment alleged that the Administration’s Paper did not provide any substantive reply to the question of whether the requirement to cover a minimum number of properties in the price lists is

rationally connected to its stated aim and whether it is consistent with BL 6 and BL 105.

9. It should be pointed out that, while our courts are yet to rule on whether BL 6 and BL 105 impose the implicit requirement of the “fair balance test”, the Administration did not seek to dodge the “fair balance test” issue. As stated in the Administration’s response to the Opinion (LC Paper No. CB(1) 2066/11 – 12(02)), even assuming that the “fair balance test” applies, our courts are likely to accept that the requirement is rationally connected to its stated aim.

10. As the Administration has explained, even though vendors are not required to offer for sale those properties covered in the price lists, they would unlikely set prices arbitrarily on the lists (even for those properties which are not intended for sale immediately), given that once a price list is issued, the properties covered in that price list must be sold at the prices as set out in that price list unless the vendor changes the prices by a revision to the price list. Vendors will as far as possible avoid changing the prices for fear that this would give a bad impression to the public. The Administration therefore considers that the requirement is rationally connected to its stated aim of enabling purchasers to get a fuller picture of the prices of a considerable number of properties in a development. As far as the question of “rational connection” is concerned, our courts are likely to give the Administration’s views a considerable margin of appreciation and their level of scrutiny of those views is likely to be low.

11. Indeed, the Opinion did not seek to argue that the requirement would contravene BL 6 and BL 105. It merely stated that the requirement may contravene BL 6 and BL 105 insofar as the Government has not provided any cogent reason to explain how the requirement is rationally connected to its stated aim. Given that the Administration has now clarified the “rational connection” between the requirement and its stated aim and that our courts are likely to give the Administration’s views a wide margin of appreciation, the Administration does not agree that the requirement would contravene BL 6 and BL 105.

Provision of information on gross floor area (“GFA”) for a property (paras 8-22 of the Attachment)

12. The Attachment claimed that the Administration’s Paper only highlighted those paragraphs in the CFA’s judgment in *Fok Chun Wa v Hospital Authority*¹ which are favourable to the Administration and disregarded the balanced view expressed in the Opinion on margin of appreciation.

13. As explained in the Administration’s Paper, the Administration’s response should be read together with the Opinion. As paragraph 45 of the Opinion has already quoted the relevant passage in paragraph 77 of the CFA’s judgment, it is unnecessary for the Administration’s Paper to quote it again.

14. Indeed, *Fok Chun Wa’s* case is the most recent authority in which the CFA discussed the concept of margin of appreciation in detail. The Administration has summarised the CFA’s views on margin of appreciation so that the Bills Committee can have a better understanding of that concept in the context of socio-economic policies.

15. The Attachment also alleged that the Administration’s Paper did not refer to certain legal principles about freedom of expression laid down by the courts. For example, the court has held that free speech is a constitutional freedom even when it is only commercial speech. Freedom of expression is an important principle even where the intention behind the expression is personal financial gain.

16. It is true that the right to freedom of expression is a fundamental right and includes the right to advertise. However, the right is not absolute and has to be balanced against other competing interests. Commercial speech is also treated as being of less importance than political or artistic expression in international human rights jurisprudence. Restrictions on commercial speech will generally be subject to less strict scrutiny on the basis that what is being served is a private, rather than a public interest. A wide margin of appreciation will be extended where the speech interfered with has an essentially competitive purpose.

¹ FACV 10/2011, 2 April 2012.

17. Further, there would not be a total and absolute ban on the disclosure of GFA-related information under the Bill. Vendors would be required to provide information about: (a) the saleable area (SA) of a residential property; (b) the area of those features which the owners of a residential property will have exclusive use; and (c) holistically the types and area of common facilities in the development. This would provide prospective purchasers with the necessary area information so that they can make an informed decision as to whether or not to purchase the property but would at the same time avoid any confusion caused by the use of GFA information in advertisements, sales brochures and price lists.

18. The Opinion stresses that vendors do not want the freedom to provide misleading information. All that they seek is the right to provide accurate GFA information. As pointed out in the Administration's response to the Opinion, although the Court accepted that the public interest as far as advertising is concerned lies in the provision of relevant material to enable informed choices to be made, "it is also important to bear in mind the need to protect the public from the disadvantages of advertising".² For example, in *Dr Chan Hei Ling Helen v Medical Council of Hong Kong*, it had been argued that public endorsement of a product should be allowed provided the information is accurate, honest and not misleading. The Court of Appeal pointed out that "accuracy may be difficult to verify and the manner in which the information is presented may lack balance, objectivity and impartiality when the person conveying the information has a conflict of interest."³ Hence, the mere fact that a piece of information is accurate and not misleading does not necessarily mean that its publication may not be subject to any restriction.

19. In the absence of a commonly adopted definition of GFA for a property, allowing the use of GFA for quoting property size and property price per square foot/metre in advertisements, sales brochures and price lists, alongside the statutorily defined SA, will cause confusion rather than enable prospective purchasers to make an informed decision.

² CACV 373/2006, 24 January 2008, paras 29-34.

³ CACV 403/2006, 30 April 2009, para 57. On appeal in *Medical Council of Hong Kong v Helen Chan*, FACV 13/2009, 14 May 2010, the CFA noted at para 81 that the speech involved was commercial rather than political speech.

In fact, it will go against the intent that information about property size and property price per square foot/metre should be provided to prospective purchasers in a clear, accurate and consistent manner so that they can compare property prices of different developments calculated on the same area basis.

20. As mentioned in the Administration's Paper, the lack of a standardized definition of GFA for a property is one of the reasons, but not the only reason, why we propose in the Bill that SA should be the only basis for presenting the floor area and price per square foot/metre for a property in the sale of a first-hand residential property. Another consideration is that the use of GFA for a property is not a suitable way of showing the public and the prospective purchasers the floor area of a residential property. We consider that the proposed approach as set out in paragraph 17 above is a viable and more direct means to let prospective purchasers know what they are buying for.

21. In conclusion, the proposed prohibition on providing information on property area and property price per square foot/metre otherwise than by reference to the SA of the property in advertisements, sales brochures and price lists is in conformity with the right to freedom of expression under Article 27 of the Basic Law and Article 16 of the Bill of Rights.

Transport and Housing Bureau
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