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THE LAW SOCIETY OF HONG KONG 香港律師會

Submissions of the Law Society of Hong Kong on the Consultation Paper on "The Proposed Legislation to Regulate the Sale of First-hand Residential Properties"

A. General Comments

1. The Law Society's Property Committee has reviewed the proposals put forward by the Transport and Housing Bureau in its Consultation Paper on *"The Proposed Legislation to Regulate the Sale of First-Hand Residential Properties"*.

2. The Committee supports the objective of the proposed legislation to enhance the transparency and fairness of the sales arrangements of first-hand residential properties for the protection of purchasers. However, as the Consultation Paper has repeatedly stated, the proposed legislation should strike a balance between enhancing consumer protection and allowing a certain degree of flexibility for the developers to respond to changing market needs.

3. ***There are some fundamental concerns with the draft Residential Properties (First-hand Sales) Bill, including but not limited to:***

   - ***whether the draft Bill casts its net over the correct class of persons, in particular, whether the present definition of "vendor" will catch the innocents and let go the culprits***
   - ***instead of strict liability offences, mens rea should be required as an element for the offences created under the proposed legislation or appropriate defences should be provided for in the legislation***
   - ***the need to introduce exemptions for the professionals, such as architects and solicitors, from possible criminal liability for their negligence or mistakes, in view of Clause 56 of the draft Bill and section 89 (in relation to aiders, abettors and accessories) of the Criminal Procedure Ordinance and its equivalent common law rules. The imposition of criminal liability on a professional who is merely negligent or makes mistakes should not be the legislative intent. The consequences should be a civil one (at common law), and not a criminal one***
   - ***the rigidity of the proposed legislation and the absence of a mechanism to grant exemption to the statutory requirements in justifiable circumstances***

- ***time limit for prosecutions***

4. The Committee also has some drafting concerns on the draft Bill which concerns the Administration should address to give more certainty in law particularly in view of the criminal liability that the Bill seeks to impose.

5. Given the relatively short time for consultation, the Committee sets out its preliminary comments on the draft legislation. These comments are not exhaustive and the Law Society reserves its right to make further comments on the final Bill to be introduced. For easy reference, the Committee's comments are set out below with reference to the provisions of the draft Bill.

B. Comments on the draft Residential Properties (First-hand Sales) Bill ("the draft Bill")

PART 1 – PRELIMINARY

Clause 2 – Interpretation

Definition of "residential property"

6. It is unclear whether the definition of "residential property" will cover serviced apartments.

Definition of "working day"

7. Saturday is counted as a "working day" in the draft Bill while it is not regarded as a "business day" for the purpose of the ASP. Many law firms in Hong Kong are not open for business on Saturdays. It is suggested that Saturday should not be counted as a "working day" under the draft Bill.

Clause 3 – Definition of Saleable area and related expressions and their measurements

8. Since any mis-statement of the saleable area and area other than the saleable area will, after the coming into effect of the new law, becomes an offence, ***more precise definitions must be given to each item of the definition of "saleable area" (clause 3(1)(b)) and each item excluded from it (clause 3(1)(c)) so as to avoid any unintended violation of the new law.***

9. The definition of "saleable area" under Clause 3 of the draft Bill (which only means "the floor area of the residential property" and includes "a balcony, an utility platform and a verandah") is different from the existing one adopted under the Consent Scheme in various aspects.

10. Under the existing Consent Scheme, "saleable area" is measured from the exterior of the enclosing wall of the unit. If the unit is a house, since the measurement is from the exterior of the walls; the measurement will include, where applicable, an internal lift and lift shaft thereof. Under the draft Bill, it

is unclear whether the lift and lift shaft should be included in (i) the floor area of the residential unit under saleable area or (ii) "any other facilities" for the residential property under Clause 3(1)(c)(xi). ***In particular, the meaning of "any other facilities" should be further clarified.***

11. Moreover, stairhood is now excluded from the definition of "saleable area" under Clause 3(1)(c)(ii). Such exclusion does not appear in the existing Consent Scheme; and as a stairhood is enclosed by walls, the definition of "saleable area" under the existing Consent Scheme would include the area of a stairhood. Clause 3(1)(c)(ii) is a departure from the existing Consent Scheme requirement.

12. Further clarification will need to be made as to what constitutes a "utility platform, balcony, flat roof or roof". Under the existing practice of the Buildings Department, a utility platform or balcony (with or without exempted Gross Floor Area (GFA)) may combine with a flat roof or roof. If such combination occurs, the two will not be physically distinguishable though they will be marked differently on the approved building plans as "utility platform", "balcony" and "roof " (or "flat roof") (as the case may be). In such case, whether the utility platform, balcony, flat roof and roof under the Bill should be given its ordinary meaning or given their technical meaning under the building plans should be clarified. Further clarification should be provided in the Bill to avoid unintended violation of the new law.

13. As to the term of "air-conditioning plant room", nowadays there are other variants of this term serving similar function but with a different name as may be approved by the Building Authority and shown on the approved building plans; they may be called "air-handling unit room", "Variable Refrigerant Volume Room", " air-conditioning plant room (VRV)" etc. They are given different names on the approved building plans. The question is whether the areas of these items should be stated under "air-conditioning plant room" or stated under "any other facilities". The Administration may also wish to confirm with the Buildings Department on these issues.

14. Similar clarifications on what constitutes flat roof, roof, yard, terrace, garden or "other facilities" should be provided along similar reasoning as stated in paragraph 12 mentioned above. The question is whether they should be given their ordinary meanings or be given their technical meanings under the approved building plans.

15. Under Clause 3(2)(a), the measurement of saleable area is from the exterior of the enclosing walls of the residential property. However, what constitutes the exterior of the enclosing walls is not precisely stated in the Bill. The question is whether the exterior of the enclosing walls should exclude the tiles, plaster and metal or other types of claddings attached to the enclosing walls or that the exterior of the enclosing walls should only just mean the wall as shown on the approved building plans. This should be clarified to avoid any ambiguity.

16. Under Clause 3(4)(a)(ii) the measurement of the area of a cockloft or a stairhood would include the internal partitions and columns within it.

However, under Clause 3(4)(d), in the case of yard, garden, flat roof and air-conditioning plant room or other facilities, the inclusion of the area of internal partitions and columns is not mentioned. It is submitted that the measurement under clause 3(4)(d) should also include the internal partitions and columns within the yard, garden, flat roof, air-conditioning plant room or any facilities specified in Clause 3(1)(c)(xi). A sub-paragraph (iii) on similar terms as Clause 3(4)(a)(ii) should be added to Clause 3(4)(d).

17. Under Clause 3(6), the measurement of balcony, utility platform or verandah if *enclosed by a wall that is not a solid wall,* the measurement of floor area is from the external boundary of the balcony, utility platform or verandah. What is meant by "*enclosed by a wall that is not a solid wall*" in that context should be clarified. Moreover, what constitutes the external boundary is not precisely stated. Should it (i) exclude tiles and plaster and any metal or other types of cladding attached to the external boundary of these items and (ii) include kerbs where, for example, glass balustrade is erected? This should also be clarified to avoid any ambiguity.

18. Clause 3(1)(c) does not list out swimming pool (or lower part of swimming pool, if any) and filtration plant room.

- If a swimming pool is located in the flat roof or garden or terrace, will the area of the garden, terrace and flat roof be reduced by the area of the swimming pool?
- And should the swimming pool or lower part of swimming pool (if any) be regarded as "other facilities" and its area be stated separately?
- Moreover, how the area of the swimming pool is to be measured is not mentioned. For some forms of ASP approved by the Lands Department under Consent Scheme, the measurement of swimming pool is stated to be measured from the interior walls of the swimming pool. If this measurement is also applicable under the Bill, this should be stated clearly.
- We assume that filtration plant room can be stated as "other facilities" under Clause 3(1)(c)(xi). If it is otherwise, it should be clarified.

19. Under the new definition of *"saleable area"* (as defined under Clause 3 (1) of the draft Bill), it is uncertain whether certain indoor area should be classified as *"saleable area"* or *"areas other than saleable area"*. For example, under the existing Consent Scheme, for indoor swimming pool located within a House or large duplex or other atypical residential unit, since the indoor swimming pool is enclosed by walls of the unit, the area of the indoor swimming pool is counted as part of the saleable area. However, under the new definition of saleable area, it is not clear whether the indoor swimming pool will be counted as "any other facilities" under clause 3 (1)(c)(xi) of the draft Bill and not as part of the saleable area of the unit. The same problem would apply to other indoor area of the unit. There is a need to clarify this uncertainty in order to avoid any unintended violation of the law.

20. ***In view of the uncertainties that may arise in reality (some of them are mentioned above) and other special circumstances that may arise as the building design and technology may evolve from time to time, we propose that the Authority to be established under the new Ordinance be given the power and duty to issue guidelines and to answer questions timely that may be put to the Authority in relation to the aforesaid matters.***

21. ***As mentioned above, there are notable differences between the new definition of "saleable area" under Clause 3(1) of the draft Bill and the existing definition of "saleable area" under Consent Scheme adopted by the Director of Lands. Please clarify whether such differences are intentional or unintended; and if the former, please provide the justification. The differences in the two definitions of saleable area will cause confusion to the public and are undesirable.*** The existing records of saleable areas of the units in Hong Kong generally kept by the Government will also need be amended and updated to fit the new definition.

Clause 4 – Application of the Ordinance

Exemption Provisions

22. Clause 4(3) only exempts a completed development where 95% of the number of the residential properties in the development as set out in the OP has been held under lease since the occupation permit has been issued and each of those residential properties has been held under lease for at least 36 months. With respect, this is impracticable and unrealistic.

23. For a development with 100 units, at least 95 of the units must be held under lease for 36 months. If a developer has pre-sold 6 units to genuine home-owners before the issue of the OP and these home-owners have not leased out their units to any third party, the requirement of 95% of the residential units held under lease will never be reached.

24. It will be more appropriate to apply the 95% threshold to units still retained by the developer unsold at the time of when the OP is issued but then, the 95% threshold is still too high a hurdle to pass. Depending on the then rental market in Hong Kong and whether the developer intends to hold the unsold residential properties as long term investment or for sale, if the number of remaining unsold units by the developer is few, say below 20, then the 95% requirement would actually mean the developer needs to lease out 100% all its residential properties to third parties. This will be too high a hurdle to pass in practice.

25. The high threshold of 95% will prompt a developer to lease out the unsold residential properties rather than put them up for sale to the general public. This will be contrary to the Government's policy to increase the supply of residential properties in Hong Kong. There may be other unintended side effects that the Government needs to carefully consider this 95% requirement.

26. Under Clause 4(4), the draft legislation would not apply to a one building development for which a certificate of exemption has been issued under S. 5(a)

of the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121). ***It is unclear why the legislation should only exempt first-hand single building developments in the New Territories but not elsewhere in Hong Kong. There does not seem to be any good justification why NT should be given any preferential treatment and the Administration should clarify the policy intention behind this.***

27. Clause 4(7) states that "if residential properties are sold to one person under one agreement for sale and purchase..." and so on. It is not clear whether "one person" will include two or more legal persons holding the properties as *tenants-in-common* or *joint tenants,*" and whether "one agreement for sale and purchase" will allow *supplemental agreement(s)* to the principal agreement for sale and purchase or any other *side agreement(s)* incidental to the principal agreement for sale and purchase. These should be clarified.

28. "En bloc" sale is exempted from all provisions in relation to sales practices under Part 2 of the Bill. The Bill however makes no differentiation between high-rise and low-rise developments. It appears that sale of a 3-storeyed low-rise building (even to general public) would be exempted under the present drafting. Also, for a big development with a podium with 3 phases and 10 towers, it is unclear whether "En bloc" means the whole development, one phase or one tower. ***The meaning of what is meant by "En bloc" sale should be clarified.***

29. ***Generally speaking, the exemptions granted under the Clause 4 are too limited. There may be some exceptional situations which justify the exemption from the application of the new ordinance.*** The following are some possible scenarios for which exemptions should be granted under the Bill:

(a) A family which owns the entire residential building may want to distribute the residential units only to their family members by way of notional sale or otherwise. Yet under the draft Bill, such family arrangement will not be possible without going through all the cumbersome procedures prescribed under the Bill. This is not sensible.

(b) An entire residential building is held under a family trust created many years ago. Under the terms of the family trust, there may be some special stipulations as to the manner of disposal of the units in the residential building e.g. the trust may only allow disposal of the residential units to the family members and not to any outsiders who are not members of the family. The new law will create a situation where the trustees of the family trust will be impossible to perform their duties and functions according to the terms of the trust.

(c) A developer who owns some unsold units in the building may, as a matter of group properties restructuring, want to transfer the unsold units by way of intra-group transfer seeking exemption under section 45 of the Stamp Duty Ordinance with no intention of selling the unsold units to outsiders whatsoever. Again such restructuring will not be possible without going through all the cumbersome procedures prescribed under

the Bill. Again this is not sensible and is against the normal commercial practice and reality;

(d) transfer of residential property between charitable organizations or other non-profit making organizations.

PART 2 – SALES PRACTICES IN RELATION TO SPECIFIED RESIDENTIAL PROPERTY

Division 1 – Preliminary

Clause 5 - Definition of "Vendor"

30. ***The Law Society is concerned that with the proposed definition of "vendor", the proposed legislation will catch the innocents and let go the culprits.***

31. Throughout the draft Bill, criminal liability is imposed on the "vendor" who has contravened the provisions of the Bill. Under Clause 5(1), "vendor" means the "owner of the residential properties" and does not extend to (a) a *joint venture partner* of the vendor in the development of the residential properties for sale; or (b) the holding companies of the vendor.

32. Developer
It is a common arrangement in property development joint ventures between owners and experienced developers that the owners provide the land for development and the developers are responsible for the construction of the developments, the marketing and the carrying out of the sale activities. The developers have most of the commercial interest in the sale proceeds in the sale of the development and the owners are usually just passive land providers with limited resources in carrying out the development and sale on its own and who do not actually develop the land and conduct the sale of the units in the development. It would be unfair to impose the obligations on the owners.

33. Holding Companies
Further, developers in Hong Kong usually use shelf companies to acquire and develop land. A complex corporate structure may be used in commercial reality with many layers of corporate vehicles in between or among different shareholders.

34. In response to the Society's concern that the legislation will not be able to hold the holding company who may be a real culprit behind the scene, liable, the Administration has quoted S. 89 of the Criminal Procedure Ordinance ("CPO"). However, S.89 of the CPO is not a good answer to the problem as it requires the element of mens rea for the offence whereas many offences in the Bill are strict liability offences.

35. ***The Committee proposes that the various obligations of the vendor under Part 2 should be imposed on either the vendor or the developer. An appropriate definition of "developer" should be added in this regard and the definitions of "vendor" and "developer" should include their ultimate holding companies. If a section is contravened, the one who commits the***

relevant offence should be the vendor or the developer who carries out the relevant activities, prepares the relevant document or fails to perform the relevant obligation. Otherwise the requirements in the Bill can be easily circumvented and it will fail to achieve the purposes it intends to achieve.

Division 2 – Sales Brochure

Clause 10 – Contents of sales brochure: information required to be set out

36. There are different types of mandatory information which should be set out in the sales brochure. However, certain mandatory information to be disclosed in the sales brochure could be relatively subjective, such as lease conditions that are onerous to a purchaser, etc.

The form of "Notes to Purchasers of First-hand Residential Properties" prescribed by the Estate Agent Authority and Consumer Council

37. Item 1 of paragraph 19 (on page 8) of the Consultation Paper states to the effect that the form of "Notes to Purchasers of First-hand Residential Properties" ("the Form") needs to be set out as the first item in the sales brochure. However, Clause 10(2) of the draft Bill has omitted this requirement. Please clarify.

38. Moreover, since the requirement to include the Form in sales brochure is (i) presently applicable to both Consent Scheme and *Non-Consent Scheme*, and (ii) will apply to *completed development* too, the existing Note 3 of the Form which concerns only sales of uncompleted development under Consent Scheme is insufficient to cater for situation

- (i) under *Non-Consent scheme*;
- (ii) sale of uncompleted development to which *neither Consent Scheme nor Non-Consent Scheme applies* but separate legal representation are sought, and
- (iii) *completed development* situation.

Since the Form is a Government's form, the Government should amend the Form to cater for the aforesaid diverse situations. For example, for a Non-Consent Scheme project, the adoption of note 3 of the Form is already presently inappropriate to the factual situation and is already in need of amendment. As any misstatement in the sales brochure will in future become a criminal offence, amendment of the Form is acutely needed.

39. Clause 10(5) provides that if the sales brochure is required by clause 10(2) or Part 2 of Schedule 1 to set out any information that is not applicable to the developments, the sale brochure must contain a separate paragraph for the information. Under Clause 10(2) and Part 2 of Schedule 1, the information required can be said to be related to the development. Could the Administration explain what is meant by information that is not applicable to the development?

Clause 11 – Contents of sales brochure: further information

40. Clause 11(2) states that the sales brochure may set out one plan showing one elevation of the development. It is not clear why the plan should limit to one plan showing one elevation and not more than one plan or more than one elevation.

Clause 12 – Contents of sales brochure: other requirements for information

41. Clause 12(2) provides that the information set out in the Sales Brochure must be accurate and Clause 12(5) provides that if Clause 12(2) is contravened, the Vendor who prepares the Sale Brochure is liable to imprisonment. ***The Bill as drafted will catch any minor and inadvertent mistake and can render the Vendor or its officers liable to imprisonment. Firstly, it should be accuracy in a material respect before it renders the Vendor liable to a fine of $500,000 and to imprisonment for 12 months. The penalty should be proportionate to the gravity of the breach. Secondly, the person should have the relevant mens rea before imprisonment should be imposed. The person should have knowledge of the inaccuracy before he should be imprisoned.***

42. An analogy can be drawn from the Trade Description Ordinance ("TDO)") although the defence under S26 of TDO is similar to Clause 62 of the Bill, the charging provision under S2, 7 and 9 under TDO are different as "false trade description" requires description which is false and misleading to a material degree. TDO requires the person acting "with intent to defraud" namely the mens rea to defraud.

Clause 13 – Sales brochure must not set out other information

43. Clause 13(1) provides that the sales brochure "must not set out any information other than the information required or authorized by the Ordinance" and the detailed requirements for such information are set out in Schedule 1 Part 1.

44. However, each development has its own unique features and also special covenants in the Government Grant and DMC. The restriction in Clause 13(1) will not be suitable for developments with special features and special requirements under the Land Grant, or otherwise as may be required by the Lands Department, Buildings Department, Town Planning requirements or any other statutory or governmental requirements.

45. If the restriction is intended to exclude advertisement of other irrelevant information, then it should be stated out explicitly to such effect rather than imposing such absolute prohibition.

46. Clause 13 also provides no room for, and even prohibits the vendor from, giving more information which would assist prospective purchasers in making an informed decision. It is unfair to punish those vendors who have, apart from setting out the mandatory information, set out other information in the sales brochure with a view to make it more comprehensive. It is not unusual

that there are instruments which are neither the land grant nor DMC that create rights and obligations affecting the owners of a development, eg. deed of grant of easement, deed of grant of right of way, footbridge construction and maintenance agreement, etc. Such instruments and other matters that affect the rights and obligations of an owner should be disclosed in the sales brochure.

47. It is proposed that ***there should be a mechanism to allow inclusion of additional relevant and material information of the development in the sales brochure.***

Division 3 – Price List

Clause 22 – Sale of specified residential property at price in relevant price list

48. Clause 22(2)(a) states that the vendor may only sell the property at the price of that property as set out in the relevant price list.

49. Depending on the prevailing economic condition, a vendor may launch different payment methods to suit purchasers' needs from time to time. It is also quite often that a purchaser, subsequent to the signing of ASP, requests a change of payment method and consequently a variation in the purchase price. For example, the purchaser may subsequently select another payment method and asks for payment of full purchase price before completion. Normally, the developer will give a discount on the purchase price for the early payment of purchase price and the parties will enter into a supplemental agreement to vary the payment terms including the amount of purchase price. Under Clause 22(2)(a) of the Bill, such variation is not permitted, notwithstanding the genuine agreement of the parties. Another possible scenario is that if there is a sharp downturn in the property market and a purchaser cannot obtain sufficient mortgage finance from banks, the purchaser will naturally ask the developer-vendor for a reduction of purchase price so as to avoid its default of the purchase. Under Clause 22(2), the vendor will not be able to entertain the purchaser's request. The remaining option for the vendor will be to rescind the contract and resell the property to third party and sue the defaulting purchaser until he bankrupts or otherwise. This may cause an even more severe selling pressure on the market and prompt the number of bankruptcies in Hong Kong to rise sharply as what happened in 2000-2003 or other periods of financial crisis.

50. ***Clause 22 should therefore be amended to avoid the aforesaid consequences.***

Division 5 – Viewing of Property in Completed Development or Phase

Clause 31 – Viewing before sale

51. "Completed development" is defined in Clause 2(1) as "a development in respect of which an occupation permit has been issued". For a "completed development", the requirements of viewing of property under Division 5 of Part 2 will apply. Further, for a "completed development" governed by the Consent Scheme but the Consent to Assign ("CA") or Certificate of

Compliance ("CC") has not yet been issued, the Agreement for Sale and Purchase ("ASP") shall contain certain mandatory provisions as under Clause 40(3). The proposed mandatory provisions in this regard are set out in Part 1 of Annex D of the Consultation Paper.

52. However, in respect of a development governed by the Consent Scheme, the issuance of an Occupation Permit ("OP") does not mean that the development has been completed in all respects and is in a condition ready to be handed over to the purchaser. Normally, after the issue of an OP and before the issue of the CA or CC, construction and fitting out works will continue to be carried out on site for a period of 7 months. As it is not safe and is in fact dangerous for the property to be opened to potential purchasers for viewing during this period, such development should not be regarded as a "completed development" for the purpose of this property viewing obligation unless and until the relevant CA or CC has been issued by the Director of Lands and the vendor is in a position to validly assign property in the development to the purchasers.

53. For a development not governed by the Consent Scheme, they should only be regarded as a "completed development" for the purpose of this property viewing obligation when the OP has been issued with all the fittings, finishes and appliances set out in the ASP completed and the vendor is in a position to validly assign property in the development to the purchasers.

54. According to the mandatory provisions in Part 1 of Annex D, before the issue of the CA or CC, the property will not be sold in an as-is condition but will be sold with the fittings, finishes and appliances as set out in Schedule 4 to the ASP which are to be completed. The requirement of viewing the property during this period really serves no meaningful purpose.

55. ***The Committee submits that:***

(a) the meaning of "completed development" and "completed phase" for the purpose of the property viewing obligation shall be amended as appropriate; and

(b) Part 1 of Annex D should be deleted and relevant changes should be made to Annex C to cater for ASP governed by Consent Scheme to be entered into during the period between the issue of OP and the issue of Certificate of Compliance or Consent to Assign e.g. the expiry of building covenant and the Vendors right to alter the building plans of the development.

56. Clause 31(2) provides that the vendor is not required to make available a specified residential property for viewing if, among others, the vendor has provided a "comparable" residential property in substitution.

57. The word "comparable" has no legal meaning; and does not lend itself to certainty. Is a residential property with a ±15% difference in area a comparable? How about a property with a different elevation from the specified residential property?

58. It is important to prescribe a set of parameters within which a "comparable" may be identified. For example, in terms of area, the variation may not exceed a ±15% difference. Even with the proposed parameters, it is also necessary to provide plans for both the specified residential property and the comparable, along the line as provided under Clause 26(3), so that prospective purchasers may make a relevant genuine and meaningful comparison between the specified residential property and the comparable.

Division 7 – Preliminary Agreement and Agreement

Clause 39(2) – Execution of agreement for sale and purchase

59. It is not unusual that a purchaser may fail to execute the ASP within 3 working days after the date of the Preliminary Agreement ("PASP") due to unexpected reasons, such as leaving Hong Kong due to urgent matters, admission into hospital or the power of attorney made by the purchaser has not been properly executed... etc. Irrespective of the reasons behind, according to Clause 39(2), the PASP is terminated and the preliminary deposit is forfeited if the ASP is not executed within 3 working days by the purchaser. This will cause hardship and unfairness to such willing purchaser who has lost the preliminary deposit.

60. ***It is suggested that, similar to an application for a waiver from the Lands Department under the Consent Scheme, there should be provisions in the Bill to deal with such special cases by allowing the purchaser to enter into the ASP within a specified time period as the Authority may prescribe.***

Clause 40 – Provisions incorporated into PASP and ASP

61. Mandatory Terms of the ASP for Completed Development (Annex D — Parts 1 and 2) –We fail to see the need to incorporate the mandatory terms in the ASP for completed development where the CC or the CA has been issued if the purchaser has separate legal representation. ***The freedom of contract should be respected and it is suggested that the legislature should leave the vendor and the purchaser to negotiate the terms of the ASP for completed units if they have separate legal representation.***

Division 8 – Register of Transactions

Clause 42 – Contents of, and entries in, Register of Transactions

62. Clause 42(1)(g) requires the register of transactions to set out information on whether the purchaser is or is not a related party to the vendor. Clause 42(8) states where the vendor is a company, a related party is (i) a director of the vendor; (ii) a parent, spouse or child of a director of the vendor; or (iii) a manager of the vendor. The drafting is inadequate as it does not extend the disclosure requirement to a director of the *parent/holding company of the vendor* or the *joint venture developer* of the vendor or parent/holding company of the vendor and the *parent/holding company of the joint venture developer*.

63. Under the present drafting of Clause 42, for example, if the vendor (e.g. URA, MTRC, KCRC or other governmental special purpose corporate vehicles or a religious/charitable institution) forms a joint venture with a developer to develop the development, then even if the purchaser is a director of the joint venture developer/the parent company of the joint venture developer, there is still no need to make the disclosure. Also if the vendor develops on its own, then even if the purchaser is a director of the parent company of the vendor but not a director of the vendor, there is still no need to make the disclosure. This is contrary to the intention of the Bill.

64. ***The Committee suggests that Clause 42 should be re-drafted to catch the aforesaid situations.***

Division 9 – Exemptions and Additional Requirements

Clause 48 – Additional requirement: unsold property in completed development

65. Some development projects may have been completed a long time ago and most of the residential units have been sold and only a small number of unsold units are retained by the developer. The development may be under the management of a manager who is not the DMC manager and a substantial second market of the residential unsold units in the development has been in existence for some time.

66. For such cases, there is no real difference between the sale of such unsold units held by the developer and the second hand sale of a sold unit by subsequent purchasers.

67. It is unreasonable to require the developer to prepare a sales brochure which may never have been in existence in order to comply with Division 2 of Part 2 for sale of such unsold units.

68. The information about the development in the possession of the developer may also not be update. For example, the club house facilities and the other common areas and facilities may have already been changed. It will be extremely burdensome and costly on the developer who will pass the cost onto prospective purchasers.

69. ***The Committee proposes that Section 48(7) should be amended to the effect that if the number of unsold property in completed development mentioned in Section 48 shall not exceed certain percentage (e.g. 5%) of the total residential units in the development and the development has been completed for a certain period (e.g. 5 years), the requirement under Division 2 of Part 2 shall be dispensed with.***

Rigidity in the legislation and absence of mechanism to approve deviations in justifiable circumstances

70. The Bill basically includes all the detailed requirements regarding sales brochure, pricelist, show flat, advertisements, form of preliminary agreement

and formal ASP, etc. into the body of legislation. Such arrangement results in rigidity and the lack of flexibility. Any amendment would call for amendment of the legislation which entails lengthy and cumbersome procedures.

71. As mentioned above, under Section 39(2), if a purchaser fails to execute the formal ASP within 3 working days after entering into the preliminary agreement, the preliminary agreement is terminated and the preliminary deposit is forfeited. The Bill does not provide any mechanism to approve deviation from the mandatory provisions of the preliminary agreement and the formal ASP and it could result in very harsh consequences for purchasers. For example, S39 of the Bill requires the purchaser to execute an agreement for sale and purchase within 3 working days. There is no exception even if the purchaser has died or is hospitalised in the meantime. Similar requirement can be found, as one of the standard conditions, in the pre-sale consent granted by LACO under Consent Scheme. However, in practice, in special circumstances on giving reasonable explanations to LACO's satisfaction, LACO would give specific waiver of the relevant pre-sale consent condition and allow the purchaser to sign the formal ASP within a further period or allow refund of preliminary deposit paid out of the stakeholder account.

72. ***The Committee proposes that:***

- ***Some sales practices in Part 3 should not be included in the main body of the legislation but can be included in the guidelines to be issued by the Enforcement Authority to be published in the Gazette; and***
- ***The Ordinance should also include a mechanism to provide flexibility in approving deviations from the detailed requirements in justifiable circumstances by the Enforcement Authority.***

PART 3 – ADVERTISEMENT OF SPECIFIED RESIDENTIAL PROPERTY

Clause 50 – Advertisement must not contain false or misleading information

73. Clause 50 creates an offence for publishing an advertisement containing information that is false or misleading in a material particular. What is material is not well defined. ***The imprecision of this offence is worrying. More precise definitions must be provided.***

74. In view of the magnitude of the offence - a maximum fine of HK$ 5 million and imprisonment of 7 years, the charge should be limited to cases where the offending act would cause actual financial loss to a purchaser *of a sufficient large amount* and not of a trivial omission or acts which can be compensated or remedied by the vendor readily.

75. In the interest of justice, more deliberations on how this offence should be defined in a more precise way are needed.

Clause 53 – Additional requirements for printed advertisement

76. Clause 53(3)(a) provides that an advertisement must contain the information of the vendor and if the vendor is a company, every holding company of the vendor. As mentioned earlier in this paper, the Bill fails to make the holding company of the vendor (i.e. the developer) liable. In that case, what is the use of setting out the information of the holding company? This information is beneficial to the vendor only and may be misleading to the purchasers.

PART 4 – MISREPRESENTATION, AND DISSEMINATION OF FALSE OR MISLEADING INFORMTION ETC.

Clauses 55 and 56 – Deletion of reference to omission of a material fact in relation to the offence of misrepresentation under Section 55 and offence of dissemination of false or misleading information under Section 56

77. Clause 55(1) creates an offence of a person making a fraudulent misrepresentation or reckless misrepresentation for the purpose of inducing another person to purchase a specified residential property. The scope of fraudulent misrepresentation and reckless representation as defined under Clauses 55(3) and (4) respectively are very wide. The creation of such offence is worrying. ***A more precise definition of what constitutes an offending fraudulent or reckless misrepresentation is needed.***

78. Omission of a material fact will also render a statement a fraudulent or reckless misrepresentation. ***The meaning of "omission of a material fact" is too vague and creates uncertainty:***

- a fact, e.g. a cemetery which is within the view of the property (even on the other-side of the harbour), may be material to some prospective purchasers but not others
- in the case of sale of an uncompleted development, if the vendor provides the sales brochure in compliance with the new law, it is difficult to see what else the vendor would need to further disclose. In the interest of certainty (as a breach of Clause 55(1) will be an offence) "omission of a material fact" should be qualified such that the vendor cannot be said to have omitted a material fact if he provides a compliant sales brochure in accordance with the new law.
- similarly, in case of completed development, if the vendor produces a compliant vendor's information in accordance with Clauses 46 or 48, then the vendor cannot be said to have omitted a material fact.

79. It is different from other Ordinances like the Securities & Futures Ordinance ("SFO") as the Bill has already set out in great specific detail what is required to be disclosed in the Sales Brochure whereas the SFO does not list out the details of what is required to be disclosed to prospective purchasers...

80. ***The Committee proposes that:***

- ***Sections 55(3)(c), 55(4)(c) and 56(1)(b)(ii) should be deleted.***
- ***If those Sections are not deleted, at least what constitute the scope of omission of a material fact should be defined clearly.***

PART 5 – DEFENCE PROVISIONS, AND OTHER SUPPLEMENTARY PROVISIONS ON OFFENCES

Division 1 – Defence of Reasonable Precautions and Due Diligence

Clause 57 - Defence

81. Clause 57 provides that it is a defence to prove that the person took all reasonable precaution and exercised all due diligence to avoid the commission of the offence by that person if the person is charged with an offence under Part 2 or 3 (i.e. on the sales practices and advertisement) (other section 50). It is too vague and lacks certainty.

82. ***The Committee proposes that:***

- ***The word "all" in line 2 and line 3 of Section 57 shall be deleted.***
- ***It shall be a defence if a person can prove that the person took reasonable practicable steps or measures so far as is necessary to ensure that proper safeguards exist to avoid the commission of the offence by that person.***
- ***Alternatively, it shall be a defence if a person did not know and could not with reasonable diligence have known that the offence has been committed.***

Defence Provisions for professionals

83. Clause 56(1) may be too wide. A person commits an offence if the person disseminates, or *authorizes or is concerned* in the dissemination of, information. Solicitors acting for the Developer in preparing sales brochure or other sales materials may commit an offence.

84. It is foreseeable that if a person is charged with such an offence, that person may try to make an excuse that he has relied on professional advice such as an authorized person (i.e. Architect) or its legal advisor in relation to the preparation of the relevant documents or making of statements. In this regard, the relevant professional may be dragged into the criminal charge and there is a possibility that the relevant professional may become criminally liable under the Bill for its mere negligence or mistake in advice or preparation of documents to the developer/ vendor (because of section 89 of the CPO or its equivalent common law rules). This in effect will impose a potential criminal liability for negligence or mistake on the professionals, such as architect or solicitors.

85. It should not be the original intent of the Bill to make the relevant professionals criminally liable for their negligence or mistake in this way. The consequences should be a civil one (at common law), and not a criminal one. ***The defences available under the Bill should be further expanded and it should be made clear to exempt the relevant professionals from any possible criminal charge for their mere negligence or any mistakes made. It is morally wrong to make the professionals criminally liable for the acts committed by the vendor. If the commission of an offence is due to a mistake made by a third party, or accident or some other cause beyond his control, then this should also be a defence. Similar defence of mistake, accident etc provided under section 26 of TDO should also be included in the Bill.***

Division 3 – Other Supplementary Provisions on Offences

Clause 62 – Liability of company officers etc. for offence committed by company

86. "Recklessness" should be deleted from Clause 62(1)(b)(ii) as consent or connivance should be sufficient. There are too many obligations to comply with (some in minute details) and recklessness is too low a mental state requirement. An analogy can be drawn from S101E of Criminal Procedure Ordinance (Cap.221).

Clause 63 – Time Limit for prosecution

87. Clause 63 provides that proceedings other than an indictable offence may be brought within 3 years after the commission of the offence.

88. Most of the offences under the draft Bill are akin to offences stated under the Trade Descriptions Ordinance ("TDO") (Cap 362). It is provided under section 19 of the TDO that the time limit for prosecution of an offence under the TDO is 3 years from the date of commission of the offence or the expiration of 1 year from the date of discovery of the offence by the prosecutor, whichever is the earlier.

89. ***Given that the nature of the offences stipulated under the draft Bill are all easily ascertainable by the prosecutor, it is submitted that a shorter period for prosecutions should be similarly imposed in the Bill so as to remove any uncertainty of the criminal liability of the relevant persons, which should not be dragged on indefinitely. As time passes, the memories of the relevant persons or witnesses would fade and the evidence of the commission of the offences or possible defences to any criminal charges may disappear or be difficult to trace; hence in the interest of justice, a shorter period of prosecution is needed. Clause 63 should be drafted in more or less similar terms as section 19 of the TDO.***

SCHEDULE 1 – INFORMATION IN SALES BROCHURE

Part 1 – Detailed Requirements for Specific Information Required to be Set Out (See Section 10(2))

Item 1 – Information on the development

90. Item 1(2)(b) states that the sales brochure must state the street number allocated by the Commissioner of the Rating and Valuation ("CRV"). What if the street number is not yet allocated by the CRV or the street number at the date of printing of the sales brochure is just a provisional one allocated by the CRV and subject to change? Please clarify.

Item 15 – Summary of land grant

91. Item 15(2)(f) states that the sales brochure must contain a summary of land grant concerning the lease conditions that are onerous to a purchaser. What lease conditions are *onerous* is sometime unclear and is a matter of subjective judgement. A more precise definition of what is onerous in that context should be stated clearly under the Bill.

Item 16 – Information on public facilities and public open space

92. Item 16(6) requires the sales brochure to set out the provisions of the land grant, the deed of mutual covenant and the deed of dedication that concern those facilities in open space and the part of the land. This means the reproduction of the entire title documents in the sales brochure. This is not sensible as they could be very lengthy and may not be comprehensible to the laymen-purchasers. Rather, a summary of the terms thereof should only be required.

93. Moreover, item 16(6) does not include any Deed of Grant of Easement or right of way or other rights of different nature granted under previous title document(s) or to be granted under other title document(s) that is/are to be entered into. Apart from the Land Grant, DMC and deed of dedication, there may be other important title documents of various nature that may affect the rights of the purchasers. These important documents should also be included in the list for disclosure under the sales brochure.

Part 2 – Additional Information Required to be Set Out

Item 21 – Service agreements

94. Item 21 states that the sales brochure must set out information on any agreement with a utility company for providing utility service for the residential property. The extent of information to be set out is not stated precisely under the said item 21. More exact scope of information required should be specified.

Item 25 – Maintenance of slopes

95. Item 25 mentions slope maintenance information. What about the requirement as to the maintenance of any footbridge, any turnabout, any public road, etc.? Are they also be required to be set out? Please clarify.

SCHEDULES 3, 4 & 5 – Proposed Mandatory Provisions for Preliminary Agreement and Agreement for Sale and Purchase (set out in Annexes B, C & D of the Consultation Paper)

Annex B - paragraph 9, Annex C - paragraph 35, Annex D - Part 1 -paragraph 31 and Annex D - Part 2 - paragraph 10 under the Consultation paper

96. These paragraphs state that the vendor shall not restrict the purchaser's right to raise requisition or objection in respect of title. Such mandatory restriction is inappropriate.

97. In the majority of cases, a vendor is under a duty to, and can as a matter of law, prove and give good title and these situations should not present a problem. However, there may be some exceptional cases, e.g. where there is missing land grant, missing power of attorney, defective company's execution, missing title documents, possible adverse possession claim by a trespasser, or the developer-vendor is in fact selling an interest in a property under construction which is for less than the whole of the residue of the term of years under which the property is held under the relevant Land Grant (see also Law Society's Practice Direction A2 requiring separate representation under such situation, an example is *Robertson Place*, which was sold for a lease term of 99 years out of a 999-year term of the Land Grant). In these special situations, the vendor and purchaser will be separately legal represented and the preliminary agreement and formal agreement for sale and purchase will be specially drafted to include special provisions dealing with such title issues.

98. The practice mentioned in the above paragraph is a well accepted practice in Hong Kong and should not be altered by the Bill; otherwise it will make these developments with special title issues virtually not saleable even with full disclosure to the purchasers and with separate legal representation.

Annex D - Part 1: Mandatory Provisions for Agreement for Sale and Purchase for Completed Development under Consent Scheme

99. The captioned form may be inappropriate. It seems that it is an agreement for sale and purchase for an uncompleted development which will require stakeholding of money by the vendor's solicitors for the payment of construction costs and professional fees, rather than an agreement for sale and purchase for a completed development. Please clarify.

SCHEDULE 6 – VENDOR'S INFORMATION FORM

100. Paragraphs 1(1)(h) and (i) may not be wide enough to cover building orders, illegal structures or alterations.

TRANSITIONAL PROVISIONS

101. The Bill does not include any transitional period provisions. It takes substantial time for the vendor and the developer to prepare sales brochure and other documents and to set up show flats and make arrangements to comply with the requirements under the new law and such requirements cannot be confirmed as the law in its final format cannot be ascertained unless and until the Bill (with all the guidelines set out) is passed.

102. It is suggested that suitable transitional measures should be adopted. This is required so that, for example:

- The form of agreement for sale and purchase (i) already approved by the Lands Department under the existing Consent Scheme or (ii) already annexed to a statutory declaration declared by a partner of a law firm and registered at the Land Registry for the purpose of pre-sale under the Non-consent Scheme should not be affected by the draft Bill after the passing of the Bill.
- Show flats already built by a vendor and already opened for viewing by prospective purchasers or by the general public used for sale adopting the previous measures stipulated under the Consent Scheme or REDA's guidelines should not be affected so that there is no further need to make further alterations so as to suit the new requirements of the Bill.
- Similarly, sales brochure already printed prior to the date of the Bill's coming into effect should not need be amended to fit the new requirements under the new law as sales have already implemented; this transitional measure is also needed to avoid any confusion to the public.
- Other matters covered under the Bill should also have similar transitional provisions. This requires a more careful consideration of the other provisions of the Bill.

The Law Society of Hong Kong
The Property Committee
14 February 2012