

Ref : CB1/BC/11/95/2

Bills Committee on Estate Agents Bill

**Minutes of meeting
held on Tuesday, 7 March 1997, at 8:30 am
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Andrew CHENG Kar-foo (Chairman)
Hon Edward S T HO, OBE, JP
Hon Ronald ARCULLI, OBE, JP
Hon Albert CHAN Wai-yip
Hon LEE Wing-tat
Hon LI Wah-ming
Hon CHAN Yuen-han
- Members absent** : Hon Mrs Selina CHOW, OBE, JP
Hon James TO Kun-sun
Hon CHAN Kam-lam
Dr Hon LAW Cheung-kwok
Hon NGAN Kam-chuen
- Public officers attending** : Miss Eva TO, Principal Assistant Secretary for Housing
Ms Sherman CHAN, Senior Assistant Law Draftsman
- Clerk in attendance** : Mrs Vivian KAM, Assistant Secretary General 1(Acting)
- Staff in attendance** : Mr Stephen LAM, Assistant Legal Adviser 4
Miss Becky YU, Senior Assistant Secretary (1)3
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I Draft Committee stage amendments proposed by the Administration

(LegCo Paper No. CB(1) 938 and 985/96-97)

Before commencing discussion on the draft Committee stage amendments (CSAs), the Principal Assistant Secretary for Housing (PAS for H) briefed members on the Administration's response to concerns raised by members which had not been addressed in the CSAs.

Clause 2. Interpretation

2. PAS for H said that legal advice from the Attorney General's Chambers (AGC) had been sought on the proposed exclusion of public tender from the application of the Bill. As both public tender and auction were different from mainstream estate agency work and had been treated separately in other types of disposition of properties such as the Sale of Goods Ordinance and the Unconscionable Contract Ordinance, the Administration had no objection to excluding public tender from the Bill as in the case of auction. Consideration was being given to amend clause 2(3)(b)(i) as "references in this Ordinance to estate agency work are not to be construed as including references to work which relates solely to a survey, to a valuation or to disposition by way of competitive tender or auction" to effect such a change. The Senior Assistant Law Draftsman (SALD) supplemented that reference had been made to other similar legislation in proposing the amendment. On the definition of "public tender", SALD advised that there was no express interpretation for the term in question under the existing legislation.

Clause 3. Exemption

3. PAS for H said that the Estate Agents Authority (EAA) was empowered under clause 3 to grant exemptions to certain class or description of persons, subject to the approval of the Secretary for Housing. These exemptions would be referred to the Legislative Council for approval and amendment if necessary within a specified period of 28 days. She stressed that this was the normal procedure for most subsidiary legislation, and that it was uncommon for orders to be passed by positive resolution as suggested by members.

Clause 13. The register

4. As to whether the Administration would consider waiving the fees for inspecting the register of licensees under clause 13(5), PAS for H explained that as EAA was a self-financing regulatory organization, it was expected to finance its operation through the charging of fees including inspection fees. The general principle was to recoup the operating costs. On the feasibility of uploading the register onto the Internet, PAS for H advised that there were no specific provisions on the manner in which the register should be presented. EAA would take account

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of the experience in other organizations such as the automated system in the Rating and Valuation Department (RVD) before taking a final decision.

Clause 32. Appeal

5. The Administration was of the view that an application for an appeal should not affect the coming into force of EAA's decisions in relation to the refusal of renewal/suspension/revocation of a licence. Such decisions should be upheld unless and until these had been varied and reversed. Under clause 28(5)(b), suspension or revocation of licences should take effect on the date of the relevant notice or such later date as might be specified. Having regard to the availability of a due diligence defence and the opportunity of licensees being heard, the Administration considered that such disciplinary actions as suspension and revocation of licences should not be held up by an application for appeal. Moreover, EAA might need to suspend a licence as soon as possible in the interest of the public in the event of serious breaches. It would be impractical and inappropriate to prohibit the Authority from exercising such a power or postpone the effective date pending an appeal. PAS for H added that similar provisions were adopted in other licensing systems including the Leveraged Foreign Exchange Trading Ordinance (LFETO).

Clause 36. Contractual or other liability unaffected by suspension of licences

6. On the need for clause 36, PAS for H said that this had been retained on the advice of AGC to remove any uncertainties or grey areas over the liability of estate agents in the event of suspension or revocation of licences. The clause was in line with the common law position and similar provisions could be found in other licensing systems such as the Travel Agents Ordinance and the LFETO. She considered a direct comparison between proposals for clauses 36 and 45 inappropriate as the latter only sought to re-state the common law position.

Clause 37. Information as regards properties

7. PAS for H remarked that the subject of accessibility of property information had been thoroughly discussed at the meeting on 26 November 1996 and the Administration had set out in writing the proposed amendments to the Bill and various improvements made by the Land Registry and the RVD. She assured members that information required under clause 37(2) would be prescribed by EAA in the form of subsidiary legislation as reflected in the CSAs.

Clause 47. Advertising

8. The Administration recognized the need to define clearly in the Bill the term "advertisements" given the power of EAA to require certain prescribed statements or particulars to be included in the advertisements such as licence number of estate agents as was the case with registered travel agents. To this end,

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the Administration had incorporated in the CSAs a definition for advertisements which mainly referred to those in newspapers or other publications, by television or radio, display of posters, notices, signs, brochures, etc.

9. As regards the requirement for estate agents to seek written agreements from vendors before placing an advertisement for the vendor, PAS for H considered this essential as written agency agreements were fundamental to the proposed regulatory framework in improving the service standards of estate agents and minimizing disputes arising from verbal instructions. The Administration remained of the view that estate agents should obtain vendors' agreements before advertising the properties; this would also help tackle the problem of "fake listing". The proposal would not affect the efficiency of property transactions as the Authority might prescribe a standard form for the estate agency agreement.

10. In response to members, PAS for H confirmed that the transfer of cases among estate agents was allowed so long as the vendor concerned agreed to such an arrangement in an estate agency agreement. She supplemented that the listing of advertisements was prohibited without vendor's agreement.

Clause 53. Dispute over commission

11. Under clause 50, the Authority might prescribe by regulation the manner in which agreements which varied or supplemented the original one were to be made. As for commission, the Administration was of the view that any subsequent changes which had been agreed verbally should be followed by written agreement in order to protect the interests of both the estate agent and the client. PAS for H stressed that as an agreement was made between the two parties, either party was obliged to inform the other of changes to provisions contained therein.

12. Members then proceeded with a clause-by-clause examination of the marked-up copy of the Bill.

Clause. 2 Interpretation

13. A member questioned the rationale for excluding such professions as architects from clause 2(2)(b) since work undertaken by these professionals was very similar to those of solicitors, notary publics and accountants. PAS for H pointed out that clause 2(3)(b)(i) had stipulated clearly that any work done in relation to surveys, valuations or auctions should not be construed as estate agency work. SALD supplemented that reference had been made to overseas legislation in drawing up clause 2(2)(b). The intention of including solicitors in the clause was to provide for circumstances under which disposition of properties on behalf of clients might be required as in the case of executors of estates of deceased clients. She acknowledged the member's concern on the need to generalize the provisions under clause 2(2)(b) to encompass professions which were closely related to estate agency work and suggested that one possible solution would be to

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amend the clause as "in the course of practising his profession which does not ordinarily involve estate agency work".

14. As for developers' subsidiary companies, PAS for H advised that clause 2(3)(da) had spelt out the circumstances under which developers' subsidiary companies could be excluded from the Bill, and clause 2(4)(ii) had stipulated the scope of developers' first sale viz. the relevant properties were owned by the developers and had not been previously assigned. A member remained concerned about the status of developers in the event of non-transferability of land ownership as in the case of joint-venture projects with such statutory bodies as the Kowloon-Canton Railway Corporation and the Mass Transit Railway Corporation. SALD advised that both clauses 2(2)(da) and 2(4) had provided for the circumstances suggested by members.

Clause 6. General powers, etc. of the Authority

Clause 7. Directors by Governor

Clause 8. Authority may establish committees

15. No particular comments were made on these clauses.

Clause 10. Disclosure of interest, etc.

16. PAS for H advised that clauses 10(1)(b) to (d) had been included in the light of members' concern on the need to facilitate public access to declarations so made. Reference had been made to the Airport Authority Ordinance in drawing up these clauses. Members were supportive of the inclusion.

Clause 11. Staff of Authority, consultants

Clause 15. Estate agents to be licensed

Clause 18. Right to grant of licences

Clause 19. Grant of estate agent's licences to individuals restricted

Clause 20. Grant of estate agent's licences to companies restricted

Clause 21. Grant of salespersons' licences restricted

Clause 22. Applications for grant of licences

Clause 23. Renewal of licences

Clause 24. Refusal of applications for licence or renewal

Clause 27. Objections

Clause 28. Suspension or revocation of licences

17. No particular comments were made on these clauses

Clause 29. Investigations

18. In response to a member, PAS for H confirmed that the public would be informed of the results of investigations and relevant disciplinary actions as was the case with the Securities and Future Commission (SFC).

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Clause 30. Complaints

19. No particular comments were made on the clause.

Clause 31. Disciplinary powers

20. As regards the publication of disciplinary actions under clauses 31(1)(i) to (vi), PAS for H advised that EAA was required to publish notices of decisions consequential upon the exercise of disciplinary powers in accordance with clause 32(2)(a)(ii). Hon Ronald ARCULLI considered that flexibility should be accorded to EAA to take account of the seriousness of offences in publishing these notices, and suggested that reference should be made to the SFC in this respect.

Clause 32. Appeal

21. No particular comments were made on the clause.

Clause 33. Appeal panels and tribunals

22. A member sought clarification on the term "serve on" under clause 33(6A)(b); he was worried that the efficiency of EAA would be undermined in the event of non-delivery of notices. SALD explained that this would be interpreted in accordance with the Interpretation and General Clauses Ordinance. Furthermore, clause 43 on Giving of notices had already stipulated the manners in which notices should be given. PAS for H supplemented that every licensee was required to provide a registered address under clause 14 on Registered address to which all communications and notices might be sent. SALD undertook to refine the term having regard to the provisions under clauses 14 and 43.

Clause 34. Tribunal proceedings, etc.

23. PAS for H advised that clauses 34(2)(2A)(a) to (c) had been included in the light of members' concern on the manner in which proceedings should be conducted. Under these provisions, all proceedings should be held in public unless otherwise advised by the tribunal taking into account views of the parties to the appeal. Reference had been made to the Administrative Appeals Board Ordinance in drawing up these clauses.

Clause 35. Inquiry proceedings

24. No particular comments were made on the clause.

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Clause 37. Information as regards properties, etc.

25. In response to members, SALD advised that reference to clause 48 had been removed from clause 37 as clause 48 had been deleted, in any event the former focused on salespersons and was irrelevant to the latter which dealt mainly with licensed estate agents although it could be relevant for clause 37(3).

26. A member asked if the Administration would consider deleting the phrase "at any time prior to that at which the client becomes bound by contract to dispose of the property" in clause 37(1)(a)(v) as this had placed too much onus on the estate agents. SALD advised that the clauses 37(1)(a)(v) and 37(6)(a)(i) were complementary to each other; the latter stipulated that the onus of proving that a party was bound by contract at any time should rest with the defendant. Another member suggested including in the estate agency agreement a provision to require vendors to inform estate agents after disposition of the properties. SALD undertook to consider members' views.

Clause 38. Account's reports

27. No particular comments were made on the clause.

28. The Assistant Legal Adviser was requested to follow-up on the wordings of the CSAs to ensure that these truly reflected members' views expressed.

II Any other business

29. The Chairman requested members to inform the Clerk should they wish to move any CSAs on the Bill.

30. The next meeting would be held on Thursday, 13 March 1997, at 2:30 pm. An additional meeting had been scheduled for Wednesday, 19 March 1997, at 10:30 am.

Legislative Council Secretariat
9 May 1997