

Ref : CB1/BC/11/95/2

Bills Committee on Estate Agents Bill

**Minutes of meeting
held on Thursday, 13 March 1997, at 2:30 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Mrs Selina CHOW, OBE, JP (Chairman)
Hon Edward S T HO, OBE, JP
Hon Albert CHAN Wai-yip
Hon LEE Wing-tat
Hon Fred LI Wah-ming
Hon CHAN Yuen-han
Hon Andrew CHENG Kar-foo
Dr Hon LAW Cheung-kwok
Hon NGAN Kam-chuen
- Members absent** : Hon Ronald ARCULLI, OBE, JP
Hon James TO Kun-sun
Hon CHAN Kam-lam
- 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) 985/96-97)

As Hon Andrew CHENG Kar-foo had to attend a court case and would be late for the meeting, Hon Mrs Selina CHOW took the chair for the meeting.

2. The Chairman said that the purposes of the meeting were for the Administration to report on the five areas raised at the meeting on 7 March 1997 which required follow-up actions; for the Assistant Legal Adviser (ALA) to report any comments which he might have on the draft Committee stage amendments (CSAs), and for the Bills Committee to go through the remainder of the marked-up copy of the Bill starting with clause 39 on Accounts regulations.

Areas requiring follow-up

Clause 2. Interpretation

3. At the invitation of the Chairman, the Principal Assistant Secretary for Housing (PAS for H) said that legal advice from the Attorney General's Chambers (AGC) had been sought on the need to make references to specific professions in clause 2(2)(b). This had been retained to ensure that professions such as solicitors would not be caught unnecessarily by the definition of estate agency work in the course of practising their profession as in the case of conveyancing. As regards the proposed inclusion of architects and surveyors in clause 2(2)(b), PAS for H advised that the former were not directly related to estate agency work and the latter had been covered under clause 2(3)(b)(i). A member was not convinced of the Administration's response as architects might be required to certify certain property information such as floor area in property transactions. PAS for H suggested that one possible solution would be to include architects under clause 2(2)(b) or 2(3)(b)(i). Members were in favour of the former option.

4. As for the proposed exclusion of public tender from the application of the Bill, PAS for H advised that the Administration was prepared to accept members' views and would include the term tender in clause 2(3)(b)(i).

Clause 31. Disciplinary powers

5. PAS for H advised that reference had been made to the Securities and Futures Commission Ordinance and the Leveraged Foreign Exchange Trading Ordinance in the light of members' concern in relation to clause 31(2)(a)(ii) for the Estate Agents Authority (EAA) to publish notices of decisions consequential upon the exercise of disciplinary powers. As the Securities and Futures Commission could have flexibility in publishing notices of decisions, the Administration was prepared to amend the provision to bring it in line with other legislation.

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6. While acknowledging the need for EAA to publish the exercise of such disciplinary powers as suspension and revocation of licences to ensure consumer protection, some members considered that regard should be made to the seriousness of offences by requiring only cases other than admonishment to be published. They also suggested spelling out explicitly in subsidiary legislation the penalties provisions for different offences. PAS for H undertook to consider members' views. In reply to a related question, the Senior Assistant Law Draftsman (SALD) explained that there was no difference in term of legal liability for notices of decisions to be published in the Gazette or in newspapers, and that there would be no legal objection to including reference to newspapers in clause 31(2)(a)(ii).

Clause 33. Appeal panels and tribunals

7. SALD advised that consideration was being given to replacing the term "serve on" by "give" in clause 33(6A)(b) to eliminate possible grey areas.

Clause 37. Information as regards properties, etc.

8. PAS for H stressed that the provisions for estate agents to disclose fully to their clients (the vendor/purchaser or both) their interest in a property transaction as well as information on all offers made were aimed at ensuring that parties concerned would make informed decisions. In the light of members' concern on the onus of estate agents under clause 37(1)(a)(v), the Administration was prepared to replace the phrase "at any time prior to that at which the client becomes bound by contract to dispose of the property" by "the client withdraws his instructions, or that at which the estate agency agreement ceases to be of effect, whether by the elapse of a specified period of time or the happening of a specified event under that agreement, whichever is the earlier".

9. Some members asked if it was an offence for estate agents to change the particulars in an estate agency agreement such as the sale prices of properties without the prior consent of vendors. PAS for H explained that as an agreement was made between the two parties, either party was obliged to inform the other of changes to provisions contained therein. Under the circumstances suggested by members, estate agents concerned would have breached the provision under clause 47. As regards speculation involving confirmers, PAS for H advised that estate agents would have breached the provision if they failed to inform the clients of all offers made.

The Assistant Legal Adviser's report

10. After going through the CSAs, ALA proposed that the Administration should be invited to elaborate on the following:

Developers' subsidiary companies (Clause 2. Interpretation)

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11. On the applicability of the Bill on different scenarios relating to developers' subsidiary companies, PAS for H reiterated that the objective of the Bill was to regulate estate agency activities. Property owners including developers disposing of their own properties were not targets of the Bill and developers' subsidiary companies selling developer' wholly owned or joint-venture properties should therefore fall outside the scope of the Bill; these would be addressed by a separate piece of legislation on description of flats on sale to be introduced into the Legislative Council in 1997. In order not to unduly affect these commercial operations, there was a need for an express provision in the Bill to exclude such activities from the definition of estate agency work provided that the relevant properties were local properties owned or developed by the developers and had not been previously assigned, and that the subsidiary companies concerned must satisfy the criteria prescribed under clause 2(2)(da). These requirements were aimed at restricting the scope of exclusion to developers' first sale to ensure that activities including the re-sale of first sale properties by confirmors would come under the jurisdiction of the Bill. PAS for H conceded that the scope of exclusion might not be able to cover all scenarios such as the disposition of previously assigned properties by developers including those acquired for redevelopment but which later turned out to be non-viable. It was not possible to expand the scope to cover all odd cases without creating loopholes. In any case, if further exemptions were required in future, this could be done under clause 3.

*Due diligence (Clause 31. Disciplinary powers and
Clause 37. Information as regards properties, etc.)*

12. SALD said that reference had been made to other legislation in drawing up the definition for due diligence in the CSAs for these clauses. While agreeing that the CSAs as drafted spelt out in more concrete terms the general concept of due diligence and provide flexibility for EAA, ALA advised that the adoption of such a definition would be a policy decision. Members were generally supportive of the CSAs, in particular on clause 31(1)(1C) as this would serve as a useful reference for EAA in devising practising guidelines for estate agents. In reply to a member, SALD advised that information provided by vendors might not in all cases be accepted as a due diligence defence for estate agents as the latter were required to obtain and verify the requisite information under regulations made under clause 37(2). However, it would be possible that under special circumstances such as the breaking down of the infoline services reliance on vendor statements might be accepted as a due diligence defence.

Dual representation (Clause 37. Information as regards properties, etc.)

13. While noting that the provisions under clauses 37(1)(vii)(A) and (B) might not be all-embrative, ALA advised that the CSAs as drafted could largely address members' concern arising from the deletion of the term "fair, open and honest". He however pointed out that the adoption of these CSAs was again a policy

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decision. In response to members, PAS for H confirmed that apart from the information required under regulations made under clause 37(2), estate agents were only required to supply upon request to either of such clients information provided by the other client as regards the property concerned.

14. Members continued with a clause-by-clause examination of the marked-up copy of the Bill starting with clause 39.

Clause 39. Accounts regulations

Clause 40. Effective Control of offices; managers

Clause 45. Vicarious liability of estate agents

Clause 47. Advertising

15. No particular comments were made on these clauses.

Clause 48. Section 37(4) not to apply to certain licensed estate agents

16. ALA advised that the proposed deletion of clause 48 was in order from a legal point of view. Members were supportive of the deletion.

Clause 49. Estate agency agreement required as regards certain proposals and undertakings

17. No particular comments were made on the clause.

Clause 50. Form and content of estate agency agreement

18. Some members sought clarification on the term "specified relative" in clause 50(5)(a)(a) and if persons under this category were too wide. SALD explained that "specified relatives" referred to those stipulated under the definition in clause 50(5)(b). PAS for H supplemented that reference had been made to other advisory committees in drawing up the list of specified relatives, and that the important point was to ensure parity treatment to estate agents. She nevertheless undertook to consider members' view.

II Any other business

19. In addition to the meeting on 19 March 1997, members agreed to schedule another meeting for Tuesday, 18 March 1997, at 8:30 am.

20. The meeting ended at 4:25 pm.

Legislative Council Secretariat
8 May 1997