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Bills Committee to study the Estate Agents Bill

**Minutes of Meeting held
on Tuesday, 19 March 1996 at 4:30 p.m.
in Conference Room B of the Legislative Council Building**

Members Present : Hon Andrew CHENG Kar-foo (Chairman)
Hon Mrs Selina CHOW, OBE, JP
Hon Edward S T HO, CBE, JP
Hon Ronald ARCULLI, OBE, JP
Hon LI Wah-ming
Hon James TO Kun-sun
Hon CHAN Yuen-han
Hon NGAN Kam-chuen

Members Absent : Hon Albert CHAN Wai-yip
Hon LEE Wing-tat
Hon CHAN Kam-lam
Dr Hon LAW Cheung-kwok

**Public Officers
Attending** : Mr William SHIU Wai-chuen
Principal Assistant Secretary for Housing

Miss Eva TO
Assistant Secretary for Housing

Mr Dennis Morris
Senior Assistant Law Draftsman

**Staff in
Attendance** : Mr Arthur CHEUNG
Assistant Legal Adviser 5

Mrs Vivian KAM
Chief Assistant Secretary (Panels)2

Miss Becky YU
Senior Assistant Secretary (Panels)3

I. Internal Discussion

The Chairman said that this meeting was a continuation of the last two meetings on 8 and 18 March 1996 during which members examined the legislative framework of the Bill according to the order in the Legislative Council Brief. He also drew members' attention to the two letters dated 1 February and 18 March 1996 from the Family Realty Cosmo City Inc. tabled at the meeting.

II. Meeting with the Administration

2. Members raised the following major areas of concern on the proposed Bill. Where appropriate, the Administration was invited to provide its initial comments.

Part IV. Investigations and Discipline

Clause 31. Disciplinary powers

3. Members requested clarification on the rationale for the provision under Clause 31(4) for the Estate Agents Authority (EAA) to impose disciplinary sanctions on convicted estate agents without further investigations. They also enquired whether the licence of an estate agent was subject to revocation or suspension if an act of fraud was committed by one of its directors or salespersons, and about the effect which the suspension would have on the estate agent's business as well as on the clients' interest.

4. Members asked for the rationale for not imposing cash penalty apart from costs recovery under Clause 31(5).

Clause 32. Appeals

5. On Clause 32(2), members considered that in addition to a stipulated notice period for an appeal, there should also be a specified period for the appeal to be heard in order to avoid possible delay. In response to the Chairman, Mr William SHIU advised that the subject would have to be considered by the EAA in due course.

Clause 33. Appeal panel and tribunals

6. With regard to the type of persons to be appointed as members of the appeal panel and tribunal, members considered that reference should be made in the Bill of the background and composition of members of the appeal panel. They also enquired whether the power for the Secretary for Housing (S for H) to appoint members to the appeal channels should be delegated to an independent authority and if other Policy Secretaries had similar power.

7. In reply, Miss Eva TO confirmed that members of the EAA would not be eligible for membership of the appeal channels. Mr SHIU also advised that the S for H was empowered to appoint appeal channel members in his capacity as a public officer and he would do so in accordance with the spirit of the legislation. It was not uncommon for a Policy Secretary to appoint persons to an appeal panel. At the Chairman's request, Mr SHIU undertook to provide examples for members' reference. Miss TO supplemented that the Director of Administration had been consulted on the feasibility of placing the tribunal under the central Administrative Appeal Board but this was ruled out having regard to the specific nature of disputes involved in the panel.

Clause 34. Tribunal proceedings, etc

8. Members expressed concern about the type of persons, as stated in Clause 34(2), who could be present at proceedings apart from counsel or solicitor. Mr SHIU advised that the intention behind the clause was to provide for flexibility for the tribunal in prescribing suitable procedures. The type of persons in question referred to those who could represent parties concerned in the proceedings, such as an accountant in financial disputes.

Clause 35. Inquiry proceedings

9. On sub-clause (1)(c), members asked for the rationale for empowering the EAA to admit or exclude the public from the inquiry, and the standard to be adopted.

Part I - Preliminary

Clause 3. Exemptions

10. Members considered it necessary for a list of exemptions to be annexed to the Bill for easy reference. They wished to know whether subsidiary or agency arms of properties developers handling the sale of properties owned by the developers could be exempted, and whether partners of joint-venture development appointed as project managers and sales agents were either exempted or covered by the Bill. Members requested that the definition of estate agency work under Clause

2 be made more explicit to eliminate grey areas including for example auctions and sales before and after auctions. Since the work undertaken by surveyors in this respect was similar to those of solicitors and accountants, and surveyors in turn were governed by rules and regulations in their own profession, consideration should be given to exempting surveyors from the application of the Bill.

11. In reply, Mr SHIU advised that the EAA was empowered to grant exemption, subject to the approval of the S for H, and such exemption would have to be promulgated. Mr SHIU clarified that property developers and their staff, or any owners selling their own properties were not targeted under the Bill. The Administration was aware that developers might adopt various arrangements for sale of properties. The Administration's objective was to ensure parity treatment for all existing estate agency work. The Real Estate Developers Association of Hong Kong had been consulted on the possible effects of the Bill, and its legal adviser had been requested to provide information on arrangements adopted by developers in the sale of properties. Mr SHIU undertook to set out in writing the Administration's position on this matter.

12. On the proposed exemption of surveyors from the Bill, Mr SHIU emphasized that the Bill did not provide exemption for solicitors and accountants who practised estate agency work. For avoidance of doubt, Clause 2(3)(b)(i) specified that references in the Bill to estate agency work were not meant to include work which related solely to a survey, a valuation or an auction. As regards the definition of estate agency work, Mr SHIU advised that this generally referred to work done by an estate agent in the course of a business.

Part VII - Miscellaneous

Clause 53. Disputes as regards commission

13. Members considered it impractical to draw up a new agreement if subsequent changes on for example the amount of commission had been made. A member remarked that contracts were not very commonly used nowadays except in the sale of land. Mr SHIU advised that this provision was included because many disputes between estate agents and clients were related to the payment of commission. In order to protect the interests of both agents and clients and to facilitate settlement of disputes if required, written agreements should be drawn up.

14. Members urged the Administration to re-consider whether the EAA's decision should be "final and binding" despite the existence of other channels of arbitration. Miss TO clarified that this provision enabled disputes be settled in a quicker and less costly way, as long as both parties agreed to refer the matter to the EAA for arbitration. If either one refused to do so, the other party could always seek redress through other judicial channels.

Clause 55. Immunity

15. Members considered that similar powers requiring a person to "answer questions put to him in any investigation" were only conferred upon the Securities and Futures Commission and the Independent Commission Against Corruption whose nature of work had significant impact on the society. They sought elaboration on the rationale for including similar provisions in the Bill and urged the Administration to re-consider its need.

Clause 56. Offences

16. The Chairman said that the majority of deputations felt that criminal liability was unnecessarily harsh and that this was uncommon amongst other common law jurisdictions. Members were of the view that incrimination should only apply to dishonest acts of estate agents whereas non-compliance due to negligence should be the subject of disciplinary sanction. They were worried about the reliability of information provided by third parties, as in the case when the Public Order (Amendment) Bill was considered, and considered that any accusations relating to the supply of false or misleading statement or information would need to be substantiated that this had been done with intent. Furthermore, the criminal law had already covered cases of fraud. In reply, Mr SHIU emphasized the need for adequate disciplinary measures as effective deterrents against serious breaches. Nevertheless, in order to address members' concern, the Administration would consider bringing in the concept of "due diligence" so that persons who had taken all reasonable steps in discharging their duties dutifully would not be unduly penalised.

III. Date of Next Meeting

17. The next two meetings would be held on:

- Tuesday, 9 April 1996 at 2:30 pm; and
- Wednesday, 10 April 1996 at 4:30 pm.

18. Before concluding, the Chairman urged the Administration to respond to members' concerns as early as possible.

19. There being no other business, the meeting closed at 6:30 pm.

LegCo Secretariat
16 May 1996