

Ref : CB1/BC/11/95/2

**Bills Committee on Estate Agents Bill**

**Minutes of meeting  
held on Wednesday, 26 February 1997, at 8:30 am  
in Conference Room B of the Legislative Council Building**

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

(LegCo Papers No. CB(1) 630, 712, 713, 861, 862, 908, 909 and 922/96-97)

The minutes of the meetings held on 23 July, 4 October, 30 October, 13 November, 18 November, 26 November, 10 December and 17 December 1996 were confirmed.

**II Draft Committee stage amendments proposed by the Administration**

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

2. The Chairman remarked that the Bills Committee had resumed meeting after a break of two months to enable the Administration to prepare for the series of Committee stage amendments (CSAs) to the Bill. Before commencing discussions, the Assistant Legal Adviser (ALA) was requested to prepare a marked-up copy of the Bill for members' reference at the next meeting.

*(Post-meeting note: The marked-up copy of the Bill had been circulated to members vide LegCo Paper No. CB(1) 985/96-97(02).)*

3. In response to the Chairman, the Principal Assistant Secretary for Housing (PAS for H) advised that in proposing the CSAs, the Administration had taken into account suggestions and comments made by the Bills Committee and views expressed by the public, the trade and professional bodies. The major areas covered by the proposed CSAs were as follows:

Developers' subsidiary companies (Clause 2)

4. PAS for H stressed that the objective of the Bill was to regulate estate agency activities; this commonly referred to work done in relation to the acquisition or disposition of properties on behalf of other persons. Property owners including developers disposing of their own properties were not targets of the Bill and developers' subsidiary companies selling developers' wholly owned or joint-venture properties including those where land ownership was not transferable fell outside the scope of the Bill. 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 owned or developed by the developers and had not been previously assigned.

5. A member sought clarification on the intention behind the phrase "previously assigned". PAS for H explained that this aimed at restricting the scope of exclusion to developers' first sale. As the sale of previously assigned properties normally took place in the secondary market, this would fall outside the scope of developers' first sale and as such the proposed exclusion would not apply.

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The member was not convinced of the Administration's response as there might be cases where developers would dispose of previously assigned properties such as those acquired for redevelopment but the project later turned out to be non-viable. Other examples would include the transfer and apportionment of joint-venture properties amongst developers which might also involve the process of assignment. Another member asked if the re-sale of first sale properties by estate agents within the three-month period of assignment would be excluded from the Bill. PAS for H reiterated that the proposed exclusion would only apply to developers' first sale, i.e., the vendors must be the developers or their subsidiary companies and the relevant properties had not been previously assigned. She supplemented that the Administration recognized the complexity of the issue and was still working on the relevant CSAs with a view to eliminating as far as possible any grey areas. These CSAs would be available for members' reference in about one week's time.

6. Hon LEE Wing-tat remained concerned that with the absence of legislation governing the sale of developers' properties, it would be against the principle of consumer protection to exclude developers' subsidiary companies selling developers' own properties from the application of the Bill. While agreeing that developers should provide accurate sales description of flats put for sale, PAS for H emphasized that this fell outside the scope of the Bill and would be addressed by a separate piece of legislation on description of flats on sale to be introduced into the Legislative Council in 1997. She supplemented that the Administration would likely need to make consequential amendments to the Bill after enactment of the proposed legislation.

7. Given the divergent views on the proposed exclusion of developers' subsidiary companies, PAS for H asked if the Bills Committee could give some indications as to the future direction so as to enable the Administration to work out the relevant CSAs. Members considered that the Administration should proceed with the CSAs in accordance with the pre-determined policy; members who had different opinions could move amendments at a later stage.

### Direction by the Secretary for Housing (Clause 7)

8. PAS for H said that the Administration had made reference to other legislation including the Hospital Authority Ordinance and the Securities and Futures Commission Ordinance (SFCO) in the light of members' concern on the power of the Secretary for Housing (S for H) to issue directions to the Estate Agents Authority (EAA) on the grounds of public interest. As such a power was normally conferred upon the Governor, the Administration was prepared to amend the provision to bring it in line with other Ordinances.

9. In reply to a member, ALA confirmed that any decisions on the delegation of such a power would be an administrative arrangement and LegCo would not be notified.

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### Objections (Clause 27)

10. PAS for H said that similar objection mechanisms were available to members of the public who could object to applications for the grant or renewal of licences on specified grounds, e.g. activities involved might cause nuisance or inconvenience to residents in the vicinity as in the case of amusement games centres and licensed bars. Similar mechanisms however were uncommon in the licensing/registration systems of professions or trades including solicitors, surveyors, medical practitioners, leveraged foreign exchange traders, travel agents, insurance agents and security guards. In view of the existence of a complaint channel for members of the public and for sanctions against breaches of licensing requirements in the Bill, the Administration had no objection to removing clause 27.

11. In response to a member, PAS for H stressed that the proposed deletion of clause 27 would have no bearings on the eligibility criteria for licences, and that EAA would take into account the requirements stipulated in clauses 19 to 22 in considering applications for the grant or renewal of licences. Nevertheless, contravention of any of these provisions would constitute a cause for complaint against estate agents.

### Investigation power (Clauses 29 and 55)

12. To address the concern over possible abuse of EAA's investigative power, the Administration proposed to amend clauses 29 and 55 as follows:

- (a) requiring investigators appointed or employed by EAA to maintain confidentiality of information obtained during the course of investigations;
- (b) refining the provisions to specify the grounds under which investigative powers might be exercised;
- (c) defining clearly the identity of investigators;
- (d) requiring EAA to inform licensees under investigation of the results of investigations; and
- (e) removing the power to require from persons under investigation answers which might lead to self-incrimination.

13. In reply to a related question on (d) above, PAS for H explained that EAA would be required to inform the licensees under investigation the results of investigations, recommendations made by the investigators as to whether exercise of powers under clause 31 should be considered, and other comments arising from

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the investigation including those on operational issues upon receipt of the final reports. Some members were not convinced that investigators should be in the position of making comments in the reports as these might have serious consequences on the estate agents. Another member suggested that comments should be made in the form of letters to the licensees concerned as was the case with the Securities and Futures Commission. PAS for H undertook to consider members' views.

14. Some members were of the view that a higher threshold for invocation of investigation such as "prima facie evidence" as opposed to "has reason to believe" should be adopted in clause 29 as the latter was too subjective. PAS for H stressed that the phrase "has reason to believe" was commonly used in other regulatory framework including the SFCO and the Leveraged Foreign Exchange Trading Ordinance. She cautioned that the investigative role of EAA would be compromised in the event prima facie evidence was required. In reply to a related question on clause 29(7), PAS for H explained that this had been included to bring it in line with similar provisions in SFCO. She however emphasized that the court was the authority in making the decision of whether convicted licensees should pay EAA the whole or part of the costs or expenses of the investigation.

### Disciplinary powers (Clause 31)

15. The Administration proposed to amend the clause along the following lines:

- (a) to stipulate clearly that disciplinary actions should only be exercised by the EAA or a disciplinary committee appointed by it;
- (b) to stipulate that disciplinary actions should not be exercised without first giving the licensees a reasonable opportunity of being heard and to provide a "due diligence" defence for licensees; and
- (c) to provide EAA with the power to impose fines in addition to other disciplinary powers such as suspension or revocation of licences.

16. In response to members, the Senior Assistant Law Draftsman (SALD) advised that legal advice on the term "well-founded" in clause 31(1)(b)(ii) had been sought from the Civil Division of the Attorney General's Chambers (AGC). Retention of the term had been recommended as this was commonly adopted in other legislation such as sections 69 of Cap. 32, 81 of Cap. 480 and 77 of Cap. 487; furthermore, the term had its specific meaning in legislation. Members were generally supportive of the proposed retention.

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### Provision of property information (Clause 37)

17. In the light of the concern that estate agents might have difficulties in meeting the statutory requirement on provision of property information, the Administration was prepared to clarify in the clause both the exact types of information required and the power of EAA in making regulations and guidelines relating to such a requirement. It would also amend the clause so that specific regulations could be made for properties of a particular class or description. Furthermore, the incorporation of the concept of "due diligence" would provide a defence for estate agents who had taken reasonable steps to obtain the required information.

18. As to whether the Administration would prescribe by way of a schedule the avenues through which property information could be obtained including the Buildings Department, PAS for H assured members that a list similar to the Annex to LegCo Paper No. CB(1) 415/96-97 detailing the sources such as relevant government departments from which property information could be obtained would be drawn up.

19. A member asked if the provisions under the Bill would cover overseas properties at the present stage. PAS for H reiterated that the Administration aimed at phasing out implementation of different provisions in the Bill. The subject of overseas properties would be considered at a later stage taking into account the results of the Law Reform Commission's report on sales descriptions of overseas uncompleted residential properties. Hon Mrs Selina CHOW considered that a new round of discussion on the implementation might be required if overseas properties were to be included as members had expressed reservations at the recommendation of holding estate agents liable for any acts of overseas developers when the report was discussed at the meeting of the LegCo Panel on Housing on 2 December 1996.

### Duties of estate agents (Clause 37)

20. The Administration considered that the statutory requirement for estate agents to act in a "fair, open and honest" manner to both vendors and purchasers in the event of dual representation under clause 37(3)(b) and (4) was too vague, and that establishing contravention of these provisions would be too difficult according to the AGC. As most of the salient elements constituting the act of being "fair, open and honest" by estate agents had been spelt out in such provisions as supply of information to clients/full disclosure of beneficial interests/requirement to inform clients whilst acting for both vendors and purchasers/and need for informing the vendor of every offer, the Administration had proposed to delete the phrase in question.

21. Members held divergent views on the proposed deletion of the term "fair, open and honest". While some considered it undesirable to remove such a requirement as this would serve as a reference for EAA in devising practising

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guidelines for estate agents, in particular those on dual representation, others were of the view that the statutory requirement for estate agents to conduct transactions in a "fair, open and honest" manner was hard to enforce in practice. PAS for H advised that the deletion had been proposed on the basis that the conceptual requirement of acting in a "fair, open and honest" manner was too vague, and that the salient elements constituting the term had been spelt out in clause 37(1). She assured members that EAA would take into account the principles of "fair, open and honest" in drawing up practising guidelines for estate agents.

### Accountant's report (Clause 38)

22. As EAA had sufficient power under clause 39 to make regulations concerning the keeping of clients' money, accounts as well as records, and to ensure compliance by examining and requiring the production of all accounts and records, including those of the estate agents' own accounts, the requirement for annual accountants' reports was not necessary. The Administration therefore proposed to delete clause 38.

23. Some members expressed reservations at the proposed deletion having regard to a similar provision under the Travel Agents Ordinance (TAO) where it was a standing practice for travel agents to submit an annual accountant's report to the Registrar for monitoring purpose. In addition, the Bills Committee had only suggested confining the scope of clause 38 to clients' accounts rather than removing it from the Bill. PAS for H considered it inappropriate to compare TAO with the Bill as the former involved advance cash payment which was different from the latter where commission was only paid after the transaction had been completed. She said that the provision under clause 38 for estate agents to submit annual accountant's reports on their business had been subject to queries and debate as these accounts contained commercially sensitive information. It was also not practical for EAA to examine all the reports taking into account the number of some 5,000 to 6,000 estate agents in Hong Kong. Furthermore, clause 39(1)(d) had already empowered EAA to examine and require the production of all accounts and records including those of the estate agent's own accounts as and when necessary. As for the initial intention of clause 38, PAS for H advised that this had been included to enhance the monitoring role of EAA but in view of the public concern over the provision, the Administration had proposed to delete the clause from the Bill. Some members were worried that the proposed deletion might deprive clients of the opportunity of getting back the commission in the event of unsatisfactory services rendered by estate agents. PAS for H assured members that claims against estate agents regarding commission would be dealt with by clause 53. Hon Mrs Selina CHOW was in support of the Administration's proposal as estate agents' business accounts were commercially sensitive and should only be disclosed under exceptional circumstances.

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### Vicarious liability (Clause 45)

24. The Administration was of the view that the clause was unnecessary as the relevant concept had already been embodied in the common law. Members were supportive of the proposed deletion.

### Dispute over commission (Clause 53)

25. The objective of the clause was to provide a quicker and simpler avenue through which disputes over commission or fees could be settled. To avoid possible abuse by frivolous and vexatious claims, or overloading with cases on points of law or cases involving a large amount of money which should more appropriately be dealt with by a court of law, the Administration was prepared to empower EAA to decline the determination of cases, make regulations on the procedures for settling disputes subject to the approval of S for H, add new provisions to enforce the determination so made, and provide for an appeal mechanism against decisions of EAA. The relevant CSAs would be submitted for members' consideration together with those on the exclusion of developers' subsidiary companies in due course.

### Offences (Clause 56)

26. PAS for H said that the Administration remained of the view that criminal sanctions were necessary for certain serious breaches such as undertaking estate agency work without a licence, making false or misleading statement in connection with applications for the grant or renewal of licences and failure to repay clients' money. However, taking into account the general concern over offence provisions and the nature of individual offences in the Bill, the Administration proposed that:

- (a) relatively minor offences such as failure to report change of address and employment would be subject to disciplinary action including fines by EAA;
- (b) breaches of statutory duties under clause 37 relating to professional competence such as failure to provide correct information on properties would be subject to disciplinary action; and
- (c) the wording of some offence provisions should be refined.

27. PAS for H confirmed in response to a member that the disciplinary actions referred to in paragraph 14 of the information paper would include the imposition of fines.



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28. Before concluding, the Clerk was requested to prepare a list of concerns raised by members which had not been addressed in the CSAs and the Administration was asked to follow-up accordingly.

*(Post-meeting note: The list of concerns and the Administration's response had been circulated vide LegCo Paper No. CB(1) 985/96-97(03) and (04) respectively.)*

**III Any other business**

29. Members agreed to schedule the next two meetings as follows:

- Friday, 7 March 1997, at 4:30 pm (after the House Committee meeting); and
- Thursday, 13 March 1997, at 2:30 pm.

30. The meeting ended at 10:30 am.

Legislative Council Secretariat  
29 April 1997