



立法會 LEGISLATIVE COUNCIL  
石禮謙 議員 Hon Abraham Shek Lai-Him J.P.

28 May 2012

The Honourable CHAN Kam-lam, SBS, JP  
Chairman, Bills Committee on  
Residential Properties (First-hand Sales) Bill  
Legislative Council Secretariat  
1 Legislative Council Road  
Central, Hong Kong

Chairman,

**Responses to the Administration's Response (Ref: CB(1) 1936/11-12(02) to Issues Raised at  
the Bills Committee Meeting held on 24 April 2012**

I am writing to provide further information (see attachment) to assist the Bills Committee to study various issues relating to the Bill.

I am particularly not convinced of the Administration's belated response in respect of the Scope of the Bill, Exemption Arrangements under the Bill, Disclosure of Gross Floor Area and Mandatory requirements to provide minimum number of flats in price lists. The Administration's justifications are flimsy and have repeated most of the same responses previously given to the Bills Committee.

It was also appalling for the Administration to submit the Response document only one day before the Bills Committee meeting scheduled for 22 May 2012. I strongly urge the Administration to submit its responses in a timely manner to allow Members of the Bills Committee to better digest them and give meaningful feedback at the future meetings.

Yours sincerely,

Abraham SHEK Lai-him  
Member of Bills Committee on Residential Properties (First-hand Sales) Bill

Encl.

**Residential Properties (First-hand Sales) Bill**

**Responses to the Document entitled "Administration's Response to Issues Raised by Members at the Bills Committee Meeting held on 24 April 2012"  
prepared by Transport and Housing Bureau dated May 2012 (the "Response Document")**

**Background**

1. According to the Response Document (Ref: CB(1) 1936/11-12(02), the Administration purported to respond the enquiries on a number of issues relating to the Bill raised by the Members at the meeting held on 24 April 2012.
2. The issues referred to in the Response Document were further discussed in the meeting of the Bills Committee held on 22 May 2012.
3. This paper serves as an *aide memoire* to assist the Bills Committee to further study the issues relating to the Bill.

**General**

4. As required by the Administration, all written submissions relating to the Bill from the public including the invited stakeholders and concern groups shall be submitted by 20 April 2012. In the Bills Committee meeting held on 24 April 2012, certain invited stakeholders, associations, professional bodies and concern groups attended the meeting to make oral submissions to express their views and concerns on the Bill.
5. It took the Administration more than one month to review those submissions and comments and prepare the Response Document. However, the Administration's response given in the Response Document was only distributed to Members of the Bills Committee for consideration one day before the Bills Committee meeting scheduled for 22 May 2012.<sup>1</sup>
6. Further, it is noted that most of the responses given by the Administration in the Response Document simply repeated the responses previously given by the Administration *verbatim* without providing further elaboration, justification or examples to substantiate the Administration's position.
7. There is [*considerable*] reservation on the approach adopted by the Administration in handling the views and comments relating to the Bill. Given the far-reaching impact of the Bill on the real estate industry, the Administration should provide sufficient time and materials to facilitate Members of the Bills Committee to study those views and comments, so as to ensure that thorough and comprehensive discussions can be made and, if necessary, suitable amendments can be made to the Bill.

**Scope of the Bill: Should not apply to completed residential flats**

8. In the Response Document, the Administration repeated most of the same responses *previously* given to the Bills Committee (e.g. little difference between completed & uncompleted, developer and purchaser no in equal footing as developers in stronger position with more resources and bargaining power, etc). Unfortunately, no justification or further elaboration have been given by the Administration on the following issues :-
9. **Unfair treatment** to first-hand vendors :-
  - (a) First-hand vendors will be **deprived of an even playing field with second-hand owners (e.g. investors/ speculators)** because they can intentionally purchase some of the flats from the first-hand owners and then re-sell them as second-hand within a very short period of time. Such second-hand re-sale will **not** be subject to the Bill
  - (b) This will **discriminate** against first-hand owners and create room for **abuse by investors/ speculators**.
  - (c) For example: first-hand owners are required to issue a price list and wait for at least 3 days to launch the sale; but the second-hand owners of the same building can check the prices offered by first-hand owners in the price list and then offer to sell to the same target prospective purchasers at a **lower price in less than 3 days**.
  - (d) This will create **unfair competition** in favour of second-hand property market.
10. The Administration argues that since first-hand vendors already start selling units during construction period and continue to do so after construction, to draw a line between them is *artificial*. It is not entirely correct to say that drawing a line between the two is *artificial* :-
  - (a) There are fundamental differences between uncompleted and completed units :-
    - (i) Once completed with the occupation permit and (if applicable) certificate of compliance issued, then those units are in substance **no difference from normal second-hand units**.
    - (ii) There is **no** requirement whatsoever under the current administrative framework (whether under the Consent or Non-consent Scheme) to restrict the sale of completed residential units.
  - (b) **True apple-to-apple comparison**: completed first-hand units, by their very nature, are the same as second-hand units. If second-hand units are not subject to the Bill, then it does not seem to be fair that first-hand units shall nevertheless be subject to the Bill, as this will discriminate against the first-hand vendors in favour of second-hand owners.
11. **Not all first-hand vendors are developers** with the so-called stronger position in terms of resources and bargaining power as claimed by the Administration in the Response Document :-

- (a) The scope of the Bill is sufficiently wide to cover **vendors or owners of any kind** of first-hand residential units (e.g. owners of small non-New Territories houses or apartments).
- (b) Accordingly, the justifications provided by the Administration to include completed first-hand units in the Bill (i.e. that first-hand vendors is always in a "much stronger position") do not seem to be entirely accurate and correct.

### **Exemption Arrangements under the Bill**

#### **12. Exemption to Housing Authority ("HA")**

- (a) In the Response Document, the Administration again repeated substantially the same responses *previously* given to the Bills Committee to try to justify the special treatment granted to HA, that is, by arguing that Home Ownership Scheme ("HOS") flats are subsidized flats and HA has to follow sets of parameters to dispose of HOS flats). Unfortunately, no justification or further elaboration have been given by the Administration on the following issues :-
- (b) **Absurd outcome:** Projects jointly developed by HA and private developers, doubtful whether only HA will be exempted from the application of the legislation. If so, then, in the same development, the HA will be exempted from the legislation but private developer will be subject to the legislation.
- (c) Even if the HA may be exempted from the relevant measures and arrangements regulating the sale of first-hand units in Part 2 of the Bill (e.g. sales brochures, price lists, etc), there is **no reasons why the HA should also be totally exempted from other parts of the Bill (i.e. Part 3 to Part 6).**
  - (i) The remaining Parts of the Bill go to some basic and fundamental principles relating to the sale of first-hand units. For example :-
    - Part 3 regulates advertisement of residential units.
    - Part 4 imposes criminal liability on misrepresentation and dissemination of false or misleading information.
    - Part 5 provides for relevant defences to criminal liability and regulates the liability or company officers for offence committed by company.
    - Part 6 deals with the investigation and supervision by the enforcement Authority.
  - (ii) Even if, which is not agreed, HA can be exempted from the measures imposed by Part 2 of the Bill for the purported reason that HOS flats are subsidized flats and HA has to follow sets of parameters to dispose of HOS flats, such reason cannot be a justification to exempt the HA from complying with the *remaining Parts* of the Bill.
  - (iii) This is especially the case because, according to the Legislative Brief and other explanations provided by the Administration, the purpose of those measures is to safeguard the interest of prospective purchasers. The buyers of the HOS

flats are no different from other prospective purchasers and there is no justification as to why those prospective purchasers do not deserve the same degree of protection offered by the *remaining Parts* of the Bill

13. **Single house in New Territories Exempted House ("NTEH")**

- (a) The Administration claims (at page 11 of the Response Document) that the Bill only intends to exempt the sale of one single house with certificate of exemption under the Buildings Ordinance and that extending the exemption to other non-NTEH single houses may lead to possible abuse.
- (b) However, NTEH single houses, by their very nature, are in substance no different from other non-NTEH houses, for so long as they are categorised as "houses". In any event, there is already guideline published by the Lands Department on the interpretation of "house" for the purpose of Government land grants.
- (c) This exemption is therefore **unfair** to, and **discriminatory** against, other vendors of other non-NTEH houses.
- (d) Such exemption should either be **removed** or be expanded to **other non-NTEH houses**.

14. **Sale of units to existing tenants**

- (a) This category of exemptions already presumes that the Bill will apply to *completed* residential flats. This is because a flat can be leased out to tenants only after it has been completed. For the reasons given in the above paragraphs, the Bill should not apply to completed residential flats, and it follows that this category of exemption also should **not** apply.
- (b) However, entirely without prejudice to the aforesaid position, even if this category of exemption should apply, the proposed duration of 36 months and the proposed percentage of at least 95% of the number of the residential properties for letting are unrealistic and practically impracticable. Such duration and percentage should be reduced to a more reasonable threshold.
- (c) The Administration responded (at page 9 of the Response Document) that it sees the need to set a higher threshold to ensure that a vendor will not simply withhold the sale of a development for a relatively short period of time in order to circumvent legislative control.
- (d) The Administration's response disregards the commercial reality of the real estate market that a decision as to whether to sell or lease the units in a development largely depends on the demand of the units and the prevailing market conditions. In any event, the requirement that at least 95% of the number of the residential properties for letting is unfair to, and discriminates against, the vendors of *small* residential developments because, if the number of units included in a development is small, then the meeting of 95% threshold would naturally mean 100% of the residential properties.

15. **Other special circumstances which justify exemption** (e.g. distribution between family members, intra-group transfer)
- (a) The Administration confirms (at page 10 of the Response Document) that it is not the policy intention to require the sale of first-hand residential units among family members and between body corporate and associate corporation to prepare sales brochure, price lists, and register of transactions etc.
  - (b) The Administration is required to provide the draft clauses for review by the Bills Committee.

**Disclosure of Gross Floor Area**

16. **Counsel opinion submitted by The Real Estate Developers Association of Hong Kong ("REDA")**
- (a) To justify the prohibition on the disclosure of GFA, the Administration claimed (at page 17 of the Response Document) that (i) the right to freedom of expression is not absolute, (ii) less justification is required for restrictions on commercial speech and (iii) the Court recognises that the legislature has a wider margin of appreciation for imposing restrictions on freedom of expression on commercial matters.
  - (b) In fact, the above arguments have already been taken into account by the Counsel opinion dated 19 April 2012 submitted by REDA.
  - (c) The Counsel opinion concluded (at paragraphs 81 and 82(b)) the following :-
    - (i) Freedom of expression is of **fundamental importance**, and the restriction in this case (i.e. prohibition to disclose GFA) would **prevent the transmission of information which is an established part of the market.**
    - (ii) There are **strong arguments** that the prohibition on providing information on the price per square metre/ foot in any format other than Saleable Area would be unconstitutional.
    - (iii) The prohibition would constitute a **significant interference** with vendors' freedom to provide, and purchasers' freedom to receive, GFA information.
    - (iv) The Administration's objective will only be partly met by the restriction, because GFA will still be permitted in the secondary market, and the confusion among purchasers will continue.
  - (d) The leading counsel who prepared the Counsel opinion is **Lord Pannick Q.C.**, who is one of the most experienced and reputable counsel in the UK specialised in human rights law, and has represented the Government for some leading human right and constitutional cases.

- (e) However, notwithstanding the strong conclusion given in by a reputable senior counsel in the Counsel opinion, the Administration did not give any response at all in the Response Document.

17. **Proposed standardised GFA**

- (a) The Administration repeatedly claimed that there is no standardised definition of GFA for a property and that it would take a long time for all stakeholders to agree on the standardised definition of GFA.
- (b) In fact, REDA has proposed to adopt a **standardised definition of GFA** which are **objectively verifiable**, the key features of which include the following :-
  - (i) Only GFA of common areas serving **exclusively residential part** will be included and apportioned to the flats.
  - (ii) Such apportionment will **follow the corresponding undivided shares actually allocated to a particular unit**.
  - (iii) Both **accountable and non-accountable GFA are to be included**, so long as they serve exclusively the residential part.
  - (iv) All other GFA which do **not** serve exclusively the residential part of the development will **not** be mentioned.
  - (v) A plan delineating the relevant part of the GFA will be prepared and annexed to sales brochure.
- (c) In the Counsel opinion submitted by REDA, Counsel concluded (at paragraphs 79 and 80) the following :-
  - (i) The **availability of the standardised GFA strengthens the arguments that the prohibition against disclosure of GFA information would be unconstitutional**.
  - (ii) The **Administration's argument that it would take a considerable time for all stakeholders to agree on a standardised definition is not a strong reason when set against the proposed interference with vendors' freedom of speech**.

18. **Double standards on GFA disclosure**

- (a) Clause 19(1) of the Bill requires that the sales brochure shall disclose information relating to **exemption/ concessions of GFA** granted by the Building Authority under section 42 of the Buildings Ordinance or regulations 22 or 23 of the Building (Planning) Regulations.

- (b) **If information relating to GFA exemption/ concessions shall be disclosed in the sales brochure, then why the relevant GFA apportioned to each particular flat cannot be disclosed?**
- (c) This is particularly the case because the GFA (whether exempted or accountable) are still calculated on the **same basis** in accordance with the **same requirements** under the Buildings Ordinance and Building (Planning) Regulations.
- (d) If vendors are under a legal duty to disclose information relating to GFA exemption/ concessions, then, as a matter of fairness and equal treatment, vendors shall also have the **duty and the right to make full disclosure of all GFA-related information**.
- (e) The **selective disclosure of GFA** as proposed in the Bill is **discriminatory** against vendors of first-hand flats and will only **create confusion** to prospective purchasers.
- (f) Unfortunately, no response has been given by the Administration to the above legitimate concerns in the Response Document.

**Mandatory requirements to provide minimum number of flats in price lists**

**19. Counsel opinion submitted by REDA**

- (a) To justify the provision of minimum number of flats in the price lists, the Administration responded (at pages 30 to 32 of the Response Document) that the minimum number of units disclosed in the price list does not require that the vendors must offer to sell all the residential units in the price list.
- (b) The Administration's position above has also been taken into account by Counsel in the Counsel opinion submitted by REDA. Counsel concluded (at paragraph 82(a)) the following :-
  - (i) Even if the units disclosed in the price list does not require the vendors to sell all the units so disclosed, there are **strong arguments that the requirement that vendors of first-hand properties must publish price lists containing the prices of a minimum number of properties would be unconstitutional**.
  - (ii) The Administration **has not cogently set out any rational connection between the aim of providing purchasers with fuller information on prices, and the requirement that they should be told the "prices" of properties which are not actually for sale at all.**
- (c) No response has been given by the Administration to the Counsel opinion in this respect in the Response Document.

**20. Commission of a crime by giving false or misleading statement or misrepresentation**

- (a) Even if a vendor is not required to sell all the units set out in the price list, the requirement to force a vendor to put in the price list more flats than he genuinely wishes to sell will effectively **force a vendor to give false or misleading statement**



**or misrepresentation in the price list as to the number of flats the vendor actually wishes to sell.**

- (b) It should be noted that provision of false or misleading information/misrepresentation is a criminal offence under Clauses 65 and 66 of the Bill.

**21. Other parts of the Bill to require vendors to make public key information on sales arrangements**

- (a) Government also responded (at page 32 of the Response Document) that the Bill requires vendors to inform the public of "*certain key information on sales arrangements*" and such information includes "*the number of residential properties to be offered for sale at any specific time and what they are*". This is not entirely accurate for the following reasons :-
  - (i) It is logically incorrect to require vendors to specify in the price list the purchase prices of those units which the vendors have no intention whatsoever to sell if the vendor has already informed the public under such "*another requirement*" that those units are *not* for sale.
  - (ii) Such requirement (i.e. to inform the public that some of those units shown in the price lists are actually *not* for sale) will be in **direct contradiction** of the number of units so stipulated in the price lists, because the relevant units not intended for sale will still need to be included in the price list with specific purchase prices specified therein.
  - (iii) Therefore, the mandatory requirement to provide minimum number of units in the price lists will only cause **unnecessary confusion** to prospective purchasers as to whether or not the relevant units are actually intended to be sold by the vendors.
- (b) Again, no response has been given by the Administration to this legitimate concern in the Response Document.