Hong Kong Special Administrative Region of the People's Republic of China

LEGISLATIVE COUNCIL
Hon Abraham Shek Lai-him J.P.

CB(1) 2086/11-12(04)

31 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,

Response to the Administration's Response (LegCo paper no: CB(1) 2066/11-12(02)) to Real Estate Developers Association of Hong Kong (REDA)'s Submission dated 19 April 2012

I am writing in response to the Administration's latest response (the Response) released on 30 May 2012 to REDA's submission dated 19 April 2012.

The 14-page long Response jointly prepared by the Department of Justice and the Transport and Housing Bureau is hardly a corroborating one, failing to clarify the Administration's legal standpoint where REDA has been questioning since day one.

To put it in perspective, the contents of the Response are highly selective and subjective. Most of the counter-arguments and legal principles mentioned in the Response have already been covered and analysed by the Counsel for REDA in great detail in Parts C1, C2 and C3 of REDA's Counsel opinion. The Response simply ignores those Parts and quoted some paragraphs of the judgment (or even some passages, commentary, articles from academics - see for example footnotes 3, 4, 11-14 of the Response) which do not give a full and complete picture of the relevant legal principles involved.

The detailed remarks on the Response are set out on the attachment of this letter.

Yours sincerely,

Abraham SHEK Lai-him

ROOM 806, MANNING HOUSE, NO.48 QUEEN'S ROAD CENTRAL, HONG KONG.
TEL: (852) 2588 1060 FAX: (852) 2588 1623 E-MAIL: abrahams@netvigator.com

Hong Kong Special Administrative Region of the People's Republic of China

LEGISLATIVE COUNCIL
Hon Abraham Shek Lai-him J.P.

Member of Bills Committee on Residential Properties (First-hand Sales) Bill

Encl.

ROOM 806, MANNING HOUSE, NO.48 QUEEN'S ROAD CENTRAL, HONG KONG.
TEL: (852) 2588 1060 FAX: (852) 2588 1623 E-MAIL: abrahams@netvigator.com

Attachment

Provision of minimum number of flats in price list (Paragraph 2 to 18 of the Response)

1. The Response (at Paragraph 7, 8) argued that for cases involving interference with property rights which fall short of deprivation, then the European jurisprudence would adopt the "fair balance" test to strike a fair balance between the demands of the general interest of a society and the requirements of protecting individual rights, and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Response went on to say that the Counsel for REDA fail to address the issue of whether the application of the "fair balance" test is justified under Basic Law 6 and 105.

2. The so-called "fair balance" test is in essence the same as the "proportionality test" analysed by the Counsel for REDA in their opinion (the Counsel Opinion) (i.e. the restrictions on human rights must be rationally connected with one or more legitimate purposes and the means must be no more than is necessary to accomplish such purpose). Paragraphs 35 to 40 of the Counsel Opinion has given a comprehensive review of the relevant legal principles on the "proportionality test".In paragraphs 59 to 62 of the Counsel Opinion, the Counsel for REDA applied those principles to explain why the requirement to provide minimum number of flats in price list may be unconstitutional

3. It is therefore misleading and factually wrong for the Administration to say (at paragraph 12 of the Response) that REDA have failed to address the issue of whether the application of the "fair balance" test is justified under Basic Law 6 and 105.

4. The Response then went on to say, at paragraph 13 and 18, that, even assuming the "fair balance" test applies, the Administration has a considerable margin of appreciation in determining the restrictions imposed to achieve the aim to protect prospective purchasers.In fact, the legal principles on margin of appreciation were analysed in great detail in paragraphs 41 to 47 of the Counsel Opinion, which has already taken into account the considerable margin of appreciation afforded to the Administration. The Counsel for REDA consider that, despite such considerable margin of appreciation,the requirement to provide minimum number of flats may still be unconstitutional as the Administration has failed to provide sufficient "cogent reasons" to justify the measure.

Freedom of expression and prohibition on GFA information (Para 19 to 40 of the Response)

1. The Administration's strongest argument is that commercial expression such as advertising deserves a lesser degree of protection. Again, the Response argued that, given the broad margin of appreciation, it is unlikely that the prohibition to disclose GFA information per flat would be regarded unconstitutional. On this issue,the Administration placed significance on the recent Court of Final Appeal case Fok Chun Wa v Hospital Authority (paragraph 27 to 29 of the Response) and argued that even the Court of Final Appeal held that unless the relevant measure is manifestly beyond the spectrum of reasonableness (or manifestly without reasonable foundation) the court will not interfere.In support of this conclusion, the Response quote paragraphs 74 to 76 of the Court of Final Appeal's judgment (see footnote 18 of the Response).

2. However,Court of Final Appeal at paragraph 77 of the same judgment (i.e.the paragraph immediately after the paragraphs quoted in the Response), held the following: “The proposition that the courts will allow more leeway when socio-economic policies are involved, does not lead to the consequence that they will not be vigilant when it is appropriate to do so or that the authorities have some sort of carte blanche.Afterall, the courts have the ultimate responsibility of determining whether acts are constitutional or lawful. It would be appropriate for the courts to intervene (indeed they would be duty bound to do so) where, even in the area of socio-economic or other government policies, there has been any disregard for core-values.” In other words, the relevant parts quoted by the Administration fail to give a full and complete picture of the Court of Final Appeal’s decision, the Court made it clear that the Court remains have the ultimate responsibility to determine whether a particular measure or restriction is constitutional.

3. Further,the said Court of Final Appeal case has already been analysed in paragraphs 42 to 45 of the Counsel Opinion but, again, the Response ignored the same and the way the Administration presented its cases gives an impression to the members and public that the Counsel for REDA has committed a mistake by failing to take into account the recent Court of Final Appeal decision. The above show the selective and subjective attitude and approach adopted by the Administration in preparing the Response.

4. The Administration further agued that disclosure of GFA information of a particular flat will create confusion (by using the example in paragraph 33 of the Response). However, the flaw of this argument is that, as REDA has repeatedly mentioned in their submissions, it is not REDA's position to only refer to GFA of a particular flat. REDA's position is that both of the Saleable

Area and the GFA of a particular flat should be disclosed. If both information are disclosed, then there will be no question of creating confusion because prospective purchasers can always have a choice of Saleable Area and GFA. Again, the impression given by the Response is that REDA's position is that only GFA related information should be disclosed, which is misleading and factually incorrect.