

Residential Properties (First-hand Sales) Bill

Administration's Response to Issues Raised by Members at the Bills Committee Meeting held on 28 May 2012

At the meeting of the Bills Committee on the Residential Properties (First-hand Sales) Bill (the Bill) held on 28 May 2012, Members raised enquires on a number of issues relating to the Bill. The Administration's responses are set out below.

(1) To provide written response to the letter from Hon Abraham SHEK tabled at the meeting.

2. The Administration's response to Hon Abraham SHEK's letter is at **Annex**.

(2) To keep in view the financial position of the Consumer Legal Action Fund (CLAF), particularly after the enactment of the Bill, to ensure timely injection of fund as and when necessary. To also review the level of contribution to CLAF from complainants.

3. As set out in our previous written response to the Bills Committee (LC Paper No. CB(1)1598/11-12(02)), to ensure that sufficient resources are available under the CLAF to assist consumers with meritorious claims, the Government will continue to closely liaise with its trustee, i.e. the Consumer Council, and monitor the financial position of CLAF. We have relayed to the Commerce and Economic Development Bureau Members' suggestion that the level of contribution to CLAF from complainants should be reviewed.

(3) To consider providing a definition of "furniture" in clause 46 to differentiate between "furniture" and "fittings, finishes and appliances".

4. Clause 46 of the Bill requires that if any furniture is shown on the floor plan, the furniture must be drawn to scale and the dimensions of such furniture must be shown on that plan. Under the Bill, "furniture" is

to be construed according to the natural meaning of the word, which generally refers to “movable” articles that are used to make a room or building suitable for living or working in, such as tables, chairs, or desks. For “fittings, finishes and appliances”, section 21 of Schedule 1 to the Bill sets out the specific information to be set out in a sales brochure, e.g. the type of wall used for kitchen, connection points for telephone, shower or bath tub, kitchen cabinet and built-in wardrobe. We consider it is clear that “furniture” is different from “fittings, finishes and appliances” and there is no need to define “furniture” under the Bill.

(4) To provide for members' reference the papers for discussion by the Steering Committee on Regulation of the Sale of First-hand Residential Properties by Legislation in relation to clause 67.

5. The Steering Committee on Regulation of the Sale of First-hand Residential Properties by Legislation (the Steering Committee) considered that there should be appropriate defence provisions such as the general defence of “due diligence” available for a person charged under the proposed legislation. This recommendation is set out in chapter 14 of the Steering Committee Report which is available on the website of the Transport and Housing Bureau (THB).

(5) To review the drafting of clause 69(1)(d) and similar provisions in clauses 70 and 71 as the clauses as drafted may have the effect of requiring the person being charged to prove his innocence. Besides, a person who have exercised due diligence in providing the explanation or evidence may still be subject to prosecution.

6. Division 2 of Part 5 of the Bill contains defence provisions in respect of an offence under clause 66(1) or 60 of the Bill. An offence under clause 66(1) or 60 is not an offence of strict liability. The prosecution has to prove all the elements of the offence, including the mens rea that the defendant knows that, or is reckless as to whether, the information concerned is false or misleading. Even where the prosecution has proved all the elements of the offence, it is a defence to the charge if the statutory defence under Division 2 of Part 5 is proved on the balance of probability. The defence provisions do not have the effect of requiring a person being charged to prove his innocence.

7. The following is extracted from paragraph 8 of the Statement of Prosecution Policy and Practice issued by the Department of Justice –

“8.1 When considering the institution or continuation of criminal proceedings the first question to be determined is the sufficiency of evidence. A prosecution should not be started or continued unless the prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. The Secretary for Justice does not support the proposition that a bare prima facie case is enough to justify a decision to prosecute. The proper test is whether there is a reasonable prospect of a conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. When reaching this decision, the prosecutor will wish as a first step to be satisfied that there is no reasonable expectation of an ordered acquittal or a successful submission of no case to answer.

8.2 A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court, as well as an evaluation of the admissibility of evidence implicating the accused. The prosecutor should also consider any defences which are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction.”

8. Assuming a person is suspected of contravening the offence under clause 66(1) of the Bill. i.e. disseminating false or misleading information (as to a material fact) that is likely to induce another person to purchase any specified residential property. If, in the course of investigation, there is evidence that the defence set out in clause 69 is available to the person, the prosecutor should also take this into account in evaluating the sufficiency of evidence for determining whether or not there is a reasonable prospect of conviction. All these are important factors in considering the institution of criminal proceedings against the

person. Each case must be considered on its own particular facts and in light of the surrounding circumstances.

(6) To consider the feasibility of appointing a committee rather than a public officer as the Authority under clause 74 to enhance transparency and impartiality.

9. As set out in our previous written response to the Bills Committee (LC Paper No. CB(1)1598/11-12(02)), to facilitate early implementation of the legislation and to maximize the use of public resources, we propose that an enforcement unit be set up under the THB. Our initial thinking is that it should be headed by a public officer at an appropriate directorate level (the Authority), and underpinned by an appropriate number of supporting staff. The enforcement unit will operate in a transparent manner. Information on the organisational structure and functions of the enforcement unit will be made public in Government's website. Also, being part of the Government structure, the enforcement unit will be subject to the established checks and balance mechanism within the Government and will come under public scrutiny, including the Legislative Council and the Ombudsman.

10. The Government will keep open the option of replacing the enforcement unit with an independent statutory body for performing similar functions at an appropriate time.

(7) To advise the scope of "other functions" of the Authority under clause 75.

11. The current drafting of clause 75(d) of the Bill is similar to the provision on the functions of other enforcement agencies under various existing legislation, such as section 37(3) of the Construction Workers Registration Ordinance (Cap. 583).

12. Under clause 75 of the Bill, "other functions" refer to "the functions conferred on the Authority by or under the proposed legislation or any other enactment. Clause 75(d) is a cover-all provision which makes clear that such other functions are also functions of the Authority. The second limb merely provides that the Authority has to carry out functions, other than those under the Bill, as may be entrusted with under

any new legislation in future. If that happens, the Legislative Council will be duly consulted as the new legislation will need to be passed by the Legislative Council.

(8) To provide an undertaking that the Legislative Council will be consulted on the guidelines before these are issued by the Authority under clause 76.

13. Under clause 76 of the Bill, the Authority may (a) issue guidelines indicating the manner in which the Authority proposes to perform any function or exercise any power; or (b) providing guidance on the operation of any provision of the Ordinance. The Administration will engage the relevant stakeholders in preparing the guidelines. The Administration will provide a set of the published guidelines to the Legislative Council for information.

(9) To endeavour to put in place a central database covering both first-hand and second-hand residential properties to provide free-of-charge access to information by the general public.

14. The electronic database to be set up by the Authority will provide information on the sale of first-hand residential properties. We will review the function of the database from time to time after its establishment.

15. The Property Information Online (PIO) set up by the Rating and Valuation Department (RVD) provides the public with access to updated property information of all assessed private residential properties (excluding village houses) at a modest cost. In order to enhance valuation transparency, it is RVD's long term goal to provide payers of assessed private residential properties (excluding village houses) with saleable area information of their own properties free of charge. RVD is currently exploring a cost-effective way of doing so.

(10) To advise whether the performance of the Authority is subject to scrutiny and if so, the party responsible for the scrutiny. To also advise whether there is an appeal mechanism against the decisions of the Authority.

16. As mentioned in paragraph 9 above, being part of the Government structure, the enforcement unit will be subject to the established checks and balance mechanism within the Government and will come under public scrutiny, including the Legislative Council and the Ombudsman.

17. The enforcement unit will have powers to issue guidelines and to establish an electronic database (or to delegate another person to establish such a database). While it will carry out investigation, it does not make any decision on whether or not to take prosecution. As such, we consider there is no need for an appeal mechanism against the enforcement unit's decisions.

(11) To provide a comparison between the Authority and the Buildings Authority in respect of investigation under Division 2 of Part 6 of the Bill.

18. We have made reference to the Securities and Futures Ordinance (Cap. 571) in drafting the provisions on "investigation" under Division 2 of Part 6 of the Bill.

19. Since the Building Authority and the Authority to be appointed according to clause 74 of the Bill are responsible for carrying out different functions, their investigation powers are not directly comparable and are of a different nature. For example, the Building Authority may, under section 22(1) of the Buildings Ordinance (Cap. 123), at any time enter and where necessary, in the presence of a police officer, break into any premises or enter upon any land to ascertain whether the provisions of the Ordinance are being complied with. For such purposes, access to every part of any building works or street works shall be provided by the registered general building contractor, registered specialist contractor or registered minor works contractor. We have not proposed such power for the Authority, as the Authority does not need that.

**Administration's Response to the Letter of 28 May 2012
from the Hon Abraham Shek**

The Administration's responses to the letter of 28 May 2012 from the Hon Abraham Shek are set out below.

Comment (1) – The Administration did not give a timely response to the comments made by deputations at the Bills Committee meeting on 24 April 2012.

2. Following the Bills Committee meeting on 24 April 2012, we spared no time in considering the views/comments made by the deputations. Also, we met various deputations to exchange views with them before finalizing our responses. We issued to the Bills Committee the written response to the deputations' submissions on 21 May 2012.

Comment (2) - The Bill should not apply to the sale of completed residential flats.

3. We explained why we considered that the Bill should apply to the sale of all types of first-hand residential properties in our previous written response to deputations' submissions issued on 21 May 2012 (LC Paper No. CB(1) 1936/11-12(02)). We set out our views once again as below.

4. We propose that both first-hand uncompleted and completed residential properties should be regulated because, from the perspective of enhancing consumer protection, we see little difference between the two. It is quite common for the vendor to start selling residential properties during the construction period and continue to do so in respect of the remaining residential properties upon completion. To draw a line between first-hand uncompleted and completed residential properties in terms of legislative control is artificial and not defensible.

5. In most of the cases of the sale of first-hand residential properties, regardless of whether the properties are uncompleted or completed, the vendors (i.e. developers) and individual purchasers are not on an equal

footing. The former is always in a much stronger position vis-a-vis the latter in terms of resources and bargaining power. Not only do vendors hold first-hand residential properties in bulk, they also possess and control the release of information relating to those properties and their sales arrangements. On the other hand, second-hand residential properties are often owned by private individuals. As such, the vendor and the purchaser are generally on an equal footing in the sale of second-hand residential properties.

6. We consider it crucial that purchasers of first-hand residential properties have access to a full range of information for making informed decisions. While the availability of completed residential properties for viewing may help flat purchasers visualize the size, layout and orientation of a flat, there are other key pieces of information regarding a development which flat purchasers also require, such as price lists and transaction information. The fact that purchasers of first-hand completed residential properties may have the opportunity to view completed residential properties and the actual environment of the development does not justify exempting the sale of first-hand residential properties from the legislation.

Comment (3) - The Bill should not provide exemption for developments constructed by the Housing Authority

7. We explained our rationale for proposing an exemption for the developments constructed by the Housing Authority in our previous written responses to the Bills Committee. Please see LC papers No. CB(1) 2014/11-12(01) and No. CB(1) 1861/11-12(01)).

Comment (4) – If New Territories Exempted House (NTEH) could be exempted from the Bill, exemption should also be given to the sale of other single house.

8. We propose in the Bill to exempt the sale of one single house which has been issued with a certificate of exemption under the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121). If the development involves the sale of more than one NTEH, no exemption will be granted.

9. As set out in our written response to deputations' submissions issued on 21 May 2012 (LC Paper No. CB(1) 1936/11-12(02)), we are concerned that extending the exemption to cover non-NTEH single houses may lead to possible abuse. We are therefore of the view that the proposed exemption should be limited to the sale of just one single NTEH.

Comment (5) - It is impractical and unrealistic to grant exemption to a development where 95% or more of the residential properties have been leased out for 36 months.

10. As set out in our previous written responses to the Bills Committee, the proposed exemption under clause 10(3) of the Bill takes into account the views of the real estate sector that first-hand residential properties which a vendor leases out for a reasonably long period rather than sells upon completion are akin to second-hand properties and their sales should not come under the same regulatory regime as first-hand properties. That said, as the objective of the legislation is to enhance consumer protection for sales of first-hand residential properties, we see 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. We consider the proposed exemption threshold appropriate.

Comment (6) – The Bill should provide exemptions under special circumstances (e.g. distribution of properties between family members, intra-group transfer)

11. As set out in our written response to deputations' submissions issued on 21 May 2012 (LC Paper No. CB(1) 1936/11-12(02)), we will exempt the sale of first-hand residential properties among immediate family members, and the sale of first-hand residential properties between a body corporate and an associate corporation or a holding company of the body corporate from certain requirements of the Bill. However, when the residential properties are subsequently offered for sale to the general public, they will have to fully comply with all the requirements under the Bill. We have proposed CSAs on this.

Comment (7) –the Administration should respond to the Counsel opinion submitted by the Real Estate Developers Association of Hong Kong (REDA) on the potential constitutional implications of the Bill & the proposed standardized gross floor area (GFA)

12. The Administration has submitted a paper for Members' reference which sets out the basis of the Administration's response to the issues raised in the joint legal opinion submitted by REDA to the Bills Committee.

Comment (8) – There are double standards in the Bill on GFA disclosure as vendors are not allowed to provide GFA of residential properties but are required to disclose information on GFA concessions in the sales brochure.

13. As explained in our previous written responses to the Bills Committee, we consider that our proposed approach of requiring vendors to provide (i) the saleable area of a residential property, (ii) the area of those features which the owners of a residential property will have exclusive use; and (iii) holistically the types and area of common facilities in the development, a viable and more direct means to let prospective buyers know what are they buying for.

14. Information on GFA concessions has to be presented on an **aggregate basis**, same as information on common facilities in a development which has also to be presented on an aggregate basis. There is no double standard.

Comment (9) - the Administration should respond to the Counsel opinion submitted by REDA that the mandatory requirements to provide minimum number of flats in price lists may be unconstitutional.

15. The Administration has submitted a paper for Members' reference which sets out the basis of the Administration's response to the issues raised in the joint legal opinion submitted by REDA to the Bills Committee.

Comment (10) – the requirement that a vendor has 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, and the requirement to make public key information on sales arrangements is unnecessary.

16. As set out in our written response to deputations’ submissions issued on 21 May 2012 (LC Paper No. CB(1) 1936/11-12(02)), what we are proposing in the Bill is to set the minimum number of residential properties to be disclosed in each price list while not requiring that vendors must offer to sell all the residential properties in the price list. The Bill also requires vendors to make public certain key information on sales arrangements including the number of properties to be offered for sale at any particular time and what they are. This enables the public to know without ambiguity how many and which of those properties shown on a price list are offered for sale.

17. As explained at various Bills Committee meetings and in our previous written responses to the Bills Committee, vendors are not required to offer to sell all the residential properties in the price list. Therefore, a vendor will not be regarded as giving false or misleading statement or misrepresentation simply because of his compliance with the “minimum number” requirements in respect of the price list under the proposed legislation.

Transport and Housing Bureau
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