

Residential Properties (First-hand Sales) Bill

Administration's Response to Issues Raised by Members at the Bills Committee Meeting held on 31 May 2012

At the meeting of the Bills Committee on the Residential Properties (First-hand Sales) Bill (the Bill) held on 31 May 2012, Members raised enquires on a number of issues relating to the Bill. The Administration's responses are set out below.

(1) To consider re-instating clauses 16(2) to (4) in the proposed Committee Stage amendments (CSAs) with suitable amendments to the definition of "specified information" by replacing "section 18(2)(b) or (c)" with "clause 18(2)", and the phrase "any change" in clause 16(2) by "any material change" to narrow down the scope to major changes.

2. As mentioned in paragraph 5 below, we will propose revised CSAs to require that sales brochure being made public in relation to a sale has to be the one which is updated/examined within the past three months, instead of the past six months. We consider this enhanced frequency of mandatory updating once every three months should apply across-the-board to all types of information in a sales brochure.

(2) To review the need for the phrase "from time to time" in the proposed CSA to clause 16A.

3. We agree with Members' comment that the phrase "from time to time" in clause 16A in the proposed CSAs may not be necessary. In fact, section 39(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that where any Ordinance confers any power, then the power may be exercised from time to time as occasion requires. We will delete the phrase from the clause in the revised draft CSAs.

(3) To advise the basis upon which the six-month period for examination and revision of sales brochures in the proposed CSA to clause 23(9) is arrived at, and the feasibility of shortening such period to say two to three months in consultation with the trade and the Consumer Council. To also advise how to prevent circulation of outdated sales brochures by parties other than the vendor, and possible exploitation by vendors who are not required to update the sales brochures within the six-month period even if there are major changes during the interim.

4. In proposing in the CSA that sales brochure being made public in relation to a sale has to be the one which is updated/examined within the past six months, we have taken into account the need to strike a balance between practicality, and the provision of updated information to prospective purchasers.

5. Given that vendors are required under the Bill to provide a lot of information in the sales brochure, we consider it impractical to require vendors to update the sales brochure whenever there are material changes to the information in the sales brochure. Also, too frequent updating of the sales brochure will cause confusion to prospective purchasers as there will be many editions of the sales brochure over a period of time. Having taken Members' views into account, we propose that sales brochure being made public in relation to a sale has to be the one which is updated/examined within the past three months, instead of the past six months. We will submit revised CSA on this.

6. According to clause 77 of the Bill, an electronic database on first-hand residential properties will be set up. All sales brochures prepared for the sale of first-hand residential properties that are subject to the proposed legislation will be uploaded onto the database. This will facilitate prospective purchasers to ascertain whether a sales brochure is the most updated version.

7. We consider the latest proposal that sales brochure being made public in relation to a sale has to be the one which is updated/examined within the past three months will minimize the possibility that vendors will deliberately delay the updating of information in the sales brochure.

(4) To advise the liability of an "owner" in the sale of a specified residential property where he does not actually conduct the sale himself, a liquidator in the sale of properties of a company being wound-up, and a personal representative of the estate of a deceased owner in the sale of the property of the estate in the event of contravention to clauses 50(1) and (2) committed by the owner.

8. As explained in our previous written response to the Bills Committee (LC paper No. CB(1) 2066/11-12(01)), if a company is in the process of winding up, the liquidator may sell the company's property in the name of the company by exercising the power to sell under section 199 of the Companies Ordinance (Cap. 32). In that case, the liquidator acts as the agent of the company and the company will be regarded as "owner". Whether the owner is to be held liable for a non-compliance with clause 50(1) or (2) will depend on the facts of the particular case. The owner may raise the due diligence defence under clause 67.

9. The case of personal representatives is not the same as that of liquidators. A personal representative represents the deceased in regard to his estate. He steps into the shoes of the deceased for the purpose of administering the deceased's estate and may dispose of the deceased's property. In this respect, the personal representative is to be regarded as "owner".

(5) To advise whether it is a contravention under proposed section 10 of Schedule 4 for codifying the provisions on raising requisition or objection in respect of title under the Consent Scheme in the Preliminary Agreement for Sale and Purchase/Agreement for Sale and Purchase.

10. According to clause 50 of the Bill, the owner must not enter into a preliminary agreement for sale and purchase (PASP) and agreement for sale and purchase (ASP) with any person unless that agreement contains the mandatory provisions set out in Schedules 4 (for PASP) and Schedules 5 to 7 (for ASP under different scenarios). The PASP and ASP may include other additional provisions as mutually agreed by the vendor and the purchaser. However, under clause 50(8), the mandatory

provisions contained in the PASP or ASP will prevail an additional provision that is not consistent with the mandatory provisions.

11. Under the mandatory provision set out in clause 10 of Schedule 4 to the Bill, the Vendor shall not restrict the Purchaser's right to raise requisition or objection in respect of title. We are asked about the effect of a PASP or ASP that contains an additional provision setting out the Purchaser's common law rights (as of the date of the agreement) to raise requisition or objection in respect of title. The answer depends on whether the additional provision in question will be consistent with the mandatory provisions. If the additional provisions are inconsistent with the mandatory provisions, the mandatory provisions prevail over the additional provision.

(6) To consider replacing the word "and" in the third line of clause 7(2) with "or" with a view to preventing circumvention of liability by vendors by engaging two or more persons to carry out the prescribed work, while ensuring that the right person will be held liable for the contravention he/she has committed.

12. In the proposed legislation that was put up for public consultation, "vendor" was defined as the "owner". Our understanding then was that the "owner" would also be the person who co-ordinates and supervises the development process. While this would cater for most situations where a development would be undertaken by the owner who is also in the business of real estate development (i.e. a property developer), we have taken into account comments received during the public consultation exercise (including comments from the Law Society of Hong Kong) that the definition of "vendor" should be expanded to cover situations where the owner (who is not a property developer) would engage a property developer to co-ordinate and supervise the development process. An example is that a Non-Government Organisation owns a piece of land and collaborates with a property developer to undertake a residential development on that piece of land. To ensure that in such circumstances both the owner and the property developer will be held criminally liable for the offences relating to Part 2 of the Bill, we have revised the definition of "vendor" with a view to including the "property developer" as well. Instead of using a label

“property developer” in the Bill, we use the phrase that “a person to co-ordinate and supervise the process of designing, planning, constructing, fitting out, completing and marketing the development” to describe a “property developer”. The characteristics of a property developer is that it will co-ordinate and supervise each and every major aspect in the process of undertaking a first-hand residential development for the purpose of offering the residential properties for sale. It is not our intention to cover a person who is engaged to co-ordinate and supervise only one or some of those aspects of the development process.

13. If we replace the word “and” in the third line of clause 7(2) with “or”, that clause would not deal with the situation in which the owner (who is not a property developer) engages a property developer to co-ordinate and supervise the development process. Instead, it would deal with the situation in which the owner engages another person to co-ordinate and supervise individual aspect(s) of the development process. This is not our intention.

14. We remain of the view that, the definition of “vendor” in the Bill reflects the policy intention that both the owner and the property developer (if one is engaged by the owner to co-ordinate and supervise the development process) should be responsible for contravention of those requirements under Part 2 of the Bill, as they should be the one who oversee and make final decision on the development, including the sales of the development, notwithstanding that they may commission various professional practitioners and relevant parties (e.g. designers, architects, surveyors, solicitors, and building contractors) in the process.

Transport and Housing Bureau
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