Residential Properties (First-hand Sales) Bill

Administration's Response to the Letter of 31 May 2012 from the Hon Abraham Shek

The Administration's responses to the letter of 31 May 2012 ("the Letter") from the Hon Abraham Shek are set out below.

Provision of minimum number of properties in price lists

2. The Administration responded to the joint legal opinion by Lord Pannick, QC, Tristan Jones and Wilson Leung ("the Opinion") dated 19 April 2012 in its paper of May 2012 to the Bills Committee ("the Administration's Response") (LC Paper No. CB(1) 2066/11-12(02)).

3. Hon Abraham Shek's letter dated 31 May 2012 alleged that it was "misleading and factually wrong" for the Administration's Response to state that the Opinion had failed to address the more fundamental question of whether the application of the "fair balance" test is justified under BL 6 and BL 105 given the following:

(a) the "fair balance" test is in essence the same as the "proportionality test";
(b) the Opinion had given a comprehensive review of the legal principles relating to the "proportionality test";
(c) the Opinion had applied the above principles and explained why the requirement to cover a minimum number of properties in the price lists would fail to meet the "proportionality test".

4. The Administration agrees that the Opinion has set out the legal principles relating to the "fair balance" test and applied them to the requirement to cover a minimum number of properties in the price lists. Yet, it did not explain why the requirement was to be subject to the "fair balance" test in the first place in the absence of any local court decision that BL 6 and BL 105 impose such a test.

5. The Letter further alleged that the Opinion had analysed in great detail the concept of margin of appreciation and had already taken into account that concept when arguing that the requirement to cover a minimum number of properties in the price lists may be unconstitutional.

6. As the Letter pointed out, the argument that the requirement may be unconstitutional was made on the ground that the Administration had failed to provide any "cogent reason" to explain how the requirement was rationally connected to its purported aim.

7. The Administration has explained in the Administration's Response that the requirement is rationally connected to its stated aim since the vendors would unlikely set prices arbitrarily on the price lists (even for those properties which are not intended for sale immediately). Our courts are likely to give the above views a wide margin of appreciation and thus are likely to accept that there is a "rational connection" between the requirement and its stated aim.

Provision of information on gross floor area for a property

8. The Letter stated that that part of the Administration's Response concerning the prohibition on the use of information about GFA for a property in advertisements, sales brochures and price lists failed to give a full and complete picture of the Court of Final Appeal's (CFA) decision in the case of *Fok Chun Wa v Hospital Authority*, FACV 10/2011, because it did not make any reference to paragraph 77 of the CFA's judgment. It also stated that the Administration's Response conveyed an impression that the Opinion had failed to take into account that CFA decision.

9. The Administration's Response is a response to the Opinion and should be read together with that Opinion. The Opinion has already quoted the relevant passage in paragraph 77 of the CFA judgment (at para 45 of the Opinion) in order to point out that courts have the ultimate responsibility of determining whether acts are constitutional or lawful. The Opinion has also cited paragraphs 61 to 76 of the CFA judgment (at para 42 of the Opinion) when pointing out that there is a particularly wide margin of appreciation in cases involving social and economic policy.

However, the Opinion does not further explain how the Court would apply the concept of margin of appreciation in these cases. The Administration's Response seeks to give Members of the Bills Committee a better understanding of the concept of margin of appreciation in the context of socio-economic policies by summarising the Court's views in paragraphs 61 to 76 of the judgment (at para 27 to 29 of the Administration's Response).

10. The Administration notes REDA's position that both saleable area (SA) and gross floor area (GFA) for a property should be disclosed. Since there is no doubt that information on SA for a property should be provided, the previous discussion has been focused on whether the provision of information on **GFA for a property** could be provided to prospective purchasers in a clear, accurate and consistent manner so as to facilitate property purchasers to compare flat prices of different developments calculated on the same area basis.

11. As we have repeatedly set out in our previous written responses to the Bills Committee, in the absence of a commonly adopted definition of GFA for a property, allowing the use of GFA for quoting property size and property price per square foot/metre in advertisement, sales brochure, price list, alongside the statutorily defined SA, will cause confusion rather than enable prospective purchasers to make an informed decision. In the Administration's Response (LC Paper No. CB(1) 2066/11-12(02)), we have used a hypothetical case to illustrate the confusion caused to prospective purchasers if GFA is used for quoting property size and property price. In fact, it will go against the intent that information about property size and property price per square foot/metre should be provided to prospective purchasers in a clear, accurate and consistent manner so that they can compare flat prices of different developments calculated on the same area basis. Different vendors may include different items in the constituents of "apportioned share of common areas" in their calculation of GFA for a flat. The methodologies adopted to determine unit prices of flats calculated on the basis of GFA are likely to be inconsistent among vendors and not transparent. Prospective purchasers are unable to carry out an apple-to-apple comparison of the size, price and "efficiency ratio" of flats bearing the same GFA in different residential property developments.

12. As we mentioned in our written response as a follow up to the Bills Committee meeting on 22 May 2012 (LC Paper No. CB(1) 2066/11-12(02)), the lack of a standardized definition of GFA for a property is one of the reasons, but not the only reason, why we propose in the Bill that SA should be the only basis for presenting the floor area and price per square foot/metre for a property in the sale of a first-hand residential property. There are other considerations, including the consideration that the use of GFA for a property is not a suitable way of showing the public and the prospective buyers the floor area of a residential property. We consider that the proposed approach of requiring vendors to provide information about: (a) the saleable area of a residential property; (b) the area of those features which the owners of a residential property will have exclusive use; and (c) holistically the types and area of common facilities in the development, a viable and more direct means to let prospective purchasers know what are they buying for. Under the proposed approach, there will not be a total and absolute ban on the disclosure of GFA-related information.

Transport and Housing Bureau
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