

SUBMISSIONS BY THE PROPERTY COMMITTEE OF THE LAW SOCIETY OF HONG KONG ON THE SALES DESCRIPTION OF UNCOMPLETED RESIDENTIAL PROPERTIES BILL

The Property Committee of The Law Society of Hong Kong has reviewed the draft *Sales Description of Uncompleted Residential Bill* put forward by the Administration in its Consultation Paper and has the following comments:

1. Real Property

- 1.1 It is observed that the term *'real property'* is used throughout the draft Bill to describe landed property. However, with the exception of the land on which St. John's Cathedral is situated, each and every piece of land in Hong Kong is leasehold property and does not fall within the traditional meaning of real property.
- 1.2 **It is recommended that either the term *'land'* or *'immovable property'* as respectively defined in the *Conveyancing and Property Ordinance (Cap.219)* and the *Interpretation and General Clauses Ordinance (Cap. 1)* be adopted instead.**

2. Public Sale

- 2.1 The draft Bill is mainly concerned with *'public sale'* which is defined in the interpretation clause as:
- "in relation to uncompleted residential properties in a development, means the developer's entering into agreements for sale and purchase for the sale of such properties to members of the public pursuant to an invitation to the general public to make an offer to purchase such properties".*
- 2.2 In Section 5, the duty to provide sales brochures, and thus the provisions that follow concerning the sales brochures, only apply to *'public sale'*. In Section 10, the requirement of the developer to make available copies of the DMC, building plan and standard sale and purchase agreement for public inspection only applies to uncompleted residential properties put up for *'public sale'*.
- 2.3 Indeed, by using the words *'otherwise than by public sale'* in Clause 14(c) of Schedule I, the Bill clearly recognises the method of private sale. If a developer were to transfer the entire uncompleted development to a purchaser under private sale, the developer will *"not"* be required under section 5 to provide sales brochures to the purchaser nor will it need to comply with the other requirements under the Bill regulating *'public sale'*.

- 2.4 The Government should take steps to prevent potential problems arising from circumvention of the legislation by the means outlined in the preceding paragraph.
- 2.5 The Committee observes further that the definition of *"developer"* in section 2 excludes confirmors who buy and re-sell uncompleted residential units. Any purchaser from a developer wishing to resell the property will thus not be a *"developer"* within the definition of that term. Such purchaser will not be required to comply with any of the obligations imposed upon a developer under the draft Bill.
- 2.6 The combined effect of the various requirements of the Bill being limited to cases of *"public sale"* and the narrow definition of *"developer"* means that in essence, a developer can easily circumvent the various obligations under the draft Bill by first transferring the entire property to a purchaser under private sale and for the purchaser to in-turn re-sell individual units to members of the public.
- 2.7 **It is recommended that the definition of *"developer"* should be tightened up.**

3. **Section 4 - Exemption**

- 3.1 The Bill imposes onerous duties and responsibilities upon developers. Under Section 4, the Secretary of Housing may exempt any developer from any or all of the requirements under the draft Bill in relation to any development or any type of development. The Committee fails to appreciate why such power is not given to the Director of Lands so that all relevant applications can be made to one single government department, especially in the case of consent scheme. **The Committee recommends that the power to grant exemption be given to the Director of Lands.**
- 3.2 The draft Bill does not give any idea of the type of circumstances that the Secretary of Housing will be prepared to grant exemption. Bearing in mind the onerous duties imposed on developers under the draft Bill, unless exemptions are given to small residential developments, developers of small residential developments would be forced to complete construction of the development before offering the property for sale. **It is recommended that the Government should enact regulations to give the public a clear idea of the type of cases for which exemption will be granted and consult the public in this regard in advance.**

4. **Section 5 & Schedule 1 - Information to be provided in a sales brochure**

- 4.1 Section 5 requires property developers to provide sales brochure to prospective purchasers containing the information as prescribed in Schedule 1 at least 7 days before the date of public sale. The prescribed information is observed to be too

substantial and onerous and there may be technical difficulties for a developer to provide all the required information

- 4.2 In comparison with Part II (major provisions of the Government Lease and the Deed of Mutual Covenant) and Part III (fittings and finishes of the unit), the information required under Part 1 of Schedule 1 is more susceptible to changes and onerous to the developer. An example is the extent of the contents required of the disposition plan under paragraph 5 of Part 1 of the draft Bill. The information to be contained in the disposition plan is too exhaustive and is subject to changes after issuance but before the entering into of the agreement for sale and purchase. Changes in the details of the plans can be caused by a variety of factors, such as changes in government regulations, upgrading of facilities or physical constraints (like site formation re cutting and filling of slopes), etc. These cannot be foreseen at the time when the plan is drawn up. It is neither practical for the developer to change the disposition plan from time to time nor to inform potential purchasers of all such changes and inclusion of detailed description in the disposition plan may create confusion and lead to disputes. In order to allow for a certain degree of flexibility, **the Committee recommends that the disposition plan shall contain general rather than detailed description.**
- 4.3 The sales brochures is also required to contain floor plans of all floors and for the floor plans to show the internal partition and thickness of load bearing walls of each type of residential properties (paragraph 6(5)(b) & (c) of Part 1). It is submitted that the matter of measurement of flat size is the gist of homebuyer protection. In this connection, it is considered that disclosure of the "*saleable area*" and the "*gross floor area*" (in accordance with the standardized method of measurement introduced in the Bill) together with the separate calculation of the bay window, yard, terrace, etc. and specification of certain items included in the gross floor area have already provided the core protection to home buyers. **It is thus recommended that the requirement to show the thickness of the walls is unnecessary in the circumstances and should be excluded from the Bill.**
- 4.4 In the absence of a duty to disclose, omission or non-disclosure does not constitute misrepresentation and there is generally no duty on the part of one party to a contract to disclose information known only to him. However, with the statutory duty of disclosure now imposed by the Bill, inadvertent omission of certain *minor* information will become the cause for complaint or result in an offence under the Ordinance. Purchasers are more likely to rescind the agreements by relying on misstatement or even omission by the developer to disclose any one of the endless lists of information set out in Schedule 1. It may be foreseen that in falling property market situation, Schedule 1 (especially Part 1 thereof) could possibly lead to abuse by purchasers. In this sense, the draft Bill may be achieving more than necessary for consumer protection but in fact resulting in the hindrance of healthy development of the local property market.

5. **Section 7 - Bilingual information**

Section 7 provides that in case of conflict between the English and the Chinese version of the sales brochures, the version selected by the purchaser of the particular property shall prevail. The section, although may afford better protection to purchasers, would create a precedent to be followed by other cases. This may not be good for the profession or to the public. In case of differences between the English or Chinese version in legislation in criminal proceedings or in the charge sheet in criminal proceedings, would Government allow the accused to choose either the English version or the Chinese version?

6. **Section 10 - Deed of Mutual Covenant**

6.1 Section 10(2)(b) provides that where no deed of mutual covenant ("DMC") has been executed, the term *Deed of Mutual Covenant* refers to the latest draft of the DMC proposed to be executed in respect of the development. In the Non-Consent Scheme cases, this includes a draft DMC that is intended to be annexed to a statutory declaration under Rule 5C(3)(a) of the Solicitors' Practice Rules. However, it is to be noted that Rule 5C(3) only applies to cases where both the vendor and the purchaser are jointly represented.

6.2 **It is recommended for the words "*which includes*" in Section 10(2)(b) and for the two sub-clauses (i) and (ii) to be deleted.**

7. **Sections 14, 15 & 16 - Criminal Liability**

7.1 **It is recommended that:**

(a) **there should be criminal liability on directors and other officers of a corporation only if the offence were proved to have been committed with the express consent or direction of such directors or other officer. The same should apply to a partnership**

(b) **even if criminal liability were to be imposed, the defence given under Section 14 should be widened.**

If information was supplied by an architect or surveyor in a project, can a Company Director escape responsibility? It is arguable whether he had authority over the architect or surveyor and whether the accident was beyond his control.

7.2 The Committee cannot see why members of the Housing Authority or the officer of the Housing Department and those persons mentioned in Section 15(3) should be treated differently from the various office bearers of the developer as mentioned in section 15(1).

8. **Transitional Provision**

There is no transitional provision in the draft Bill as to its applicability over uncompleted residential properties for which sales brochures have already been issued but that the agreement for sale and purchase has not yet been executed before the operation of the Bill. **The Committee recommends that the Bill should provide a cut-off date to cater for such kind of situation.**

**The Property Committee
The Law Society of Hong Kong
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