

**Submission of
The Real Estate Developers Association of Hong Kong
("REDA") to the Transport and Housing Bureau**

**Consultation Paper on The Proposed Legislation to
Regulate the Sale of First-Hand Residential Properties
Proposed Legislation: Residential Properties (First-hand Sales) Bill**

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The Real Estate Developers Association of Hong Kong
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Section 1

Background and Purpose

Background

1. On 29 November 2011, the Secretary for Transport and Housing (the "**Secretary**") released the "Consultation Paper on The Proposed Legislation to Regulate the Sale of First-Hand Residential Properties" (the "**Consultation Paper**") to seek the views of members of the public and stakeholders on the proposed legislation to regulate the sale of first-hand residential properties (the "**Proposed Legislation**"), in the form of a bill entitled the "Residential Properties (First-hand Sales) Bill" (the "**Bill**").
2. Prior to the submission of the Consultation Paper, on 10 October 2011, the Steering Committee on the Regulation of the Sale of First-hand Residential Properties by Legislation submitted its report (the "**Report**") to the Secretary setting out its recommendations on how it is proposed to regulate the sale of first-hand residential properties by legislation.
3. Before and after the submission of the Report, REDA submitted to the Permanent Secretary for Transport and Housing (Housing) expressing its concerns and suggestions over a number of the proposed recommendations of the Steering Committee.

REDA's position - no objection if reasonable and proportionate

4. REDA has no objection in principle to the Administration's proposal to regulate the sale of first-hand residential properties Provided That :-
 - (a) the proposed measures are reasonable and proportionate to, and rationally connected with, the legitimate purpose of the proposal, i.e. to protect purchasers in first-hand residential properties; and
 - (b) the restrictions imposed are no more than are necessary to accomplish such legitimate purpose.

Purpose

5. It was acknowledged in the Consultation Paper (paragraph 6) that the Transport and Housing Bureau has considered the recommendations made in the Report to prepare the draft provisions of the Proposed Legislation.
6. However, REDA notes that its views and concerns on some important issues raised in its previous submissions to the Permanent Secretary have not been fully reflected and addressed in the Proposed Legislation. The purpose of this submission is to reiterate REDA's position on certain key issues which have not been fully reflected or addressed in the Proposed Legislation.

7. To the extent that REDA does not agree with, or has reservations on, the Proposed Legislation, the Administration should also include and reflect the views of REDA in the next stage of consultation, so that the public will have a balanced view of the issues and all the issues may be properly debated during the legislative process.

Section 2

Scope of Legislation: Should not apply to completed flats

Legislation should not apply to *completed* residential flats

8. Clause 4(1) provides that, save in very limited exceptional circumstances, the Proposed Legislation applies to any residential property in a development situated in Hong Kong in respect of which property no agreement for sale and purchase has ever been entered into. This follows the recommendations made in the Report that the Proposed Legislation shall apply to first-hand uncompleted and completed residential flats.
9. For the reasons given in REDA's Submissions, REDA objects to the proposal that the Proposed Legislation should apply to first-hand completed residential flats.
10. The Proposed Legislation should only apply to first-hand uncompleted flats.

Wrong in principle

11. While REDA generally supports reasonable measures to regulate the sale of first-hand residential flats, it is equally important to ensure that those measures are *proportionate* to the legitimate purpose of the proposal and that those measures must not disproportionately deprive developers and owners of their freedom to dispose of their properties.
12. It is wrong in principle to cover first-hand completed flats for the simple reason that there is no difference in substance between first-hand and second-hand completed flats and no logical distinction can be drawn between the two. In both cases, the flats are already in existence and can be inspected by potential purchaser *physically*. This is in fact also acknowledged by the Administration in the sense that the provisions in Part 2 Division 4 (the requirement to provide show flats for uncompleted developments) of the Draft Bill only apply to uncompleted flats and do not apply to completed flats.
13. The developers will not be on even playing field with an investor who has purchased flats from the developers and then resells the flats as second-hand. The distinction creates room for abuse. REDA considers that such restrictions cannot be regarded as *proportionate* to the legitimate purpose to protect purchasers.
14. In any event, completed flats may be held by an owner for leasing or left vacant due to market condition or other reasons. There is no good *justification* :-
 - (a) to require an owner to comply with requirements of, say, provision of sales brochures and price lists when it sells completed flats; *but*

- (b) where the owner has sold the flats to a purchaser either before or after the flats have been completed, the purchaser will not be subject to such requirements when it resells the flats.
15. The interests of purchasers are already adequately protected by, among other things, the following :-
- (a) The ability of the potential purchasers to actually inspect the physical flat.
 - (b) The existing law regarding misrepresentation and breach of contract.
 - (c) The rules of the Law Society for Non-consent Schemes.

Constitutionality - contravention of the Basic Law

16. The Basic Law guarantees the protection of private property rights which includes the freedom of owners to *dispose of* their property (emphasis added) :-
- (a) The general principle is contained in Article 6: "*The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.*"
 - (b) Article 105 goes on to provide: "*The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.*"
17. A restriction on an owner's constitutional right to *dispose of* its property can only be justified if :-
- (a) the restriction is *rationally connected* with one or more legitimate purposes;
 - (b) the means to impair the right is *no more than is necessary* to accomplish the purpose in question; and
 - (c) the legislative objective is *sufficiently important* to justify limiting the constitutional right.
18. To the extent that the Proposed Legislation :-
- (a) imposes restrictions beyond what is necessary for the protection of the interests of purchasers; or
 - (b) unduly restricts the right of the owner to dispose of its flats in a manner which is discriminatory; or

- (c) compels the owner to dispose of more flats than it would wish to do (for example, requiring the owner to offer to sell at least a prescribed number or percentage of flats whenever it wishes to market any flat),

the legislation would be unconstitutional as being contrary to the Basic Law.

- 19. REDA considers that if the Proposed Legislation were to apply to first-hand completed residential flats, then one or more of the requirements recommended to be included in the Proposed Legislation may be regarded as *unconstitutional* for the reason that the restrictions imposed are *disproportionate* to the legitimate purpose which the Administration intends to achieve, that is, protection of purchasers.
- 20. In the light of the above, REDA considers that the following mandatory requirements currently proposed in the Bill on first-hand *completed* residential flats may be regarded as *unconstitutional* :-
 - (a) **Sales Brochures** (Part 2 Division 2) - To require an owner to prepare the sales brochure (Clause 7) and to make the sales brochures available to the general public at least 7 days in advance of sale (Clause 15(1), (2), (3)). REDA submits the following :-
 - (i) The owner may intend to offer *only* a few flats for sale and keep the rest for leasing as a long-term investment.
 - (ii) The flats may have been altered or renovated and a considerable time may have elapsed since the building has been completed when the flats are offered for sale.
 - (iii) The sale may be to a sitting-tenant or as a result of an unsolicited offer.
 - (b) **Price Lists** (Part 2 Division 3) - To require an owner to prepare price lists (Clause 17) and to make the price lists available to the general public at least 3 days in advance of sale (Clause 20(1), (3)). Such a requirement is impractical and undesirable in that :-
 - (i) It will limit the number of flats that can be made available for sale immediately to purchasers when there are strong demands, especially when additional flats are proposed to be put up for sale because the flats originally offered for sale have already been sold out quickly.
 - (ii) It will delay sale and cause inconvenience to purchasers who would need to go home and return 3 days later.
 - (iii) It will make it impossible for those overseas purchasers who would need to depart from Hong Kong within the next 3 days.

- (c) **Minimum Number of Flats for Sale** (Part 2 Division 3) - To specify the mandatory *minimum* number of flats in the price lists for sale (Clause 18). This requirement effectively forces owners to *cover more than the number of flats that an owner intends to sell*.
21. Further, apart from the objective to protect purchasers, no other cogent reasons have been provided which would enable the Proposed Legislation to survive a constitutional challenge. In any event, detailed explanation of the following have not been provided :-
- (a) The *specific* policy aims behind the Proposed Legislation.
- (b) How each of the proposed measures is *rationaly connected* to such policy aims.
- (c) Whether *less* intrusive means exist, whether such *less* intrusive measures have been considered by the Administration and whether they have been rejected for sound reasons.

Section 3

Disclosure of Information on Gross Floor Area ("GFA")

General principles

22. Clause 3 provides a standardised definition of "saleable area" and it is suggested that such defined "saleable area" shall be used as the *only* basis to quote unit prices of flats in the sales brochures, price lists and advertisements.
23. The defined term of "saleable area" excludes all "GFA-related" information such as GFA per flat and unit price based on GFA.
24. According to paragraphs 14 to 16 of the Consultation Paper, the Administration considers that since different developers may include different items in calculation of GFA, this will affect the apportioned share of common area of a residential unit and, accordingly, information on the GFA per flat is not transparent and is inconsistent among different developers.
25. REDA opposes the proposal that no information on GFA may be provided because :-
- (a) the proposal constitutes an infringement upon freedom of expression guaranteed by the Basic Law and Hong Kong Bill of Rights and may be regarded as unconstitutional;
- (b) the proposal which applies *only* to the first-hand residential properties (but not secondary market) is *discriminatory* against owners of the first-hand residential properties;
- (c) the proposal runs contrary to the principle of transparency of information;

- (d) it has been the market practice to quote GFA in the sale of flats and confusion in the market may be created by an abrupt change in practice;
- (e) the proposal, if implemented, may create the impression that there has been a drastic price hike;
- (f) the existing template which show both the saleable areas as well as the GFA has worked well, because purchasers are provided with information on the total saleable area and the saleable areas of the component parts of the flat and there is no issue of the purchasers being misled.

Infringement of freedom of expression

26. The freedom of expression is constitutionally guaranteed by the Basic Law and Hong Kong Bill of Rights (incorporated as part of the laws in Hong Kong by Section 8 of the Hong Kong Bill of Rights Ordinance, Cap.383) as follows (with emphasis added) :-

- (a) Article 27 of the Basic Law provides that "*Hong Kong residents shall have **freedom of speech, of press and of publication**"*
- (b) Article 16 of the Bill of Rights provides as follows :-

*"(1) Everyone shall have the **right to hold opinions without interference.***

*(2) Everyone shall have the right to **freedom of expression**; this right shall include **freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.***

(3) The exercise of the rights provided for in paragraph (2) of this article carried with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary :-

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals."

27. The right of an owner to disclose the GFA-related information in the sales brochure and price list clearly falls within the category of freedom of speech and publication which are constitutionally protected by the Basic Law and Bill of Rights. The restriction to disclose GFA-related information constitutes a restriction on an owner's right to the freedom of expression.

28. A restriction on an owner's constitutional right to freedom of expression can only be justified if :-

- (a) the restriction is *rationally connected* with one or more legitimate purposes;
 - (b) the means to impair the right is *no more than is necessary* to accomplish the purpose in question; and
 - (c) the legislative objective is *sufficiently important* to justify limiting the constitutional right.
29. It is also the well-established principles that :-
- (a) the burden is on the decision maker to justify any restriction imposed on the freedom of expression; and
 - (b) the decision maker must provide **cogent reasons** to justify any such restriction.
30. Further, unlike other constitutionally guaranteed rights, Article 16 of the Bill of Rights specifically sets out the scope of permissible restrictions on the right to freedom of expression in Article 16(3).
31. In the light of the above, REDA has the following comments :-
- (a) One of the principle purposes of providing the GFA-related information in the sales brochure and price list is to enhance *transparency* in the sale of first-hand residential properties by providing *more details and information* to the potential purchasers with respect to the actual basis of calculating the purchase price of the residential properties.
 - (b) So long as the GFA-related information is accurate, correct and objectively verifiable (e.g. the basis of calculation and apportionment of the GFA to each particular flat can be supported by some objective criteria, say, certificate issued by the authorised person), then such freedom of disclosing such information as guaranteed by the Basic Law and the Bill of Rights should be respected. REDA sees not cogent reasons which can override an owner's constitutional right to provide accurate, correct and objectively verifiable information to the members of the public in selling their first-hand residential properties.
 - (c) The availability of the GFA-related information also benefits the public by providing further information with respect to the residential properties. This will enable informed decisions and choices to be made by the potential purchasers. The restriction to disclose the GFA-related information will unreasonably deprive the potential purchasers of their right to *seek* and *receive* information as guaranteed by Article 16(2) of the Bill of Rights.
 - (d) If the aim to restrict the disclosure of GFA-related information is to prevent dissemination of false or misleading information in terms of the GFA-related information, then such aim has already been achieved by *other* provisions of the Bill (i.e. Parts 3 and 4 of the Bill). Under Parts 3 and 4 of the Bill, an owner

commits an offence if he provides any false or misleading information (this will no doubt cover the GFA-related information). With this legal obligation in place, the owners will need to provide accurate, correct and objectively verifiable GFA-related information in order to justify the *accuracy* thereof. It is therefore not necessary to prohibit disclosure of GFA-related information to accomplish such intended purpose.

- (e) In any event, the only reason given by the Administration to restrict the disclosure of GFA-related information as stated in the Consultation Paper is because different developers may include different items in calculation of GFA in the Consultation Paper. Given (i) the significance of the right to freedom of expression, (ii) the legitimate purpose for an owner to disclose GFA-related information as mentioned above and (iii) the duty on the part of the Administration to provide *cogent reasons* to justify the restrictions, REDA considers that such stated reason cannot be regarded as *rationally connected* with the purpose of protecting the potential purchasers.
- (f) Further, the restriction to disclose GFA-related information does not fall within any of the permissible restrictions prescribed in Article 16(3) of the Bill of Rights. Such restriction is neither for respect of the rights or reputations of others, nor for the protection of national security or of public order (*ordre public*), or of public health or morals.

32. In the circumstances, REDA's position on the proposed prohibition to disclose GFA-related information is as follows :-

- (a) The *means* proposed in the Bill (i.e. a total and absolute ban on disclosure of all GFA-related information, irrespective of the fact that those information are accurate and objectively verifiable) is much more than is necessary to achieve the legitimate purpose the Administration intends to achieve (i.e. to protect the interest of potential purchasers in the first-hand residential properties market).
- (b) The Administration fails to demonstrate with *cogent reasons* that (i) the restrictions go no further than are reasonably necessary and (ii) there is no *other less intrusive means* to achieve such legitimate purpose.
- (c) Accordingly, the total and absolute ban on the disclosure of GFA-related information may be regarded as *unconstitutional* as the restriction is *disproportionate* to the legitimate purpose to protect purchasers of first-hand residential properties.

Discrimination against owners of first-hand residential properties

33. The proposed restriction on disclosure of GFA-related information *only* applies to the sale of first-hand residential properties. Such restriction does not apply to residential properties sold in the second-hand market.

34. If the reason given by the Administration to propose such restriction (i.e. different developers include different items in calculation of GFA in the Consultation Paper, which affect the accuracy of the purchase price of different residential flats) is justified, then the same concern is equally applicable to the flats sold in the secondary market. REDA sees no good justification why the owners of second-hand residential properties should be exempted from such restriction.
35. To prohibit owners of first-hand residential properties from disclosing the GFA-related information (but allow the owners of second-hand properties to continue to refer to GFA as the basis to calculate the purchase price) is *discriminatory* against owners of first-hand residential properties. There is no good justification :-
- (a) to prohibit an owner of first-hand residential properties from disclosing the GFA-related information; but
 - (b) where the owner has sold the flats to a purchaser, such purchaser will *not* be subject to such prohibition when he re-sells the flats in second-hand market.
36. The owners of first-hand residential properties will not be on even playing field with an investor who has purchased flats from those owners and then resells the flats as second-hand.
37. This proposal will also create *confusion* to the potential purchasers because there will be different and inconsistent *basis* relied on by the owners to calculate the purchase prices of first-hand and second-hand residential properties. Such confusion clearly contradicts the intention of the Administration to achieve the purpose of *protecting* individual purchasers.

Less intrusive means: proposed standardized definition of GFA

38. Without prejudice to REDA's position in paragraphs 26 to 32 above, even assuming that such prohibition could be justified, the reason given by the Administration to justify the restriction on disclosure of GFA-related information (i.e. different items included by different developers in calculating the GFA) can easily be addressed by the adoption of a common definition for GFA for sale of uncompleted flats as there is already a ready-made definition of GFA in the Building (Planning) Regulations under the Buildings Ordinance which is used in the calculation of plot ratio by the Buildings Department and authorised persons on a daily basis.
39. Accordingly, REDA proposes that a **common definition of GFA** be adopted for the purpose of the price lists, sales brochures, advertisements and other promotional materials. For this purpose, REDA suggests the following :-
- (a) Only those GFA of the common areas which serve *exclusively* the residential part of the development are to be included and apportioned to residential units.
 - (i) The relevant areas are commonly classified as "Residential Common Areas" in the context of the deed of mutual covenant of a development.

- (ii) Under the Consent Scheme, the authorised persons are required, on a routine basis, to certify the GFA of the "Residential Common Areas" to support the calculation of undivided shares and management shares (where appropriate).
 - (b) Both accountable and non-accountable (or exempted) GFA are to be included, so long as they serve exclusively the residential part of the development.
 - (c) A plan identifying the GFA of the common areas which serve exclusively the residential part of the development is to be certified by an authorised person, so that there will be no uncertainty as to the basis of the calculations.
 - (d) This plan is to be included in the sales brochure.
 - (e) All other GFA (irrespective of whether they are accountable or non-accountable) which do not serve exclusively the residential part of the development will not be mentioned in the price list or sales brochure.
40. The suggested common definition of GFA will result in a *standardisation* of the "GFA-related" information in the price list and sales brochure. This will have the benefit of :-
- (a) Increasing the amount of information made available to purchasers. Purchasers will have a better idea of the nature and extent of the common areas serving exclusively the residential part of the development which may impact on their use and enjoyment and the amount of management fees which they will have to bear.
 - (b) Obviating the negative misconceived impression which the public may have that there is a sudden drastic price hike in unit prices, if references to GFA are prohibited.
41. With a standardised common definition of GFA, REDA suggests that the existing template which shows both the saleable areas as well as the GFA apportioned to individual residential flats should be retained.
42. The adoption of the proposed common definition of GFA also shows that there are *other less intrusive means* to achieve the legitimate purpose of protecting the individual purchasers of first-hand residential properties.

Section 4

Definition of saleable area and related terms and expressions

43. Under Clause 55, provision of fraudulent or reckless misrepresentation of information relating to the first-hand residential properties will be subject to criminal liability. This means that misrepresentation of the saleable area as required under the Proposed Legislation will also constitute criminal offence.

44. Given the imposition of *criminal* liability on the relevant persons, REDA considers that more precise and accurate definitions must be given to each item to be included in the calculation of saleable area (as set out in Clause 3(1)(b)) and each item to be excluded from such calculation (as set out in Clause 3(1)(c)). For example :-
- (a) Under Clause 3(1)(b), the saleable area includes the floor area of a **balcony**, an **utility platform** and a **verandah**. However, no definition of these terms is provided in the Bill. According to the current practice of the Building Authority, for the purpose of general building plans submissions, an utility platform or balcony may combine with a flat roof or roof. If such combination occurs, then they may no longer be physically distinguishable although they may be marked differently by the authorised person on the general building plans.
 - (b) Under Clause 3(1)(c)(x), an **air-conditioning plant room** should be excluded from calculation of the saleable area. However, for the purpose of general building plans submissions, different variants of this term serving substantially the same function but with a different name as may be proposed by the authorised persons and approved by the Building Authority and shown on the approved building plans. For instance, it may be called "air-handling unit room", "variable refrigerant volume room" etc. The question is whether the areas of those terms should be regarded as "air-conditioning plant room" or "any other facilities".
 - (c) For the same reasons given above, uncertainty will also arise as to what constitute each of the items as set out in Clause 3(1)(c) (e.g. **flat roof, roof, yard, terrace, garden**, etc.).
45. In the light of the above, REDA considers that, to avoid confusion and uncertainty as to what should be included in, or excluded from, the calculation of saleable area, the Administration must provide precise and accurate definitions of each and every of the items as set out in Clause 3(1)(b) and (c) of the Bill.
46. In this respect, REDA proposes that **common definition of each of the terms in Clause 3(1)(b) and (c)** should be provided and, for this purpose, **references should be made to the terms used by the Building Authority in processing general building plans applications**, so as to ensure that consistent terms are adopted by the Building Authority and in the Proposed Legislation.

Section 5

Requirements of price lists

Minimum number of flats in price lists

47. Clause 18 of the Bill provides that owners of a development shall provide a price list of flats covering some *minimum number* of flats for sale.

48. By covering the minimum number of flats for sale in a development, the owners would effectively be forced to offer to sell the relevant number of flats so stipulated in the price lists. REDA considers that this requirement clearly amounts to an unlawful infringement of the owner's rights under Article 105 of the Basic Law :-
- (a) Under Article 105, an owner has the right to *use* or *dispose* of the flats it owns, which means that the owner also has the right *not* to sell the flats and keep it for its own use.
 - (b) To require the owner to publish a price list for a specified number or percentage of the flats in the development, even though it wishes to sell only *one or some* but not the other flats, is tantamount to requiring it to sell all the flats in the list.
 - (c) To force the owner to sell is a substantial *intrusion* into an owner's dominion over his own properties, especially in the context of the capitalist system practised in Hong Kong which, under the Basic Law, is required to be protected and preserved.
 - (d) The compulsion unreasonably interferes with the constitutional rights of an owner to *own* and *dispose of* its properties and cannot be regarded as a rational or proportionate response to an objective to protect purchasers.
49. An owner of a development may intend to sell only part of the flats in a development for immediate profits and to retain the majority part for long-term investment (e.g. leasing) purpose. In this sense, even if an owner is not required to actually sell all the units set out in the price list, the requirement to force an owner to put in the price list more flats than he genuinely wishes to sell will :-
- (a) deprive the owner's legitimate right to retain certain units for long-term investment purpose.
 - (b) effectively force the owner to give a *false* or *misleading* statement and representation in the price list as to the number of flats the owner actually wishes to sell.
 - (c) adversely affect the tax position of the owner because, notwithstanding the owner's true intention to retain certain flats for long-term investment purposes with different tax treatment, there is a real possibility that :-
 - (i) *all* the flats as set out in the price list will be treated by the tax authority as properties for sale; and
 - (ii) the owner may be deemed to have the intention to sell *all* those flats in the price list.

General exemption for sale of residential properties with special characteristics

50. Entirely without prejudice to REDA's primary position mentioned in the above paragraphs that it is wrong in principle to require owners to set out *minimum number* of flats for sale in

the price list, REDA considers that, for the reasons given below, even if this requirement is to be implemented, there should be a general exemption to the sale of residential properties which are of special characteristics with special considerations which are different from the sale of ordinary residential properties in the market. They include, among other things, sale of **house developments** and special units in a multi-storey building which are **generally large in size (e.g. penthouse, duplex units)**.

- (a) The nature and scale of the sale of house type developments and large-size special units mentioned above are very different from the those of sale of ordinary residential flats in multi-storey buildings.
 - (b) Given the relatively smaller scale of house developments in Hong Kong (which generally does not consist of more than 30 houses in one single development) and the limited number of large-size special units, the target purchasers and market orientation are generally different from those of sale of ordinary residential flats in multi-storey buildings.
 - (c) It is legitimate that the owners of house developments and those large-size special units may not wish to offer to sell all the houses at the same period of time.
 - (d) Further, insofar as the sale of large-size special units is concerned, apparently the target purchasers are different from those of the sale of ordinary residential units. Given the special characteristics and size of these special units, the potential purchasers will generally require more time in making informed decisions as compared with the sale of ordinary units in the same building. Further, the sales pace of the large-size special units is generally much slower than that of ordinary units in the building. Due to the limited supply and lack of comparables for those large-size special units in the market, owners will need more time to determine the target price which will accurately reflect the true market value of the units and it is inappropriate to require owners to also include these special units in the price list.
51. To provide an *objective* standard to determine what constitutes large-size special units as mentioned above, REDA proposes that reference be made to the valuation and classification of private domestic units by the Rating and Valuation Department. In this respect, REDA suggests that the flats should be regarded as large-size special units and exempted from the price list requirements if the flat size of a particular residential unit is 160 sq. m. or 1,722 sq. ft. or above (i.e. "Class E" under the Rating and Valuation Department's classification of private domestic units).

Price list to be made available at least 3 days before the sale

52. According to Clause 20 of the Bill, the price list must be made available to the general public at least 3 days before a date of the sale.
53. REDA considers that such a requirement is impracticable and undesirable in that :-
- (a) it will unreasonably limit the number of flats that can actually be made available for sale immediately to purchasers when there are strong demands, especially when

additional flats are proposed to be put up for sale because the flats originally offered for sale have already been sold out quickly. This is clearly against the freedom of market.

- (b) it will delay sale and cause inconvenience to the purchasers who would need to leave and return at least 3 days later.
 - (c) it will make it impossible for those overseas purchasers who would need to depart from Hong Kong within the next 3 days.
54. In any event, this requirement is also undesirable in the adverse market condition. This is because, given the vulnerability of the market in the sale of residential properties, the requirement to wait for 3 days to sell the flats in adverse market condition would seriously affect the opportunity for owners to minimise their loss by disposing of their units as fast as possible. This is in fact also the common market practice that the owners will offer a lower price in the request of prospective purchasers who intend to buy more than one flat in the same development.
55. Accordingly, REDA suggests the following :-
- (a) This 3-day rule should not be implemented and, in any event, the number of days should be reduced.
 - (b) This requirement should not apply to a subsequent price change in case the price is lowered.

Section 6

Imposition of criminal liability and sanctions

Underlying principles

56. REDA's position on the underlying principles is as follows :-
- (a) Criminal penalty should only be imposed where there is an element of *dishonesty* or *recklessness*.
 - (b) All proposed offences must be clearly defined, with no ambiguity.
 - (c) Presumption of guilt and shifting of the burden of proof to the defence should be avoided;
 - (d) In determining the penalty for an offence, it is essential to maintain consistency in our legislation so as to avoid any anomaly in our laws, and the Administration should compare similar offences before determining any penalty;
 - (e) Reference should be made to existing legislations and other jurisdictions.

57. In proposing offences, the Administration should bear in mind that the threat of criminal prosecution may be exploited by litigious flat purchasers who are looking to rescind agreements for sale and purchase, particularly during a downturn in the property market. The Administration must not move away from one of the most important pillars of our criminal justice system - that save in very exceptional cases and with good justification, the burden of proof in criminal cases should rest on the prosecution.

Non-compliance which are minor and regulatory in nature

58. According to paragraph 55 of the Consultation Paper, when determining the types of penalties in the Proposed Legislation, the Administration adopts the principles that even certain non-compliance which are *minor* and *regulatory* in nature (e.g. a failure to provide building plans for free public inspection, failure to deposit sales brochures with specified authorities within the required timeframe) will still be subject to criminal sanctions.
59. While REDA has no objection in principle to the imposition of a fine of a reasonable amount proportionate to the relevant non-compliance in question, REDA objects to the imposition of *criminal* sanction on non-compliance which are *minor* or purely *regulatory* in nature.
60. REDA considers that criminal penalty should be imposed *only* where there is an element of dishonesty or recklessness. It is highly inappropriate to criminalise non-compliance with minor or regulatory requirements such as a failure to provide building plans for public inspection. The Administration should not be, and cannot be perceived as being, too eager to criminalise minor non-compliance which can easily lead to abuse, not only by some officers in the Administration, but also by purchasers who wish to get out of a bargain freely made when there is a drop in the market.
61. REDA therefore proposes that, save and except for those non-compliance which involves an element of dishonesty or recklessness (e.g. fraudulent or reckless misrepresentation, intentional provision of false or misleading information inducing property transactions), other non-compliance should not be subject to criminal penalty.
62. The Administration should adhere to the principle that where civil remedies are available and appropriate for the non-compliance which are minor or regulatory in nature, criminal sanction is not a legitimate and proportionate measure to be introduced.

Lowering the penalty levels

63. According to paragraph 55 of the Consultation Paper, the proposed penalty levels range from a fine at level 6 (HK\$100,000) to HK\$5,000,000 plus imprisonment up to a maximum of 6 months to 7 years.
64. REDA considers that the Administration should use the Trade Description Ordinance (the "**TDO**") as the reference for the proposed legislation as the nature and purpose of the TDO (that is, to prohibit false trade descriptions, false, misleading or incomplete marks and the

like in respect of the goods provided in the course of trade or by suppliers of goods) are similar to what the Proposed Legislation seeks to achieve.

65. Under section 18 of the TDO, the normal maximum penalty for offences committed in respect of trade descriptions and trademarks is :-
- (a) on conviction on indictment, a fine of HK\$500,000 and imprisonment for 5 years; or
 - (b) on summary conviction, a fine at level 6 (HK\$100,000) and imprisonment for 2 years.
66. Without prejudice to REDA's position in paragraph 54 to 58 above that non-compliance which are minor or regulatory in nature should not be subject to criminal sanction, REDA suggests that :-
- (a) the TDO should be used as the reference for the Proposed Legislation; and
 - (b) the penalty levels of a number of offences proposed in the Proposed Legislation (in particular for those which are minor or purely regulatory in nature) should be *lowered*.

Liability of corporate officers

67. It is normal for developers to set up special purpose vehicles in the form of limited companies for individual projects. In this respect, Clause 62 regulates the liability of company officers for offence committed by the company. Clause 62(1) provides that if a company commits an offence under the Proposed Ordinance, an officer shall also be guilty of such offence if :-
- (a) *"the commission of the offence is aided, abetted, counselled, procured **or induced** by an officer of the company or by a person purporting to act as such an officer"* or
 - (b) *"the offence is committed with the consent or connivance of, or is **attributable to any recklessness** on the part of, an officer of the company or a person purporting to act as such an officer."*
68. Under section 89 of the Criminal Procedure Ordinance ("**CPO**"), a corporate officer may be convicted along with the company of an offence, as a secondary party, by aiding, abetting, counselling or procuring the offence. Under this section, in order that the officer can be convicted, there must be proof of actual participation by the officer in the commission of the offence in the sense that the officer has helped, supported or assisted the company or that there were acts of encouragement, incitement, instigation or the like on the part of the officer.
69. In addition, section 101E of the CPO states: *"Where a person by whom an offence under any Ordinance has been committed is a company and it is proved that the offence was committed with the consent or connivance of a director or other officer concerned in the*

management of the company, or any person purporting to act as such director or officer, the director or other officer shall be guilty of the like offence." [Emphasis added]

70. In other words, under the general law, a corporate officer can be found guilty of the same offence as the company if :-
- (a) he helped, supported or assisted in the offence or he had ordered, advised, encouraged or persuaded the commission of the offence; or
 - (b) the offence was committed with his consent or connivance.
71. On the face of it, Clause 62 mirrors and combines the provisions of sections 89 and 101E of the CPO. However, REDA notes the following :-
- (a) No justification has been given by the Administration in the Consultation Paper as to *why* it is considered necessary to provide for *separate* provisions in the Proposed Legislation when the *existing* legislation has already covered the same situation.
 - (b) Further, the elements of "*inducement*" and "*recklessness*" (as highlighted in paragraph 63(a) and (b) above) are not provided in the existing provisions of the CPO. The inclusion of these new elements will no doubt expand the scope of the corporate officers who may be subject to criminal sanctions. However, no explanation has been provided as to why it is considered that these new elements need to be included.
72. As a matter of principle, REDA considers that it would be wrong for the Administration to promote *unnecessary* new legislation. Over legislation must be avoided, as this will only create unnecessary confusion and inconsistency.

Burden of proof

73. As a fundamental principle to the rule of law, there is a presumption of innocence and the normal rule is that the burden of proof lies on the prosecution :-
- (a) Article 87 of the Basic Law provides that "*anyone who is lawfully arrested shall ... be presumed innocent until convicted by the judicial organs*" (emphasis added).
 - (b) Article 11(1) of the Hong Kong Bill of Rights also provides that "*everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law*" (emphasis added).
 - (c) This is so even under the general provision in section 390(1) of the SFO which states: "*(1)Where the commission of an offence under this Ordinance by a corporation is proved to have been aided, abetted, counselled, procured or induced by, or committed with the consent or connivance of, or attributable to any recklessness on the part of, any officer of the corporation, or any person who was purporting to act in any such capacity, that person as well as the corporation, is*

guilty of the offence and is liable to be proceeded against and punished accordingly." [Emphasis added]

74. The Steering Committee also recommended in the Report (paragraph 14.13) that, to ensure the presumption of innocence, the phrase "*it is proved*" should be included in the Proposed Legislation to ensure that the burden of proof shall always lie on the prosecution.
75. However, this recommendation was **not** incorporated into the Bill (e.g. Clause 62(1) of the Bill). REDA considers that the taking away of the express requirement for the prosecution to prove its case will create uncertainty that there is a presumption of guilt and shifting the burden of proof from the prosecution to the defence. Such uncertainty and presumption of guilt may be regarded by the court as unconstitutional for contravention of the above provisions and articles of the Basic Law and the Hong Kong Bill of Rights.
76. REDA sees no good justification for the Proposed Legislation to depart from the general law and from the recommendations made by the Steering Committee in the Report.
77. REDA further submits that the principle of presumption of innocence should also be expressly incorporated into other parts of the Proposed Legislation where criminal sanctions are imposed for contravention of the Proposed Legislation.

Defence provisions

78. According to Part 5 of the Bill, the available defences on the offences under the Proposed Legislation are divided into two parts :-
 - (a) Division 1 (Clause 57): Defence of reasonable precautions and due diligence
 - (b) Division 2 (Clauses 58 to 61): Defence for offences in relation to false or misleading information

Division 1 - Defence of reasonable precautions and due diligence

79. Clause 57 provides that "*if a person is charged with an offence under Part 2 or 3 (other than section 50), it is a defence to prove that the person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by that person*". [Emphasis added.]
80. REDA considers that the "due diligence" defence should apply to all the offences under the Proposed Legislation :-
 - (a) This is in fact in line with the Steering Committee's recommendations in paragraphs 14.10 and 14.14 of the Report that appropriate defence provisions such as the general defence of "due diligence" should be available for a person charged under the Proposed Legislation. The general defence should not be subject to any qualification in its application.

- (b) It is too restrictive to confine the scope of this general due diligence defence to Parts 2 and 3 of the Bill only.
 - (c) More importantly, no justification has been given in the Consultation Paper as to why this general defence should not apply to the offence under Clause 50 (i.e. advertisement must not contain false or misleading information).
81. The Administration also acknowledge (paragraph 58 of the Consultation Paper) that the provisions imposing liability on corporate officers modelled, among others, on the legislation such as the TDO :-
- (a) According to section 20 of the TDO, it is a defence available to the an officer of a company that he shall not be guilty of an offence if "*he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the commission of the offence*".
 - (b) REDA considers that, given the very nature of conveyancing transactions in first-hand sale of residential properties in Hong Kong and the voluminous information involved, the "*absence of knowledge*" element should be included in this general defence and, in any event, should be available to the officers of the company.

Division 2 - Defence for offences in relation to false or misleading information

82. The defences specified in Division 2 only apply to two specific offences, namely, Clause 56(1) (for disseminating, or authorizing or being concerned in the dissemination, of false or misleading information) and Clause 50 (publishing or causing to be published an advertisement containing any information that is false or misleading in a material particular).

SFO is an inappropriate model

83. Apparently, the structure and criteria of the proposed defences mirror those stipulated in the Securities and Futures Ordinance (Cap. 571) (the "**SFO**"). REDA considers that the SFO is an inappropriate model, in so far as penalties are concerned as :-
- (a) the SFO regulates the highly complex securities and futures industry for the protection of investors;
 - (b) securities and futures contracts are constituted by highly complicated financial instruments which are not easily understood by laymen, or even well educated people;
 - (c) fraud could easily be committed in the securities and futures industry and is difficult to detect;
 - (d) the very nature of the securities and futures industry call for extensive powers to be vested in the regulatory authority and heavy penalties to be imposed on offenders;

- (e) none of the above features are applicable to the sale of flats by owners.

Scope of application of the defences

84. REDA considers that the scope of application of the defences (which is confined to three scenarios, namely, issue or reproduction of the information/ advertisement, re-transmission of the information/ advertisement and live broadcast of information/ advertisement) is too restrictive.
85. REDA suggests the Administration to review the scope of application of the defences under Division 2 to expand their application to more scenarios and circumstances.

Elements of the defences too complicated

86. Further, the criteria/ elements of the defences in Division 2 are complicated and are considered disproportionate to the nature of sale of first-hand residential units. For the reasons given in paragraph 79 above, the complicated elements of defences should be applicable to the highly complex securities and futures industry for the protection of investors under the SFO, but are not applicable to the sale of first-hand residential properties.
87. REDA therefore suggests the Administration to thoroughly review the criteria/ elements of the defences to *simplify* the same, so as to make them proportionate to the very nature of the sale of first-hand residential units. In this respect, REDA suggests that references be made to similar defences under the TDO :-

- (a) Section 27 of TDO (Innocent publication of advertisements) provides that, in proceedings for an offence under this Ordinance committed by the publication of an advertisement, it shall be a defence for the person charged to prove that he :-
- (i) is a person whose business is to publish or arrange for the publication of advertisements; and
 - (ii) received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence under the TDO.
- (b) Section 13C(4) of the TDO (False or misleading representation as regards seller's connection with another person) provides that it is a defence for a person charged to prove that he did not know and has no reason to believe that the relevant representation made by him was false.

Indictable offences

88. Clause 63 of the Bill provides that proceedings in respect of an offence under the Proposed Ordinance, *other than an indictable offence*, may be brought within 3 years after the commission of the offence.

89. According to the Bill, the following offences are categorised as *indictable* offences :-
- (a) Publication of an advertisement containing information which is false or misleading in a material particular - Clause 50
 - (b) Fraudulent or reckless misrepresentation for the purpose of inducing another person to purchase a specified residential property - Clause 55
 - (c) Dissemination of false or misleading information that is likely to induce another person to purchase a specified residential property - Clause 56
 - (d) Failure to comply with the requirements of investigations conducted by the enforcement authority for suspected contravention - Clauses 68 and 69
90. The effect of the above is that the above four offences are **not** subject to the time limit for prosecution.
91. Indictable offences are more serious offences and may be dealt with summarily only where the prosecution has expressed its consent to such a course. Having regard to (i) the underlying purpose of the Proposed Legislation is to regulate sale of first-hand residential properties and to protect individual purchasers and (ii) the nature and degree of the offences proposed, REDA considers that :-
- (a) it is sufficient that criminal sanctions are imposed on those offences; and
 - (b) it is inappropriate to categorise the above four offences as *indictable* offences because this is *disproportionate* to the legitimate purpose which the Administration intends to achieve by introducing the Proposed Legislation.
92. Accordingly, REDA suggests the following :-
- (a) References to "*conviction on indictment*" should be removed from the above four offences.
 - (b) The penalties imposed on the above four offences should be reduced to those proportionate to *summary* offences and the relevant non-compliance in question.
 - (c) All the offences under the Proposed Legislation should be subject to the *same* time limit for prosecution as proposed in the following paragraphs.

Prosecution time limit

93. Clause 63 provides that proceedings may be brought within 3 years after the commission of offence. In fact, most of the offences under the Bill are similar to the offences as stated under the TDO. According to section 19 of the TDO, the time limit for prosecution of an offence is :-

- (a) 3 years from the date of commission of the offence; **or**
 - (b) the expiration of 1 year from the date of discovery of the offence by the prosecutor, whichever is the earlier.
94. Given that the nature of the offences proposed in the Bill are generally easily ascertainable by the prosecutor, a shorter period for prosecutions should be similarly imposed in the Bill in order to remove any uncertainty of the criminal liability imposed on the relevant persons, which should not be dragged on for unduly long period of time.
95. More importantly, given that the nature and purpose of the TDO (that is, to prohibit false trade descriptions, false, misleading or incomplete marks and the like in respect of the goods provided in the course of trade or by suppliers of goods) are very similar to what the Proposed Legislation seeks to achieve, REDA considers that Clause 63 should be drafted in more or less the same way as in section 19 of the TDO.

Clause 50 (Advertisement must not contain false or misleading information)

96. In addition to the submissions in paragraphs 85 to 88 above that the offence under Clause 50 of the Bill should not be categorised as *indictable* offence, REDA further submits that references to "*material particular*" in Clause 50(1)(a) and (b) will create uncertainty as to the actual scope and degree of gravity in determining whether a person commits an offence under Clause 50.
97. Although references to "*material particular*" are found in some other pieces of legislation which impose criminal sanctions on provision of false or misleading information, having regard to the special nature of conveyancing transactions in first-hand sale of residential properties, the voluminous information, publication and advertisements involved and the vulnerability of the property market in Hong Kong, it is not appropriate to mechanically adopt the same criteria and standard in criminalising the conduct under Clause 50.
98. REDA considers that it would only be fair and reasonable that a higher degree of threshold be imposed to criminalise the conduct contemplated under Clause 50. In this respect, REDA proposes that a person may be regarded as committing an offence if the person :-
- (a) publishes or causes to be published an advertisement containing information that is false or misleading in a **significant and substantial** particular; and
 - (b) the person knows that, or is reckless as to whether, the information is false or misleading as to the **significant and substantial** particular,

Section 7

Appointment of the enforcement authority

Establishment of enforcement authority

99. Part 6 Division 1 regulates the appointment of the enforcement authority to, among other things, ensure effective enforcement of the Proposed Legislation. Under the current proposal, the enforcement authority will be a public officer to be appointed by the Secretary for Transport and Housing.
100. REDA has no objection to the establishment of an enforcement authority to ensure effective implementation of the Proposed Legislation provided that the powers conferred to it are proportionate to the protection of purchasers in first-hand residential properties.
101. REDA understands that the rationale behind the proposal to establish the enforcement authority *within* the Government is to facilitate early implementation of the Proposed Legislation and to maximize the use of public resources. However, having regard to (i) the wide power conferred to the enforcement authority under the Proposed Legislation (e.g. to issue guidelines, to require suspects to produce whatever documents or records it requires, to attend before it to answer any question relating to any matter under investigation, etc.); and (ii) the proposal that failure to comply with the relevant requests/ requirements of the enforcement authority commits an offence and is liable to a fine of HK\$5,000,000 and to imprisonment for 7 years, REDA has the following suggestions :-
- (a) To ensure the independence and impartiality of the enforcement authority to discharge its functions under the Proposed Legislation in the long run, the appointment of a public officer as the enforcement authority should be an *interim* measure only and for a short *transitional* period.
 - (b) The Administration should aim to transform the enforcement authority into an independent statutory body within a specified time limit. REDA and members of the public should be consulted of such specified time limit
 - (c) During such transitional period (i.e. before establishment of such independent statutory body), the enforcement authority should be headed by a senior directorate grade officer and comprise a multi-disciplinary team with professional knowledge and experience in various relevant field and should be fully funded by Government revenue. This is in line with the recommendations made by the Steering Committee in Chapter 15 of the Report.

Issue of guidelines

102. Clause 66 provides that the enforcement authority appointed by the Secretary for Transport and Housing may issue guidelines indicating the manner in which the enforcement authority proposes to perform any function or exercise any power, or providing guidance on the operation of any provision of the Proposed Legislation.
103. It seems to REDA that the provisions in Clause 66(1) to (5) mirror the provisions in, among others, section 13 of the Financial Reporting Council Ordinance (Cap.588), section 8 of the Deposit Protection Scheme Ordinance (Cap.581) and section 6H of the Mandatory Provident Fund Schemes Ordinance (Cap.485). REDA suggests that other requirements

and criteria in relation to the issuance of guidelines under these legislation should also be incorporated in the Proposed Legislation. For example :-

- (a) The requirement that the guidelines "*not inconsistent with this Ordinance*" should be expressly incorporated in the Proposed Legislation.
- (b) There should be an express requirement that the guidelines should have *general* application to all the vendors and other parties affected by, or subject to, the Proposed Legislation.
- (c) The guidelines, and any amendments or revocation thereof, should be published in the *Gazette*.

Wide investigation powers

- 104. Apparently, the provisions relating to the enforcement authority's investigation powers under Part 6 Division 2 of the Bill make reference to the provisions in section 183 of the SFO. Given the different nature and purpose of the SFO as illustrated in paragraph 79 above, REDA considers that the powers conferred to the investigator appointed by the Securities and Futures Commission under the SFO are excessive and should not apply to the sale of first-hand flats.
- 105. More importantly, as compared with the offences under the SFO, many offences imposed by the Proposed Legislation are relatively *minor* and *regulatory* in nature (e.g. a failure to provide building plans for free public inspection, and failure to deposit sales brochures with specified authorities within the required timeframe).
- 106. Given the contrast of the nature of the offences targeted by the SFO and the Proposed Legislation, REDA considers that it is highly inappropriate to :-
 - (a) confer such a wide power to the enforcement authority as currently proposed in Clause 68(2) of the Bill to conduct investigations with respect to the offences proposed under the Proposed Legislation; and
 - (b) impose heavy penalties (i.e. on conviction on indictment to a fine of HK\$5,000,000 and to imprisonment for 7 years; or on summary conviction to a fine of HK\$1,000,000 and to imprisonment for 3 years as proposed in Clause 69(8) of the Bill) on, say, a corporate officer who fails to produce a particular document or record requested by the enforcement authority in relation to a technical breach of the Proposed Legislation which is minor or regulatory in nature.
- 107. REDA submits that the proposed wide power and heavy penalties are *disproportionate* to the legitimate purpose of the Proposed Legislation and will unreasonably deprive developers and owners of their freedom to dispose of their properties. Given the very different nature and degree of the offences the SFO targets to combat, the Administration should provide detailed explanation and justification to whether other *less* intrusive measures and means of investigation have been considered and, if so, whether and why those other *less* intrusive measures and means are rejected.

108. REDA suggests that the following should be included into the Proposed Legislation :-
- (a) Sufficient advance notice shall be given to the persons under investigation. The enforcement authority shall inform in writing the persons under investigation the reasons and justifications for which the investigation is conducted in relation to him as early as possible.
 - (b) More "*reasonableness*" requirements should be provided. For example, the persons under investigations should be given *reasonably sufficient* time to produce the relevant record, document and/or response as required under Clause 68(2) of the Bill; the time and place to be specified in the requirement as referred to in Clause 68(2) should also be subject to the same *reasonable* requirement.
 - (c) Having regard to (i) the vulnerability of property markets, (ii) the sensitive information involved in the sale of first-hand residential properties and (iii) the wide range of persons who may be subject to investigations as proposed in Clause 68(3) of the Bill (the scope of the draft wording is wide enough to cover any individual purchasers), there should be an express requirement that the enforcement authority and any person who performs or assists the enforcement authority in the investigation shall maintain *confidentiality* in respect of all matters and information produced or given or otherwise furnished for the purposes of the investigation.
109. Since the nature and degree of activities and offences proposed in the Proposed Legislation are similar to those under the Estate Agents Ordinance (Cap.511), the Administration may refer to the provisions relating to the investigations conducted by the investigator appointed by the Estate Agents Authority under section 28 of the Estate Agents Ordinance.

Section 8

Forfeiture of Preliminary Deposit of 5% of the Purchase Price

110. Clause 38(1) of the Bill proposes that a preliminary deposit of **5% of the purchase price** is payable by a person to the vendor on entering into a preliminary agreement for sale and purchase of the first-hand residential property. Clause 39(2) further provides that, if such person does not execute an agreement for sale and purchase (i.e. commonly known as the *formal* sale and purchase agreement) in respect of such property within 3 working days after the date of the preliminary agreement, then the preliminary agreement is terminated and the preliminary deposit representing **5% of the purchase price** is forfeiture.
111. REDA does not have objection to this proposal. However, currently under the Consent Scheme and REDA's Guidelines, a purchaser is required to pay the preliminary deposit of **10% of the purchase price** upon the signing of the preliminary agreement and, if a purchaser unilaterally decides not to proceed with the signing of the formal sale and purchase agreement, then such preliminary deposit shall be forfeited to the vendors. In fact, for many years the relevant amount of the preliminary deposit was only 5% of the purchase price and the increase from 5% to 10% of purchase price was specifically required by the

Administration when it introduced various measures in the middle of 2010 for the purported reason to curb property speculations.

112. Since the increase of the preliminary deposit from 5% to 10% of the purchase price was only introduced by the Administration for approximately 1 year since 2010, REDA does not understand why the amount of the preliminary deposit should now be reduced from 10% back to 5% of the purchase price within such a short period of time.
113. To ensure consistency in policy making and to secure market stability, the Administration should provide reasons and justifications to support its proposal to reduce the amount of the preliminary deposit from 10% back to 5% of the purchase price within such a short period of time.

Section 9

Exemptions to the application of the Proposed Legislation

General

114. According to Clause 4(1) of the Bill, the Proposed Legislation applies to *any* residential property in a development situated in Hong Kong in respect of which property no agreement for sale and purchase has ever been entered into.
115. According to Clause 4(2) to (5) of the Bill, there are only three situations where the application of the Proposed Legislation is exempted, namely :-
 - (a) Sale of residential properties where 95% or more of the units of the development have been leased out for not less than 36 months - Clause 4(3).
 - (b) Sale of one first-hand single house with a certificate of exemption is issued under section 5(a) of the Buildings Ordinance (Application to the New Territories) Ordinance (i.e. the New Territories Exempted Houses, the "NTEH") - Clause 4(4).
 - (c) Sale of development constructed by the Hong Kong Housing Authority (the "HKHA") - Clause 4(5).
116. While REDA welcomes the exemptions granted to the application of the Proposed Legislation, REDA has the following recommendations which are necessary to secure the fair implementation of those exemptions.

Sale of residential properties to existing tenants: Clause 4(3)

117. This category of exemption already presumes that the Proposed Legislation will also apply to *completed* residential flats. This is because a flat can be leased out to tenants only after it has been completed.

118. However, for the reasons given in Section 2 above, it is REDA's position that it objects to the proposal that the Proposed Legislation should apply to completed residential flats. On this basis, REDA considers that this category of exemption is not applicable. In any event, without prejudice to the aforesaid position, (a) the requirement of 36 months as proposed in the Bill is unduly long and should be shortened to 6 months and (b) the proposed percentage that at least 95% of the number of the residential properties are let out is practically impossible and such percentage should be reduced to over 50%.

Sale of first-hand single house: Clause 4(4)

119. REDA considers that it would not be fair to other owners that this category of exemption is only granted to the sale of NTEH. REDA suggests that this category of exemption should also apply to sale of other types of house developments in Hong Kong.

Exemption to HKHA: Clause 4(5)

120. According to paragraph 13 of the Consultation Paper, the Administration takes the view that developments that are constructed by the HKHA (including the new and residual Home Ownership Scheme) flats should be exempted, for the reason that Home Ownership Scheme flats are subsidized flats and that the HKHA has to follow set parameters to dispose of those flats which, as the Administration considers it, are completely different from "normal" market practice.
121. REDA strongly objects to this special treatment granted to the HKHA as this is discriminatory against owners of *all* other developments in Hong Kong, irrespective of whether those owners are developers or not.
122. In any event, REDA does not consider that the reasons given by the Administration in the Consultation Paper are justified :-
- (a) Having regard to the aim and purpose of the Proposed Legislation (i.e. to protect individual purchasers of first-hand residential properties), the fact that the Home Ownership Scheme flats are subsidised flats is totally irrelevant.
 - (b) The Consultation Paper also mentions that the Proposed Legislation is not applicable to HKHA because the HKHA has to follow set parameters to dispose of the flats. However, the first-hand sale of residential properties are also subject to certain mandatory requirements under the Consent Scheme or, as the case may be, the Non-Consent Scheme.
 - (c) In any event, those parameters which the HKHA has to follow (e.g. determination of the target group, setting of sale price and determination of the flat selection priorities among eligible applicants etc) do not have any conflicts whatsoever with the measures and requirements as currently proposed in the Bill.
123. REDA sees no good justification to offer special treatment to the HKHA and strongly recommends that the Proposed Legislation should also apply to the HKHA.

Other special circumstances which justify exemption

124. Generally speaking, the exemptions provided for in Clause 4 are too limited. There are *other* exceptional situations which justify non-application of the Proposed Legislation. For example :-
- (a) A family which owns a whole residential building wishes to distribute the residential units only to their family members by way of notional sale or otherwise. Under the Bill, however, such bona fide family arrangement will be subject to the complicated procedures such as the publication of sales brochures and price lists as prescribed under the Proposed Legislation.
 - (b) Another example is that, as the practice commonly adopted in the industry, for the purpose of group restructuring, a developer may wish to conduct internal transfer of some or more of the residential properties from one subsidiary to another subsidiary company by way of intra-group transfer under section 45 of the Stamp Duty Ordinance. Under the current draft of the Bill, such internal transfer will also be subject to the complicated procedures as prescribed under the Proposed Legislation.
125. The above are only some obvious examples which demonstrate that there are legitimate situations where the Proposed Legislation should not apply. REDA therefore proposes that :-
- (a) the Administration should give further considerations on the special circumstances which would justify the exemption of application of the Proposed Legislation; and
 - (b) in any event, the family arrangement and intra-group transfer under section 45 of the Stamp Duty Ordinance as mentioned above should be exempted from the application of the Proposed Legislation.

Section 10

Other comments and recommendations

126. In addition to the specific comments and recommendations mentioned in the above Sections, REDA has the following comments and recommendations in other parts of the Consultation Paper.

Provision of master layout plan in sales brochure

127. Clause 10(2)(i) of the Bill provides that the sales brochure for a development must set out, among other things, a master layout plan of the development. Schedule 1 Part 1 Section 9 also provides that the master layout plan must satisfy certain requirements prescribed in Section 9(a), (b) and (c) thereof.
128. Since no definition of "master layout plan" is provided in the Bill, it is uncertain as to whether the term "master layout plan" used in the Bill *only* refers to the master layout plan

which is required to be prepared by a grantee under the land grant and/or the master layout plan required to be submitted by an owner for the purpose of obtaining planning application under the Town Planning Ordinance (e.g. for land zoned as Comprehensive Development Area under the relevant outline zoning plan).

129. If it is the intention of the Administration that the term "master layout plan" used in the Bill should *only* refer to the master layout plan for the purpose of the land grant and outline zoning plan, then such "master layout plan" will **not** be available for residential developments where (a) there is **no** requirement under the land grant to prepare master layout plan (especially for those old Government leases which are virtually unrestricted save for the non-offensive trade clause) and (b) a developer is **not** required to apply for planning approval under the applicable outline zoning plan.
130. However, since it is a **mandatory** requirement under the Bill (because the word "**must**" is used in the beginning of Clause 10(2) of the Bill) to set out **a** master layout plan in the sales brochure, the owners of those developments which do not have any master layout plan would be regarded as committing an offence for failure to provide a master layout plan in the sales brochure.
131. REDA therefore suggests that :-
- (a) a clear definition be provided for the term "master layout plan", i.e. the master layout plan should mean the master layout plan required to be prepared under the land grant conditions and/or the applicable outline zoning plan; and
 - (b) if an owner of a development is not required under the land grant or the applicable outline zoning plan to prepare the master layout plan, then such owner shall be exempted from the requirement to set out the master layout plan in the sales brochure.

Aerial photos

132. Clause 10(2)(g) provides that the sales brochure for a development must set out, among other things, the latest aerial photo of the development as at the date on which the sales brochure is printed. Schedule 1 Part 1 Section 7(2) provides that the aerial photo of the development to be provided in the sales brochure must be the Survey and Mapping Office of the Lands Department at a flying height below 7,000 feet.
133. The proposed requirement for an aerial photo showing the development is not supported because :-
- (a) to the extent the owner is required to take or commission the photo, it is too onerous, particular for small developers or small developments.
 - (b) to the extent that the photo is obtained from the Survey and Mapping Office of the Lands Department, there will necessary be a time gap between the taking of the

photographs and publication of the sales brochures which may render the aerial photograph misleading or incorrect due to changes in the neighbourhood.

- (c) aerial photo of a particular area at which the development is situated may not be available at the Survey and Mapping Office.

134. REDA therefore suggests the following :-

- (a) The requirement to set out aerial photo in the sales brochure should be dispensed with.
- (b) Even if this requirement is to be retained, owners of a development should be given the option of taking their own aerial photo instead of those prepared by the Survey and Mapping Office of the Lands Department so long as the basic requirements are met.

Contents of, and entries in, Register of Transactions

135. REDA has the following comments and recommendations on the requirements of the register of transactions proposed in Clause 42 of the Bill :-

- (a) Clause 42(2): The time limit should be increased from 24 hours to 48 hours after the signing of the relevant preliminary agreement for sale and purchase.
- (b) Clause 42(3): The time limit should be increased from 1 working day to 2 working days after the signing of the relevant agreement for sale and purchase.
- (c) Clause 42(4): The time limit of the 4th working day should be extended to the 5th working day after the date on which the preliminary agreement for sale and purchase is entered into.
- (d) Clause 42(5): The time limit should be increased from 1 working day to 2 working days after the date on which the agreement for sale and purchase is terminated.

Contents of sales brochure: summary of land grant

136. Schedule 1 Part 1 Section 15(2)(f) provides that the lease conditions that are onerous to a purchaser shall be summarised and provided in the sales brochure.

137. REDA has considerable concern on the ambiguous definition of "*onerous*", for the simple reason that what is considered as *onerous* by the Administration or the enforcement agency could be very different from that by the owners of a development.

138. Given the serious consequence in failing to summarise the required lease provisions in the sale brochure under the Proposed Legislation (i.e. criminal sanction), the Administration has a duty to avoid such unclear and ambiguous definition. The Administration should therefore provide a clear, certain and unambiguous definition of "*onerous*" in the Proposed

Legislation. For example, an exhaustive list of those *onerous* lease conditions should be specified in the Proposed Legislation.

Street number of the development

139. Clause 53(2)(c) and Schedule 1 Part 1 Section 1 provide that an advertisement and sales brochure must state the street number allocated by the Commissioner of the Rating and Valuation for the purpose of distinguishing the development.
140. In fact, such street number for the new development may not be available from the Commissioner of the Rating and Valuation at the time when the sales brochure is printed.
141. REDA therefore suggests that this requirement is applicable only if the street number of the development has been allocated by the Commissioner of the Rating and Valuation.

Floor plans

142. Clause 10(2)(j) provides that the sales brochure must set out floor plans of the residential properties in the development. Schedule 1 Part 1 Section 10(2)(b) further provides that the floor plans must state 6 items (i.e. Section 10(2)(b)(i) to (vi)) in accordance with the approved building plans for the development.
143. However, REDA notes that it is *not* a mandatory requirement under the Buildings Ordinance and the relevant building planning regulations that *all* of those 6 items set out in Section 10(2)(b)(i) to (vi) must be shown or incorporated in the building plans for the purpose of Building Authority's approval.
144. Accordingly, to avoid unnecessary confusion, REDA suggests that the relevant (i.e. not all) items set out in Section 10(2)(b)(i) to (vi) shall be stated in the floor plans in accordance with the approved building plans if such item(s) is/are so provided and incorporated in the relevant approved building plans. In any event, an owner should not be regarded as committing an offence for not providing any of those 6 items in Section 10(2)(b)(i) to (vi) in the floor plans if such item(s) is/are not required to be provided in the approved building plans.

Show flats requirements

145. Clause 26(5) provides that if the floor-to-ceiling of the show flats is less than that specified in relation to the residential property in the sales brochure or the approved building plans, then the vendor must display in the show flat a notice stating the difference between those heights.
146. Clause 26(5) only deals with situation where the floor-to-ceiling height of the show flats is less than that specified in relation to the residential property in the sales brochure or the approved building plans. REDA considers that it is also necessary to deal with the situation where there is a difference in floor surface level. REDA therefore suggests the following :-

- (a) The words "*or floor surface level*" should be added after the words "*floor-to-ceiling height*" at the first sentence of Clause 26(5); and
- (b) The words "*or levels (as the case may be)*" should be added after the words "*those heights*" at the end of Clause 26(5).

Floor plans of specified residential property showing furniture

- 147. Clause 71(3)(b) provides that if furniture is shown on the floor plan of any specified residential properties, then the dimensions of the furniture must also be shown on the floor plan.
- 148. In view of the relatively small size of the floor plans, REDA considers that it is highly impracticable to set out all such dimensions in the floor plans. This said requirement would only cause unnecessary confusion to prospect purchasers when viewing the floor plans.

Section 11

Transitional Measures

- 149. No transitional measures are provided in the Bill. As a matter of fairness, REDA considers that the Proposed Legislation should not have retrospective effect and suitable transitional measures should be adopted.
- 150. In this regard, REDA has the following proposal :-
 - (a) For the residential developments where the form of agreement for sale and purchase (i) has already been approved by the Director of Lands under the Consent Scheme or, as the case may be, (ii) already annexed to a statutory declaration made by a partner of a solicitors firm and registered at the Land Registry for the purpose of pre-sale under the Non-consent Scheme should not be subject to the requirements under the Proposed Legislation.
 - (b) Show flats already constructed by a vendor and, where applicable, opened for viewing by potential purchasers used for sale in compliance with the relevant guidelines of the Consent Scheme or, as the case may be, the Non-consent Scheme prior to the date on which the Proposed Legislation comes into effect should not be affected by the Proposed Legislation.
 - (c) Sales brochures already printed by a vendor in compliance with the guidelines of the Consent Scheme or, as the case may be, the Non-consent Scheme prior to the date on which the Proposed Legislation comes into effect should **not** be affected by the Proposed Legislation.
- 151. The purpose of adopting the above transitional measures is to ensure that the time and resources of the vendor (in particular for those relatively smaller residential developments) will not be wasted and, more importantly, to avoid any unnecessary confusion and

uncertainty to the public on the application of the Proposed Legislation and relevant requirements.

Others

152. The above comments are not exhaustive and REDA reserves its right to raise further comments to the Proposed Legislation.
153. REDA also reserves its right to disclose the contents of this submission to any third party.

The Real Estate Developers Association of Hong Kong
27 January 2012