



# 香港地產建設商會

## THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

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### Stamp Duty (Amendment) (No.2) Bill 2010 ("the Bill")

#### -- Comments of The Real Estate Developers Association of Hong Kong

The Real Estate Developers Association of Hong Kong ("REDA") supports the objectives as enunciated by the Government in the introduction of the Special Stamp Duty ("SSD"), namely to *"curb short-term speculative activities"*, to *"reduce the risk of the development of an asset bubble and ensure the healthy and stable operation of the property market"*, and that *"at the same time, genuine home buyers and long-term investors should not be affected."* However, we have reservations as to whether these objectives may be achieved through the Bill as currently drafted.

We have the following comments:

#### 1. No sunset clause or review date

The Government says that the SSD is needed as an extraordinary measure under the current exceptional circumstances in Hong Kong. Exceptional circumstances, by definition, do not last forever. Once normality returns, there is absolutely no place for the SSD. However, the Bill does not provide for a date for the cessation of SSD, nor is there a mechanism provided for the review of the suitability of SSD by the Legislative Council ("Legco"). As it now stands, the Bill will incorporate SSD as a permanent feature of the Stamp Duty Ordinance.

It is noted that SSD has already given rise to a lot of concerns among homeowners, investors, estate agents, the legal profession and the banking community, quite apart from developers. The imposition of SSD will severely reduce the flexibility of homeowners and genuine investors in the disposal or transfer of their properties. The SSD may also be unfair and prejudicial to homeowners and genuine investors and will undermine the reputation of Hong Kong as a free-market economy. It should only be allowed to last for as long as considered absolutely necessary and not a day more.

#### *REDA recommends that*

- A "sunset date" of say, 12 months from 20 November 2010, by which date SSD will cease to apply. Alternatively, there should be incorporated in the Bill a review date of say, 9 months with the provision that unless Legco passes a resolution confirming the need to extending the SSD for another definitive period of time, the SSD shall cease to apply. This is to ensure that the SSD will not become a permanent feature.



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### 2. Collateral damage to homeowners and genuine investors

We are concerned that the imposition of SSD will have the unintended consequence of causing collateral damage to homeowners and genuine investors who may be forced to sell their properties due to unforeseen or changed circumstances including sudden unemployment, matrimonial problems, family bereavement and illness.

#### *REDA recommends that*

- The Government should consider expanding the scope of exemptions to protect homeowners and genuine investors against unforeseen or changed circumstances. An appeal mechanism should also be provided for such purposes.

### 3. Prejudicial effect on the interests of mortgagees and other creditors

We are concerned that the imposition of SSD will have the unintended consequence of prejudicing the interests of mortgagees (licensed banks or private lenders/mortgagees), other creditors (whether secured or unsecured), and the original homeowner in the event of a mortgagee or a chargee exercising its power of sale or appointing a receiver to sell the property. According to Section 50(2) of the Conveyancing and Property Ordinance ("CPO"), any receiver appointed pursuant to an implied power in a legal charge or equitable mortgage by deed under section 50(1) of CPO will be deemed the agent of the mortgagor and the mortgagor will be solely responsible for the receiver's acts and defaults. A disposal of the property by the receiver (so appointed by the mortgagee) will therefore be deemed to be made by the mortgagor. If the disposal by the receiver (as agent of the mortgagor) occurs within 24 months of the "acquisition" of the property by the mortgagor, the mortgagor (and in effect the mortgagee) will bear the liability of SSD.

In addition, an equitable mortgage in favour of a bank over a property acquired by a mortgagor under a sale and purchase agreement of a flat in an uncompleted development usually contains a power of sub-sale allowing the mortgagee to sub-sell the property (whether in the name of the mortgagor or otherwise) even before the assignment of the unit is executed by the developer as vendor in favour of the mortgagor. It appears that SSD will be payable under a sub-sale by the mortgagee, if the sub-sale by the mortgagee (if made in the name of the mortgagor) occurs within 24 months of the sale and purchase agreement.

Furthermore, it is not uncommon that a developer will provide finance to a purchaser for the latter's purchase of the property to be secured under a second mortgage. If SSD is payable on the disposal as mentioned above, then the interests of the developer as a second mortgagee, as well as other creditors, e.g. a creditor under a subsequent charging order or an unsecured



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creditor, will be affected as the sales proceeds will be reduced by the amount of the SSD payable. The residue (after deduction of SSD) that is distributable to the first mortgagee, second mortgagee and other creditors (whether secured or not) will be reduced. The above examples show that the imposition of SSD will prejudice the normal business activities in Hong Kong. These effects appear to be beyond the intended scope of the Bill. In any event, any powers exercised by a mortgagee/creditor in general for the purpose of enforcing repayment of loans/debts can hardly be associated with "speculation".

It is noted that a sale or transfer of a property due to bankruptcy or involuntary winding up are proposed exemptions from SSD. It is thus only logical that exemptions should also be granted to cases where a mortgagee/chargee exercises its power of sale or appoints a receiver to sell under a mortgage/charge or resell the property after foreclosure.

### *REDA recommends that*

- An exemption be provided where a property is disposed of pursuant to a power (whether expressed or implied at law) under a mortgage/charge or charging order. This should include, inter alia, sale by a mortgagee, sale by a receiver appointed by a mortgagee, sub-sale under an equitable mortgage, or resale of property by a mortgagee after a foreclosure order is made.

#### **4. Residential sites and urban renewal**

Notwithstanding that the Administration's intention is to target the speculation of residential units, it appears that *residential sites* will also be caught inadvertently by SSD. A developer will be exposed to SSD if he has unified the title of an old building and commences presale or sale of the units in the redeveloped building within 24 months. To protect himself, the developer may choose to defer putting the units on the market until 2 years have elapsed. The same would also apply if the developer were to acquire a bare site for redevelopment. In the circumstances, the supply of new housing units will inevitably be pushed back. Hence the SSD may have the unintended consequences of stifling urban renewal and constricting new housing supply.

### *REDA recommends that*

- SSD should not apply to the following categories:
  - (a) bare sites;
  - (b) where units in an existing old building are disposed of for the purpose of redevelopment (or if SSD is paid, the SSD will be refunded when the old building is demolished); and



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- (c) in the disposal of new units in a new development (or uncompleted development) by a developer even if the interests in the land (whether consisting of old units in the old building to be demolished or an undivided share or whole interest in a bare site) are acquired by the developer within 24 months before the disposal.

### 5. Distribution of unsold units to a joint development party pursuant to a joint development agreement

A joint development agreement in Hong Kong commonly provides for the transfer of unsold units in a newly completed development to a party to the joint development agreement after a certain period of time upon fulfilment of certain conditions. This usually happens in a joint venture between MTR Corporation Limited or Urban Renewal Authority (as provider of the land) and a developer (for the construction of the development). The joint development agreement may provide for the sale of the unsold units after a certain period of time by the legal owner of the land to the developer at a certain price to be fixed accordingly to certain criteria.

A developer who acquires the unsold units under such circumstances should not be subject to SSD when it resells the units within 24 months of its acquisition of the units. There is no speculation involved. The acquisition of the units is made pursuant to the joint development agreement and the disposal of the units is made in the ordinary course of business. If SSD is to be payable on the subsequent disposal of units by a developer under such circumstances, the developer may opt to withhold the sale of the units until the 24-month period is elapsed, and this will have the unintended effect of delaying the supply of new units to the market.

#### *REDA recommends that*

- The Bill should provide that for units acquired by a party pursuant to a joint development agreement, SSD will not apply in the subsequent disposal of the units by that party.

### 6. Intra-group transfers

It is not uncommon for developers to transfer units or bare sites owned by different members of the same group to facilitate redevelopment. The transfers will usually be exempted from payment of *ad valorem* stamp duty under sections 45 and 29H(3) of the Stamp Duty Ordinance. As the transfers are within the same group, there is no question of speculation.



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### *REDA recommends that*

- The Bill should provide for the exemptions of such transfers from the SSD. Otherwise, the transferee company may delay putting the units on the market until 24 months after the date of the transfer, and this would have the unintended effect of constricting new housing supply.

### **7. Provisional Agreement for Sale and Purchase**

We understand that the question of what must be included in a Provisional Agreement for Sale and Purchase ("PASP") before it can be said to effect a transfer of equitable ownership is the subject of a current dialogue between the Inland Revenue Department and the legal profession, and we would be pleased to defer the interpretation of such legal principles to the experts.

For our part, *REDA recommends that*

- More precise definitions should be provided in the Bill to clarify what will constitute an "acquisition" and a "disposal" to achieve certainty and to avoid litigation.

### **8. Retrospective effect of the Bill and the rule of law**

On 19 November 2010, the Government announced the introduction of SSD, to come into effect on 20 November 2010. The proposed SSD is an entirely new tax and there is a total lack of consultation before it was announced. It is now apparent that the SSD, if implemented in the manner in which it was announced, will have a lot of unintended consequences. While this Bill is being scrutinized in LegCo, the Government has already adopted the attitude that the people of Hong Kong will have to order their affairs as if the proposed SSD were law. For fairness' sake, we believe any PASP signed prior to 20 November 2010 should not be subject to the proposed SSD, as neither the vendor nor the purchaser would have any knowledge of imposition of or details of the scope and applicability of SSD at the time when they entered into the agreement.

Further, the Administration is already providing interpretation on the charge to SSD and giving directions on compliance of the requirements of the proposal as if it were law. This state of "rule by decree" is highly undesirable and is in contravention of the spirit of the rule of law. Retrospective legislation should be avoided in our civil society. The problem arising from retrospective legislation is evident in the examples of homeowners and genuine investors being caught in unforeseen adverse circumstances as mentioned above.





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### *REDA recommends that*

- Legco must ensure that retrospective legislation be scrutinized with the utmost care and in any event SSD should not apply to PASP signed prior to 20 November 2010.

### *In summary REDA recommends that*

- (i) A "sunset date" of say, 12 months from 20 November 2010, by which date SSD will cease to apply. Alternatively, there should be incorporated in the Bill a review date of say, 9 months with the provision that unless Legco passes a resolution confirming the need to extending the SSD for another definitive period of time, the SSD shall cease to apply. This is to ensure that the SSD will not become a permanent feature.
- (ii) The Government should consider expanding the scope of exemptions to protect homeowners and genuine investors against unforeseen adverse circumstances and an appeal mechanism should be provided for such purposes.
- (iii) An exemption should be provided where a property is disposed of pursuant to a power (whether expressed or implied at law) under a mortgage/charge or charging order. This should include, inter alia, sale by a mortgagee, sale by a receiver appointed by a mortgagee, sub-sale under an equitable mortgage, or resale of property by a mortgagee after a foreclosure order is made.
- (iv) SSD should not apply:
  - to bare sites;
  - where units in an existing old building are disposed of for the purpose of redevelopment (or if SSD is paid, the SSD will be refunded when the old building is demolished); and
  - in the disposal of new units in a new development (or uncompleted development) by a developer even if the interests in the land (whether consisting of old units in the old building to be demolished or an undivided share or whole interest in a bare site) are acquired by the developer within 24 months before the disposal.
- (v) For units acquired by a party pursuant to a joint development agreement, SSD will not apply in the subsequent disposal of the units by that party.



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- (vi) For intra-group transfers, SSD will not apply.
- (vii) More precise definitions should be provided in the Bill to clarify what constitutes an "*acquisition*" and a "*disposal*".
- (viii) Legco must ensure that retrospective legislation such as this Bill be scrutinized with the utmost care to protect innocent parties from collateral damage. In any event, SSD should not apply to provisional agreements for sale and purchase signed prior to 20 November 2010.

**The Real Estate Developers Association of Hong Kong**  
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