RESIDENTIAL PROPERTIES (FIRST-HAND SALES) BILL

JOINT OPINION

A. Introduction

1. We are asked to advise the Real Estate Developers Association of Hong Kong ("REDA") on whether there are strong arguments that the following measures in the Residential Properties (First-Hand Sales) Bill ("the Bill"), which is currently before the Legislative Council, would be unconstitutional:

   (a) The requirement that some vendors of first-hand properties must publish price lists containing the prices of a minimum number of properties; and

   (b) The prohibition on relevant vendors from providing information on the price per square metre/foot in any format other than "saleable area" (therefore excluding the possibility of providing such information on the basis of "gross floor area").

2. In summary, we consider that REDA has strong arguments that these two measures would be unconstitutional.

B. Background

B1. The residential property market

3. The residential property market may be divided into sales of "uncompleted" and "completed" properties. A property is "completed" when it passes the relevant administrative stage.[1]

[1] For Consent Scheme projects, the grant of a Certificate of Compliance or Consent to Assign. For Non-Consent Scheme projects, the issuing of the Occupation Permit.

4. Sales of uncompleted properties may be further divided between those which fall within the "Consent Scheme" and those which do not. Properties fall within the Consent Scheme if the Government land grant prohibits the developer from selling uncompleted properties without prior consent of the Director of Lands. In such cases, the Government imposes conditions which must be met before consent will be given. There is therefore a system of regulation of the sale of uncompleted Consent Scheme properties.

5. Sales of uncompleted properties which do not fall within the Consent Scheme are not subject to similar governmental regulation. However, developers which are members of REDA are bound to follow REDA's guidelines, which generally mirror the Consent Scheme.

6. There is no similar system of regulation of sales of completed properties.

B2. Background to the Bill

7. The Government has, since at least 2010, been engaged in efforts to increase the regulation of sales of residential property. It has focused only on "first-hand properties": broadly speaking, new properties which have not previously been sold. The proposed regulation would, however, cover both uncompleted and completed first-hand properties.

8. The Government's initial approach was to attempt to persuade REDA to agree to adopt the so-called "Nine New Measures". We understand that, following negotiations with the Government, REDA adopted those measures in relation to sales of uncompleted, but not completed, properties.

9. The Government then turned its attention instead to the possibility of legislation. In particular:

   (a) A Steering Committee on the Regulation of the Sale of First-hand Residential Properties by Legislation was appointed. The Steering Committee Report was published in October 2011. We have been provided with letters from REDA dated 26 September 2011 and 31 October 2011 which comment on that report.

(b) In November 2011, the Government published a "Public Consultation on The Proposed Legislation to Regulate the Sale of First-Hand Residential Properties" (the "Public Consultation"). We have been provided with REDA's submissions to that consultation, dated 27 January 2012.

(c) On 13 March 2012, the Government decided to introduce the Bill into the Legislative Council. It published a Legislative Council Brief which sets out the Government's justification for the Bill. Annex A of the Legislative Council Brief is the Bill.[2] Annex B is the Report on the Public Consultation. Annexes C to H contain further detail regarding the Government's justifications.

10. It is helpful to set out here the core of the Government's justification, which appears at paragraph 2 of the Legislative Council Brief:

> "2. The purchase of a residential property is a major undertaking for most Hong Kong people. In most of the cases of the sale of first-hand residential properties, the vendors (i.e. real estate developers) and individual purchasers are not on an equal footing. The former are always in a much stronger position vis-a-vis the latter in terms of resources and bargaining power. Not only do vendors hold first-hand residential properties in bulk, they also possess and control the release of information relating to those properties and their sales arrangements. To further enhance the transparency and fairness of the sales arrangements and transactions of first-hand residential properties, the Chief Executive announced in the 2010-11 Policy Address that a Steering Committee would be set up to discuss specific issues on regulating the sale of first-hand residential properties by legislation. The Steering Committee was set up in October 2010. It completed its work and submitted recommendations on how to regulate the sales of first-hand residential properties in a report to the Secretary for Transport and Housing in October 2011. Most of the recommendations are built on the existing requirements under the Lands Department's Consent Scheme (the Consent Scheme) and the guidelines issued by the Real Estate Developers Association of Hong Kong (REDA). Having considered the recommendations made by the Steering Committee, the Transport and Housing Bureau (THB) consulted the public on the legislative proposals in the form of draft legislation from 29 November 2011 to 28 January 2012.

[2] We understand that there have since been some minor amendments to the Bill, but we are asked to focus our attention on the version at Annex A to the Legislative Council Brief.

The legislative proposals are primarily based on those recommendations."

B3. The Bill

11. Clause 10 provides that, subject to certain limited exceptions:

> "(1) This Ordinance applies to any residential property in a development situated in Hong Kong in respect of which property-
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> (a) no agreement for sale and purchase has ever been entered into; and
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> (b) no assignment has ever been made."

12. The Bill therefore applies, subject to certain exceptions, to all first-hand sales, for both completed and uncompleted properties.

13. **Part 2** of the Bill sets out detailed provisions regulating sales practices in relation to "specified residential property" (i.e. any property to which the Bill applies by virtue of clause 10). It is divided into nine Divisions. By clause 14, Divisions 2, 3, 6, 7 and 8 apply to any sale of a relevant residential property. Division 4 applies only to sales of uncompleted properties, and Division 5 only to sales of completed properties.

14. Division 2 sets out various requirements relating to the provision of a sales brochure. Clause 21(1) provides that the sales brochure must not set out any information other than the information required or authorised by the Bill.

15. By clause 23, the sales brochure must be made available free of charge to the general public at least seven days before the date of sale of the property.

16. Division 3 contains requirements relating to price lists. Clause 26 provides:

> "(1) Subject to subsection (2), the vendor must prepare for the purposes of section 29 a document setting out the price of each specified residential property in the development.
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> (2) If the development is divided into 2 or more phases, the vendor must prepare for the purposes of section 29 a document setting out the price of each specified residential property in each phase.

(3) The price of a specified residential property in a development may only be set out in-

(a) in the case of subsection (1), any one price list for the development; or

(b) in the case of subsection (2), any one price list for the phase of which the residential property forms part.

(4) If there is any change to the price of a specified residential property, the vendor must revise the price list that sets out the price to reflect the change."

17. Clause 27 requires that price lists must contain the prices of a minimum number of properties. In broad terms, if there are 30 or fewer residential properties in the development, a price list must set out the prices of all of the properties. If there are more than 30 but less than 100 properties then each price list must set out the prices of at least 30 properties. If there are 100 or more properties, then the first price list must set out the prices of the higher of 20% or 50 of the properties, and subsequent price lists must set out the prices of at least 10% of the properties.

18. Clause 28 contains detailed requirements regarding the contents of the price list. It must state the saleable area of the property (see further below). It must not, however, set out any information other than that information required by the Bill (clause 28(9)).

19. Under clause 29, the price list must be made available to the general public at least three days before sale. If a property is sold, it must be sold at the price in the price list (clause 31).

20. Price lists may be revised if the developer wishes to change the price for a property (clause 26(4)), but the revised price list must then be made available three days before sale and the sale must be at the price in the revised price list (clause 31(2)(b)).

21. Division 4 imposes requirements regarding the provision of show flats for uncompleted developments. Division 5 concerns the viewing of completed properties. It requires the property to be made available for viewing, subject to

certain exceptions (clause 40), and provides that prospective purchasers must be allowed to take measurements, photographs and video recordings (clause 42).

22. Division 6 concerns the sales arrangements. Clause 43 requires that, at least three days before sale, vendors must make the following information available:

> "(a) the date and time when, and the place where, the specified residential property will be offered to be sold;
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> (b) the number of specified residential properties in the development that will be offered to be sold at that date, time and place;
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> (c) a description of the specified residential properties mentioned in paragraph (b);
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> (d) the method to be used to determine the order of priority in which each of the persons interested in buying any of those specified residential properties may select the residential property that the person wishes to purchase;
>
> (e) the method to be used, in any case where 2 or more persons are interested in purchasing a particular specified residential property, to determine the order of priority in which each of those persons may proceed with the purchase."

23. Division 7 imposes requirements relating to the preliminary agreement and final agreement. Division 8 requires the vendor to keep a register of transactions.

24. **Part 3** of the Bill relates to advertisements. Clause 60 prohibits the provision of false or misleading information. Clause 61 imposes further requirements relating to the contents of advertisements. Of particular importance is clause 61(4), which is the only provision (apart from the rules against false or misleading information) which prevents the vendor from providing particular information. It provides that:

> "An advertisement must not give information on the unit price of any specified residential property otherwise than by reference to the saleable area of that property."

25. "Saleable area", or "SA", is defined in clause 8. It is the floor area of the property, including any balcony, verandah or utility platform, but excluding any of the items in Part 1 of Schedule 2 (which includes such things as a bay window or a garden). SA also excludes the common parts of the development.

26. The practical significance of clause 61(4) is that it prevents vendors from providing information on the price per square foot or square metre in any form other than SA. In particular, vendors will not be able to quote the price using Gross Floor Area ("GFA"), which is a measure which takes account of common areas and is widely used in Hong Kong property sales.

27. **Part 4** creates offences relating to misrepresentation by false or misleading information.

28. We also note that the Bill creates many other new offences. Most of the clauses mentioned above contain a provision making breach an offence. A person will be liable to a fine of $1 million for breaching the requirement to publish a sales brochure seven days in advance of sales (clause 23(6)), or the requirement to produce a price list three days ahead of sale (clause 29(1)), or the requirement that the price list must include a minimum number of properties (clause 27(9)). A person who includes GFA information on an advertisement will be liable to a fine of $500,000 (clause 61(6)).

C Legal Principles

C1. Basic Law and Bill of Rights

29. The relevant constitutional protections are contained in the Basic Law and the Bill of Rights, which implements the provisions of the International Convention on Civil and Political Rights as required by Article 39 of the Basic Law.

Protection of property

30. Article 6 of the Basic Law provides:

> "The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."

31. More detailed provision is made by Article 105 of the Basic Law:

> "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."

32. Article 7 of the Basic Law is also relevant:

> "The land and natural resources within the Hong Kong Special Administrative Region shall be State property. The Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development. The revenues derived therefrom shall be exclusively at the disposal of the government of the Region."

Freedom of expression

33. The right to freedom of expression is guaranteed by Article 27 of the Basic Law:

> "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to from and join trade unions, and to strike."

34. Article 16 of the Bill of Rights makes more detailed provision:

> "Freedom of opinion and expression
>
> (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.
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> (3) The exercise of the rights provided for in paragraph (2) of this article carries 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-
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> (a) for respect of the rights or reputations of others; or
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> (b) for the protection of national security or of public order (ordre public), or of public health or morals."

C2. General approach to assessing lawfulness

35. The general approach to deciding whether legislation is unconstitutional was set out by Ma CJHC in *Leung v Secretary for Justice* [2006] 4 HKLRD 211 (CA):

> "43. As with most inquiries into whether a piece of legislation is unconstitutional, two stages should be analysed as a matter of legal approach:
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> (1) First, has a right protected by the Basic Law or the Bill of Rights (the ICCPR) been infringed?
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> (2) Secondly, if so, can such infringement be justified?
>
> An infringement that cannot be justified will mean that the relevant piece of legislation will be held to be unconstitutional and of no effect.
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> 44. As a matter of the burden of proof, it is for the Applicant to make good the first stage inquiry, viz, whether the Basic Law or the Bill of Rights has been breached. If this cannot be shown, that is the end of the matter. But if an infringement is proved, then the second stage comes into play and it is for the Respondent (usually the Government or one of its arms) to demonstrate that the breach is justified. It is at the second stage that the court examines whether the constitutional infringement can be legally justified by the application of the proportionality test. [...]"

36. The proportionality test was formulated in the following terms by the Court of Final Appeal in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, at paragraph 36:

(a) The restriction must be *rationally connected* with one or more legitimate purposes.

(b) The means used to impair the right must be *no more than is necessary* to accomplish the purpose in question.

37. The burden is always on the Government to prove justification: it must provide "cogent reasons" to justify the infringement. The applicant does not have the onus of showing that the infringement is unjustifiable or disproportionate. See: *Kwok Hay Kwong v Medical Council of Hong Kong* [2008] 3 HKLRD 524

(CA), at paragraphs 21, 23 per Ma CJHC; *Leung v Secretary for Justice*, at paragraph 44 per Ma CJHC.

38. In assessing whether a measure is proportionate, it is necessary to have regard to the importance of the legitimate aim on the one hand, and the extent of the interference with an individual's rights on the other. As Stock JA explained in *Hung Chan Wa v HKSAR* [2005] 3 HKLRD 291 (CA), at paragraph 111:

> "The remedy proposed for an evil must be proportionate not merely to the threat posed by that evil. If that were the long and the short of it, the test would signal open season for Draconian measures at the expense of fundamental rights. Proportionality addresses not merely the threat posed, but the consequences for individual rights which flow from the suggested remedy."

39. Similarly, in *Mok Charles Peter v Tam Wai Ho and another* (2010) 13 HKCFAR 762, Ma CJ stated at paragraph 53, with the agreement of the other members of the Court of Final Appeal:

> "As a matter of approach to this aspect of whether a restriction or limitation goes too far, the court has often to look at competing interests. One must examine the nature of the constitutional provision in question against the legitimate aim that the relevant restriction seeks to address, and above all, bear in mind the public interest. In other words, a balancing exercise may be involved."

40. As to whether the means used to impair the right are *"no more than is necessary"*:

    (a) The Government does not need to show that it took the absolutely least intrusive route to achieve the purpose. There is a range of measures which the Government may adopt. The Government does not have to show that it has taken the least intrusive route, but rather that it has chosen from a range of solutions which, whilst commensurate with the legitimate objective, infringes upon the right as little as is reasonably possible: *Kwok Hay Kwong*, at paragraph 71 per Stock JA.

    (b) Further, as the Court of Final Appeal has recently held, the test of whether a measure is *"no more than is necessary"* does not require the court to

substitute its views for that of the legislature, especially in social and economic contexts: *Fok Chun Wa and Zeng Lixia v The Hospital Authority and The Secretary for Food and Health* (2 April 2012) FACV 10/2011, at paragraphs 74-76 per Ma CJ.

(c) However, the Court is nonetheless entitled to take into account whether less intrusive means were available. As Stock JA explained in *Hung Chan Wa v HKSAR* [2005] 3 HKLRD 291, at paragraph 85:

> "Insofar as it is said that the courts should not look for the least intrusive route, that is correct. But that is not to say that the court, when examining proportionality, is precluded from ascertaining whether a less intrusive route would achieve the same objective. *A-G of Hong Kong v Lee Kwong Kut & Others* [1993] 2 HKCLR 186 itself, whilst rejecting a test of 'the least possible intrusive means', rejected it on the assumption that it was nevertheless shown that the Legislature 'has chosen from a range of means which impairs s.11(1) as little as is reasonably possible' (p.200) *R v Chaulk* (1990) 62 CCC (3d) 193, to which both *A-G of Hong Kong v Lee Kwong Kut & Others* and *R v Choi Kai On* [1995] 1 HKCLR 79 referred, said of this issue that whilst the Legislature was not required to seek out and adopt the 'absolutely least intrusive means of attaining its objective', nonetheless:
>
> > ... when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the same objective or would achieve the same objective as effectively. (per Lamer CJC at p.221).
>
> It is, in other words, and as the Chief Justice of Canada in *R v Chaulk* intimated (at p.222), not for the courts to second-guess the wisdom of policy choices made by the legislature, if the choice made is one of several, all within an acceptable range. Yet since the issue of legality is the province of the courts, and since legality cannot in cases such as this be decided without proper consideration of proportionality, the court cannot shut itself off from the question whether the stated and justifiable objective could have been achieved by means less harmful to the protected fundamental right. That being so, the courts must necessarily, in pursuing the proportionality question, inquire whether less harmful means were in fact available, whilst not tinkering or so closely tuning its assessment as to make fine distinctions." [emphasis added]

See also: paragraphs 119-123 per Stock JA.

C3. Margin of appreciation

41. In assessing the justification and proportionality of a particular measure, the decision-maker is granted a "margin of appreciation". This was explained in the following way by Ma CJHC in *Kwok Hay Kwong*:

> "22. In the determination of the issue of justification, the court will, in practical terms, also have to accept the fact that proper respect must be accorded to the expertise of the decision maker. This is a manifestation of the limited role of the court in judicial review proceedings and acknowledges the pertinent fact that courts do not possess the necessary expertise or knowledge that the decision maker has. This approach is sometimes referred to as the margin of appreciation or deference that a court must allow to a decision maker when judicially reviewing decisions. [...]
>
> 23. Many authorities in Hong Kong, from the United Kingdom and from the European Court of Human Rights, unnecessary to enumerate full, make out this principle. The following points, however, emerging from the judgment of Reyes J in the court below, have to be borne firmly in mind when considering arguments based on margin of appreciation:
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> (1) While the starting point is that the court will of course give due deference to the views of the decision maker, it is the court that has the ultimate responsibility to determine whether constitutionally guaranteed rights have been infringed, grappling as it does with questions of proportionality. This is a matter of law and it is not for the decision maker to make this determination.
>
> (2) Accordingly, the decision maker must provide cogent reasons to justify any interference with a constitutionally guaranteed right for the court to scrutinize.
>
> (3) The burden is on the decision maker to justify; it is not for the applicant to prove that the restriction is not justifiable or proportionate."

42. The scope of the margin of appreciation depends on the subject under consideration. Courts have recognised that there is a particularly wide margin in cases involving social and economic policy: see in particular the recent judgment of the Court of Final Appeal in *Fok Chun Wa* at paragraphs 61-76.

43. However, it is important that the existence of a broad margin of appreciation does not mean that the court will *never* interfere. As Ma CJ stated in *Mok Charles Peter*, at paragraph 56:

> "There are, however, obvious limits to the utility of this concept [i.e. the "margin of appreciation"]. It is important to acknowledge that while the views of the legislature are to be considered, it is the court that has the ultimate responsibility to determine whether legislation is constitutional. This is a matter of law, only for the courts to determine."

44. The challenge in *Mok Charles Peter* was to a legislative provision which barred further appeals from the Court of First Instance in certain election petitions. The justification was said to be the prompt resolution of such petitions. The Court considered that such cases may raise issues of constitutional significance (paragraph 62). It was not persuaded that the need for prompt resolution justified an absolute bar on appeals, especially given the right to appeal in other elections (paragraphs 63ff). It therefore held the provision to be unconstitutional.

45. As Ma CJ similarly stated in *Fok Chun Wa* at paragraph 77:

> "The proposition that the courts will allow more leeway when socio-economic policies are involved, does not lead to the consequence that they will not be vigilant when it is appropriate to do so or that the authorities have some sort of carte blanche. After all, the courts have the ultimate responsibility of determining whether acts are constitutional or lawful. It would be appropriate for the courts to intervene (indeed they would be duty bound to do so) where, even in the area of socio-economic or other government policies, there has been any disregard for core-values."

46. An example of a court interfering even in the context of social and economic policy is the case of *Yao Man Fai George v The Director of Social Welfare* (17 Feb 2012) CACV 153/2010. The complaint in *Yao* was that the relevant social security rules were discriminatory in that they required a person not only to be resident in Hong Kong for at least seven years, but *also* to have been resident in Hong Kong continuously for at least one year immediately before the date of application for the benefit, subject to an absence of no more than 56 days. The complaint was, therefore, that such a strict rule was disproportionate to the

stated objective of only providing the benefit to people who had not lived outside Hong Kong "for a long time". Stock VP stated at paragraph 164:

> "I accept that the test for justification of the one-year rule is the same as that for the seven-year rule; that the measure falls under the umbrella of policy matters of a kind with which the courts should be slow to intervene. I accept as well that the line must be drawn somewhere and that the court should only intervene where that line has been drawn at a self-evidently unreasonable point. But, as I have said before in this judgment and as the judge said in the court below, the court nonetheless retains a function of scrutiny and if the facts drive the court to the conclusion that the line has been arbitrarily drawn or drawn in such a way as to be substantially out of kilter with the reasons given for drawing the line at that point or juncture, the court may then conclude that the policy is unlawful."

47. He held at paragraph 167:

> "... The point is this, that the policymakers and the decision-makers took the view that there was a sound basis for excluding from entitlement those who had lived away from Hong Kong for a long time and for giving them notice that upon their return, they should not expect immediate entitlement to welfare benefits. That view and that approach can hardly be said to have been unreasonable. No one suggests that it is. And no one could cogently suggest that the drawing of a line which excluded that category of person was unreasonable and or that there was only one point, one particular period of years, which could reflect the time at which a person had lived elsewhere for a long time or had cut or reduced his commitment or contribution to Hong Kong. But what one can do, sensibly and reasonably, is recognise a line which has been drawn at a point that simply does not reflect the rationale offered. And that, in my judgment, is what has happened in this instance."

D. Protection of Property: minimum number of properties in a price list

48. We address in this section the question of whether the requirement in the Bill that vendors must include a minimum number of properties in a price list may be said to be unconstitutional for breach of the protection of property at Articles 6 and 105 of the Basic Law. We focus on Article 105 rather than Article 6 because it contains the more detailed provision.

D1. Lack of clarity in the Bill

49. There is in our opinion a certain lack of clarity over whether the Bill is intended to mean that developers will be *forced* to offer for sale the minimum number of properties which are to be included in the price list. The requirement at clause 26 that the vendor must set out the "price" of a property may be thought to suggest that the property is actually for sale (hence why it has a price). On the other hand, clause 43 appears to envisage that the vendor will only sell properties after publishing further information about the sale.

50. In the Legislative Council Brief, the Government states that it is not the Bill's intention that vendors will be forced to offer properties for sale. As we discuss below, if that is correct then it is rather difficult to understand what the intention is behind the obligation to include properties in a price list.

51. We recommend that, at the very least, the Bill be amended to make it clear beyond any doubt that it is not intended to force vendors to sell their properties. Of course, if that was the effect of the Bill then it would be a very significant interference with vendors' property rights: and, in our view, an interference which would be almost impossible to justify in court given that the Government has publicly stated that that is not its intention.

52. We focus below on whether, even if the Bill does not force vendors to sell their property, it may be said to be an unconstitutional interference with vendors' rights.

D2. Engagement of Article 105

53. The first question is whether the measure would constitute a breach of Article 105 such as to require justification (or, to use the alternative approach sometimes preferred by the courts, whether the measure "engages" Article 105 such that there will be a breach unless the measure is justified).

54. We consider that a court would hold that a requirement, prior to selling a property, to publish a price list containing a minimum number of properties does engage Article 105. In particular, it places a restriction on the vendor's

right to dispose of its property. The key issue is whether the restriction is justified.

D3. Legitimate aim

55. As set out above, the aim of the Bill is to *"further enhance the transparency and fairness of the sales arrangements and transactions of first-hand residential properties"* in circumstances where, in most residential sales, the vendors are in a much stronger bargaining position than individual purchasers.

56. We do not understand REDA to take any issue with the legitimacy of that general aim. A court would in our opinion find it to be a legitimate aim for the purposes of Article 105.

D4. Rational connection to legitimate aim

57. In our opinion, the real difficulty with this provision is in understanding its connection to the Government's aim.

58. The Legislative Council Brief says this:

> "7. We propose that a vendor must make public the price list at least three days before the date of sale except under various specified circumstances. To enable prospective purchasers to get a fuller picture of the prices of a considerable number of properties in a development through price lists, the minimum number of properties to be covered in each price list will be provided in the proposed legislation. Even though a vendor is not obliged to offer to sell all the residential properties covered in a price list, if a vendor sells such a residential property, the vendor must do so at the price set out in the price list. Once a price list is issued, adjustments to the prices can only be made through issuing a revised price list, and the residential property concerned cannot be sold unless the revised price list has been made public at least three days ahead. All these requirements will help enhance price transparency.
>
> 8. REDA took the view that requiring each price list to cover a minimum number of residential properties for sale would effectively be forcing the owners to offer all those residential properties for sale. REDA considered this an infringement of the owners' rights to use or dispose of the residential properties they own under the Basic Law. We do not agree

> with REDA's comments. The proposed legislation does not require that vendors must offer for sale all the residential properties covered in the price lists. Also, there is a requirement under the proposed legislation that vendors should make public certain key information on sales arrangements including the number of residential properties to be offered for sale at any specific time and what they are. This enables vendors to tell the public without ambiguity how many and which of those residential properties shown on a price list it will offer for sale.
>
> 9. There has been a suggestion that, to further minimize the possibility of vendors deploying the tactics of selling residential properties in small batches, every residential property covered in a price list must be offered to be sold. We do not support this proposal as this will impose an excessive burden and restrictions on the vendors that they must offer to sell their properties at specified quantities prescribed by the Government. In fact, our proposal is already more stringent than the existing practice and has been thoroughly discussed at the Steering Committee. It strikes a balance between enhancing consumer protection and allowing vendors to continue to take business decisions in the light of changing market situations."

59. We repeat that the stated objective of the price list provisions is: *"To enable prospective purchasers to get a fuller picture of the prices of a considerable number of properties in a development."* However, it is certainly open to doubt whether the provisions will actually achieve that aim. In particular, it is strongly arguable that a price list would only give purchasers a *"fuller picture of the prices"* if the properties on the list were in fact going to be offered for sale at the prices in the price list.

60. However, the Government contends that developers do <u>not</u> need to offer properties for sale at all, even if they appear on a price list. It is in our view very difficult to see how the objective of giving customers a fuller picture of prices will be met by providing them with "prices" (which by definition would be purely notional) of properties which are not for sale.

61. Furthermore, a price list may be amended prior to sale (clause 31(2)(b)). We agree that such a price list could therefore create confusion and obfuscation rather than the transparency which the Government says is its aim.

62. The Government has not explained how requiring price lists to include properties which may not be for sale, or not at the stated price, achieves the aim of enabling purchasers to get a fuller picture of prices in a development. Unless the Government is able to provide a cogent explanation in this regard, the requirement for a minimum number of properties in the price list would, in our view, be highly vulnerable to a constitutional challenge.

D5. Proportionality

63. We note for completeness that, if the Government were to demonstrate that the minimum property requirements have a rational connection to the legitimate aim, it would still need to satisfy the hurdle of showing that they are proportionate. That would of course depend in part on the detail of the justification relied upon, and the nature of the rational connection between the measures and the aim.

E. Freedom of speech: Gross floor area

64. We address in this section the question of whether the prohibition on providing information relating to the price per square foot/metre by way of anything other than saleable area ("SA") complies with Article 16 of the Bill of Rights. We focus on that Article rather than Article 27 of the Basic Law because it contains the more detailed provision.

E1. Engagement of Article 16 of the Bill of Rights

65. Article 16(2) states expressly that the right to freedom of expression *"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"* (emphasis added). It is therefore clear that the Article is engaged and that the provisions in question must, in order to be lawful, be justified.

E2. Legitimate aim

66. Article 16(3) states that restrictions on the freedom of expression:

"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."

67. Any restriction on freedom of expression must fall within one of the aims in (a) and (b) above: see *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at paragraph 45 (Li CJ); *Chan Hei Ling Helen v Medical Council* [2009] 4 HKLRD 174 (CA), paragraph 49 (Le Pichon JA); *Kwok Hay Kwong*, paragraph 28 (Ma CJHC).

68. Annex C of the Legislative Council Brief states:

"3. The reason we recommend using only SA to present property size and property price per square foot/metre for first-hand residential properties is that the measurement methodology to be prescribed in legislation has to be clearly defined. There is at present a standardized definition of SA, but not a commonly-adopted definition of GFA for a property. Without such a commonly-adopted definition of GFA, it is at present not possible to define GFA for a property in precise term in the draft legislation. Our experience in working out a standardized definition of SA indicates that it will take a considerable time for all relevant stakeholders to agree on a standardized definition on GFA for a property.

4. Allowing the use of GFA for a property, which currently does not have a standardized definition, for quoting property size and property price per square foot/metre will cause confusion rather than enhance the comprehensiveness of information to prospective purchasers. As different vendors may include different items in the constituents of "apportioned share of common areas" in their calculation of GFA for a property, it is not an apple-to-apple comparison of the size, price and "efficiency ratio" of properties bearing the same GFA in different residential property developments."

69. The key aim is thus to avoid confusion among consumers. In deciding whether that is a legitimate aim, it is in our view strongly arguable that a court should interpret Article 16(3) narrowly having regard to the general principle that:

"Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a

> generous interpretation to its constitutional guarantee." (*Ng Kung Siu*, paragraph 41).

70. It is therefore arguable that the proposed restrictions do not fall within a legitimate aim.

E3. Rational connection to legitimate aim

71. If the aim of avoiding confusion is legitimate, a court would in our opinion hold that the restriction has a rational connection to that aim.

E4. Proportionality

72. Even if there were a rational connection to a legitimate aim, the measure would still have to satisfy the criterion of proportionality. On this question, it is again important to stress that freedom of expression is a fundamental freedom which must be given a generous interpretation (*Ng Kung Siu*, paragraph 41). As Bokhary PJ explained in *Medical Council v Helen Chan* (2010) 13 HKCFAR 248 at paragraph 75:

> "Free speech is a constitutional freedom even when it is only commercial speech. And I say "only" not to diminish the importance of free commercial speech but to acknowledge the even greater importance of free political speech."

73. *Kwok Hay Kwong* is of particular importance. The case concerned restrictions on the rights of medical practitioners to advertise their practice. In discussing the proper approach, Ma CJHC set out the following important points:

(a) Freedom of expression is an important principle even where the intention behind the expression is personal financial gain (paragraph 29, citing *Casado Coca v Spain* (1994) 18 EHRR 1).

(b) Ma CJHC accepted the following general proposition, contained in the speech of Lord Steyn in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, at 126F-127A:

> "The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value. For example, no prisoner would ever be permitted to

have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech."

(c) However, there was in *Kwok Hay Kwong* more to be considered other than just commercial gain for doctors. Ma CJHC emphasised that all that the applicant sought (in relation to the first restriction) was, *"to be able to provide the same objective, accurate and basic information in various printed media as is now permissible to be provided to the public under the existing rules*" (paragraph 31).

(d) There is also a public interest in permitting advertising (paragraph 32(1)):

> "The public interest as far as advertising is concerned lies in the provision of relevant material to enable informed choices to be made. This was described in the decision of the US Supreme Court in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc* 425 US 748 (1976), at p.770 (footnote 24) as 'the flow of truthful and legitimate commercial information'."

(e) This is to be balanced against the need to protect the public from the *"disadvantages"* of advertising, such as advertisements that would mislead the public or lead to unfair competition (paragraph 33).

(f) Ma CJHC concluded at paragraph 34:

> "The body that imposes restrictions (in our case the Respondent) must therefore carefully balance the interests of the person who seeks the right to exercise the freedom of expression (such as the Applicant) against other aspects of the public interest. Where the public interest is in favour of allowing advertising, the fact that the person who places the advertisement will incidentally benefit is no reason to justify restrictions. I should also add this. In the context of medical advertising, there is in addition the important consideration that the "public" which is exposed to advertising will include particularly vulnerable members of society, namely, the sick and infirm. The interests of these persons must be particularly borne in mind. The balancing exercise may not always be easy to perform, and in any given case, the scales may be tipped one way or the other by the importance of any factor in the circumstances."

74. All four of the restrictions in *Kwok Hay Kwong* were held to be unjustified. The most relevant are the first and second. The first prevented doctors from

providing in print media the same accurate and basic information about their practices as they were already permitted to provide in signboards and other specified places. The prohibition was disproportionate to the stated aim of preventing misleading advertising (paragraphs 44-45). The second restriction limited the number of services a doctor could publicise. Its purpose was to avoid, *"the dangers of misleading information being provided to the public, as well as the difficulties that could arise when laymen may not understand medical terms or are confronted with what was called 'information overload'."* Ma CJHC held that those concerns could be met by less intrusive restrictions aimed at misleading advertising (paragraph 50).

75. *Kwok Hay Kwong* therefore contains much of assistance to REDA. It stresses the importance of free speech, even in a commercial context. Furthermore, REDA is in a similar position to the applicant in *Kwok Hay Kwong* in that it does not want the freedom to provide *misleading* information. All that it seeks is the right for developers to provide accurate GFA information. That is information which has historically been provided, and which consumers are familiar with. Furthermore, it is information which, absent any broader change, will continue to be provided in the context of second-hand sales. It is arguably disproportionate to ban its use from one section of the market when it will continue to be widely used in another.

76. Furthermore, it is strongly arguable that the Government's concern to ensure that there is one standard method of comparison between properties will be achieved through the requirement that prices must be provided by way of SA. What is far more difficult to justify is the additional requirement *prohibiting* the transmission of information by way of GFA. That, it may be said, is particularly onerous in circumstances where there is no suggestion that GFA is deceptive or intended to mislead.

77. One likely response from the Government is that it is engaging in a process of encouraging a general move away from the use of GFA and towards SA, even in the second-hand market. Paragraphs 6-8 of Annex C of the Legislative Council Brief state that some vendors in the second-hand market already have to provide measurements in terms of SA, and that the Estate Agents Authority is

considering using only SA. Moreover, it is said that: *"A change in mindset is needed to bring about the switch from GFA to SA. [8] We will step up public education between now and the implementation of the Bill to bring about the mindset change."*

78. However, these assertions do not fully address REDA's concerns. There is no guarantee that all second-hand sales will use SA, and no suggestion that second-hand vendors will be prohibited by law from using GFA. Nor is any detail given regarding the "public education" which is planned.

79. In addition, REDA has put forward an alternative, less-restrictive alternative, namely a suggested standardised approach to the calculation of GFA. That, it is said, would address the concern that GFA is uncertain and potentially misleading. Developers could then provide information both in the form of SA and GFA.

80. We agree that the availability of this alternative solution strengthens REDA's case. At present, the only reason given by the Government for rejecting this proposal is that it would take a considerable time for all stakeholders to agree on a standardised definition (Legislative Council Brief, Annex C, paragraph 3). That is in our view not a strong reason when set against the proposed interference with developers' freedom of speech. Moreover, freedom of expression is not a context in which the court will normally recognise a broad margin of discretion for the legislature.

81. In conclusion, we consider that REDA has a number of strong arguments in its favour. Freedom of expression is of fundamental importance, and the restriction in this case would prevent the transmission of information which is an established part of the market. Moreover, the Government's objective will only be partly met by the measure, since GFA will still be permitted in the secondary market. The confusion among purchasers, if such confusion exists, will therefore continue.

F. Conclusion

82. In conclusion, we consider that REDA has strong arguments that the following measures in the Bill would be unconstitutional:

(a) The requirement that some vendors of first-hand properties must publish price lists containing the prices of a minimum number of properties. In particular, we consider that the Government has not cogently set out any rational connection between the aim of providing purchasers with fuller information on prices, and the requirement that they should be told the "prices" of properties which are not actually for sale; and

(b) The prohibition on providing information on the price per square metre/foot in any format other than SA. In particular, we consider that this would constitute a significant interference with developers' freedom to provide, and purchasers' freedom to receive, GFA information.

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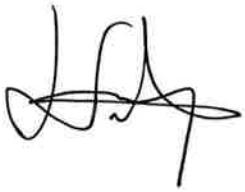

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