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Buying and Selling Real Estate in Hong Kong



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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER HONG KONG LAW

Introduction

According to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong"), all realties in Hong Kong are held under the People's Republic of China and are managed, used or developed by the Government of Hong Kong (the "Government"). There are constitutional provisions under the Basic Law (Articles 6 & 105) which specifically provide for protection of the right of private ownership, including the rights to acquire, use, dispose and inheritance of property and the right to compensation for lawful deprivation of property.

Almost all landed properties in Hong Kong are leasehold tenures. The Government may lease or grant to individuals or legal persons a piece of land for use or for development. It is also typical that such a lease or grant of land will be subject to certain onerous terms and covenants to be observed or performed by the lessee or grantee. Therefore, a sale and purchase of land in Hong Kong (whether in the first-hand property market or the second-hand property market) is in fact a transfer or assignment of a lease (with the term being the residue of the term under the lease granted by the Government). In general, interest in land comprises of the legal estate and the equitable interest. In a sale and purchase transaction, the vendor agrees to sell, and the buyer agrees to purchase both the legal estate and the equitable interest so that the purchaser will acquire a good title on completion of the purchase.

Registration of Deeds System

It should be noted that, unlike other common law jurisdictions, the Hong Kong registration system is not one of registration of title; the title to the land or real property cannot be

guaranteed by registration. The Hong Kong registration system may be described as a system of registration of documents determining the priority of registered documents; the owner of a prior registered interest will have priority over a subsequent interest.

Under the current registration system, documents such as deeds, conveyances and other instruments in writing creating or dealing with an interest in land, or otherwise affecting land, are considered as registrable instruments and are required to be registered at the Government's Land Registry in order to have priority over any other subsequent registrable interests in land. While the general rule is that the priority of the registrable instruments shall be determined by the priority of their respective dates of registration, priority shall take effect by relation to the date of execution instead of the date of registration if such registrable instruments are registered within one month after the date of execution. Failure to register a registrable interest will render the same to be null and void against any subsequent registered bona fide purchaser or mortgagee for valuable consideration.

Sale and Purchase of Land

All dealings or disposals of land or real property in Hong Kong must be in writing. In view of that legal requirement and that a legal estate in land may only be created, extinguished or disposed of by deed, the vendor and the purchaser under a sale and purchase transaction relating to land will usually execute an agreement for sale and purchase and later a deed of assignment, to transfer the equitable interest and the legal estate in the land from the vendor to the purchaser. The vendor and the purchaser may enter into a provisional but legally binding or



non-binding agreement for sale and purchase in which (1) the vendor agrees to sell and the purchaser agrees to purchase the real property or land at an agreed consideration; (2) the parties agree to negotiate and enter into a formal agreement for sale and purchase after the signing of the provisional agreement; and (3) the sale and purchase transaction will be completed at a date several weeks or even months from the date of signing of the provisional or formal agreement.

Upon the signing of a legally binding provisional agreement for sale and purchase, the purchaser will pay to the vendor or to the vendor's solicitor as escrow agent a sum being the initial deposit. The purchaser will register the provisional agreement at the Land Registry. After signing the provisional agreement, the vendor and the purchaser will negotiate and agree on the terms and conditions of the formal agreement. The formal agreement, if signed, will also be registered at the Land Registry. The vendor will be under a duty to prove good title to the property by (1) delivering to the purchaser certified copies of all relevant title deeds and documents in respect of the property for proof of title; and (2) answering requisitions on title raised by the purchaser before completion. If the vendor agrees to sell the property to the purchaser free from any encumbrances (which is the normal practice), the vendor will have to remove all title encumbrances or to remedy all title defects so that the vendor will be able to assign the property to the purchaser free from encumbrances upon completion.

On the date of completion, subject to there being no prior registered interests shown on the 'on-the-day' land search obtainable from the Land Registry, the purchaser shall pay to the vendor the balance of the purchase price and the parties shall execute a deed of

assignment in which the vendor shall assign all the estate, rights and interest the vendor has in the property (including the legal estate of the property) to the purchaser. The vendor shall also give title by delivering to the purchaser the original title deeds and documents on completion or within an agreed period after completion. The purchaser will then register the Assignment at the Land Registry.

Stamp Duty Implications

The following stamp duty implications will have to be carefully considered prior to entering into a sale and purchase transaction in relation to land: -

Ad valorem duty ("AVD")

Any instrument executed on or after 5 November 2016 for the sale and purchase or transfer of residential property, either by an individual or a company will be subject to AVD at the rate set out under "Part 1 of Scale 1" under Schedule 1 to the Stamp Duty Ordinance (Cap.117) ("SDO") (i.e. flat rate of 15% of the consideration or value of the residential property, whichever is the higher), unless specifically exempted or provided otherwise.

Part 1 of Scale 1 does not apply to an agreement /conveyance for a residential property where the purchaser/transferee is a Hong Kong permanent resident ("HKPR") (or he/she is a tenant or an authorized occupant of the Housing Authority who acquires the residential property under the Tenants Purchase Scheme) acting on his/her own behalf and he/she does not own any other residential property in Hong Kong at the time of acquisition of the subject property. In those circumstances, only the rate set out under "Scale 2" under Schedule 1 to SDO (i.e. rate ranging from \$100 to 4.25% of the consideration or value of the residential



property, whichever is the higher) will apply to such agreement/conveyance.

However, unless specifically exempted, the sale and purchase or transfer of more than a single residential property under a single instrument executed on or after 12 April 2017 will be subject to AVD at a flat rate of 15% of the consideration or value of the residential property, whichever is the higher, irrespective of whether or not the purchaser/transferee is a HKPR who is acting on his/her own behalf and does not own any other residential property in Hong Kong at the time of acquisition of the subject properties.

Any agreement executed on or after 23 February 2013 for the sale and purchase or transfer of non-residential property, either by an individual or a company will be subject to AVD at the rate set out under “Part 2 of Scale 1” under Schedule 1 to SDO (i.e. rate ranging from 1.5% to 8.5% of the consideration or value of the residential property, whichever is the higher), unless specifically exempted or provided otherwise.

While it is typical for the purchaser to agree to bear the AVD, it is important to note that the purchaser, the vendor, and any person who uses the instrument, under the Hong Kong law, will be jointly and severally liable to pay AVD. In other words, the purchaser, the vendor and any person who uses the instrument will have the same extent of liability to pay for any AVD payable on the chargeable instruments, irrespective of any agreement to the contrary made between them.

Buyer’s stamp duty (“BSD”)

Unless specifically exempted or provided otherwise, BSD is chargeable on an agreement/conveyance for the sale and purchase or transfer of any residential property acquired on or after 27 October 2012, except

where the purchaser or transferee is a HKPR acquiring the subject property on his/her own behalf. It is the purchaser (not the vendor) who is liable to pay BSD, the rate of which is 15% of the consideration or value of the residential property, whichever is the higher.

Special stamp duty (“SSD”)

SSD is chargeable on a transaction involving the sale and purchase or transfer of a residential property if the subject property is acquired on or after 27 October 2012 and resold within 36 months after acquisition. The rate of the SSD payable varies from 10% to 20% of the consideration or value of the residential property, whichever is the higher, depending on when the subject property was resold within those 36 months. The purchaser and the vendor to the property transaction and any person who uses the instrument will be jointly and severally liable to pay SSD.