



THE HONG KONG INSTITUTE OF SURVEYORS

August 16, 2005

Mr Michael Suen
Secretary for Planning and Lands Bureau
Housing, Planning and Lands Bureau
8/F, West Wing, Central Government Offices
11 Ice House Street
Central, Hong Kong

Dear Mr Suen

RE: LAND (COMPULSORY SALE FOR REDEVELOPMENT) ORDINANCE (CAP.545)

Land (Compulsory Sale for Redevelopment) Ordinance (the "Ordinance") was introduced in April 1998. With the experience gained over the past six years since the application of the Ordinance, the Hong Kong Institute of Surveyors ("HKIS") considers it timely to review the effectiveness of the Ordinance, and to identify areas of improvement relating to the Ordinance.

Accordingly, please find attached a Paper, outlining the position and recommendations of the HKIS relating to the Ordinance, for your consideration.

We would recommend the Administration and the relevant authorities to take these views further such that the deficiencies of the Ordinance could be addressed and the process of urban renewal fostered. The HKIS would be happy to meet and to elaborate these ideas further.

We look forward to receiving your reply soon. Meanwhile, should you have further queries, please do not hesitate to contact Mr Stephen Yip, coordinator of Cap. 545 Working Group of the HKIS (Tel: 28697138), or the undersigned.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'TT Cheung', is written over a light-colored background. The signature is fluid and cursive, with a long, sweeping stroke extending upwards and to the right.

TT Cheung
President (2004-2005)

c.c.: HKIS GPD Chairman - Mr K.H. Yu
Mr Stephen Yip
Hon. Patrick Lau

HONG KONG INSTITUTE OF SURVEYORS POSITION PAPER ON LAND (COMPULSORY SALE FOR REDEVELOPMENT) ORDINANCE (CAP. 545)

1. BACKGROUND AND PURPOSES

1.1 The Land (Compulsory Sale for Redevelopment) Bill ("the Bill") was first introduced in the Provisional Legislative Council in early 1998. The Bill intended to enable persons who held a specified majority of the undivided shares in a lot to make an application to the Lands Tribunal for an order to sell the whole lot by public auction for the purpose of redevelopment. The Bill was introduced with a view to facilitating private sector participation in expediting urban renewal. The Bill would provide a solution to the problem of property acquisition for redevelopment due to defective titles, untraceable owners, owners who had died intestate or owners demanding unreasonably high prices. After a thorough discussion in the Bills Committee, the Bill was passed in the Provisional Legislative Council on 7 April 1998.

1.2 The Land (Compulsory Sale for Redevelopment) Ordinance ("the Ordinance") has come into operation since June 1999. Since its enactment, four cases have been granted the order for sale by the Lands Tribunal under the Ordinance (Table 1.1).

Table 1.1: Cases granted the Order for Sale under the Land (Compulsory Sale for Redevelopment) Ordinance

Application Site	Date of Application to the Lands Tribunal	Date of Public Auction
Garley Building, Jordan	Nov 2000	September 2003
Melbourne Industrial Building, Quarry Bay	June 2001	May 2002
Lai Sing Court, Tai Hang	October 2003	January 2005
4-6A Castle Steps, Mid Levels	June 2004	March 2005

1.3 With the experience gained over the past six years since the implementation of the Ordinance, the Hong Kong Institute of Surveyors ("HKIS") considers it timely to review the effectiveness of the Ordinance and to identify areas for improvement relating to the Ordinance.

2. AREAS OF POTENTIAL DEFICIENCIES OF THE EXISTING ORDINANCE

2.1 There were comments from practitioners from both the public and the private sectors that there could be deficiencies within the prevailing Ordinance. These potential areas of deficiencies are elaborated further as follows:

Definition of "Lot"

2.2 The Ordinance applies to a lot forming the subject of a Government Lease or a section or a subsection of a lot ("the Lot"). The majority owner (who may comprise of more than one being or entity) can apply to the Lands Tribunal for an order to sell all the undivided shares in the Lot for the purpose of redevelopment.

2.3 Section 3(2) of the Ordinance stipulates that an application to the Lands Tribunal for compulsory sale may cover:-

(a) 2 or more lots where the majority owner owns not less than 90% of the undivided shares in each lot; or

(b) 2 or more lots:-

(i) on which one building is connected to another building by a staircase intended for common use by the occupiers of the buildings; and

(ii) where the average of:

(A) the percentage of the undivided shares owned by the majority owner in the lot or lots on which one of the buildings stands; and

(B) the percentage of the undivided shares owned by the majority owner in the lot or lots on which the other buildings stands, is not less than 90%.

2.4 The example (Figure 2.1) below could serve to illustrate the possible deficiencies in the application of the Ordinance. Whilst hypothetical in nature, the issues identified are based upon real life examples.

Figure 2.1: An Example to illustrate the Possible Deficiencies of the Ordinance

Lot/ Building	1	2	3	4	5	6	7	8	9	10
4/F					Minority					
3/F			Minority			Minority				
2/F	Minority									Minority
1/F										
G/F										


Summary of Ownership Status:

Ownership of each Lot	80%	100%	80%	100%	80%	80%	100%	100%	80%	100%
Ownership of the Combined Lots	90%		90%		80%		100%	90%		100%
Ownership of the 10 Lots	90%									

Remarks:

- a) Each of the above lots is occupied by one building.
- b) Buildings 1 & 2 are served by one common staircase; Buildings 3 & 4 are served by one common staircase; Buildings 5 & 6 are served by one common staircase and Buildings 8 & 9 are served by one common staircase.
- c) All units have one undivided share.
- d) There are a total of 50 undivided shares for 10 Lots.

Legend:

 Units owned by the Majority Owners

Under the above scenario, three separate applications will have to be submitted under Section 3(2)(b) of the Ordinance as follows:-

- i. One application in respect of Lots 1 and 2, as the two buildings have one connected common staircase;
- ii. A second application in respect of Lots 3 and 4, as the two buildings have one connected common staircase;
- iii. A third application in respect of Lots 8 and 9, as the two buildings have one connected common staircase.

- 2.5 Given the above circumstances, the majority owners could run into the following situation:
- i. An order for compulsory sale is granted by the Lands Tribunal relating to one, but not all of the three applications;
 - ii. The majority owner is the successful purchaser of one, but not all of the different lots ordered by the Tribunal to be sold.
- 2.6 The two buildings at Lots 5 and 6 are served by one common staircase. However, no application can be made under Section 3(2)(a) of the Ordinance or Section 3(2)(b) of the Ordinance. The existing definition of a "Lot" pursuant to the Ordinance is that any sub-section of a parent lot is also regarded as a "Lot". Accordingly, and as illustrated in the above example, failure to purchase one of the many units within a building could prevent the application of the Ordinance.
- 2.7 The above example illustrates that no application of the Ordinance can be made in respect of two buildings connected with a common staircase unless and until a percentage lower than the current 90% ownership threshold pursuant to the Ordinance is to be introduced. This is particularly the case for buildings of less than 9 storeys (one unit per floor) or buildings sharing common staircases of less than 5 storeys, since failure to acquire one unit would imply failure to comply with the minimum threshold of 90%.

Minimum Percentage of Ownership

- 2.8 Under Section 3(5) of the Ordinance, the Chief Executive in Council may, by notice in the Gazette, specify a percentage lower than 90% in respect of a lot belonging to a class of lots specified in the notice, provided that such percentage shall not in any event be less than 80%.
- 2.9 Nevertheless, there is no criteria specified under which the Chief Executive in Council will lower the threshold to 80 percent. As at today, we are given to understand that no application has been made to the Chief Executive in Council to lower the ownership threshold pursuant to Section 3(5). This has created a certain degree of uncertainty for private developers seeking to adopt the Ordinance in the urban renewal process.

- 2.10 The judgment of the Court of Appeal in *Bond Star Development Limited v. Capital Well Limited* [CACV 458/2002] would imply that the Ordinance would not be applicable to land where the applicant is already a 100% owner. If the applicant owns 100% of one lot and only 90% of an adjoining lot, an application under the Ordinance should cover only the lots where 90% of ownership has been acquired. Using the example above for illustration, whilst Lots 8 and 9 would be included in a single application, Lot 7 or Lot 10 would not be applicable pursuant to the Ordinance under the spirit of the *Bond Star* case.
- 2.11 Unless lots are connected by a common staircase, the current 90% threshold will only apply to a single lot. Majority owners who hold an average of 90% of aggregate undivided shares in the contiguous lots cannot apply to redevelop the lots as a package. This could, effectively, prevent the implementation of a comprehensive development for buildings straddling several lots and encourage the development of "pencil" buildings. This would be against the intention of the Ordinance and the general principle of town planning or urban renewal.

Justification for Redevelopment

- 2.12 Pursuant to Section 4(2) of the Ordinance, the Lands Tribunal shall not make an order for sale unless, after hearing the objections of the minority owners, the Tribunal is satisfied that:
- "(a) the redevelopment of the lot is justified (and whether or not the majority owner proposes to or is capable of undertaking the redevelopment)-*
- (i.) due to the age or state of repair of the existing development on the lot;*
 - or*
 - (ii.) on one or more grounds, if any, specified in regulations made under Section 12;..."*
- 2.13 No regulation has been made under Section 4(2)(a)(ii). Therefore, the age or state of repair of the existing development would generally be relied upon to justify the redevelopment. This would divert the focus of the application from its primary aspects, including its original intention in fostering urban renewal.

Fair and Reasonable Steps

- 2.14 Under Section 4(2)(b) of the Ordinance, the majority owner has to prove to the Lands Tribunal that reasonable steps have been used to acquire the interests of minority owners. However, the definition of "fair and reasonable" has not been defined. The meaning of a "fair and reasonable" offer for acquisition could be subject to interpretation and challenge.

Application of the Formula

- 2.15 Section 4(2)(b) of the Ordinance only requires the majority owner to negotiate with a minority owner whose whereabouts are known. For missing owners and those units with title defects, it has not been stipulated as to whether the same principle in assessing the acquisition price (i.e. the then current Redevelopment Value of the Lot multiplied by the ratio of the Existing Use value of a minority owner's unit to the aggregate of the Existing Use Value of all units within the Lot) should be applicable. Given that the genuine intention of the Ordinance would be to avoid owner of the last remaining unit to demand a premium that would stultify a redevelopment, the same principle should therefore be applicable to all owners of undivided shares.
- 2.16 Whilst the Ordinance has expressly allowed missing owners to be categorized as minority owners, the status of those owners with title defects is unclear.

Others

- 2.17 In addition to the issues identified above, other relatively minor issues have been identified by practitioners during the application of the Ordinance. These are elaborated further in the following paragraphs.
- 2.18 The Ordinance is silent about the arrangement(s) relating to unauthorized building structures or illegal use of space.

- 2.19 Under Section 8(b)(i) of the Ordinance, all tenancies should be terminated immediately upon the day on which the purchaser of the Lot becomes the owner and the tenants should deliver the vacant possession 6 months from the termination day. However, the Ordinance is silent as to whether ex-tenants will need to pay any rent during this transition period and who will be responsible for maintenance fees, utility charges and rates and repair of the units. It is also unclear whether the purchaser can ask the ex-tenant to pay mesne (this word does not make sense!)_ profits after termination of tenancies.
- 2.20 The remunerations of the trustees and the auctioneer are borne by the majority owners of the lot only. Given that both the majority owners and the minority owners will benefit from appointment of the trustees and the auctioneer, there could be a case for the minority to share the appropriate proportion of such remunerations.

3. PROPOSALS FOR THE AMENDMENT OF THE EXISTING ORDINANCE

- 3.1 Having regard to the number of potential deficiencies identified above, the HKIS would like to propose a number of ideas for discussion purposes. It is acknowledged, however, that these proposals are preliminary in nature, and further investigation relating to their application would be required before putting these proposals into action.

Lowering the Ownership Threshold

- 3.2 As elaborated at paragraphs 2.1 to 2.11 above, the 90% threshold could be a major obstacle in the acquisition process. This is particularly the case for those six-to-nine-storey buildings in old and dilapidated areas, which are generally the targeted areas in urban renewal. In this connection, consideration could be given to lower the 90% ownership threshold to, say, 80% or an even lower percentage. Whilst the actual percentage of ownership threshold could be determined having regard to buildings within areas targeted for urban renewal, the example illustrated at Figure 2.1 above would suggest lowering of the ownership threshold to be essential in addressing some of the most common problems in urban decay.

Encouragement of Comprehensive Development

- 3.3 Land which is 100% owned by an owner cannot apply for an order for sale pursuant to the Ordinance. An order for sale is only applicable for lots where the majority owners hold not less than 90% of all the undivided shares.
- 3.4 Given that a deadline will be imposed on redevelopment of the lot following authorization of the order for sale by the Lands Tribunal pursuant to the Ordinance, the current provisions would not encourage the further amalgamation of other adjoining lots for a comprehensive development. In this regard, further guidelines could be included such that the Ordinance or regulations or other provisions associated with the Ordinance could stipulate clearly that, in the event that the purchaser subsequently amalgamate with other adjoining lots, the deadline stipulated under the order for sale could be extended further.

Clear Guidelines for Redevelopment

- 3.5 It would appear that no regulation has been made under section 12 of the Ordinance. As such, the grounds for redevelopment under Section 4(2)(a) would tend to be restricted to "age or state of repair of the existing development". The lack of clear guidelines would make it difficult for Lands Tribunal to authorize a redevelopment, as well as creating a certain degree of uncertainties for the private developers seeking to apply the Ordinance in their redevelopment projects.
- 3.6 Accordingly, it is considered that further guidelines or regulations could be stipulated to assist the Lands Tribunal in determining the authorization of redevelopment pursuant to the Ordinance. Some of the possible guidelines could include, for example, buildings which are over 40 years of age could be deemed to satisfy the age requirement of the building. In addition, to accord with the intention of the Ordinance in fostering urban renewal, additional grounds such as planning merits, environmental improvement, economic and financial benefits; could be stipulated in order to facilitate decisions to be made by the Lands Tribunal.

Scheme Concept

- 3.7 Having regard to the potential deficiencies in definition of "Lot" pursuant to the Ordinance and in an attempt to facilitate urban renewal, the HKIS would suggest that, in addition to the "Lot" as currently defined, a "scheme" concept ("the Scheme") be introduced within the Ordinance. Boundary of the Scheme could be proposed by the majority owners. Nevertheless, the proposed boundary would have to be approved by the Lands Tribunal or other relevant authorities and that the merits of a comprehensive redevelopment or other reasons should be justified.
- 3.8 By using the "Scheme" concept, the private sector would be encouraged to amalgamate sites for a more comprehensive urban redevelopment. At the same time, the minority owner can also enjoy the benefit from the Scheme as the minority owner will receive an amount that includes the redevelopment potential of the Scheme, as against a value based upon a piecemeal development associated with a single lot.
- 3.9 If the "Scheme" concept is accepted, the mechanism as to how the redevelopment value should be allocated to each lot will of course need detailed deliberation.

4. NEXT STEPS

- 4.1 The above proposals would represent some of the preliminary views of HKIS in addressing the potential deficiencies of the Ordinance. These preliminary proposals are not meant to be exhaustive, further studies and investigations in connection with the actual implementation of them would be essential.
- 4.2 We would recommend the Administration to take these preliminary views further such that the deficiencies of the Ordinance could be addressed and the process of urban renewal fostered. The HKIS is most prepared to contribute in further studies and investigations, and would appreciate it if we could be consulted further towards the implementation of these preliminary proposals.

Prepared by The Hong Kong Institute of Surveyors
8th August 2005