



THE HONG KONG INSTITUTE OF
SURVEYORS

29 May 2006

Ms Olivia Nip
Housing, Planning and Lands Bureau
Murray Building
Garden Road
Hong Kong

Dear Ms Nip

Land (Compulsory Sale for Redevelopment) Ordinance
Proposals to Lower Compulsory Sale Threshold for Specified Classes of Lots

We are delighted to read the Government's Consultation Paper which was enclosed with its letter Ref: HPLB(UR)70/41/85 Pt.14 dated 8 March 2006.

The Institute has since studied the matter and is pleased to submit our views as per attached.

Yours sincerely

The Hong Kong Institute of Surveyors

Wong Chung Hang
President

encls



THE HONG KONG INSTITUTE OF SURVEYORS

SUPPLEMENTARY PAPER ON LAND (COMPULSORY SALE FOR REDEVELOPMENT) ORDINANCE (CAP.545)

1. BACKGROUND

The HKSAR Government commenced a consultation in March 2006 on proposals to lower the compulsory sales threshold for three specified classes of lots under the Land (Compulsory Sale for Redevelopment) Ordinance (the "Ordinance"), with the aim of facilitating private redevelopment. The consultation has been undertaken after the release of a Hong Kong Institute of Surveyors (HKIS) Position Paper in August 2005, outlining the deficiencies of the Ordinance and our proposals in tackling these deficiencies.

This Supplementary Paper serves as a direct response to the consultation document issued by the HKSAR Government. This Supplementary Paper shall be read in conjunction with our paper issued in August 2005; a copy of which is attached as **Appendix I** for easy reference.

2. RESPONSES TO THE GOVERNMENT'S PROPOSALS

2.1 HKIS Welcomes Government's Proposals

HKIS welcomes and supports the Government's proposals to lower the ownership threshold for certain classes of lots, including:

- (i) a lot with "all units but one" acquired;
- (ii) a lot with building(s) that are aged 40 years or above; and
- (iii) a lot with missing/untraceable owners.

HKIS considers the proposals a step to foster the urban renewal process. The proposals have created a greater degree of certainty for implementation of redevelopment projects. This would serve to encourage more collective sales as well as enhancing the chance of success for similar exercises. Through collective efforts, owners of individual units will be rewarded with an amount reflecting not only value of the individual flats but also their shares in redevelopment value of the site.

The proposals also address some of the deficiencies of the prevailing Ordinance. For



example, the existence of one greedy and unscrupulous owners and / or missing and untraceable owners holding more than 10% undivided share of the lot have been the major obstacles for some redevelopment projects. Furthermore, the proposed lowering of the ownership threshold for building ages of more than 40 years can also encourage and facilitate redevelopment for this class of buildings which are, in general, poorer in conditions.

2.2 Clarifications of Government's Proposals

Within the context of our support to Government's proposals, HKIS would like to clarify certain aspects of the proposals.

2.2.1 Age of Buildings

For reference purposes, in Singapore, the threshold percentage will be automatically decreased from 90% to 80% once the building age is 10 years old or more.

HKIS would recommend that consideration be given to relax the proposed age requirement of 40 years.

2.2.2 "Missing/untraceable" Owners

The Government should also clarify if the "missing/untraceable" owner scenario should only be satisfied at the time of submission of application.

HKIS would recommend that a clear time line be specified in determining certain individual owners as "missing/untraceable". At the same time, definition of "missing/untraceable" owners should be clearly stated, with the procedure involved to define owners as "missing/untraceable" elaborated.

2.2.3 Responses to Government's Reservation to the "Site/ Scheme" Concept proposed by HKIS



HKIS has proposed to include a “Scheme” concept such that the private sector would be encouraged to amalgamate sites for a comprehensive urban redevelopment (*paragraphs 3.7 to 3.9 of our paper dated 8 August 2005*). The Government, within the consultation document, has expressed reservation to this concept.

Judgment of the Court of Final Appeal

In this connection, we would like to make reference to the judgment of the Court of Final Appeal (“CFA”) in *Capital Well Limited v. Bond Star Development Limited* [FACV 4/2005], delivered in November 2005, as follows:

39. *the minority owner, if sufficiently funded, might be able to bid up the single lot to a highly inflated price thereby exercising “ransom power through the medium of the public auction. And if the minority owner or a third party actually acquired the auctioned lot, the intended redevelopment might have to be abandoned or face lengthy delays subject to the uncertainties of negotiations with the new owner of the lot. Such consequences plainly run counter to the statutory objectives.*
40. *If, on the other hand, it were open to the majority owner to combine sale of the Lot with sale of the other lots already owned, the entire developable site would be put up for sale. Such an auction could be expected to attract only bids from genuine developers. There would be no room for ransom-motivated bids. An appropriate reserve price would have to be fixed to ensure that the minority owner receives a proper share of the redevelopment value of the site. But whether the successful bidder should prove to be the majority owner or someone else, a redevelopment of the entire site would be able to proceed without impediment, in line with the objectives of the Ordinance*

The CFA then went further to suggest that “.....we wish expressly to leave it open for possible future consideration whether the Tribunal has a discretion to give suitable directions (under s 4(6)(a) of the Ordinance or otherwise) concerning conduct of the sale designed to secure that the sale of the single lot, the subject of its order, can take place together with the sale of the other redevelopment lots.”



In summary, and whilst the judgment of the CFA was delivered after issuance of the HKIS Paper in August 2005, there are apparently lots of common grounds between the CFA judgment and the HKIS's proposal for a "Scheme" Concept to be applicable to the Ordinance.

Lack of Shares in one of the Lots within a "Site/ Scheme" for Redevelopment

The Government's consultation paper also expressed reservation about application of the "site/ scheme" concept to the Ordinance in that it "...*may result in undesirable situations where a majority owner is unable to acquire any of the undivided shares in one of the lots in the "site/ scheme" notwithstanding his holding of not less than 90% of the aggregate undivided shares...*".

It is considered possible to address the above concern by incorporating a requirement for acquisition of at least a certain percentage of ownership within individual lots within the scheme before an application for disposal of the lots within the scheme as a whole can be submitted. The 80% threshold proposed within the current Proposals, for example, could act as a starting point.

3. CONCLUSION

Social Perspective – Benefits to both Individual Owners and the Society

It is sometimes perceived that the Ordinance will deprive the proprietary interests of the individual owners of units, in particular the minority owners. HKIS is, however, of the view that interests of individual owners of units are well protected by the Ordinance through the procedures before the Lands Tribunal. As in the CFA judgment stipulated, "...*What the Tribunal must do is to consider whether, in the circumstances of each case, the offer falls within a band of what represents a fair and reasonable assessment of the value of the minority owner's interest reflecting a proportionate share of the redevelopment value of the whole site....*"¹

¹ Paragraph 36, *Capital Well Limited v. Bond Star Development Limited* [FACV 4/2005], handing down of reasons on 2 November 2005 by the Court of Final Appeal.



More importantly, the enactment of the Ordinance has made it possible for individual owners to collectively sell their units for redevelopment such that, rather than facing the increasing amount of maintenance cost to their aging properties, they can share the redevelopment potential of the lot by way of a collective disposal of their units. Under such circumstances, and rather than suppressing the interests of 10%-20% minority owners, as some might have suggested, the Ordinance actually assists 80%-90% individual owners to release the redevelopment potential of the lot so as to create a “win-win” situation.

The fact that more than 20 groups of individual owners are initiating “collective sale”; a list of which is attached as **Appendix II**, are evidences that the Ordinance serve its function as a catalyst in the urban renewal process.

Way Forward

HKIS considers the current Proposals put forward by the Government a useful step in addressing the deficiencies of the prevailing Ordinance. Nevertheless, and as rightly pointed out by the Court of Final Appeal, there would appear to be rooms for improvement to the Ordinance. In this connection, **HKIS would urge the Government to consider/ re-consider the points and suggestions raised in our paper dated 8 August 2005, as well as the supplementary information and advice given in this Supplementary Paper.**

Prepared by The Hong Kong Institute of Surveyors

28 May 2006

APPENDICES

Appendix I: HKIS Position Paper dated 8 August 2005

Appendix II: Examples of “Collective Sales” Projects



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

APPENDIX II:				
<u>Properties under Strata-title Ownership with Potential and/ or are currently arranging Collective Sales</u>				
No.	District	Building Name	Street No	Street
Hong Kong Island				
1	Happy Valley	Blue Pool Mansion	1-3	Blue Pool Road
2	Mid Level	Sung Ling Mansion	1A	Babington Path
3		Ping On Mansion	1B	Babington Path
4		Arts Mansion	31	Conduit Road
5		Minerva House	28-34	Lyttelton Road
6		Carol Mansion	36-42	Lyttelton Road
7			25	Robinson Road
8		Jade Garden	105	Robinson Road
9		Fair Wind Manor	6	Seymour Road
10		Merry Terrace	4A-4P	Seymour Road
11	North Point	Oxford Court	24-26	Braemar Hill Road
12		Fook On Building	2-16	Lower Kai Yuen Lane
13		Kai Yuen Mansion	1-22	Upper Kai Yuen Lane

14	Quarry Bay	Kut Cheong Mansion	704-730	King's Road
<u>Kowloon</u>				
15	Kowloon Bay	Kai Tak Mansions	53-55A	Kwun Tong Road
16	Kowloon Tong	Joy Garden	3	Alnwick Road
17		Lung Cheung Court	15-37	Boardcast Drive
18	To Kwa Wan	(Total 3 Block)		Ngan Hon Street & Wing Kwong Street
19		(Total 4 Block)		Wan Fuk Street & Wan Shun Street
20		(Total 4 Block)		Wan Tat Street, Wan Fat Street, Wan Hing Street, Wan Lok Street & Bailey Street
<u>New Territories</u>				
21	Tsuen Wan	Lok Shun Factory Building and Lok Seaview Factory Building	6-28	Chai Wan Kok Street
<i>Sources: Reports from various newspapers.</i>				
C:\Documents and Settings\eric.ho\My Documents\Others\HKIS\Cap545 Working Group\[Strata-title Properties20060406.xls]Sheet1				