

**(For Discussion)**

***PCTF Paper 6***

**Economic and Employment Council  
Pre-construction Task Force**

**Simplification of Lease Conditions**

**Introduction**

The Pre-construction Task Force of the Economic Employment Council has made reference to an earlier submission from the Real Estate Developers' Association (REDA), in May 2003, which referred to specific Special Conditions in proposing various "simplification" measures including deletion, amalgamation and review. In many instances, it has been suggested that the Special Condition concerned could be satisfactorily substituted by the issue of a Joint Practice Note (JPN) or Practice Note (PN) as appropriate. This Paper is a general response to such suggestions and serves to establish certain fundamental principles to facilitate mutual understanding and further detailed consideration.

**Background/History**

2. Lease conditions have evolved over the years in response to various influences including advances in building design and construction techniques, legal advice, court judgements, ICAC assignment report recommendations, Audit and Ombudsman reports, PAC requests, Consumer Council recommendations, changing demands/expectations, new statutory requirement etc.

3. Increasing complexity is, perhaps, inevitable and is not necessarily a negative feature since clarity and precision in lease conditions help avoid potential disputes in interpretation of the rights and obligations between the lessor and lessee.

## **Government as Landlord**

4. Lands Department represents the HKSAR Government in various land matters including the leasing and granting of land within Hong Kong. Its role as the landlord's agent is different to other departments' roles performed under various ordinances. A land lease is a contract which operates in private, not public, law and is generally not subject to Judicial Review (JR), which is an important factor in carrying out this role decisively and efficiently in the public interest.

5. PNs or JPNs offer no substitute for lease conditions as they are not contractually binding on the lessee and will erode the protection of contractual agreements from JR by potentially bringing the development requirements into the domain of public law, which may result in more legal challenges and delays.

6. Moreover, issue of PNs or JPNs do not automatically equate to simplification of lease conditions since the lease would still need to contain the appropriate terms in respect of which the relevant PNs or JPNs are issued.

7. Subsequent changes in or deletion of PNs or JPNs may have unpredictable implications in the application of lease conditions. This would cause uncertainty and possible delays.

8. Furthermore reliance on a general power in the lease and a qualifying PN as to how it will be applied which may be changed from time to time would restrict the ability to charge premia for lease modifications to accommodate such changes. Lands Department has a responsibility to protect a major Government asset such as land and to protect the public revenue.

9. It must also be remembered that appropriate conditions in the land lease are essential to protect Government's reversionary interest in the land upon lease expiry or termination.

10. Having regard to the above, we are not in favour of a general transfer of control from lease to PN. We regard the PN's role as amplifying how a particular provision in the lease will be applied.

## **Responses to Specific Proposals in PCTF Paper 2/2004**

11. Please see EABFU's related table of comments from concerned departments.

## **Possible Improvements**

12. The Government has, nevertheless, been conducting a review to see if there are ways to address concerns about lease conditions. Our initial finding is that there is scope to simplify some language in certain lease conditions.

13. Some conditions are being revisited to assess opportunities for redrafting/relaxation (see table above). At this preliminary stage, it may be noted that we have already identified the potential for several Special Conditions to be deleted, amalgamated or simplified.

14. In some cases, relevant ordinances would need to be amended/replaced/updated to ensure necessary and appropriate Government control and enforcement outside the lease if reference to them is to be removed from the lease. However, this is not a straightforward issue and has already proven to be problematic, e.g. in a recent audit review regarding contamination issues where the original decision to delete environmental protection clauses from leases was reversed as a result.

15. Work on redrafting the General Conditions is at an advanced stage. Before the final decision is made, interested parties including the Law Society, the Hong Kong Institute of Surveyors, REDA and the Land and Building Advisory Committee will be consulted. We are planning to do this in March/April 2005.

## **Implementation Timeframe**

16. The revision of some conditions and issue of any PNs/JPNs will require further detailed consultation with other concerned departments and bureaux. It is also desirable to have all the

amendments considered and implemented simultaneously so that all related implications can be addressed. Associated with this task, significant resources and time will be required to draft the relevant Special Conditions and PNs/JPNs, as appropriate. Affected departments will also need to consult their own legal advisors regarding the adequacy of existing powers available under their respective ordinances and the need for any legislative amendments. At this stage, therefore, it is not possible to provide a meaningful or definitive implementation timeframe for the implementation of all potential amendments or simplification measures but we undertake to keep the Task Force fully informed of progress on a regular basis.

17. Due to the obvious complexity and implications of this review, also involving other departments/bureaux and potential legislative amendments, the above comments and Lands Department's views stated in the attached table of comments from Government departments represent initial comments only to facilitate discussion with the Task Force, and are without prejudice to our final conclusions.

Lands Department  
March 2005