(For Discussion)

PCTF Paper 8

Economic and Employment Council
Pre-construction Task Force

Streamlining the Lease Modification Process

Introduction

The Pre-construction Task Force of the Economic Employment Council ("the Task Force") has made six proposals for expediting and streamlining the lease modification process. They are as follows :

(A) Deletion of the Special Condition governing the Design, Disposition and Height (DD&H) of a development.

(B) Imposition of a fixed time limit for the lease modification process.

(C) Parallel processing of lease modifications and related actions of gazette notices and handling objections.

(D) Setting up an enquiry mechanism on land matters with time limits.

(E) Publication of Lands Department's Land Instructions.

(F) Establishment of an arbitration system (e.g. through the Lands Tribunal) to facilitate timely agreement on premium.

2. In the absence of detailed proposals regarding the above, this Paper offers Lands Department's preliminary views on these outline suggestions to facilitate further deliberation by the Task Force, without prejudice to the final conclusions.

(A) Deletion of the DD&H Special Condition

2.1.1 This is an important clause for the protection of the public interest. For example, it is used to control excessive retaining structures and unsightly stilting. In addition, it has also proved to be a very necessary and effective means of control in certain special cases such as that of Nina Tower in Tsuen Wan where the operation of Chek Lap Kok Airport would have been compromised had such control not been available to the Administration.

2.1.2 Practice Note 1/1999 issued by the Director of Lands clarifies and explains how Lands Department exercises its authority conferred by this Special Condition. The Practice Note covers such aspects as site coverage, headroom/ceiling height, building height, stilting, carparking, external finishing and appearance. All relevant factors will be taken into consideration in processing approvals under this Special Condition and our aim is to facilitate the development process whilst safeguarding Government's position as landlord under the lease.

2.1.3 Deletion of this Special Condition would not remove the need for building plan approval under the lease.

(B) Imposition of Fixed Time for Lease Modification Process

2.2.1 The Lands Department, unlike others such as Buildings Department and Planning Department, does not operate under an Ordinance with statutory time limits, it operates under contract law in its role as landlord. In recognising the need for a time frame to be established, the Department has issued a number of performance pledges which are generally being met. By way of example, the following table summarises the performance pledges and examples of targets achieved in respect of lease modifications.

Services	**Performance Pledges**	**Targets Achieved**
Lease Modifications (non-small house cases)		
(a) reply to application	Within 3 weeks	99%
(b) offer or rejection or indication of in-principle agreement upon receipt of a valid application	Within 24 weeks	96%
(c) issue of legal document from receipt of a binding acceptance of the final basic terms and premium offer	Within 12 weeks	99%
(d) completion of technical modifications	Within 12 weeks	93%

2.2.2 The length of the lease modification process is often dictated by the applicant in terms of seeking revised planning approvals, submitting building plans for revised schemes, or repeatedly appealing against the premium assessment. With regard to the latter, the proposal for arbitration outlined in (F) below has the potential to have a significant impact.

2.2.3 It should be noted that the notion of a "deemed approval" upon expiry of any time limit without rejection is not acceptable in the context of a lease modification which must be distinguished from the nature of a building plan submission.

2.2.4 We look forward to receiving more views from the Task Force as to how the time limits might be imposed, what they will refer to and the consequences if they are not met.

(C) Parallel Action in Processing the Modification and Ordinance-related Issues

2.3.1 Lands Department already does this in many cases and elaboration by the Task Force would be welcome.

2.3.2 Provided the applicant's parent company provides the necessary undertaking to fund the administrative costs including handling objections and settling claims in respect of, say, a gazettal for road works, then we do take the gazettal forward once District Lands Conference has approved the proposal. Also, it should be noted that some ordinance-related matters, for example, regarding Environmental Impact Assessment, should have been taken care of at the planning approval stage.

(D) Enquiry System on Land Matters

2.4.1 We understand this suggestion relates to a system of processing enquiry submissions of building plans similar to that adopted by Buildings Department. This facility or service is already available from Lands Department as promulgated by Practice Notes 1/1994 and 2/2002 and Joint Practice Note 3 in August 2003.

(E) Publication of Land Instructions

2.5.1 The Land Instructions are the internal guidelines of the Lands Administration Office and are not a legal or official public document. They are intended to provide guidance and reference points to staff on procedure in the interest of consistency.

2.5.2 The Land Instructions are not intended to be applied rigidly without having regard to relevant circumstances. Such flexibility or discretion would be fettered by such public disclosure and this would impact negatively on the whole area of Land Administration, not just lease modifications, restricting Government's ability to respond to valid and justified requests from developers, to address site specific requirements and to address other stakeholders' concerns.

2.5.3 Certain sections of the Land Instructions make reference to the history of the issues, legal advice given in the context of the subject matter as well as other internal meetings and documents of the Lands Department. As such it is not appropriate to disclose the information.

2.5.4 We will continue to publish Practice Notes and Joint Practice Notes to amplify how provisions in the lease will be applied and to announce revised procedures and practice in various areas of land administration. For example, over the last two years, eleven such Practice Notes have been issued covering aspects as diverse as the operation of the Application List System for land sale, landscaping, and re-engineering of the development approval process.

(F) Establishment of an Arbitration System

2.6. We have previously (in 1998) put forward such a proposal to determine the amount of premium but this was not entirely welcomed by the Real Estate Developers' Association at the time.

2.6.1 Whilst noting that the adoption of any such arrangement for determination of lease modification premium will require policy endorsement due to the implications for public revenue, we are agreeable to further explore this proposal with the Task Force. Our initial thinking is that such a system should include the following features :

(a) The arbitrator should be a valuation expert appointed by the mutual agreement of Government and the developer outside the authority of the Arbitration Ordinance to obviate the possibility of appeal.

(b) It would require the signing of a suitably binding agreement between the developer and Government to accept the arbitrator's conclusion.

2.6.2 In examining this proposal again, we have encountered some issues and concerns upon which we would welcome the Task Force's views to assist an appropriate resolution :

(a) Whilst the Lands Tribunal would be a good forum to consider and decide cases, this would require an amendment to the relevant Ordinance and, more significantly, the Lands Tribunal itself may decline to take on such additional work bearing in mind its current workload.

(b) The difficulty in identifying independent arbitrators in Hong Kong with no potential conflict of interest. This would become a progressively more acute problem if the adoption of such procedure became more common.

(c) Whether referral to an arbitrator/expert should be optional or it should be mandatory if agreement is not reached within a certain period of issuing the binding basic terms offer letter containing the premium amount.

(d) Since the proposal is a departure from current practice, we would need to have regard to other concerns such as potential implications for the Public Finance Ordinance in ensuring that public revenue is protected and the Administration "relinquishing" its right as landlord to determine such matters. Extensive discussion amongst concerned bureaux/departments is required before a decision on this proposal can be made by the Administration.

Lands Department
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