

Third Meeting of the EEC Subgroup on Business Facilitation

Agenda Item 4 : Handling of applications relating to the operation of residential care homes for the elderly

Purpose

This paper briefs Members on the licensing and premises-related requirements relating to the operation of residential care homes for the elderly (RCHEs), background of the case relating to the Wing On Home for the Aged (WOHA), and the measures the Government has taken to facilitate the operation of private RCHEs in a business-friendly environment.

Overview

2. As a statutory requirement, all RCHEs have to apply for licences under the Residential Care Homes (Elderly Persons) Ordinance (the Ordinance), Cap. 459, which was fully implemented in 1996. SWD's Licensing Office of Residential Care Homes for the Elderly (LORCHE) is responsible for handling applications for RCHE licences. LORCHE is a multi-disciplinary team comprising four inspectorate teams on building safety, fire safety, health, and social work, with officers seconded from the Buildings Department (BD) and the Fire Services Department.

3. Being a free market economy, RCHEs run by the private sector make up a significant portion of the RCHE sector in Hong Kong. As at 31 August 2004, there were 585 RCHEs run by private operators (i.e. about 77 % of the total number of 758 RCHEs). Altogether they provide more than 46 000 RCHE places, which is about two-thirds of the total number of RCHE places in Hong Kong.

4. Unlike RCHEs run by non-government organizations which are mainly located in purpose-built premises and public housing estates, the majority of the RCHEs run by private operators are located in commercial or residential buildings built before 2001 under co-ownership governed by Deeds

of Mutual Covenant (DMCs), which may prohibit the operation of RCHEs¹. As at 31 August 2004, around 500 RCHEs run by private operators were located in private commercial or residential buildings under co-ownership governed by DMC.

5. Depending on the prescribed uses of the premises/buildings, the land use zoning and the conditions of the land leases, RCHE operators/owners of the premises may have to apply for approval/waivers from the following authority/departments for using premises for RCHEs at pre-licensing stage:

- (a) confirmation of no objection from the BD for material changes in the use of non-domestic premises or non-domestic part of a composite building for RCHEs under section 25 of the Buildings Ordinance (Cap. 123), or no objection to the non-exempted alternation or additional works. No-objection from the BD is a prerequisite for LORCHE to consider the licensing applications;
- (b) planning permission from the Town Planning Board (TPB) for using the premises as RCHEs under section 16 of the Town Planning Ordinance (Cap. 131); and
- (c) waiver from the Lands Department (Lands D) for changes in the land leases to allow the operation of RCHEs.

The DMC issues

6. A major concern of private RCHE operators in starting businesses is the uncertainties arising from potential disputes on DMCs if they operate in commercial or residential buildings built before 2001.

7. DMC is a private agreement that defines and regulates the rights, interests, entitlements, responsibilities and obligations among co-owners of a building. Like other tenants in private commercial and residential buildings, RCHE operators have to ensure that their operation comply with the DMCs of the buildings they are occupying. Otherwise, they may run the risk of being challenged by other co-owners.

¹ In February 2001, the Lands D disallowed the prohibition of RCHEs in DMCs for new residential developments where commercial uses are normally permitted in the lowest three floors.

8. As DMCs are contracts among private owners, if there are disputes between the parties concerned over provisions in the DMC, it is up to the relevant parties to resolve the matter. There are channels to resolve DMC disputes, such as mediation amongst parties concerned with the assistance of relevant Government departments as necessary, legal action by means of civil litigation, or application to the Lands Tribunal for interpretation and enforcement of DMC provisions in accordance with section 45 of and the Tenth Schedule to the Building Management Ordinance (Cap. 344).

9. Currently, the majority of private RCHEs operating in private developments maintain good communication and co-operation with other owners/residents and co-exist harmoniously with the Incorporated Owners (IOs) concerned. According to SWD's operational experience, most of the initial disputes are eventually resolved at an early stage when mutually agreed measures like having separate entrance for the RCHE, clear delineation of common areas, sensible management of the RCHE environment by the operator, etc., have been adopted. Disputes between owners/residents and the RCHE operators resulting in lawsuits are the exception rather than the norm.

10. There have been a few major disputes in recent years between individual RCHE operators and individual IOs or owners/residents groups on the operation of RCHEs breaching the DMCs. The most widely known case was the dispute between the IOs of the Kai Ning Mansion in Aberdeen and the Old Chi Oi Home for the Elderly, which was finally brought to the High Court in March 2003. The High Court granted an injunction in favour of the IOs restraining the RCHE operator from using the premises in the Kai Ning Mansion as RCHE on the basis of a provision in the DMC of the building.

11. In view of possible disputes on DMCs, there have been suggestions that SWD should also take into account possible breaches of DMCs in deciding whether or not to grant licences to applicants. SWD has sought legal advice on this on various occasions, in particular after the High Court case aforementioned. According to the legal advice, breaches or alleged breaches of the DMC are private disputes between the applicant and his owners. They are irrelevant considerations in the context of RCHE licence application. It is not proper for SWD as the Licensing Authority to use licensing power to enforce any provisions in a DMC. In other words, it is outside SWD's power to require proof of compliance with the DMC before it will accept application for or issuance of licence under the provisions of the Ordinance.

The WOHA case

12. The case involved disputes between the WOHA and the Incorporated Owners of the World-Wide Gardens (WWGIO) on the DMC. It also involved breaching of the land leases. Major developments are summarized below.

13. For the purpose of operating an RCHE in the World-Wide Gardens Commercial Complex, the WOHA operator submitted the following applications to the following departments/bodies:

- (a) a planning application to the TPB in October 2002;
- (b) an application for change of uses of the premises to the BD in November 2002;
- (c) an application for an RCHE licence to the SWD in March 2003; and
- (d) an application for a temporary waiver for changes in land leases to the Lands D in June 2003.

14. WWGIO objected to the operation of WOHA on the grounds that the operation would breach the DMC and the land leases, and that they were concerned about the lack of direct access of emergency vehicles to the Complex. They raised objections to various Government departments including the Lands D, BD, the Planning Department (Plan D), and SWD starting from October 2002. There were extensive discussions and communication among various Government departments and WWGIO regarding the objections throughout the entire processing period of the various applications. However, the objections were considered unsubstantiated.

15. Having taken all relevant factors into account:

- (a) TPB approved the planning application in November 2002;
- (b) the BD indicated no-objection to the changes in the uses of the premises for RCHEs in December 2002;

- (c) Lands D informed the operator in June and July 2003 that the latter had to resolve all the local objections first before the department would consider granting a waiver;
- (d) SWD issued a licence to the operator in April 2004; and
- (e) Lands D took action against WOHA for breaching the land leases in June 2004.

16. WWGIO lodged a complaint to the Ombudsman and the Legislative Council in June 2004 regarding the handling of its objections among various Government departments. In particular, WWGIO was of the view that SWD should not have issued a licence to the WOHA when it knew that Lands D would not issue a waiver.

Departments' considerations

17. BD, TPB, SWD and Lands D each have their own ambits in processing applications relating to RCHEs. BD ensures that the premises meet the buildings and fire safety requirements. TPB ensures that the use of the premises as RCHEs is acceptable from the planning perspective. As the licensing authority, SWD ensures that the operation of RCHEs complies with the licensing requirements laid down in the Ordinance, the subsidiary Regulations and the Code of Practice for Residential Care Homes (Elderly Persons) (the Code) regarding aspects such as location, design, structure, staffing, equipment, fire precautions, safety, health, sanitation, and space, etc. Lands D takes into account all relevant aspects, including the views of relevant parties such as co-owners/co-users of the buildings and local community, in deciding whether or not to grant a waiver for changes in land leases.

18. As individual authority/departments have their own ambits in considering applications relating to the operation of RCHEs, it is possible that an applicant is granted approval from some but not all the relevant departments. In the WOHA case, WOHA received no objection from BD, approval from TPB and a licence from SWD but did not receive a waiver from Lands D due to unsolved objections from WWGIO.

19. LORCHE granted a licence to WOHA because it was satisfied that the latter had complied with all the licensing requirements as laid down in the

Ordinance, its subsidiary Regulations and the Code regarding location, design, structure, staffing, equipment, fire precautions, safety, health, sanitation, and space etc. It did not consider it legally proper to take into account WWGIO's objections on DMC and land lease reasons. This is in line with the legal advice that the enforcement of DMC is not among the objects of the Ordinance, and that breaches in DMC and land leases are irrelevant considerations in the context of RCHE licence applications.

Measures to facilitate private RCHEs

20. We are aware of the challenges which private RCHEs are facing in starting businesses, in particular due to the DMC issues. In the past few years, we have taken various measures to improve the business environment of private RCHEs.

Changing the DMC provisions

21 Private residential buildings are an important source of premises for RCHEs. As RCHEs are operating in compliance with the licensing standards set out in the Ordinance, its subsidiary Regulations and the Code, the Administration does not think that their operation should be discriminated. On the advice of the Elderly Commission, the Lands D has since February 2001 expressly disallowed prohibition of RCHE in DMCs for new residential developments where commercial uses are normally permitted in the lowest three floors. This would in the long run help alleviate problems encountered by RCHE operators arising from concerns relating to DMC.

22. We had considered changing the DMCs of all the residential buildings built before 2001 to the effect that they could not prohibit the operation of RCHEs. However, the legal advice was that any proposals that aimed at amending pre-existing DMCs with across-the-board retrospective effects would be too drastic and difficult to justify.

Providing private RCHE operators with greater access to purpose-built RCHE premises

23. As a long-term objective, we are of the view that RCHEs should preferably operate in purpose-built premises. In consultation with the Elderly Commission, the Government has launched various initiatives over the years to

increase the overall supply of quality RCHE premises accessible to private operators as set out below –

- (a) since December 2001, we have provided purpose-built RCHE premises at nominal rent for competitive bidding by both NGOs and the private sector. As of to-date, seven homes have been contracted out. One of them was awarded to a private RCHE operator;
- (b) the Government will continue to build, or to pay developers to build on Government's behalf, purpose-built RCHE premises for competitive bidding by private operators and NGOs. We have reserved about 4 000 residential places mainly in public housing estates, or under urban renewal/railway-related development projects in the next 10 years; and
- (c) we have introduced a premium concession scheme to encourage developers to incorporate purpose-built RCHE premises in their new private developments. Under the scheme, eligible RCHE premises will be exempted from assessment of premium under different types of land transactions including lease modifications, land exchange, and private treaty grants, on the condition that the developers are willing to accept incorporation of certain lease conditions to ensure the delivery of the RCHE premises.

Enhancing information dissemination

24. Realising that potential RCHE operators may not be fully aware of the need to comply with the requirements relating to premises under the jurisdiction and expertise of different approval authorities, and of the complexity of DMC issues, departments concerned have been proactively alerting applicants and potential RCHE operators of the requirements through various channels, as below:

- (a) when notifying applicants of the outcome of their applications for changes of the uses of the premises, BD will convey the requirements or comments of the Plan D and Lands D to the applicants. This serves to remind the applicants of the need to seek approval/waivers from those authority/departments relating

to the uses of their premises as RCHEs, if they have not yet done so;

- (b) when RCHE operators apply for licences, they are reminded of the importance of choosing suitable premises for RCHEs, the possible need to seek approval/waivers from authority/ departments such as the TPB, Lands D and BD for premises-related issues, and the need to comply with the DMCs. Such reminders are set out explicitly in the “Procedural Guide for Application for Licensing of a Proposed Residential Care Home for the Elderly” (the Procedural Guide) and the Code issued by LORCHE free of charge. Potential home operators can also consult LORCHE inspectors through their intake and telephone enquiry line services on all licensing-related issues; and
- (c) there is a warning statement on the licence issued to RCHEs that licensing of an RCHE does not release the operator or any other person from compliance with any requirement of the Buildings Ordinance or any other Ordinances relating to the premises, nor does it in any way affect or modify any agreement or covenant relating to any premises in which the RCHE is operated.

Co-ordination among departments

25. BD, Lands D, Plan D and SWD inform each other of the applications they have received, and solicit each other’s inputs as appropriate in processing applications at the pre-licensing stage whereas LORCHE has all along been providing one-stop service of licence processing and issuance.

Further enhancement

26. In the light of the WOHA case, we have reviewed the DMC issue and the application processes of RCHEs, and explored possible means to facilitate private RCHEs to start businesses and enhance their sense of security.

27. On the DMC issue, we conclude that it will be a non-starter for the Government to introduce legislative changes to prevent the DMCs of buildings built before 2001 from prohibiting the operation of RCHEs. Instead, we

would encourage private RCHE operators to consider as far as possible premises without DMC problems (i.e. residential buildings built after 2001) when identifying premises for new operations. For operators who wish to operate in buildings with potential DMC problems, we strongly encourage them to liaise with the IOs or the resident groups of the buildings with a view to reaching mutually agreed arrangements in the planning stage. If there are unresolved objections from IOs or resident groups, RCHE operators may have to consider other possible premises as alternatives.

28. In support of the Government's policy to facilitate the operation of RCHEs as far as possible, Lands D will work closely with SWD to handle applications for waivers, if required, in respect of RCHEs, with a view to facilitating the application as far as possible if the project has the support of SWD. That said, the applicant will still have to resolve any DMC issues with the IOs or resident groups concerned.

29. Starting from September 2004, a potential RCHE operator will receive reminders on the need to comply with various premises-related requirements and DMC issues at pre-licensing stage from SWD after he has received no objection in-principle to the change in use from the BD. We are mindful of the fact that if potential RCHE operators are not fully aware of the complexities of the premises-related requirements and DMC issues, they may not take them into account when making investment decisions. By the time they realize the complexity of those issues, they may have already invested considerably into the project and may have difficulties in withdrawing without incurring financial losses. We believe that it will be more effective for SWD as the Licensing Authority to alert potential RCHE operators of the need to comply with premises-related requirements and DMCs at the pre-licensing stage.

Advice sought

30. Members are invited to note the contents of this paper and provide comments.