

**Fifth Meeting of the
EEC Subgroup on Business Facilitation**

Agenda Item 3 : Progress report on the Pre-construction Task Force

Purpose

This paper reports on the work progress of the Pre-construction Task Force since the last Subgroup meeting.

Overview

2 The Pre-construction Task Force held two meetings with the Lands Department (LandsD) in the last quarter to exchange views on simplification of lease conditions and improving the lease modification mechanism. The purpose of the discussions was to find out philosophically and practically how the public and the private sectors could operate together more efficiently.

3. To address the issue on simplification of lease conditions, the secretariat has also worked with departments concerned which had empowered the Director of Lands to enforce their requirements, with a view to identifying conditions which could be removed from the lease or simplified without compromising the Government's public accountability and enforcement power as landlord.

Simplification of lease conditions

4. The meeting on 18 March discussed the LandsD's role of the past and in the future. There was a suggestion that the role of LandsD in specifying detailed requirements in land leases and administering minor lease modification be revisited as it had costs and disbenefits which had not been measured.

5. The Task Force considered that, in simple terms, ‘simplification of lease conditions’ was to question whether there was a need to put into the lease the many levels of requirements, details and controls which now existed. The Task Force wished to work with LandsD to decide whether philosophically there was common ground for a much simpler set of title documents. Under the present system, lessees and their agents had to deal with other departments and also LandsD on similar subjects, thus creating a degree of inefficiency and prolonging the time taken in the land development process.

6. Some members felt that there was a parallel system under the present land process because developments on land under old leases, which had lesser restrictions, could enjoy a simpler system while developments on new leases followed a more complicated process due to the more stringent conditions on such leases, but the eventual output did not materially differ, therefore indicating the additions/restrictions were of minimal benefit.

7. The Task Force was of a general view that simplification of lease conditions would benefit developers by speeding up cash flow, and the Government as rates and rents could be collected more quickly. The community would also benefit as it would create a more active market and increase job opportunities.

8. LandsD did not agree that there had been double handling of issues. While land leases contained clauses which required lessees to abide by the respective legislation, LandsD looked at issues from the point of the lease in its private law role as landlord. It was noted that deletion or amendment of some conditions would necessitate legislative amendments and that some of the lease conditions served as safety nets to ensure that all government requirements and public/community concerns, including revenue, were satisfied. LandsD had reservation that such lease conditions had resulted in serious time being taken up in the pre-construction process.

9. LandsD had explained that lease conditions had evolved over the years in response to various influences. Increasing complexity was inevitable and might not be a negative feature since clarity and precision in lease conditions helped avoid potential disputes in interpretation of the rights and obligations between the lessor and lessee. A land lease was a contract

which operated in private, not public, law and was generally not subject to Judicial Review. Practice Notes could not replace lease conditions as they were not contractually binding, but served to explain the application of lease conditions.

10. LandsD had also iterated that appropriate conditions in the land lease were essential to protect the Government's reversionary interest in the land upon lease expiry or termination. They would also serve to capture any increase in land value, in the event of lease modifications being required.

11. The Task Force was of the view that there were many minor modifications which had slowed down the system and created a level of control that practitioners found onerous and had argued this was not in the public good. Therefore, there was a case to simplify lease conditions to focus on core issues.

Improving lease modification mechanism

12. The discussion on 31 March covered the Task Force's proposals on six specific areas as follows –

(a) Enquiry system on land matters

The Task Force proposed that a formal enquiry system be set up to advise landowners or developers of the basis on which a site would be assessed for valuation purpose so that they could establish the criteria at the outset and make a decision as to whether to proceed with lease modification. The proposed service was not intended to obtain legal opinion but to clarify the assumptions to be taken into account when determining the appropriate use for valuation purposes in exceptional cases with unusual user clauses. These cases were very few and LandsD had no objection in principle to respond to enquiries on an individual basis.

(b) Publication of Land Instructions

This proposal of the Task Force was intended to enhance the transparency of the lease modification process. LandsD however

had reservations as this proposal had potentially serious implications because it would bring land administration into the purview of judicial review. The Instructions were internal administrative guidelines to assist consistency in the daily work of LandsD and were not intended for publication or the use of its clients. Nevertheless, LandsD does regularly issue Practice Notes clarifying various procedural and other matters and would continue to do so to further enhance the transparency of the process.

(c) Imposition of fixed time for lease modification process

The Task Force was of the view that time limits could speed up processes. If the intention was that non-compliance with the time limit would mean 'deemed approval', LandsD did not consider this acceptable in the context of a lease modification. It was also noted that the lease modification process necessarily involved several parties and was not carried out under legislation, which made the imposition of time limits less realistic.

(d) Parallel action in processing the modification and ordinance-related issues

The proposal aimed to overlap the gazettal process(es) (e.g. for roads) with the modification procedure so that the whole development could be completed earlier. LandsD had no objection in principle with parallel action and would consider the earliest point at which this could commence.

(e) Establishment of an arbitration system

The Task Force proposed that an arbitration system or an expert determination system be introduced to break deadlocks and to expedite the premium determination process. The Task Force envisaged that the system would be optional, but the determination should be binding on both parties. The Land Tribunal was an existing structure with a judicial and expert dimension, hence this was considered a good forum to take on arbitration for resolving the premium issue. One Member however worried about potential

litigation, hence technical operational details would have to be carefully considered upon the endorsement of the basic principles. LandsD was open to suggestions in this respect and it was noted that the fundamental issues involved were yet to be deliberated upon by the Administration.

(f) Deletion of DDH Clause in Special Conditions

One Member raised that DDH, being the only non-specific clause, had been the concern of practitioners for years because it was so discretionary and wide-ranging. LandsD was of the view that the control provided through DDH approval was very important and necessary and it provided LandsD with the ability to control certain potential abuses. Its interpretation and application was already clarified through Practice Notes but further clarifications could be provided as necessary.

Way forward

13. The Task Force will invite the Secretary for Housing, Planning and Lands and LandsD to join in the next meeting(s) in May to revisit the issues before recommendations are consolidated for submission to EEC in June.

EEC Subgroup on Business Facilitation Secretariat
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