



1. Introduction

1.1 At present, the Government resumes private land for public purposes pursuant to the provisions in the relevant legislation, such as the *Lands Resumption Ordinance* (Cap. 124), the *Roads (Works, Use and Compensation) Ordinance* (Cap. 370) and the *Railways Ordinance* (Cap. 519). The dispossessed owners of the resumed land/property and/or persons having an interest in the land such as the tenants, are entitled to statutory compensation for the open market value of the land and building (if any) or other land interests resumed in accordance with the provisions of the relevant legislation. Open market value refers to the "amount which the land if sold by a willing seller in the open market might be expected to realize".¹

1.2 The Government has also put in place a system of ex-gratia land compensation and allowances as an alternative to statutory compensation with a view to (a) addressing the reasonable needs of the affected parties; and (b) reducing their need to submit claims for statutory compensation. If the parties concerned do not accept the ex-gratia compensation offer, they may continue pursuing their claim for statutory compensation.

1.3 In determining statutory compensation for lots/buildings in *multiple ownership*, the Lands Department has adopted the practice of assessing the open market value of an individual unit with reference to the use as shown on the approved building plans/alternations and additions plans and the use as permitted under the lease (i.e. the existing use value of the individual unit) at the date of resumption. For lots/buildings in *single ownership*, the existing use value and redevelopment value will be assessed and the higher of the two values will be offered as a statutory compensation.²

¹ Section 12(d) of the *Lands Resumption Ordinance*.

² See Lands Department (2013).

1.4 The Panel of Development will discuss the issue related to the different treatment of lots/buildings in *single* and *multiple ownerships* by the Government in assessing statutory compensation at a future meeting. To facilitate the discussion of the subject matter, the Panel at its meeting on 28 October 2014 requested the Research Office to study the overseas practices adopted for assessing the value of resumed properties.³ This information note studies the practices adopted by England of the United Kingdom, New South Wales ("NSW") of Australia, Ontario of Canada⁴ and Singapore in assessing the value of resumed properties. England, NSW and Ontario are selected as they are common law jurisdictions, whereas Singapore is selected as it shares similar socio-economic conditions with Hong Kong.

2. Assessing the value of resumed properties in Hong Kong

2.1 In Hong Kong, the principles of assessing statutory compensation for resumed properties are set out in the relevant legislation and the court rulings made in relevant land resumption cases. According to the *Lands Resumption Ordinance*, statutory compensation payable to the owner of resumed land is based on the open market value of the resumed land at the date of resumption. However, compensation may not take into account: (a) the resumption being compulsory (section 12(a)); (b) the fact that the land is affected by specified provisions of a town plan (section 12(aa)); (c) any non-conforming use of the land (section 12(b)); and (d) any expectancy or probability of the grant, renewal or continuance of any licence, permission, lease or permit unless the grant, renewal or continuance could have been enforced as of right if the land in question had not been resumed (section 12(c)).

2.2 The statutory provisions governing compensation for land resumption have been reinforced by common law principles, which include:

- (a) the presumption that the law does not permit resumption without compensation;

³ The Panel also requested the Research Office to study the mechanism adopted by Hong Kong and Commonwealth states for resolving disputes arising from land resumption. In this connection, the Research Office has prepared a separate information note *Resolving disputes arising from land resumption* (IN04/14-15).

⁴ In Australia and Canada, the land resumption process is regulated by legislation developed by individual state/province and territory.

- (b) any increase or decrease in the value of the land due to the scheme underlying the resumption is disregarded;
- (c) where the resumed land has development potential, the owner is entitled to have the value of his or her land assessed to include the development value;
- (d) the owner is entitled to have the land valued under its highest and best use⁵; and
- (e) a claimant may apply either for the bare present value of the land plus disturbance or the land's development value.⁶

2.3 According to the Lands Department, for the basis of assessment of development value, reference can be made to the judgment handed down by the Court of Appeal in *Siu Sau Kuen v The Director of Lands* in July 2013. It was held in the judgment that the test for determining if a development value should be included in the compensation payable in respect of a resumed property is whether, *on a balance of probabilities*, the evidence discloses that, as at the date of resumption, redevelopment of the property resumed was likely. Such likelihood may be demonstrated by (a) "actual proposals by the applicant to redevelop the property (or unlikelihood demonstrated by the absence of such proposals) whether on its own or by merger with other properties" or (b) "evidence of redevelopment in the vicinity of the resumed property (whether accompanied by evidence of redevelopment plans for the resumed property or not), so long as such evidence of redevelopment in the vicinity supports a finding that redevelopment on its own or merger of the resumed property with other properties giving rise to a viable redevelopment scheme was likely within a reasonably foreseeable time scale".⁷

2.4 In the light of the relevant statutory provisions and the principles established in relevant court cases, the Lands Department has adopted the approach of determining statutory compensation for properties in *multiple ownership* by assessing their existing use value in accordance with the established valuation practices. For lot(s)/building(s) in *single ownership*, the

⁵ In Hong Kong, the common law best use principle is "limited by section 12(c) of the *Land Resumption Ordinance* to uses which may lawfully be carried on under the user covenants of the Government lease, new grant or other title granted by Government". See Cruden (2009).

⁶ See Special Committee on Compensation and Betterment (1992).

⁷ See *Siu Sau Kuen v Director of Lands*, CACV 180/2012.

Lands Department has considered that the owner concerned will normally choose to redevelop his or her own lot(s)/building(s) if redevelopment is proved to be more profitable. In such cases, where redevelopment as a private initiative is more likely to take place, the existing use value and the redevelopment value will be assessed, and the higher of the two values reflecting a more profitable option will be offered as a statutory compensation.

2.5 Nevertheless, the Lands Department states that it will examine each compensation case having regard to its own peculiar facts and circumstances. If a former owner contends that there is a likelihood of redevelopment of the building of which his or her resumed property forms part at the date of resumption, he or she has to provide the relevant evidence (e.g. the availability of an approved redevelopment proposal) to prove the existence of such likelihood of redevelopment.

3. Assessing the value of resumed properties in selected overseas jurisdictions

3.1 With regard to the practices adopted in assessing the value of resumed properties, the relevant land resumption legislation in the selected jurisdictions does not contain any provision specifying the use of different approach for assessing the value of resumed properties in *single* and *multiple ownerships*. Nor do the relevant guidelines on compensation for land resumption issued by the relevant authorities (if available) specify such a requirement.

3.2 In the selected overseas jurisdictions, the principles for assessing the value of resumed properties are laid down in the relevant land resumption legislation and the case law. The common law compensation principles mentioned in paragraph 2.2 also apply unless the relevant legislation provides otherwise. In general, the value of the resumed properties is assessed on the basis of the market value of the properties at the date of resumption or valuation. The ensuing paragraphs describe the practices adopted by the selected overseas jurisdictions for assessing the value of resumed properties, particularly whether and how development potential of the resumed properties is taken into account in the assessment.

England of the United Kingdom

3.3 In England, the principles for determining compensation for land resumption are laid down in legislation (including the *Land Compensation Act 1961* and the *Compulsory Purchase Act 1965*) and the case law. According to the *Land Compensation Act 1961*, the resumed properties are valued on the basis of their open market value at the date of valuation⁸ without any increase or decrease attributable to the scheme of development underlying the resumption. Any increase in the value of property which is attributable to a use which is unlawful or detrimental to the health of the occupants of the premises or to public health may be excluded.

3.4 The open market value of the resumed property may be assessed on the basis of the existing use of the property. However, the assessed value may reflect development value provided it can be demonstrated that such value would have existed in the absence of the scheme which gives rise to the resumption. Any claim that the resumed property possesses development value has to be justified by actual⁹ or assumed planning permission for the development, and market demand for such development.¹⁰

3.5 In contrast with the regulatory framework in Hong Kong, the land resumption legislation in England provides for the application of statutory planning assumptions when land with development potential is being resumed. This avoids the necessity to assess, on the balance of probabilities, whether the necessary permissions and approvals will be forthcoming. The relevant legislation provides for different forms of assumed planning permission including: (a) a permission for development of the land resumed in accordance with the proposals of the acquiring authority; and (b) a permission for development certified by a local planning authority on an application to it. In case an actual or assumed permission for development is not available, the prospect or hope of permission for the development being granted at the valuation date may be taken into account in assessing the value of the resumed property.¹¹

⁸ The valuation date for the assessment of compensation is the earliest of (a) the date the acquiring authority takes possession of the property or the date the title of the land vests in the acquiring authority; and (b) the date when the assessment is made.

⁹ Actual planning permission refers to any planning permission that is in force at the valuation date.

¹⁰ See Davies (1994).

¹¹ See Barnes (2014).

New South Wales of Australia

3.6 The assessment of compensation for land resumption in NSW is governed by the *Land Acquisition (Just Terms Compensation) Act 1991*. It stipulates that the independent NSW Valuer General¹² will consider, among other things, the market value of the land at the date of acquisition in determining the amount of compensation to be offered to the dispossessed land owners.

3.7 In NSW, market value of the land is defined as the amount that would have been paid for the land if it had been sold at the date of acquisition by a willing but not anxious seller to a willing but not anxious buyer. But the value will not include (a) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was resumed; and (b) any increase in value of the land caused by unlawful use, and improvements carried out by the state government authority before resumption for the public purpose for which the land is to be resumed.

3.8 In practice, the market value of the resumed land is determined on the basis of its most advantageous use, i.e. the highest and best use of the resumed land, at the date of acquisition. The land resumption legislation in NSW does not provide for planning assumptions as in the case of England. As such, the highest and best use potential is determined on the basis of the most probable use of the land based on planning guidelines, and whether the development is physically possible, legally permissible¹³ and financially feasible¹⁴. The value of the development potential depends upon how good was the chance of the potential being realized at the acquisition date.

Ontario of Canada

3.9 In Ontario, the *Expropriation Act* provides that compensation payable to property owners affected by land resumption will be based on, among other things, the market value of the land (i.e. the amount that the land might be

¹² The NSW Valuer General is an independent statutory officer appointed by the Governor of NSW to oversee the land valuation system. The NSW Valuer General determines the amount of compensation for land resumption independent of the owners of the resumed properties and the acquiring authorities.

¹³ Legally permissible means, for example, whether the resumed land is appropriately zoned or likely to become appropriately zoned under the relevant planning instruments.

¹⁴ Financially feasible means, for example, whether the development project is likely to be profitable.

expected to realize if sold in the open market by a willing seller to a willing buyer). In determining the market value of the land, no account shall be taken of (a) the special use to which the acquiring authority will put the land; (b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the resumption is made; and (c) any increase in value of the land resulting from any use that is unlawful or is detrimental to the health of the occupants of the land or to the public health.

3.10 In practice, market value of the resumed property is determined on the basis of its highest and best use, i.e. its highest economic use. Similar to NSW, the land resumption legislation in Ontario does not provide for planning assumptions. As such, if the land would need to be rezoned to realize its highest and best use, the hypothetical rezoning must be reasonably probable based on planning evidence.

Singapore

3.11 In Singapore, the land resumption process and the award of compensation to the affected parties are governed by the *Land Acquisition Act* (Cap. 152). Prior to 2007, payment of compensation was based on the market value of the resumed property as at the date of acquisition or the statutory date (which was a date in the past), whichever was lower. The market value of the resumed property was assessed basing on the value of its existing use or the value of its anticipated continued use as designed in the government's land use plan, whichever was lower. As such, potential development value of the resumed property was disregarded in determining the amount of compensation for the dispossessed property owner.

3.12 After the amendment of the *Land Acquisition Act* in 2007, valuation of the resumed property has been based on the market value which a bona fide purchaser would reasonably be willing to pay for the property, after taking into account the permitted use of the property and the potential value that is realizable under the Master Plan¹⁵, subject to the prevailing planning requirements, and other factors such as location, restrictive covenants in the title and site conditions. Nonetheless, no account will be taken of any

¹⁵ The Master Plan is the statutory land use plan which shows the permissible land use and density for development in Singapore. The Master Plan guides Singapore's development in the medium term and is reviewed every five years.

potential value of the land for any other use more intensive than that permitted by or under the Master Plan at the date of acquisition. Besides, the amount of compensation to be awarded will not take into account, among other things, (a) any increase in value likely to accrue from the use to which it will be put when resumed; and (b) evidence of sales of comparable properties, unless the parties concerned can prove that these transactions were bona fide and not speculative.

Conclusion

3.13 In the selected overseas jurisdictions, the value of the resumed properties is assessed on the basis of the market value of the properties at the date of resumption or valuation. Development value of the resumed properties may be taken into account in assessing the amount of compensation payable to the dispossessed property owners. In England, NSW and Ontario, the claim for development value has to be justified by evidence demonstrating that the development plan for the resumed property would have been permissible and feasible at the date of resumption. In contrast, the claim for development value in Singapore is subject to the statutory restriction laid down in the relevant legislation.

3.14 In England, the claim for development value can be justified by actual or assumed planning permission. Unlike England, the land resumption legislation in the other selected overseas jurisdictions does not provide for planning assumptions. In NSW, a claimant may have to demonstrate that the development plan of the resumed property is physically possible, legally permissible and financially feasible in the claim for development value. In Ontario, a claimant claiming for development value may need to provide evidence to justify that the rezoning of the resumed land would have been probable if rezoning is required to realize the development potential of the resumed land.

3.15 In Singapore, the land resumption legislation provides that no account will be taken of any potential value of the land for any other use more intensive than that permitted by or under the Master Plan at the date of acquisition.

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