

LEGISLATIVE COUNCIL PANEL ON WELFARE SERVICES

Operation of Residential Care Homes for the Elderly (RCHEs) In Premises subject to Deed of Mutual Covenant

PURPOSE

This paper updates Members on the regulation of residential care homes for the elderly (RCHEs) operating in premises subject to Deed of Mutual Covenant (DMC), with particular reference to a recent High Court judgment in which the Incorporated Owners (IOs) of the building were granted an injunction restraining the operator from using the premises in the building as RCHE on the basis of a provision in its DMC.

BACKGROUND

2. With the growth in Hong Kong's elderly population in recent years, the demand for and supply of RCHEs have been increasing. To safeguard the operation of these homes, much attention and efforts have been put into the regulation of RCHEs over the past decade.

3. In the early 1990s, the Social Welfare Advisory Committee (SWAC) advised a statutory licensing scheme of control be implemented to regulate RCHEs. The Residential Care Homes (Elderly Persons) Ordinance (the Ordinance) was enacted in October 1994, came into effect in April 1995 and was fully implemented in June 1996. The Licensing Office of Residential Care Homes for the Elderly (LORCHE), a multi-disciplinary office staffed by four inspectorate teams, i.e. building safety, fire safety, health and social work,

was set up by the Social Welfare Department (SWD) in 1995 for the regulation of RCHEs through enforcement of the legislation.

4. In processing licence applications, LORCHE assesses the applications against the requirements laid down in the Ordinance, its subsidiary regulations, and the Code of Practice for Residential Care Homes (Elderly Persons) regarding aspects like location, design, structure, safety measures, staffing, fire precautions, space and care standard. It should be noted that the full implementation of the licensing regime was undertaken through a gradual approach comprising regulation and support. All those RCHEs that existed before the coming into effect of the legislation were allowed to operate on a certificate of exemption in order to give them the time to complete the licensing requirements. When the Ordinance was fully implemented in June 1996, only 70 out of the then 572 existing homes (12%) were issued with a licence; the rest were operating on a certificate of exemption.

5. All private RCHEs have reached licensing standards since March 2001 through proactive efforts by the Government including provision of financial assistance and health worker training places and purchase of places under the Bought Place Scheme /Enhanced Bought Place Scheme, and with the full co-operation from the private sector. Thereafter we have been pursuing service quality improvement initiatives including enhancing training for staff of RCHEs, disseminating information on RCHEs to the public to assist customers in making informed choice, encouraging private RCHEs to adopt service quality standards of subvented RCHEs, stepping up prosecution against non-compliant private RCHEs and devising an enhanced computerised system. In addition, we commissioned in mid 2002 a two-year study to develop a local accreditation scheme for RCHEs, aiming to further improve service quality.

PREMISES FOR THE OPERATION OF RCHEs

6. When the statutory licensing scheme came into full implementation in June 1996, we had a total of 572 RCHEs, of which 111 were subvented, 27 were non-profit-making self-financing and the remaining 434 were private homes. Of these 434 private RCHEs, many of them were (and remain) located in commercial or residential buildings under co-ownership and governed by DMC.

7. As at 30 April 2003, there were 123 subvented homes with 48 being located in purpose built premises and 75 situated at public housing estates (PHEs) not subject to DMC. There were 575 private RCHEs with a total capacity of 45 000 and an enrolment of 31 000 elderly residents. Other than about 50 private RCHEs located in New Territories Exempted Houses, nine in low rise buildings with single owner, two in PHEs and another 16 in Government-owned premises, we believe that the majority of the remaining around 495 private RCHEs are located in commercial or residential buildings under co-ownership governed by DMC.

CONCERNS RELATING TO DEED OF MUTUAL COVENANT (DMC)

8. In the course of processing licence applications for RCHEs in private buildings, SWD has from time to time received complaints lodged by IOs, individual owners/residents or owners/residents groups on alleged breaches of the relevant DMC provisions. In response to these concerns related to DMCs, SWD has repeatedly sought legal advice. According to the advice sought, it is not proper for the Licensing Authority to use licensing power to enforce any provisions in a DMC which is a private agreement that defines and regulates the rights, interests, entitlements, responsibilities and obligations among co-owners of the building, to which the Government is not a party. It is outside the Licensing Authority'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.

9. Despite the above, SWD has drawn potential operators' attention to the concerns relating to DMC. In the Code of Practice (1999 version) published by SWD, we have stipulated in paragraph 1.2 the purpose of the Ordinance as "ensuring that residents in these homes receive services of acceptable standards that are of benefit to them physically, emotionally and socially". To ensure RCHE operators appreciate the importance of DMC compliance, we have included, among other reminders, in the Code of Practice (paragraph 6.2 refers) that "it is the responsibility of operator to ensure that his/her premises for the operation of the RCHE comply with lease conditions and Deed of Mutual Covenant. Operators should understand that the lease and the Deed of Mutual Covenant are legally binding documents and their

residential care homes may be ordered to terminate operating in the premises in civil proceedings.”

10. As DMCs are contracts among private owners, it follows that if there are disputes between the parties concerned over provisions in the DMC, it is up to these parties to resolve the matter. As we understand it and from experience of the Home Affairs Department, there are existing 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.

11. Currently, the majority of private RCHEs set up in private developments maintain good communication and co-operation with other owners/residents and co-exist harmoniously with the IOs concerned (if any). 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 environments 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. Government departments concerned will continue to endeavor to mediate in such disputes to enable smooth operation of RCHEs in private buildings.

PRE-REQUISITE REQUIREMENT OF NO-OBJECTION TO CHANGE-IN-USE

12. SWD has stipulated in paragraph 6.3.2 of the Code of Practice that a RCHE shall not be situated in a non-domestic building or in the non-domestic part of a composite building if objection in writing is raised by the Building Authority to the change in use under the Buildings Ordinance. In our procedural guide, we have advised the prospective operator to seek advice from an Authorized Person or professional consultants and submit an application to the Buildings Authority for change in use, i.e. from non-domestic to domestic, of the proposed premises. If there are alteration or additional works not exempted under the Buildings Ordinance and its subsidiary regulations, permission of the Building Authority should also be obtained for compliance

with the requirements.

THE COURT CASE OF OLD CHI OI HOME FOR THE ELDERLY (THE HOME)

13. The Home is located at the whole first floor of the commercial part of a composite building, namely Kai Ning Mansion in Aberdeen. The Buildings Authority raised no-objection to the “change-in-use” under section 25 of the Buildings Ordinance in June 1997 and the Home has been in operation since licensed in November 1998 with a licensing capacity of 65 care places. Its current licence is valid until 31 October 2003. As at 15 May 2003, the Home had an enrolment of 48 elderly residents.

14. The IOs of the Kai Ning Mansion had raised objection against the setting up of the Home in the building on the ground of its alleged breach of DMC. Thereafter, there were disputes between the two parties including the IOs objecting to the use of common lift service by the Home and the pipe installation for the supply of gas to the Home. The disputes were finally brought to the High Court in March 2003.

15. The legal action was in fact instituted by the landlord of the RCHE premises (the plaintiff) against the IOs (the defendant) on the issues as mentioned in the preceding paragraph. The IOs then counterclaimed the landlord (the 1st defendant) and the Home operator as the tenant was brought in as 2nd defendant by this counterclaim. The issue of the counterclaim is whether there has been a breach of Clause 7(f) of the DMC which prohibits the use of the building as a “boarding house”. The IOs seeks injunction relief against both the landlord and the Home operator in respect of the alleged breach of DMC.

16. The Judge ruled that by its natural and ordinary meaning, the Home is a boarding house albeit restricted to elderly persons. The fact that there is an age restriction does not take it out of the normal ordinary definition of a “boarding house”. Nor can the further and additional services (such as medical, health or nutritional) provided in the Home take it out of that definition.

17. As such, the Judge concluded that the Home is a boarding house within the meaning of that word as used in Clause 7(f) of the DMC and is thereby caught by that user prohibition clause. The main judgment for the IOs on its counterclaim include an injunction restraining the landlord and the Home operator from allowing or carrying on at the Premises the business of a boarding house in the form of RCHE in breach of DMC. In this regard, the Judge granted a six-month grace period for the closure of the business to facilitate the decantation of the residing elders.

IMPLICATIONS OF THE COURT CASE ON THE REGULATION OF RCHES

18. The above court case is the first of its kind. We met with the Hong Kong Association of Private Homes for the Elderly on 20 May 2003 to listen to their concern and it remains to be seen whether there will be an appeal. SWD has sought legal advice subsequent to the court ruling. Legal advice has re-affirmed that enforcement of DMC is not among the objects of the Ordinance; enforcement of DMC would be a distraction from the Director of Social Welfare's (DSW's) duties in ensuring that the residents of RCHES receive acceptable standards of care. Should DSW take pre-emptive action and refuse to issue or renew a licence on the ground that a DMC prohibited the operation of a RCHE, she would be abandoning unnecessarily the possibility that the operators could reach an agreement or compromise with the IOs to nevertheless allow the home to be operated on the premises, with the accompanying likelihood, contrary to the object of the Ordinance, of displacing large number of elderly residents who need to find new homes. In short, legal advice has confirmed that there are no legal policy objections to the DSW maintaining the existing policy of not taking into account the terms of DMC in considering whether to issue, renew, suspend or cancel certificates of exemption or licences under the Ordinance. DSW has met the obligation to respect property rights in the form of the clear and specific information and warnings to applicants about the requirement to comply with the lease conditions and DMC in the Code of Practice as noted above in paragraph 9.

19. As we understand it, the Home operator is still considering to appeal against the court decision and the Hong Kong Association of the Private Homes for the Elderly which no doubt is concerned about the implications of such a ruling on their present and future operations, is also considering to

render financial assistance to such an appeal. The Home operator has also indicated contingency arrangements to decant the elderly residents either by re-provisioning the Home to nearby suitable premises or by transferring them to branch homes under mutual consent. In the eventuality that the welfare of any elderly residents in the Home is likely to be affected by subsequent developments, SWD will provide the necessary support to ensure alternative welfare arrangement for the affected elderly residents. As at 30 April 2003, there were 45 000 places in 575 private RCHEs with an average occupancy of about 70%. There is thus sufficient supply to meet the care needs of any affected elders.

INITIATIVES TO PROVIDE QUALITY PREMISES FOR RCHEs

20. As a long term objective, we are of the view that RCHEs should preferably operate in purpose-built premises. Thus, in consultation with the Elderly Commission, the Government has launched various initiatives to increase the supply of quality RCHE premises as set out below -

- (a) Under the premises-led approach, the Government will continue to build, or to pay developers to build RCHE premises on the Government's behalf and on an entrustment basis. We have reserved about 6 000 residential places mainly in PHEs, or under urban renewal/railway-related development projects in the next ten years. The number of places to be provided will be adjusted in light of demand;
- (b) The Government has opened up Government supplied purpose-built RCHE premises at nominal rent for competitive bidding by both NGOs and the private sector. Since December 2001, five homes have been contracted out providing a total of 504 subsidized places and 213 non-subsidized places. These homes are required to provide continuum of care and from the third home onwards, about half of the subsidized places are for direct admission of elders of nursing home frailty. These homes are vigorously monitored to ensure full compliance of contract terms in meeting the agreed performance standards, both in terms of quality and quantity; and

- (c) the Government is finalizing details of a premium concession scheme to encourage developers to incorporate purpose-built RCHE premises in their new private developments.

However, private buildings will remain an important source of premises for RCHEs and as these homes are operating with upgraded standards, we do not think that their operation should be discriminated. On the advice of the Elderly Commission, the Lands Department 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.

ADVICE SOUGHT

- 21. Members are invited to note the contents of this paper.

Health, Welfare and Food Bureau/
Social Welfare Department
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