

For discussion
on 24 May 2005

**LEGISLATIVE COUNCIL
PANEL ON PLANNING, LANDS AND WORKS**

**Proposed Legislation for the Reconstitution of Missing or Illegible
Government Leases and Related Land Documents**

Purpose

This paper consults Members on the proposed legislation for the reconstitution of missing or illegible Government leases and related land documents.

Background

2. Hong Kong has been implementing the “leasehold system” since the early days of the colonial government in the mid 19th Century. The leases issued by Government as the lessor provide for the rights and obligations of both the lessor and the lessee as to the land leased.

3. Leases in the urban area have mostly been issued with terms and conditions specific to each of them.

4. For a long period of time before the 1980s, for historical reasons, the way leases were drawn up in the New Territories (NT) was rather different from that in the urban area. The majority of private land in the NT is covered by Block Crown Leases (referred to as Block Government Leases (“BGLs”) after July 1997), which were issued by the Government in around 1905. They are substantially in the same terms and are in only two forms, namely, standard form and taxlord form. Subsequent leases granted in the NT were mostly issued subject to the terms and conditions in Government Gazette Notices prevailing at the time with relatively few conditions specific to each lease. This practice was gradually replaced by issuing lease with terms and conditions specific to each lease.

5. All the original land leases are in paper form. Given the long history of our land lease system, it is inevitable that the condition of them in their paper form has deteriorated with the passage of time. Further, during the Japanese occupation of Hong Kong at the time of the Second World War, many leases were lost or became wholly or partially illegible.

Problems caused by missing or illegible leases

6. Under section 13(1) of the Conveyancing and Property Ordinance (“CPO”)(Cap. 219), unless the parties otherwise agree, a purchaser of property is entitled to require the vendor to produce the original of the Government lease or a copy attested by a solicitor’s clerk or certified by a public officer or solicitor. Pursuant to that section, solicitors acting for purchasers invariably require the production of the original or certified copy of the Government lease. If the Government lease is missing or illegible, section 13 of CPO cannot be satisfied, with the result that the marketability of their properties may be affected. The effectiveness of Government’s land administration work, such as lease enforcement action, is also adversely affected by the missing lease problem.

7. Having considered various options to resolve the problem, the Administration has come to the view that the problem can only be resolved by enacting a new piece of legislation for the reconstitution of the terms and conditions of missing and illegible Government leases

The Proposed legislation

General principles

8. The Administration has adopted the following main principles in drawing up the relevant legislative proposals:

- (a) many leases and land documents have become missing or illegible with the passage of time, particularly, during the Second World War. The fault, in some cases, does not lie with the lessees. As such, the proposed legislation (featuring a lease reconstitution process) should be made as simple and practicable as possible to reduce the burden on the lessees and persons with interests in the lot concerned;
- (b) the terms and conditions of the reconstituted leases and land documents should be as close to the original as possible; and
- (c) to protect private property interests, all persons with interests in the land concerned should have an opportunity to participate in the reconstitution process or have remedies in law.

The legislative proposals

(A) Automatic reconstitution of missing or illegible BGLs *upon* enactment of the legislation

9. As mentioned in paragraph 4 above, the terms and conditions of BGLs are known to the Government. The Administration considers that the best way to reconstitute them is through an “automatic reconstitution” mechanism. That is to say, they will be automatically reconstituted in the same terms and conditions as in either the standard or taxlord form. All these identified missing or illegible BGLs will be listed in a schedule to the ordinance. They will be reconstituted immediately following commencement of the proposed legislation by way of endorsement on each of the BGLs listed in the schedule.

(B) Automatic reconstitution of missing or illegible Government leases *after* enactment of the legislation

10. The Administration will try its best effort to identify the BGLs that can be reconstituted automatically upon commencement of the legislation. However, due to the existence of the large number of BGLs, the aforesaid automatic reconstitution exercise may not be exhaustive. It is possible that after enactment of the legislation, the Land Registry (“LR”) may come across missing or illegible BGLs that should have been automatically reconstituted had they been identified earlier. Moreover, with the further passage of time, BGLs in their paper form as deposited in the LR will inevitably deteriorate. If this happens and the LR does not have a legible image of the BGL to allow for reconstitution by the LR under paragraph 11 below, such BGLs will be reconstituted in either the standard or taxlord form upon application of a registered holder of an interest in the lot(s) concerned.

11. In addition, if a Government lease in its paper form as deposited in the LR is illegible or is missing and the LR has a microfilm or image legible copy of that lease, the proposed legislation will empower the LR to reconstitute the lease in the terms and conditions of the copy held by LR.

(C) Provisions for Compensation

12. Unlike reconstitutions by application (see (D) below), the reconstitution process envisaged in (A) and (B) above will not provide for participation by owners in determining the terms and conditions of these

restitutions. This is because the Administration is wholly confident that the restitutions envisaged in (A) and (B) above will be in the same terms and conditions as those in the original Government lease. However, in the very unlikely event that the restitutions envisaged in (A) and (B) above do result in restitutions different from the original and the owner(s) suffer loss or damage, the proposed legislation will contain a right for the owner(s) to claim compensation from the Government.

(D) Reconstitution by application

13. For missing or illegible Government leases (including relevant land documents) that cannot be reconstituted automatically, they can be reconstituted on application. Such application is to be made by a current registered holder of an interest in the land concerned. The applicant should produce a certificate from the Land Registrar that the Government lease in its paper form is not then deposited in the LR (i.e. "missing"), or the applicant should satisfy the Director of Lands ("the Director") that the Government lease in its paper form as deposited in the LR is partially or wholly illegible and the LR does not have a legible microfilm or image of the Government lease (thereby preventing reconstitution to be provided for under paragraph 11 above). The following is an outline of the application process:

(a) For leases covered by Gazette Notices

For those missing or illegible leases which are covered by known Gazette Notice(s), the reconstitution will be in the form of the Government lease in the relevant Gazette Notice(s). The owners will be given an opportunity to satisfy the Director that the lot is held subject to terms and conditions different from those in the relevant Gazette Notice. In the case of partially illegible Government leases subject to Gazette Notices which contain legible terms and conditions, the restitutions will incorporate the legible terms and conditions.

The onus will be on the applicant for reconstitution to establish to the satisfaction of the Director that the lease of his lot was subject to the Gazette Notice(s) which were current at the date when the Government lease was issued and/or subject to other terms and conditions.

The Director will then prepare a proposed reconstitution of the Government lease. He will notify holders of registered interests of the lot concerned of the proposed reconstitution. Objection and appeal procedures will be provided to let holders of registered interests to state their objections to the proposed reconstitution to the Director, and further to the Lands Tribunal or higher court if they are not satisfied with the Director's determination. After all the relevant procedures have been completed, the lease will be reconstituted as determined by the Director, or where there has been an appeal, as amended by the Lands Tribunal or higher court as the case may be, by registration of the reconstituted lease in the LR.

(b) For leases not covered by known Gazette Notices

For leases not covered by known Gazette Notices, the onus will be on applicants to satisfy the Director as to the terms and conditions of the leases. The procedures for reconstitution are essentially the same as those for grants subject to Gazette Notices.

Where an applicant cannot satisfy the Director as to a lease being held under Gazette Notices and/or the terms and conditions of a lease, the Director will propose the terms and conditions (with legible terms and conditions incorporated in the cases of partially legible lease), which will be subject to objection and appeal as outlined in paragraph (a) above.

(c) For land documents

The onus will lie with the applicant for reconstitution of a land document (e.g. modification, waiver, approval, licence or consent) to produce evidence to the Director of the terms and conditions of that land document. The objection and appeal mechanisms will be similar to those described in paragraph (a) above.

(E) Reconstructed leases

14. There are about 96 leases known to have been "reconstructed" from a copy of the original lease by the LR (or its predecessors), but the original itself cannot be found now. As these reconstructed leases are

essentially reproductions of the original held by the lessees, they can also be automatically reconstituted (in their reconstructed form) upon enactment of the legislation.

15. Due to the technological constraints at the time of the reconstruction, or where the original leases submitted to the LR for reconstruction were not entirely legible, some of these reconstructed leases may be partially illegible. Therefore, such reconstructed leases as reconstituted may need to be further reconstituted. The procedures for these further reconstitutions will be similar to those for reconstitution upon application as outlined in paragraph 13 above.

16. In line with other automatic reconstitutions, we propose to also allow persons with interests in reconstituted reconstructed leases to have the right to make statutory claim against the Government, on the condition that they obtain a further reconstitution of that lease already reconstituted, and the persons making the claim can prove loss or damage.

(F) Other major provisions

17. The proposed legislation will include (among other things) the following provisions:

- (a) the applicant has to pay a fee for a reconstitution by application as well as expenses (e.g. the costs of notifying other registered holders of interests of a proposed reconstitution) of effecting the reconstitution;
- (b) the terms and conditions of the Government leases deemed to have been reconstituted by the proposed legislation will, from the date of the reconstitution, supersede the original terms and conditions of the Government leases. The reconstituted leases will be binding upon the owners of all registered interests in the lot(s) concerned;
- (c) a statutory waiver of Government's right as lessor will be provided in respect of pre-existing breaches of the terms and conditions of the reconstituted lease, provided that such terms and conditions in the original Government leases are illegible or missing;
- (d) consequential amendment will be made to the definition of "Government lease" in the Interpretation and General Clauses Ordinance (Cap. 1) to include reconstituted leases so that the same

may be produced in compliance with the requirements under section 13 of the Conveyancing and Property Ordinance (Cap. 219);

- (e) consequential amendment will be made to the Land Registration Ordinance (Cap. 128) to the effect that the LR microfilm or image of an instrument (e.g. a modification) attached to a memorial registered with the LR will be treated as the original of that document. This amendment is necessary because the LR does not retain the original of instruments registered in the LR. Therefore, in response to requests for a LR certified copy of such instruments, the LR produces a certified copy of the LR microfilm or image of the instrument. With this amendment, it is envisaged that the need for reconstitution of many land documents can be reduced substantially; and
- (f) consequential amendments will be made to the Lands Tribunal Ordinance (Cap 17) to allow for appeals against decisions of the Land Registrar to refuse to certify that a Government lease or land document is missing; against the Director's determination on the terms and conditions of a proposed reconstitution upon application, and on the statutory compensation in the automatic reconstitution cases.

Way Forward

18. The Administration will fine-tune the legislative proposals in the light of the outcome of the consultation with stakeholders and proceed with the preparation of the Bill. We intend to introduce the Bill into the Legislative Council in the 2005/2006 legislative session.

Advice Sought

19. Members' advice are sought in respect of the above legislative proposals.

Housing, Planning and Lands Bureau
May 2005