Bills Committee on Land Titles Bill
Thirty-third meeting on 1 June 2004

List of follow-up actions to be taken by the Administration

1. Given that the Bills Committee aims to complete scrutiny of the Bill by mid-June to enable the resumption of the Second Reading debate on the Bill at the last Council meeting on 7 July, the Administration undertakes to provide the Bills Committee with the written views of the Law Society of Hong Kong (Law Soc) on the draft proposed Committee Stage amendments (CSAs) before the Bills Committee meeting on 11 June 2004.

2. In examining the draft proposed CSAs to clause 3, members note the Assistant Legal Adviser (ALA)'s view that it is not necessary to add the proposed new subclause (1A) to provide that the Bill would apply to unregistered land subject to the provisions of Schedule 1A, as Schedule 1A would automatically apply upon expiry of the 12-year incubation period. Members also note the Administration's view that subclause (1A) is needed to introduce Schedule 1A but the drafting of the subclause may be refined. The Chairman invites the Administration and ALA to discuss on the drafting issues.

3. Members note that clause 3(3) provides that "where there is any conflict or inconsistency between the provisions of this Ordinance and the provisions of another enactment in relation to the validity of a transfer (including an agreement to transfer), then the provisions of that enactment shall, in relation to the land to which the transfer relates and to the extent of that conflict or inconsistency, as the case may be, prevail over the provisions of this Ordinance". ALA is concerned that the proposed provisions would give rise to uncertainty because there would always be a possibility that the Bill is in conflict or inconsistent with certain existing or subsequent legislation, but whether there is a conflict or inconsistency between the two is a matter of interpretation. In this connection, members invite the Administration to brief the Bills Committee on the purpose of clause 3(3) and to consider ALA's views.

4. In examining the draft proposed CSAs to clause 4, members reiterate their concern expressed at the meeting on 27 April 2004 that clause 4(d) is too wide, giving the Land Registrar (LR) unlimited power to permit registration of any matter that affects registered land, a registered charge or a registered long term lease but not covered by clause 4(a), (b) or (c). Moreover, such a wide scope may give rise to uncertainty on whether or not a matter is registrable under the Bill. Members stress the importance of certainty because failure to register a registrable matter would result in loss of the relevant interests. The Administration is invited to improve the clause to address members' concerns, and to consult Law Soc on the issue.

5. In connection with clause 5 (Land Registry), members note that the definition of "Land Registry" is added in clause 2. Members also note that the Administration is considering amending the definition of "Land Registry" to remove the reference to the Land Registration Ordinance (Cap. 128), to delete clause 5(1), and to amend some key terms in the Bill such as "Title Register" in clause 5(2)(a).

6. In examining the proposed new clause 6A, members note that the new clause, which is the modified version of the original clause 88, provides that the LR may apply to the Court of First Instance for direction if any question of law arises "in respect of the performance or exercise of any functions or powers imposed or conferred on the Registrar by or under this Ordinance". Some members cast doubt on the need for the provision having regard that the LR may seek legal advice from the Department for Justice and where there is a dispute between an applicant and the LR, the LR can seek judicial review. While the scope of the new clause 6A is narrower than that of the original clause 88, some members are concerned whether regulations would be made to govern the exercise of power by the LR under the new clause 6A and to provide for the procedures for implementation. The Administration agrees to check whether there are any existing laws of court that govern the exercise of such power and consider the need to make regulations. The Administration is also invited to address some members' views that since the provision may involve inter-parte hearings, there is a need to ensure that the other party would know what steps he should take and his rights in the circumstances, especially as the provision may have implications on any appeals against decisions made by the LR under clause 89.

7. In examining the proposed CSA to clause 10(3)(g), a member opines that if the term "lessee" is meant to stand for long term lessee, the definition of the term in clause 2 would need to be improved to reflect such. A suggested option is to provide that the term "means the person named in the Title Register as the lessee of a long term lease". The Administration is invited to improve the definition of "lessee" in the light of the above views.

8. In examining the proposed new clause 10A, members see the need to improve and simplify the definition of "long term lease" in clause 2. They do not consider it necessary to make reference to "the owner of the land at the time of the grant as determined in accordance with the law applicable to land which is not registered land" in sub-paragraph (a)(ii) of the definition. The Administration is invited to consider these views and improve the definition of "long term lease".

9. In examining the proposed new clause 10A, ALA notes that paragraph (c) of the definition of "owner" in clause 2 provides that in relation to registered land to which Part II of the New Territories Ordinance (NTO) (Cap. 97) applies, "owner" includes "any clan, family or t'ong". ALA is concerned that this definition may give rise to problems because members of clan, family or t'ong could not be exhaustively determined. ALA also points out that it is the managers of such land who are responsible for dealing with the land as trustees and there is a need to ensure that they may continue to deal with the land under the land title registration system (LTRS) as at present, so that the land would continue to be transferable. The Administration agrees to review the relevant provisions in the Bill, including clause 24 (1)(a), and advise the Bills Committee of how it would work under the LTRS. The Administration is also invited to link the relevant provisions in the Bill with NTO.

10. In examining the proposed CSAs to clause 11, ALA opines that the expression "on there being a Title Register in relation to the land to which the register relates" in subclause (1) is not precise enough because there is no reference to any particular point of time. A suggested option is to replace the expression by "on the appointed day on which the LTRS will come into full operation". The Administration agrees to improve the drafting of subclause (1) with reference to ALA's views and to paragraph 4

of the list of follow-up actions to be taken by the Administration arising from the thirtieth meeting of the Bills Committee on 27 April 2004 (LC Paper No. CB(1)1899/03-04(02)).

11. In examining the proposed CSA to clause 11(4)(a), ALA suggests that the phrase "uncompleted building units" be changed to "an uncompleted building unit" to correspond with the reference to "a" sale and purchase agreement before it. In this regard, a member opines that, to avoid misunderstanding that the phrase refers to an uncompleted building as a whole, the phrase should be further amended to read "a unit in an uncompleted building". The Administration agrees to check the normal expression used in other legislation and consider how the drafting could be improved.

12. In examining the proposed CSAs to clause 11, ALA opines that the drafting of subclause (4)(b), which provides that "equitable mortgage" excludes a mortgage of an equitable estate of land held under a Government Lease without a certificate of compliance, is quite loose having regard that many Government Leases, e.g. those granted for 999 years, do not require the issue of a certificate of compliance. The Administration is invited to clarify its policy intention and to improve the drafting of subclause (4)(b) to reflect the intention.

13. In examining the proposed new clause 11A and the new Schedule 3, ALA expresses the following views:

(a) References to "registered non-consent caution" in clause 11A(a), (b) and (c) are not necessary because it is through registration that a caution is effected and there is no such matter as an "unregistered non-consent caution";

(b) Along the same line as (a) above, there is no need for definitions of "registered caution against conversion" and "registered caveat" to be provided in Schedule 3. Only "caution against conversion" and "caveat" need to be defined, and they should be defined in relation to the particular sections that provide for their registration;

(c) Along the same line as (a) above, the phrase "a registered caveat against the land" in clause 11A should be amended to read "a caveat registered against the land"; and

(d) Clause 11A(c), which provides that "all the provisions of this Ordinance…..shall apply to the deemed registered non-consent

caution accordingly", is not necessary because the provisions of the Bill would apply to the deemed registered non-consent caution even without the clause.

Please consider the above views of ALA, and improve the drafting of the proposed new clause 11A, new Schedule 3 and other relevant parts of the Bill where appropriate.

14. In examining the proposed CSAs to clause 12 and the definition of "new land" in clause 2, ALA expresses the following views:

(a) Unless the Administration would never grant land by means other than those listed in the definition of "new land", the definition is inadequate, and would restrict the application of the LTRS to new land, so that the types of new land which can become registered land upon commencement of the Bill would be limited;

(b) There may not be a need for clause 12(1)(a), which provides that upon the issue of a Government lease "in respect of new land", the LR shall register the land concerned. This is because, to enable the amended clause 12 to continue to have effect after the 12-year incubation period, the issue of new land, namely, the types of land covered and the relevant timing of conversion, should be dealt with in the schedules, such as in the new Schedule 1A, instead of in the main body of the Bill;

(c) Clause 12(1)(b), which provides that the LR shall register a piece of land upon the issue of a Government lease "on or after the commencement day", should be deleted because the Bill would not have retrospective effect; and

(d) Instead of specifying in clause 12 when and what types of land would be converted under the LTRS as it does in subclauses (1)(a) and (1)(b), it would be safer and clearer to state that the LTRS would not apply to existing land before the appointed day on which the LTRS comes into full operation. In this way, subclause (2) may also be deleted. There may then be no need for the use of the term "new land" and hence its definition in the Bill.

Please consider ALA's views above.

15. In examining the proposed CSAs to clauses 14 and 21, members and ALA express the following views:

(a) In clause 14(1) on the effect of first registration of land on ownership, the reference to "first owner of the land" is misleading

because the owner of existing land which becomes registered land by first registration under the LTRS may in fact not be the "first owner" of the land concerned. To avoid misunderstanding, the Administration is invited to improve the drafting and as a last resort, to consider the need to include in the Bill the definition of "first owner of the land" to specify that it means the first owner after the first registration;

(b) Clause 14(2)(d) is grammatically ill-fitted; and

(c) Having regard that the differences between clauses 14 and 21, which deal with first registration and subsequent registration respectively, are mainly in clauses 14(2)(d) and 14(3), the two clauses should be merged or redrafted to avoid repetition of certain subclauses and confusion.

The Administration agrees to consider the above views.

16. In examining the proposed new clause 15, ALA expresses the following views:

(a) In subclause (1), the reference to "other land" makes the subclause impracticable because the phrase is not defined in the Bill; and

(b) Subclause (2)(a) relates to the proposed new clause 10A. If the new clause 10A is to be amended as proposed above, this subclause may also need to be amended.

The Administration agrees to consider the above views, probably by moving all transitional arrangements under the daylight conversion mechanism to the new Schedules 1A and 3.

17. In examining the proposed CSAs to the proposed new clause 15A, ALA expresses his concern that the drafting does not achieve the purpose of the clause. The Administration agrees to review the drafting of the clause.

18. In examining the proposed CSAs to clause 20, ALA comments that the expression "there may be issued" in subclauses (6)(b) and (6)(d) is rather strange. Please consider ALA's view and improve the drafting of the two subclauses.

19. In examining the proposed CSAs to clause 21, ALA comments that the expression "equitable interest" in subclause (1) should be changed to "equitable estate" because the former in normal usage indicates a lesser interest in land. Please consider his view.

20. In examining the proposed CSAs to clause 22, members and ALA make the following comments:

    (a) In consideration of the Law Soc's wish to ensure that the holder of a long term lease can enjoy a status equal to that of a land owner, the phrase "of a long term lease" should be added after "the lessee" in subclause (2). The phrase "will hold his interest and rights" therein should also be replaced by "will hold his land"; and

    (b) Subclause (2)(d) needs to be reformulated because it does not fit grammatically in the structure of the subclause. If the proposed new clause 10A is amended, this subclause may also need to be amended.

    Please consider the above comments.

21. In examining the proposed CSAs to clause 24, ALA makes the following comments:

    (a) The addition of the phrase "easements provided for in any instrument" to subclause (1)(c)(i) would diminish the possibility of easements covering "easements by prescription";

    (b) The proposed amendment to subclause (1)(d) would exclude all easements acquired by usage and therefore seriously narrow the scope of easements that can be carried over to the LTRS under this subclause; and

    (c) Subclause (1)(f) is wholly unnecessary and would tend to give the impression that unless the Government's right of re-entry is preserved as overriding interest, it can be lost. This would raise the question of whether the rights of landlords and lessors need similar protection.

    Please consider the above comments. Please also explain the Administration's policy intention regarding easements by prescription and the reasons behind, and consult the Hong Kong Bar Association on the issues relating to easements. Please also explain why clause 24(1)(g) is still retained given the Administration's agreement to apply the doctrine of notice to deal with the priority issue under the LTRS (item 2 of the list of follow-up actions to the thirty-first meeting of the Bills Committee on 11 May 2004 (LC Paper No. CB(1)1917/03-04(01)).

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