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Information note for the Subcommittee on West Kowloon Cultural District Development

Land disposal cases to illustrate the need for Legislative Council to have access to documentations relevant to issues under its examination

Purpose

This information note outlines issues which have arisen from the manner communications between the Government and private parties or documentations of agreements were made, and have been identified in six land disposal cases examined by committees of the Legislative Council (LegCo). These committees were the Public Account Committee (PAC), Panel on Housing, Panel on Planning, Lands and Works; and Panel on Information Technology and Broadcasting.

Background

2. At the meeting of the Subcommittee on West Kowloon Cultural District Development (the Subcommittee) on 3 February 2006, the Subcommittee requested the Secretariat to retrieve previous land disposal cases studied by LegCo where communications between the Government and private parties or documentations of agreements were in issue in order to illustrate the importance for the Subcommittee to have access to documents relevant to the communication between the Government and the proponents under the Invitation for Proposal. Following the announcement of the Government's decision not to pursue the West Kowloon Cultural District under the Invitation for Proposals process at the Subcommittee's meeting on 21 February 2006, the Subcommittee considered that the information on land disposal cases would no longer be necessary as it was originally intended to facilitate the Subcommittee to consider the scope of documents that should be ordered for production in the event the powers under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) were to be exercised. The

information however would be useful as a general reference for LegCo when the same subject is to be brought up again in any committee.

Cases identified

3. Having conducted a preliminary research, the Secretariat has identified the following six cases –

(a) Footbridge connections between five commercial buildings in the Central District *(considered by PAC)*;

(b) Implementation of planning objective for developing the Siu Sai Wan site and the change in classification of the site – Island Resort *(considered by PAC)*;

(c) Grant of land at Discovery Bay and Yi Long Wan *(considered by PAC)*;

(d) Development of a site at Sai Wan Ho - the Grand Promenade *(considered by PAC);*

(e) The Hunghom Peninsula Private Sector Participation Scheme (PSPS) project *(considered by the Panel on Housing and the Panel on Planning, Lands and Works); and*

(f) The Cyberport *(considered by the Panel on Information Technology and Broadcasting).*

4. The background information on the above cases, the conclusions of PAC and the deliberations of the relevant Panels insofar as they relate to documentations and communications between the Government and the private parties are extracted from the relevant Reports and Papers. They are set out in **Appendices I to VI**. References to the sources are provided to facilitate members to refer to other details in the original Reports and Papers, if necessary.

Issues identified in the six cases

(a) <u>Lease conditions silent on important information</u>

5. In the case of the Siu Sai Wan site (Case II), notwithstanding the Government's planning objective for developing the Siu Sai Wan site was to lower

the development density in order to "thin out" the population, the District Lands Conference, comprising an interdepartmental and multi-disciplined group of Government officials, decided to delete the clause on the maximum residential gross floor area (GFA) for the site from the Conditions of Sale. Although the maximum plot ratio permitted and the maximum GFA of the development of the site were essential information for the prospective purchasers to consider before the public auction, the Conditions of Sale of the site were silent on the site classification and the maximum GFA. As the result, the Government failed to achieve the planning objective, prospective purchasers might not have put forward the most competitive bids at the auction, and the Government was unfair to developers of various sizes with different risk taking capacity.

6. In the development of the Grand Promenade at Sai Wan Ho (Case IV), when the draft Special Conditions of the site was being prepared, the Buildings Department (BD) had advised the Lands Department (Lands D) that the Government Accommodation should be included in the GFA calculation. However, the information had not been incorporated into the lease conditions and no maximum GFA was specified. This gave rise to diverse views when, after the sale of the site, the Authorized Person for the Developer applied for excluding the Government Accommodation from the GFA calculation. The Building Authority, after seeking legal advice, decided to exclude part of the Government Accommodation from the GFA calculation.

(b) Responses to enquiries from prospective tenderers not recorded or publicized

7. The Conditions of Sale of the Siu Sai Wan site (Case II) were silent on the site classification and the maximum GFA. Enquiries concerning details of the Siu Sai Wan site, including site classification, domestic GFA, and development density, were received and answered by the Planning Department but not recorded or publicized. The change in the classification of the site from Class A to Class C after land sale had given rise to the concern that the Administration had not been fair to all prospective purchasers, in particular those who had made the enquiries.

8. In the development of the Grand Promenade at Sai Wan Ho (Case IV), a prospective tenderer (not the successful tenderer) sought clarification from Lands D on whether the Government Accommodation would be excluded from the GFA calculation. After consulting BD, Lands D informed the prospective tenderer that the lease conditions did not specify a maximum GFA, and according to the advice of the Director of Buildings, the Government Accommodation "shall be included" in the GFA calculation. Lands D had provided similar answers to other prospective tenderers in response to their enquiries before the close of tendering of the land sale. The answers given by Lands D were recorded on the department's file but the department had not publicized them before the close of tender.

(c) Discretion exercised by public officers to modify lease conditions not transparent enough for protection of public interests

9. According to the lease conditions of the Discovery Bay site (Case III), the grantee should erect, maintain and keep in use on the site a leisure resort and certain "minimum associated facilities", which should include a public golf course and a cable car system. Subsequently, the public golf course and the cable car system were deleted from the relevant Master Layout Plans upon approval of the Plans by the then Secretary for City and New Territories Administration and the Director of Lands respectively. As a result, the original concept of the Discovery Bay development had changed from a holiday resort and residential/commercial development to that of a first-home community. No endorsement for the change in development concept was obtained from the Executive Council (ExCo), which had given advice on the grant of the site to the developer at a certain land premium based on the original resort concept.

10. In the case of Hunghom Peninsula PSPS flats (Case V), the Government carried out private negotiation with the developer to modify the Conditions of Sale to allow 2 470 flats in the project to be sold in the open market. The developer subsequently announced its plan to demolish the flats for redevelopment for a higher return. Members of the Panel on Housing and Panel on Planning, Lands and Works were concerned that in negotiating modifications to the Conditions of Sale, the Government might not have anticipated the demolition of the flats and had not included specific provisions to effectively prevent the developer from taking such a move. Although the demolition plan was abandoned due to public pressure, panel members considered that the outcome of the negotiation behind closed doors had benefited only the developer at the expense of public interest.

11. In the case of the Cyberport development (Case VI), one of the provisions in the Letter of Intent entered with Pacific Century Group (PCG) was the guarantee by PCG to take up extra space if Cyberport did not attract enough tenants as envisaged. Subsequently, the Government voluntarily dropped the take-up guarantee from the Project Agreement as it anticipated that demand was likely to exceed the supply of office space in Cyberport and that dropping the guarantee would allow more flexibility in accommodating a greater number of information technology companies interested in operating in Cyberport and was in the Government's favour. Some members of the Panel on Information Technology and Broadcasting considered that the take-up guarantee was a kind of safeguard against the risk of unsatisfactory tenancy uptake and should not therefore be dropped by the Administration on its own accord. The Cyberport tenancy would be underwritten by PCG only when no other tenants could be secured. Some Panel members

cautioned that the voluntary waiver of the guarantee might be construed as a form of "transfer of benefit" in favour of PCG.

(d) Requirement for provision of public facility not included in legal documents

12. The requirement on the owners of Building I (i.e. China Building) in the Central District (Case I) to build a footbridge between Building I and Building II (i.e. Entertainment Building) in return for bonus area and exempted area granted was not included in the Deed of Variation in respect of Building I executed in March 1975, notwithstanding that the owners of Building I had already accepted the Government's proposal for the construction of the footbridge. Record of the meeting between the Authorized Person for Building I and the Administration on 3 February 1975 could not be found and the letter of 5 February 1975 from the Authorized Person to the Director of Building Development indicating acceptance of the proposal for the construction of a footbridge was not made available for the Public Works Department Conference on 6 February 1975. As a result, the requirement for the provision of a footbridge had not been included in the Modification Offer Letter nor the subsequent Deed of Variation even though bonus and exempted areas were granted.

(e) Failure to maintain records to facilitate monitoring of changes

13. The Administration failed to maintain a record of the public recreational facilities in the Discovery Bay development (Case III) and did not verify the specific as-built facilities in the development with those agreed with the developer. There was also no documentation on the reasons for not assessing and/or charging premium for the changes in the relevant Master Layout Plans.

Advice sought

14. Members are requested to note the information set out in this paper.

Council Business Division 1
Legislative Council Secretariat
28 March 2006

Appendix I

Case I: Footbridge connections between five commercial buildings in the Central District

Case summary

In Report No. 32 of the Director of Audit, it was found that the Building Authority had granted to the owners of three commercial buildings a total bonus area of 3 296 square metres and a total exempted area of 1 902 square metres in exchange for the provision of footbridges in Central District. The market value of the bonus area and the exempted area as at June 1998 was $350 million and $359 million respectively. However, none of the footbridges had been built. There were inadequacies in the legal documents resulting in difficulties in requiring the construction of Footbridge A between Building I (i.e. China Building) and Building II (i.e. Entertainment Building) in connection with the redevelopment of the two sites, and there was room for improvement in the procedures for granting bonus and exempted areas in connection with the provision of footbridge connections.

(Paragraph 1 of Chapter 2, PAC's Report No. 32)

Findings of Public Accounts Committee

2. The Public Accounts Committee arrived at the following conclusions in relation to inadequacies of legal documents -

(Extracts from paragraph 58 of Chapter 2, PAC's Report No. 32)

"The Committee:

- condemn the Administration:

(i) for failing to impose the requirement to build and receive the Footbridge A linkage in return for the bonus and exempted areas granted to the owners of Buildings I and II in 1975 and 1992 respectively, because the provision was not included in the lease nor in the Deeds of Variation and Deeds of Dedication for the Building I site;

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- consider it inexplicable that:

  (i) the record of the meeting held on 3 February 1975[1] could not be found;

  (ii) the record of the meeting held on 3 February 1975 and the letter of 5 February 1975 from the Authorized Person to the Director of Building Development[2] were not made available for the Public Works Department Conference (PWDC) on 6 February 1975; and

  (iii) the conclusions drawn, as recorded in the PWDC minutes of 6 February 1975, did not make reference to the offer given by the Authorized Person in his letter of 5 February 1975 and did not include a specific instruction to incorporate a requirement for the provision of Footbridge A in the Modification Offer Letter to the owners of the Building I site;

- condemn:

  (i) the then Director of Public Works, acting as Chairman of the PWDC, for failing to perform an important duty to ensure that the Administration's intentions for the construction of Footbridge A were properly implemented; and

  (ii) members of the PWDC, being senior government officials, for failing to remind the Chairman of the PWDC of the Administration's intentions and to monitor the implementation of the discussions at the meeting;

- express serious dismay that the then Principal Government Land Agent, who was responsible for giving instructions to his staff for drafting the Modification Offer Letter with the usual basic terms, had not raised the issue with the Chairman of the PWDC before issuing the instructions. If he was in doubt about the conclusions reached at the meeting, he should have consulted the Chairman;

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- express serious concern that:

  Footbridge D, which was included in the relevant Outline Development Plan (ODP), has not been included in the Letter of Undertaking for the Building IV site;**"**

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[1] It is believed that the proposals for the construction of Footbridge A were discussed at this meeting between the Administration and the Authorized Person.

[2] The Authorized Person indicated in this letter that his clients reluctantly accepted the proposals for the construction of Footbridge A.

Appendix II

Case II: Implementation of planning objective for developing the Siu Sai Wan site and the change in classification of the site (Island Resort)

Case summary

In Report No. 37 of the Director of Audit, it was found that -

(a) The Government's planning objective for developing the Siu Sai Wan site was to lower the development density in order to "thin out" the population and that the maximum plot ratio for the domestic part of the development should be 6.5. In June 1996, the draft Special Conditions of the Conditions of Sale of the site contained Clause 10(b)(i) which specified that the total gross floor area (GFA) for the domestic part of the development should not exceed 167 700 square metres. However, at the District Lands Conference (DLC) meeting held on 27 September 1996, the representative of the Planning Department said that the maximum residential GFA of a plot ratio of 6.5 might not be achievable. The DLC subsequently agreed to delete the clause. In the event, the GFA of the domestic part of the development was 223 914 square metres, which was equivalent to a plot ratio of 8.819. This was much higher than the plot ratio of 6.5 specified in the Metroplan Selected Strategy.

(b) Although the Planning Department had received and answered a number of enquiries concerning the classification of the site, the domestic GFA, and the development density before the auction, details of the answers were not recorded and there was a change in the classification of the site after the land sale, giving rise to concern if the Administration had been fair to those prospective purchasers who had made enquiries.

(c) After the land sale, the purchaser proposed to provide two internal streets in order to make the Siu Sai Wan site a Class C site. The proposal was accepted by the Buildings Department. Ultimately, the Building Authority agreed that only one street had to be provided. It was doubtful whether it was unusual to accept after a land auction the successful bidder's application to create two additional streets so as to change the classification of a site from Class A to Class C, resulting in an increased plot ratio.

(Paragraphs 2, 19, and 42 of Chapter 8, PAC's Report No. 37)

Findings of Public Accounts Committee

2. The Public Accounts Committee arrived at the following conclusions in relation to inadequacies of legal documents and non-disclosure of communications between the Government and private parties -

(Extracts from paragraph 53 of Chapter 8, PAC's Report No. 37)

"The Committee:

- express grave dismay that:

(a) the Director of Lands, and the chairman and members of DLC had:

(i) neither achieved the Government's planning objective of lowering the development density in order to "thin out" the population, despite the Committee's recommendation in their Report No. 21A on "Sale of a commercial site in Garden Road" that "the Government's planning intention should always be accurately translated into the conditions of sale of a site", nor

(ii) sought to obtain the maximum revenue at the public auction by upgrading the Siu Sai Wan site to a Class C site, for example, by requiring the provision of an extra street;

(b) although the maximum plot ratio permitted and the maximum gross floor area (GFA) of the development of the site were essential information for the prospective purchasers to consider before the public auction, the Conditions of Sale of the Siu Sai Wan site were silent on the site classification and the maximum GFA. As the result of the uncertainties about the classification of the site, the Government eventually failed to achieve the planning objective, prospective purchasers might not have put forward the most competitive bids at the auction, and the Government was unfair to developers of various sizes with different risk taking capacity;

(c) the DLC's decision to delete the clause specifying the maximum residential GFA from the Conditions of Sale of the Siu Sai Wan site was unjustified because the decision had not fulfilled any land policy, revenue, or planning objectives;

(d) with the change in the classification of the Siu Sai Wan site from Class A to Class C after the auction, the total GFA of the development was increased from 226 918 square metres by 41 985 square metres to 268 903 square metres. If the additional GFA had been taken into account, the reserve price of the Siu Sai Wan site would have been increased by $1,018 million;

(e) if the site had been clearly classified as a Class C site for auction, the eventual auctioned price might be higher than the present auctioned price of $11,820 million; and

(f) the requirement for the provision of retail carparking spaces was not stipulated in the Conditions of Sale of the Siu Sai Wan site;

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- express concern that other departments concerned, such as the Planning Department, did not have the procedures similar to those of the Lands Department's Lands Administration Office Instruction, which requires the recording and advertising of all pre-auction enquiries received from (and answers given to) prospective purchasers if they relate to a basic ambiguity in the Conditions of Sale;**"**

Appendix III

Case III: Grant of land at Discovery Bay and Yi Long Wan

Case summary

In Report No. 43 of the Director of Audit, it was found that –

(a) In December 1973, the Executive Council (ExCo) was informed that the basic concept of the Discovery Bay (DB) development was to create a self-contained recreation and leisure community with a wide variety of recreational facilities. On 6 July 1976, the ExCo was informed that the user condition restricted the use of the land to the purposes of a holiday resort with limited residential and commercial purposes. Having considered the lease conditions, the ExCo advised and the then Governor ordered that the land at DB should be granted to a developer (Developer A) for a holiday resort and residential/commercial development at a premium of $61.5 million.

(b) The original concept of the DB development envisaged local families coming on day trips or purchasing holiday homes, and international tourists staying at budget or luxury class hotels, making use of the non-membership (i.e. public) and membership golf courses, tennis courts, swimming pools and other facilities. However, there has been a fundamental change in the concept of the DB development from the above to that of a first-home community.

(c) According to the lease conditions of the DB site, the grantee should erect, maintain and keep in use on the site a leisure resort and certain "minimum associated facilities", which should include a public golf course and a cable car system. However, Developer A subsequently applied for the deletion of the public golf course and the cable car system. In February 1982, the then Secretary for City and New Territories Administration (SCNTA) approved Master Layout Plan (MLP) 5.0, by which the public golf course was deleted. In February 1985, the Director of Lands approved the deletion of the cable car system upon the approval of MLP 5.1.

(Paragraphs 3, 4 and 37 of Chapter 5, PAC's Report No. 43)

Findings of Public Accounts Committee

2. The Public Accounts Committee arrived at the following conclusions in relation to inadequacies of legal documents -

(Extracts from paragraph 143 of Chapter 5, PAC's Report No. 43)

"The Committee:

- expresses alarm and strong resentment that:

  (a) the lease conditions of the DB site failed to specify the requirements for achieving the development concept; and

  (b) the original resort concept of the DB development, as reflected in the Governor-in-Council's decision of 6 July 1976, had changed from a holiday resort and residential/commercial development to that of a first-home community, and the Administration had failed to obtain ExCo's endorsement of that change;

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- expresses astonishment and serious dismay that:

  (a) the approval of Master Layout Plan (MLP) 5.0 had in effect deleted the requirement to provide a public golf course, notwithstanding its specification in the lease conditions; and

  (b) the Lands Department (Lands D) had failed to assess the implications, financial or otherwise, of the deletion of the facilities in the DB development;

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- expresses astonishment and finds it inexcusable that the Lands D failed to:

  (a) maintain a record of the public recreational facilities actually provided in the DB development;

  (b) verify the specific as-built facilities in the DB development with those agreed with the developer to ensure that they had in fact been built; and

  (c) document the reasons for not assessing and/or charging premium for the changes in those MLPs;

- condemns the then land authorities for having failed to assess whether premium should be charged for the changes made in the MLPs after the land grant and prior to 7 June 1994 (including the deletion of the public golf course in MLP 5.0 and the cable car system in MLP 5.1);**"**

Case IV: Development of a site at Sai Wan Ho – the Grand Promenade

Case summary

In Report No. 45 of the Director of Audit, it was found that -

(a) In January 2001, a site at Sai Wan Ho, Hong Kong (the Site), with an area of about 12 200 square metres (m^2), was sold by tender to a developer (the Developer) at a premium of $2,430 million for a residential development. The lease conditions of the Site required the Developer to provide, on a reimbursement basis, Government Accommodation comprising of a marine police operational area (MPOA) with a net operational floor area of not less than 1 500 m^2, and a public transport terminus (PTT) which included a public transport interchange and a cross boundary coach terminus.

(b) In late November 2000, before the close of tendering of the Site, a prospective tenderer (not the successful tenderer) sought clarification from the Lands Department (Lands D) on whether the Government Accommodation would be excluded from the GFA calculation. After consulting the Buildings Department (BD), the Lands D informed the prospective tenderer that the lease conditions did not specify a maximum GFA, and the Director of Buildings had advised that, under Building (Planning) Regulation (B(P)R) 23(3)(a), the Government Accommodation "shall be included" in the GFA calculation. While the Lands D recorded enquiries from, and its answers to, prospective tenderers on its file, Audit could not find records showing that the Lands D had publicised them.

(c) In November 1998, the Metro Planning Committee of the Town Planning Board had been informed that the Site would be able to produce about 1 000 residential flats. According to the Planning Department (Plan D)'s calculation, this was equivalent to a maximum permissible domestic GFA of 85 720 m^2. However, in November 1999, in response to the Lands D's enquiry about the drafting of the lease conditions, the Plan D recommended a minimum GFA of 80 000 m^2 for residential purposes to produce about 1 000 residential flats with an average size of 80 m^2. It now transpired that the actual development of the Site turned out to be a development of five 61 to 64-storey blocks of 2 020 residential units, with a total domestic GFA of 135 451 m^2.

(d) In November 1999, when the draft Special Conditions of the lease of the Site was being prepared, the BD had advised the Lands D that the Government Accommodation (i.e. the PTT and the MPOA) should be included in the GFA calculation. However, the information had not been incorporated into the lease conditions. At the expanded BAC on 1 August 2001 to determine the application of the Authorised Person (AP) for the Developer for excluding the Government Accommodation from the GFA calculation, there were diverse views on the issue. After seeking legal advice, the Building Authority decided in October 2001 that the PTT should be excluded from the GFA calculation while the MPOA should be included.

(e) In November 1998, during the planning of the MPOA, the Architectural Services Department (ArchSD) assessed that the approximate area for the 71 parking bays of the MPOA was 3 200 m^2. The departments concerned considered that the ArchSD's assessment was excessive. In late November 1998, the Hong Kong Police Force (HKPF) had accepted the proposed layout of the MPOA with 1 500 m^2 of space. The ArchSD also confirmed that the expected project requirements were achievable. However, after the sale of the Site, the AP claimed that extra space was required to meet the MPOA requirements specified in the Technical Schedule, and that the PTT had to be extended to "encroach" on areas designated on the Control Drawing as "Proposed Space Reserved for Entrance Lobbies and Other Facilities to Upper Floor" (the Reserved Areas).

(f) In view of the need to extend the PTT into the Reserved Areas, in July 2001, the AP asked for bonus areas in return for the dedication of part of the Reserved Areas for public use. On 1 August 2001, the Building Authority agreed to grant bonus areas to the Developer in return for the dedication of part of the Reserved Areas for PTT use. Although the relevant departments considered that the amendments of the layout and the alleged extension into the Reserved Areas had stemmed from the AP's own design, the ArchSD said that there were no grounds to reject the AP's proposal because, among other things, the Control Drawing attached to the lease conditions was "for information only" and was "not to scale".

(g) In January 1999, the BD advised the Lands D that the Site was a Class B site under the Buildings Ordinance. In December 1999, to qualify the Site as a Class C site, the Lands D incorporated a Special Condition in the lease stating that an area of about 194 m^2 (i.e. Area III) would be demarcated as a non-building area and should be open for public passage at all times. In the circumstances, the Lands D and the prospective tenderers might have considered that Area III would

have to be excluded from the site area in plot ratio and site coverage calculations. Indeed, the Lands D had excluded this area from the site area calculation when it carried out the reserve price valuation. However, after the sale of the Site, at the BAC held on 1 August 2001, the Building Authority agreed that the Site was a Class C site without requiring the Developer to demarcate Area III as a street.

(Paragraphs 1, 11, 17, 24, 103, 104, 125 of Chapter 1 of Part 7, PAC Report No. 45)

Findings of Public Accounts Committee

2. The Public Accounts Committee arrived at the following conclusions in relation to inadequacies of legal documents and non-disclosure of communication between the Government and private parties -

(Extracts from paragraph 134 of Chapter 1 of Part 7, PAC Report No. 45)

"The Committee:

- expresses great dissatisfaction that:

(a) the Lands Department (Lands D) had not publicized pre-tender enquiries and answers on GFA calculation before the close of tendering of the land sale of the Site; and

(b) when a prospective tenderer sought, after noting that there was no explicit statement on exemption of the Government Accommodation from the GFA calculation under the Land Grant Conditions and that public transport termini (PTTs) were often exempted from GFA calculation in a number of other cases, confirmation that the Government Accommodation (i.e. the PTT and the marine police operational area (MPOA)) would be exempted from the GFA calculation of the Site, the Lands D only informed the tenderer that the Conditions of Sale did not specify a maximum GFA and, as advised by the Director of Buildings, "the Government Accommodation shall be included in the GFA calculation, under B(P)R 23(3)(a)". The response could have been interpreted as that the PTT would be included in the GFA calculation;

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- finds it unacceptable that:

(a) although the BD had advised the Lands D, when the draft Special Conditions of the lease of the Site were being prepared, that the Government Accommodation should be included in the GFA calculation, the information

had not been incorporated into the lease conditions of the Site;

(b) the lease conditions of the Site had not specified whether the Government Accommodation should be included in the GFA calculation. Prospective tenderers therefore could have doubts about this point;

(c) for cases where there was no maximum GFA clause in the lease conditions, the Lands D did not consider it appropriate to stipulate in the lease conditions whether the government accommodation required would be included in GFA calculation; and

(d) the BD did not, in the absence of established procedures, devise any criteria for appointing external observers when the two observers were invited to attend the Building Authority Conference (BAC), and they had not been required to declare whether they had any conflict of interest;

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- expresses grave dismay at the Building Authority's decision to exclude the PTT from the GFA calculation of the Site and finds it unacceptable, as it:

(a) had negative financial implications, in that:

(i) the value of the Site would be affected by whether any of the Government Accommodation would be included in or excluded from the GFA calculation. The tender price offered might have been higher if the PTT had been excluded from the GFA calculation at the outset;

(ii) the Lands D's assessment of the tender reserve price of the Site was on the basis that the Government Accommodation would be included in the GFA calculation. The reserve price could have been higher if it had been decided before the land sale that the PTT with an area of 7 297 m^2 would be excluded from the GFA calculation; and

(iii) the prospective tenderer who received written confirmation that the Government Accommodation "shall be included in the GFA calculation" subsequently offered the second highest bid. That tenderer might have put forward an even more competitive bid if he had been informed that the PTT would be excluded from the GFA calculation; and

(b) might be unfair to other tenderers in the sale of the Site as it was contrary to the advice given to some tenderers before the close of the land sale that the Government Accommodation would be included in the GFA calculation, and this decision increased the value of the Site after the land sale;"

Appendix V

Case V: Hunghom Peninsula Private Sector Participation Scheme flats

Background information on the case

In November 2002, the Government decided to cease indefinitely the production and sale of Home Ownership Scheme (HOS)/PSPS flats from 2003 onwards to address the imbalance between supply and demand of private residential flats, and to restore the confidence of the public and investors in the property market. The Hunghom Peninsula was one of the two PSPS projects that needed to be disposed of pursuant to the decision.

2. On 9 February 2004, the Government announced that it had reached an agreement with the developer of the Hunghom Peninsula PSPS project, First Star Development Limited, to modify the Conditions of Sale to allow the 2 470 flats concerned to be sold in the open market. The developer agreed to give up its right to receive the payment of a guaranteed purchase price at $1,914 million from the Housing Authority (HA) and paid a premium of $864 million to the Government for the lease modification.

3. On 29 November 2004, the developer announced plans to demolish and redevelop the Hunghom Peninsula PSPS project. The announcement aroused much public concern about the possible implications of the plans, especially those on the environment.

(Paragraphs 4, 10 and 14 of LC Paper No. CB(1) 1218/04-05(04) – Background brief on Disposal of Hunghom Peninsula Private Sector Participation Scheme Flats)

Deliberations of Panel on Housing and Panel on Planning, Lands and Works

4. Following the public announcement of the outcome of the negotiation, the Panel on Housing, together with the Panel on Planning, Lands and Works, held two special joint meetings to discuss the subject. Many members expressed grave concern about the agreement reached by the Administration with the developer of the Hunghom Peninsula PSPS project concerning the disposal of flats. The major concerns of members were as follows:

(a) It was inappropriate for the Administration to negotiate with the developer behind closed doors. The flats could be sold through open tender or auction so that other developers could have a chance to participate. The approach taken by the Government benefited only the developer concerned at the expense of public interests;

(b) The agreement to modify the relevant Conditions of Sale to allow the 2 470 flats to be sold in the open market was against the Administration's stated housing policy of ceasing the production and sale of HOS and PSPS flats;

(c) The agreed premium of $864 million was pathetically low, taking into account the fact that the property market was picking up; and

(d) The agreement did not settle the issue once and for all as there was still pending litigation for damages filed by the developer.

5. To address members' query about the basis for accepting the agreed premium and in response to members' request, the Administration provided to the Panels the valuation report compiled by the Lands Department for the negotiation and mediation. Upon securing the developer's consent to disclose the pertinent information about the mediation, the Administration provided the Panels with details of the discussion on the premium including the developer's estimates of the premium for the lease modification.

6. Since some members were unconvinced of the approach taken by the Government to settle the issue by means of negotiation and mediation, at members' request, the Administration made available on a confidential basis the legal advice on the disposal options for the Hunghom Peninsula PSPS project for members' inspection.

7. The Panel on Housing held a meeting on 6 December 2004 to discuss the plans to demolish and redevelop the Hunghom Peninsula PSPS project. Members raised the following concerns at the meeting -

(a) Whether the Administration was aware that the developer might redevelop the Hunghom Peninsula site at the time of negotiation. If so, why the Administration had not included any condition in the agreement for lease modification to restrict the developer to redevelop Hunghom Peninsula;

(b) Whether the Administration could and would prevent the developer from demolishing the Hunghom Peninsula flats. In particular, whether clause 11(a) of the Special Conditions of the relevant land lease and clause 7 of the General Conditions of the land lease could, as the Administration claimed, effectively prevent redevelopment of the Hunghom Peninsula site even after the deletion of certain conditions from the original land lease, such as specification of architectural design of the flats and number and sizes of units, in the lease modification. In a member's view, the deletion seemed to facilitate the developer to redevelop the site; and

(c) Whether the legal basis upon which the Administration could require the payment of additional premium for redevelopment of the Hunghom Peninsula site was sound enough. If so, whether the requirement could serve any purpose in preventing demolition and redevelopment.

8. To address the concerns of members and the public, the Panel requested the Administration to make public all information about the disposal of the Hunghom Peninsula flats, in particular the Administration's correspondence with the developer, as well as papers and minutes of internal meetings at which the disposal was discussed. Subsequent to a motion passed by the Panel to recommend the setting up of a select committee, the Administration confirmed that it would provide the requested information subject to the guidelines and principles under the Code on Access to Information. The information was thereafter issued to members in batches. On 10 December 2004, the developer announced that it would not proceed with the plans to demolish Hunghom Peninsula flats.

(Paragraphs 11 to 13 and 15 to 19 of LC Paper No. CB(1)1218/04-05(04) – Background brief on Disposal of Hunghom Peninsula Private Sector Participation Scheme Flats)

Appendix VI

Case VI: The Cyberport

Background information on the case

The Financial Secretary announced that the Government would proceed with the Cyberport project at Telegraph Bay, Pokfulam with the Pacific Century Group (PCG), a private-sector company under a public-private-partnership mode in the Budget 1999-2000. The project comprised a Cyberport Portion and an ancillary Residential Portion. The Cyberport Portion aimed to create a strategic cluster of leading information technology (IT) and information services (IS) companies and a critical mass of professional IT/IS talents in Hong Kong while the Residential Portion would generate revenue to drive the project.

2. On 17 May 2000, the three limited companies owned by the Financial Secretary Incorporated to undertake the project signed the Project Agreement with Cyber-Port Limited, a company set up by PCG as the developer responsible for the construction of the Cyberport Portion and the Residential Portion. The development right of the Cyberport was granted to the developer on 8 June 2000.

(Paragraphs 1 and 2 of LC Paper No. CB(1)623/04-05 - Background brief on Cyberport)

Deliberations of the Panel on Information Technology and Broadcasting

Implementation framework

3. In principle, members had no objection to building a Cyberport in Hong Kong. However, much controversy had arisen from the Government's decision to award the project to PCG without going through the usual competitive tendering process. While some members expressed agreement with the Administration's move to take forward the project promptly, some other members stated their strong dissatisfaction as the arrangement had deviated from the established procedures. Notwithstanding the Administration's explanation that there was an urgency for Hong Kong to secure the first-mover advantage in the face of rapid developments in the IT industry and keen competition from neighbouring territories, some members considered that the Administration had set a bad precedent of using expediency as an excuse for circumventing the necessary procedures.

(Paragraph 15 of LC Paper No. CB(1)623/04-05 - Background brief on Cyberport)

4. As regards the recent deliberation of the Panel on issues relating to the implementation framework for the Cyberport, the Panel convened a special meeting to follow up two articles authored by the Secretary for Commerce, Industry and

Technology and published in local newspapers on 26 and 27 January 2005. In an effort to set the record straight, many members reiterated their grave concern about the Government's decision to award the project development right to Pacific Century Group (PCG) (now PCCW) in 1999 without going through the usual tendering procedures. They considered that funding approval for the essential infrastructural works should not be taken as LegCo's support for taking the project forward under the present mode of implementation. Panel members further pointed out that LegCo Members did not have the opportunity to consider any alternative proposal on project implementation as the Administration had already reached agreement with PCG on the broad development framework.

(Paragraph 31 of LC Paper No. CB(1)1803/04-05 - Report of the Panel on Information Technology and Broadcasting for submission to the Legislative Council)

Take-up guarantee by PCG

5. Apart from issues relating to the implementation framework, the Panel also had substantial discussion on the issue of "take-up guarantee by PCG". In the paper submitted to the Panel and the Planning, Lands and Works Panel on 29 April 1999, the Administration set out the main terms of the Letter of Intent (LOI) it had entered with PCG on 2 March 1999. One of the provisions in the LOI included a take-up guarantee by PCG to take up extra space if the Cyberport did not attract enough tenants as envisaged. PCG would occupy at least 7 000 square metres of office space in Cyberport Phase I, and if the remaining space of the Cyberport Portion was not taken up by other tenants 36 months after completion of construction, PCG would take up not less than 20% and not more than 50% of the total office space within the first five years of the completion of Phase I. The take-up guarantee was subsequently dropped in the Project Agreement signed on 17 May 2000.

(Paragraph 9(c)(iv) of the Administration's information paper for the joint meeting of the Panel on Information Technology and Broadcasting and Panel on Planning, Lands and Works)

6. According to the Administration, during the negotiations on the Project Agreement, PCG considered that its proposed take-up guarantee would give it an automatic right to occupy not less than 20% and not more than 50% of the office space in Cyberport under a long-term lease and on concessionary terms. The Government voluntarily dropped the guarantee as it anticipated that demand was likely to exceed the supply of office space in the Cyberport and that dropping the guarantee would allow more flexibility in accommodating a greater number of IT companies interested in operating in the Cyberport and was in the Government's favour. The Government also considered that an arrangement for one single company to occupy 20% to 50% of the space available in a Government-owned IT infrastructure would be perceived as excessive. PCG was required to apply for

tenancy in the same way as other interested companies, and all such applications would be subject to the approval of a committee comprising local and international experts.

(Page 5252 of the Official Record of Proceedings of the Legislative Council Meeting on 9 March 2005 and paragraph 37 of the minutes of meeting of the Panel on Information Technology and Broadcasting on 2 February 2005)

7. The Administration reported to LegCo through a LegCo Brief on 17 May 2000 and the ITB Panel meeting on 12 June 2000 on the decision to drop the PCG's proposed take-up guarantee from the Project Agreement, which was signed on 17 May 2000. The Cyberport was completed in phases from 2002 to 2004. According to the Administration's progress report presented to the Panel in January 2005, as at December 2004, 33 tenants took up 74% of the space in Cyberport 1, 98% of Cyberport 2 and 20% of Cyberport 3. The aggregate take-up rate for the three buildings was about 46% (and about 42% if Cyberport 4 is included).

8. Some members considered the take-up guarantee was in fact a kind of safeguard against the risk of unsatisfactory tenancy uptake and should not therefore be dropped by the Administration on its own accord. The Government's requirement for the PCG to first make a guarantee does not mean that the PCG has to lease 50% of the Cyberport. According to the take-up guarantee, the PCG has to fulfil its commitment to the Government by leasing 50% of the Cyberport when no other tenants could be secured. The agreement stated clearly that Cyberport has to be leased to other tenants who were interested to do so. The Cyberport tenancy will be underwritten by the PCG only when no other tenants can be secured. Some members cautioned that the voluntary waiver of the guarantee might be construed as a form of "transfer of benefit" in favour of PCG.

(Paragraph 38 of the minutes of meeting of the Panel on Information Technology and Broadcasting on 2 February 2005)

9. To ascertain whether there had been any collusion between the Government and the business sector in the decision-making process, the Panel requested the Administration to reveal further information, notably records of its internal deliberations on the Cyberport project. Following the Administration's refusal to disclose further information, Hon LEE Wing-tat moved a motion at the Council meeting on 9 March 2005 for the Council to exercise its powers under the Legislative Council (Powers and Privileges) Ordinance to order the Administration to provide the requested documents. The motion was negatived. Meanwhile, the Panel continues to monitor the progress of the Cyberport periodically.

(Paragraph 32 of LC Paper No. CB(1)1803/04-05 - Report of the Panel on Information Technology and Broadcasting for submission to the Legislative Council)