

**For information on
1 April 2019**

Legislative Council Panel on Housing

Policies on and Regulation of Divested Properties

Purpose

The Government has, on multiple occasions, explained its policy position and regulatory work as well as those of the Hong Kong Housing Authority (HA) to the general public and the Legislative Council (LegCo)¹ on the commercial facilities divested by HA. Details of which are provided in a number of documents² submitted to LegCo Subcommittee on Issues Relating to Shopping Centres, Markets and Carparks in Public Rental Housing Estates and Home Ownership Scheme Estates, which has completed its work early this year. The salient points are set out below for Members' reference.

Background

2. HA divested 180 properties in 2005 through The Link Real Estate Investment Trust (now known as Link Real Estate Investment Trust (Link)), including retail and carparking facilities, in order to focus on its core function of providing subsidised public housing and improve its financial position in the short-to-medium term with proceeds from divestment. It was considered that the efficiency of the commercial facilities would also be enhanced under the operation of a private entity in accordance with commercial principles. Since 2014, Link has put some of these commercial facilities up for sale in seven rounds, involving a total of 56 properties.

Policy Position and Regulatory Work

3. As with other private property owners, owners of divested properties (including Link and subsequent property buyers) are governed by laws, land lease conditions, Deeds of Mutual Covenant (DMCs) and the relevant restrictive

¹ Including a question by the Hon MAK Mei-kuen, Alice on 17 January 2018 on "Commercial facilities divested by Hong Kong Housing Authority" (<https://www.info.gov.hk/gia/general/201801/17/P2018011700587.htm>) and a question by the Hon IP LAU Suk-ye, Regina on 16 May 2018 on "Provision of amenities ancillary to housing" (<https://www.info.gov.hk/gia/general/201805/16/P2018051600487.htm>)

² Including LegCo Papers Nos. CB(4)801/17-18(01) (https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs104/papers/hs10420180226cb4-801-1-e.pdf), CB(4)1128/17-18(03) (https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs104/papers/hs10420180525cb4-1128-3-e.pdf) and CB(4)126/18-19(01) (https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs104/papers/hs104cb4-126-1-e.pdf)

covenants in the assignment deeds. The Government cannot interfere with the lawful right of the divested property owners to use their properties so long as the legal requirements and land lease conditions are complied with. Likewise, provided that the owners concerned do not contravene the above covenants with HA, HA cannot and will not interfere with their day-to-day operations and commercial decisions, including disposal of properties, letting arrangements, etc. However, if it is confirmed that the owner concerned is in breach of any laws, land lease conditions or covenants with HA, the relevant government departments and HA will certainly pursue the matter seriously and take appropriate actions. The Government and HA treat Link and other divested property buyers on an equal footing. Our position and work will not be affected by changes in the ownership of these properties. The relevant regulatory measures are set out below.

(1) Legal Requirements

4. Owners of divested properties shall, depending on the actual circumstances, comply with the legal requirements during the operation of such properties. For example, the uses of the properties shall comply with the statutory plans prepared and published by the Town Planning Board under the Town Planning Ordinance, while addition and alteration works shall be approved in accordance with the Buildings Ordinance, etc.

(2) Land Lease Conditions

5. On the enforcement of land lease conditions, the Lands Department (LandsD), in the capacity of the landlord, handles the leased land under the conditions of the land leases. As with other private properties, LandsD mainly acts on complaints, referrals or enquiries about suspected breaches of the leases of the divested properties by conducting inspections and taking follow-up actions in accordance with the existing procedures. Depending on the circumstances, LandsD will also consult the relevant policy bureaux/ government departments and seek legal advice. If breaches of the lease conditions are confirmed, LandsD will take appropriate lease enforcement actions.

6. Land uses of the lots are generally specified in the land lease, which will not impose regulation on the mode of operation of the commercial facilities. According to LandsD, land leases for carparking facilities in divested properties do not contain any conditions restricting the divestment of parking spaces, but some land leases may contain provisions indicating that sub-deeds of mutual covenant have to be entered into before property divestment or that deed polls shall be subject to the approval of LandsD. In addition to the above, owners are required to comply with other relevant requirements in the land lease, such as those relating to the restriction on the use of parking spaces.

(3) DMCs

7. There are provisions under the DMCs about the management and maintenance of common areas and recreational facilities, etc., in housing estates/ courts to ensure that the owners will discharge their responsibilities. For example, in accordance with the provisions under individual DMCs, owners are obliged to make available the recreational facilities ancillary to the commercial facilities for use by residents of the housing estates/ courts, as well as properly manage and maintain such facilities and the access thereto. The daily management work of the housing estates/ courts are usually performed by the management company. DMC managers can also require the owners to comply with the provisions under DMCs, including the conditions and limitations set out in the relevant land leases.

8. HA, as one of the owners of the housing estates, maintains communication with other owners on day-to-day estate management matters, with a view to protecting its rights. Any suspected breach of land leases and DMCs identified by HA will be referred to DMC Managers, Owners' Corporation (OCs) and the relevant District Lands Offices for follow-up.

(4) Restrictive Covenants

9. The assignment deeds of the divested properties also contain, on a case by case basis, certain restrictive covenants, including retail covenants, carparking covenants, welfare-letting covenants and split-ratio covenant. Assignment deeds of all divested properties have been registered at the Land Registry (LR). As in any property transactions, buyers and vendors of divested properties are obliged to clarify the rights and obligations associated with the properties, including any restrictive covenants. Legal advice shall be sought as and when necessary. Any person may conduct a search of the assignment deeds at LR in order to have a clear understanding of the restrictive covenants that ought to be included in the purchase and resale of commercial facilities.

10. Under the retail covenants, retail facilities in housing estates or courts shall not be disposed of except as a whole, i.e. individual shops in the facilities cannot be disposed of separately. It is stipulated in the covenant that the covenant will remain effective so long as HA has any interest other than the retail facilities, such as residential units, in the relevant housing estates or courts.

11. Under the carparking covenants, the carparking facilities in the housing estates or courts shall not be disposed of except as a whole. It is specified in the covenant that the covenant shall cease to have effect when HA sells any residential units in the remaining parts of the housing estates or courts.

12. Under the welfare-letting covenants, certain designated units in individual divested properties shall be let out to non-profit-making organisations nominated by designated nominating authorities at concessionary rent or 50% of the market rent as assessed by HA for the operation of purposes such as social welfare or education facilities. The covenant also stipulates that the owners shall sign tenancy agreements with such non-profit-making organisations for a tenancy period of three years. After the end of the three-year tenancy period, the owners shall continue to let out such units to the nominated non-profit-making organisations for the operation of social welfare or education facilities, etc. Concessionary rent refers to the level of rent determined by HA which is applicable to units for welfare or similar usages in properties owned or controlled and managed by HA. HA evaluates such a level of rent from time to time. Divested property owners are only allowed to charge the relevant organisations the concessionary rent determined by HA. No additional management fee should be charged, otherwise HA will regard such acts as breaches of the covenants. In an effort to safeguard its legal rights, HA will take actions as appropriate in case an owner violates the restrictive covenants.

13. Regarding the split-ratio covenant, all commercial facilities (including carparks) in Home Ownership Scheme (HOS) courts were owned by HA before the divestment of such facilities in 2005. HA generally pays a monthly management fee based on the number of shares it owns in the residential lots concerned according to the DMCs of HOS courts. Apart from those requirements under DMCs, HA, as the owner of these commercial facilities, and, out of goodwill, agrees to make contributions to the management and maintenance expenses of applicable “specific activities” in the common areas and common facilities of certain HOS courts according to a specified ratio, having regard to the circumstances of the HOS courts and requests of the OCs.

14. The above restrictive covenants remain valid even if the ownership of the divested properties has changed. HA has an established mechanism in place to ensure that divested properties are covered by such covenants, even if there are changes in the ownership of some of the properties. For example, HA issues letters to remind owners about the restrictive covenants applicable to their properties. Owners will also be reminded that they are required to incorporate similar provisions in the assignment deeds upon disposal of the properties concerned. Furthermore, HA requires new owners to execute the deeds of undertaking with HA. Upon the completion of property transactions, HA will issue letters to remind those buyers about the restrictive covenants applicable to their properties as well as other related matters.

15. HA attaches great importance to divested property owners’ strict compliance with the terms in the restrictive covenants. Necessary actions will be taken immediately against any suspected non-compliance. If breaches of the terms are confirmed, HA will, depending on the circumstances, consider

enforcing the terms through legal means. In this connection, HA has already reminded the divested property owners that, upon disposal of the properties concerned, if similar provisions have not been incorporated in the assignment deeds with the new buyers, or if the executed deeds of undertaking with HA have not been procured from such buyers, the vendors will remain liable for matters relating to breaches of the covenants despite the change in property ownership.

16. In addition to maintaining communication with stakeholders, HA provides assistance to them and responds to their enquiries as and when necessary to facilitate the smooth implementation of various restrictive covenants. For example, in view of the earlier concerns and enquiries by the public and OCs of certain HOS courts about the split-ratio covenant, HA has contacted the management companies of the 23 HOS courts again to reiterate its position on the matter. Background information has also been provided to the management companies and OCs for their reference.

Housing Ordinance

17. Under section 4(1) of the Housing Ordinance, HA is required to secure the provision of housing and “such amenities ancillary thereto as the Authority thinks fit” for the persons concerned. When handing down its Judgement in 2005 on a related judicial review case, the Court of Final Appeal (CFA) affirmed that the divestment plan by HA was consistent with the objectives as laid down in section 4(1) above. According to CFA, it was not stipulated in the Housing Ordinance that tenants of public rental housing (PRH) had any statutory right to the continued retention and control by HA of the facilities while the tenants were still using the facilities. HA had already secured the provision of such facilities, even if they were provided by a third party over whom HA had no control. In reaching its conclusions, CFA noted that a market-oriented commercial approach would be adopted in operating the divested properties, whereas HA’s approach at that time might not be in line with private sector practice.

18. CFA was aware that HA’s divested retail and carparking facilities were subject to the conditions in the land leases. Any change to the land use would require an application for modification of the lease conditions. In addition, HA has certain covenants including requiring owners to let out designated units in the properties at concessionary rent for the operation of certain social welfare facilities. CFA was also aware of the fact that there might be changes in the operation of the relevant facilities, such as the tenant trade mix.

Liaison between HA and Divested Property Owners

19. HA, as one of the owners of PRH estates and HOS courts, maintains communication with other owners on the day-to-day management of such estates or courts to protect its rights under the DMCs and the restrictive covenants, and, at the same time, improve the living environment of the residents. In respect of PRH, HA will, where necessary, invite divested property owners to send their staff members to attend Estate Management Advisory Committee meetings, so that they can listen to residents' views for enhancing their service quality. HA will, as and when necessary, refer residents' requests to the management of the companies concerned.

20. In order to achieve a mutually beneficial outcome, we encourage various stakeholders to offer their views to divested property owners, thus enabling them to have a better grasp of the concerns of the residents and the public during the formulation of business strategies. In view of the fact that these properties are located in PRH estates and that their residents are major service targets, the Government has, on multiple occasions, encouraged Links and other property owners to step up efforts in shouldering their corporate social responsibilities, hoping that they will pay more attention to and take account of the views of LegCo Members and the general public, thereby strengthening communication with various stakeholders in their day-to-day operation. Furthermore, we hope that they will attach importance to the changing expectations and needs of the residents, so as to maintain proper, effective and constructive connection with the residents and local stakeholders.

Concluding Remarks

21. In fact, same as those of the general public, the daily needs of public housing residents for shopping, community services, carparking, etc. are met by different means, including the facilities and services provided by various public and private organisations.

22. In recent years, the Government has been making a lot of efforts to enhance the living quality of PRH residents. As far as public markets are concerned, as indicated in the Chief Executive's 2018 Policy Address, the Government has completed the studies on site selection for public markets in Tin Shui Wai and Tung Chung. Moreover, the Government is identifying sites for public markets in Tseung Kwan O and Kwu Tung North New Development Area. In respect of carparking spaces, the Government will follow the principle of "single site, multiple uses" to provide public car parking spaces in suitable "Government, Institution or Community" facilities and public open space projects. It is expected that at least 1 500 public car parking spaces will be provided over the next five years.

23. The Government will continue to take forward the work mentioned above and listen to views of the public on how to enhance the living quality of public housing residents.

Transport and Housing Bureau
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