

**For Discussion  
On 3 June 2019**

**Legislative Council Panel on Housing**

**Preliminary Views of the Government on Legislating for the  
Regulation of Facilities Divested by the Hong Kong Housing Authority**

The Panel Secretariat requested the Government, in two letters dated 31 January and 13 February 2019, to provide its views on a bill entitled “Regulation of Commercial Facilities in Public and Subsidized Housing (Legislative Provisions) Bill” (hereinafter referred to as “the Bill”) put forward by the Honourable Mrs Regina IP LAU Suk-yee and the Honourable Alice Mak Mei-kuen. It is proposed under the Bill that measures such as a mechanism for regulating the rate of rent increase, the right of first refusal to renew existing lease and vacancy tax (hereinafter referred to as “the proposed measures”), etc. be introduced for regulating certain properties divested by the Hong Kong Housing Authority (hereinafter referred to as “HA”).

2. Having consulted the relevant departments and organisations (including the Department of Justice, the Commerce and Economic Development Bureau, Financial Services and the Treasury Bureau, the Office of the Government Economist and the Competition Commission (hereinafter referred to as “CC”)) and considered the views of the Members, the public and the media on the Bill in the past few weeks, the Transport and Housing Bureau sets out the Government’s preliminary views as follows.

## Basic Law

### Article 74 of the Basic Law

3. According to **Article 74<sup>1</sup> of the Basic Law**, Members shall not introduce any bills that have a substantive effect on (and hence “relate to”) “public expenditure”, “political structure” or “operation of the government”. Members’ bills relating to “government policies” under Article 74 of the Basic Law may not be introduced except with the written consent of the Chief Executive. Based on our preliminary views, the Bill not only relates to “public expenditure<sup>2</sup>” but also “operation of the government<sup>3</sup>” and “government policies<sup>4</sup>”.

4. **As far as public expenditure and operation of the government are concerned**, if the Government is to introduce a new vacancy tax<sup>5</sup>, it would need to set up a new regime for assessing and levying the tax concerned, as well as for preventing and taking action against tax evasion, which will incur additional expenses. At the same time, HA will need to incur additional expenditure for implementing the proposed mechanism<sup>6</sup> on rental regulation.

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<sup>1</sup> Article 74 of the Basic Law provides that “[m]embers of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.”

<sup>2</sup> According to past rulings by the President of the Legislative Council, a bill relates to “public expenditure” if its implementation would have a substantive effect on public expenditure. The President shall make a decision as to whether the amount was so substantial that it cannot be ignored.

<sup>3</sup> The President of the Legislative Council has ruled that a bill relates to the “operation of the government” if its implementation would have an obvious effect on the structure or procedure of the executive authorities, and that the effect would not be of a temporary nature.

<sup>4</sup> According to past rulings by the President of the Legislative Council, “government policies” are those that have been decided by the Chief Executive or the Chief Executive in Council as well as those policies reflected in the legislation. Policies decided by former Governors or Governors in Council prior to the implementation of the Basic Law which are still in force are also included.

<sup>5</sup> Clauses 15 and 16 of the Bill.

<sup>6</sup> Clause 4 of the Bill.

5. **As far as government policies are concerned**, quite a number of complex policy areas are involved under the Bill, which include the Government's policy on divested properties (see paragraphs 8 to 11 for details), the free market and fair competition system of Hong Kong (see paragraphs 12 and 13 for details), and the Government's policy on the implementation of tenancy control (see paragraphs 14 and 15 for details). The Chief Executive has to seriously consider the implication of the Bill on the existing policies before deciding on whether to give a written consent in accordance with Article 74 of the Basic Law.

### **Articles 6 and 105 of the Basic Law**

6. Furthermore, in accordance with **Article 6<sup>7</sup>** and **Article 105<sup>8</sup>** of the **Basic Law**, when introducing any measures (including legislative and administrative measures) for imposing restrictions on private property rights, we must strike a balance between the public benefits of such measures and the protection of private property rights. Careful considerations should be given to the factors of suitability, necessity and proportionality<sup>9</sup>.

7. We have doubts as to whether the objectives as claimed (i.e. “with a view to ensuring the reasonable provision of amenities and facilities within the divested properties” under Paragraph 1 of the Bill's Explanatory Memorandum and “to balance lawful exercise of private property right against the potential abuse of market power by owners” and “to address the community's concern on the skyrocketing of rents in the divested properties” under Paragraph 6 of the Bill's Explanatory Memorandum) can be achieved by implementing the proposed measures.

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<sup>7</sup> Article 6 of the Basic Law provides that “[t]he Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.”

<sup>8</sup> Article 105(1) of the Basic Law provides that “[t]he Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.”

<sup>9</sup> In assessing whether a restrictive measure satisfies the proportionality test under Articles 6 and 105 of the Basic Law, the courts would consider (a) whether the restriction pursues a legitimate aim; (b) whether the restriction is rationally connected with advancing that aim; (c) whether the restriction is no more than necessary for that purpose (or whether the restriction is manifestly without reasonable foundation); and (d) whether a reasonable balance has been struck between the societal benefits of the measure and the inroads made into the rights of the individual, asking in particular whether the pursuit of the societal benefits results in an unacceptably harsh burden on the individual (*Hysan Development Co. Ltd v Town Planning Board* [2016] 19 HKCFAR 372).

## **Policy Implications**

### **Implications on the Policies on Divested Properties**

8. HA divested 180 properties in 2005 through The Link Real Estate Investment Trust (now known as Link Real Estate Investment Trust), 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. We believe that the various factors previously considered by HA during its divestment of the commercial facilities remain applicable today.

9. 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 judgment in 2005 on a related judicial review case, the Court of Final Appeal (hereinafter referred to as “CFA”) affirmed that the divestment plan of HA was consistent with the objectives as laid down in section 4(1) above. CFA pointed out that it was not stipulated in the Housing Ordinance that tenants of public rental housing (hereinafter referred to as “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.

10. In making its judgment, 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. 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.

11. The Government understands that HA has all along been performing its functions by prioritising its duties among various considerations such as resource constraint, cost-effectiveness and community's expectations. The Government has, on multiple occasions, explained its policy position and regulatory work as well as those of HA to the general public and the Legislative Council on the commercial facilities divested by HA. As stated in the Government's paper<sup>10</sup> entitled "Policies on and Regulation of Divested Properties" which was submitted to the Panel in March 2019, like other private property owners, owners of divested properties are governed by laws, land lease conditions and Deeds of Mutual Covenant. 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. However, if the owner concerned is in breach of any laws or any land lease conditions, the relevant government departments will certainly pursue the matter seriously and take appropriate actions. As for HA, provided that the owner concerned does not contravene the relevant restrictive covenants with HA in the assignment deeds, HA has no legal basis and will not interfere with the day-to-day operations and commercial decisions of the owner, including disposal of properties, letting arrangements, etc. If the owner is in breach of the restrictive covenants, HA will also pursue the matter seriously and take actions. The Government and HA treat all divested property owners equally, and our position and work will not be affected by changes in the ownership of these properties.

### **Implications on the Free Market System and Competition**

12. To enhance economic efficiency and facilitate economic development, the Government is, as always, committed to maintaining a free market system and a pro-competition environment. The proponent of the Bill stated that the operation mode of divested properties may possibly contravene the Second Conduct Rule under the Competition Ordinance. i.e. businesses with a substantial degree of market power by abusing that power by engaging in conduct that has the object or effect of harming competition in Hong Kong. As far as retail facilities are concerned, the CC considers that it would be difficult to conclude whether an owner 'monopolises' a market without looking into the actual market conditions of specific locations..

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<sup>10</sup> LC Paper No. CB(1)771/18-19(05).

13. It is stipulated under the Bill that the proposed measures should only be applicable to the 147 divested properties in Schedule 2, but not all other properties in Hong Kong where retail facilities and amenities are equally available. The Government has queries as to whether the proposed measures may contravene the principle of free and fair competition. Such measures may also trigger legal challenges by these property owners.

### **Tenancy Control**

14. Based on the views of the CC, the Government should not lightly consider the introduction of tenancy control unless the market power of a certain owner or retailer cannot be restrained in the course of normal market competition. Generally speaking, before contemplating tenancy control, the Government should, in addition to giving priority consideration to various measures that promote market competition, carefully look into and strike a balance between the cost and benefits of introducing tenancy control.

15. The Government has, in the past, conducted detailed studies on tenancy control on the residential property market. Having examined past experience in Hong Kong and relevant overseas experience, the Government has elaborated its views on this subject in the Long Term Housing Strategy (hereinafter referred to as “LTHS”<sup>11</sup>) promulgated in late 2014. We believe that the analyses therein are, to a large extent, equally applicable to the case of commercial properties. For example, given that tenancy control will undermine owners’ ability in rent adjustment and cancellation of signed tenancy agreements, owners may be more inclined to let their properties to major commercial tenants (such as chain stores) and continue to do so by taking advantage of the right of first refusal to renew existing lease. Such initiative

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<sup>11</sup> According to paragraphs 6.15 to 6.17 in the LTHS, “[r]eintroducing tenancy control is a highly controversial issue and there is as yet no consensus in the community over this issue. Drawing reference from the history of tenancy control in Hong Kong and studying overseas experience, the Government notes that despite the good intention of the advocates, tenancy control measures often lead to an array of unintended consequences, including those to the detriment of some of the tenants whom the measures seek to assist. Such unintended consequences include: (a) Reducing supply of rented accommodation...(b) Limiting access to adequate housing by the socially disadvantaged...(c) Encouraging certain behaviour from landlords to offset the impact of the tenancy control measures...and (d) Discouraging proper maintenance of the rented accommodation...Public views on the subject are diverse. While there is considerable support of the revival of tenancy control among inadequately housed households and concern groups championing grassroots rights, others cast doubts on the effectiveness of the measure in offering the desired protection to grassroots tenants, having regard to the unintended consequences aforementioned.”

may possibly affect the owners' incentive to renovate and maintain their shop premises. Furthermore, introducing tenancy control may cause owners to charge tenants a large fee on miscellaneous expenses (such as management fee and air-conditioning fee).

### **HA's Role in Implementing the Initiatives**

16. The Bill proposes delegating to HA the responsibility to implement tenancy control on its divested properties which it has already relinquished its legal title. The implementation of such measures must be in accordance with the requirements in the Bill (including the rent adjustment formula and consultation mechanism), which is completely different from HA's prevailing rental policy for its non-domestic properties. The parallel implementation of two different sets of practices will have serious implications on HA's role and operations.

17. The Bill requires HA to consult District Councils, divested property owners, the relevant Owners' Corporations and Estate Management Advisory Committees on the rate of rent increase. The implementation of such measures has quite some difficulties. For example, in the event that there are divergent views among the stakeholders in the consultation process, there would be difficulties in implementing the proposed measures.

### **Community Views**

18. Members of the community have different views on the Bill, some are in favour of it. This group of people indicates that the rate of rent increase of divested properties in the past is notably higher than the average rate of rent increase of all the shop premises in Hong Kong, and thus they consider that such property owners "maximise their profits" and "force the small shop tenants out by outrageous rent increase". On another front, there are views that the scope of operation of divested properties involves major public interest, hence it is necessary for the owners to shoulder the social responsibility of caring for the grassroots, instead of operating business simply from a market economy perspective.

19. On the other hand, some people have quite a lot of concerns, comments and views about the suitability, effectiveness and feasibility of the proposed measures under the Bill as well as their implication on Hong Kong's society and economy. Some believe that there are many loopholes in the Bill, under which, for example, nothing can prohibit an owner from changing the use of its shopping facilities and further divesting its properties. Also, as it may take a few years for the Bill to go through the procedures from scrutiny to implementation, owners may have already fixed the rent at a relatively high level before the implementation of the relevant measures in a bid to counteract the tenancy control.

20. Some consider that the Government and HA, instead of implementing tenancy control, should make efforts to improve the operation of public markets and provide a wider array of shopping choices to PRH residents, such as through the provision of mobile shopping trucks, to put pressure on divested property owners by means of market competition. Some people worry that the Bill may deliver a message to the business sector in that the Government may, at any time, interfere with the operation of private enterprises and their price levels through legislative means, which may lead to misunderstanding among investors that there is a fundamental change in Hong Kong's business environment, thus denting market confidence about Hong Kong's commitment in upholding the free market system. There are also some people who worry that the Bill only covers certain divested properties, which is unfair to the owners concerned. This may, on the one hand, trigger legal challenges, and, on the other hand, go against the Government's on-going practice of regulating enterprises on an equal footing.

## **Concluding Remarks**

21. We understand that the objective of the Bill is to introduce certain proposals to address certain problems that the community has an on-going concern, but based on the above analysis from the legal and policy perspectives and various views held, we consider that there is insufficient basis for the Government to support the proposed measures and the Bill.



22. Same as those of the general public, the daily needs of PRH residents for shopping, community services and carparking are met via different means. As indicated recently in a speech by the Chief Secretary for Administration in a motion debate at the Legislative Council<sup>12</sup>, the Government has been making a lot of efforts in the areas as mentioned above. In terms of carparking spaces, the Government will follow the new principle of “single site, multiple uses” to provide public car parking spaces in suitable “Government, Institution or Community” facilities and public open space projects. If technically feasible, it is expected that at least 1 500 public car parking spaces will be provided over the next five years.

23. As far as public markets are concerned, the Government is gearing up the preparation work for a number of new public market development projects. The Government will definitely go full steam ahead on these projects as it understands that the public wish to see the early provision of new markets. At present, according to the Hong Kong Planning Standards and Guidelines, the Government will, on a case-by-case basis, consider the provision of new public markets. Relevant factors of consideration include demographic mix, community needs, availability of any public or private market facilities nearby, and the number of fresh provision retail outlets in the vicinity. The actual situation of individual districts and the views of stakeholders on all fronts will also be taken into account in the process.

24. Regarding the views that temporary bazaars should be set up in individual districts to cater for residents’ daily shopping needs, the Government adopts an open attitude in its policies towards specific bottom-up proposals for organising bazaars. As long as such proposals will not compromise public order and safety, food safety and environmental hygiene, and will not cause obstruction to public passageways, the Food and Environmental Hygiene Department will assist the bazaar proponents to liaise with relevant departments to obtain permissions or apply for licences as appropriate if the organisations concerned have identified suitable sites and obtained support from local communities and the respective District Councils.

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<sup>12</sup> During the discussion on Member’s motion on “Requesting the Government to overcome the ‘three big mountains’ in people’s livelihood” at the Legislative Council meeting of 4 April 2019.

25. 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 understanding of the concerns of the residents and the public in the course of formulating their business strategies. The Government always encourages divested property owners to step up efforts in shouldering corporate social responsibilities, hoping that they will pay more attention to and take account of the views of Legislative Council 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.

26. The Government will continue to take forward the work mentioned above. We will listen and make reference to the relevant views and suggestions raised by the public.

**Transport and Housing Bureau**  
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