An Introduction to Possible Mechanisms for Allocating Land to the Proposed Harbourfront Authority

Information Paper

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1 Introduction

1.1 The Objective of this Information Paper

This Information Paper has been prepared by the Harbour Business Forum (HBF) for the benefit of the Harbourfront Commission (HC). Its objective is to assist HC Members in better understanding the issues involved in the choice of mechanism to be used for allocating land to the proposed Harbourfront Authority (HFA). In particular, this Paper seeks to:

- Introduce Members to the range of land allocation mechanisms most commonly used in Hong Kong
- Provide Members with a high-level understanding of each mechanism
- Raise awareness of the pros and cons of using each mechanism to allocate land to the proposed HFA

Importantly, this Paper does not attempt to identify or propose a preferred mechanism for allocating land to the proposed HFA. Its aim is purely to raise HC Member awareness of current practices and the pros and cons of different land allocation mechanisms in relation to the proposed HFA.

1.2 Background and Context

This Paper is the second Information Paper that HBF has prepared for the benefit of HC Members. HBF's first Paper, *'A Framework for Debating the Creation of a Harbour Authority in Hong Kong'*, was prepared in 2011 to inform the HC's early debates regarding whether a HFA was required and how it might be structured.[1]

This debate has subsequently moved forward significantly. In October 2012, the HC wrote to the Chief Executive, recommending the establishing of a HFA. The Chief Executive, in his 2013 Policy Address, welcomed the proposal and undertook that the Development Bureau would collaborate with the HC to gauge community views on the proposed HFA in two stages. Phase I of the Public Engagement (PE) exercise ran from October 2013 to January 2014 and elicited broad public support. Phase II, focusing on the more detailed proposal, has just started.

1.3 Why an Information Paper on Land Allocation Mechanisms?

Throughout this period, the issue of land holding has been a key part of the debate:

- HBF's 2011 Information Paper identified that similar organisations in overseas jurisdictions and some local public authorities are able to hold, sub-lease and dispose of land as appropriate, and established that similar functions should also be considered for the proposed dedicated authority
- The first PE exercise raised the need for the authority to be able to plan, develop and manage 'vested' harbourfront sites and general agreement was reached on the need to allocate land to the HFA
- The second PE excise has again proposed that land be allocated to the HFA and identified a series of possible sites

Although 'vesting' has been mentioned a number of times, the latest digest proposes that "land allocation arrangements, including terms and conditions of each site, will be examined and worked out by the Government."[2] This Paper discusses the implications of alternative

[1] This Paper was presented to the HC at its eighth meeting on 13 December 2011. Please see: http://www.hfc.org.hk/en/meetings/meeting_20111213.html. Agenda item number 8.

[2] Phase II Public Engagement Consultation Digest, page 23. http://www.hfc.org.hk/hape/doc/en/public_engagement_materials/PhaseII_PE_Digest.pdf

land allocation arrangements and how each would affect the ability of the HFA to discharge its duties.

1.4 Structure of this Information Paper

This Information Paper comes in three further sections:

- Section 2 provides an overview of some of the most common, currently-used land allocation mechanisms in Hong Kong;
- Section 3 discusses the pros and cons of a shortlist potentially relevant mechanisms; and
- Section 4 concludes by summarising the implications of various land allocation mechanisms to the proposed HFA.

2 An Overview of Land Allocation Mechanisms in Hong Kong

2.1 The Land Allocation System in Hong Kong

Virtually all land in Hong Kong is leased or otherwise held from the Hong Kong Special Administrative Region Government (HKSARG).[3] The authority over land resources of the HKSARG is vested in the *Basic Law,* Article 7 of which states that "*land and natural resources within the Hong Kong Special Administrative Region (SAR) shall be State property. The Hong Kong SAR Government shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development*."[4] The Lands Department (LandsD) is the HKSARG's agent on land matters.

There are several ways the HKSARG allocates land. The most common mechanisms for the information of HC Members include:

1. **Internal procedures**, which are used to allocate land between Government Bureaux and Departments (B/Ds);
2. **Vesting Orders** and **Private Treaty Grants**, which are used to facilitate the delivery of specific policy objectives by entities other than Government B/Ds;
3. **Land sales**, which are used to allocate land for commercial use; and
4. **Short Term Tenancies**, which are used to generate revenue or public value from land that has no immediate development plan

This Section provides a high-level overview of each of these mechanisms in turn, including an introduction the processes, restrictions and examples associated with each.

2.2 Internal Procedures

Internal procedures are used to allocate land between Government B/Ds for public use. These procedures are governed by the *Lands and Works Branch Technical Circular No. 26/85 Provision of Land for Government Projects or Use*.

B/Ds would apply for temporary or permanent land allocations by submitting applications to LandsD indicating the approximate location(s) of the site(s) and the approximate area required.[5] If the proposed development is likely to have a clear boundary (e.g. a secondary school), a Preliminary Allocation Plan would be issued for comments from B/Ds concerned.

The site(s) allocated to a B/D would be subject to the use and development conditions laid down by LandsD. The B/D would also have to comply with relevant regulatory requirements such as the Town Planning Ordinance.

2.3 Vesting Orders and Private Treaty Grants

2.3.1 Vesting Orders

A Vesting Order is a means of allocating the right to control and manage Government land, typically to statutory controlled bodies, to meet specific policy objectives. Vesting Orders have been used for decades for example to allocate land to the Housing Authority for the development of public rental housing (although not for the development of subsidised housing for sale – for this a Private Treaty Grant would typically be used).

[3] Lands Department, *General Information*, available at http://www.landsd.gov.hk/en/service/landpolicy.htm

[4] Legislative Council Secretariat *Information Note – Land Supply in Hong Kong (IN21/12-13), available at* http://www.legco.gov.hk/yr12-13/english/sec/library/1213in21-e.pdf

[5] Development Bureau, *Lands and Works Branch Technical Circular No. 26/85 Provision of Land for Government Projects for Use*, available at < http://www.devb.gov.hk/filemanager/technicalcirculars/en/upload/275/1/lwb2685.pdf

Importantly, a Vesting Order is a means of allocating the authority to control land to another body, without transferring ownership of the land itself. The entity being vested with the land may be permitted let or sublet land within the order's boundary but there can be no outright sale as the ownership of the land rests at all times with the Government.[6]

The terms, conditions and site plan for each order would be prepared by LandsD and would be subject to approval by the relevant B/Ds concerned. Each Vesting Order would typically specify the permitted land-uses and development parameters, where such uses and parameters are not already specified within the relevant statutory authority's ordinance. Where such uses are already specified in the statutory body's own ordinance, the process becomes much simpler and the Vesting Order need only state the area of land to be transferred.

Vesting Orders do not result in a lease so are typically not termed by a prescribed expiry date. They therefore provide the statutory authority with long term use of the land (i.e. 'proper tenure'). Allocation of land by Vesting Order is not usually subject to land premium.

2.3.2 Private Treaty Grants

Private Treaty Grants are another means of allocating land to meet specific policy objectives, usually to statutory bodies or public service providers, most commonly public utility companies and MTRC. Examples include:

- Land allocated to the Hong Kong Housing Authority (HKHA) and Hong Kong Housing Society (HKHS) for the construction of subsidized housing for sale (as opposed to rental);
- Land allocated to the Urban Renewal Authority (URA) for agreed projects, such as the Kai Tak 'flat-for-flat' scheme;
- Land allocated to MTRC for residential and / or commercial developments; and
- Land allocated to the Airport Authority Hong Kong to develop the airport island.

Private Treaty Grants are site specific and each allocated site would require its own grant. Land allocated through this mechanism is restricted to the uses specified in the grant conditions, which are commonly very prescriptive and restricted to the grantee's operational needs. Any subsequent changes would require a formal lease modification.

As distinct from Vesting Orders, Private Treaty Grants result in the actual transfer of the land to the non-government entity. Although alienation or sale of the site as a whole is prohibited, Private Treaty Grants can be written to allow the entity sell undivided shares in the future completed development, for example for the sale of individual subsidised housing flats. Entities that operate on commercial principles, like utility companies, or that have the right to sell future undivided shares, would be required to pay full market premium to reflect the nature of their development. These require approval from the Executive Council.[7]

Where Private Treaty Grants are made to not-for-profit organisations that have no intention to sell undivided shares then the lease conditions will prohibit this and the grant will be subject to nil or nominal premium. Examples would include non-profit-making educational, medical or charitable institutions for operating schools, hospitals, social welfare and other community facilities.[8]

The length of each Private Treaty Grant varies depending on the intended use of the land. For example, Private Treaty Grants awarded to companies operating under a franchise

[6] A VO boundary is usually larger than the area of the development site. In the case of land vested to HKHA, the VO boundary may include lands that are not developable (greenbelt and steep slope). However, the HKHA is also responsible for the control and management of these lands. The Treasury, Accrual-based consolidated financial statement of the Government for the year ended 31 March 2013 < http://www.try.gov.hk/internet/pde_accrual_accounts_2012_13.pdf

[7] Nissim R (2008) *Land Administration and Practice in Hong Kong* p58

agreement with Government (e.g. allocation of land to a public franchised bus company for a bus depot) would have a length equal to the length of the franchise, and would be subject to further renewal at franchise expiration. Otherwise, Private Treaty Grant leases are normally for 50 years.

2.4 Land Sales

For land intended for commercial development (residential, offices and other commercial properties) by private entities, land sales via auction or tender are commonly used.

Prior to 1999, the disposal of government land for commercial development was primarily done through the Annual Land Sale Programme (ASP), which provided a timetable for when specific sites would be put up for scheduled auctions and tenders. Interested developers would respond to tenders or participate in open auctions.

In light of the local property market fluctuations in the early 2000s, a market-led mechanism called the Application List (AL) system was introduced to supplement the ASP. Under the AL system, LandsD published a list of sites available for sale upon application. Upon submission of an offer by developers that met or exceeded the minimum trigger price, LandsD would put the site up for open auction or tender. This measure was intended to avoid the market being overloaded by excessive land supply.[9] The AL system was subsequently abolished in 2013 when a more proactive means of supplying land for new housing was needed, and the regular land sale programme resumed.[10] All land sales have subsequently been conducted via tender (rather than auction).

Land sold through these measures would be subject to a 50-year lease that sets out the conditions of how the land is to be used. Full market premiums would be charged.

2.5 Short-Term Tenancies

Short-Term Tenancies allow the Government to generate revenue or public value from land with no immediate development plan. In certain cases, Short-Term Tenancies are also granted to regularize unlawful uses of land.[11]

Generally, the terms of a Short-Term Tenancy would not go beyond seven years as prescribed in *Cap 150 New Territories Leases (Extension) Ordinance*. In practice, Short-Term Tenancies are typically granted for one, two or three years certain, with monthly or quarterly renewal thereafter.[12] Permitted uses and special conditions are usually stipulated and published as part of the open tender process. Due to the temporary nature of Short-Term Tenancies, permitted uses are usually limited to open storage and public parking lots. Permanent structures are not likely to be built due to the short tenancy period.[13]

There are four ways that the LandsD grants Short-Term Tenancies:

1. **Open tender:** land that is likely to be of general commercial interest is let by open tender – examples include Short-Term Tenancies for stores, fee paying public car parks, plant nurseries and golf driving ranges.
2. **Direct grants:** Short-Term Tenancies may be granted directly where the land is of no general commercial interest and where there is only one interested party. Examples include works areas and sites to be used for non-profit-making activities by charitable or

[9] Legislative Council Secretariat *Information Note – Land Supply in Hong Kong (IN21/12-13), available at* http://www.legco.gov.hk/yr12-13/english/sec/library/1213in21-e.pdf

[10] Government Press Release - *CE's statement on abolishing land sale by the Application Mechanism* available at http://www.info.gov.hk/gia/general/201302/28/P201302280598_print.htm

[11] Audit Commission *Report No.47 of the Director of Audit, Chapter 2, Administration of Short Term Tenancies*, available at http://www.aud.gov.hk/pdf_e/e47ch02.pdf

[12] Summary of Lands Department's *Short Term Tenancy Tender Result Records* for multiple years, available at http://www.landsd.gov.hk/en/stt/2014q2.htm

[13] Same as footnote (10)

non-profit-making organisations for which policy support by the relevant policy bureau has been given.

3. **Regularisation of unauthorised occupation of government land**: when unlawful occupation of government land without structures is detected by LandsD, it may be regularised under certain circumstances by the issue of a Short-Term Tenancy to the occupier at market rent. LandsD considers this to be a practical way of resolving issue of unlawful occupation of Government land and obviates the need for deploying considerable manpower in conducting frequent inspections to prevent its re-occupation.
4. **Conversion from Government land licence / permit:** since the mid-1970s, it has been Government policy to convert old land licenses to Short-Term Tenancies to effect better land control.

Short-Term Tenancy tenants are required to pay a monthly rental at market value.

3 Pros and Cons of Possible Mechanisms

3.1 Applicable Mechanisms

As described in Section 2, there are a number of mechanisms that the Government uses to allocate land to meet its policy objectives. Given the proposed HFA is intended to be an independent, dedicated statutory authority, neither the internal procedures used to allocate land between Government B/Ds nor the allocation of land direct to the private sector via land sales would be appropriate. This leaves Short-Term Tenancies, Vesting Orders and Private Treaty Grant for further consideration.

3.2 Considerations in Choosing between Alternative Mechanisms

The ideal land allocation mechanism to the HFA should:

- **Allow land to be allocated quickly and simply**, to allow the HFA to deliver quick wins upon establishment
- **Minimise the HFA's exposure to high land premia payments while allowing the HFA to generate income from commercial developments**, given the need for the HFA to be financially sustainable over the long term
- **Allow for flexibility in land planning, development and management**, in order to provide diversified attractions and activities with innovative designs and flexible management
- **Provide secure and long-term tenure**, to provide certainty and allow initial development costs to be recovered
- **Allow sufficient government oversight**, to ensure public accountability and prevent sale of land

3.3 Pros and Cons of the Three Shortlisted Mechanisms

The table below compares the pros and cons of the three relevant land allocation mechanisms based on the considerations listed above.

Table 3.1 Pros and Cons of Three Shortlisted Mechanisms

Consideration	Short-Term Tenancies (STT)	Vesting Orders (VOs)	Private Treaty Grant (PTG)
Allow land to be allocated quickly and simply	■ Can be arranged reasonably quickly by LandsD ■ Each site would require its own STT ■ No need for ExCo approval	■ Quick and simple to arrange if the Authority's ordinance is already in place ■ Separate VOs are not needed for each site ■ No need for ExCo approval	■ Prescriptive nature of PTGs can mean they take longer to arrange ■ Each site would require its own PTG ■ ExCo approval required for commercially-orientated PTGs
Minimise exposure to land premia while allowing the HFA to generate income from commercial developments	■ No upfront land premium – monthly rent only ■ Short tenure hinders viability of developing	■ Nil or nominal land premia ■ Would allow the HFA to generate revenue through letting or	■ Sites with commercial elements would require payment of full market premia

Consideration	Short-Term Tenancies (STT)	Vesting Orders (VOs)	Private Treaty Grant (PTG)
	revenue generating facilities	subletting – but not land sales	■ PTG could be written to allow revenue generation through the sale of undivided shares in a development, as well as letting / subletting
Allow for flexibility in land planning, development and management	■ Permitted uses are clearly specified in the terms of tenancy agreement	■ Permitted uses are stated in the VO, but the entity is free to use the vested land in accordance with its statutory objectives.	■ Permitted uses are specified in the conditions of grant tied to the operation of the grantee. Changes would require a lease modification
Provide secure and long-term tenure	■ Short and uncertain, not conducive for long term planning or developing permanent structures and facilities	■ Long and certain, conducive to long term planning and provision of permanent structures and facilities	■ Long and certain, conducive to long term planning and provision of permanent structures and facilities
Allow sufficient government oversight	■ Oversight of the use of the site would be limited limited to ensuring compliance of the tenancy agreement ■ Sale of the site or any part thereof is not permitted under a STT	■ Government would have less direct control over the use of the site but would be able to re-take the site in the event of severe breaches of conditions ■ Sale of the site or any part thereof is not permitted under a VO	■ Government would have more control over use the site through tight specification of the grant conditions ■ PTG can be written to prevent the sale of the site or any part thereof

3.4 Discussion

Based on the comparison above, it is clear that:

- Short-Term Tenancies may be useful to allow rapid allocation of sites to the HFA to allow initial place-making and site animation work to begin or to facilitate short-term pilot projects or quick wins. However, they would not be suitable over the longer-term as they are not conducive to long term planning and the introduction of permanent structures. In this regard, Private Treaty Grants or Vesting Orders would be more suitable for long-term land allocation.
- The proposed HFA is expected to provide a variety of uses to create vibrancy. Short-Term Tenancies and Private Treaty Grants come with more prescriptive lease conditions that a HFA could find constraining in terms of developing diversified sites for public enjoyment.

- Compared to a Private Treaty Grant, a Vesting Order would give the Authority a freer-hand in managing and operating allocated land. A Vesting Order would also allow more holistic planning as all individual plots and land-uses that fall within the Vesting Order boundary would be managed by the same entity and be governed by the same Vesting Order Agreement. The land allocation process would also be the most straightforward: additional sites can be added by adjusting an existing Vesting Order through gazettal of a revised plan.
- By contrast, Private Treaty Grants are site-specific, meaning that each site allocated to the HFA over time would require its own individual Private Treaty Grant. Combined with the prescriptive nature of Private Treaty Grants and the need for a formal lease modification in the event of any changes in use, this would significantly increase the degree of control that Government could excise over the HFA's use of the site. However, this would reduce the HFA's flexibility in discharging its duties and would involve significant administrative burden in drafting, agreeing, processing and approving each individual grant and any subsequent modifications.
- Like many purpose-formed public authorities, the HFA is expected to operate on prudent commercial principles with the intention of achieving long term financial sustainability. Given this, Vesting Orders and Short-Term Tenancies would impose the least financial burden to the authority (zero or nominal premium). By contrast, the HFA would only be able to avoid a paying a premium on lands granted under a Private Treaty Grant if the site is wholly non-commercial. If Private Treaty Grants are used, the proposed HFA may therefore face limitations in its ability to generate income or could be required to pay full market premium if commercial elements are included or modifications to existing uses are made.

It can be seen from this discussion that for a public authority, both Private Treaty Grants and Vesting Orders would provide relevant options for longer term planning. However, Vesting Orders appear to have the advantage of simplicity, flexibility and reduced exposure to financial burden.

4 Conclusion

This Information Paper seeks to assist HC Members and the public in better understanding how land could be allocated to the proposed HFA and how the choice of mechanism might affect the HFA's subsequent operations. HBF hopes that this Paper will raise awareness of the issues involved and facilitate an informed debate on the most appropriate mechanism to be used.

This paper has identified that Vesting Orders, Private Treaty Grants and Short Term Tenancies are the most relevant mechanisms for allocating land to the HFA. Of these, Short Term Tenancies could be used to enable quick wins or pilot projects on small sites but would not be appropriate for the longer-term allocation of land to a permanent body such as the HFA, which has to plan and manage its sites on a long term basis. The choice between Vesting Orders and Private Treaty Grants then comes down to a trade-off between increased flexibility and simplicity under Vest Orders versus increased Government control and administrative process under Private Treaty Grants. This trade-off would become most acute once the HFA's enabling ordinance has been enacted – and if Vesting Orders are to be adopted then the HFA's ordinance should be drafted with this in mind.