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Solicitors & Notaries

URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

The Environmental Impact Assessment Bill continues to be debated by Legco. The Bill is presently with the Bills Committee which will again consider it in early December. Important amendments to allow for some form of third party (ie. public) appeals have been suggested by Legco member Christine Loh. Passage of the Bill awaits Legco agreement on this issue. In this Report we consider the main elements of the Bill, and point out several of its short-comings.

Beginning with this, the Autumn edition, the Quarterly in future will be published in each of the four seasons of the year, with each edition reflecting data, news and views relating to the previous three months (as is the case now). This minor charge will, hopefully, avoid the perception of some readers that they receive their copies of the Quarterly unnecessarily later. (It does take time to collate, research and report on the information collected during the preceding three month period).

Our Senior Partner, Mr. Fred Kan, received a letter from Mr. M. J. Stokoe, Deputy Director of Environmental Protection dated 14th October, 1996 alleging inaccuracies in our article "Are Hong Kong's Anti-Pollution Laws Effectively Enforced" appearing in the June 1996 issue of the Quarterly. Due to space constraint we shall deal with Mr. Stokoe's letter and our response in our next issue.

The Editors

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Hong Kong's Proposed Environmental Impact Assessment Law

The Environmental Impact Assessment Bill was introduced into Legco at the beginning of the year. This follows a lengthy period of drafting during which the government received representations from interested parties and specialist organizations, such as the Hong Kong Environmental Law Association.

However, the Bill in its present form does not reflect all of the major submissions put to the government in the drafting stage.

One of those submissions, and a concern of professional people in particular who have had experience with similar legislation in other jurisdictions, is that the Bill in its present form does not allow the public any rights of appeal against decisions of the Director. Appeal rights are provided only to the developer applicant. Compared to jurisdictions which have a much greater length of experience of environmental impact assessment legislation, it is very significant that the government has chosen not to include such rights in the Bill.

Once again it has been left to Legco member, Christine Loh, to try to redress that situation. The Bill is currently held up in the committee stage pending resolution of Ms. Loh's various proposals to incorporate some form of third party appeal rights within the legislation. As clearly urgently needed as the legislation is, it must be recognized that the Bill in its present form, which does not allow the public more than merely the right to make representations in respect of critical decisions, brings from its inception an inherent weakness which may be more difficult to redress at a later stage than attempting to do so from commencement of the legislation. Leaving aside that issue, what follows is a necessarily brief summary of some important components of the proposed legislation.

When is an Environmental Impact Assessment ("EIA") necessary?

The application: Section 5 (1) requires any person "planning a designated project" to make application to the Director for Environmental Protection ("the Director") for either one of the following:
(a) an *environmental impact study brief* ("study brief") as a preliminary to proceeding with an EIA; or, bypassing the EIA procedure,
(b) an approval to apply directly for *an environmental permit* ("environmental permit").

So the "trigger" factor is whether or not the development proposal amounts to "a designated project" (see below for further comments). In respect of either application, the applicant is required to submit to the Director a *project profile* "which must comply with the Technical Memorandum" ("TM") which forms part of the legislation, and which also is put before Legco in draft form: section 5(2).

Section 5(3) and (4) outline what the Director has to do following receipt of an application. If the EIA process, (a) above, is to be followed, the Director has to issue within 45 days the study brief and he must also notify the Advisory Council on the Environment ("ACE") accordingly. Although section 5(4)(b) does not require it, he presumably would forward a copy of the study brief to ACE at the same time. If the Director is not satisfied with the project profile, he may within 14 days, request further information concerning the project: section 5(3).

Where the application is for approval to apply for a permit directly, there are basically three sets of circumstances in which the Director may permit the direct application (and, note, that at this stage of the process, the application is for, as it were, leave to apply for the permit). The circumstances when the Director may grant that "leave" are:
(a) where the project has already been the subject of an EIA report and the Director considers that that report still is "relevant"; or
(b) where the permit is needed for an addition or alteration to an *exempted project* and the Director is satisfied that there is no material change to the impact of the project and that the project profile still meets the requirements of the TM; or
(c) where the Director, with the consent of the Secretary, is satisfied that on the basis of the project profile the environmental impact of the proposed project "is unlikely to be adverse" and the measures described in the project profile meet the requirements of the TM.

An important and somewhat unusual feature of the process concerning the " leave to apply directly" application ((a) immediately above) is that in granting "leave" the Director may impose any conditions on his approval, provided that the condition "is reasonable": section 5(8). No guidance is given in the draft Bill as to whether *reasonable* is to be measured only in environmental terms (as should be the case, since the whole process concerns *environmental* assessment and protection) or in economic terms, or a mixture of both. However, the Director has power to impose a second set of conditions at the time he grants the nmental permit itself: section 10(4). Again, no criteria for the conditions are specified in the legislation. No doubt these provisions will be a fertile source of litigation, assuming the Director adopts an environmentally realistic approach to the permit process and does in fact impose meaningful environmental conditions on permit holders where it is necessary to do so in order to avoid significant environmental impacts.

Designated Projects: The starting point in terms of the application of the legislation is the proposed development project itself. As currently drafted, the Bill applies only to a "designated project", that is, a project of a kind described in Schedules 2 and 3. Consideration of the Schedules indicates another glaring weakness in the proposed legislation, in that the projects described there could broadly be termed *mega-projects*. They include :

- an airport
- a container terminal
- any reclamation works resulting in a 5% decrease in cross-sectional area
- a breakwater of more than 1 kilometre in length or extending into a tidal flushing channel by more than 30% of the channel width
- a dam more than 10 metres in height
- a facility for ship building
- a transport depot, provided it is located less than 200 metres from the nearest residential area
- a new town
- a store for coal and ores with a capacity of at least of 200 tonnes
- a road or railway tunnel longer than 800 metres
- an abotoir, but only if it has a daily slaughter capacity of more than 500 head of stock
- a golf course
- a horse-racing course

..... and so the list goes on.

Setting the minimum limits of designated projects at such an extraordinarily high level, in terms of potential direct *and* cumulative environmental impacts, greatly weakens the value of this legislation.

Setting the minimum limits of designated projects at such an extraordinarily high level, in terms of potential direct *and* cumulative environmental impacts, greatly weakens the value of this legislation. A small shed can have significant environmental impacts, depending on where it is sited. Numerous small scale developments can collectively have the impact of a designated project, yet none will require an EIA (which is another aspect of the failure to recognize cumulative impacts - see comments below). It might be possible to cover those situations in the town planning approval process; but as it stands, the Bill makes no reference to the *Town Planning Ordinance*, and we are left in the dark as to how the government sees the relationship between the two processes (if any). It should be noted that smaller projects, if they are proposed for gazetted country parks or other gazetted conservation areas, are included in the category of designated projects (Schedule 1Q). But even there, the latitude given developers or the government, where it is the developer, is very generous compared to other jurisdictions where legislation such as this has been in force for many years, e.g. the United States. For example, any building of less than 500 m^3 is permitted, as are all earthworks related to forestry, education and recreational facilities. Excluded also are *all works* which are not otherwise within the definition of designated projects and which are undertaken by the Country and Marine Parks Authority "for developing country parks and marine parks and the provision of facilities for public enjoyment". (That exemption illustrates the continuing Hong Kong preoccupation with "developing". Most environmental

scientists would argue that it is a contradiction in terms to speak of developing a country park or marine park. This approach to environmental legislation reflects the classical and discredited *anthropocentrism* environmental philosophy i.e. human domination of nature is emphasised, and the "value" of the environment is measured solely in terms of its usefulness to humankind).

The Environmental Permit Application Procedure

The EIA process: Where an applicant has applied for and been given an EIA study brief, he then must prepare an EIA report ("EIAR") which complies with both of:
(a) the study brief and
(b) the applicable provisions of the TM: section 6(1).

There is no time limit set for the preparation of the EIAR. The applicant must pay a fee at the time he delivers the EIAR to the Director.

Within 60 days of receiving the EIAR the Director must decide that it meets the requirements specified above or it does not. If not, the Director must advise the applicant of the reasons that it does not do so: section 6(3) and (5).

Should the Director decide that the EIAR does meet the requirements then he advises the applicant accordingly and requires the applicant to exhibit for public inspection the EIAR at places and at times that the Director considers necessary. Public exhibition includes advertising the EIAR as and when the Director directs. Section 7 concerns public inspection of EIAR's. The main point to note here is that the Director must forward the report to ACE, which then has 60 days from the date of receiving the copy within which to respond. On the other hand, the public has 30 days within which to inspect the document once it goes on public exhibition. The public are entitled to copies free of charge to the extent the "Director may require".

Within 14 days of the expiry of the public inspection period, the Director may require the applicant to provide further information, presumably in response to those comments that the Director considers warrant a response. Thus the public have, in effect, 44 days within which to inspect and make comments on the EIAR and associated documents. There is no apparent reason why ACE is given a longer period.

Once approved, the Director must place the EIAR on a register: section 8(4). If the Director rejects an EIAR he is required to give the applicant reasons for so doing: section 8(5).

Environmental permits: No person may carry out a designated project unless he has an environmental permit: section 9(1). However, if a project has already received all other necessary statutory approvals, including Town Planning Board approval, prior to the Ordinance coming into force, it will be exempted from the provisions of the proposed laws. There are also various other relatively limited categories of statutory exemptions provided for in section 9 (3) - (5).

Section 10 provides the procedure for the actual application for an environmental permit. Therefore, the mere fact that an EIAR has been approved does not automatically mean that the permit will be issued. Nevertheless, it is difficult to imagine the circumstances where the permit would not automatically follow. But it must be stressed that the Director does retain the discretion to refuse the application, although it would appear to be a very limited one once the EIAR has been approved; see, for example, section 10 (2).

The Director is required to advise both the applicant and ACE (where in fact it has been consulted) of his decision on the application for issue of the environmental permit, and must do so within certain set time periods allowed for in section 10(3). There is no requirement to advertise the decision and therefore the public is not necessarily directly or indirectly informed of it.

Importantly, the Director may issue an environmental permit subject to conditions: section 10(4). Schedule 4 to the Bill contains suggested conditions, as to, for example:

- the design alignment or visual appearance;
- the physical scale or scope or extent;
- the methods for carrying out the project
- importantly, measures for mitigation of environmental impact required of the developer, such as the installation of pollution control, equipment, erecting acoustic barriers, and so on.

Interestingly, section 10 (7) directs the Director not to include a condition that might be included in "approval of any nature under another Pollution Control Ordinance" unless the condition is needed to have the project meet the requirements of the TM and the EIAR specifies that approval may include such a condition.

Appeals: As mentioned, the public do not have a right of appeal under the existing Bill. The applicant may appeal against any decision of the Director concerning the non-issue of an environmental permit or conditions imposed on a grant of the permit and so on. In short, an applicant has a right of appeal in respect of any substantive decision of the Director, whether that be made concerning an original application or made subsequently. It is important to note that the Director has power to cancel or vary an environmental permit that has been issued: section 14. He would do so where he concludes that a person has contravened a condition, or gave misleading information in the course of the application process or is no longer able to comply with the conditions of the permit.

Sections 18-20 concern the establishment of an Appeal Board and the responsibilities and powers of the Board. The Chairman and Deputy Chairman of the Appeal Board are to be persons qualified to be appointed to the level of District Court Judge. Otherwise, there is no restriction on the qualifications of persons who may be appointed by the Governor to the Appeal Board : section 18 (5).

The Appeal Board will have the same powers of the High Court to enforce attendance of witnesses, rule persons in contempt, and other usual powers relating to conducting adversarial proceedings.

Enforcement

Sections 22 - 29 deal with enforcement. Space does not permit detailed consideration of those provisions. Suffice it to say that were the wide powers of entry, inspection, prosecution and the like resolutely used by the Environmental Protection Department (the authorized enforcement agency), the Bill could be said to provide for adequate and effective enforcement procedures.

Importantly, an "urgency power" is provided by section 24 which allows the Director, with the consent of the Secretary, to issue a restraining order to any person to prevent further work on a designated project in certain circumstances, such as where the work is commenced prior to an environmental permit having been issued. Hopefully the Director will not be slow to exercise that power where appropriate, given in particular the rather sad history of Hong Kong's undertaking huge projects at the same time as the EIA is being conducted. This Bill, in its present form or improved by Christine Loh's amendments, may at least signal the end of that practice.

Section 29 provides for personal liability of directors of companies in certain circumstances, such as where the director consents to the commission of an offence under the Bill. The primary offence of carrying out or continuing a designated project without the necessary environmental permit attracts a heavy penalty. Section 26(4) provides that :
(a) for a first conviction *on indictment* (in other words, allowing now for the District Court or indeed the High Court to have original jurisdiction in the field of environmental offences) - a fine of HK$2,000,000 and imprisonment for 6 months;
(b) a second conviction attracts a maximum fine of HK$5,000,000 and imprisonment for 2 years (where the conviction is on indictment);
(c) for a first summary conviction, the fine is at level 6 (i.e. HK$100,000 and imprisonment for 6 months), and a second summary conviction attracts a maximum fine of HK$1,000,000 and imprisonment for 1 year.

There is also a provision for a daily fine of HK$10,000 in respect of the continuation of the offence.

"Environmental Impact" and the Technical Memorandum

The "environment" and "environmental impact" are defined in Schedule 1. Encouragingly, *the environment* is defined widely as "the components of the earth" (which definition is expanded upon in the Schedule). However, it is surprising to note that *environmental impact* is restricted to direct effects, on-site or off-site, of the project in question. Thus, unlike legislation in other parts of the world, including legislation introduced last year in China, the *cumulative* environmental effects of the project i.e. its own direct or indirect (anticipated) environmental effects *added to* the known or anticipated effects of existing or planned, or even (in the case of the United States) *potentially* planned projects are not to be taken into account. Frankly, in terms of objectively meaningful and effective EIA legislation, that omission by itself renders the whole scheme of the Bill substantially less effective, and less credible.

The TM are detailed but not, because of that, necessarily substantive. It is a significant restriction on the draftspersons that cumulative impacts cannot be addressed.

Change of Ownership and Exemptions

The scheme of the Bill is that the developer and or operator of a designated project must have the required environmental permit to proceed or continue. The permit attaches to the developer or operator personally. Therefore, where "responsibility for a designated project for which an environmental permit has issued" changes, the new owner or operator must apply for an environmental permit in his own right: Section 12(1). However, a person in that position is not required to submit an EIAR if he satisfies the Director that there has been no material change in the nature and operation of the designated project since the original permit was issued: Section 12 (2).

It is possible for a developer applicant to be exempted entirely from the provisions of the Bill. Section 30 allows the Governor in Council "in the public interest" to exempt the project from the provisions of the Bill. It is difficult to imagine when it might be in "the public interest" to allow a person or company to avoid the provisions of the proposed EIA law, particularly given the enormous extent of environmental damage that has occurred already in the name of "development". Should that provision survive, it can only be hoped that it is never used. This will require a marked reversal of the government's priorities to date.

Conclusion

The Bill is Hong Kong's first legislation to force environmental issues to be taken into account when large-scale projects are proposed is to be welcomed. It represents an attempt to require private developers and government decision makers to take into account the potential direct and indirect environmental impacts of certain proposed developmental projects. As such, it must be welcomed as another step towards improving Hong Kong's environment. However, the Bill confers enormous discretion on the Director (and, effectively, his Department) with no real counter-balance in the form of third party appeals rights. Further, the ambit of environmental impacts is unrealistically limited to impacts of the subject project, rather than the project's cumulative impacts. Another fundamental weakness is the unrealistically limited scope of the categories of *designated projects*.

Other flaws are apparent (such as the lack of guides as to how the EIA laws will interface with the *Town Planning Ordinance*), but at least the Bill *is* a significant step in the right direction at last.

Digest of LEGISLATION

Air Pollution Control (Motor Vehicle Fuel) (Amendment) Regulation 1996 (L.S.No.2 to Gazette No.27 1996 Dated 5th July 1995 L.N.310 of 1996) - Schedules 1 and 2 to the principal Regulation contain specifications to be complied with by motor vehicle diesel and unleaded petrol respectively. These amendments substantially reduce allowable sulphur levels in diesel and lead levels in unleaded petrol. The Schedules are amended to specify more stringent standards and require the specifications to be those determined by the testing procedures of the American Society for Testing and Materials. The Regulation also makes amendments to section 6(2) to clarify the intention.

Air Pollution Control (Vehicle Design Standard) (Emission) (Amendment) Regulation 1996 (L.S.N0.2 to Gazette No.27 dated 5th July 1995 L.N.311 of 1996) - Amends regulation 7A of and the Schedules to the Air Pollution Control (Vehicle Design Standards) (Emission) Regulations (Cap.311 sub. leg.) (in which are contained standards relating

to emission from vehicles) to specify more stringent standards, for levels of emission, to be adhered to by vehicles. Regulation 7(A) regulates the engines used by every goods vehicles, light bus or bus registered on or after 1 April 1995. Substantial amendments to the levels of smoke emission is found in the Schedules.

Waste Disposal (Amendment) Ordinance 1995 (14 of 1995) (Commencement) (No.2) Notice 1996 (L.S.No.2 to Gazette No.35 1996 Dated 22 August 1996 L.N.379 of 1996)

Waste Disposal (Forms And Fees For Licences) (Amendment) Regulation 1996 (L.S.No.2 to Gazette No.39 1996 Dated 27 September 1996 L.N.402 of 1996- Prescribes the fees payable for making an application for a waste import permit or a waste export permit for a single shipment and multiple shipments of waste under the Waste Disposal Ordinance (Cap.354).

Air Pollution Control (Specified Processes) (Removal Of Exemption) Order 1996 (L.S No.2 to Gazette No.42 1996 Dated 18 October 1996 L.N.421 of 1996)- Removes an exemption from the requirement to comply with section 13 of the Air Pollution Control Ordinance (Cap.311) granted under section 20 of that Ordinance to the owner of certain classes of premises.

Planning Decisions/ Planning Issues

Planning Decisions

1. Town Planning Appeal No.18 of 1995 : Lau Chung Kuk and Kan Tat Yeung

Change of land use - Building New Territories exempted houses on agricultural land - Whether the land in question is not suitable for agricultural use - Whether an application can be restricted to a single site without regard to the surrounding area as a whole

Summary of the case

The appellants, who were two indigenous New Territories persons, proposed to build two New Territories exempted houses of 3 storeys high with 6 flats at Lot No.465B in D.D.92 Kwu Tung North, Sheung Shui, New Territories ("the Lot"). The application was rejected by the Town Planning Board ("the Board") and the case came before the Town Planning Appeal Board ("the Appeal Board") on 25th July 1996.

The appellants argued that, though the Lot fell within an area zoned "agriculture", the Lot was unsuitable for agricultural use because decomposed coarse ash crystal tuff of the Tai Mo Shan rock formation had been used to level the Lot, and arable farming was, therefore, impossible. Two experts from the Department of Geography and Geology, University of Hong Kong gave evidence to support the appellants' case.

Decision of the Appeal Board

The Appeal Board determined that:

i) Though the Lot was not suitable for arable farming, it was not accepted that the Lot could not be used for some other kind of agricultural purpose, such as plant nursery or mushroom farming. (The Appeal Board accepted the evidence submitted by the Agriculture Fisheries Department on this point.)

ii) When considering whether an intended development was consistent with the planning intention, it is necessary to have regard to the area as a whole. It may be that a site of only say, a 100m2 in area, was uneconomical for any form of agricultural use, but that did not mean that in an area zoned agriculture which had a total area of, as here, 137 hectares, any applicant who could confine his application to plots of 100m2 each should be given permission to use such plots for building purposes.

iii) The shortage of land for exempted houses should be dealt with comprehensively and systematically and that suitable land for small house development should be provided as a matter of planning.

iv) To allow this application would result in an inefficient use of land resources, dispersed residential development and disrupted agricultural activities in the area.

The appeal was dismissed.

Comment

The Appeal Board did not offer a clear indication as to why it accepted the evidence of the Agriculture and Fisheries Department that a plant nursery or mushroom farming on the Lot was economical, but rejected the evidence of the appellants which alleged otherwise. Besides, The Board stated clearly that as the Lot covered an area of only 283m2, as compared to a total of 137 hectares of agricultural land in the area, an uneconomical agricultural use of the Lot did not entitle the appellants to confine their application to the Lot, without regard to the area as a whole. It would seem that, the Appeal Board is prepared to employ a strict approach towards the issue, so as to avoid any adverse effect on the long term sustain ability of agricultural activities in the designated agricultural area. The Appeal Board's view that the shortage of land for exempted houses should be a matter of planning under s.3 of the Town Planning Ordinance, and was therefore outside its jurisdiction, further reinforces this point.

2. Town Planning Appeal No.21 of 1995 : Cheng Hing Lung

Change of use of land - Building a factory and warehouse on agricultural land - Whether the Town Planning Board's decision in line with the planning intention

Summary of the Case

The appellant sought planning permission to develop a factory and warehouse for manufacturing and storage of plastic materials at Lot No.987 in D.D. 106, Shek Kong, Yuen Long ("the Lot"), which was held under a Block Crown Lease and demised as agricultural land. The application was refused by the Town Planning Board ("the Board") and the Board Review in 1995. The appeal came before the Town Planning Appeal Board ("the Appeal Board") on 6th August 1996.

The appellant had been operating a factory and warehouse for manufacturing and storage of plastic materials on other lots adjacent to the Lot ("the Adjacent Lots") before 5th October 1990, which is the relevant date for determination of existing use of the land in question ("the Relevant Date"). The appellant proposed to move part or all of the operation from the Adjacent Lots onto the Lot.

Decision of the Appeal Board

The Appeal Board determined that:

i) The Lot was located in an area for which the planning intention was clearly to preserve and encourage agricultural use, and was under cultivation on the Relevant Date.

ii) The proposed development was not an in situ upgrading of existing structures as allowed in the relevant draft DPA Plan, but was to build a new structure on the Lot and demolish old structures on the Adjacent Lots.

iii) Even if the Lot was covered by concrete and it was not possible to return it to agricultural use, a fait accompli could not be allowed to force the Appeal Board into granting permission which would otherwise not be granted.

The decision of the Board was upheld.

Comment

Since the land in question was located within the north and north-western portions of the area that is South to Shek Kong Camp, which had been included in the extension of Agricultural Land Rehabilitation Scheme (ALRS), it has been expected that agricultural use would be preserved and encouraged. However, as the western part of the area was dominated by industrial buildings and temporary structures, in-situ upgrading and reconstruction of the said temporary structures with permanent material might conceivably be allowed, as stated in the Explanatory Statement attached to the relevant draft DPA Plan.

Planning Issues

(The following article summarises some of the highlights of the Government's recent publication *A Consultative Digest: Territorial Development Strategy Review '96*)

1. Territorial Development Strategy Review (TDS)

The TDS, first promulgated in 1984, has been the basis of Hong Kong's planning framework to guide development and investment, to secure the best use of resources and to establish a high quality living and working environment. A comprehensive review of the TDS commenced in mid 1990 and has now been completed.

The TDS aims at establishing a broad, long-term planning framework, which attempts to integrate and strike a more effective balance between various land use, transport and environmental factors. It is hoped that the framework will provide the necessary land and infrastructure, after taking into account of all available resources, to ensure Hong Kong's continuous growth as an important regional centre as well as an international city, and to make it a better place to live and work in.

2. Objectives

The objectives of the TDS are as follows :

a) To enhance the role of Hong Kong as an international city and a regional centre for business, finance, information, tourism, entrepot activities and manufacturing.

b) To ensure that adequate provision is made to satisfy the land use and infrastructure needs arising from sectoral policies on industry, housing, commercial, rural, recreation and other major socio-economic activities.

c) To conserve and enhance significant landscape and ecological attributes, and important heritage features.

d) To enhance and protect the quality of the environment with regard to air quality, water quality, noise, solid waste disposal and potentially hazardous installations by minimizing net environmental impacts on the community and maximising opportunities to resolve existing environmental problems.

e) To provide a framework within which to develop a multi-choice, high capacity transport system that is financially and economically viable, environmentally acceptable, energy efficient and provides for the safe and convenient movement of people and goods.

f) To formulate a strategy that can be carried out both by the public and private sectors under variable circumstances, particularly with respect to the availability of resources and significant changes in demand patterns.

3. Strategic Planning Options

The above objectives are the basis on which the strategic planning options are formulated. In formulating these, the importance of the economic interaction between Hong Kong and the wider region has been considered, as a result of which two TDS scenarios have been developed as the basis for option generation:

a) Scenario A postulates that the Pearl River Delta (PRD) will be the major economic hinterland of Hong Kong over the long term. This is essentially a trend-based scenario in terms of population and economic growth for Hong Kong.

b) Scenario B postulates that Guangdong Province and other inner provinces of China will be the major economic hinterland of Hong Kong. This scenario assumes a higher rate of economic and population growth for Hong Kong.

These two scenarios should not be regarded as being mutually exclusive. Rather, they represent a progression from A to B.

4. Long-term Strategies

Recommended Strategies for the period to 2011 for Scenarios A and B have been derived. The principle characteristics of the strategies are set out below in terms of the distributions of population and jobs, transport system, overall development patterns, the future use of rural and marine areas.

a) Distribution of population

I) Scenario A

i) Consolidation of development in Base Growth Area (i.e. existing development) including Tseung Kwan O, Tin Shui Wai, Tung Chung.

ii) Strategic growth at Kai Tak - Kowloon Bay Phase I, Green Island Reclamation, Central and Wan Chai Reclamation, Tsuen Wan Bay Reclamation and Hong Kong Island South; and

iii) Strategic growth at Tseung Kwan O Phase 3, Tung Chung Phase 2 to 4, supplemented by new development areas at Yuen Long South and Au Tau - Kam Tin, and low-density housing at Whitehead.

II) Scenario B - same as Scenario A plus

i) further extension of Tseung Kwan O, Tung Chung and Kam Tin - Au Tau;

ii) additional strategic growth at Kai Tak - Kowloon Bay (Phases 2 and 3), Tai Ho, Lok Ma Chau San Tin and rural North-West New Territories, supplemented by low-density residential development at Tuen Mun East; and

iii) potential solution (i.e. additional) spaces in the Tuen Mun - Yuen Long Corridor, Fanling North and the Border Area, subject to further studies.

b) Distribution of jobs

I) Scenario A

i) consolidation and expansion of the existing Central Business District (CBD) and development of Tsuen Wan as a major business centre;

ii) the development of job nodes around major transport interchanges in Metro Area (Hong Kong Island, Kowloon, New Kowloon and Tsuen Wan - Kwai Tsing) outside the CBD;

iii) retention of existing industrial areas for environmentally clean and manufacturing-related activities;

iv) the possible development of new industrial areas estates at South East Kowloon, Chek Lap Kok and North Lantau Port; and

v) the development of a Science Park at Pak Shek Kok, and, possibly, business estates at Chek Lap Kok, Lantau Port and Au Tau - Kam Tin.

II) Scenario B - same as Scenario A plus :

i) further development of job nodes along a North-South axis between Kowloon and North-East New Territories along the KCR MTR corridor; and

ii) possible development of high-tech industrial parks or areas in the North-East New Territories near the border area.

c) Transport System

The principal idea is to construct a N - S and E - W network of highways and railways to connect principal activity nodes within the Territory, and to provide new and upgraded, cross-border links, especially in the western sector, to provide connections between the core of the Metro Area, the new airport and port facilities on North Lantau and the areas of growth along the eastern and western banks of the PRD. Potential new highway and railway projects have therefore been proposed to meet the respective transport needs of the two development scenarios.

d) Rural and marine areas

The principal framework for land and marine-based conservation areas respectively comprises:

i) "Unique Areas", which include the Mai Po Marshes, the uplands of the North-East New Territories and pockets of inshore waters in the North-East New Territories, South-West New Territories and South-East New Territories. All such areas are distinguished by their natural attributes.

ii) "Significant Areas", which include the remaining major upland landscapes and certain areas of inshore waters.

Besides, there remain residual, lowland areas, most of which are now covered by statutory outline zoning plans or development permission area plans. These provide for the growth needs of village settlements, the reservation of land for a range of semi-urban uses (e.g. open storage), the conservation of high quality farmland, the protection of sites of special scientific interest and the conservation of scenic and historical features.

Apart from the Long-term Strategies, there is a Medium-term Strategy for 2006 which is designed to meet the more imminent land use and infrastructure needs of Hong Kong. The details of this Medium-term Strategy can also be found in the Review (distributed free of charges).

Note: The Government has invited the public to give comments on the TDS before the end of this year.

HONG KONG Briefing

Planning and Land Use

1. The shortage of flats by the turn of the century, as predicted by the Government, could give rise to new slums. Mr. Lee Wing-tat of the Democratic Party said, there is a big demand for public housing both to house new immigrants from the mainland as well as those already on the waiting list for public housing.

He said there could be a repeat of the scenario in the 1960s, of slums and squatters in northern Kowloon and the hillsides on Hong Kong Island, if the Government failed to satisfy the demand for public housing.

Slums and squatters areas were widespread in Hong Kong in the years after the communist victory in China in 1949 due to the big influxes of refugees into the territory.

Huge fires in squatter areas in the 1950s led to the Government programme of building public housing estates. More than half the population lives in public housing now. (Hong Kong Standard 10/08/96)

Environmental and Public Health

1. According to a survey by the Baptist University, Hong Kong people are willing to dig deeper into their pockets for "green" products. The survey showed that 68.8 percent of the households interviewed were willing to pay more for environmentally safe products. It also found that 66.9 percent were willing to sort household waste for recycling, compared with 20.8 percent strongly against the idea. About 39.2 percent said they were willing to spend one Sunday afternoon picking up rubbish at a country park. The respondents' willingness to pay more for earth-friendly products reflected their high level of awareness of the need for environmental protection. However, most respondents' did not fully understand the causes and effects of pollution problems. This probably is attributable to the low priority given to environmental issues by the media. (SCMP 15/07/96)

2. The Government may force tunnel operators to comply with measures to reduce air pollution by amending legislation governing their operation. The tunnel companies have been accused of not complying with guidelines that require them to monitor nitrogen dioxide. However, the tunnel operators argue that pollution levels are being adequately controlled and they are unwilling to install expensive sensors that the Government says are essential to monitor nitrogen dioxide levels. The Environmental Protection Department ("EPD") is considering introducing legislation to make monitoring nitrogen dioxide levels mandatory, in addition to adjusting set levels for other pollutants.

Since existing ordinances governing tunnel companies had not been updated to include monitoring nitrogen dioxide, tunnel operators could not be made to comply, despite the fact the EPD issued guidelines in 1994.

The Government is taking a pro-active approach to improving air quality in government- run tunnels. For example, the Government had spent HK$6 million on installing nitrogen dioxide sensors and improving the ventilation system at Lion Rock Tunnel. There are plans for installation of sensors at the Airport Tunnel and improving air quality at other government-run tunnels. (Hong Kong Standard 01/07/1996)

3. Newly registered vehicles will be required to use higher quality diesel and follow stringent emission rules in line with international standards from next year.

Under the new rules, maximum lead content will be reduced from 0.013 to 0.005 grams per litre and maximum benzene content to five percent by volume for unleaded petrol. For motor vehicle diesel, maximum sulphur content will be reduced from 0.20 percent to 0.05 percent by weight.

But the Planning, Environment and Lands Branch said the measures would only maintain respirable suspended particulate and nitrogen oxide concentrations "at their present unacceptable levels". (SCMP 06/07/1996)

4. The polluters - pay principle reflected in the introduction of sewage charges brought the Government an extra HK$685 million last year. The Director of the Drainage, Services Departments, Ng Yee-Yum, said that statistic showed no domestic customers were unable to pay sewage charges.

The Sewage Charging Scheme came into effect in April last year and introduced the polluters - pay principle to Hong Kong's anti-pollution legislation. Revenue from sewage charges is used directly for the operation and maintenance of the

sewerage systems. But Legislative Council pressure was mounting last month in an attempt to force Government to cut the charges and recoup sewage facility operating costs over a longer period.

The Department also operates and maintains more than 90 sewage pumping station throughout Hong Kong. Twenty-six submarine outfalls are operated and maintained to safely dispose of this sewage into the sea. Sewage collected will undergo chemically enhanced primary treatment before being discharged through an outfall into Western Harbour. (Hong Kong Standard 07/07/1996)

5. The Conservancy Association welcomed the initiatives of the EPD to study waste separation and recovery programmes in residential estates.

One of the key issues of the study would be to address the barriers to and difficulties in separating different kinds of rubbish. An integrated approach to waste management is needed, and in particular to recycling. There are four steps - source separation, collection and treatment, reprocessing and marketing recycled products. The EPD initiative serves as an experiment into appropriate material recovery and is very much appreciated.

The Government has also commissioned a waste reduction study and a report has been produced. The Executive Secretary of the Conservancy Association said that this is an important action and should be co-ordinated to achieve an integrated plan. (SCMP 09/07/96)

PADS UPDATE

The government plans to set up a high-level steering committee to oversee the implementation of the Western Corridor Railway (WCR) and two other railway projects. It will also consider establishing an office similar to the New Airport Projects Co-ordination Office (Napco), which oversees the airport core projects, when the WCR nears construction stage.

According to a discussion paper, the functions of the proposed steering committee will be similar to those of the Airport Development Steering Committee for the Airport Core Projects.

It was discussed on 26 July, 1996 at a meeting of the Legislative Council's Transport Panel Sub-Committee to monitor the WCR project. Meanwhile, the government has disclosed that the Kowloon-Canton Railway Corporation has established a WCR Project Committee to supervise the development.

A firm partly owned by Sun Hung Kai Properties has been chosen to run the new Lantau Fixed Crossing. It is understood that the Government has chosen to award the four-year contract to Tsing Ma Management Limited, from three other pre-qualified tenders. Sun Hung Kai Properties owns 40 per cent of its shares.

A Government official said the award of the contract should not be controversial, as the contract and open tender procedures were similar to other Government tunnels. The Lantau Fixed Crossing, which comprises the Tsing Ma and Kap Shui Mun bridges, will be completed next year to link the new airport with the rest of the territory.

Hong Kong and China had on 18 July 1996 reached initial agreement on the landing points of two cross-border transport links between, western Tuen Mun and neighbouring Zhuhai and Shenzhen.

Speaking at the end of a meeting of the Infrastructure Co-ordinating Committee, leaders from the two sides agreed it was necessary to increase transport links between the territory and South China. The committee decided that Lan Kok Tsui in Tuen Mun was preferred as a landing point for the Lingdingyang Bridge in Hong Kong, while Pak Nai was the best landing area for the Shenzhen Western Corridor.

Construction of the two projects is estimated to cost $16.8 billion. The Government would spend several million dollars on the first-phase study of the impact on Hong Kong's transport links, which would take about one year to complete.

China and Britain ended four years of stalemate on 19 September, 1996 by finally announcing a deal on Hong Kong's controversial Container Terminal 9. Under the deal, endorsed by the Joint Liaison Group in Beijing, the Wharf-led Modern Terminals Ltd will swap its two berths at CT8 with the two berths originally allocated to the Tsing Yi consortium at CT9.

After signing the deal, both British and Chinese JLG representatives said it would help to maintain and enhance Hong Kong's status as an international shipping centre. It is estimated construction will start at the end of the year, with the first berth in place in mid-1999. All berths will be ready by mid-2001.

The passenger terminal at Hong Kong's new airport at Chek Lap Kok is quickly taking on the appearance of a working building rather than a construction-site skeleton. It is now possible to walk through the building and gain a feel for how up to 35 million passengers a year will experience their arrival and departure from Hong Kong.

Progress can be seen in construction, such as the installation of skylights in the roof, as well as exterior glazing and cladding. The building's "moving parts", such as the baggage handling system and electrical and mechanical systems, are also rapidly taking shape.
At a briefing to the media on site on 26 September 1996, officials reaffirmed the Airport Authority's commitment to complete key facilities at Chek Lap Kok by October 1997 to ensure the airport can open in April 1998.

A government spokesman said on 20 September 1996 that it supported the action taken by the Airport Authority to conclude supplemental agreements with the two main Passenger Terminal Building contractors at the new airport at Chek Lap Kok.

The agreements settle claims and other outstanding matters with the contractors. These include the re-establishment, in agreement with the contractors, of a works programme that supports April 1998 as that target airport opening date.

As the payment to the two contractors will be within the overall budget of $49.8 billion for the construction of the new airport, there will be no increase in the overall cost of the project as a result of these agreements.

CASELAW UPDATE

Kwan Kong Co Ltd v Town Planning Board (Civil Appeal No 194 of 1995, 9, 10 and 11 July 1996, Litton VP,

Godfrey and Liu JJA)

Appeal from order dismissing application for judicial review of decision of the Town Planning Board refusing to amend draft zoning plan - Whether appellant's proposed alteration to the draft plan to suit its objection made out of time - whether time limit for submission of proposed alteration mandatory - whether the Board treated the appellant unfairly - appeal dismissed.

Background to the appeal

This case concerned various lots owned by the appellant in Kwun Tong. In 1993, a draft plan was gazetted under which the land was to be rezoned from agricultural (but the appellant had a waiver to use its land for 'open storage') to 'Other Specified Use (mining and quarrying)'. The appellant lodged an objection with the Town Planning Board ('the Board'), seeking to have the land excluded from the mining and quarrying zone and to have part of the land rezoned as residential (Group B) and part as green belt. The Board refused to amend the draft plan both at a preliminary hearing and a subsequent full hearing. The appellant applied to the High Court for judicial review but its application was dismissed. Finally it appealed to the Court of Appeal.

Summary of facts

The appellant was the registered owner of various lots in Kwun Tong, using the land for open storage. In 1993, a draft plan was gazetted under which the land was rezoned for 'Other Specified Use (mining and quarrying)'. The rezoning was part of a scheme aimed at the rehabilitation of a quarry, and envisaged the resumption of the appellant's land.

The applicant lodged a written statement of objection pursuant to s6(1) of the Town Planning Ordinance (Cap 131), seeking to have the land excluded from the mining and quarrying zone and to have part of the land rezoned as residential (Group B) and part as green belt. At a preliminary hearing, the Board refused to amend the draft plan. The appellant then asked for a full hearing pursuant to s6(6), which was eventually fixed for 29 April 1994 after two postponements to suit the convenience of the appellant.

On 26 April 1994, the appellant wrote to the Board affirming that its previous grounds of objections still applied and that these grounds and further submissions in relation to them were the preferred position of the appellant but that, if necessary, the appellant was prepared to accept (and so proposed) the rezoning of the land from Mining and Quarrying to Other Specified Use, including development of residential units and supporting GIC and open space whilst allowing interim quarrying activities and other formation work (the new rezoning proposal).

At the hearing, the appellant abandoned its previous submission and addressed the Board on the new rezoning proposal only. The Board heard the applicant without objection. After the hearing, the Board decided to reject the new rezoning proposal on the ground that it was made out of time, and it refused to amend the Gazetted draft plan.

The appellant applied for judicial review of the decision of the Board on the grounds:

(i) that the Board failed to consider the merits of the objections when it rejected the new rezoning proposal without warning the appellant that it was made out of time and when it knew that the appellant had already abandoned its original position; and

(ii) that the decision of the Board violated the appellant's right to a fair hearing guaranteed by Art 10 of the Hong Kong Bill of Rights Ordinance (Cap 383) and was therefore invalid and of no effect.

Of these two grounds, only the first ground is of concern here.

On 5 July 1995, the Governor in Council approved the draft plan. Subsequently the High Court dismissed the application: (1995) 5 HKPLR 261. The appellant appealed to the Court of Appeal.

The decision

The Court's decision in respect of ground (i) can be summarized as follows:

1. Litton VP, at the beginning of his judgment, referred to s6(1) of the Town Planning Ordinance (Cap 131), (pursuant to which persons affected by the draft plan had two months after the exhibition of the draft plan for public inspection to send to the Board their written statements of objection), and cited s6(2) which states: (2) Such written statement shall set out -

(a) the nature of and reasons for the objection;

(b) if the objection would be removed by an alteration of the draft plan, any alteration proposed.

2. His Lordship formulated the issue before the Court as being whether the High Court arrived at the correct conclusion that any proposed alteration to the draft plan by an objector must be made within two months of the publication of the draft plan and therefore the Board was right in the end to refuse consideration of the new rezoning proposal.

3. His Lordship ruled that s6 provides a complete statutory regime for dealing with objection and that it is only upon receipt of a written statement of objection in accordance with s6(1) that the Board has the power to give preliminary consideration to it. In the judgment of His Lordship, to be a written statement within the meaning of s6(1), there must be compliance with paras (a) and (b) of s6(2) and the requirements of s6(2) are imperative, not directory. Accordingly, the Board was right to disregard the new rezoning proposal put forward by the counsel at the hearing.

4. As far as the appellant's com-plaint of unfair treatment was concerned, His Lordship held that the Board had acted fairly in rejecting the appellant's objection because the hearing had been adjourned twice to suit the convenience of the appellant, who had been given every opportunity to put forward its opposition to the plan.

5. Referring to the appellant's complaint that the Board treated the appellant unfairly by entertaining the latter's submissions on the new rezoning proposal without an indication at the outset that the Board was not prepared to consider the submissions because they were out of time, Godfrey JA rejected the complaint, saying that if the Board had said something to encourage the appellant to think that it would consider the new proposal on its merits and, on the faith of such an indication from the Board, the appellant had changed its position in some way, there might have been something in the complaint. However, nothing of that sort happened. All that happened was that the Board, having allowed the appellant to present the new rezoning proposal although it was out of time, decided that it 'should be disregarded in the further consideration of the objection'. His Lordship ruled that all the Board was obliged to do is consider the objection itself and that it cannot possibly be said that the Board treated

the appellant unfairly.

6. Finally two interesting points deserve mention here. First, Litton VP, in dealing with the issue of fair hearing, described the nature of the decision-making process of the Board. In his Lordship's words, there are no contesting parties before the Town Planning Board. All that the Board is empowered to do is to entertain the objection in accordance with the provisions of s6 and under s8 to forward to the Governor-in-Council, with or without the amendments, the draft plan for approval, together with a schedule of the objections. Any final 'determination' if that be the right expression -- is made by the Governor-in-Council, not by the Board. Secondly, Liu JA pointed out that no Bill of Rights challenge had been mounted against the validity of the provisions of the Town Planning Ordinance nor indeed is its statutory regime for consultation on the Draft Plan questioned as being inconsistent with the Bill of Rights. Pursuant to s8, the Draft Plan was submitted together with 'a schedule of objections made and not withdrawn' to the Governor in Council for approval. The Draft Plan had been approved by the Governor in Council as the Approved Plan which had since been gazetted. Section 9(2) provides:

The Governor in Council may approve a draft plan notwithstanding that any requirements of this Ordinance applicable thereto had not been complied with.

His Lordship found that the Approved Plan was clearly not reviewable for any alleged non-compliance. The Approved Plan had superseded the submitted Draft Plan. Therefore the proceedings before the Board became inconsequential, and the court should not be invited to embark on an academic exercise.

ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

During the July - September quarter the Environmental Impact Assessment (EIA) Sub-Committee of ACE met (9th September, 1996) to consider an EIA report prepared by Hong Kong United Dockyards Ltd. (HUD) in respect of the operations of its three floating docks, two at Yam O and one at Tsing Yi island. The main concern addressed by the EIA (and of the members of the Committee and invited participants, who included 4 senior members of the EPD plus two environmental consultants representing HUD) was the continued use by HUD of the marine antifoulant paint TBT (*tributyl tin*, which is a highly toxic organotin compound which causes deformities in marine species: see, for example, *Environment Hong Kong* 1995, pp. 72-73). Whilst "some of the TBT paint flakes" are filtered out, present operations of all floating docks, not only those of HUD, entail direct discharge of TBT paint flakes/residue into the marine environment. One of the EPD representatives informed the committee that his colleagues responsible for water pollution were concerned with TBT discharge into the marine environment. He promised to arrange for a paper on the issue to be forwarded to the Committee.

The Committee also heard from one of HUD's environmental experts that some countries prohibited ships with TBT paint from entering their waters, others did not allow any use of TBT paints. HUD representatives pointed out that HUD had voluntarily applied for a pollutants discharge licence (under the *Water Pollution Controls Ordinance*) in respect of its floating dock ("the United"). Other operators had not done so.

The Committee was advised that the EPD had written to all dockyard operators indicating that it would like "to bring all dockyard operators under the control of the WPCO". HUD expressed the view that should that occur, the viability of floating docks "would depend on the licensing standards implemented".

Central to the Committee's deliberations was the claimed (or likely) effectiveness of HUD's proposed filtration system in removing TBT (in whatever form) from effluent discharged into Hong Kong's marine waters. HUD proposed no minimum removal rate, although 80% was, its expert said, a relatively easily achievable goal.

The Committee member representing Friends of the Earth noted that even at an 80% removal rate the TBT concentration "would not be reduced to a level which would not cause harm to marine life". Further, HUD's WPCO licence prohibited the discharge of toxic substance, and thus, it would seem, the "EPD had already given a waiver on TBT discharge". (The minutes do not record any response from the EPD representatives on this point). It was also noted that other dockyards at Yam O had no filtering systems yet were allowed by EPD to continue operating.

The EPD representatives endorsed the EIA on the basis that the "project proponent had committed to achieve the conservative estimate of 70% removal rate....". With the exception of the Friends of the Earth representative, the Committee resolved to endorse acceptance by ACE of the EIA with the condition that there be established a "programme to monitor the discharge and the efficiency of the wash water collection and filtration system". The Chairman also urged EPD "to devise a long term policy on TBT control".

[ACE also met on several other occasions to consider a wide-ranging variety of environmentally related issues, including proposals for charging fees for waste import/export permits. Space does not allow discussion of those matters here.]

REGIONAL AND INTERNATIONAL

China

China's urban pollution problems

The vice-chairman of the National People's Congress ("NPC"), who is also a team leader of a national environmental inspection team set up by the Standing Committee of the NPC, recently warned of the enormous pollution problems faced by China's larger cities. In particular, increasing urban density, which has brought with it acute sewage and industrial waste disposal problems, has increased dramatically general pollution levels being experienced in China's larger urban regions.

Mr. Wang acknowledged that city governments were spending on average 1.5% of their gross domestic product on environmental programs. Nevertheless, problems of water shortages and pollution remain serious.

The NPC has reacted recently to the environmental problems facing China and has greatly expanded its power in that area. In particular, the NPC has

appointed and is sending out into the country inspection teams for the purpose of implementation of environmental protection laws (SCMP, 4 July 1996).

In a recent article in local news magazine, *Window*, (August, 1996) the problems facing China's environment were highlighted by the magazine's Beijing correspondent. In particular, substantial loss of farmland, extensive damage to forests, degeneration of grassland and fresh water shortages continue as major problems. A senior official of the Standing Committee of the NPC, Mr. Wang Bing Qian, observed that one of China's problems in combatting environmental degradation is that whilst it may have broadly effective laws, they are not generally strictly enforced.

"Laws are important, but it is more important to enforce them" he is quoted as saying.

Mr. Wang has called on all levels of People's Congresses to strengthen the enforcement of environmental protection laws.

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Comparative Table of Environmental Convictions:
July - September 1996

	Number	1st Offence	2nd Offence	3rd + Offence	Highest Fine
APCO	8	5	2	1	$ 12,000
	30	21	6	3	$ 20,000
	16	12	2	2	$ 25,000
WPCO	21	13	2	6	$ 60,000
	34	22	4	8	$ 85,000
	44	31	6	7	$ 100,000
NCO	18	4	5	9	$100,000
	24	9	4	11	$ 60,000
	13	6	2	5	$ 50,000
OLPO	-	-	-	-	-
	1	1	-	-	$ 15,000
	3	3	-	-	$ 25,000
DASO	-	-	-	-	-
	1	1	-	-	$ 20,000
	-	-	-	-	-
WDO	26	26	-	-	$ 15,000
	9	9	-	-	$ 10,000
	13	13	-	-	$ 20,000
Total	73	48	9	16	
	99	63	14	22	
	89	65	10	14	

July figures appear on the first line, August figures on the second, and September figures on the third of each item. Source: EPD, Anti-Pollution Prosecution Figures.

ABBREVIATIONS

AFD	Agriculture & Fisheries Department
APCO	Air Pollution Control Ordinance
CFCs	Chlorofluorocarbons
DASO	Dumping At Sea Ordinance
EC	European Community
EE	Estern Express
EPCOM	Environmental Pollution Advisory Committee
EPD	Environmental Protection Department
EXCO	Executive Council
FEER	Far Eastern Economic Review
HKS	Hong Kong Standard
HKU	University of Hong Kong
JLG	Joint Liaise Group
LDC	Land Development Corporation
LEGCO	Legislative Council
LS	Legal Supplement
NCO	Noise Control Ordinance
NT	New Territories
OLPO	Ozone Layer Pollution Ordinance
PAA	Provisional Airport Authority
PADS	Port and Airport Development Strategy
SCMP	South China Morning Post
SMP	Sunday Morning Post
WDO	Waste Disposal Ordinance
WPCO	Water Pollution Control Ordinance

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