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Solicitors & Notaries

URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

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Hong Kong's famous Harbour has contracted in size considerably since the arrival of the British more than 150 years ago. During the last 10 years or so the pace of filling-in Victoria Harbour has increased markedly, in response to the Hong Kong economic and population growth. The main article in this issue looks at the issue of safeguarding the remnant harbour from yet more reclamation projects.

The Editors

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VICTORIA HARBOUR: WILL A LEGAL PRESUMPTION ENSURE ITS SURVIVAL?

In recent years there has been massive reclamation of Victoria Harbour to add to Hong Kong's land reserves by enlarging foreshore areas. Initially the policy of extensive harbour (inter alia) reclamation may have been uncontroversial. However, such has been the extent of conversion of waterways to land that planners, politicians and the public have become increasingly concerned for the future of our harbour.

Within the last three or four years opposition to further reclamation of Victoria Harbour has grown dramatically. For example, in 1995 a leading opponent of reclamation, Winston Chu, argued publicly against further large-scale reclamation of the harbour [Mr Chu's views on this topic were the subject of the main article in the *Quarterly Report*, September 1995]. Prominent politicians, such as Christine Loh, began to question the environmental and economic logic of interfering with Hong Kong's major, natural asset.

Opposition to the government's persistent drive to add to Hong Kong's

central foreshore at the expense of the harbour reached the point in June 1997 when the majority of the Legislative Council was prepared to pass the *Protection of the Harbour Ordinance* (Cap. 531). [Mr Chu was largely responsible for the enactment of the *Ordinance*].

Unfortunately, the *Ordinance* does not, in fact, mandate preservation of what remains of Victoria Harbour. Rather, it creates a presumption against further reclamation. In terms of environmental or cultural heritage protection legislation, its language is weak and open-ended.

Section 3 provides:

(1) *The central harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the central harbour.*

(2) *All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them.*

The central harbour (or, Victoria Harbour) is defined as the area of water between the Eastern edge of the Western Harbour Tunnel and a line drawn between North Point and Hung Hom: Section 2 and Schedule 1. So the first weakness of the *Ordinance* is

that it does not in fact apply to all of the harbour.

Further, as stated, the *Ordinance* does no more than create a rebuttable legal presumption in favour of prohibition of further reclamation, which government agencies are directed to "have regard" to.

A rebuttable presumption may be defined as:

an inference which the law requires to be drawn from given facts, and which is conclusive until disproved by evidence to the contrary (Jowitt's Dictionary of English Law, 2nd ed.).

The presumption created by section 3 is no more than a starting point for government planners. If they consider they have sufficiently sound reasons for reclamation, the presumption is rebutted. "Sufficiently sound" reasons involves a two stage process, or submission:

- a) that the perceived need for land is reasonable, in terms of Hong Kong's infra-structural, town planning and (we would argue) environmental requirements and conditions, and
- b) that there is no practical alternative to reclamation.

The other weakness, perhaps unavoidable in the light of section 3(1), is that government officials and agencies need only have "regard to" the presumption. That is, section 3 requires no more than that they "take into account" (a phrase commonly found in legislation aimed at controlling the exercise of executive powers, particularly in environmental legislation) the existence of the presumption. This requirement is quite easily satisfied, although it is inextricably linked to the process of rebutting the presumption. A statement to the effect that, simply, the official bore in mind the fact of the presumption when reaching a decision to reclaim would not discharge the whole of the administrative obligations imposed by section. 3. However, if the official can show that she/he has not acted arbitrarily or capriciously (i.e. unreasonably) in having regard to the presumption and then overriding it, a court is unlikely to reverse the decision on judicial review.

Current controversy surrounding the government's proposed Central-Wan Chai reclamation project (e.g. *Launch nears for reclamation plan*, SCMP 28/10/98) once again has focused attention on the government's policy for the future of our harbour, and the practical effect of the *Ordinance* on that policy. In the many published views on the project, few, if any, advocate strict implementation of the presumption, although certainly some groups question the validity of the government's assumption that more land is required in the central business district; e.g. see *Quarterly Report*, Summer 1998.

We cannot gauge, from the government's plan and public

utterances, the extent to which the presumption has truly influenced the decision-making process concerning this project (as one example), if it has at all. However, the fact that the government's proposals require comparatively extensive reclamation when other interested or expert bodies query the need for any at all, suggests that section 3 is being treated by government planners as just another "guide line" set by the government, rather than a substantive legal criterion or obligation.

Perhaps this conclusion is almost irresistible when the government's track record in, for example, the closely aligned field of environmental protection is taken into account also. We need only consider the disastrous on-going state of Hong Kong's air quality, and the apparent reluctance of the government to take urgent, realistic steps to curb the major sources of air pollution, notwithstanding their clear powers and obligations to do so under the *Air Pollution Control Ordinance* (Cap. 311), to realise that the political will essential to raise section 3 above the level of mere rhetoric is very probably lacking.

Government, the Legislative Council and the vast majority of Hong Kong people agree that the once fragrant Victoria Harbour, or what remains of it, is indeed a precious natural and heritage asset. If we are serious in preserving it, prohibition of further reclamation should be legislated, with only clear and narrow grounds for exemption provided.

Further, the ultimate decision as to whether a project should be exempted should be in the hands of a specialist tribunal, not the government, and ordinary citizens should be given rights of representation

and appeal in respect of its proceedings. In broad terms, this is the framework adopted by many other developed countries for dealing with major development projects likely to impact significantly their natural or cultural environment, or a specific geographical/ environmental asset.

[*Editors' note:* At the time of this edition of the *Quarterly* going to press, the government had announced an approximately 40% reduction in the extent of the Central reclamation project (e.g. SCMP, 17/3/99)].

HONG KONG BRIEFING

Friends of the Earth (FoE) has conducted a study of the economic cost of air pollution to Hong Kong. Its findings are that prevailing levels of respiratory suspended particulates (RSP) will cause an additional 1,928 death and extra health costs of \$1.3 billion in a year. As the air quality is expected to deteriorate by 50 per cent by 2011, FoE

"The presumption created by section 3 is no more than a starting point for government planners. If they consider they have sufficiently sound reasons for reclamation, the presumption is rebutted."

argued that worsening air quality will drive tourists away from Hong Kong which could cost Hong Kong billions of dollars.

Mei Ng, a director of FoE, suggested that the reason for the worsening air quality is the lack of a sustainable transport policy, and poor town planning. For instance, there has been no control on the numbers of goods vehicles travelling to and from the mainland. It is expected that these will increase threefold by 2001 and this will contribute to increasing air pollution. Although the Government has introduced a scheme to replace small diesel engines with cleaner-burning liquefied petroleum gas, this will not be fully implemented until 2005. Nevertheless, the Government's move is the way forward, since minibuses and diesel vehicles are responsible for 98 per cent of the toxic RSP pollutants. (SCMP, 31 October 1998)

The future of one of the most ecologically valuable areas in Hong Kong, Sha Lo Tung, will be decided by the Town Planning Board. The Developer, who acquired the village land rights in Sha Lo Tung in 1979, argued that its proposed development was an ecologically sustainable development. This view was supported by an ecologist, Dr Milicich, who was commissioned and paid by the Developer. On the other hand, green groups, including Friends of the Earth and the World Wide Fund for Nature, argued that the development would destroy the ecological value of Sha Lo Tung.

The main areas of dispute were on the zoning of the whole valley and the protection of rare species of orchid and dragonfly. Dr. Milicich contended that the areas with special sensitivity and ecological value had been classified as 'no go areas' protected by buffer zones. However, the north-east section of Sites of Specific Interest contains no distinctive feature to warrant their zoning as there were similar habitats in other (unspecified) parts of the New Territories, in her view. Dr. Milicich also pointed out that the so-called 'rare' species of orchid and dragonfly were found in other places of Hong Kong in quite reasonable

numbers (an assertion strongly disputed subsequently by at least two prominent wildlife biologists). The green groups disagreed and they were keen to see the whole valley zoned as a conservation area.

The villagers considered they were caught in between. They sold the land rights to the Developer and moved out of the village 20 years ago in the hope that they will return after the village was rebuilt. As a result of the environmental objections, the development was stalled. One of the angry villagers complained that some of their old folks were dying with tears wondering whether they can ever see home again or be buried there. (SCMP, 12 November 1998)

According to Patrick Lau Lai-chiu, the acting Secretary for Planning, Environment and Lands, levels of certain air pollutants such as sulphur dioxide, lead, carbon monoxide and ozone, are all now below or within the objective levels. However, nitrogen dioxide and ozone levels are creeping up. This is due to the massive increase of the number of vehicles on the road, poor maintenance of vehicles, illegal use of substandard fuels and the coming of emissions of vehicles from inland into Hong Kong.

As a result, the Government is taking the following measures to tackle vehicle emissions:

1. Leaded petrol will be banned in early 1999.
2. More stringent diesel emission standards will be imposed across the diesel fleet to reduce nitrogen dioxide and hydrocarbon emissions.
3. New standards for motorcycle will be imposed during 1999.
4. There will be more stringent inspection of vehicles and enforcement against smoky vehicles and illegal supply of diesel fuel. Licences will be revoked if the vehicles fail emission spot checks and licences will not be renewed if the vehicles fail emission tests during regular inspection. The police will be equipped with portable smoke meters and smoky vehicles will be fined on-the-spot. The level of fixed penalty fines will be increased subject to the approval of the Legislative. Finally,

more vigorous investigation and prosecution will be made by the Customs and Excise Department on the distribution and use of illegal diesel fuel.

5. EPD and the Transport Department will step up the campaign for proper vehicle maintenance.

6. Other measures will also be taken such as planting 1.5 million trees every year, development of a more environmentally friendly railway system and campaigning for more efficient use of electricity.

Further, the Government will co-operate with the Guangdong authorities to tackle the growing regional problem of air pollution. (SCMP, 7 December 1998)

DIGEST OF LEGISLATION

Fisheries Protection (Amendment) Ordinance 1998 (L.S. No. 1 to Gazette No. 43/1998, Ordinance No. 36 of 1998)

Section 4 of the Fisheries Protection Ordinance (Cap. 171) is amended by

(a) in subsection (1) by adding -

(ga) the prohibition or restriction of the use of any apparatus of a class or description specified under paragraph (gb), for the purpose of fishing;

(gb) the specification by the Director, by notice published in the Gazette, of the class or description of apparatus for the purposes of paragraph (ga);

(b) in subsection (2) by repealing "\$10,000" and substituting "\$200,000".

Section 10 is amended by repealing "Governor in Council" and substituting "Director".

Fisheries Protection (Amendment) Ordinance 1998 (L.S. No.2 to Gazette No. 46/1998 L.N. 352 of 1998 p.B3285)

Under section 1(2) of the Fisheries Protection (Amendment) Ordinance

1998, the Secretary for Economic Services appoints 19 December 1998 as the day on which the Ordinance shall come into operation.

Air Pollution Control (Petrol Filling Stations)(Vapour Recovery) Regulations (L.S. No. 2 to Gazette No. 50/1998 L.N. 379 of 1998 p.B3649)

The Regulations require every owner of a motor vehicle adapted primarily for delivery of petrol and is used to deliver petrol to a petrol filling station ("regulated vehicle"), and every owner of a petrol filling station to install a vapour recovery system which conforms with the prescribed test requirements (section 3).

Such vapour recovery system is required to be tested upon completion, after any modifications have been effected and at least once in 12 months (section 4).

Upon testing and examination, if the prescribed requirements are satisfied, a certificate will be issued by the Air Pollution Control Authority (section 5). The latest certificate must be displayed at a conspicuous location on the vehicle or in the station (section 6).

An operator shall not unload petrol from a regulated vehicle to a petrol tank if the vapour and liquid connections of the vapour recovery systems of the vehicle and the tank are not completely interconnected (section 7(1)). Where any leakage of petrol occurs during the unloading, the operator shall stop unloading and not recommence the unloading until satisfied that there will no further leakage of petrol (section 7(2)).

The Regulation does not apply to existing regulated vehicles or existing petrol stations until 12 months after the commencement date (section 8).

Penalties for contravention of section 3 to section 7 are listed in section 9.

Air Pollution Control (Motor Vehicle Fuel) Regulation

Section 3(2) is amended -
 (a) in paragraph (e), by repealing

"or" at the end;

(b) in paragraph (f), by repealing the full stop and substituting "; or";

(c) by adding -
 "(g) a test was being carried out in accordance with section 4 of the Air Pollution Control (Petrol Filling Stations) (Vapour Recovery) Regulation (L.N. 379 of 1998)."

Ozone Layer Protection (Controlled Refrigerants) Regulation (Cap. 403 Sub. Leg.) (Commencement) Notice 1998 (L. S. No. 2 to Gazette No. 51/1998, L. N. 391 of 1998, p.B3529)

Under section 1 of the Ozone Layer Protection (Controlled Refrigerants) Regulation, the Acting Secretary for Planning, Environment and Lands appoints 1 January 1999 as the day on which the Regulation shall come into operation.

Fisheries Protection (Amendment) Regulation 1999 (L. S. No. 2 to Gazette No. 3/1999, L. N. 151 of 1999, p.B69)

This Regulation shall come into operation on 27 February 1999.

The Fisheries Protection Regulations (Cap. 171 sub. leg.) are amended by adding -

"4A. Prohibition of use of apparatus

- (1) No person shall use for the purpose of fishing any apparatus of a class or description specified by the Director under subsection (2).
- (2) The Director may specify by notice published in the Gazette the class or description of apparatus for the purposes of subsection (1)."

Regulation 5 is amended -

- (a) by repealing "or 4" and substituting ",4 or 4A";
- (b) by repealing "\$10,000" and

substituting "200,000".

Regulation 7 is amended -

- (a) by repealing "or 4" and substituting ",4 or 4A";
- (b) by repealing "\$10,000" and substituting "200,000".

PLANNING DECISIONS

Tam Wai Chung (the "Appellant") v. The Town Planning Board ("the Respondent") Town Planning Appeal Board No.12/1997

[Date of decision : 9 December 1998]

This was an appeal against the decision of the Town Planning Board dated 24 October 1997 rejecting on review the application by the Appellant under s.16 of the *Town Planning Ordinance* for permission to use Lot No.110 in D.D.210 ("the Site") for "House (Redevelopment only)". The application was first lodged for "Redevelopment of 80.93 sq. m. into 2 semi-detached houses of 3 stories under 8.22 m in height", and was subsequently amended to "Redevelopment of 65 sq. m. into one small house of 8.22 m in height with 3 stories with balcony of 1.2m x 6m facing east on the first and second floors."

The Assistant Commissioner for Transport/N.T.expressed reservations in supporting the redevelopment, given the substandard condition of the access track. The Director of Agriculture and Fisheries Department also expressed reservations, unless there were strong planning justifications for the use of the Site. The Planning Department, however, had no objection, taking the view that "the proposal is small in scale and presents little impact on the local transport network and infrastructure" and that the proposed redevelopment "would not affect the natural landscape of the surrounding areas."

On the 12th June 1997, the application was rejected by the Rural and New Town Planning Committee (RNTPC) on the following grounds :-

1. The proposed redevelopment is not in line with the planning intention

of the Conservation Area ("CA") zone which is to retain the existing natural character and to protect the extensive woodland in the Ma On Shan Country Park, which is of landscape significance, from the adverse impact of building development ("the Planning Intention Point");

2. The existing track leading to the Site is substandard and is inadequate to serve the proposed development ("the Access Point");

3. Approval of the proposed redevelopment will set an undesirable precedent for similar applications leading to adverse cumulative effects on the environment and infrastructural provisions in the area ("the Precedent Point");

4. There is no information in the submission to demonstrate that there will not be any increase in plot ratio, site coverage and building height in the proposed redevelopment as compared to the house on the Site, as stipulated in the Notes for the CA zone ("the Limits Point").

The Appellant applied for a review of that decision under s17(1), *Town Planning Ordinance*. Contrary to their stance before the RWTPC, the Planning Department did not support the application on review, taking the view that the proposed redevelopment is incompatible with the planning intention of the CA zone which is to retain the existing natural character. The Town Planning Board rejected the Appellant's application on substantially the same grounds as those relied upon by the RNTPC (24th October 1997).

The Decision of the Appeal Board :

The Site had remained unused and undisturbed for at least 35 years. It became integrated as part of the rural scenic landscape which is valuable to our community. That was the state when the IDPA (Interim Development Permission Area) Plan was prepared on 12 October 1990. The Appellant came onto the scene in 1994. The current application is for reversion of the Site to a state before 1963. What that state was is now wholly uncertain. We see no convincing planning gain in

permitting the Appellant as a new comer to take a plunge back to the unknown. Accordingly we dismiss the appeal on the basis of the Planning Intention Point, the Access Point and the Limits Point.

Per curiam : The Applicant purchased the Site after publication of the Outline Zoning Plan (OZP) which applies the Conservation Zone limitations to the Site (and the larger surrounding area). The Appellant's entitlement under her Crown Lease granted in (1905) was not unfettered but was curtailed by the planning intention in the OZP.

PLANNING ISSUES

Application for Minor Amendments to Previously Granted Planning Permission

Pursuant to section 2(5)(b) of the *Town Planning Ordinance* (Cap.131), the Town Planning Board has delegated to the Director of Planning power to approve minor amendments to: development proposals already granted planning permission under section 16 of the Ordinance, master layout plans approved by the Board under section 4(A) and conditions of approval attached to a previously granted planning permission under section 16.

For minor amendments to development proposals, the Director may approve an application for minor changes in: (a) height or number of storeys of a proposed building; (b) site boundaries or site area; (c) the user of a proposed building; (d) gross floor area for the granting of bonus plot ratios by the Building Authority in return for dedication of part of a site for public purpose; or (e) the number of flats, or the number car-parking or loading/unloading spaces required, provided that the Commissioner for Transport does not object.

For minor amendments to master layout plans, the Director may approve an application for minor changes in: (a) the number of flats, or the number car-parking or loading/unloading spaces required,

provided the Commissioner for Transport does not object; (b) the size or location of a government/institution/community facility or open space provision, provided that the relevant government departments do not object; or (c) relocation of ingress/egress points, lay-bys, footbridges or ancillary utility installations, subject to the consent of the relevant government departments.

Where a new planning application is made for an alteration to the conditions of approval, the Director may approve: (a) an extension of the usual time conditions for not more than six months; (b) an extension of a permission for temporary use, for not more than six months; or (c) a revision of a condition of approval on car-parking or loading/unloading requirements required subject to the Commissioner for Transport's consent.

(Practice Note for Professional Persons No.2/98, Planning Department, 8 October 1998)

AIRPORT AUTHORITY UPDATE

The second part of phased construction works at the passenger terminal is nearing completion. The Northwest Concourse extension (Phase 2), will add 34,000 sqm of gross floor space to the passenger terminal, bringing the total to 550,000 sqm, and additional 11 gates suitable for the next generation of new large aircraft, to the 37 already in use in the rest of the building. The extension will also provide more than 2,900 extra lounge seats.

It is anticipated that the extension will be opened to coincide with the commissioning of the second runway (the northern runway). Physical construction of the runway is now almost completed. Testing of the various systems to ensure compliance with operational and safety requirements, as specified by the Airport Authority (AA) and the Civil Aviation Department, will begin shortly.

There is no operational need to rush Phase 2 as these construction projects are not imperative to the day-to-day

operations of the airport at this time. The existing runway has an hourly capacity of 37 aircraft movements, as against 31 movements per hour at the old international airport at Kai Tak and can fully cope with the present demand. Also, the current economic climate has seen a decline in traffic when compared with the original forecast.

However, there is no doubt that the additional passenger and cargo capacity which the second runway will give the airport will maintain Hong Kong's competitive edge as a regional aviation hub well into the next century.

When complete, both projects will enable the declared runway capacity to increase initially from 37 aircraft movements per hour to 50 movements per hour.

(Airport Authority Newsletter, Issue No. XVIII - Sep/Oct 98)

AA has made seven special awards to contractors in recognition of their commitment to site safety during the construction of the new airport. The recipients were the overall winners of the AA's Contractor Safety Award Scheme during Phase 1 of the building project, which led up to airport opening. The AA has been running a quarterly safety award scheme for the past five years. As part of the scheme it was intended that after airport opening there would be a major presentation to the overall winners.

The awards, presented on 25 September 1998, are in two categories: Major contracts that employed on average 5,000 or more mandays per month, and other contracts that employed less than 5,000 mandays per month.

The panel, comprising senior officials of the AA's Project Division, made a joint award to the Airfield Works Joint Venture (AWJV) and Leighton Contractors (Asia) Ltd. The meritorious awards went to the AEH Joint Venture and the NCCH Joint Venture. In the smaller contract category, the award winner was Swire Engineering, while the meritorious winners were Balfour Beatty and

Costain.

Each of the winning contractors had previously won awards in the quarterly safety award scheme. They had to meet other criteria, including having cumulative accident frequency rates (AFRs) less than the AA average, currently 51 reportable accidents per 1,000 workers per year. In addition to considering the scope, complexity and risk factors of the work undertaken, the selection panel considered the commitment of the contractor's management to safety and health issues; the amount of safety training carried out by the contractor; and the effectiveness of the contractor's safety team.

(Press Release, Airport Authority, Hong Kong, 28/09/98)

REGIONAL AND INTERNATIONAL

CHINA

China will phase out the use of polluting polystyrene food boxes within a year as part of a eco-friendly programme which includes recycling waste. The Administration Centre of China's Agenda 21 programme, responsible for implementing China's sustainable economic and social development, will organise specialists to work out long-term plans for turning solid wastes into recycled resources.

Separation equipment will be used to convert discharged waste into organic compounds. By employing the new technology, garbage which once took 40 days to be burned would need only nine to 12 days to be made "environmentally friendly".

A Science and Technology Ministry official said that the new technology should be used widely in more cities because it can produce more economic profits than traditional burning or burying methods.

The ministry said it also would push for "green food boxes", made of biodegradable materials such as rice straw, and phase out plastic food

containers within a year. Statistics show that the mainland uses 10 billion polystyrene food boxes each year.

(SCMP, 15/12/98)

NEW ZEALAND

The Government's Environment Minister, Mr. Simon Upton, said that New Zealand would send air force planes to conduct surveillance of Antarctica's Ross Sea to investigate the illegal fishing of Patagonian toothfish. Information suggested several long-lining vessels had been involved in uncontrolled fishing in Antarctic waters and could move into the Ross Sea for potentially rich pickings, Mr. Upton said. Estimates indicate illegal toothfish fishing equals the catches of legal fishing. Fisheries activities in the Ross Sea region are regulated by the Commission for the Convention for the Conservation of Marine Living Resources, which has been signed by 23 countries. The Commission estimated the potential inadvertent seabird catch within the convention area from illegal and unregulated toothfish fishing in the Indian Ocean sector alone was between 50,000 and 89,000 birds, mainly white-chinned petrels, giant petrels and albatross.

About 80 per cent of the illegally fished stock landed in Mauritius with about 75 per cent of that going on to Japan and the remainder sold to the United States.

(The Age, 30/12/98)

BANGLADESH

Bangladeshis are the victims of what some experts say could be the biggest mass poisoning in history. Dangerous levels of arsenic have been detected in the groundwater which tens of millions of people drink every day from the country's millions of tube wells.

But with the World Bank and other groups apparently several years away from finding a solution to the problem, villagers are left with no alternative but to drink water which will condemn them to a slow and painful death. Of Bangladesh's 64 districts, 41 have been found to have arsenic in their groundwater. Traces have also been

found recently in areas previously thought free of the poison.

The World Bank estimates 18 million Bangladeshis have been poisoned, a figure considered conservative by other organisations including the Dhaka Community Hospital and Disaster Forum, two organisations working on the problem.

Anyone who drinks arsenic laced water regularly for six months or more is likely to be affected. Two-thirds of the country's 127 million people are likely to have consumed arsenic-tainted water for at least that period.

In many villages, men and women have lesions on the palms of their hands and soles of their feet, signs of advanced arsenic poisoning which usually do not appear for several years. Death, in the shape of various cancers, can occur 20 years after arsenic was first swallowed. This is one explanation as to why the problem has remained undocumented until this decade.

Arsenic was drawn up from tube wells dug in the 1970s to save people from dying of diarrhoea and other diseases caught from the bacteria-infested ponds from which villagers had previously taken their water. A campaign 25 years ago by Unicef and the Bangladesh authorities to get people to use the wells was so successful that the Government now finds it hard to persuade people to stop using contaminated ones which are marked with red paint.

Harvesting rainwater, treating the old ponds to make them safe for use or fitting filters to pumps are considered too expensive for a country as poor as Bangladesh, especially now, when it is still reeling from the impact of last year's record floods.

(SCMP, 02/01/99)

AUSTRALIA **South Australia**

In *Tysoe & Ors v City of Unley & ElderCare* the Environment, Resources & Development Court South Australia) commented on the

role of expert planning witnesses in planning appeals. The Court stressed that witnesses must not attempt to give evidence beyond their area of expertise, or to advocate their client's cause. In this regard it said:

"We repeat that an expert's duty is to assist the Court in the area of his or her expertise; not to be a general advocate for the party who has engaged him or her It is a waste of time of the Court and the parties to hear opinion evidence from a person who is not qualified to give an opinion....."

The Court acknowledged that expert planning witnesses are qualified to comment on matters addressed by the Development Plan; however, such opinions must be supported either by research or experience or must be based on the opinion of another properly qualified expert.

This case highlights the duty of expert witnesses to give opinions based on their genuine area of expertise and the duty of lawyers to properly test a witness before calling them to give evidence.

(*Planning & Environment Briefly*, November 1998. Norman Waterhouse, Solicitors, Adelaide)

New South Wales

The North Sydney Council recently was found negligent by the New South Wales Supreme Court in the way it notified a development application. Damages are to be assessed.

The developer received planning approval for a large development from the Council, which was later overturned by the New South Wales Land & Environment Court, due partly to the incorrect public notification of the correct address for the development. The developer sued the Council for the loss caused by the Council's failure properly to notify the proposal. These losses are expected to be significant, given that the developer had pre-sold approximately \$50,000,000.00 worth of apartments but was subsequently forced to refund the deposits

following the overturning of the approval.

The case demonstrates the magnitude of loss that may be suffered by a developer as a result of a small procedural error by a Council or planning authority.

(*Planning & Environment Briefly*, November 1998, Norman Waterhouse, Solicitors, Adelaide)

Australian lawyers with the Environmental Defenders Office and E-LAW Australia have won a temporary court victory for threatened flying-foxes. School administrators wanted to remove a colony of flying-foxes living close to a high school. Experts have determined that the colony, which includes the threatened Black Flying-fox, has inhabited the area since the 1800s. The school was built in the 1960s.

On January 20, 1999 Australian lawyers Lisa Ogle and Chris Norton of the Environmental Defender's Office (EDO) in Sydney obtained an interlocutory injunction from the New South Wales Land and Environment Court to restrain the Department of Education from disturbing the colony. The EDO is representing the North Coast Environment Council (NCEC) in the case. The NCEC requested an urgent injunction to prevent the Department from attempting to move the colony, which is located in a rainforest reserve next to the high school. The Department planned to use noise and smoke to move the threatened species of flying-fox, including a machine known as the Phoenix Bat Wailer.

The Bat Wailer emits loud noises which are directed at the flying-foxes to deter them from settling in their roosts. NCEC is concerned about the impacts of the Wailer on the colony, and in particular on the juvenile flying-foxes, which are too young to fly and cannot escape the noise. The NCEC presented evidence showing that it was likely that there would be many injuries and deaths among the flying-foxes.

The court found that the case raised serious legal issues. The court also found that the adverse effect of the

disturbance on the flying-foxes outweighed the inconvenience to the school until the final court hearing. In particular, the evidence showed that the Department of Health believes the colony poses no public health threat. The court will now fully consider the competing arguments March 17-19, 1999, as to whether the colony can be disturbed.

This case will test the adequacy of the laws of New South Wales to protect threatened species. We will report on developments in the case in future editions of the E-LAW U.S. Update.

(*E-Law Update*), Environmental Law Alliance Worldwide (U.S. Office, Winter, 1998/99).

Northern Territory

The World Heritage-listed Kakadu National Park is under immediate threat from uranium mining. The unprecedented mission to Kakadu by World Heritage experts will investigate claims that its unique values are being put at risk by the controversial Jabiluka uranium mine.

Submissions to the delegation from Aboriginal traditional owners, environmentalists, the Academy of Humanities, the Academy of Scientists and others, will allege that Kakadu is faced with "specific and proven imminent danger", and that rich Aboriginal heritage is being disregarded. They will also claim that the oldest known site of human habitation - Malakananja II - is part of the proposed Jabiluka mining lease, despite being listed as protected.

Kakadu, in the Northern Territory, was listed as a World Heritage site because of its outstanding natural features and rock paintings that were "master-pieces of human creative genius". However, large areas have been excised for mining leases covering vast uranium reserves worth billions of dollars. The building of the new Jabiluka mine has sparked passionate protests across the country.

UN committee chairman Francesco Franioni said his mission would collect all the facts before making a

recommendation in late November on whether to list Kakadu as a "World Heritage in Danger" site.

But the traditional owners, the Mirrar people, say they will boycott the mission unless they are granted observer status.

(*SCMP*, 27/10/98)

NEPAL

As U.S. states begin to tighten regulations on tobacco, multi-national companies are targeting smokers in less industrialized countries. (See *E-LAW Update*, winter 1998).

Through the E-LAW network, advocates are fighting the invasion of tobacco companies. E-LAW is giving advocates information about the harm caused by active and passive smoking and tobacco ads, and the tools that governments are beginning to use to regulate tobacco.

These efforts are paying off: Lawyers in Nepal have won a victory for public health. Last year, lawyers with Pro Public in Nepal filed a petition to the Supreme Court of Nepal demanding an end to tobacco ads on radio and TV. The Court issued a judgment that lamented the court's lack of legal authority to require such a ban, and requested relevant agencies of the Nepali government to consider a ban.

Victory came this January. The Nepali Ministry for Information and Communications announced that, effective February 19, 1999, no tobacco ads will be allowed on government or private radio and TV stations in Nepal. Although the Ministry estimates that the ban will cost the government 35 million rupees annually in lost advertising revenue, the Ministry considers the ban necessary to protect the welfare of the Nepali people.

(*E-Law Update*), Environmental Law Alliance Worldwide (U.S. Office, Winter, 1998/99).

ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

Minutes of Meeting - 3 August 1998

The Environmental Impact Assessment Subcommittee (the EIA Subcommittee) met on 3 August 1998 to consider the Environmental Impact Assessment Report on "Kai Tak Airport North Apron Decommissioning" (the EIA Report).

The EIA Report assesses the potential environmental impacts arising from the proposed work under the "South East Kowloon Development at Kai Tak Airport (KTA) Design and Construction for Decontamination and Site Preparation" project. Key activities of the project include:

- (a) decommissioning of airport related facilities;
- (b) decontamination of the airport site;
- (c) building and pavement demolition; and
- (d) site preparation.

The project will provide groundwork for future residential, commercial and industrial development and landscaping at the KTA North Apron site.

The EIA Report

The EIA Report assesses impacts in respect of construction noise, air quality, water quality, demolition waste, ecology and land contamination. It concludes that the environmental impacts can either be considered small or can be mitigated to an extent that is acceptable. The Report recommends a continuing environmental monitoring and audit programme for noise, air quality, water quality and land contamination.

The EIA Subcommittee's Views and Recommendations

Members of the EIA Subcommittee generally agreed with the EIA Report's conclusions that the environmental impacts of the project were either small or could be mitigated to an acceptable extent. The Subcommittee noted a letter from solicitors acting on behalf of the Oil Companies Tank Farm in

which concerns about the effectiveness of decontamination Method II, Soil Vapour Extraction and Air Sparging system, were expressed. Members appreciated these concerns but agreed with the approach proposed in the EIA Report, namely that pilot tests should be conducted before implementation, and that further soil tests would continue to monitor the effectiveness of the clean up. Where necessary an alternative method - excavation and biopile system - will be adopted.

The Subcommittee also noted that the project proponent would convey Members' concerns on the health of workers involved in excavation work near the Ma Tau Kok Gas Works to relevant parties.

The EIA Subcommittee agreed to recommend that ACE endorse the EIA Report on the condition that the project proponent should submit a report on the final (after decontamination) soil quality for consideration by the EIA Subcommittee. The project proponent agreed to report on final soil quality before the start of housing development.

Customs & Excise Department Paper - August 1998

In August 1998, the Customs & Excise Department (C&ED) issued a paper to brief Members of the Advisory Council on Environment on the causes and impact of illicit use of diesel oil, and the law enforcement efforts made by C&ED. Key elements of the paper included the following.

TYPES OF ILLICIT DIESEL OIL

There are currently three types of diesel oil being illegally used in Hong Kong, namely:

- Light Diesel Oil
- Marked Oil
- Detreated Oil

The following paragraphs briefly describe these types of illicit fuel and the channels through which they come into the black market.

Light Diesel Oil

Light diesel oil (LDO) is a kind of hydrocarbon oil commonly known as '油渣' in Chinese. It is colourless and easily available at legitimate filling stations. Government duty is imposed on LDO for use as vehicle fuel. Following the latest revision on 23 June 1998, the current duty rate on one litre of LDO is \$2.00 and the pump price at local filling stations is \$5.69 per litre.

Illegally imported LDO is duty-not-paid and is therefore referred to as 'dutable LDO'. Most of the dutable LDO is smuggled into Hong Kong from the Mainland by the sea route. Chinese trading vessels and fishing boats are commonly used for such smuggling activity. Some dutable LDO is brought in through the land route by cross-border vehicles.

Local oil companies usually obtain diesel oil from overseas sources, such as Singapore. On occasions, they will obtain supply from Mainland suppliers. In such case, the Mainland fuel will have to meet all environmental requirements as usual supplies from other sources. For practical reasons, cross-border vehicles are allowed to bring in a small quantity of LDO in their fuel tanks as a duty free concession. It may run up to a maximum of 300 litres depending on the type of vehicle involved.

Marked Oil

Marked oil, also known as 'industrial diesel oil', is LDO to which a marker and a colouring substance have been added to distinguish it from ordinary LDO. Being free from duty, it is only intended for industrial use, such as in restaurants, dyeing factories and construction sites, or as fuel for fishing vessels. It is not permitted to be used as fuel in road vehicles and pleasure vessels. Marked oil can be obtained from legitimate oil suppliers without restrictions in Hong Kong and is sometimes found being smuggled to the Mainland.

Detreated oil

Apart from smuggled LDO, illegal traders use detreated oil as a substitute

to fill the large demand for illicit diesel in the black market. They use chemical methods to remove the red colour from marked oil and make it look like ordinary LDO. This is usually done by adding concentrated sulphuric acid and caustic soda to the marked oil or by filtering with industrial activated carbon. Recently silica gel has also been used as a decolourizing substance. The decolourized diesel oil is called *detreated oil*.

CAUSES OF THE ABUSE OF DIESEL OIL

The illicit use of LDO is a long-standing problem which has caused the utmost concern of the department. The following are the major causes leading to the present situation :

- (1) substantial savings from using illicit fuel;
- (2) lucrative profits from selling illicit fuel;
- (3) easy availability of dutable LDO and marked oil; and
- (4) light penalties on diesel oil offenders.

Substantial savings from using illegal fuel

At present, the price of legitimate LDO from filling stations is \$5.69 per litre, including the duty levied by Government. However, illicit diesel is being sold in the black market currently at a much cheaper price of about \$3.5 - \$4 per litre. This gives a saving of about \$1.7 - \$2.2 per litre, which may simply become irresistible to drivers, tempting more to take the risk of using the illegal fuel.

Lucrative profit from selling illicit diesel oil

Due to the low cost of supply and the large demand, selling illicit diesel oil is a lucrative business. As a rough estimate, a medium-sized illegal filling station can generate a profit of around \$8,000 to \$11,000 from selling an average of 6,000 litres of illicit fuel a day. This basically accounts for the large number of illegal filling stations in operation throughout the territory.

Easy availability of dutiable LDO and marked oil

Marked oil is easily obtainable from legitimate oil depots. There is no legal restriction on the possession, sale and movement of marked oil unless it is put into the fuel tank of a motor vehicle or a pleasure vessel. The lax control in this area in effect provides an easy supply of marked oil for illegal detreating plants. At the retail level, the large number of illegal filling stations spreading over the territory are providing easy access for drivers to use illicit fuel.

Light penalties

The maximum penalty for dutiable LDO offences is a fine of \$1,000,000 and imprisonment for 2 years while marked oil offences carry a maximum penalty of a fine of \$200,000 and imprisonment for 2 years. Nonetheless, statistics once revealed that the usual fine for a driver using illegal fuel ranged from \$1,000-\$2,000 while for cases involving bulk seizure, the penalty was only around \$10,000-\$20,000. Only on rare occasions, custodial sentences were imposed.

From the enforcement point of view, the generally light penalties imposed on offenders are manifestly inadequate to reflect the prevalent situation and could hardly pose a sufficient deterrent. In an attempt to change this situation, the Customs and Excise Department has tried successfully on 2 occasions - one in March 97 and the other in March 98 - to organise a presentation and field visit for magistrates to enable the judiciary to have a better understanding of the problem of illicit use of diesel oil. Slightly higher penalties have since been recorded as can be reflected by the increase in the average fine from \$4,300 in 1997 to \$5,600 this year, and the increased number of custodial sentences meted out by courts.

ENVIRONMENTAL IMPACT

Apart from the evasion of duties, illicit use of diesel oil can also cause serious problems to the environment in the following ways :

- fire hazard to the public;
- other impacts on the community;

Fire Hazard

Diesel oil is classified as Category 5 goods under the Dangerous Goods Ordinance. It is inflammable and catches fire easily if stored improperly. There have been incidents where fire and explosions occur in connection with storage of illicit diesel oil causing deaths and serious damage. Illegal filling stations set up in urban residential areas are therefore a serious threat to life and property, which requires urgent enforcement action.

When substantial quantities of diesel oil are found in C&ED's raids, the Fire Services Department will be informed for taking corresponding action under their jurisdiction. Under the Dangerous Goods Ordinance, a licence from the Fire Services Department is required for the storage of diesel oil over the exempted quantity of 2,500 litres.

Other Impacts

Marked oil usually has a sulphur content of around 0.35%, which is much higher than the 0.05% limit currently set for legitimate automotive diesel oil. Smuggled LDO is also found to have a sulphur content similar to marked oil. As such, the use of marked oil and smuggled LDO by road vehicles will emit more sulphur dioxide and respirable suspended particulate (RSP), both being an air pollutant which is harmful to health.

Detreated oil may also contain other harmful chemicals left over from the decolourizing process. The use of detreated oil as automotive fuel may therefore cause not only air pollution but also wear and tear problems to vehicle engines.

ENFORCEMENT EFFORT

In attempting to prevent the illicit use of diesel oil, the C&ED in recent years has been doing all it can to maintain enforcement at all levels against the illegal activities. Two stringent measures have been introduced to increase the deterrent

effect on users. From December 1996, any vehicle, other than a public vehicle, found using illegal fuel for the second time will be detained for forfeiture. In addition, with effect from 1 January 1997, drivers will have to bear criminal record if charged and convicted of any offence relating to the use of illegal fuel.

These additional measures resulted in a 78% drop in marked oil cases from 1996 to 1997. The hit ratio on vehicles checked for using marked oil also dropped to about 2% from the previous level of 20%. The black market then responded by a shift of demand to smuggled LDO and detreated diesel, which have now become the focus of our enforcement attention.

To enhance the gathering of intelligence, the C&ED has, in cooperation with the oil industry, introduced a reward scheme for information that leads to the seizure of illicit diesel oil. The scheme was launched in April 1996 with an initial contribution of \$1 million from the five local oil companies. Up to June 1998, a total of 146 pieces of information have been received under the scheme resulting in the seizure of 920,243 litres of illicit LDO from cases involving illegal imports, detreated oil plants and storage and distribution centres.

Latest enforcement action also led to the seizure of 240,000 litres of LDO in July, which had been released to an oil barge for export to Mainland but was subsequently found being conveyed back to land illegally for sale in the black market. While this is an upward trend for smuggling LDO, increased vigilance is being mounted at sea to intercept more oil barges for routine and special checking.

Following the reduction of duty rate on LDO from \$2.89 to \$2.00 per litre as from 23 June 1998, C&ED anticipates that some of the illicit diesel oil users may shift back to using legitimate LDO. However, it is difficult to estimate the full effect of the measure on the illicit diesel oil smuggling trend at this stage and C&ED will closely monitor the situation.

CONCLUSION

The C&ED appears determined to

stop the use of illicit diesel oil. Apart from stepping up enforcement, it will continue to review its enforcement

strategies and develop new measures for effective control of the situation.

This Quarterly Report does not constitute legal advice given on any particular matter. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors and omissions. Further information and enquiries in respect of this quarterly should be directed to *Fred Kan & Co. (Mr. Fred Kan or Mr. Brian Baillie)* :

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Comparative Table of Environmental Convictions:
October - December 1998

	Number	1st Offence	2nd Offence	3rd + Offence	Highest Fine
APCO	18	14	2	2	\$ 30,000
	18	13	2	3	\$ 50,000
	34	26	2	6	\$ 30,000
WPCO	46	30	7	9	\$100,000
	19	10	5	4	\$100,000
	46	35	3	8	\$135,000
NCO	23	11	3	9	\$100,000
	30	11	6	13	\$ 80,000
	19	8	1	10	\$100,000
OLPO	-	-	-	-	-
	2	2	-	-	\$15,000
	2	2	-	-	\$20,000
DASO	-	-	-	-	-
	-	-	-	-	-
	-	-	-	-	-
WDO	23	18	3	2	\$ 25,000
	23	19	2	2	\$ 15,000
	34	28	3	3	\$ 12,000
Total	110	73	15	22	
	92	55	15	22	
	135	99	9	27	

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

October figures appear on the first line, November figures on the second, and December figures on the third of each item. Source: EPD, Anti-Pollution Prosecution Figures.

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