

FRED KAN & CO.

Solicitors & Notaries

**URBAN PLANNING AND
ENVIRONMENTAL LAW
QUARTERLY**

簡 家 聽 律 師 行 城 規 環 保 簡 訊

Perhaps the single most significant factor in the continuing, sorry tale of environmental degradation in virtually every part of the world is the inexplicable lack of resolve on the part of regulatory agencies to enforce laws designed to protect the environment. As a consequence, the role of private citizens in enforcement of legislation is increasingly important. The main article in this Report considers how some countries have linked that role with the notion of fundamental human rights.

The Editors

CONTENTS

Page

HUMAN RIGHTS AND BROADER LOCUS STANDI IN PUBLIC INTEREST LITIGATION.....	1
DIGEST OF LEGISLATION	3
HONG KONG BRIEFING	4
PADS UPDATE	5
ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)	6
PLANNING ISSUES	7
PLANNING DECISION	8
CASELAW UPDATE	8
REGIONAL & INTERNATIONAL	9
STATISTICS	12
ABBREVIATIONS	12

**HUMAN RIGHTS AND
BROADER LOCUS
STANDI IN PUBLIC IN-
TEREST LITIGATION**

Neither Hong Kong's Basic Law nor its Bill of Rights includes a fundamental right to a healthful environment, i.e. an environment that is not exploited for profit to the significant detriment of the long-term integrity of all elements of our ecological systems. A symptom of this state of social order is the lack of citizens' rights to enforce or supervise the laws we have for the protection of the environment (inter alia). The main article in this Report looks briefly at how some other jurisdictions have overcome this by developing liberal *locus standi* rules in public interest litigation.

Hong Kong's most recent, significant

piece of legislation related to protection of the environment is the *Environmental Impact Assessment Ordinance* (No.9 of 1997)(EIAO). With the EIAO the government had an opportunity to be innovative (for Hong Kong) by allowing much greater involvement of citizens in ensuring compliance (by both the EPD (Environment Protection Department) and land-users) with the provisions of the ordinance. This could have been achieved by providing for broad (or "open") standing to sue, whereby the ordinary citizen could bring before the courts alleged breaches of the EIAO, including breaches by the Director of the EPD in failing to discharge his supervisory and enforcement responsibilities under the ordinance (should that be the apparent case).

In fact the EIAO does not even provide for the more limited form of

third parties' appeals rights that exist, for example, in Western countries' town planning legislation. This reflects the true position of the relatively low priority. Hong Kong has given to fostering a healthy environment.

By stark contrast (on this issue at least), a number of 'developing' countries have taken a more enlightened approach to the wider issue of ordinary citizens' right of access to the courts in matters of public interest, such as preventing significant damage to the environment. The following are just a few examples.

India

As early as 1982, the Supreme Court of India (which is India's final court of appeal) ruled in favour of, in effect, *open standing* in public interest litigation, such as "environmental litigation". Justice Bajdwata considered that public-minded persons or organizations were entitled to standing in the Supreme Court in matters of public interest, even where the matter concerned did not directly injure or threaten their individual rights: [*S.P. Gupta v. Union of India*, 1982 AIR (SC) 149]

Liberal standing in environmental cases has been justified by Indian Courts on, at least partly, the notion of citizens' "right to life", which encompasses the right to live in a healthy environment: e.g. *Rural Litigation & Entitlement Kendra & Ors. V. State of Uttar Pradesh & Ors.* (1986) Supp SCC 517 (Supreme Court).

Subsequently, the Supreme Court said this in respect of public interest litigation:

In a public interest litigation, unlike traditional dispute resolution mechanism, there is no determination or adjudication of individual rights. While in the ordinary conventional adjudications the party structure is merely bi-polar and the controversy pertains to the determination of the legal consequences of past events and the remedy is essentially linked to and limited by the logic of the array of the parties, in a public interest action the proceedings cut across and transcend these traditional forms and inhibitions"

[*Sheela Barse v. Union of India* 1988 AIR(SC) 2211, 2214].

Generally, courts in India, led by the Supreme Court, have

drastically loosened their rules for legal standing since 1982. This is particularly evident in a series of cases concerning environmental issues. For example, in one of dozens of actions brought by the famous environmentalist and lawyer, M.C. Mehta, for injunctive relief against polluting factories, the Supreme Court held in 1986 that any citizen was entitled to bring an action to remedy harm from (as in that particular case), so dangerous a source as leaking chlorine gas: *M. C. Mehta v. Union of India*, 2 SCC 1766 (1986).

As mentioned, this change in the Supreme Court's view of *locus standi* (in respect of public interest litigation concerning protection of the environment) has been justified by the court on the basis of a declared fundamental right to a safe environment founded on the general provisions of the preamble to the India Constitution and the Directive Principles of the Constitution. Broader capacity for citizens to enforce environmental rights, that is, allowing for enforcement of laws by ordinary citizens, as well as by government agencies, arguably is integral to a constitutional *fundamental right to life*. That is now accepted by India's courts, and those of various other countries

Broader capacity for citizens to enforce environmental rights, that is, allowing for enforcement of laws by ordinary citizens, as well as by government agencies, arguably is integral to the fundamental right to life. That is now accepted by India's courts, and those of various other countries.

Pakistan

Liberal standing provisions exist in Pakistan in respect of public interest and environmental litigation. Open standing is based on Pakistan's constitutional protection of a "right to life" which the courts have interpreted as including a right to live in a wholesome and healthful environment: e.g. *Shahla Zia v. WAPDA*, (1994) PLD 693.

The Philippines

Section 16 of Article II of the Constitution of 1987 provides that the State "shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature". Section 15 provides that the State "shall protect and promote the right to health of the people and instill health consciousness" among them.

In the landmark case, *Oposa and Others v. The Honourable F. S. Factoran, JR. and Ors.* (GR No. 101093, 30th July, 1993; (1994) 30 ILM 173), the

plaintiffs were a large number of children who were represented by their parents. They argued that these constitutional provisions gave them *locus standi* to bring proceedings, not just on their own behalf but also on behalf of succeeding generations, to prevent damage to the environment which, it was alleged, was likely to occur from the defendants' challenged decisions and actions. The defendants were government ministers and agencies and their decisions/actions related to granting logging concessions within an area of Philippines' fast disappearing rain forests. The Supreme Court upheld that argument, declaring that the plaintiffs were entitled to bring a class suit on their own behalf and on behalf of succeeding generations, based on the right to live in a balanced and healthful ecology. Feliciano, J (concurring with Davide, Jr.) said:

I join in the result reached by my distinguished brother in the court, Davide, Jr., in this case which, to my mind, is one of the most important cases decided by this Court in the last few years. The seminal principals laid down in this decision are likely to influence profoundly the direction and cost of the protection and management of the environment, which of course embraces the utilization of all the nature resource in the territorial base of our polity. I have therefore sought to clarify, basically to myself, what the Court appears to be saying. The Court explicitly states that petitioners have the locus standi necessary to sustain the bringing and the maintenance of this suit (Decision, PP. 11-12) Locus standi is not a function of petitioners' claim that their suit is properly regarded as a class suit. I understand locus standi to refer to the legal interest which a plaintiff must have in the subject matter of the suit. Because of the very broadness of the concept of "class" here involved ----- membership in this "class" appears to embrace everyone

living in the country whether now or in the future ----- it appears to me that everyone who may be expected to benefit from the course of action petitioners seek to require public

respondents to take, is vested with the necessary 'locus standi'.

The Court may be seen therefore to be recognizing a beneficiaries' right of action in the field of environmental protection, as against both the public administered agency directly concerned and the private persons or entities operating in the field or sector of activities involved

Costa Rica

In *Chacon v. el. Ministerio de Salud y la Municipalidad de Santo Ana*. (3705/1993) The Constitutional Division of the Supreme Court of Justice held that citizens were entitled to standing to protect both individual and social interests. The Court used language similar to that used by the Supreme Court of the Philippines in *Oposa* when it noted that unless the environment were protected its productivity would be degraded for both present and future generations.

Nepal

The Supreme Court of Nepal has interpreted Article 12(1) of the Constitution of 1990 as providing a fundamental right to citizens to bring matters of public interest before the courts, and therefore the question of whether a petitioner has *locus standi* is no longer an issue: *Leaders v Godavari Marble Industries Pvt. Ltd., Ministry of Mines & Ors.* (31 October 1995).

Conclusion

The principle embodied in these few examples that the right to a healthful environment is a fundamental right, deserves recognition in all countries constitutionally. The principle should also be given effect by the provision of *open standing*, or broad *locus standi*, to citizens to enforce laws which (inter alia) are designed to conserve or preserve the natural and cultural environments. This is particularly important given that the environments of every country in the world already have suffered damage, to a greater or lesser extent.

Digest of LEGISLATION

1. Waste Pollution Control (General) (Amendment) Regulation 1997 (L.S. No.2 to Gazette No. 23/1997/L. N. 572)

The Third Schedule to the Water Pollution Control (General) Regulations (Cap. 358 sub. leg.) is amended by repealing "785", "1,050", "2,210", "415", "625", "1,050", "285", "3,760", "1,750", "285" and substituting "1,120", "1,400", "2,960", "670", "890", "1,350", "305", "4,700", "2,140", "305" and "165" respectively.

The amendment, which applies from 16 January 1997, increases the fees payable for various matters under the Ordinance and the Water Pollution Control (General) Regulations (Cap.358 sub. leg.).

2. Air Pollution Control (Specified Processes) (Amendment) Regulation 1997 (L.S. No.2 to Gazette No. 23/1997/L.N. 577)

The Second Schedule to the Air Pollution Control (Specified Processes) Regulation (Cap. 311 sub. leg.) is amended in Form 1, 3 and 4 by repealing "\$100" and substituting "\$..... as prescribed in the Third Schedule to these regulations".

The Third Schedule is amended by repealing "2,490", "1,610", "750", "1,610" and "150" and substituting "5,330", "3,450", "1,600", "3,450" and "165" respectively.

The amendment applies from 16 January 1998: it increases various fees payable under the Third Schedule to the Air Pollution Control (Specified Processes) Regulations (Cap.311 sub. leg.) and makes a minor amendment to the forms set out in the Second Schedule

3. Air Pollution Control (Open Burning) (Amendment) Regulation 1997 (L.S. No.2 to Gazette No. 23/1997/L.N. 578)

Section 6(1) of the Air Pollution Control (Open Burning) Regulation (Cap. 311 sub. leg.) is amended by repealing "\$3,318" and substituting "\$3,780").

The amendment is effective from 16 January 1998 and effects an increase in the fee payable under the Air Pollution Control (Open Burning) Regulation (Cap. 311 sub. leg.) for the issuing of a permit to carry out open burning.

4. Air Pollution (Asbestos) (Administration) (Amendment) Regulation 1997 (L.S. No.2 to Gazette No. 23/1997/L.N. 579)

Section 8 of the Air Pollution Control (Asbestos) (Administration) Regulation (Cap. 311 sub. leg.) is amended:

(a) in subsection (1), by repealing "\$2,905" and substituting "\$3,110";

(b) in subsections (2) and (3), by repealing "\$910" and substituting "\$975"

The amendment applies from 16 January 1998. The amendment increases the fees payable under the Air Pollution Control (Asbestos) (Administration) Regulation in or restoration to the register and the annual registration fee.

5. Ozone Layer Protection (Fees) (Amendment) Regulation 1997 (L.S. No.2 to Gazette No. 23/1997/L.N. 580)

Regulation 2 of the Ozone Layer Protection (Fees) Regulations (Cap. 403 sub. leg.) is amended by repealing "\$2,090" and "\$850" and substituting "\$2,790" and "\$910" respectively.

The amendment comes into effect on 16 January 1998 and increases the fees for registration and for a licence to import or to export a specified consignment of a scheduled substance.

6. Noise Control (General) (Amendment) Regulation 1997 (L.S. No.2 to Gazette No. 23/1997/L.N. 581)

Regulation 8 of the Noise Control (General) Regulations (Cap. 400 sub.

leg) is amended-

(a) in subregulation (1), by repealing "\$270" and substituting "\$575";

(b) in subregulation (2), by repealing "\$250" and substituting "\$530".

This Regulation increases the fees payable for applications for construction noise permits in respect of percussing piling and other construction works. It comes into effect on 16 January 1998.

7. Dumping at Sea (Fees) (Amendment) Regulation 1997 (L.N. No.2 to Gazette No.23/1997/L.N. 584)

The Schedule to the Dumping at Sea (Fees) Regulation 1997 (L.N. 502 of 1996) is amended by repealing "9,000", "18,120" and "150" and substituting "9,630", "19,490" and "165" respectively.

The amendment applies from 16 January 1998. This Regulation increases the fees payable for-

(a) a permit to load for dumping and to dump spoil, and other substances or articles;

(b) a copy of an entry in the register of permits compiled by the Authority.

HONG KONG Briefing

The Mass Transit Railway Corporation (MTRC) has in recent times made efforts to incorporate environmentally friendly practices into planning, construction and operations.

One of the company's most recent developments to reduce noise levels during operations was the completion of a 235-metre acoustic enclosure between Heng Fa Chuen station and the Chai Wan portal ventilation building. This is expected to improve the environment of people living nearby. Noise reduction barriers have also been fitted along the tracks at

Kwai Fong station, Tsui Wan estate at Chai Wan and the Shau Kei Wan portal.

Environmental concerns were at the forefront of the construction of the Airport Express which would transport passengers to Chek Lap Kok at speeds of up to 135 km per hour. The MTRC, which has its own environmental department headed by an environment manager, is monitoring each stage of progress. During construction, a careful watch is kept on noise, dust emission and waste management.

A temporary noise enclosure, measuring 35 metres by 45 metres and made of plywood suspended from steel trusses, has been constructed at the site of the airport railway at Lai King station to reduce the noise levels near Block 5 of Lai King estate during bulk rock excavation.

The Airport Express will include a variety of environmentally friendly factors such as noise barriers where required, the use of natural lighting in line with energy-saving contemporary architecture, and platform screen doors. Trials are taking place at Choi Hung station to develop a programme for fitting platform screen doors to all existing underground stations which will result in significant air-conditioning energy savings.

The MTRC has also introduced a number of energy-saving improvements to both the tracks and trains, which include wheel dampers and the converting of camshaft-controlled trains to chopper-controlled trains which not only give passengers a smoother ride but save up to 25 per cent on electricity consumption. (SCMP 9/9/97)

This year marks the sixth annual Business and Industry Environment Conference and Exhibition, which is the only environmental conference with a business focus held in Hong Kong. Discussion and information exchanges on the latest environmental issues, management techniques and experiences take place. Awareness of what technology is available is important for industrial and business

managers to help them tackle the environmental problems their companies face. The conference brings together local and international experts to share views and experiences on a range of environmental topics.

The opening session features a forum where the public and private sectors will explore partnership opportunities in reducing solid waste in the Hong Kong Special Administration Region. Technical sessions will cover topics ranging from "green" building applications, environmental management systems and environmental technology.

The programme will conclude with an environmental leadership training seminar aimed at business decision-makers and managers of multi-national companies in the SAR and Guangzhou. (SCMP 9/9/97)

There is a record number of entries in this year's Energy Efficient Building Award organised by the Energy Advisory Committee and co-ordinated by the Centre of Environmental Technology (CET). The award, established in 1994, aims to promote and encourage building design and practices to achieve greater energy efficiency. It is sponsored by China Light and Power, the Real Estate Developers' Association of Hong Kong and Hong Kong Electric Co.

John Tang, the CET's senior environmental consultant, said the standard of entries - which included offices, hospitals, hotels and academic establishments - was extremely high. "We are pleased that our efforts to raise awareness of the award has created interest from building operators who have submitted detailed technical reports from a wide range of constructions," he said.

Applicants are required to supply photographs, floor plans, location plans and energy efficient features to the panel of judges which consists of professionals, academics and lay people.

Mr Tang said energy efficient buildings had financial, operational

and environmental benefits through direct cost savings and reduced maintenance and emissions. Energy efficient buildings require proper design, selection of materials and building services to ensure optimal lighting, heating, cooling and ventilation. "It is essential to ensure that energy conservation features are installed, controlled and managed", he said. (SCMP 9/9/97)

Green groups were unimpressed by plans to spend about \$25 billion on new roads and railways in the next five years and another \$710 million on road maintenance.

The Chief Executive, Mr Tung, said the financial package was designed to improve transport infrastructure to support the supply of new homes in his housing policy "To ensure that all suitable land can be used for housing, major improvements to the transport infrastructure will be needed"

Among the multi-billion-dollars projects are the KCR's West Rail project, linking West Kowloon and Yuen Long. It will be completed by 2002 and extended to Tuen Mun by 2003. There will also be an MTR extension to Tseung Kwan O by 2003. Two highways - the Sham Tsung Link, connecting the northwest New Territories and northeast Lantau, and Route 9, linking Tsing Yi and Lai Chi Kok - will be completed before 2007. The projects will cost \$32 billion in total.

Conservationists argue that the massive transport and infrastructure plan would increase pollution, cause huge disruption in the regions and destroy ecologically-rich areas. The highways, cross border links, railway extensions and reclamations would cause environmental havoc, said Citizens' Party researcher, Lisa Hopkinson. "We are very worried about the massive infrastructure programme which has been announced. All the cross border and territorial road links will cause massive disruption and havoc and there is no indication as to how the environment is going to be preserved, she said." (SCMP 9/9/97)

PADS UPDATE

1. The Government has delayed the opening of the new airport until July 6 - about two months behind its original target. At the end of an Executive Council meeting on 13 January 1998, the Government confirmed that completion of the airport railway before the end of June was "impossible".

The Airport Authority (the "AA") issued a statement welcoming the decision and saying it appreciated the need for a fully functional and integrated land transport system to service it. Financial Secretary, Sir Donald Tsang Yam-Kuen, said that the overall economy would not suffer any loss by not meeting that target, although the AA would have less revenue.

According to a senior government source, the AA would lose about \$1 billion in revenue. Another \$250 million would have to be spent on maintenance of the airport facilities, plus \$400 million on operational costs in May and June. Kai Tak would generate revenue of \$600 million in these two months. (SCMP 14/1/98)

2. The AA has invited tenders to design and build the AA's new head office at Chek Lap Kok. The AA will be the anchor tenant in the building complex with a combined gross leasable area of 40,000 - 60,000 m². The complex will be about 10 stories high and sit on a shared podium. A covered walkway will link the complex directly to the passenger terminal.

The complex will be located strategically in front of the future second passenger terminal and along the axis of the Automated People Mover tunnel that runs the length of the existing passenger terminal.

The AA's new head office will also serve as a gateway to the 45 hectare North Commercial District, the largest of the three commercial districts on the airport platform, which will comprise an integrated commercial

neighbourhood in a landscaped urban environment housing offices, hotels, restaurants, convention facilities, serviced apartments, and entertainment and cultural facilities.

The North Commercial District will be developed in phases over the next 15 to 20 years, the opening phase will be self-contained with restaurants, shops, parking, exhibition space and possibly leisure facilities. (AA's News 10/97)

3. The AA has signed a HK\$5 billion (US\$641m) Note Issuance Programme arranged by the Hong Kong Monetary Authority to finance future phases of the new airport after it opens. The AA will issue notes with a denomination of HK\$50,000 (US\$6,410) and maturities of up to 10 years. The first issue of HK\$500m (US\$64m) is likely to be launched in the coming months, subject to favourable market conditions. (AA's News 10/97)

ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

ACE Proceedings

(Highlights from minutes of recent meetings)

25th August 1997: Green Consumerism - eco-labelling scheme for Hong Kong

Mr. Peter Wong, the chairman, asked whether the Finance Bureau (FB) supported green purchasing, which might not always be in line with the Government's established practice of purchasing products at the lowest tender price. Mr. S. Barclay, the Principal Assistant Secretary of Environment, said that the FB had agreed to the establishment of a working group to establish "green specifications" for products on a case-by-case basis. The proposed working group would take into account possible savings likely to be generated from using the green product, instead of simply comparing the tender price of a

green product with that of comparable product. In response to the Chairman's query, Mr. S. Barclay said that the Environmental Protection Department (EDP) and the Government Supplies Department would be able to provide the expertise required in pursuing green purchasing.

Mr. David Melville, WWF Director, said that the government should encourage green purchasing in the community as a means to promoting "green consumerism". He said that timber products which made use of trees grown in forests managed by sustainable forest management practices should be given due recognition so as to provide incentives for such timber producers.

Professor Peter Hills, University of Hong Kong, stated that according to a survey conducted by the Environmental Campaign Committee (ECC) a few years ago, an increasing number of people in Hong Kong were prepared to pay more for products which were less harmful to the environment. However, they had difficulties in selecting the right product due to a lack of market information on green products. The ECC might conduct another survey this year to ascertain the level of environmental awareness of Hong Kong people.

25th August 1997: Draft Waste Reduction Plan for Hong Kong

Miss Vivian Ko, the Assistant Secretary of Environment, briefed members on the major elements of the Draft Waste Reduction Plan (the Draft Plan) and sought their advice on the Draft Plan. Mr. Benny Wong, the Assistant Director of Waste Facilities, said that the Housing Department had set up a task force to look into possible means to minimise the amount of wastes generated by domestic households, which included educating residents on the need to minimise waste.

Dr. Ho Kin-chung (ACE) said that the overall waste reduction targets for municipal waste should be set higher than 40% in ten years as the actual

amount of waste to be reduced would be lower than 40% under the current proposal, since 20% of the proposed reduction would come through waste-to-energy incineration, which would change only the form of the waste.

22 September 1997: Greenhouse Gas Emissions in Hong Kong

Mr. S. Barclay briefed members on Hong Kong's greenhouse gas emission levels in the past and the projected emission levels in the years 2000 and 2010. He also informed members of the challenges Hong Kong would be facing in the coming years in controlling the level of greenhouse gas emissions, and told members that Hong Kong was likely to be one of the very few economies that would actually achieve, or be close to achieving, the target set by the United Nations Framework Convention on Climate Change to return greenhouse gas emissions by the year 2000 to 1990 levels. [This meeting occurred before agreement on new emission levels was reached in Kyoto, 11th December, 1997]

The Chairman asked whether Hong Kong would adopt electricity Demand Side Management (DSM) measures from 1998 onwards. Mr. K.K. Lam, said that although a formal agreement on the adoption of DSM had yet to be signed between the government and the power companies, the latter had in fact started various trial schemes in this aspect, such as the efficiency lighting scheme for commercial/residential premises, and that an agreement on DSM would be signed by end of 1997.

20 October 1997: Review of the Public Filling Strategy and Programme

Mr. Tam Wing-kwong, of the Civil Engineering Department, briefed members on the background of the consultancy study and Mr. Mattravers informed members on the major findings and recommendations of the study.

The Chairman said that he was concerned about how these recommendations were to be

implemented. Ms. Lisa Hopkinson of Friends of The Earth said that she supported in principle the consultant's proposal for setting up "demonstration" projects to introduce and educate industry about the potential of recycled aggregates. In relation to the disposal of construction waste, she said that since there were so many reclamation projects in Hong Kong at any one time, the problem of insufficient space for the disposal of such waste could be resolved if each of these reclamation sites were assigned 10% of their area as public dumps.

In response to the Chairman's concern, Mr. Mattravers informed the Members that the consultant had already established a model, using data from the Fill Management Committee, Building Department, Planning Department and all construction and development bodies, to assess and project both the short and long term needs for disposing of inert construction and demolition materials. He said that an effective distribution network design would be based on the projected arisings and demand, and that the model would be designed in such a way that the Civil Engineering Department could manage the networks easily afterwards.

PLANNING ISSUES

In response to changing needs of the industrial sector, Director of Planning, Dr Peter Pun Kwok-Shing, announced that the Town Planning Board has introduced new guidelines on industrial land use. Based on two studies, six previous guidelines are consolidated into four. Under the revised guidelines, three major changes are introduced.

First, the proportion of ancillary office use in an industrial building in the industrial zone will be increased from 30% to 50% of the total usable floor area. A combination of ancillary office and showroom uses, which was not allowed under the old guidelines, is now also permitted for up to 50% of

the total usable floor area. However, ancillary showroom uses cannot exceed 20% of the total usable area, and otherwise planning permission must be obtained.

Second, subject to a maximum plot ratio of 1% or 10% of the gross floor area, commercial uses intended to provide supporting functions to workers, including banks and restaurants, are allowed on the lowest three floors of industrial-office buildings.

Third, for trading companies, large storage areas of not less than 30% of the total usable area would be permitted in an industrial-office building. In order to qualify, trading companies must demonstrate a need to carry out loading and unloading frequently and that the ordinary commercial-office building cannot provide adequate space for such activities.

Dr. Pun said the revised guidelines could enhance values of industrial buildings, but the main concern was to provide greater flexibility in land use in response to changing needs.

(Hong Kong Standard 13/9/97 and Sing Tao Jih Pao 13/9/97)

The Government has finished consultation on the Town Planning White Bill and is drafting the Blue Bill. The bill aims to simplify land and housing development procedures and will be submitted to the provisional legislature early next year.

The Bill would impose an 11-month limit on the time between notification of a change in a district's land use and its submission to Executive Council. The first two months would be for the public to raise objections. The process may have taken a number of years in the past.

The Planning Department's time limit for issuing written replies to developments on Town Planning Board decisions would be cut from four weeks to two. After a developer submitted a master layout plan to the department, a reply would be given

within six weeks instead of the current eight. Further, any application for a change of land use received by the department would be submitted to the Town Planning Board within three months.

Rules governing the Provisional Legislature stipulate that the body can only deal with indispensable laws. It is doubtful that the Bill can be treated as indispensable legislation. (SCMP 17/9/97)

The Planning Department and the Territory Development Department jointly commissioned a consultancy study to examine the scope and feasibility of developing the northwestern New Territories to make way for the building of hundreds of thousands of new homes.

The study, entitled *The Planning and Development Study on North West New Territories*, will be carried out in two stages - planning followed by the site investigation - by the two government departments.

The Kam Tin valley is one area being investigated for possible suitable development purposes. Currently home to approximately 50,000 people, it is estimated that if the area is found suitable as a location for a regional city, it could some day house 750,000 people.

The study is one of the three integrated planning and engineering studies outlined in Chief Executive Tung Chee-hwa's policy address, and is a positive step towards meeting the government's target of producing 85,000 flats a year.

The feasibility study will also include engineering investigations of the development of facilities and infrastructure required in the area to accommodate an additional population of 100,000 people over the next 10 years and another 100,000 in the following five years.

The study is scheduled for completion by the beginning of 2000.

(Hong Kong Standard 28/10/97 and Ta

Kung Pao 28/10/1997)

PLANNING DECISIONS

Connie Law Yuk Wah v Town Planning Board

Town Planning Appeal No.1 of 1997

Application for planning permission for temporary open storage of construction material - the site zoned agricultural - whether an appeal by the appellant against a refusal of the application should be allowed.

Summary of the facts of the case

The appellant applied to the Town Planning Board (TPB) for planning permission for temporary open storage of construction material for 12 months on Lot No.1217 and adjacent Government land at D. D. 119 in Pak Sha Tsuen, Yuen Long ("the Site"). The Site was zoned agricultural in the draft Tai Tong Outline Zoning Plan No.S/YL-TT/1 (OZP) which was gazetted before the application was made. TPB rejected the application because:

- a) the proposed development is not in line with the planning intention of the Agriculture Zone, namely: to retain arable land with good potential for rehabilitation and to retain rural characteristics of the area;
- b) no landscape proposals were included in the submission; and
- c) approval of the application would set an undesirable precedent for other similar development in the Agricultural zone.

Submissions of the Appellant

The appellant submitted to the Town Planning Appeal Board (Appeal Board):

- a) a proposal to plant more trees if the application were granted; and
- b) a personal undertaking to use the open storage for the temporary, fixed period.

Submissions of the Town Planning Board

The Board argued that according to the TPB's *Guidelines for Application for Open Storage and Port Back-up Uses under section 16 of the TPO*, it was incumbent upon the appellant to demonstrate merits to justify any departure from the declared planning intention of the OZP.

Decision of the Appeal Board

The Appeal Board determined that the appellant had made no attempt to justify a departure from the planning intention of the OZP. The appeal was dismissed.

Leung Wing-nin, Mak Pui-kec, Yeung Yu-sun, Lee Ping-kwong v Town Planning Board, Town Planning Appeal No.8 of 1996

Application for planning permission to use a site for (1) vehicles (or parts) trading and (2) car repairing workshop - the use (1) is not found in the OZP - the use (2) is in column two of the OZP in which permission is required - whether an appeal against a refusal of the application should be allowed.

Summary of the facts of the case

The appellants applied to the Town Planning Board (TPB) for planning permission to use Lot No. 349 (portion) in D.D. II4, Kam Tin Road, Pat Heung, Yuen Long ("the Site") for (1) vehicles (or parts) trading and (2) car repairing workshop. The Site was within the draft Outline Zoning Plan (OZP) No. S/YL-PH/1. The TPB rejected the application because:

- a) the use (2) did not fall within Column 1 and 2 of the OZP; and
- b) the appellant did not submit sufficient information regarding provision of a proper vehicular access to the proposed car repairing workshop, or information to demonstrate that the proposed use would not generate adverse environment and visual impacts to the surrounding environment

Submission of the Appellants

The appellants put no substantive submissions to the Appeal Board.

Submission of the Town Planning Board

The TPB submitted that paragraph 8.3.2. of the Explanatory Statement of the OZP requires that development proposals for workshops have to demonstrate clearly that they would have no adverse environment, drainage, traffic and other impacts on the surroundings.

Decision of the Appeal Board

The Appeal Board determined that the appellant should have demonstrated that their proposal would not generate adverse impacts (including visual) to the surrounding environment. The Appeal Board also suggested the appellant seek the assistance of the District Office/Planning Office to make a fresh application. The appeal was dismissed.

CASELAW UPDATE

Wah Yick Enterprises Co. Ltd v Building Authority [1997] HKLRD 1177

Town planning -village type development zone-"house" listed as one of the uses always permitted-whether a 33-storey block of flats could be erected-definition of "house" as listed in Notes to OZP-whether extrinsic aid could be used to determine definition of word-Definition of Terms Used in the Statutory Plans-"Explanatory Statement" accompanying OZP in question-whether OZP's are subsidiary legislation.

The Plaintiff ("P") wished to erect a 33-storey block of flats on its site in Yuen Long in accordance with general building plans submitted to the Defendant ("D"). D refused to give its approval on the ground that the proposed development contravened the draft Yuen Long Outline Zoning Plan (OZP). P sought a declaration from the Court of First Instance that its proposed development did not contravene the OZP and that D's refusal was unlawful and hence null

and void.

P's site consisted of three adjacent lots all held under a block Crown lease, the status of the land being agricultural. A building licence was granted to erect a building on one of the lots not exceeding an area of 2,896 sq ft. The building licence did not contain any restrictions on the number of storeys, the height of the building or number of flats permitted to be erected.

The site was within the OZP and bulk of the site fell into an area zoned for "village type development". In the Notes forming part of the OZP, under the heading "village type development zone" (VTDZ) "house" was listed in column 1 as a permitted use. P claimed that it was entitled to erect its proposed 33-storey block of flats under this. D refused permission under s.16(1)(d) of the Buildings Ordinance (Cap.123) on the ground that the proposed development could not be construed as a "house" and therefore did not fall within the permitted "house use", and thus contravened the OZP. "Flat" was not one of the uses listed in VTDZ.

The decision

The court (Deputy Judge Whaley) held that P's proposed development did contravene the draft OZP, and the declarations sought would be refused. Factors taken into account by the court in reaching its decision (as taken from the Headnote to the report) included:

1. The fact that the zone in question had been specifically set apart for "village type development" as opposed to any of the other zones must be a vitally important consideration in construing the meaning of "house" in its context.

2. The ordinary meaning of "village type development" connoted low-rise and low-density as opposed to high-rise and high-density development; it would not naturally accommodate P's proposed development.

3. It was both legitimate and sensible to have regard to the "Definition of Terms Used in the Statutory Plans" (the Definitions) published by the

Planning Department and the "Explanatory Statement" accompanying the OZP in question because they were both considered and approved by the Town Planning Board as documents to be published in order to provide assistance to members of the public to interpret and understand the provisions of the various OZPs. The Explanatory Statement was physically attached to the Notes of the OZP, so that anybody who obtained a copy of the OZP would know of its existence and the relevance of it.

4. The Definitions were clearly relevant and useful in showing the construction that was put upon various terms used in the OZP by the Town Planning Board and the Explanatory Statement was also clearly relevant in disclosing the planning intentions and considerations that were applied in the formulation of the OZP.

5. In column 1, examples of "house" given in the "remarks" column included only low-rise and low-density structures. There was nothing to suggest that a high-rise 33 storey block of flats qualified as a "house".

6. The provisions of para 8.8 of the Explanatory Statement that "land within the zoning is primarily intended for development of small houses by indigenous villagers" give a very clear indication of the planning intention to retain in the "V" zone existing villages and to reserve land for village expansion purposes. Any exceptions impliedly reserved by the use of the word "primarily" would not include the erection of a 33-storey block of flats, which would be strikingly out of character and incongruous with a village environment.

7. The word "house" had a distinct fluidity of meaning, and it was best construed in relation to the context in which it was found, and in relation to the objects and purposes of the Ordinance or of the section of the Ordinance in which it was used. Whether a particular building did come within the word "house" was a question of law and fact; fact, insofar as it was necessary to ascertain all the relevant facts relating to the building,

and law insofar as the application of the word "houses" to those facts involved the construction of the Ordinance.

8. It was not necessary to formulate a definitive definition of "house" in this case. It sufficed that in the context in which it appeared, the use "house", properly construed, did not include the 33-storey block of flats P proposed to build. This conclusion was reinforced when one had regard to the Definitions and the Explanatory Statement, which, although not part of the plan, had been adopted by the Town Planning Board and had been published specifically to assist members of the public more precisely to understand the OZP.

REGIONAL & INTERNATIONAL

CHINA

The World Bank report, *Can the Environment Wait? Priorities for East Asia*, reveals that failure to tackle the mainland's worsening air pollution will result in more than 850,000 premature deaths, 7.4 million new sufferers of bronchitis and many millions of cases of respiratory sickness a year.

The report states that, "investing one per cent of the nation's Gross Domestic Product (GDP) over 25 years in measures to combat water and air pollution would greatly reduce pollution by 2020". Richard Ackermann, the report's co-author, acknowledged that China had to bear a tougher task than Southeast Asian countries because of its reliance on coal. The air in the mainland is so polluted health costs often exceed 20 per cent of urban income. Combined water and air pollution cost 8 per cent of GDP in terms of overall damage to health, agricultural production and natural resources. It is estimated that the health cost of urban air pollution on the mainland will rise from US\$34 billion (HK\$263 billion) in 1995 to US\$104 billion (HK\$804 billion) in 2020.

Recommendations offered by the report include reducing emissions from households by using cleaner coal and replacing coal with gas or district heating networks. Others, like stricter maintenance programmes for diesel vehicles, lowering the sulfur content of coal, improved engine technology and the introduction of clean fuels would reduce the pollution problem. (SCMP 20/9/97)

JAPAN

International negotiators and delegates at the Kyoto, Japan, environmental summit agreed on 11th December 1997 to a legally binding 5.2 per cent cut of greenhouse gas emissions from 1990 levels by 2008-2012. European Union members would cut their emissions by eight per cent, the United States by seven per cent and Japan by six per cent of 1990 levels. Russia, Ukraine and New Zealand were kept at a flat 1990 figure. Australia was allowed an eight per cent increase and Iceland a 10 per cent rise. The developing countries, including China, managed to throw out a clause calling for them to set voluntary targets to limit greenhouse gas emissions at some point in the future. Controversial plans to allow trading of emissions between developed countries were referred to the next conference in 1998.

Greenpeace International said that the deal provided absolutely no protection from the increasing environmental and economic damage resulting from the burning of coal and oil. It estimated that when loopholes were taken into account, the protocol would result in no real reductions from 1990 levels. The conference's executive secretary, Michael Zammit Catayer, said that the next steps would be for the business sector to take up the governments' work and for loose ends to be tied up in the next conference in Buenos Aires in November 1998.

Many observers said China and India would have to play a bigger role in next year's talks to keep the process going. By 2015 China will be the world's largest greenhouse gas

producer. (SCMP 13/12/97)

HONG KONG

Deputy Secretary for Planning, Environment and Lands, Benjamin Tang Kwok-bun said that the Government would have to consider the agreement before deciding what targets to set. China is a signatory to the convention but it has not been extended to Hong Kong. Mr. Tang said that Hong Kong would continue its efforts to cut back emissions. (SCMP 13/12/97)

INDIA

A total of 51,779 Indians die annually due to air pollution across 36 cities, a rise of 28 per cent over the past four years. (SCMP 3/11/97)

AUSTRIA

Scientist Paul Crutzen, a 1995 Nobel Prize Winner of Chemistry for discovering the location of the hole in Earth's ozone layer, estimated the problem of ozone layer depletion will have disappeared by 2050. (SCMP 9/11/97)

HONG KONG

The HKSAR government has been criticised from time to time for failing to show greater "initiative" in improving people's "livelihood" - in the economic sense - whilst also being taken to task for its reluctance to take realistic and firm steps to control pollution.

Hong Kong's air pollution has not improved under Mr. Tung's government in any long-lasting or substantial sense. The government's failure to take firm steps to control pollution from car emissions was highlighted by an SCMP article last year (29/12/97) which reported on Better Environment Hong Kong's criticism of the government's policy on checking polluting-emissions levels of its own fleet of motor vehicles. The government responded that their vehicles were always "clean" and therefore did not need to be checked!

AUSTRALIA

The position taken by Australia, at the Kyoto Climate Summit, on reduction of its green house gases has been severely criticised world-wide. In Australia itself there is significant opposition to the Howard government's largely outdated appreciation of environmental issues.

The lead article in a recent edition of *Habitat* (a publication of the *Australian Conservation Foundation*; vol. 26, No. 1), *Australia's downhill diplomacy at Kyoto Summit* comments on the Australian delegations, less than forthright role in negotiations leading to the final draft of the Kyoto Protocol. [The initiative for Australia's "special" position (referred to below) in respect of "reduction" of emission commitments was introduced in the final hours of the week-long summit, at 1 a.m. on the last night of debate; agreement was reached at 4 a.m.]. That at a conference of world leaders called to agree on ways of reversing (or, at least, limiting) the dramatic environmentally harmful effects of greenhouse-gas emissions, over-clearance of vegetation, and the like, it is extra-ordinary that Australia secured the right to increase its 1990 emission levels. Its delegation also diluted the Summit's usefulness by having a special clause on land clearance (to remove it from emissions consideration) included in the Protocol. In the words of the article:

The Australian government's role in the negotiation of the Kyoto Protocol will go down as one of the most shameful episodes in the history of international environmental diplomacy. Ultimately, its 'victory' could jeopardise the protocol and cost Australia dearly in political, economic and environmental terms

The target that Australia was allowed to choose for itself - an eight per cent increase on our 1990 emission levels - had been carefully selected. It is low enough to give the impression that Australia is not being too

greedy - after all, one country, Iceland, has been granted a higher target. However,

because of the inclusion of a special clause on land clearing in the protocol, the target can be met

without Australia having to reduce its emissions from energy and industrial sources.

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. or any of our following associate firms.

Hong Kong
FRED KAN & CO.
 Suite 3104-06
 Central Plaza
 18 Harbour Road
 Hong Kong
 Tel: (852) 2598-1318
 Fax: (852) 2588-1318

Paris, France
THOMAS HERBECQ & ASSOCIÉS
 3 Square Pétrarque
 75116 Paris
 France
 Tel: (331) 4755-4400
 Fax: (331) 4704-5131

Macau
THE LAW OFFICE OF JOÃO MIGUEL BARROS
 Av. Infante D. Henrique n° 46
 Edifício Kam Loi 2º Andar
 Macau
 Tel: (853) 712770
 Fax: (853) 713855

In addition to Fred Kan & Co. the following are members of:



An Association of Asian Commercial Law Firms

Adelaide, Australia
NORMAN WATERHOUSE
 45 Pirie Street, Adelaide 5000
 South Australia
 Tel: (618) 8210-1200
 Fax: (618) 8210-1234

Melbourne, Australia
MADDOCK LONIE & CHISHOLM
 140 William Street, Melbourne
 Victoria 3000, Australia
 Tel: (613) 9288-0555
 Fax: (613) 9288-0666

Sydney, Australia
COLIN BIGGERS & PAISLEY
 140 Philip Street
 Sydney NSW 2000
 Australia
 Tel: (612) 221-2022
 Fax: (612) 223-1324

Kuala Lumpur, Malaysia
CHEANG & ARIFF
 39 Court, 39 Jalan Yap Kwan
 Seng, 50450 Kuala Lumpur
 Malaysia
 Tel: (603) 261-0803
 Fax: (603) 262-1533

New Delhi, India
O.P. KHATTAN & CO.
 Khattan House B-1,
 Defence Colony
 New Delhi-110 024, India
 Tel: (91)(11) 464-6516
 Fax: (91)(11) 464-6958

Bombay, India
ADVANI & CO.
 Nirmla, 14th Floor, Nariman
 Point, Bombay 400021
 India
 Tel: (91)(22) 2041950
 Fax: (91)(22) 2875671

Singapore
MADHAVAN LOUIS & PARTNERS
 No. 2 Finlayson Green #11.07
 Asia Insurance Building
 Singapore 0104
 Tel: (65) 225-5111
 Fax: (65) 227-6761

Manila, Philippines
HERRERA TEEHANKEE & FAYLONA
 5/F., SGV II Building, 6758
 Ayala
 Avenue, Makati Metro Manila
 1200, Philippines
 Tel: (632) 815-8846
 Fax: (632) 815-8828

Colombo, Sri Lanka
D.N. THURAIRAJAH & CO.
 2nd Floor, Don Carolis Building
 Post Box. 1464
 No. 64, Keyzer Street
 Colombo-11, Sri Lanka
 Tel: (94)(1) 439-798
 Fax: (94)(1) 448002

Comparative Table of Environmental Convictions:
July - September 1997

	Number	1st Offence	2nd Offence	3rd + Offence	Highest Fine
APCO	26	16	6	4	\$ 50,000
	10	5	2	3	\$ 11,000
	11	5	4	2	\$ 20,000
WPCO	26	16	3	7	\$100,000
	30	21	2	7	\$100,000
	25	18	3	4	\$ 50,000
NCO	45	14	7	24	\$120,000
	26	10	1	15	\$120,000
	27	12	5	10	\$100,000
OLPO	2	2	-	-	\$ 15,000
	-	-	-	-	-
	-	-	-	-	-
DASO	-	-	-	-	-
	-	-	-	-	-
	2	2	-	-	\$ 25,000
WDO	22	21	1	-	\$ 30,000
	20	18	2	-	\$ 25,000
	6	6	-	-	\$ 30,000
Total	521	309	117	134	
	86	54	7	25	
	71	43	12	16	

ABBREVIATIONS

AFD	Agriculture & Fisheries Department
APCO	Air Pollution Control Ordinance
CFCs	Chlorofluorocarbons
DASO	Dumping At Sea Ordinance
EC	European Community
EE	Eastern 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

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.

Fred Kan & Co.
Suite 3104-07 Central Plaza
18 Harbour Road
Wanchai
Hong Kong

Printed Matter