

# FRED KAN & CO.

Solicitors & Notaries

## URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

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簡家驄律師行 · 城規環保簡訊

*In this edition we return to the topic of saving our disappearing Victoria Harbour. This controversial issue has been the focus of at least two previous quarterlies. We include a timely letter to the editors from a pioneer in the noble cause of saving the Harbour from rampant reclamation, Winston K.S. Chu*

The Editors

### CONTENTS

	Page
<b>FEATURE:</b>	
<b>RECLAMATION CHALLENGE SUCCEEDS: JUDICIAL SUPPORT FOR PRESERVATION OF MAINLAND CHINA</b> .....	1
<b>LEGISLATION DIGEST</b> .....	4
<b>HONG KONG BRIEFING</b> .....	6
<b>HONGKONG DISNEYLAND UPDATE</b> .....	8
<b>ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)</b> .....	8
<b>TOWN PLANNING</b> .....	9
<b>REGIONAL &amp; INTERNATIONAL</b> .....	9
<b>PROSECUTION STATISTICS</b> .....	12

### RECLAMATION CHALLENGE SUCCEEDS: JUDICIAL SUPPORT FOR PRESERVATION OF VICTORIA HARBOUR

In a landmark decision, the Court of First Instance (Hon. Chu J) recently upheld a challenge brought by *the Society for Protection of the Harbour Limited* to two decisions made by the Town Planning Board (“the Board”) - on 16th December 2002 and 14th February 2003 - the effect of which was to authorize the reclamation of a further approximately 26 hectares of land from Victoria Harbour to the north and west of Wanchai : *Society for Protection of the Harbour Limited v. Town Planning Board* HCA 19/2003.

The decision represented the first ever successful challenge of the government’s

Harbour reclamation plans and policies and the first judicial interpretation of the meaning and effect of Section 3 of the Protection of the Harbour Ordinance (Cap. 531) (“the Ordinance”). As such, the judgment is a benchmark in planning and environmental law in Hong Kong, which should be closely studied by lawyers and lay-persons concerned with preserving /or substantially conserving/what is left of Victoria Harbour, and also those with an interest in the wider and commendable objective of sustainable development in Hong Kong. The judgment is also a compelling endorsement of the Society’s long - standing opposition to government agencies’ bias towards reclamation for development, as against a concern for conserving the natural and historical jewel that is Victoria Harbour.

Key elements of this case are summarised below; but before doing so we retrace some of the issues involved in the Harbour debate.

### *Harbour reclamation in modern times*

When Britain took control of Hong Kong in 1941 following the Opium War, Victoria Harbour was surrounded by mountains, with little flat foreshore. It was one of the world's best natural deep - water harbours. To provide land for industrial and residential purposes, the colonial administration of Hong Kong undertook extensive reclamation over the next 140 years. At the time of the Joint Declaration, 1984, more than three thousand hectares of the Harbour had been reclaimed.

However, the pace of reclamation increased even more during the last 15 years or so. In 1990 the government introduced a new reclamation programme with the object of creating extra land for various purposes. One of the main reasons for increased reclamation was to allow the government to replenish its land-bank, on which the government has relied heavily for revenue in order to keep tax rates low. The Town Planning Board paper No.2880 dated 14th December 1994 identified 15 separate and substantial reclamation projects totalling 1,297 hectares.

The government's latest reclamation programme was the catalyst for the formation of the *Society* in 1995 at the instigation of well-known Hong Kong lawyer, Winston Chu, and legislator and environmentalist, Christine Loh. Through the *Society's* efforts - by means of protest, public statements and direct representations to the government - the government modified its reclamation plan, and announced that in future reclamation of land from the Harbour would - in general be kept to a minimum.

A further substantial step towards ensuring that the government honoured this statement of intent was the enactment of the Ordinance, which originally was limited to apply to a small part of the Harbour but in 1999 was amended to apply to the whole of the Harbour area as defined in Cap.1. It is worth mentioning that this was a private members' Bill initiated by the *Society* and guided through the legislative process by Ms. Loh. It was enacted because Legco had come to recognize that public opinion polls taken from time to time concerning the health and future of the Harbour recorded overwhelming public

support for protecting the Harbour from further encroachment by reclamation.

### *Wanchai North Reclamation*

Through a series of official studies, public consultation exercises and government strategy reports from approximately 1991, the government finally decided on an ambitious five part reclamation and infrastructure works programme for the Central and Wanchai parts of Victoria Harbour. The first three phases have been completed, the last of which was the Hong Kong Convention and Exhibition Centre project. The fourth phase, which consists mainly of road construction, has already commenced. The fifth phase, Wanchai Reclamation Phase 11 is the project challenged by the *Society* ("the Wanchai Reclamation").

The various statutory processes which the Wanchai Reclamation proposal negotiated before reaching the Court of First Instance are largely immaterial for the purposes of this discussion. In short, the Board was required by direction of the government to formulate a draft plan for the layout of the area, a major part of which was still to be created by reclamation. This direction was given under Section 3 of Town Planning Ordinance (Cap.131) which imposes on the Board the responsibility for preparing layout and planning approval plans for land-use in Hong Kong. In this case, the Board was approaching its responsibilities in bizarre circumstances, because in fact a substantial part of the area to be governed by the (proposed) plan did not exist, or did not exist as land.

The *Society* made representations to the Board concerning the draft plan. These and other representations were substantially rejected by the Board. It was the Board's two separate decisions to recommend to the government the draft Wanchai North District Outline Concerning Plan No.S/H25/1 (referred to above) which the *Society* applied to have judicially reviewed.

The Board did not challenge the *Society's locus standi*, nor was there any doubt that the Board's decisions were made by a public administrative body. Therefore, judicial review was the appropriate remedial procedure for the *Society* in

respect of the Board's almost total rejection of the *Society's* representations, including those designed to reduce the proposed area of reclamation.

### *The Decision*

The *Society's* challenge to the Board's decision was based on Section 3 of the Ordinance :-

Section 3 of the PHO provides as follows :-

#### *3.Presumption against reclamation in the harbour*

- (1) *The 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 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.*

Justice Chu said that this section comprises three elements :-

- (i) it declares that the Harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people;
- (ii) it creates a presumption against reclamation; and
- (iii) it obliges all public officers and public bodies to have regard to the declared principle of protecting and preserving the Harbour and the presumption in exercising their powers.

The *Society* argued that Section 3 required the Board to apply three tests when deciding whether or not the Wanchai reclamation should be given the go-ahead :-

- (a) that there is a compelling, overriding and present need for reclamation;
- (b) that there is no alternative to the reclamation;
- (c) that the scale of the proposed Wanchai reclamation be restricted to what is strictly necessary to implement the undertaking.

The undertaking - and therefore the perceived need for Wanchai reclamation - was to provide space for a mix of land uses, such as : roads and infrastructure, commercial complexes, an underground entertainment centre plus a waterfront park and promenade.

The Board argued that the effect of section 3 was that the presumption became one of several material considerations the Board must take into account when exercising its powers in relation to reclamation of the Harbour. That is to say, provided the Board gave proper regard to the presumption against reclamation, but still considered that there were other public benefits from the proposal overriding the presumption, section 3 of the Ordinance had been satisfied.

In agreeing with the Society, Justice Chu ruled that :-

- (a) the Ordinance was enacted with the objective of preserving and protecting the Harbour against reclamation;
- (b) that objective is enshrined in section 3 and by the creation of the presumption against reclamation;
- (c) the Board - as a public body - is therefore by law bound to try to do everything to fulfil that objective when deliberating a matter involving the protection reclamation of the Harbour;
- (d) thus, the Board therefore was required “to give proper consideration to the need to preserve and protect the Harbour as a special public asset and natural heritage of Hong Kong people as well as the presumption against resumption”;
- (e) in order to give recognition to the presumption, “it must be shown that there are material considerations justifying a departure from the requirement to protect the Harbour”. This must be “a public interest so overwhelming as to override the duty to protect and preserve”. There must be a compelling and overriding need for reclamation, not just something that is desirable.

The Court went further, ruling that (a) the duty to fulfill the objective of preservation of the Harbour and (b) the presumption imposed by section 3 against reclamation - two separate concepts - “should form the basic tenets or starting point” in the decision-making process. That is, the duty and the presumption are not simply one or two of the several material considerations for the Board to take into account.

The Court also disagreed with the Board’s argument that there were public benefits to be derived from the Wanchai Reclamation which outweighed the public benefit of preservation of the Harbour. The judge ruled that section 3(1) requires an “element of objectivity”. It is not perceived public benefit which is the criterion, but rather public need. Beneficial development might not always be an essential need for the community. There must be stronger priorities to rebut the

*The Society’s interpretation required that the presumption be the major premise of the Board’s decision - making process...*

presumption in favour of preservation, that is, there must be an objectively demonstrated public need which the decision-maker considers overrides the public need of preserving what is left of Victoria Harbour.

Justice Chu reinforced her interpretation of section 3 by reference to the principle of sustainable development, which has also been endorsed by the Board in public policy statements. Sustainable development, the judge said, requires that a development must meet the needs of the present without compromising the ability of future generations to meet their own needs. It must follow, therefore, that any “attempt to deplete what may be regarded as a natural heritage, has to be justified by compelling and overriding public need”. This is refreshingly clear and robust

judicial language not usually seen in the development versus conservation debate in Hong Kong.

As to whether there is a reasonable alternative to reclamation, the Court said that an alternative “will not be a viable one if it involves incurring costs or paying a price that is disproportionate to the harm of carrying out the proposed reclamation?”

The *Society* also argued that Hong Kong people were entitled on constitutional grounds to expect that the Board would uphold the presumption against reclamation when deliberating the Wanchai Reclamation. The constitutional argument (which the Quarterly has made the subject of a previous article) reflects a body of recent jurisprudence in various common law jurisdictions which identifies and uphold a broad right of the individual to a safe and health environment; e.g. various progressive decisions from the Supreme Court of India, one of which was cited by Justice Chu. However, the judge considered she did not need to decide this point in reference to section 3 of the Ordinance.

The judgment explored more fully the Board’s “unreasonableness” and “irrationality” in respect of different components of the Wanchai Reclamation proposal, which we do not attempt to examine here. In doing so, the Court noted that the Board appeared to have adopted the approach that the fact that it considered there was at least one component of the proposal which could be justified in the context of section 3 would suffice to justify additional reclamation for other purposes which could all be combined and included in the same plan. The Court emphasised that section 3 of the Ordinance required that any reclamation project must be justified on its own merits. The test to be applied for this under section 3 is that the proposed reclamation:-

- (a) fulfills a compelling, overriding and the present need (i.e. public need);
- (b) has no viable alternative; and
- (c) will cause minimum impairment to the Harbour.



The Court held, in short, that the Board did not correctly interpret its role under section 3, relying instead on erroneous advice from the Department of Justice (to the effect that the presumption against preservation was only one of several material considerations to be taken into account). Accordingly, the Draft OZP approval was referred back to the Board to be reconsidered “in accordance with law.”

This judgment (which is subject to appeal) encourages us to think that an affirmative answer might now be given to the question in the title of the main article in the April 1999 edition of the Quarterly: *Victoria Harbour : Will a legal presumption ensure its survival?*”

In concluding, we publish below the major portion of a letter received from the eminent Harbour crusader, Winston Chu, regarding this judgment and the past and continuing work of the Society :-

*Dear Editors,*

*I am pleased to refer to your letter to me dated 4th June 1999 enclosing a copy of the Urban Planning and Environmental Law Quarterly published by your firm with the article “Victoria Harbour : Will a Legal Presumption Ensure Its Survival?”*

*Since the enactment of the Ordinance in 1997, our Society has been conducting a running battle with the Government over the proper interpretation of the Protection of the Harbour Ordinance, in particular the statutory presumption created by Section 3. The legal interpretation proposed by our Society was set out in various legal submissions sent to the Government and the Town Planning Board including the enclosed article published in Volume 32, 2002 of the Hong Kong Law Journal.*

*In the article, I advocated the following four tests, all of which must be satisfied before reclamation can proceed :-*

- 1. It must be for the public benefit;*
- 2. It must be essential;*
- 3. It must not be excessive; and*
- 4. There must be no reasonable alternative.*

*The matter finally received a judicial*

*pronouncement by the Judgment of Madam Justice Chu handed down on 8th July 2003 in the judicial review proceedings issued by our Society against the Town Planning Board. According to our reading of the Judgment, it appears that Madam Justice Chu agreed substantially with our interpretation of the Ordinance. You will note that the Learned Judge prescribed the following three tests :-*

- 1. Compelling overriding and present need;*
- 2. No viable alternative;*
- 3. Minimum impairment to the Harbour.*

*We have just been approached by the Department of Justice with a request to us to consent to their proposal to appeal the Judgment directly to the Court of Final Appeal, to which we have given our consent. We therefore hope that a final adjudication upon this matter will be made by the Court of Final Appeal within the near future.*

*Finally we refer to the last paragraph of your article which made the recommendation that “a specialist tribunal, not the government [should determine reclamation proposals under the Ordinance] and ordinary citizens should be given rights of representation and appeal in respect of its proceedings”. We have been advocating this idea to the Government for some years, but up to now without success.*

*We wrote to the Chief Executive-in-Council on 15th July 2003 again suggesting that the Government should establish “a Harbour Authority similar to the Sydney Harbour Development Authority to review the present reclamation proposals and to oversee future development of the Harbour and its waterfront”.*

*I hope that you will continue to support our efforts to seek to protect and preserve Victoria Harbour as a special public asset and a natural heritage of Hong Kong people not only for the benefit of ourselves but also for future generations.*

*Yours sincerely,*

*Winston K.S. Chu  
Director*

We emphatically agree!

**[See generally : Winston K.S. Chu, “Legal control of Harbour reclamation” in 32 Hong Kong Law Journal pp. 259-269 (2002)]**

## LEGISLATION DIGEST

### AIR POLLUTION CONTROL (VEHICLE DESIGN STANDS) (EMISSION) (AMENDMENT) REGULATION 2003

(Made under section 43 of the Air Pollution Control Ordinance (Cap 311) after consultation with the Advisory Council on the Environment)[This Regulation will come into operation on 1 August 2003]

Four purposes of the amendments of this Regulation are:-

- (i) to provide vehicle design stands regarding the emission of air pollutants by light buses which are first registered on or after 1 August 2003, are equipped with a positive-ignition engine and are constructed to operate on liquefied petroleum gas only;
- (ii) to authorise light buses which are first registered on or after 1 August 2003 and equipped with a positive-ignition engine to operate on liquefied petroleum gas;
- (iii) to exempt light buses which are first registered on or after 1 August 2003 and are constructed to operate only on liquefied petroleum gas from the requirement to be equipped with an on-board diagnostic system; and
- (iii) to apply more severe vehicle design standards in relation to the emission of air pollutants on the following motor vehicles which are first registered on or after 1 August 2003:-
  - (a) light buses which are operated by a compression-ignition engine and have a design weight more than 3.5 tonnes but less than 4 tonnes;
  - (b) motor vehicles which are fitted with a positive-ignition engine and have a design weight of more than 3.5 tonnes; and
  - (c) taxis which are constructed to operate on liquefied petroleum gas only.

## AIR POLLUTION CONTROL (EMISSION REDUCTION DEVICES FOR VEHICLES) REGULATION

(Made under section 43 of the Air Pollution control Ordinance (Cap. 311) after consultation with the Advisory Council on the Environment)[This Regulation shall come into operation on 1 December 2003]

The Regulation requires diesel light vehicles first registered before European Union emission standards were imposed to reduce the emission of air pollutants. Relevant details of this Regulation are as follows:-

### Section 3: Application

- (1) This Regulation applies to the classes of motor vehicle specified in Schedule 1.
- (2) This Regulation does not apply to a special purpose vehicle.
- (3) The Authority may in writing exempt any motor vehicle or class of motor vehicles from any provision of this Regulation or any part thereof if the Authority considers that there is no appropriate emission reduction device available for that motor vehicle or class of motor vehicles or that it would be in the public interest to do so.
- (4) An exemption granted by the Authority to a class of motor vehicles shall be by notice published in the Gazette.

### Section 4: Installation of approved emission reduction device

- (1) The registered owner of a motor vehicle to which this Regulation applies shall cause-
  - (a) an approved emission reduction device to be installed and kept installed on the motor vehicle;
  - (b) the device to be kept in good working condition; and
  - (c) the device to be replaced if it is no longer in good working condition.
- (2) An approved emission reduction device installed on a motor vehicle pursuant to this Regulation shall not be modified, adapted or altered.

### Section 5: Register of approved emission reduction devices

- (1) The Authority shall maintain a register of all emission reduction devices approved by the Authority.
- (2) A copy of the register shall be kept at the head office and at appropriate local offices of the Environmental Protection Department.
- (3) Any person is entitled, without charge, to inspect a copy of the register during normal business hours.

### Section 6: Approval of emission reduction devices

- (1) An emission reduction device is approved for the purposes of this Regulation if it is listed in the register.
- (2) The Authority may include in the register an emission reduction device only if he is satisfied that-
  - (a) the device can reduce the emission of air pollutants from a motor vehicle to which this Regulation applies in a manner and to an extent satisfactory to the Authority;
  - (b) the device is suitable for installation on a motor vehicle to which this Regulation applies; and
  - (c) if the device is to be installed on a motor vehicle of a class specified in column 1 of Schedule 2, the device is of a type specified opposite that class in column 2 of Schedule 2.
- (3) If the Authority proposes to delete an approved emission reduction device from the register, he must give notice of the fact in the register at least 28 days beforehand, but may give a shorter period of notice, or no notice, if he considers it necessary in the public interest.

### Section 7: Examination of motor vehicles

- (1) If the Authority reasonably suspects that-
  - (a) a motor vehicle to which this Regulation applies has not been installed with an approved emission reduction device in good working condition; or

- (b) the approved emission reduction device installed on the motor vehicle has been modified, adapted or altered, the Authority may by written notice require the registered owner of the motor vehicle to produce the motor vehicle for examination at a date, time and place specified in the notice.
- (2) The date, time and place specified in a notice under subsection (1) must be such as to give the registered owner a reasonable opportunity for compliance.
- (3) A motor vehicle produced pursuant to subsection (1) may be detained by the Authority for a period not exceeding 8 hours.

### Section 8: Conduct of examination

- (1) A motor vehicle produced pursuant to section 7(1) may be examined by the Authority.
- (2) A person carrying out an examination of a motor vehicle may carry out or cause to be carried out such inspection, examination or test of the motor vehicle, any part of the motor vehicle, any accessory affixed to the motor vehicle and any equipment or part of the equipment of the motor vehicle as he requires in order to ascertain whether-
  - (a) the motor vehicle has been installed with an approved emission reduction device in good working condition; or
  - (b) the device has been modified, adapted or altered.

### Section 9: Consequence of non-compliance

- (1) If section 4 is not complied with in respect of a motor vehicle, the Commissioner for Transport, in exercise of his power under section 25(1) of the Road Traffic Ordinance (Cap 374):-
  - (a) may refuse to license the motor vehicle; or
  - (b) may cancel the licence of the motor vehicle.
- (2) A registered owner of a motor vehicle who fails to comply with a written notice issued by the Authority under section 7(1) commits an offence and is liable to a fine at level 2.

## Section 10: Saving of other regulations

This Regulation is in addition to, and not in substitution for, the provisions of the Road Traffic (Construction and Maintenance of Vehicles) Regulations (Cap 374 sub. leg. A).

## HONG KONG BRIEFING

### *Plan for a religious theme park is withdrawn - a victory for the environment*

A developer has withdrawn a controversial plan to transfer the disused Fat Wah Temple from Sha Tin and set it up as the centrepiece of a 25,000 square meters complex between the villages of Uk Tau and Ko Tong. In addition to the small temple, the proposal included provision for concreted parking spaces for 60 tour coaches and a large number of cars, plus restaurants and retail outlets.

The plan was reviewed by relevant government departments, although a similar application was rejected in 2002 because the development was not compatible with the surrounding rural and natural environment of the country park. Residents petitioned the government to reject the plan, claiming that a tourism complex might transform their rural tranquillity into a “nightmare” like Ngong Ping on Lantau. Residents expressed their concern that Hong Kong is in danger of destroying a valuable community asset by mismanaging its country parks. Points they made include:-

1. The Hong Kong government purports to support conservation and sustainable development. However, the government appears to bend over backwards to accommodate the interests of developers as soon as they express interest in a part of a country park.
2. Building and construction are rarely undertaken in an environmentally sensitive way. Environmental impact studies are rarely commissioned, and even when they are completed, their results are often ignored.
3. Unnecessary destruction of natural bush, use of visually offensive designs and materials, and large amounts of construction waste left behind are symptoms of other approved developments.

The Chairman of the Tai Po Environmental Association said that the plan’s withdrawal was a victory for common sense.

Friends of the Earth director, Mei Ng, said environmental protection demanded a genuine sense of civic duty and unwavering will-power.

[6 May 2003, SCMP]

### *China’s deal on Kyoto Protocol to include Hong Kong*

China has agreed to extend the United Nations Framework Convention on Climate Change and the Kyoto Protocol to include Hong Kong. The Protocol covers the emission of greenhouse gases, which are responsible for major environmental problems, such as rising sea levels and long-term climate change.

The decision follows China’s announcement at the Johannesburg Earth Summit last year that it would ratify the Kyoto Protocol. Since then, discussions have been held between Hong Kong and mainland officials concerning its implementation.

Details of how the Kyoto Protocol will be applied to Hong Kong are still being worked out, but Hong Kong’s obligations will be the same as those of the mainland, which has signed up as a “developing country”. This means Hong Kong will not face mandatory requirements to reduce greenhouse gases, but it will be encouraged to adopt voluntary measures.

There is no timetable for the implementation of the Protocol in Hong Kong, and it is understood the government does not intend to implement it by means of domestic legislation. The Environment, Transport and Works Bureau said it would make strenuous efforts to control greenhouse gas emissions in Hong Kong. However, no voluntary reduction targets will be set until more studies had been conducted on their likely economic and social impacts.

“Deriving a meaningful and feasible greenhouse gas target is not an easy task. A control target will have far-reaching economic and social implications. However, our commitment to reducing the emissions is strong and unambiguous,” the Bureau said.

Hong Kong generated about 40.3 million tonnes of greenhouse gases in 2001, accounting for about 1 per cent of China’s total. The emissions, half of which are carbon dioxide, have been fluctuating over the past decade depending on the growth of energy demand and pace of factory relocations across the border. The government expects that emission levels will rise in the next decade and measures are being considered to address this.

[29 May 2003, SCMP]

### *Hong Kong’s waste problem*

The government has identified six possible ways for Hong Kong to handle its mounting waste problem. The methods were chosen from a list of proposals submitted by multinational waste-treatment operators last year, which include incineration and newer technology, such as a biological breakdown and gasification.

The shortlist takes the government a step closer to its goal of having large-scale waste treatment facilities ready by 2008. Environmental officials said such facilities were desperately needed because waste recovery and recycling alone could not solve the waste problem. Hong Kong now dumps a daily average of 21,158 tonnes of waste in the landfills, 25 per cent more than in 2001. Landfill sites will reach their capacity within 10 to 15 years.

One possible solution is to build incinerators. CH2M HILL, an environmental consultancy, was commissioned by Green Island Cement Ltd to produce an environmental assessment of that company’s controversial plan to produce cement by incinerating waste. If the project is permitted to go ahead, it will mean the return of large-scale waste incineration to Hong Kong, following the closure of facilities in 1993 and 1997.

It is a public concern that incinerators pumping out carcinogens will bring serious health problems to Hong Kong. A US Environmental Protection Agency report suggests that dioxins generated by waste incinerators could account for up to 10 per cent of cancers globally. Those living near waste-burning facilities appear to suffer increased cancer rates, respiratory ailments and reproductive abnormalities.



The Hong Kong government has denied there is a significant health risk from incinerators and has been backed on this issue by a string of environmental assessments. It claims the new breed of incinerator plants are designed to be extremely clean and are environmentally friendly. Secretary for Environment, Transport and Works has said that incineration is the most practical environmental option to overcome our mounting waste problem.

However, incinerators have been causing widespread concern and growing opposition worldwide because of the health risks associated with them. No matter how the statistics are presented by those trying to rescue their dying industry, the reality is that incineration will never be a solution, but rather only part of the problem.

[16 June 2003, SCMP]

### *Electrical and electronic waste recycling programme*

Hong Kong has set up a 140 square metres pilot recycling facility at the North West New Territories refuse transfer station to recycle electrical appliances collected from refuse collection points and housing estates in Tuen Mun and Yuen Long. The scheme covers all electrical and electronic household appliances and provides for the recycling of reusable or saleable parts, such as steel sheets, copper pipes, electric motors, compressors and plastics. Currently, about 150 electrical and electronic appliances are processed every month.

The Environmental Protection Department intends to extend this materials-recovery initiative to cover all districts under a territory-wide pilot programme launched in January 2003. Under this programme, appliances in good working condition will be repaired and donated to the needy, or sold to aid programme funding. Reusable materials from appliances beyond repair will be recycled. The trial will provide the Department with essential information for evaluating the logistics and proposed outlets for dismantling and recovery of components processes.

[April 2003, *Waste Reduction Committee, Hong Kong.*]

### *GM labelling*

The issue of the labelling of genetically modified (GM) food was debated again in the Legislative Council meeting on 26 June 2003. Fred Li Wah-ming, chairman of the panel on food safety and environmental hygiene, proposed a motion to establish a GM food-labelling system for pre-packaged products as soon as possible by adopting a “voluntary first and then mandatory approach”. His motion was approved by a majority of 27 to 8 votes, with one abstention. On the same issue, Selina Chow Liang Shuk-ye, representing the wholesale and retail sector, proposed an amendment in favour of a voluntary system. Her proposal was, however, rejected.

During the meeting the Secretary for Health, Welfare and Food reiterated the government’s support for a voluntary system, supplemented by pre-market assessments. He said the food-trading industry would need to spend an estimated \$16 million to \$91 million in order to implement the GM-labelling system. The adoption of a voluntary system could possibly strike a balance between protecting public health without adding extra financial burden for the industry.

The Secretary commented that Dr. Yeoh focused only on public health but ignored the issue of consumer rights. He claimed that it was highly unlikely that food traders would voluntarily provide such labelling and consequently the consumers would be deprived of their right to make an informed choice. By implementing a “voluntarily first and then mandatory approach”, consumers’ rights could be protected while there should be enough time for the food industry to make the necessary adjustments.

Greenpeace pointed out that more than 35 countries have introduced a mandatory labelling system. The head of the Consumer Council’s research and survey division, expressed concern that Hong Kong lagged behind other

countries on this issue. Recent tests showed that between 30 and 40 percent of food sold in Hong Kong contained GM food. However, none was labelled accordingly.

[SCMP, 23 June 2003 & 27 Jun 2003]

### *Marine life centre impact study*

Local residents have supported a move to conduct a retrospective environmental impact assessment (EIA) of a new marine life centre built by the World Wide Fund for Nature Hong Kong (WWF) at Hoi Ha Wan. Prior to the development of the marine centre, an environmental review carried out for the marine centre in 1995 concluded that a full EIA was not required. The proposed development was also approved by the Country and Marine Parks Authority in March 1998.

WWF Hong Kong’s executive director said Hoi Ha Wan provided an excellent outdoor setting to demonstrate marine heritage to students and the general public. WWF and Hongkong Post launched the Hoi Ha Wan Marine Life Centre Souvenir Pack and Hong Kong Hoi Ha Wan Marine Park Prestige Stamp Booklet on 10 May 2003. Proceeds from the sale of stamps and souvenir sets will help to support the fitting out of the centre, which has cost \$52 million to establish.

Residents of Hoi Ha Wan, however, fear that the launch of a set of stamps and souvenir packs - which are designed to raise awareness of the centre - will add to the public pressure on the Hoi Ha Wan marine reserve, which is located within the Sai Kung West Country Park. Some residents have expressed concerns that the additional publicity will increase significantly visitor numbers. The centre already attracts thousands of weekend visitors. According to residents, visitor numbers to the secluded bayside village have soared in recent months. Those who have voiced these concerns understand that publicity is one way of raising awareness of the environment, but the WWF has to make sure that the increased traffic into Hoi Ha Wan can be managed to prevent damage to the environment.

Dr. Gordon Maxwell, an assistant professor in environmental studies at the Open University of Hong Kong, said that in light of the level of awareness at the time, and the fact that the developer was a large environmental group, he would have expected the WWF to be fastidious in its assessment of potential threats to the health of the fragile ecology of the area where the centre is located. However, the environmental review prepared by WWF for the government fell far short of the mark. No mention was made of basic EIA issues, such as environmental benefits versus the adverse impacts from visitors' activities; effects on the local community; and potential adverse impacts during construction and operation. Apart from that, Dr. Maxwell believes that the EIA might provide a solution to the stand-off between residents and the WWF over issues such as heavy traffic and other impacts from thousands of visitors.

[SCMP, 10 May 2003 & 2 Jun 2003]

## HONG KONG DISNEYLAND UPDATE

*Officials avoid pollution issue, says green group chief*

Environmental officials were accused of playing a "nasty game" by using an on-going legal battle with a shipyard that the government is demolishing to make way for the Disney theme park as an excuse for not discussing land contamination policy issues. Friends of the Earth director Mei Ng Fong Siu-mei said at a meeting of the Advisory Council on the Environment that she wanted to discuss the need for a law to make polluters pay for the contamination they caused, but found herself facing a brick wall.

Mrs Ng, who is a member of the Council, raised the topic in the wake of the discovery of 30,000 cubic metres of dioxin-contaminated soil at Cheoy Lee shipyard in Penny's Bay, Lantau, which the government is demolishing to build access roads to the future Disneyland.

The discovery led to a surge in the decommissioning cost of the shipyard from the original estimate of \$22 million to \$450 million, including \$350 million in decontamination costs.

Mrs Ng's group has been pressing the government for an answer as to whether the former shipyard operator will be asked to share the cost, but officials keep saying they are still seeking advice concerning a current legal case with Cheoy Lee.

Mrs Ng said she was disappointed to find that officials from the Environmental Protection Department yesterday refused to discuss either the matter itself or general land contamination policies, citing the same excuse.

"I'm very disappointed. This is a very nasty game. I hope the government will stop hiding or we may never be able to find out the truth even after the theme park is open," Mrs Ng said.

Friends of the Earth last month filed a complaint with the Audit Commission, urging it to investigate whether the government had misused public money in the handling of the shipyard saga by failing to assess the contamination problem before selecting the site.

[15th July 2003, SCMP]

## ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

*Report on the 78th Environmental Impact Assessment Subcommittee Meeting*

At the meeting held on 29th April 2003, the Environmental Impact Assessment (EIA) Subcommittee considered the EIA report on the Tung Chung Cable Car project proposal. The proposal was first included in the North Lantau Development Study in 1992 and was further developed through the Visitor and Tourism Study for Hong Kong. It aims to enhance tourism in Ngong Ping on Lantau Island.

The project involves a cable car system which will connect terminals at Tung Chung and Ngong Ping. The project is a designated project under item Q1, Schedule 2 of the EIA Ordinance requiring a full environmental impact assessment. Construction of the project will start this year and will be completed in 2005.

One of the members expressed concerns that the overall cumulative impacts of

various development projects in Ngong Ping, which is an ecologically important area. However, the project proponent team explained that assessments of the cumulative impacts were carried out in accordance with the study brief and all requirements had been complied with. Initial assessments of impacts of construction activities in respect of noise, dust, etc. were conducted and detailed assessments were then made of the cumulative effects of those impacts. A series of mitigation measures to address the impacts would be put in place. The proponent was also aware of other planned projects in Ngong Ping, such as the Sewage Treatment Work, and had considered its impacts together with impacts of the present project in terms of protection measures and having regard to the precautionary principle. In view of its dual role as the project proponent as well as the operator of the Cable Car System for the next 30 years, the MTRC stated it will try its best to maintain the existing ecology of the project area as far as practicable and to make the built environment more conducive to wildlife.

Another member expressed concerns about the impacts on the ecology of Ngong Ping caused by the increasing number of tourists going there. The proponent pointed out that at present there were about 1.2 million visitors travelling to Ngong Ping by bus each year and the number is expected to increase to 1.4 million within five years. The project proponent maintained it was very conscious about excessive development in Ngong Ping and had in fact turned down a request from the Tourism Commission to examine the feasibility of a mountain bike path through the country park.

In order to reduce adverse impacts on the environment by its construction work, the proponent will use the bi-cable system which requires fewer supporting towers compared with another cable system, the Funitel system, used in constructing Ocean Park. Whilst the Funitel system would have required about 20 supporting towers, the bi-cable system will require only eight. The proponent pointed out that the contractors, which were appointed on a target-cost basis, would work out detailed plans together with the design team to reduce safety risks as well as risks to the environment.



Concerning compensatory planting, the proponent advised that in consultation with experts and Kadoorie Farm, plant species which would attract wild life, such as butterflies and other kinds of fauna, would be planted. The location of the two sites for compensatory planting has been chosen on the basis of expert advice and the availability of the sites.

The members' discussion at the meeting focused on all the environmental issues in order to decide if the Tung Chung Cable Car project should be endorsed or not.

(<http://www.info.gov.hk/etwb>), May, 2003

## TOWN PLANNING

### *Hong Kong Planning Standards and Guidelines revised*

The Planning Department has revised Chapter 8 of the Hong Kong Planning Standards and Guidelines ("HKPSG"), which concerns internal transport facilities, to incorporate new planning standards and guidelines for parking and cycling.

The revisions are based on recommendations of the recently completed Second Parking Demand Study commissioned by the Transport Department. The revised Chapter 8 can be seen on the Planning Department's website at <http://www.info.gov.hk/planning>. The recommendations of the Second Parking Demand Study are available on the Transport Department's website at <http://www.info.gov.hk/td>.

New parking standards for residential developments have been adopted in line with global parking standards applicable to both private and public housing estates. The government also said that it has taken into account adjustment factors regarding the demographics of car ownership and proximity to public transport. The new standards should enable more flexibility in setting parking requirements. The revised Chapter 8 also applies to coach parking, liquefied petroleum gas-powered vehicle parking and parking for persons with disabilities.

Other modifications affect parking standards for industrial complexes, the provision of ratio of loading/unloading

spaces for light goods vehicles and heavy goods vehicles in commercial facilities, and standards for motorcycle parking spaces. There are new parking standards for "business" development and new bicycle parking guidelines as well.

The HKPSG, which sets out the criteria for determining the scale, location and site requirements of various land uses, is applied in planning studies, the preparation and revision of town plans and development control plans and guidelines.

[[http://www.info.gov.hk/planning/index\\_e.htm](http://www.info.gov.hk/planning/index_e.htm), June 2003]

### *Town Planning (Amendment) Bill 2003*

The Town Planning (Amendment) Bill 2003 (the "Amendment Bill") will be introduced into the Legislative Council ("LegCo") following its gazetting on 9 May 2003. According to the government, it aims at streamlining and expediting the town planning process, enhancing the transparency of the planning system and strengthening enforcement control of unauthorised developments in rural areas.

A spokesman for the Housing, Planning and Lands Bureau said that the government would speed up the process for enacting statutory plans by standardising the exhibition period of new and amendment plans to one month for the public to submit representations, and by shortening the period for considering representations from the current nine months to six months.

To ensure there was sufficient time for the public to respond to the proposals in the plan, the government would allow another four weeks on expiry of the plan exhibition period for representors to submit further information in support of their representations.

The Amendment Bill also includes proposals to exempt certain minor amendments to planning approvals from further application, and to allow for further delegation of the Town Planning Board's powers and functions to its committees and public officer.

To enhance the transparency of the planning system an applicant for amendment of a plan or for planning approval will be required to notify and

obtain the consent of the land owner of the application site. The Town Planning Board will also be required to publish all applications for amendment of plans and for planning approvals for public comment by posting site notices or publishing appropriate notices in newspapers.

The Amendment Bill also includes provisions to improve the efficiency and effectiveness of planning enforcement controls of unauthorised developments in the rural New Territories (which have been a major planning and environmental problem in recent years).

The government previously introduced a Town Planning Bill into LegCo in 2000. That Bill envisaged an overhaul of the statutory planning system. Due to the diversity and complexity of the issues involved, the then Bills Committee was not able to complete consideration of the Bill before the last term of LegCo ended in July 2000. The 2003 Bill is the government's fresh attempt at town planning reform.

The government has decided to adopt a phased approach to bring forth firstly, the less controversial proposals which have clear and immediate benefits to the community and thus greater public acceptance. The Amendment Bill includes there first stage amendments to the Town Planning Ordinance.

[[http://www.info.gov.hk/planning/index\\_e.htm](http://www.info.gov.hk/planning/index_e.htm), June 2003]

## REGIONAL & INTERNATIONAL

### *U.N. treaty regulating biotech crops to become law*

An international treaty that seeks to protect the environment from the potential risks of Genetically Modified (GM) organisms will officially become effective in 90 days from 13 June 2003, on 11 September 2003.

The United Nations treaty, known as the Cartagena Protocol on Biosafety, or Biosafety Protocol, was first discussed in 1992. The treaty had to be ratified by fifty countries before entering into force 90 days later. This took more than ten years to achieve. The 50th ratification, by the Pacific island state of Palau, was announced on 13 June 2003.

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This is the first treaty which seeks to protect biological diversity from potential risks posed by genetically modified organisms. It is also the first international agreement which clearly acknowledges that Genetically Modified Organisms (GMOs) are different and therefore require a different treatment. The Protocol will require all exporters of GMOs which are to be released into the environment to take measures to prevent contamination of GM seed products by implementing an identity preservation system.

However, many issues remain unresolved by the international community. One key issue is liability for damage caused by the escape of GMOs. An effective liability mechanism under the Protocol is essential in order to ensure that corporations which harm the environment, for instance through contamination by GM crops, pay for the environmental harm they cause. Enacting stricter national legislation on biosafety is also necessary.

The *Biosafety Protocol* backs the approach of the European Union, which has determined that GMOs need different regulatory treatment from non-GMOs. Therefore, the Protocol stands in contradiction to policies held by some countries, such as the United States., which assert that GMOs are not different from the conventional plants and animals they were derived from.

The Chairman of Friends of the Earth International welcomed the news that the Protocol will now come into force, and said that the treaty would help to end the uncontrolled trade of GMOs. He also said that the Biosafety Protocol had set a new era for global regulation of GMOs, and exporters from all over the world will have to take adequate measures to prevent contamination of GM seed products.

[Friends of the Earth, press release, 13 June 2003]

### Nokia and WWF begin environmental cooperation worldwide

By signing an agreement for an initial term of three years, Nokia and WWF will cooperate in conducting training workshops and seminars on environmental issues for Nokia employees and in facilitating active dialogue and exchange on environmental issues.

Nokia and WWF will implement a number of activities enabling Nokia employees around the world to learn more about environmental matters. They will launch a series of discussions with stakeholders and implement a new learning initiative for Nokia employees around the world.

Nokia's Executive Vice President stated that he believed this project could help to integrate environmental thinking into every aspect of his company's life and should improve the company's environmental performance. He welcomed this cooperation with WWF as a way of engaging their employees directly in learning more about nature and the environment.

The Director General of WWF International also viewed this as an opportunity to fulfil their aim to mobilize the highest possible number of companies and industries to protect biodiversity. "With Nokia, we are associating ourselves with a world leader which takes the environment seriously. Engaging with Nokia people around the world will be a good learning experience, allowing Nokia and WWF to learn from each other, ultimately helping both organizations to achieve their mission," he said.

[WWF, press release, 18 Jun 2003]

### Increased area near Zhejiang included in annual fishing ban

The annual three-month fishing ban in waters near Zhejiang will begin in June. The ban protects ocean fish stocks during the critical summer breeding season, according to the China Daily. The annual ban was first introduced in 1995.

The ban this year will affect 46,000 additional fishing boats, which makes the total number of boats subject to the ban stands at 180,000. An official from State Fisheries Bureau of the Ministry of Agriculture said the newly affected boats came mainly from the East China Sea, Yellow Sea, Bohai Sea and South China Sea as a result of a decision to

expand the geographical area of the ban to include more of the East China Sea region near Zhejiang. The ban has been welcomed by most fishermen because they understand that it will help to increase their catches in later seasons.

As the world's marine life comes under pressure from over-fishing, the mainland's fishing practices and its reporting of catches have been under increasing international scrutiny. Several researchers have raised queries on the mainland's report of fish catches. As the mainland accounts for about 15 per cent of the global harvest, an accurate figure of its annual catch is essential for effective international fish stocks management.

In 2001, researchers at the University of British Columbia Fisheries Centre in Canada said the mainland had over-reported its annual fish catch, masking a serious decline in global stocks. Researchers Daniel Pauly and Reg Watson said that while the Chinese government had reported that its catches during the 1990s were increasing by 315 million kg of fish per year, the catch was actually decreasing by nearly 360 million kg annually, due to a depletion of stock. Chinese fisheries officials denied the allegations, saying their figures were accurate.

[SCMP, 8 May 2003]

### Illegal timber exports from Indonesia

Indonesia is failing to halt the destruction of its rain forests by not banning export of ramin, an endangered tropical timber. The Britain based Environmental Investigation Agency (EIA) recently condemned Malaysia and Singapore for "laundering" millions of dollars worth of timber which has been illegally logged from Indonesia's endangered forests.

The EIA conducted an undercover investigation together with an Indonesia environmental group, Telapak, which discovered dozens of ships and trucks smuggling illegally logged timber from Indonesia's Kalimantan region in Borneo and Sumatra to neighbouring Sabah and Sarawak in Malaysia. The EIA has stated that much of the smuggling is conducted openly and with the knowledge of Malaysian authorities. According to Indonesian authorities at Entikong, a poorly manned border point between west Kalimantan and Sarawak, at least 100 trucks loaded with logs pass every day. The EIA also said that little effort has been made by the Malaysian authorities to stop the trade.

In the case of Singapore, Telapak investigators carrying a hidden video camera posed as timber buyers when they interviewed a Singaporean timber merchant who boasted of importing ramin from Sumatra using a permit specifying another timber species. The trader also used the permit to import 500 tonnes rather than the limit of 100 tonnes specified in the permit.

Telapak has revealed that the illegally acquired timber was laundered and legalised in Malaysia and Singapore. These countries

then exported the timber to Europe, China and the USA with customs' approval.

Telapak also has alleged that much of Malaysia's annual US\$2.5 billion (HK\$18.7 billion) timber exports and its US\$1 billion-a-year furniture trade involved the use of illegally logged timber. Between 2001 and 2002 Singapore exported US\$3 million worth of ramin, which lacked proper permits, to the USA, according to USA Customs declarations.

The Chinese mainland has become a major market for smuggled Indonesian timber, much of which is suspected of being manipulated by Singaporean businesses. However, the mainland has taken steps to stop the trade. One boatload of timber logged illegally in Papua was seized recently by Chinese authorities, according to the EIA. An estimated 80 per cent of timber processed in Indonesia is illegally logged, much of it from virgin forests and national parks.

[SCMP, 9 May 2003]

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:

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**Convictions under environmental legislation: April - June 2003**

The EPD's summary of conviction recorded and fines imposed during the period April to June 2003 is as follows:

*April 2003*

Forty-five convicted pollution cases recorded in April  
Forty-five convictions were recorded in April 2003 for breach of anti-pollution legislation enforced by the Environmental Protection Department.

Among them, 16 were convictions under the Air Pollution Control Ordinance, 12 under the Waste Disposal Ordinance, 10 under the Noise Control Ordinance and seven under the Water Pollution Control Ordinance.

One company was hit with two fines of \$30,000 each — the heaviest fine for April — for carrying out prescribed construction works and for using powered mechanical equipment without a valid construction noise permit.

Another company was also fined \$30,000 for using powered mechanical equipment in breach of the conditions of a construction noise permit.

*May 2003*

31 convicted pollution cases recorded in May  
A total of 31 convictions were recorded in May 2003 for breaching anti-pollution legislation enforced by the Environmental Protection Department.

Among them, nine were convictions made under the Air Pollution Control Ordinance, eight under the Waste Disposal Ordinance, eight under the Water Pollution Control Ordinance, five under the Noise Control Ordinance and one under the Dumping at Sea Ordinance.

The heaviest fine in May was \$75,000, assessed against a company that exported controlled waste without a permit.

*June 2003*

37 pollution convictions recorded in June  
Thirty-seven convictions were recorded in June for breach of anti-pollution legislation enforced by the Environmental Protection Department.

Among them, 21 were convictions under the Waste Disposal Ordinance, 11 under the Air Pollution Control Ordinance, four under the Noise Control Ordinance and one under the Water Pollution Control Ordinance.

The heaviest fine was \$50,000, levied against a company that used powered mechanical equipment not in accordance with the conditions of a construction noise permit.

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