

URBAN PLANNING AND
**ENVIRONMENTAL
 LAW REPORT**

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In this issue we feature a report on recent developments in Hong Kong's environmental legislation which give rise to personal liability for environmental offenses. Responding to the failure of existing penalties to deter polluters, the Government has not only increased fines but has also introduced imprisonment for environmental offenses as well as making company officers personally liable to both fines and imprisonment for wilful misconduct or neglect. In this way Hong Kong's environmental law is fast becoming more comparable to stricter European, North American and Australian practices where the role of the legal advisor to assist the corporation to plan, audit and defend compliance with environmental legislation has become standard practice.

The *Digest of Legislation* examines the recently gazetted *Air Pollution Control (Amendment) Ordinance* which introduces a new regime for the control and abatement of asbestos in premises throughout Hong Kong. The new ordinance also introduces the use of technical memoranda to control air pollution from stationary sources and makes some important revisions to legal liability and penalties.

The International section our United Kingdom correspondents report on why the contaminated lands registration system has been abandoned and what is to replace it.

So as better to reflect our *Report's* bimonthly character, this issue is labelled 'March-April' and for the convenience of readers future issues will be similarly labelled.

The Editors

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Personal Liability for Environmental Offenses

THE FAILURE of fines to deter Hong Kong's corporate environmental offender are now legend. In our November issue we considered the primary objects of criminal justice and concluded that the enforcement of Hong Kong's environmental law was not achieving them. That fines fail to deter was again recently borne out by statistics released by the EPD for 1992 which show that average fines were about 10 per cent or less of the maximum and thus easily written off as an operating expense.

The Government has finally responded in recent amend-

ments to major environmental laws. The three-pronged attack increases fines, introduces imprisonment as a potential penalty and makes company officers personally liable to both fines and imprisonment for wilful misconduct or neglect.

The *Water Pollution Control (Amendment) Ordinance* first increased fines in 1990 by doubling the maximum fines for one-off discharges. Even so the increases did little more than keep up with Hong Kong's double digit inflation over the last decade. The *Water Pollution Control Amendment Bill 1992* (digested in the January issue) proposes further to increase only the fine for making a prohibited discharge

into a communal sewer or drain to \$500,000.

Similarly, the recently adopted *Air Pollution Control (Amendment) Ordinance 1993* (digested in this issue) increases fines for prohibited one-off discharges to \$500,000 which is, at last, comparable with the fines industrialists face for injury they cause to Hong Kong's economy. For example, under certificate of origin regulations the maximum fine for mislabelling goods as made in Hong Kong is also \$500,000.

Recently a garment manufacturer was fined \$200,000 for a first offence of mislabelling goods which were valued at only \$703,535. It remains to be seen whether the courts will penalised acts which injure Hong Kong's environment as harshly as those which threaten economy.

Even hefty fines may fail to deter polluters if the fine is paid out of the corporate pocket. However, the situation will be different if the managing director is personally liable to pay the fine rather than write it off a fine as a company expense. Therefore, the first step in personal liability has been to make officers of a company personally liable for environmental offences committed by the company with their consent or by their neglect or omission.

Sections 10A and 47A of the *Water Pollution Control Ordinance* and *Air Pollution Control Ordinance* respectively provide that where a company 'is convicted of an offence and it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect or omission on the part of, any director, manager, secretary or other person concerned in the management' of the company,

'the director, manager, secretary or other person also commits the offence.'

Thus in April, a factory director was fined \$80,000 by the Sha Tin Magistracy for allowing his metal plating factory to discharge heavy metal and cyanide into Tolo Harbour and Channel Water Control Zone. It was his second conviction.

Where a company 'is convicted of an offence and it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect or omission on the part of, any director, manager, secretary or other person concerned in the management' of the company, 'the director, manager, secretary or other person also commits the offence.'

As the offences of the company and its officer are treated as the same, the fine should be the same. It is not clear if the convicted company officer's fine could be paid by his company. Of course, this would defeat the object of the offence but unlike Canadian law there seems to be no means for a Hong Kong court to order the company not to indemnify an officer for the fine.

Under a further new provision, the officer of a company will also be liable to imprisonment which was impossible before because companies could not go to prison.

Section 10(7) of the *Air Pollution Control (Amendment)*

Ordinance now typically provides for imprisonment in addition to a fine, in this case up to 12 months for failing to comply with an air pollution abatement notice. The proposed *Water Pollution Control Amendment Bill 1992* (cl. 7) makes similar provision for imprisonment up to two years for repeat offenders.

Liability for Hong Kong's environmental offences is usually strict, that is, there is no need for the prosecution to prove that the offender intended to emit a discharge. However, personal liability requires a mental ingredient, that is, 'consent or connivance', 'neglect or omission'.

This formula for personal liability is copied from the UK *Environmental Protection Act 1990* and unlike the Canadian law discussed in the *Report* in May 1992, there is no need for a defence of 'due diligence' because the burden rests on the prosecution to prove the mental ingredient.

Any attempt to reverse the burden of proof would potentially come into conflict with the *Bill of Rights Ordinance 1991*. This raises the whole question of the appropriateness for Hong Kong to continue to copy from UK legislation rather than looking to Canada where more similar qualifications are imposed on legislation by human rights provisions.

Hong Kong's environmental law is fast becoming more comparable to stricter European, North American and Australian practices where the role of the legal advisor to assist the corporation to plan, audit and defend compliance with environmental legislation has become standard practice.

Digest of LEGISLATION

(This digests *Legal Supplements to the Gazette Nos. 4/29 January to 15/16 April 1993.*)

AIR POLLUTION

Air Pollution Control (Amendment) Ordinance 1993 (No. 13 of 1993 in L.S. No. 1 to GAZETTE No. 6/12 February 1993 p. A160) This is the first major amendment to APCO since it first became law in 1983.

It is amended in three main ways. First, the amendment ordinance introduces a new regime for the control and abatement of asbestos in premises throughout Hong Kong. Premises include ships.

It requires owners to hire a registered consultant to investigate the asbestos content of premises and prepare a management plan, including plans for abatement. It also bans further import and sale of amosite and crocidolite or products thereof.

Second, the new ordinance introduces the use of technical memoranda to control air pollution from stationary sources. Technical memoranda are already used in water pollution control and provide a much more exact and strict definition of discharges.

It also revises the controls on specified processes which are currently exempt from licensing requirements. In the future, the Secretary for Environment and Lands may withdraw the exemption without compensation and require the process to be licensed.

Finally, it makes some important revisions to legal liability and penalties. Company officers and partners may be personally liable to conviction.

This is more fully discussed in this issue's feature on page one. Moreover, maximum penalties for repeat offenders have been revised to \$500,000 and imprisonment for twelve months and \$100,000 per day for a continuing offence.

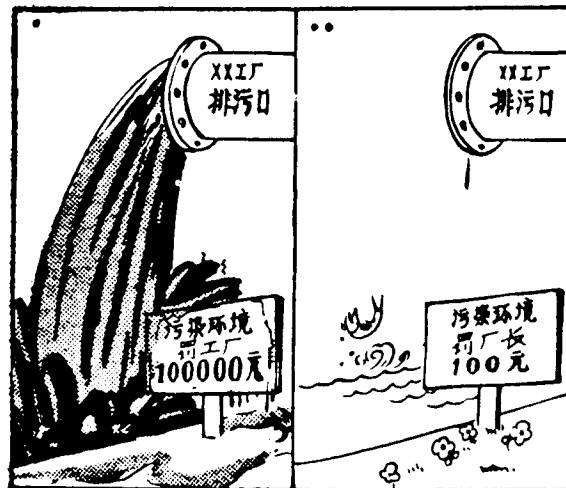
The new ordinance also attempts more carefully to define air pollution. *Air pollutant nuisance* is redefined into *air pollution and nuisance* respectively. The amendments will come into operation on a date yet to be appointed.

(Cap. 53).

FOREST AND COUNTRYSIDE

Forests and Countryside (Amendment) Ordinance 1993 (No. 14 of 1993 in L.S. No. 1 to GAZETTE No. 7/20 February 1993 p. A205) This Ordinance attempts to bring the *Forests and Countryside Ordinance* (Cap. 96) up to date in the light of new legislation and practices.

Provisions for the protection of forests by declaring prohibited areas have been repealed be-



钱少办大事

李明书

'Better Results for Less Money' by Li Mingshu

The sign next to the pipe discharging effluent reads: Factories will be fined Y100,000 for polluting the environment. The sign in the next frame reads: Factory managers will be fined Y100.

From *Satire and Humour: Selected Chinese Cartoons* Joint Publishing Co. Hong Kong 1981 p.13.

ANTIQUITIES AND MONUMENTS

Antiquities and Monuments (Declaration of Monument) Notice 1993 (L.S. No. 2 to GAZETTE No. 14/8 April 1993 p. B466) This Notice declares the walls (including all the corner towers) of Kun Lung Wai (San Wai) in Lung Yeuk Tau, Fanling, New Territories to be a monument for the purposes of the Antiquities and Monuments Ordinance

cause forests have since come under the protection of the Country Parks Ordinance.

Moreover, rather than place the protection of trees in forests and plantations in the hands of the Director of Agriculture and Fisheries can now authorise public officers to enforce the protection provisions. Acts prohibited in forests are extended to grazing

goats and felling, cutting, burning or otherwise destroying any trees or growing plants.

The amendment ordinance makes general revisions to repeal out of date provisions and ensure that the ordinance is consistent with new legislation.

MERCHANT SHIPPING

Merchant Shipping (Prevention of Oil Pollution) Regulations (Exemption) Notice 1993 (L.S. No. 2 to GAZETTE No. 6/12 February 1993 p. B227) This notice exempts for one year vessels licensed under Part IV of the *Shipping and Port Control Ordinance* (Cap. 313) from certain prevention of oil pollution requirements under the Regulations. However, Schedule 2 lists certain types of vessels which do not enjoy the exemption.

PUBLIC HEALTH

1 January 1994 has been appointed as the commencement date for the **Smoking (Public Health) (Notices) (Amendment) (No. 2) Order 1992** which was digested in the January issue and prescribes the use of health warnings on tobacco products and in tobacco advertising. (L.S. No. 2 to GAZETTE No. 11/22 March 1993 p. B382)

Diary

(See *DIGEST OF LEGISLATION* for details.)

26 March 1993: Kun Lung Wai (San Wai) in Lung Yeuk Tau, Fanling, New Territories was declared a monument.

1 January 1994: new requirements for the use of health warnings on tobacco products and in tobacco advertising shall commence on this date.

CASELAW Update

Regina v. Holderness Borough Council; Ex parte James Robert Developments Ltd. (English Court of Appeal, Times Law Report 22 December 1992) *Planning permission - council planning committee to give approval - committee member a builder/developer local councillor - rival builders' application - suspicion of bias - breach of natural justice.*

The applicants sought judicial review of the decision of a local council's planning committee not to grant them planning permission on the grounds that as one of the committee members was himself a builder and developer in the same area there would be a reasonable suspicion that he would make a decision to suit his own interests and such suspicion of bias would be a breach of the rules of natural justice.

In fact, by the time the application was heard the councillor in question had lost his seat and the planning approval had been granted. As there was no agreement as to costs, however, the Court of Appeal 2:1 proceeded to consider the substantive question in the case so as to decide how to award costs.

Simon Brown and Butler-Sloss LJ. (Dillon LJ dissenting) held that it was too wide a proposition to say that a builder ought not to sit on a planning committee hearing the application of a rival builder in the same area. There would perhaps be many rival builders and such a broad proposition would mean that none of them would be able to sit on any planning committee.

Dillon LJ. held that for a builder to sit as a member of a planning committee considering

another builder's application would give rise to a reasonable suspicion either that the builder might assist his colleague to get what he wanted or that he would try to put obstacles in the way of a rival. Either way the test of bias would be satisfied. His Lordship stressed the great dangers of local government corruption in the field of planning and that justice should be seen to be done.

This case has obvious application to a relatively small community like Hong Kong where vested economic interests can frequently come into conflict with the exercise of public duties on planning and other public committees. The majority judgment leaves a fair degree of latitude to the Government to appoint to public committees members with vested economic interests but the dissent points out the dangers of corruption and justice not being seen to be done. In fact, the dissent seems more appropriate to Hong Kong where most committee and appeal board members are not representatives elected by the people.

New Publications

A Guide to Pollution Control Legislation Affecting Manufacturing Industries 1993 Industry Department Infrastructure Support Division January 1993 (in English and Chinese) 81pp.

HONG KONG Briefing

ENVIRONMENT AND PUBLIC HEALTH

SPENDING on the environment is to be increased significantly in the new financial year with EPD and Planning, Environment and Lands and Works Branch receiving a total of more than one billion dollars. Still, concerns were expressed that with waste disposal using up 78 per cent of EPD's budget too little is being spent on other areas. (SCMP 25, 26 & 27 February 1993)

A POWER conservation campaign was launched in March aimed at reducing the estimated \$4.9b. of electricity which is wasted each year. At the same time consideration is also being given to means of cleaner and more efficient use of energy such as electric cars, converting diesel engines to petrol for which emission control technology is available and turning methane gas produced by decaying waste into an energy source. The gas is currently a potential hazard as it builds up around urban landfills. (SCMP 22 & 23 February & 2 March 1993)

TROPICAL HARDWOODS have been banned from 1 March 1993 by Works Branch tenders for use in site hoardings and to shore up the sides of trenches and pits. The Buildings Ordinance will also be reviewed to remove tropical hardwood requirements. (SCMP 23 February 1993)

A BILL to amend the Noise Control Ordinance will be introduced this year and will become law early in 1994. The amendments will extend the ban on construction noise to 12 hours from 7am to 7pm on working days and all day on

Sundays and public holidays and will cover more types of noisy construction equipment in addition to percussive pilers. (SCMP 23 March 1993)

HONGKONG'S \$1.3b. chemical waste treatment plant is due to open in April but plans to pay for it and its operation by charging its more than 9,000 users are still being held up by disagreement on the amount of the charges. A previous plan to place a levy on the chemicals themselves had already been abandoned. (24 March 1993)

CHARGES to be imposed on householders to pay for the new Victoria Harbour sewage system will not be as high as the \$25 per month expected because the Government has pledged a further \$900 million subsidy. Public consultations on the new charges start in April and will continue for two to three months. (4 & 10 March 1993)

SEWAGE treatment master plans may, like PADS, incur China's displeasure because of the escalating costs which will straddle 1997, now estimated at \$4.9b., according to a pro-China legislator. (SCMP 5 March 1993)

MEDICAL WASTE remains controversial as a Canadian expert warned Hong Kong's environmental officials not to allow plans for a central \$150m. medical waste incinerator to be cut back. Health and safety as well as public policy problems would arise if economic considerations of medical administrators were allowed to compromise the need and desire of hospital workers and the public to separate ordinary waste from medical waste and treat the latter more strictly. (SCMP 22 February 1993)

AIR QUALITY declined again in February this year compared

to 1992 according to monthly EPD data. This despite a slight improvement in January's air quality over the previous month. The decline, according to the EPD, is part of a downward trend in air quality in Hong Kong over the last three years, the reasons for which are have not been precisely pinned down. (SCMP 13 February & 13 March 1993)

DUST NUISANCE from construction sites remains a source of friction between builders and EPD as they disagree about the measures for its control. In particular, residents near the West Kowloon reclamation project are being irritated by 'sand dunes' which have been allowed to pile up 10 metres high as close as 20 metres from residential buildings through lack of environmental controls. (SCMP 2 March 1993)

POOR VENTILATION in car parks is another source of air pollution danger according to a report released by the EPD. 19 out of 38 car parks surveyed had unacceptable levels of carbon monoxide. One private residential carpark tested 400 per cent over the international standard and was voluntarily closed to improve ventilation. (SCMP 16 February 1993)

RADON gas does not pose the cancer threat suggested by a British expert in Hong Kong, according to the EPD. Levels of radioactive gas from building materials in Hong Kong are not serious enough to warrant restrictions, it said, but could be dealt with in ventilation requirements in the building code. (SCMP 12 February 1993)

EPCOM has requested the Government to report on the cumulative effects of dredging in Hong Kong waters. It is concerned that reports on indi-

vidual dredging sites, however good, do not give a picture of the overall impact of dredging on Hong Kong's waters. (23 February 1993)

A JOINT strategy between Hong Kong and China is needed to clean up the Pearl River Delta. This was the topic of a seminar between officials and academics from both sides held in Hong Kong and Guangzhou in February. (SCMP 6 & 19 February 1993)

MA PO Nature Reserve may be extended to protect the wildlife. The proposal by AFD is in response to disturbed migration of birds caused by Mainland fisherman in Inner Deep Bay who come from far and wide to collect seafood from the marshes. (SCMP 17 March 1993)

DAYA BAY nuclear plant's first generator has been installed and authorities say it will be operational in the autumn this year.

Meanwhile, dangerous cracks that could lead to a meltdown have been discovered in French nuclear reactors identical to the ones built at the Daya Bay plant. The French advisors to the PRC project admitted the reactor problem at a seminar held in Hong Kong in March. (SCMP 27 February & 28 March)

SEAWATER supplied for toilet flushing may save 175,000 cubic metres of expensive fresh water every year according to plans by the Water Supplies Department to extend seawater supplies to Sha Tin, Ma On Shan, Tai Po and Junk Bay over the next three years. (SCMP 26 February 1993)

PLANNING AND LAND USE

RECOMMENDATIONS that land owners be compensated from losses resulting from planning restrictions which were made in the report of the special committee on compensation and betterment (reviewed in the May 1992 *Feature*) have been rejected by the Government.

Citing cost as the major limiting factor, the Secretary for Environment and Lands said that Hong Kong would not be able to achieve modern planning standards if compensation payments had to be made. A new round of public consultation will now begin with the circulation of a 'white bill' in about May or June. (SCMP 23 February 1993)

'**SKYRAIL**', the proposed \$3b. elevated railway for South Kowloon, has finally been rejected by EXCO following objections from many sectors. The rejection ends four years of controversy surrounding the proposed project. (SCMP 20 March 1993)

GOVERNMENT'S conduct over the proposed developments in the Pat Sin Leung and Clearwater Bay country parks has been referred to Hong Kong's ombudsman to investigate 'maladministration and misapplication' in the approval of the two developments. The complaint was referred to LEGCO by Friends of the Earth. (SCMP 16 March 1993)

TWO PUBLIC golf course projects have recently been proposed for Hong Kong. One is to be built by the Jockey Club in Tuen Mun. The other is planned for Kau Sau Chau, an island between Sai Kung and High Island, formerly used by the British army for shelling

practice and considered unsuitable for residential or industrial development. (SCMP 25 January & 9 March 1993)

PIONEER QUARRIES have proposed a residential development and theme park to replace two quarries of over 100 hectares at East Kowloon overlooking the airport. As the quarry contract comes to an end the licensees are hoping to sign a 20 year contract for the redevelopment of the site. (SCMP 17 February 1993)

DEMOLITION work began in March to remove the 2.7 hectare slum that was formerly Kowloon Walled City. The project is due to be completed in about one year. (SCMP 24 March 1993)

TIN SHUI WAI in the New Territories was officially opened in late March. Already home to 30,000 people after four years of development, the new town will accommodate 140,000 people. The development has not been without its controversy, having been the subject of protracted litigation between developers and the Government. (26 March 1993)

'PADS' UPDATE

THE EXTENSION of the contract for the Central and Wanchai reclamation project for the third time has become another sign of how major infrastructural projects cannot be isolated from the still unresolved dispute between Britain and China over Hong Kong's political reforms. (SCMP 23 February & 10 March 1993)

Although PRC officials have again recently affirmed their support for PADS, funding remains controversial in both Hong Kong and China. Even without the political complexi-

ties, a project of this size will be fraught with difficulty and subject to cost and time inflation. (SCMP 12, 25, 27 & 29 March 1993)

RECENT developments include the awarding of the \$856m. Cheung Ching Tunnel project on Tsing Yi Island to French contractors Dragages Et Travaux Publics. Construction is due to be completed in January 1997. (SCMP 27 February 1993)

A 'tenders boycott' developed in January as international bidders for airport design packages collectively refused to submit tenders because of a dispute with the PAA over allegedly punitive bidding conditions. (SCMP 13 February 1993)

By far the most controversial development was the alleged \$6m. 'golden handshake' paid to Mr. Richard Allen after he resigned from his job as chairman of the PAA after only one year in office. (SCMP 23 February 1993)

REGIONAL AND INTERNATIONAL

UNITED KINGDOM

Contaminated Land Registers Abolished

Under section 143 of the Environmental Protection Act 1990, it was provided that local authorities would be required to maintain registers of contaminated land. The register would be open to public inspection with the aim of identifying all land within the local authority's area that is being or has been put to a use which may cause it to be contaminated with noxious substances.

The fear amongst land owners was that entry in the register

Comparative Table of Environmental Convictions: January and February 1993

	Number	First Offence	Second Offence	Third Offence	Maximum Fine
Air	7	7	-	-	\$ 5,000
	12	8	2	2	\$15,000
Noise	11	8	2	1	\$10,000
	15	9	5	4th	\$25,000
Waste	1	1	-	-	\$ 1,000
	-	-	-	-	-
Water	10	4	3	3	\$25,000
	10	6	2	2	\$25,000
Total	29	20	5	4	
	37	23	9	5	

January figures appear above February figures.

Source: EPD, Anti-Pollution Prosecution Figures (16 February & 16 March 1993).

would have a blighting effect and adversely affect the value of the land. Moreover, there was to be no mechanism for a site to be removed from the register even though clean-up works may have been carried out to bring the land into good condition.

Following much debate and substantial criticisms of the provisions the Environmental Secretary has recently announced that the proposed registers are to be abandoned.

Instead, there is to be a review into land contamination by a group to be chaired by the Department of the Environment.

Abandonment of the registers does not mean that the problem has gone away. Owners remain liable for damage caused by contamination. Legislation is intended to give powers to waste regulation authorities to clean up sites causing pollution and the cost of the clean-up will be borne by the owner.

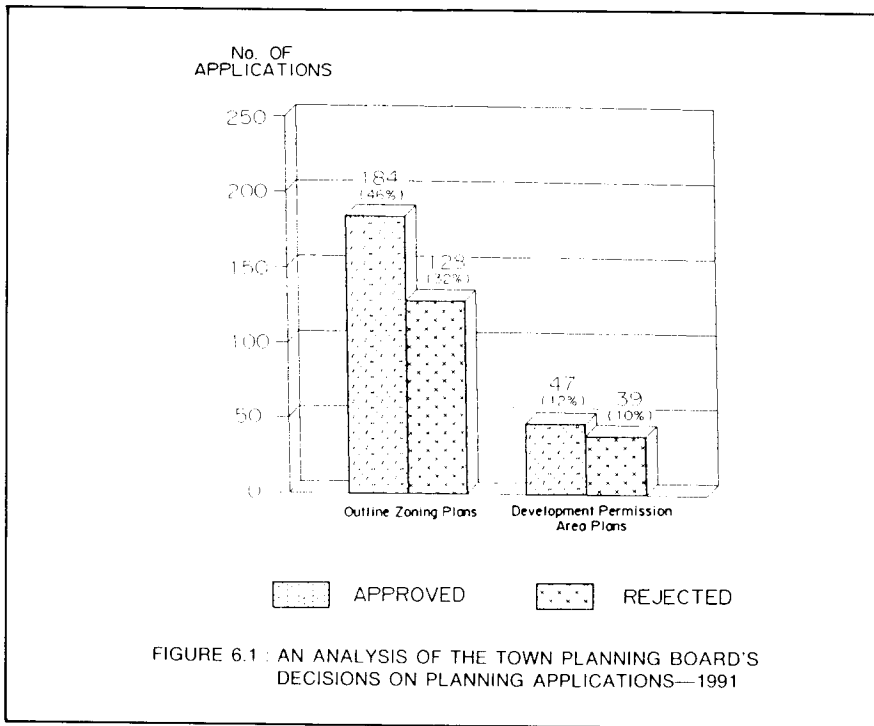
Clean-up operations can be very expensive. Extra vigilance is required for would-be purchasers of land where there may be a potential risk of inheriting liabilities for existing contamination. In addition, land owners would be well advised to consider the state of their existing land holdings to assess potential liability.

The Royal Institute of Chartered Surveyors has recommended an alternative system whereby a Land Quality Statement accompanies a planning application identifying the presence and degree of land contamination. The contamination register would then be combined with the existing planning register, which is already open to the public, giving a 'one-stop' information system.

Whilst the review by the Department of the Environment is welcomed, it has not alleviated concern and uncertainty within the property industry. (Irwin Mitchell, Solicitors)

Erratum

In January's *Feature* we referred to Figure 6.1 in the *Town Planning Board:1991 Annual Report* but by error we reproduced Figure 6.3 instead. Below is a reproduction of Figure 6.1. We apologise for the error and any confusion thereby caused to our readers.



ABBREVIATIONS

- AFD Agriculture & Fisheries Department
- APCO Air Pollution Control Ordinance
- CFCs Chlorofluorocarbons
- EC European Community
- EPCOM Environmental Pollution Advisory Committee
- EPD Environmental Protection Department
- EXCO Executive Council
- FEER Far Eastern Economic Review
- JLG Joint Liaison Group
- LDC Land Development Corporation
- LEGCO Legislative Council
- LS Legal Supplement
- NCO Noise Control Ordinance
- NT New Territories
- 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

This report does not constitute advice of a legal nature. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors or omissions. Further information, inquiries and advice in respect of this report should be directed to:

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