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URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

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This issue features comments on the recently published Final Report of the *Territorial Development Strategy* made at a recent seminar by one of the government's principal planners responsible for the lengthy and detailed review process. We also highlight a number of compelling criticisms raised by a panel of leading town planners (at the seminar) in respect of the Final Report and the TDS process generally.

The Editors

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PLANNING FOR HONG KONG'S FUTURE DEVELOPMENT

The Final Report of *The Territorial Development Strategy* ("TDS") was released at the beginning of April this year (see our previous issue). At a seminar hosted by the Centre of Urban Planning and Environmental Management (CUPEM) on the 3rd April, 1998, Michael Chan, the Chief Town Planner in the Strategic Planning Unit (the Unit) of the Department of Planning, Environment and Lands (which was responsible for formulating the TDS) reviewed the evolution of the TDS and highlighted some of its major considerations and objectives. In this issue we summarise several of the main points made by Mr. Chan, and, as well, some of the criticisms of the TDS and its review process which were expressed by the seminar panel.

The Unit's perception of the TDS process

The first review of the TDS began in 1984. The government's intention in initiating the TDS process was to set comprehensive planning standards and guidelines for Hong Kong's future development. The government was particularly concerned to provide planning strategies on a sub-regional basis.

As Hong Kong's development and population increased at a fast rate, the

Unit found that almost from the outset its base data were significantly outdated and therefore inaccurate. Thus, with the first review completed it was obvious to the Unit's planners that a second review and report were necessary. This second round of the TDS review began in 1990 and culminated in the Final Report. During the reviews the public were given the chance to comment on draft review reports on a number of occasions, and their comments were taken into account in drafting the Final Report.

The first review was concerned with "foundational studies", that is, assessing Hong Kong's initial planning options in the light of projected growth figures applicable in the early 80s. In the second review, medium-term, planning options, as well as longer-term ones, were identified and analysed. The reason for this was the uncertain forecasts of Hong Kong's population growth. The 1996 census suggested that estimates used in the earlier TDS studies were "out of date", i.e. too low. For the Final Report the Unit has worked on a probable population of 7.8 million in the year 2011, although the Report's authors considered that figure could easily be 8.1 million.

Difficulties in projecting population numbers accurately are compounded by the uncertainty of identifying Hong Kong's growth areas, which would require particular planning attention. For example, with the TDS

encompassing more rail and road links with Southern China, it is possible Hong Kong's population will disperse into the Pearl River delta regions rather than remaining within its borders, as has happened in other regional growth centres. Such difficulties led to the need for medium-term town planning, taken as the period to 2001, as well as longer term.

First planning priority

The TDS gives priority to housing. Therefore much of the Final Report is devoted to planning for housing needs in the medium term and beyond. Following the 1996 census three main population growth areas were identified by the Unit, namely north-east New Territories ("N.T.") south-east N.T. and south Hong Kong Island together with Lama Island. The government has therefore commenced integrated planning and engineering studies in those areas and is taking steps to ensure that there is an adequate land-bank to cater for the anticipated increased need for housing in identified growth areas.

Commercial

A broad objective of the TDS is to encourage the relocation of commercial activities away from Central to various sites alongside major transport corridors. It is envisaged that this will increase employment opportunities.

The Unit proposed the creation of science and industrial parks as an additional land-use method of assisting in creating employment. The government's planners have accepted that Hong Kong now must focus on value-added enterprises. A number of locations, such as Pak Sai Kok, were identified by the planners as suitable for this purpose.

Transport

The Unit's planners were conscious throughout the TDS review period that improving Hong Kong's transport system is critical to the overall orderly development of the Territory. The Final Report includes several proposals for maintaining Hong Kong's generally efficient public transport network. For example, the Report focuses on the development of light-rail systems. There will also be MTR extensions to the proposed Green Island reclamation and development, and a fourth harbour tunnel is likely to be necessary. *The Second Railway Strategy Plan*, which forms part of the TDS review process, is currently under revision. A second connection to Shenzhen will probably be included in amendments likely to be made to the *Railway Strategy*.

More highways will be built to service, particularly, the New Territories and Southern China. An extension of Route 10 to Zuhai is likely, for example.

Urban renewal

Most of Hong Kong's future (and past) planning problems concern the major metropolitan areas of Kowloon and Hong Kong Island. The Unit has identified urban renewal as an area where much more planning focus is required to further that objective. A separate urban renewal review has been commissioned, and the government will establish an Urban Renewal Agency to take charge of a projected massive urban renewal programme.

The environment

The Unit realises that not all environmental problems can be solved by juggling land uses (via planning controls) but certainly the TDS will play a very significant part in securing better protection of Hong Kong's environment. Several key policies which have been or will be incorporated into the TDS are:

- although the major priority of the TDS is to provide adequate housing for all Hong Kong residents, this will not be done at the expense of long-term protection of the environment, and so the widely accepted concept of sustainability will underscore housing and other TDS programmes;
- a separate study, *Sustainable Development in the 21st Century*, will be commissioned for the purpose of examining all options and considerations necessary to achieve a *sustainable* balance between development and environmental protection;
- a separate study of Hong Kong's future growth and needs will be initiated with the aim of checking on whether the TDS has correctly identified those, including measures for protecting the environment in the future;

- the Unit accepts, as fundamental bases of its reviews and recommendations concerning TDS, that there is an urgent need for Hong Kong to (i) reduce waste (ii) reduce polluting emissions and (iii) do everything possible to protect (and keep intact) country parks and marine reserves;
- more specifically, the Unit will review the *Master Sewerage* and *District Sewerage Plans* to take into account Hong Kong's charging demography.

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The reality...

Government planners simply do not know Hong Kong's likely long-term infrastructure and housing needs. Therefore, the emphasis in the Final Report and the Unit's continuing TDS and associated reviews is on the medium term. This medium-term bias is largely a result of the need to provide land and community services to accommodate the 85,000 new flats per year promised by the Chief Executive Officer.

The panel's comments

Members of the panel (all very well qualified and Hong Kong experienced town planners) criticized the Final Report and the Unit's current thinking on TDS on various grounds, some of which are as follows.

Population

Future population estimates are carried forward from the *Metro Plan* and are unsound, as Hong Kong was not growing as quickly then. Estimates for the year 2011 are ten years behind actual population growth figures to date. The second review of TDS considered a 9-10 million population in 2016 as a long-term point of reference. However, that longer term view cannot realistically, in planning terms, be kept separate from medium-term assessments as long-term recommendations may well need to "feed back" to the medium term.

As to whether Hong Kong's increasing population might be dispersed over a greater Southern China area, it must be remembered that Hong Kong has artificially fixed borders (in terms of the PRC) and therefore the extent and ease of cross-border communications and movement will be critical on this important issue.

Generally, there is agreement amongst town-planners that accurately forecasting Hong Kong's medium and long-term population is difficult, which makes planning for future development that much more complex.

Employment near housing

A concern which many planners would have with a comprehensive community development plan such as the Final Report is that the authors tend to think that people will find jobs near their homes. However, over the last ten years Hong Kong's experience contradicts that assumption. There has been a 12% reduction in metro-based jobs in that time, and a general trend for people to move out to the N.T. and commute. These new metro areas are not attracting core employment industries at the same rate, however. This fact alone may make it difficult to apply the TDS.

The environment

The government's and the Unit's willingness to accept high population growth assumptions is surprising given that the 1996 review acknowledged that projected high population growth could not be sustained without significant (additional) damage to Hong Kong's environment, particularly from sewerage disposal. Yet the Report essentially accepts and reacts to a (housing etc.) demand-driven approach to planning for Hong Kong's future. One aspect of this approach is Hong Kong's ever increasing reclamation of its once famous, natural harbour for construction of new housing and commercial projects, with some 300 ha already reclaimed in recent years and a further 500 ha possibly to be undertaken in the medium term (e.g. the eastern harbour proposal).

Should these proposals proceed the environmental impacts will be severe, and Victoria Harbour will end up as little more than a river.

The planning policies

Most planners recognise that there is a

danger in formulating a comprehensive land use plan which concentrates excessively on one kind of land use, which in the case of the Final Report is private housing. Initially the TDS gave equal weight to all kinds of land use, reflecting the government's development and planning policy of the time. This was initially the broad policy stance of the Report also, but then after the handover a sentence (or more) was added to make it clear that housing was the single priority of the TDS. This means the TDS does not have fundamental planning balance.

Aside from that, the Report's coverage of housing policies and planning recommendations is deficient in that the vital question of urban renewal is not addressed sufficiently.

Public consultation

There is a general need for much greater consultation with the public in the ongoing review and implementation of the TDS. This is particularly so in the area of potential, significant environmental impacts. For example, in commenting on future urban renewal policies, the Report appears to give weight only to economic factors, with little or no regard for social and environmental factors. Over-emphasis on economic factors is no longer an acceptable or realistic basis on which to formulate development plans for Hong Kong. Despite their notorious traditional apathy towards non-economic factors, the people of Hong Kong are increasingly aware of and concerned about other issues, such as environmental impacts, associated with large-scale town planning programmes.

The Final Report has been prepared with minimal public participation (which is in line with the way the planning process works on a day-to-day basis in Hong Kong). More effort should have been made to involve the public, and to make people aware of the kinds of major policy recommendations the Unit was contemplating. For example, the Report lists Lama Island as a major growth area of the future, yet none of the documents released by the Unit for public discussion prior to the Report highlighted this or even raised the issue of Lama as a potential urban growth centre.

The people of Hong Kong are

becoming much more sophisticated in community planning matters. The government and its planners must be aware of this, and must involve the public more in the TDS review and formulation process if it is to have any chance of successful implementation.

DIGEST OF LEGISLATION

Town Planning (Amendment) Ordinance 1998 (Ord. No.16 of 1998) (L.s. No.1 to Gazette No.14 Vol.2, p.A409)

The Town Planning Ordinance (Cap.131) is amended by adding -

"2A Appointment of committees by the Board

(1) Notwithstanding section 2(3), the Board may appoint committees from among its members to exercise the Board's powers under section 6(6), (6A), (6B), (7), (8) and (9).

(2) A committee appointed under this section shall consist of not less than 5 members at least 3 of whom are not public officers.

(3) The Board shall, from the members of a committee appointed under this section, appoint one member to be Chairman of the committee and one member to be Deputy Chairman of the committee.

(4) The quorum for a committee is the Chairman or Deputy Chairman and 2 members.

(5) Notwithstanding subsection (4), a committee shall not meet or continue to meet unless a majority of those present are not public officers."

Section 6 is amended by adding -

"(6A) the Board may direct that any objection made under subsection (1) in respect of the same draft plan or, as the case may be, received under subsection (8) shall be dealt with at the same meeting and such objection may be dealt with by the Board either individually or collectively as it may determine.

(6B) If the objector or his authorized representative does not attend any meeting held for the purposes of subsection (6) or, as the case may be,

meeting and deal with the objection or adjourn it and such meeting may not be adjourned more than once."

Section 8 is amended -

(a) by renumbering it as section 8(1);

(b) by adding -

"(2) A submission to the Chief Executive in Council under subsection (1) shall -

(a) in the case where the Board does not make amendments to the draft plan under section 7, be made before the expiration of a period of 9 months after the expiration of the period of 2 months mentioned in section 5; and

(b) in the case where the Board does make amendments to the draft plan under section 7, be made before the expiration of a period of 9 months after the expiration both, of the period of 2 months mentioned in section 5 and of the period of 3 weeks mentioned in section 7,

or in either case, such further period, being not more than 6 months, after the expiration of either period of 9 months as the Chief Executive may, on application by the Board, allow in any particular case."

The amendments effected by this Ordinance shall not apply in respect of -

(a) a draft plan which, prior to the commencement of this Ordinance, has been exhibited under section 5; or
(b) an amendment to a draft plan which, prior to the commencement of this Ordinance, has been exhibited under section 7,

of the Town Planning Ordinance (Cap.131)

Air Pollution Control (Vehicle Design Standards) (Emission) (Amendment) Regulation 1998 (L.N. 96 of 1998) (Commencement) Notice 1998 (L.s. No.2 to Gazette No.13/1998 L.N.196 or 1998 p.B1929)

Under section 1 of the Air Pollution Control (Vehicle Design Standards) (Emission) (Amendment) Regulation 1998, Secretary for Planning, Environment and Lands appoints 1 April 1998 as the day on which the Regulation shall come into operation.

Town Planning (Amendment) Ordinance 1998 (16 of 1998) (Commencement) Notice 1998 (L.s. No.2 to Gazette No.15/1998 L.N.208 of 1998 p.B2353)

Under section 1(2) of the Town Planning (Amendment) Ordinance 1998, Secretary for Planning, Environment and Lands appoints 14 April 1998 as the day on which the Ordinance shall come into operation.

Public Health and Municipal Services Ordinance (Public Pleasure Grounds) (Amendment of Fourth Schedule) Order 1998 (L.s. No.2 to Gazette No.21/1998 L.N.225 of 1998)

The place specified in Schedule 1 is set aside for use as a public pleasure ground.

The places specified in Schedule 2 shall cease to be set aside for use as public pleasure grounds.

The Fourth Schedule to the Public Health and Municipal Services Ordinance (Cap.132) is amendment to the extent specified in Schedule 3.

SCHEDULE 1

PLACE SET ASIDE AS A PUBLIC PLEASURE GROUND

Kowloon and New Kowloon
Hong Ning Road Park

SCHEDULE 2

PLACES CEASING TO BE SET ASIDE AS PUBLIC PLEASURE GROUNDS

PART I

The Island of Hong Kong
Possession Street Sitting-out Area

PART II

Kowloon and New Kowloon
Fortune Street Playground

SCHEDULE 3

AMENDMENT OF FOURTH SCHEDULE, CAP.132

Item Amended

1. The list of public pleasure grounds (other than bathing beaches) under the heading "The Island of Hong Kong".

Extent of Amendment

By repealing the reference to the place specified in Part I of Schedule 2 to this Order.

2. The list of public pleasure grounds (other than bathing beaches) under the heading "Kowloon and New Kowloon".

(a) By adding the reference to the place specified in Schedule 1 to this Order.

(b) By repealing the reference to the place specified in Part II of Schedule 2 to this Order.

Shipping and Port Control (Amendment) Regulation 1997 (L.M.228 of 1997) (Commencement) (No.2) Notice 1998 (L.s. No.2 to Gazette No.18/1998 L.N.217 of 1998, p.B2409)

Paragraph (a) of the Shipping and Port Control (Amendment) Regulation 1997 (L.N. 228 of 1997) (Commencement) Notice 1998 (L.N. 179 of 1998) (which appointed 4 May 1998 as the day on which section 2 of the Shipping and Port Control (Amendment) Regulation 1997 (L.N. 228 of 1997) was to come into operation) is repealed.

Under section 1 of the Shipping and Port Control (Amendment) Regulation 1997, Secretary for Economic Services appoints:

(a) 4 May 1998 as the day on which section 2(b); and
(b) 6 July 1998 as the day on which sections 2(a) and (c) and 5(a),

of the Regulation shall come into operation.

Quarantine and Prevention of Disease Ordinance (Declaration under section 2(1) Notice 1998) (L.s. No.2 to Gazette No.26/1998 L.N.250 of 1998, p.B2595)

The Hong Kong International Airport at and in the vicinity of Chek Lap Kok is, on and from 1 July 1998, declared to be an authorized aerodrome for the purposes of the definition of "authorized aerodrome" in section 2(1) of the Quarantine and Prevention of Disease Ordinance (Cap.14).

Waste Disposal (Refuse Transfer Station) (Amendment) Regulation

1998 (L.s. No.2 to Gazette No.26/1998, L.N.251 of 1998, p.B2597)

The Schedule to the Waste Disposal (Refuse Transfer Station) Regulation is amended by adding North Lantau Transfer Station and specifying the cost of each load of waste in that Station.

Quarantine and Prevention of Disease Ordinance (Sanitary Aerodrome) Declaration 1998 (L.s. No.2 to Gazette No. 26/1998, L.N.255 of 1998 p.B2613)

The Hong Kong International Airport at and in the vicinity of Chek Lap Kok is, on and from 1 July 1998, declared to be a sanitary aerodrome for the purposes of the definition of "sanitary aerodrome" in section 2(1) of the Quarantine and prevention of Disease Ordinance (Cap.141).

Waste Disposal (Designated Waste Disposal Facility) (Amendment) Regulation 1998 (L.s. No.2 to Gazette No.27/1998, L.N.260 of 1998, p.B2629)

This regulation amends the Waste Disposal (Designated Waste Disposal Facility) Regulation by adding a number of Waste Transfer Station around Hong Kong.

Road Traffic (Traffic Control) (Designation of Prohibited and Restricted Zones) Notice (L.s. No.2 to Gazette No.27/1998 L.N.266 of 1998, p.B2789)

This notice has designated certain areas around the Chep Lap Kok Airport to be (1) prohibited zones which prohibits the driving of all motor vehicles or (2) restricted zones which prohibits drivers from picking up or setting down passengers or loading or unloading goods.

HONG KONG BRIEFING

1. Municipal councils face a drastic cut in their powers under a government proposal to centralise food and environmental hygiene controls. A new post of deputy secretary for health and welfare is to be created to oversee improved controls following the recent spate of food and health crises.

The new secretary will oversee staff most of whom now handle food and environmental hygiene and work in the Urban Services Department and Regional Services Department. This proposal is contained in a set of controversial proposals on the future of district organisations released for consultation in June.

Lack of co-ordination between Urban Services and Regional Services and other policy bureaus and departments has been blamed for the bird flu crisis, red tide and other food and environmental scares. At present, Urban Services and Regional Services are the policy arms of the provisional urban and regional council respectively. In future, it was proposed that hygiene work will come only under the Health and Welfare Bureau. (15 May 1998, SCMP)

2. Swirling mud disturbed in Deep Bay is washing up on the mud flats, creating a greater expanse above the high-tide mark in the Mai Po Marches nature reserve. It may represent only three centimeters a decade but more mud means dramatic changes to the mudflat ecology.

Worms and crabs are not the only ones turned off by the influx of stinking gunge. Their predators, the gulls and waders which refuel on the rich pickings during their Mai Po pit-stop, also seem to be suffering. For 15 years the number of birds flocking to Mai Po has increased annually, but last year they declined for the first time by nearly 4,000. This year's winter water fowl count brought cold comfort: 10,000 fewer birds than the previous winter, a 19 per cent drop from the peak of 1996 when numbers reached 68,000.

The rising mudflats are caused by silt being churned up in Deep Bay by massive earth-moving infrastructure projects on the northern shore on the main bird according to Dr. Young, Manager of Mai Po. The project will eventually fill up 20% of inner Deep Bay.

The World Wide Fund for Nature (WWF) has requested monitoring data on the impacts on the ecology of Deep Bay from cross-border projects, like the Shenzhen River Regulation, but this has become a frustrating and fruitless exercise. The HKSAR

Government has denied that the Shenzhen River project had caused any adverse impact on the surrounding area.

Under siege on all fronts and at risk are the species which are Mai Po's major claims to ornithological fame: the Dalmatian pelican, and the black-faced spoonbill. The spoonbill is a globally endangered species numbering only 450 worldwide, some 27 per cent of which spend the winter at Mai Po. The 1,500-hectare site boasts 13 other regionally important species and more than 20 rare kinds of invertebrate. Those birds unable to "refuel" at Mai Po because of insufficient food might lack the strength to reach their distant breeding and wintering grounds and may therefore die enroute.

The Agriculture and Fisheries Department is planning a long-term ecological monitoring programs to understand the situation, better. (9 March 1998, SCMP)

3. In March 1998, the Planning Environment and Lands Bureau appealed to the Planning, Lands and Works Panel of the Provisional Legislative Council for \$230 million to clean up the Kai Tak Airport.

It was found that 154 hectares of land under Kai Tak was contaminated by the leakage of underground fuel pipes. Petrol, methane and benzene had accumulated and caused serious soil and underground water pollution.

The Kai Tak incident is the tip of the iceberg. It is estimated there are 150 illegal waste dumping sites in the New Territories, mainly for construction material. The largest of them contains 10 tonnes. The number of complaints about solid waste pollution leapt from 535 in 1996 to 753 last year.

A Friends of the Earth investigation team toured some of the black spots and discovered dead pigs, piles of construction waste and tonnes of burning scrap tyres. The repulsive smell from rotting pigs and the toxic fumes from burning rubber were unbearable. Wild birds were seen feeding on the dead animals, which is a potential factor in the spread of the infamous bird flu.

In addition, toxic gases here released from burning tyres. Lead emission

from burning tyres is markedly higher than that released from burning coal. Dioxin and PCB emissions are increased by 22 and 26 times respectively. An added concern is that some black spots are next to villages, country parks and buffer zones to ecological sensitive areas such as Mai Po marshes.

There are ordinances which apply to illegal dumping. These include the Waste Disposal Ordinance (WDO), Chemical Waste Reduction Ordinance (CWRO) and Town Planning Ordinance (TPO). However, the problem is one of enforcement. Prosecution under the WDO is only possible when offenders are caught in the act. According to the Environmental Protection Department (EPD), there were only 42 prosecutions in 1997, although that was an increase compared with 17 in 1996.

If illegal dumping is on private land, it is the responsibility of the Planning Department to prove that the owners are liable for breaching the permission conditions under the TPO.

Fines, however, are little deterrent. A large construction company was recently fined \$50,000 for its 22nd pollution offence. Another made its 17th trip to court to receive a slap on the wrist and a penalty of \$40,000. Every month more than 100 offenders regularly appear, flouting anti-pollution laws and making a mockery of the judicial system.

The New Territories Black Spots Task Force set up by former Governor, Chris Patten, has served as nothing but a public relations exercise. Miss Mei Ng, a director of Friends of the Earth Hong Kong, said that it is time for the SAR Government to consider short-term measures and a long-term strategy and it is time to ask why there are no disposal facilities and why there is no decision on building an animal carcass incinerator.

There has been little research into the long-term impact of soil pollution on public health, nor is there any protective legislation.

Miss Ng urged that the right precautions should be taken, not only in the interests of establishing equitable land prices and liability for

mishaps, but also to protect public health and the well being of the eventual users or consumers, that is, the flat buyers or tenants. (2 April 1998 SCMP)

PLANNING DECISIONS

In the Matter of an Appeal under Section 17B of Rightlane Investment Limited (Town Planning Appeal No.12 of 1996)

[Date of decision : 12 November 1997]

The appellant was the owner of Rural Building Lot No.691 R.P. (No.12 Headland Road, Hong Kong) ("the site") who sought to appeal under s17B of the Town Planning Ordinance against a decision to refuse minor relaxation of site development restriction under s16. The site in question was classified R(C)3 and development was restricted to "maximum 3 storeys in addition to 1 story of carports" in height and plot ratio of 0.75. The explanatory notes to the Shouson Hill and Repulse Bay Outline Zoning Plan ("the OZP") provided that restrictions may be relaxed if planning objectives are met. The planning objectives are stated in paragraph 6.3.1 and 6.3.2 of the Explanatory Statement of the OZP:

- (a) to preserve the existing amenity and character of the Area;
- (b) to preserve significant public views;
- (c) to avoid overburdening the access road system; and
- (d) to avoid excessive development.

It was hoped to encourage imaginative designs which were adapted to the characteristics of particular sites and overcame the need for stilting as well as allowing for the conservation of environmentally important natural features or mature vegetation. However, the notes stressed that each proposal will be considered strictly on its own merits.

Under the proposed development, the plot ratio would have been increased by 10%. After considering evidence from officers of various government departments, the Appeal Board found that the proposed development had greater merits over other plans where the planning restrictions were strictly adhered to. For example:

1. more trees will be saved or planted;
2. the garden was directly accessible from the living room;
3. a split level design provided better accommodation for elderly people;
4. the houses were no bigger than other plans had proposed;
5. the design of the proposed development was more imaginative;
6. there was no need for stilting;
7. the proposed development was more human in scale and did not result in excessive development.

As a result, the Appeal Board concluded that as Headland Road is in one of the best known scenic areas in Hong Kong, the proposed development best served the planning objectives and planning restrictions therefore should be relaxed. It was emphasised that this decision was not to be treated as a precedent, and that each proposal will be considered strictly on its merits.

A further argument by the respondent was considered by the Board, namely that under the proposed development, part of the car park floor would be used for residential purposes and therefore it amounted to a rezoning because there would be 4 storeys with 1 storey of carport, and the Board therefore had no power to permit such relaxation of planning restrictions. The Appeal Board rejected this argument and pointed to the fact that the description "maximum 3 storeys in addition to 1 storey of carports" regulates only the height of the development. The Board Considered and the argument was purely "a lawyer's point".

The appeal was allowed.

In the Matter of an Appeal under Section 17B by Ms. Lee Fu Chun and Ms. Tang Wai Lin (Town Planning Appeal No. 4 of 1997)

[Date of decision: 13 May 1998]

The Appellants appealed against a decision of the Town Planning Board refusing permission to use Lot 823 Rp (part) in D.d.90 ("the Site") for a cooked food stall on a temporary basis, namely for 12 months.

The Site was situated within the Closed Area near the Vehicle Holding Area at the Man Kam To Border Crossing. In 1990, the Appellants originally operated a fast food outlets near the

Site. In about 1993, that site was resumed by the Government and the Appellants were relocated to the Site. At that time, the Site was zoned Unspecified Use on the Development Permission Area Plan.

On 24 June 1994, the Site was zoned agricultural on the draft Fu Tei Au and Sha Ling Outline Zoning Plan ("OZP"). Another site to the north of the Site was zoned G/IC which allows for 2 cooked food stalls and public tender to operate 2 cooked food stalls were invited. The Appellants put in a tender but it was unsuccessful.

On 4 September 1996, the Appellants applied for permission to use the Site temporarily for a cooked food stall. There is a power under para (vi)(b) of the General Notes of the OZP for such permission. Nevertheless, the Appellants failed in their s16 application and s17 review. The reasons given were:

1. the proposed development was not in line with the planning intention of the Agriculture zone;
2. there were already 2 cooked food stall nearby to the north of the Site; and
3. the approval of the application would set an undesirable precedent for similar applications in the area.

The Appellants sought to argue that the Site was too small for agricultural use. Nevertheless, the Appeal Board agreed with the reasons. It commented that if permission were granted, it would be unfair to those who were successful in the public tender. It further held that it would be a misuse of the power under the OZP as the Appellants in fact did not only want temporary permission but rather a long term arrangement whereby the permission would be renewed annually.

The appeal was dismissed.

PLANNING ISSUES

Central Reclamation Draft Outline Zoning Plan Endorsed

The Town Planning Board endorsed on 15 May 1998 the draft Outline Zoning Plan (OZP) covering reclamation in Central and Wanchai.

A Government spokesman explained that one of the principal functions of

the Central and Wanchai Reclamation is to provide land for the much needed transport infrastructure which includes the Central-Wanchai By-pass (CW By-pass); the Island Eastern Corridor Link (IECL); the MTR North Island Line (MTRNIL); and the overrun tunnel for the Airport Railway.

The CW By-Pass and IECL connect the existing Route 7 in the West to the Island Eastern Corridor to form an east-west relief route to the existing heavily congested trunk road along the north shore of Hong Kong Island.

The spokesman said that this relief route needs to be established by the early part of the next decade in order to avoid an absolute grid-lock.

The MTRNIL is needed to provide relief to the anticipated congestion on the MTR Island Line within the next several years. The Airport Railway overrun tunnel is also urgently required to improve safety for the Airport Railway and to enable the Hong Kong Station to be put into full operation.

Projections of passenger volumes by the MTRC indicate that the overrun tunnel will have to be extended by mid 2000 at the least. Any further delay to the reclamation project will aggravate future overcrowding problems at the platform and thereby have an adverse effect on the safety of the Airport Railway operations.

The Central and Wanchai Reclamation (CWR) is divided into five phases. Phases I and II of Central Reclamation and Phase I of Wanchai Reclamation have been completed. Detailed engineering investigation and design work for Central Reclamation III (CR III) was completed in August 1997 but similar studies for Wanchai Reclamation II (WR II) have yet to commence.

"Apart from transport infrastructure, we have also reviewed the land use needs on the CWR and considered that about 59 ha of additional land would be required in Central and Wanchai to meet the needs for high quality Grade A offices to cater for the expansion of the Central Business District, a new SAR Government cum civic centre and open space and waterfront promenade," the spokesman said.

The proposed scale of reclamation

involves about 32 ha of land for the Central and 27 ha for the Wanchai segments of the project. The spokesman said that the overall scale of reclamation represents a considerable reduction from the scale of 80 ha originally proposed under the CWR Feasibility Study completed in 1990.

The original proposed commercial corridor has been shifted westward to allow a well-designed and co-ordinated administrative square to be developed at the Tamar site. The layout of this square has been designed to include an open-air civic square which is mainly for ceremonial functions and general recreational uses and the SAR Government Headquarters.

For WR II, the Kellett Island (currently occupied by the Yacht Club) is proposed to be turned into a vantage point for recreational use by both tourists and the public.

Overall, the proposed reclamation will provide 9 ha of land for commercial, 4 ha for Government/Institution/Community, 24 ha of open space and 22 ha for roads, infrastructure and other uses.

"We have thoroughly reviewed various possible scale of reclamation and consider that the proposed scale is the minimum required to meet both transport and development needs," the spokesman added.

The spokesman explained that as the existing waterfront at the central harbour is not easily accessible by the public, the reclamation will provide an opportunity to create new heritage and improve the quality of the waterfront as a public asset and for Hong Kong people to greatly enhance their enjoyment of the harbour.

It is estimated that the proposed reclamation would generate a revenue of about \$14.76 billion from the scale of commercial land at May 1998 price level. The development cost of the entire project is estimated to be about \$8.00 billion at 1997 price level.

The tentative construction time-table is to commence reclamation in respect of CR III in 2000 for completion in 2004; and for WR II to commence in 2002 for completion in 2007. The transport infrastructure is expected to be fully completed in 2009/2010.

"We would proceed to conduct the detailed engineering investigation and design work for WR II which would take 18 months to complete," the spokesman said.

Over the past three years, there has been considerable public debate over the need for reclamation in Victoria Harbour. This eventually led to the enactment of the Protection of the Harbour Ordinance on 329 June 1997. The Ordinance establishes a principle of "presumption against reclamation" but does not prohibit reclamation.

It rather imposes a public law duty on all public officers or bodies, in deciding on reclamation, to have regard to this principle. Provided that proper and genuine regard is given to the consideration, the decision, even if it is in favour of reclamation, will be lawful.

The cumulative water quality impact of major reclamation projects within Victoria Harbour has been fully assessed. The results concluded that, having taken into account the phased implementation of the Strategic Sewage Disposal Scheme and the effects of reclamation on the hydraulics of the harbour water, the major reclamation projects, if implemented, would have no adverse impact on the water quality.

An environmental impact assessment (EIA) for CR III also concluded that, with the implementation of recommended mitigation measures, the cumulative residual environmental impact would be kept within established environmental standards. A detailed environmental monitoring and audit programme has been formulated to ensure compliance.

An EIA for the WR II will be conducted as part of the detailed investigation study to assess the potential impact and to recommend mitigation measures. (980515e.htm at www.pelb.wpelb.gov.hk)

PADS UPDATE

1. The new airport offers a left-luggage service whose rates are well below those charged at Kai Tak. A new feature is a three-hour storage service for short term users, such as departing passengers who arrive early

for their flights, or standby passengers who need to stay longer at the airport and might want to get rid of the burden of luggage and to enjoy the amenities of Hong Kong Skymart. (*Airport Authority Hong Kong News*, March 98)

2. Hong Kong Skymart, the world-class airport retail complex inside the passenger terminal, comprises more than 140 shops, cafes and restaurants covering some 30,000 sqm. Multi-cultural clientele has been catered for with cuisines from dim sum to Western fastfood. Franchisees include McDonald's, Maxim's, Cafe de Coral, Banana Leaf, Grappa's, Oliver's Super Sandwiches, Fook Ming Tong, and TCBY, offering both landside (non-restricted area) and airside (restricted area) food and beverage services.

The Terminal has a general merchandise market, CD shops, bookstores, an electrical appliance shop, convenience stores and others. There are banks and ATMs, and even a business centre for those who can't leave their work behind. (*Airport Authority Hong Kong News*, May 98)

3. The Ground Transportation Centre is the focal point for all surface transportation to and from the new airport. Occupying an area of 55,000 sqm, the integrated centre houses the Airport Express Station, taxi ranks, stations for franchised bus, tour coaches, hotel courtesy buses and limousines. Each mode of transport has a completely segregated passenger handling facility with individual links to the passenger terminal.

The new airport incorporates an advanced airfield lighting and control system. The airfield is also equipped with airport 'smart' equipment that controls stopbars, holdbars and 'follow-me' lights. This, in conjunction with the movement guidance signs, heightens airport safety and maintains optimum traffic control. (*Airport Authority Hong Kong News*, June 98)

4. A time capsule marked the completion of the HKSAR Government facilities at Chek Lap Kok like the Air Traffic Control Complex and Tower, the Air Mail Centre, the Government Flying Service Headquarter, the Airport Police Station, the Chek Lap Kok Sub-Divisional Fire Station, and the

Passenger terminal VIP suite. Items contained in the capsule, which is to be opened in 30 years, include departmental reports and organizational charts, a weather observer's logbook, a set of current definitive stamps, a HKSAR specimen passport, photograph albums and a Rubik's cube. (*Airport Authority Hong Kong News*, June 98)

CASELAW UPDATE

Secretary for Justice v Hung Wan Construction Co Ltd. [1997] 3 HKC 150

Town Planning — Enforcement notice — Validity — Whether notice should specify alternative to prosecution for non-compliance — Person ought to be made aware of rights so that statutory defence could be pursued — Town Planning Ordinance (Cap 131) s 23(1)

Facts

The defendant was accused of using its land for storing construction equipment and material without planning permission. The Director of Planning issued an enforcement notice to the defendant under s23(1) of the Town Planning Ordinance (CAP.131) ("TPO"). However the notice did not set out the alternative provided by s23(1)(b)(ii) of the TPO, so the Magistrate acquitted the defendant in reliance on *R v Tai Tong Lychee Valley Co Ltd* [1997] 2 HKC 64. The prosecution appealed.

Issue

The main issue was whether a notice issued under s.23(1) of the TPO must include the alternatives provided by s.23(1)(b)(i) and s.23(1)(b)(ii) of the TPO.

The Decision

Held, dismissing the appeal:

1. If the notice did not include all the alternatives provided by the TPO, the defendant would not know that it had a right to apply for permission under s.23(9)(d) of the TPO and would lose an opportunity to pursue a statutory defence under the section. The Town Planning Board should have notified the defendant of all its rights in its first notice because if the defendant failed to comply with the date specified in the notice, it would be liable to criminal prosecution. Therefore, the notice was

null and void.

3. All necessary information must be placed before the recipient of the notice to enable the recipient to decide the proper course of action. If essential information was not disclosed to the recipient, the recipient might be curtailed from his statutory rights. As the Director of Planning failed to include s.23(1)(b)(ii) of the TPO in its notice to the defendant, the omission must be looked upon as repugnant to the concept of fairness.

ADVISORY COUNCIL ON THE ENVIRON- MENT (ACE)

ACE met on 23 March 1998 to consider, inter alia, the Environmental Impact Assessment Report concerning Kowloon-Canton Railway Corporation (KCRC) West Rail Phase 1, West Kowloon to Tuen Mun Centre (the report).

The report was in the first instance considered by the Environmental Impact Assessment Sub-committee (the EIA Sub-committee). As only three EIA Sub-committee members agreed to endorse the report, whereas three refused and one reserved his position, the report was referred to ACE for further deliberation.

The EIA Sub-committee Chairman reported that members of the EIA Sub-committee were not satisfied with that part of the report which dealt with the ecology of the affected area. The Sub-committee members main concerns were:-

1. whether the proposed 12 hectares (ha.) of re-created wetland was adequate to compensate for the corresponding loss of 12 ha. of wetland and another 60 ha. of agricultural land;
2. whether it would be ecologically effective to establish compensating wetland under the viaducts; and
3. whether the authors of the report had assessed the long-term, cumulative ecological impacts of the project to the surrounding area.

In connection with the ecological value of 60 ha. of agricultural land which would be lost, Mr. James Blake, Senior Director - Capital Projects of KCRC

said that since the proposed 12 ha. of re-created wetland habitat would be in the form of a large piece of adjoining land which will be well-managed, they would be of higher ecological value than the existing wetland habitat which was fragmented, isolated, scattered and basically unmanaged. Mr. Vic McNally, Environmental Manager of KCRC further explained that KCRC would employ professional bodies to manage the re-created wetland in the long-term.

A member was concerned that the overhead railway traffic would cause nuisance to birds, as almost 50% of the proposed re-created wetland would be located under viaducts. Mr. Blake explained that the viaducts would be designed in such a way that they would minimise the nuisance to birds or other wildlife underneath them. Instead of building one viaduct, five viaducts would be built and they would be elevated to as high as 20m above the ground level. Each viaduct would not be very wide and there would be sufficient space in between each of them to provide adequate flight paths for birds. He assured the Sub-committee that KCRC would consult local green groups in preparing the Habitat Creation and Management Plan which would define the precise range of habitats and ecological functions to be provided within the compensatory area.

Mr. Blake also observed that since the West Rail project would be unique and ground-breaking in many respects, it would not be easy to make a like comparison with other railway systems (from an environmental perspective). Mr. Peter Marsden, EIA Study Manager of ERM confirmed that there was at least one example in the USA where wetlands under viaducts were successfully created.

Regarding the proposal to channelise a section of the Yuen Long ----- Kam Tin Main Drainage Channel, a member queried whether there was a genuine need to provide concrete lining to the whole channel. Mr. McNally explained that KCRC was only carrying out the proposed channelisation project for and on behalf of Drainage Service Department (DSD) as the West Rail Depot construction project would affect DSD's original channelisation programme. He said that DSD had agreed to consider adopting a more environmentally-friendly design to

replace concrete lining provided the new methods would not compromise the hydraulic capacity of the channel. He gave assurances that KCRC would explore all environmentally-friendly designs for the channel project.

Three members asked KCRC whether it would carry out off-site mitigation measures if the proposed wetland compensation package was found to be inadequate to compensate for the wetland loss. Mr. Blake responded that KCRC would be willing to work closely with government to provide the required mitigation measures as appropriate. He emphasised that KCRC was committed to making the West Rail the best possible environmentally responsible railway that could be built.

Mr. K.W. Cheung, Ecological Assessment Officer of Agriculture and Fisheries Department opined that KCRC's proposed wetland habitat recreation project should have a higher chance of success than members seemed to think. He said that the existing wetland, which was made up of fish ponds, meanders and wet agricultural land, was of poor environmental condition. If this kind of unmanaged wetland could attract birds and other wildlife, there were strong grounds to believe that the proposed compensatory wetland to be created by KCRC, which would be well-planned and well managed, would do an even better job.

On the basis of KCRC's commitments, assurances and undertakings, ACE endorsed the report.

REGIONAL AND INTERNATIONAL

FRANCE

Eco-taxes underutilized in fight against pollution

The number of environmental taxes assessed in France has doubled in the past 10 years with total revenue rising more than 360 percent, yet fiscal measure are still underutilised in the battle against pollution, according to a report released in early January by the French Environmental Institute. The report said that transport and energy taxes have far outweighed direct or indirect pollution taxes. While they may bring indirect

environmental benefits, the report noted that the instruments were conceived in an effort to reduce petroleum imports and are thus not directly targeted at ecological goals. France has yet to make full use of transport and energy taxation as an inducement to reduce pollution. (email:ifen.fr.)

Clear link between air pollution and health problems

A French government health authority released a series of new reports on January 7 1998 detailing extensive links between atmospheric pollution and public health in the Ile-de-France region, proving a direct correlation between days or periods of exceptionally high atmospheric pollution and increasing levels of illness and death from respiratory and cardiac causes, prompting the Minister of Environment, Dominique Voynet, to re-think government air pollution control measures.

Voynet, heading up the effort of an interministerial commission to study the links between public health and the environment, specifically targeted vehicle pollution, saying that increases in nitrogen oxides, airborne particulates, and sulfur dioxide, all of which are found in vehicle emissions of pollutants which have contributed to the highest irregularities in public health data. (*International Environment Reporter*, Jan 98)

CHINA

Timber quotas to be cut

China will cut timber quotas this year and gradually phase out logging in ecologically vulnerable areas, a senior central government official said on January 7, 1998.

Chinese Forestry Minister, Chen Yaobang, said authorities would draft an unprecedented federal plan to conserve the country's dwindling forest reserves, but did not specify when the plan would be introduced or what measures it would contain. The Ministry of Forestry said its draft plan's 'main focus is to slash annual logging quotas, preserve natural resources, channel surplus [forestry] workers into afforestation... and enhance the sector's efficiency.' (*International Environment Reporter* Jan 98)

Mills and factories closed due to pollution problems

More than 65,000 mills and factories which were cited as environmental hazards were forced to close for lack of pollution control. Authorities said the shutdown would reduce China's annual emissions of effluent by 2.2 billion tons and cut industrial discharges of solid waste by more than 89 million tons.

The unprecedented campaign of forced closures had targeted polluters in China's non-state industrial sector, known as "township enterprises", a collection of more than 23 million mines, mills, and factories operated for profit by local authorities and private domestic investors nationwide, and representing the fastest-growing sector of China's economy. Authorities estimated township enterprises emit more than 25 million tons of industrial soot, ash, and dust each year, compared to emissions of 34.5 million tons from larger, state-owned factories. (*International Environment Reporter*, Jan 98)

SOUTH AFRICA

Reform in National Parks of South Africa

Kruger Park, South Africa's largest game reserve has pledged to improve its environmental policy. The number of water holes has been reduced, to allow natural selection to take its course in determining which animals survive in the park. The culling of elephants ended in 1996; the previous policy was to cull whenever the elephant population exceeded 8000. The current population is about approximately 8300. In addition, since last year fires have been allowed to burn as a way of allowing natural new growth. Some also dream of removing the park's perimeter fences to enable animals to follow their natural immigration patterns. (*The Weekend Australian*, Mar 98)

BANGLADESH

Dhanmondi Lake to shimmer again

The Dhanmondi Lake, which was turned into a virtual sewage outfall due to unplanned development activities around it and lack of maintenance, is expected to regain its scenic beauty within a couple of years. The lake will

again shimmer at moonlit nights as a result of steps taken up by the Dhaka City Corporation to restore the lake's ecological environment by removing all the dirt that collected in its bed over the last three decades and a half.

The 110-acre lake area forms one-fifth of the Dhanmondi Residential Area. When people began using it as their waste dump, the lake water turned toxic and unsuitable for aquatic life. A recent survey of the lake area showed 48 sewage connections led to the lake, resulting in a non-stop flow of sewage and sludge into the lake.

In 1995 the Bangladesh Environmental Lawyers Association (BELA), led by Dr. Mohiuddin Farooque, served a legal notice to the Mayor of the Dhaka City Corporation, the Secretaries of the Ministries of the local government the Chief Engineer of the Public Works Department, the Director General of Fisheries Department, and the Organizing Secretary of the Amateur Anglers Association, charging them with failure to discharge their responsibilities to maintain the lake and its aquatic resources. Remedial work was begun last year. The first step was to drain the lake. The lake bed was then treated scientifically to ensure that the congenial aquatic environment would be restored when the lake was filled again with water. The sewer outlets were sealed, and pumps installed to extract water exclusively for the lake. (*E-Law U.S.*, May 98)

INDIA

The Taj Mahal case

On environmentalist lawyer M.C. Mehta's public interest petition, the Supreme Court passed the order shifting polluting industries outside the Taj trapezium to save the dying monument from pollution and regulatory negligence. The Uttar Pradesh government urged the court to reconsider its order on grounds that the specified industries had installed the required pollution-control devices. Mr. Mehta however said that it had been the government's admission that Taj areas were an ecologically fragile zone, and that if the industries were aggrieved by the shifting order they should have approached the court directly instead of the government coming before the court. The case was set to continue in July.

Mehta, general secretary of the Indian Council for Enviro-Legal Action, a voluntary environmental protection organization in India, has been harnessing the law to clean up India. He maintained that Article 21 of the Indian Constitution gives the right to live which the Supreme Court of India has broadened its scope to include the

right to live in a healthy environment, implying access to clean air and water. He has also been emphasizing the importance of people's participation to save the environment crisis India is now suffering. He accused multinationals which are now investing in India of being atrociously and irresponsibly ignoring Indian laws and

polluting the country. He said development should not take place at the cost of human suffering and human life but unfortunately the government long ago adopted a lopsided policy favouring huge capital-intensive industry.

(*E-Law U.S. Science, May 98; Multinational Monitor, Jul/Aug 95*)

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

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Comparative Table of Environmental Convictions:
January - March 1998

	Number	1st Offence	2nd Offence	3rd + Offence	Highest Fine
APCO	13	7	2	4	\$ 12,500
	19	14	4	1	\$ 50,000
	21	11	7	3	\$ 30,000
WPCO	17	10	3	4	\$ 80,000
	25	19	2	4	\$ 80,000
	34	17	10	7	\$ 70,000
NCO	31	15	2	14	\$ 125,000
	39	22	3	14	\$ 50,000
	53	18	5	30	\$ 140,000
OLPO	-	-	-	-	-
	-	-	-	-	-
	1	1	-	-	\$ 6,000
DASO	4	3	1	-	\$ 30,000
	20	20	-	-	\$ 20,000
	-	-	-	-	-
WDO	13	13	-	-	\$ 22,000
	15	14	-	1	\$ 20,000
	28	28	-	-	\$ 35,000
Total	78	48	8	22	
	118	89	9	20	
	137	75	22	40	

January figures appear on the first line, February figures on the second, and March figures on the third of each item. Source: EPD, Anti-Pollution Prosecution Figures.

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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

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