

FRED KAN & CO.

Solicitors & Notaries

URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

簡 家 號 律 師 行 · 城 規 環 保 簡 訊

In this edition we consider key aspects of Hong Kong's *Territory Development Strategy Review '96*. This document and the imminent follow-up report will provide the bases for Hong Kong's further town planning, particularly in respect of the built environment. More than any other single piece of legislation or government policy, these documents are also likely to dictate the extent to which Hong Kong might preserve what is left of its natural environment.

The Editors

CONTENTS

Page

FEATURE: Planning for Hong Kong's Future Development . . .	1
LEGISLATION DIGEST	4
HONG KONG BRIEFING	5
PADS UPDATE	5
ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)	6
PLANNING DECISIONS	7
CASELAW UPDATE	8
REGIONAL & INTERNATIONAL	9
STATISTICS	12
ABBREVIATIONS	12

PLANNING FOR HONG KONG'S FUTURE DEVELOPMENT

In 1996 the Planning, Environment and Lands Branch ("PEL") released *A Consultative Digest - Territorial Development Strategy Review '96* ("the *TDS Review*") for public discussion and comment. The purpose of the *TDS Review* is to encourage public participation in the complex process of planning for Hong Kong's medium and long-term development. With Hong Kong's population expected to reach 8.1 million (from the present 6.3 million) within 15 years, the government has realised it must implement effective town-planning measures and regulations to try to ensure that the SAR develops in an orderly and sustainable way.

In this Report we provide a brief overview of the scheme of the *TDS Review*. [However, we do not include a review or comment on the Chief Executive's recent policy announcements concerning proposed, massive infrastructure and housing projects.] Once the government has

digested views expressed by the public it will release a *TDS Review Executive Report*. [This was due to be published early this year, but at the time of writing has not been. Presumably, therefore, submissions will continue to be accepted by the PEL.]

Since the *Territory Development Strategy* ("*TDS*") was first prepared in 1984, it has been the basis of Hong Kong's planning framework to guide development and investment, to secure the best use of resources and to establish a high quality living and working environment whilst at the same time attempting to ensure a reasonable degree of conservation of our ecology. It is this latter aspect which is likely to prove the most difficult challenge for Hong Kong's planners.

The *TDS Review* reviews and updates this broad planning framework, with the objective of striking a more effective balance between various land use, transport and environmental factors. The government hopes that the framework will provide the necessary land and infrastructure allocations, after taking into account

all available resources, to ensure Hong Kong's continuous growth as an important regional centre as well as a pleasant international city to live and work in.

Objectives

The objectives expressed in the *TDS Review* are as follows:

- a) To enhance the role of Hong Kong as an international city and a regional centre for business, finance, information, tourism, entrepot activities and manufacturing.
- b) To ensure that adequate provision is made to satisfy the land use and infrastructure needs arising from sectoral policies on industry, housing, commercial, rural, recreation and other major socio-economic activities.
- c) To conserve and enhance significant landscape and ecological attributes, and important heritage features.
- d) To enhance and protect the quality of the environment with regard to air quality, water quality, noise, solid waste disposal and potentially hazardous installations by minimizing net environmental impacts on the community and maximising opportunities to resolve existing environmental problems.
- e) To provide a framework within which to develop a multi-choice, high capacity transport system that is financially and economically viable, environmentally acceptable, energy efficient and provides for the safe and convenient movement of people and goods.
- f) To formulate a strategy that can be carried out both by the public and private sectors under variable circumstances, particularly with respect to the availability of resources and significant changes in demand patterns.

Strategic Planning Options

The objectives are the bases on which the strategic planning options have been formulated. In particular, the importance of the economic interaction between Hong Kong and the wider region of southern China has been considered, as a result of which two *TDS* scenarios are proposed:

- a) *Scenario A* postulates that the Pearl River Delta (PRD) will be the major economic hinterland of Hong Kong over the long term. This is essentially a trend-based scenario in terms of predictions for population and economic growth of Hong Kong.
- b) *Scenario B* postulates that Guangdong Province and other provinces of China will be the major economic hinterland of Hong Kong. This scenario assumes a higher rate (than *A*) of economic and population growth for Hong Kong.

These two scenarios should not be regarded as being

mutually exclusive. Rather, they represent a progression from A to B.

Long-term Strategies

Recommended strategies for the period to 2011 for Scenarios A and B are included in the *TDS Review*. The principal characteristics of the strategies are set out below in terms of anticipated distributions of population and jobs, transport system, overall development patterns and the future use of rural and marine areas.

a) Distribution of population

Scenario A

i) Consolidation of development in Base Growth Area (i.e. existing development) including Tseung Kwan O, Tin Shui Wai, Tung Chung.

ii) Strategic growth at Kai Tak - Kowloon Bay Phase I, Green Island Reclamation, Central and Wan Chai

Reclamation, Tsuen Wan Bay Reclamation and Hong Kong Island South; and

iii) Strategic growth at Tseung Kwan O Phase 3, Tung Chung Phase 2 to 4, supplemented by new development areas at Yuen Long South and Au Tau - Kam Tin, and low-density housing at Whitehead.

Scenario B

Same as *Scenario A* plus:

i) further extension of Tseung Kwan O, Tung Chung and Kam Tin - Au Tau;

ii) additional strategic growth at Kai Tak - Kowloon Bay (Phases 2 and 3), Tai Ho, Lok Ma Chau/San Tin and rural North-West New Territories, supplemented by low-density residential development at Tuen Mun East; and

iii) potential solution (i.e. additional) spaces in the Tuen Mun - Yuen Long Corridor, Fanling North and the Border Area, subject to further studies.

b) Distribution of jobs

Scenario A

i) Consolidation and expansion of the existing Central Business District (CBD) and development of Tsuen Wan as a major business centre.

ii) The development of job nodes around major transport interchanges in Metro Area (Hong Kong Island, Kowloon, New Kowloon and Tsuen Wan - Kwai Tsing) outside the CBD.

iii) Retention of existing industrial areas for environmentally clean and manufacturing-related activities.

iv) The possible development of new industrial areas/estates at South East Kowloon, Chek Lap Kok and North Lantau Port.

v) The development of a Science Park at Pak Shek Kok, and, possibly, business estates at Chek Lap Kok, Lantau Port and Au Tau - Kam Tin.

Scenario B - same as *Scenario A* plus:

The government hopes to ensure Hong Kong's continuous growth as an important regional centre as well as a pleasant international city to live and work in.

i) further development of job nodes along a North-South axis between Kowloon and North-East New Territories along the KCR/MTR corridor; and

ii) possible development of high-tech industrial parks or areas in the North-East New Territories near the border area.

c) *Transport systems*

The principal transport plan put forward in the *TDS Review* is the construction of a North-South and an East-West network of highways and railways to connect principal activity nodes within the Territory, and to provide new and upgraded, cross-border links, especially in the western sector, to provide connections between the core of the Metro Area, the new airport and port facilities on North Lantau and the areas of growth along the eastern and western banks of the PRD. Potential new highway and railway projects have therefore been proposed to meet the respective transport needs of the two development scenarios.

d) *Rural and marine areas*

The principal framework suggestions for land and marine-based conservation areas are:

- i) *Unique Areas*: these include the Mai Po Marshes, the uplands of the North-East New Territories and pockets of inshore waters in the North-East New Territories, South-West New Territories and South-East New Territories. All these areas are distinguished by their outstanding environmental attributes.
- ii) *Significant Areas*: which include the remaining major upland landscapes and designated inshore waters.

Additionally, there remain residual, lowland areas, most of which are now covered by statutory *outline zoning plans* or *development permission area plans* which contain a broad planning framework for the growth needs of village settlements, the reservation of land for a range of semi-urban uses (e.g. open storage), the conservation of high quality farmland, the protection of sites of special scientific interest and the conservation of scenic and historical features.

Medium-term Strategies

The authors of the *TDS Review* have also proposed various planning principles, objectives and strategies to cater for Hong Kong's growth in the medium-term, during "the long lead time required for the planning and production of land for development and provision of infrastructural....."

The medium-term is taken to be the years until 2006 by which time the government anticipates that existing programmes and land dedicated for housing will have largely been taken up. The government estimates a potential 'new' demand for 390,000 public and private flats during 2001-2006, which equates with housing approximately 1 million extra people.

Significantly, the *TDS Review* targets two "extreme" patterns of growth, namely a New Territories - biased (NT-biased) and a Harbour-based (HB-biased) option. The authors recognise the high level of public concern with further Harbour reclamation, which has prompted the NT versus HB options comparison. Suggested advantages and disadvantages of both options are:

NT-Biased Option

Advantages:

- more financial returns to private land owners;
- greater involvement of private sector;
- broadens choice of housing;
- promotes closer interaction with the PRD;
- increases viability of new rail links;
- helps achieve a better population-job distribution in non-Metro areas and thus reduces worker travel times;
- encourages creation of new employment nodes in the NT;
- upzoning could facilitate the clearance of temporary uses; and
- enhances accessibility of residents to wider outdoor recreational opportunities.

Disadvantages

- longer lead-time prior to development due to need for comprehensive feasibility studies;

- assembly of land of fragmented ownership difficult, time consuming and costly;
- difficulty in obtaining adequate supplies of fill for raising site levels;
- requires heavy expenditure of public funds to overcome drainage and flooding problems and also provide other major infrastructure;
- problems in inducing creation of employment opportunities;
- large commuter travel demands;
- longer trip times and higher levels of congestion in the NT;
- congestion on cross-harbour transport links;
- air pollution impacts in Tuen Mun Air Quality Control Zone;
- sewerage and river pollution problems;
- potentially serious impacts on water bodies in the NWNT and North Lantau;
- increased threats to ecologically sensitive areas; and
- high cumulative environmental impacts.

Harbour-Biased Option

Advantages:

- earlier start possible as harbour reclamation areas are either covered by detailed feasibility studies or are currently subject to such investigations;
- provides "solution spaces" for urban renewal;
- new commercial nodes to satisfy market preferences;
- relatively few land acquisition problems for reclamation projects;
- high net financial benefit for the community;
- better job-population balance and shorter travel times;
- facilitates improvement to road and rail-based transport systems of the Metro Area;
- relatively easy to extend infrastructure services to new development areas;
- relieves pressures of development on areas of ecological and landscape value in the NT;
- eliminates some highly polluted bodies of water such as Kai Tak

- Nullah; and
- provides opportunities to develop new waterfront promenades to enhance public use and visual appeal of the city.

Disadvantages

- further reduction in the size of Victoria Harbour;
- substantial up-front works and resource allocations;
- large quantities of fill required;
- relocation of some port facilities;
- more congestion on cross-harbour links;
- local traffic congestion;
- heavy utilisation of all passenger rail lines;
- deterioration of air quality in the Harbour Air Quality Control Zone;
- reclamation works can have temporary adverse effects on water quality and marine activities;
- early implementation of the later stages of the Strategic Sewage Disposal Strategy would be required; and
- potential strategic growth development in the N.T. held back post 2006."

The *TDS Review* concludes that both options involve considerable initial capital costs, but the NT option raises more uncertainties "in terms of resource implications".

Environmental Concerns

Whilst the *TDS Review* places some emphasis on the need to devote resources to mitigating the serious deterioration of the health of Hong Kong's environment, it acknowledges that "potential environmental impacts cast doubt on the long-term sustainability of continued demand-led development within the limits of current policies and proven technology." It also admits that, for example, air quality "will continue to deteriorate".

The *TDS Review* does not hold out much hope for realistic conservation of the natural environment of Hong Kong. There is no detailed suggestions for the creation of

realistically effective conservation reserves and effective buffer zones to them. No firm proposals are put forward for resolutely reducing polluting activities, such as the possibility of restrictions on vehicle ownership/use to combat the enormous pollution (and other) problems generated by Hong Kong's high traffic volumes.

More fundamentally, the *TDS Review* accepts that the major premise in planning is that human needs take precedence over environmental integrity. It is extremely doubtful that such an anthropocentric planning bias will allow for the exclusion of long-term, effective environmental protection measures.

[For a more detailed analysis of the environmental implications of the *TDS Review*, see Pryor, E.G. and Chu, Teresa L.Y., *The Environmental Dimension of the Territorial Development Strategy Review (1997)* 5 Asian Journal of Environmental Management pp.1 - 14]

Digest of LEGISLATION

Control of Chemicals (Amendment) Regulation 1997 L.N. 230 of 1997

This Regulation came into operation on 27th June 1997. It increases the fees payable for the issue or reissue of licences or permits under regulation 6 of the Control of Chemicals Regulations (Cap.145 sub.leg). The new fee for the issue of a licence, including the issue of a new licence under section 8(5) of the Ordinance, shall be \$790 for each year. The new fee for issue of permit shall be \$510 for each year. The fee payable on the reissue of a licence under section 9(5) of the Ordinance shall be \$790 and a permit under section 9(5) shall be \$510.

Waste Disposal (Charges for Disposal of Chemical Waste)(Amendment) Regulation 1997 L.N. 231 of 1997

This Regulation came into operation on 27th June 1997. It amends Schedule 1 to the Waste Disposal (Charges for Disposal of Chemical Waste) Regulations (Cap 354 sub.leg.) to impose higher charges payable to the Director of Environmental Protection for the disposal of chemical waste at the Chemical Waste Treatment Centre owned by the Government.

Air Pollution Control (Construction Dust) Regulation (L.N. 127 of 1997) (Commencement) Notice 1997 L.N. 304 of 1997

The Air Pollution Control (Construction Dust) Regulation came into operation on the 16th June 1997.

Plant Varieties Protection Regulation L.N. 279 of 1997

This Regulation is made under section 42 of the Plant Varieties Protection Ordinance ("the Ordinance") (Cap 490) with the consent of the Financial Secretary.

In considering an application for a grant of plant variety rights under the section 31(1)(b) of the Ordinance, the Registrar of Plant Variety may commission a test of the relevant variety, i.e. the variety which is the subject of the application, in order to determine whether the relevant variety is new, distinct, stable and homogeneous within the meaning of the Ordinance.

Under section 6(1) of the Regulation, the Registrar shall maintain a Register of Plant Variety Rights which may be inspected by the members of the public. The Registrar shall in relation to an application for a grant, enter in the Registry various details concerning the plant species, including the name of the species of the relevant variety, the date on which provisional protection took effect and the name and address of the applicant. Under section 6(8) of the Regulation, it is required of the

Registrar to keep a record of the description of the distinctive features of the protected varieties and makes those details available for public inspection at his office.

HONG KONG

Briefing

1. The Environmental Campaign Committee has previously concentrated its activities on young people. But chairman Ronnie Wong Man-chiu said the committee would now pay more attention to educating adults on the need to protect the environment. For example, the Committee will encourage taxi drivers to use less fuel and to maintain engines so as to reduce emissions, and will teach factory workers to save energy and reduce pollution in the workplace. It will also try to persuade housewives to reduce their use of plastic bags, chemicals and detergents in the home. (SCMP 16.8.1997)

2. Officials admitted that air pollution could generally be 20 per cent worse than the daily index suggested on for example, 20th August 1997. They also feared air quality standards might not be strict enough. Their admission came as the index reached 108 in industrial areas - an "unhealthy" reading for the second day running. On Tuesday, the index was 109 - the highest this year - after a toxic cocktail of vehicle emissions reacted with sunlight to form ozone. Only one of the Environmental Protection Department's nine air quality monitoring stations is at street level. There could be as much as 20 per cent difference at street level."

Deputy Director, Mr. Stokoe, said the daily index was an average which took into account roadside pollution. When the index exceeds 100, the Department advises people with heart and respiratory illnesses to avoid physical exercises. But Mr Stokoe said the warning applied to anyone. More stringent standards were under consideration after American research raised fears about the health impact of tiny toxic particles, he said.

The head of Hong Kong University's Department of Community Medicine, Professor Anthony Hedley, said overseas research indicated that vigorous exercise in heavy air pollution affected even fit and healthy people:

There is evidence that people who are athletically fit suffer acute lung effects if they exercise vigorously in urban types of pollution. There is evidence this is associated with high ozone levels.

Professor Stephen Wong Heung-sang, of the Chinese University's Department of Sports Science and Physical Education, said pregnant women should also take extra care when pollution was high. (SCMP 21.8.1997)

3. Professor Peter Hills, the Director of the University of Hong Kong's Centre of Urban Planning and Environmental Management, said there was little point in tightening pollution standards without a comprehensive policy tackling air pollution.

In 1996, 6,272 people in Hong Kong died of respiratory diseases including bronchitis, chronic emphysema and asthma - 20 per cent of the total deaths, and a 10 per cent rise on the 5,707 deaths in 1995. More than 22,000 people died of respiratory problems between 1991 and 1996.

In an effort to limit air pollution, the government has decided to swap taxis and vans from diesel to cleaner liquefied petroleum gas (LPG) which will take up to three years, following a trial set to start this October. Nevertheless, with the expected container truck expansion of more than 500 per cent by 2011, air pollution is likely to worsen by 50 per cent by then. (SCMP 24.8.1997)

PADS UPDATE

1. Although in development for some time, the level of the Airport Operational Readiness (AOR)

programme activity will intensify over the next few months, culminating in the *Relocation*, a complex 90-day operation where facilities and staff will be moved from Kai Tak to Chek Lap Kok. One of the five *Relocation* phases is the Night Move, where staff and equipment essential to both airports' operations will be relocated in the few hours between the closure of the old facility and the opening of the new one.

The objective of AOR is to open the new airport in April 1998. The reality is more complicated, for it requires a seamless transition from construction and programming to trials, relocation and operation. This task does not just involve the Airport Authority (AA), but must be carried out in concert with at least 17 government departments and 80 business partners.

The AOR programmes have been integrated with the airport works programme (the construction project) to form a Master Programme, which contains key dates against which progress is measured. This in turn enables critical issues to be identified, and remedial action to be implemented if required.

A further recent development has been the Airport Opening Implementation Plan. This is a management and monitoring tool that provides a comprehensive checklist of AOR activities and serves as a central reference point for the AA.

[Airport Authority Hong Kong News, June 1997]

2. The AA recently announced its intended user-charges at Chek Lap Kok. Under the Airport Authority Ordinance, the AA is required to cover its costs without a subsidy from the taxpayer as well as pay a reasonable return on the very considerable public investment made in the new airport.

The level of charges which users,

including the airlines, will pay at Chek Lap Kok must reflect those basic principles. There are several other things they must achieve. First, the AA must keep costs firmly under control, and ensure that the return sought is not excessive in Hong Kong terms. Second, it must avoid damage to Hong Kong's competitive position, including its continuing role as a centre of international and regional aviation. Finally, the Authority must consult with Chek Lap Kok's main users, the airlines, before user charges are set by the AA Board and submitted to the Governor-in Council to be under the AA Ordinance. There have been six rounds of useful discussions in the AA's ongoing consultations with the airlines on airport charges; and the seventh round will take place in mid-July.

The airport charges will have a simple structure of three components: a landing charge, parking charge, and passenger terminal charge. They will also follow the "user pays" principle; for example, cargo aircraft that do not use the passenger terminal will not pay that component of the charges.

This simple commercial principle has avoided the problem faced by some transport systems elsewhere in the world which require continuing subsidies and thus are a drain on the public purse. It requires the projects to be financed and to run competitively and commercially. This principle will apply to AA operations at Chek Lap Kok.

[Airport Authority Hong Kong News, June 1997]

3. The AA has authorised four institutions to arrange a three year revolving facility for an amount of HK\$3,000 million (US\$384.6 m). They are: China Development Finance Company (Hong Kong) Limited (for Bank of China, Hong Kong Branch), Tokyo-Mitsubishi International (HK) Limited (for The Bank of Tokyo-Mitsubishi, Ltd.), Chase Manhattan Asia Limited (for The Chase Manhattan Bank), and

HSBC Investment Bank Asia Limited (for The Hongkong and Shanghai Banking Corporation Limited).

The facility is for general corporate purposes, including the financing of the second runway, the northwest concourse and new capital expenditure arising after the opening of the airport.

Participating banks will receive a margin of 0.30% p.a., plus a management fee to be agreed.

Separate arrangements for the Airport Authority's Note Issuance Programme have also been completed, subject to execution of the related legal documents. The Programme will have the Hong Kong Monetary Authority (HKMA) as the Arranger and Agent. With this Programme, the Authority will be able to issue fixed or floating rate paper with a maturity of up to ten years.

[Airport Authority Hong Kong Press Release, 15 July 1997]

ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

The Advisory Council on the Environment (ACE) met on 25th August 1997 to discuss, inter alia, the *Draft Waste Reduction Plan*. Miss Vivian Ko from the Environmental Protection Department (EPD) briefed the ACE members on the major components of the *Draft Plan* and sought their advice on it.

Professor Hills (Director of the Centre of Urban Planning and Environmental Management, University of Hong Kong) said that the effectiveness of the proposed waste reduction measures outlined in the *Draft Plan* would depend largely on whether there existed a sophisticated recycling industry to provide an outlet for the wastes collected. He pointed out that the recycling industry was not well developed in Hong Kong and therefore there would be no ready

outlet for recyclable wastes after they had been collected and sorted.

Mr. Barrie Cook, an ACE member, said that one of the major difficulties in recycling municipal wastes was the lack of space within residential and commercial buildings to use as a depot for sorting wastes. He asked whether the government would encourage developers to provide sorting facilities in new buildings. The Chairman further clarified the situation when he indicated that developers had been rather reluctant to do so because such facilities would have to be counted as part of the built area, thereby reducing the total floor area that could be built for sale. Mr. Benny Wong from EPD said that EPD had been discussing with the Housing Department the provision of space for sorting facilities within public housing estates and was also working with the Buildings Department to amend the Buildings Regulations so that sorting facilities within private residential/commercial buildings would no longer be considered in plot-ratio calculations.

The Chairman said that he had discussed with the Director of Housing the need to minimise the amount of refurbishment wastes generated by households in public housing estates and the Director had promised to explore various possibilities, such as ceasing to provide items (e.g. doors and kitchen tiles) which would likely be replaced by residents anyway. Mr. Wong said that the Housing Department had set up a task force to look into possible means to minimise the amount of wastes generated by domestic households, including educating residents on the need to minimise waste.

Mr. Chan Kwok-wai asked whether the government would set up a recycling system for discarded electrical appliances, which was a common kind of waste generated by domestic households. Mr. Benny Wong responded that discarded

electrical appliances were left uncollected because they did not have much recycling value. However, he was aware that there were still some trade-in operators who would purchase them at a low price.

Mr. Lin Chaa-ming said that since domestic waste had the lowest recyclable value, the government could not rely entirely upon the free market mechanism to provide the recycling initiatives. The *Waste Reduction Plan* should therefore propose means to create a market for recycling domestic waste.

Dr. Ho Kin-chung said that the overall waste reduction target for municipal waste should be set higher than 40% in ten years. He said that the actual amount of waste to be reduced would be lower than 40% under the current proposal, since 20% of the proposed reduction would come through waste-to-energy incineration. He also commented that the procedures for obtaining permits to transport recyclable waste to the mainland for recycling purpose should be streamlined so as to encourage recycling activities.

To conclude the discussion, the Chairman expressed the hope that the Administration would take into account Members' views and formulate a workable and balanced *Waste Reduction Plan*. Mr. Steve Barclay from EPD said that the Administration hoped to submit the *Waste Reduction Plan* to the Council before the end of 1997.

PLANNING DECISIONS

Town Planning Appeal No.28 of 1995 : Fine Tower Associates Limited v The Town Planning Board.

Change of land use from industrial to office development - whether the application was correctly refused, based on the planning intention, compatibility and accessibility points - whether an industrial and

office development could be used exclusively as an office unrelated to any industrial use.

Summary of the facts

The Appellant appealed against the Town Planning Board ("the TPB")'s decision not to approve the Appellant's application pursuant to section 16 of the Town Planning Ordinance for planning permission to erect a 27-storey office building on the appeal site ("the site").

The site was located on the northern side of Hoi Yu Street with an area of 2,985.90m² and a sea frontage of about 55m. To the east of the site along the waterfront was a strip of land set aside for a public dumping barging point to be operated in mid-1998.

The site was zoned for industrial use under the North Point Outline Zoning Plan ("OZP") No.LH8/35 in May 1975 and became part of the Quarry Bay OZP No. S/H21/3. The site comprised Inland Lot No.8590 (2,600m²) and Inland Lot No.8723 (385.90m²). Under the current leases, both lots were restricted to industrial and/or godown purposes.

In January 1991, the site was identified as one of the target areas for commercial activity to upgrade the existing urban fabric in the Target Areas for Reduction of Densities/Restructuring Plan attached to the Metroplan.

The site was within the Quarry Bay OZP No.S/H21/9. That plan covers an area of about 209 hectares with the industrial zone taking up 0.84 hectare. The site fell within two designated zones under that plan. The major part of the site lay within the "Industrial" zone, whereas a small part in I.L.8723 was within the "G/IC" ("Government Institute or Community") zone. According to the Notes which form part of this OZP, uses that are always permitted for an industrial site include, inter alia: ancillary car/lorry park; bus depot; canteen; cooked food centre; government refuse collection point, and industrial use other than

those where planning approval is required. Uses that may be permitted with planning approval include, inter alia: bank; dangerous goods godown; marine fuelling station; office not ancillary to the industrial use; restaurant and ship-building, ship-breaking and ship-repairing yard.

The explanatory statement to OZP No.S/H21/9 of October 1994 noted that the "development of Taikoo Shing has marked the gradual transformation of the Quarry Bay area from an industrial/dockyard area into a major residential and commercial community".

The Appellant's application was for the development of a 27-storey high office building of a height of 92.66m ("the first application"). The first and second floors were designated as carparking spaces, and all floors from 3rd to 26th floors as offices. With a plot ratio of 15, the proposed office building would provide a total gross floor area of 44,788.50m². On 16th December 1994, the application was considered and rejected by the Metro Planning Committee ("MPC") of the TPB. On 16th June 1995, the TPB, on review of the first application, decided not to approve the application on the following grounds:-

1. the proposed office development is not in line with the planning intention for the site which is for water front industrial development. The subject site is one of the very few industrial sites with marine access. As such sites are rare and difficult to be reprovisioned, the site should be retained for industrial uses requiring marine access (the planning intention point);
2. the proposed office development is not compatible with the proposed public dumping barging point at the adjoining site (the compatibility point); and
3. the subject site, being isolated in location and relatively remote from the MTR station and major public

transport routes, lacking supporting facilities and having a tortious pedestrian route, is not suitable for office development (the accessibility point).

Prior to the hearing by the Town Planning Appeal Board ("the TPAB") of the appeal in respect of the first application, the Appellant on 28th January 1995 submitted another section 16 planning application for an Industrial-Office ("I-O") development with provision of a ground-level water front cargo handling area ("the second application"). In the second application, the first floor to third floor of the I-O development were designed for loading/unloading facilities and carparking spaces while the 4th to 27th floors were designated as office/workshop uses. The second application was approved by the MPC on 17th March 1995. The Appellant had made reference to the I-O development in its appeal in respect of the first application before this TPAB.

Decision of the Town Planning Appeal Board

On 16th June 1995, the TPAB, on hearing the appeal in respect of the first application by the Appellant, made the following decision:-

1. Mr. Li Chi Kwong, District Planning Officer called on behalf of the TPB, says that "There is a locational requirement for a site of such a nature to be in that part of Hong Kong Island". Mr. Warren Chan, Leading Counsel for the Appellant, repeatedly called for particulars in support of this assertion. None was forthcoming. Given the fact that the Industry Department raised no objection to the (first) application in question, we find it difficult to accept Mr. Li's assertion. For these reasons, we disagree with the TPB in the first reason (the planning intention point) they gave for rejecting the (first) application.

2. We are of the view that the

Appellant has overstated their case in asserting that in reality the approved Industrial development would be devoted exclusively to office use. The example cited by the TPB in relation to the I-O development at No.31, Wong Chuk Hang Road (the Lee Fund Centre) illustrates that user in such development can be industrial oriented. The approval of the I-O application in this case has injected an element of flexibility. It accords with the planning intention of the (appeal) site as a site zoned "industrial". It would be wrong to test the issue of compatibility on the basis that the I-O development would be used exclusively as office unrelated to any industry and in breach of the planning approval so granted. We are of the view that the grant of this application (the first application) would result in a development that is incongruous with the proposed bargaining point at Hoi Yu Street, Quarry Bay next to the (appeal) site ("QBBP"). Such incongruity would carry the risk of hampering if not jeopardizing the operation of the QBBP. We recognise the public interest in the setting up and maintenance of the QBBP. We are in agreement with the TPB in rejecting the application on the incompatibility ground.

3. We share the TPB's view that the (appeal) site is at a relatively isolated location. Transportation and supporting facilities are not within easy reach. We would therefore attach some, but not heavy, reliance on this factor in rejecting this appeal.

4. For these reasons, we dismiss the appeal

CASELAW UPDATE

Attorney General v Lam Mei Chai [1997] 1 HKC 22

Town Planning - Unauthorised development - Enforcement notice - Whether managers of tso and t'ong land were 'owners' of land - Town Planning Ordinance (Cap 131) s23(1) - Buildings Ordinance (Cap123) s2(1)

The respondent was the manager of the Lam Chung Hon tso which was

the registered owner of various parcels of land. On 14 July 1993, the Director of Planning served an enforcement notice on the respondent pursuant to s23(1) of the Town Planning Ordinance (Cap 131) requiring that certain unauthorised development be discontinued.

s23(1) provides :

(1) Where there is or was unauthorised development, the Authority may, in a notice served on one or more of a land owner, an occupier or a person who is responsible for the unauthorised development -

(a) specify the matters that constitute or constituted the unauthorised development; and
(b) specify a date by which if the unauthorised development has not been discontinued, the Authority requires -

(i) it to be discontinued; or
(ii) permission for the development to be obtained under section 16.

s23(6) provides that non-compliance with an enforcement notice is an offence.

The enforcement notice was not complied with and on 14 April 1994 an information was laid against the respondent alleging his failure to comply.

On 17 August 1996 the respondent appeared before the magistrate and pleaded not guilty. The magistrate ruled there was no case to answer as the manager of the tso was not an 'owner' of the land within the definition of the Building Ordinance (Cap 123). The magistrate held that the manager only administered the land and had no legal title to the land.

On the application of the Attorney General the Magistrate stated a case to the Court of Appeal as follows :

"Whether I was correct in holding that the managers of tso and t'ong land were not 'owners' within the definition in the Buildings ordinance (Cap123) and thus an

enforcement notice could be not served to them pursuant to s23 of the Town Planning Ordinance (Cap131)"

The decision

Held : The question posed by the magistrate must be answered in the negative; he was not correct in holding that the respondent was not an owner under the legislation.

Reasons

1. There was no reason that either the Town Planning Ordinance or the Buildings Ordinance should include provisions contained in a separate ordinance. The correct approach was to consider the provisions of each Ordinance separately and then determine whether the respondent could be held liable for any failure to comply with the enforcement notice.

2. Section 15 of the New Territories Ordinance (Cap 97) provided that a town manager was vested with the duties and responsibilities incidental to the ownership of the land. This was consistent with the manager assuming the responsibilities referred to in s23(1) of the Town Planning Ordinance.

3. From s2 of the Building Ordinance it was also clear that the definition of 'owner' included the person entitled to receive the rents and profits of the land as was a town manager. This factor alone was conclusive in determining the appeal. The magistrate was not therefore correct in holding that the respondent was not an "owner" within the meaning of the relevant legislation.

REGIONAL & INTERNATIONAL

Malaysia/Australia/Hong Kong - Toxic Torts

As is well known and documented,

Hong Kong has paid a significant environmental price for its economic miracle, particularly in the form of serious water and air pollution: see, for example, *Environment Hong Kong 1997 (EPD)*. It is therefore somewhat surprising that there is not a higher incidence of "toxic tort" litigation in Hong Kong. Nevertheless, the potential of such litigation is considerable and so a recent article concerning aspects of such litigation in *Malaysia* is of particular interest to Hong Kong.

Writing in (1997) 2 *Asia Pacific Journal of Environmental Law* Meenakshi Raman (Legal Adviser, Consumers' Association of Penang, Malaysia) notes that Malaysia faces serious environmental problems of many kinds due to the government's single-minded drive for economic development at any costs (a policy reflected in numerous parts of the world, including Hong Kong). One of the many ways the people of Malaysia have suffered is exposure to vast amounts of toxic waste generated by industry and agriculture. It is estimated that Malaysian industries produce 380,000 tons of such waste each year, which will rise to 468,000 tons by the year 2000, most of which is non-biodegradable and therefore poses a continuing threat to the health of people directly, as well as to the natural environment. There is, therefore, increasing scope for affected persons to institute proceedings against the polluters claiming damages for injury arising from unlicensed discharge of toxic waste.

Raman refers to one such case, where residents of Bukit Merah brought an action relying on private nuisance, negligence and the rule in *Rylands v. Fletcher* ((1866) LR 1EX265 (HL)) against Asian Rare Earth (ARE). The defendant, a large international joint venture, produced a rare-earth, yttrium, by treating tin-mining tailings. A by-product of this process was the creation of a highly radioactive material, thorium, which has a half-life of 40 billion years!

In the course of the trial evidence

from foreign experts established that the nearby existence of thorium was the likely cause of a high incidence of leukaemia in children of the community, as well as other serious health defects, such as abnormal miscarriage rates. The High Court found in favour of the Plaintiffs. On appeal the Supreme Court reversed that decision on the ground that the Plaintiffs should have first exhausted statutory remedies pursuant to the *Atomic Energy Act Licensing* 1984 including representation to the Atomic Energy Licensing Board, to have ARE's licence cancelled (although Raman notes that the Act does not in fact allow for such representation). [As result of the case, however, ARE voluntarily shut down its operations in early 1994].

The author points out several problems arising from the ARE case for potential toxic tort litigants. In particular, injury due to chemical contamination, for example, may not manifest itself for a considerable period following the plaintiff's exposure. The facts of exposure to dangerous toxic waste/chemicals and carelessness on the part of the defendant may be provable, but the plaintiff may not at the time of seeking advice from a lawyer be showing symptoms of injuries, and without damage the tort of negligence is not established; e.g. *Windfield And Jolowics on Tort*, 14th ed. 78. Statutory time limitations may prevent legal action subsequently being taken when injury is discovered. Even if that were not the case, and the rule that time does not run until injury is known or should have been known to the plaintiff is applied, a number of years will have elapsed which could result in practical difficulties in proving liability, particularly where first-hand evidence is needed to establish a causal link between the alleged injury and alleged exposure and/or careless act(s) of the defendant.

[This writer faced that dilemma

when advising a group of people in another jurisdiction as to their rights to bring an action for negligent application of a brand name termiticide (which was based on a highly toxic organochlorine formula). Overwhelming scientific evidence exists, mainly from research and manufacturers' own compulsory testing in the United States, that organochlorines are carcinogenic. For that reason they have been banned in numerous countries in the world. However, symptoms of cancer (for example, which is only one of the serious diseases this chemical may cause) are unlikely to become apparent for some years following exposure. In the absence, of discernable injury (although in this particular case there were some immediate symptoms, so bad was the application of the chemical) the potential plaintiffs had no cause of action in negligence. But it was important to litigate liability as contemporaneously with the incident as reasonably possible. Two possible ways of achieving this were:

- (i) to sue in the name of those plaintiffs who had in fact suffered immediate symptoms (albeit of a minor nature), and/or
- (ii) to break new ground and argue that the *mere increase in risk of cancer* resulting from exposure to the particular chemical in question was itself an injury, sufficient to complete the chain to establish a cause of action in negligence. (The writer subsequently left the jurisdiction and understands that the action did not in fact proceed.)

In view of the massive potential harm to both people directly and the environment which the use of toxic substances may cause, and especially bearing in mind that to date users of such substances for profit have largely escaped any financial or other retribution for their "free use" of the community's environment, governments should at least ensure that members of the community are able to bring a claim in negligence on the issue of liability. The extent of the ultimate

injury and disability of the plaintiff would remain an issue for assessing quantum, but exposure to risk should be sufficient in itself to establish the cause of action.

The nexus between the individual plaintiff and the negligent state/act complained of would, of course, still have to be drawn by the plaintiff on the balance of probabilities.

However, this can be done by the combination of the fact of the situation and expert opinion. Such a reform is particularly appropriate for Hong Kong, which has a small geographical but the range of noxious activities is significant, as shown by the seriously polluted state of our environment. Thus the potential for disease/injury from careless use or discharge of toxic substances is significant.

India

Industrial plots in Haryana state, India, are experiencing a surge in prices. They have virtually trebled in price over the last year. The cause of this price increase is a recent directive by the Supreme Court of India that all designated, polluting industries within the Delhi and New Delhi were required to relocate beyond the city boundaries by the 30th November, 1996.

Notices were issued to 200 of the worst offenders. Notices have been issued to other businesses requiring them to show cause why they also should not be required to move their operations.

The major concern is the amount of smoke generated by hundreds of small and medium scale industrial businesses, which has turned India's capital into the second most polluted city in India (Bangalore being the most polluted). The World Health Organization rates the Indian capital as the world's fourth worst polluted city.

The State of Haryana, located next to Delhi, aims to take advantage of the situation by offering industrial plots

to re-locating businesses. The cost of such plots has risen from approximately 2,500 rupees (HK\$512.5) per square metre late last year to approximately 8,000 rupees per square metre.

Malaysia

A developer has proposed covering a 1.2 kilometre stretch of Kuala Lumpur's Klang river with a 10 storey building.

Apparently many in the community consider the Klang, where it flows through the central part of Kuala Lumpur, to be an eyesore. The developer's proposal aims in part to counter that.

Not surprisingly, there has been an outcry from people concerned to see less high-rise and concrete style development and more natural beautification. A counter proposal is to plant more trees, flowers and establish nature parks along the river, as well as taking effective steps to clean up the river itself. However, although government guidelines prohibit construction of permanent buildings within the river reserve area (in which the proposed development would be located), the Department of the Environment has approved the project's environmental impact assessment. Apparently, the Prime Minister, Dr. Mahathir Mohamad is in favour of the project, which makes it likely that it will proceed.

Hong Kong and Southern China

Experts recently warned that some shark fin and other gourmet seafood sold in Hong Kong are contaminated with mercury and other toxic metals to such an extent that they breach prescribed maximum levels of metal contaminants.

Dr. Clement Leung Kai Man and Prof. Mike Dickman have warned the public not to eat sharks' fin and similar seafood, such as scallops,

squid and oysters. Research conducted with a grant from the Environment and Conservation Fund found that the samples of dried shark fin and scallops tested contain 30 times more heavy metal than fish. Some samples contained 5.8 parts per million of mercury. The maximum level allowed under the *Public and Municipal Services Ordinance* is 0.5 parts per million. Dr. Leung commented: "I think it behoves the Government to find out how contaminated these seafood are."

Vietnam

Hanoi, the 1,000 years old capital of Vietnam, has many buildings worthy of preservation, particularly those constructed during the French colonial regime. Until recently, the built environment was protected naturally by war, depression and the planned market policies of a communist regime. However, over the last few years the great wealth of architectural heritage of Hanoi has been under threat from capitalist style development. Today, as much construction occurs in a year as

previously took place over 10 years. Hanoi's administrators recognise the need to enact *and enforce* planning regulations to limit the extent to which heritage buildings are bulldozed, but there are signs that their conservation efforts will not be able to withstand the pressures to redevelop Hanoi, a situation which is exacerbated by the corruption of city officials. (Sources: various SCMP)

B.G. Baillie
Fred Kan & Co., Hong Kong

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 one of our following associate firms:

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

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

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

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

advocasia

An Association of Asian Commercial Law Firms

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

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

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

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

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

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

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

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

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

Comparative Table of Environmental Convictions:
April - June 1997

	Number	1st Offence	2nd Offence	3rd + Offence	Highest Fine
APCO	19	13	1	5	\$ 50,000
	21	12	3	6	\$ 20,000
	10	5	1	4	\$ 20,000
WPCO	21	10	7	4	\$ 64,000
	17	7	6	4	\$ 50,000
	15	11	1	3	\$ 50,000
NCO	64	24	14	26	\$ 80,000
	46	27	8	11	\$100,000
	28	11	4	13	\$ 75,000
OLPO	2	2	-	-	\$ 20,000
	-	-	-	-	-
	4	3	-	1	\$ 35,000
DASO	-	-	-	-	-
	-	-	-	-	-
	-	-	-	-	-
WDO	19	17	1	1	\$ 50,000
	16	15	1	-	\$ 50,000
	21	20	1	-	\$ 10,000
Total	125	66	23	36	
	100	61	18	21	
	78	50	7	21	

April figures appear on the first line, May figures on the second, and June figures on the third of each item. Source: EPD, Anti-Pollution Prosecution Figures.

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

Fred Kan & Co.
Suite 3103-06 Central Plaza
18 Harbour Road
Wanchai
Hong Kong

Printed Matter

