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Solicitors & Notaries

**URBAN PLANNING AND
ENVIRONMENTAL LAW
QUARTERLY**

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Hong Kong's town planning legislation has evolved slowly since its inception in 1939. Increasingly the economic and environmental future of the SAR will depend on the effectiveness of the legislation itself and its administration. The lead article in this issue considers a number of weaknesses in our current town planning system.

The Editors

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HONG KONG'S TOWN PLANNING PROCESS : THE NEED FOR GREATER ACCOUNTABILITY AND PUBLIC PARTICIPATION

Town and country planning in Hong Kong is governed by the *Town Planning Ordinance* (Cap.131) (TPO) and Development Plans prepared and promulgated thereunder.

The TPO was enacted on 29th June 1939. The declared purpose of the TPO is "to promote the health, safety, convenience and general welfare of the community by making provision for the systematic preparation and approval of plans for the lay-out of areas of Hong Kong as well as for the types of building suitable for creation therein and for the preparation of plans for areas within which

permission is required for development" (which was the original policy of the law as at 1939, but incorporating 1991 amendments).

Hong Kong's planning laws and systems have been under review by the government more or less constantly during the last 10 years. A major review of the TPO and its administration, meaning primarily the Town Planning Board, was ordered in September 1987, by the Executive Council. [As to the status of the Town Planning Board then, see *Cheung Kai Wai v. Fuk Ka Pak* [1990] 2 HKC 394]. Since then, however, there has been a slow and piecemeal approach to changing and improving the planning system. This is especially so in respect of making the system more open to public participation and accountability.

Following China's opening up to the world and free-market

economic policies in 1979, Hong Kong experienced its own economic boom which resulted in greatly increased pressures to develop land and other resources. This was the impetus for the government to review and improve our land use regulatory system, namely the TPO. An amendment Bill was introduced into Legislative Council in 1990, and in 1991 significant amendments were incorporated into the TPO, (although several were not proclaimed). The Planning Appeal Board was established in 1991.

In 1996 many worthwhile amendments were proposed in the Draft Town Planning White Bill ("the White Bill") which was released for public discussion and submission. When at the end of the public submission period a bill to amend the TPO was introduced into the Provisional Legislative Council (in January 1998), those working in and concerned with our planning system might have supposed it would include at least some of the important improvements to the system that were contained in the White Bill.

In fact, the 1998 Bill (which became law in April 1998) effects only very limited changes to the planning process. In particular, the government has failed to take the opportunity to address a fundamental weakness of the planning system, namely the lack of opportunity for public participation in the planning process.

Members of the public do not have even the most basic of rights in respect of that process, the right to attend meetings of the development applications - which affect the public generally to a greater or lesser extent - are assessed.

The 1998 amendments (Ordinance No.16/1998) consist of three pages only. They do not reflect the policy and detail of the much more comprehensive White Bill. The amendments are restricted largely to procedural matters. For example, Sec.6(A) is added to allow the Board to hear objections to a Draft Plan individually or together at the same meeting. Sec.6(B) empowers the Board to adjourn a meeting (in order to consider objections to a Draft Plan) once only. Sec. 8 is amended to provide for (essentially) submission of Draft Plans to the Chief Executive after a period of 9 months following the 2 months publication period (Section 5) within which objections (from "any person affected") to Draft Plans may be lodged. Sec.2(A) is added to allow the Board to exercise certain of its power in committee, subject to minimum quorum stipulations.

When speaking at a *Planning Forum on the Town Planning Bill 1998* (27 February 1998 Centre of Urban Planning and Environmental Management, HKU), Mr. Andrew Lam, Vice-President of the Hong Kong

Institute of Planners and convenor of the Institute's Public Affairs Committee, criticised the government for not taking steps to amend the TPO in a meaningful way when it introduced its 1998 amendments. The most serious defect of the 1998 amendments, in his view, is the omission to address the lack of opportunity for members of the public to participate in planning application procedures, particularly the hearing itself.

As Mr. Lam pointed out, Hong Kong's planning process continues to be treated as a private matter between the Board and the development applicant, which distinguishes it from most other developed countries' planning systems.

This private-treaty approach is reinforced by the fact that only the developer/planning applicant is entitled to appeal a decision of the Board to the Planning Appeal Board : Section 17B(1) TPO. Further, Board members are not elected, but are appointed by the Chief Executive of Hong Kong. They come mainly from business and property development sectors of the community.

Another glaring weakness of the 1998 amendments (in Mr. Lam's view) is their failure to provide for interim planning controls during period that a Draft Plan is under public

discussion, prior to its submission to the Chief Executive. Interim controls are found in most other town planning systems. Their purpose is to provide certainty and prevent land speculation during any period that development plans / rules are being formulated. The TPO should incorporate interim development controls, particularly bearing in mind that under existing procedures the Board may gazette a Draft Plan for public discussion and representation / objection and 9 months or more later the plan becomes final. Even in that time, the Draft Plan may be changed, perhaps in response to objections. In the meantime, the Board is applying the provisions of the Draft Plan to planning applications, whilst at the same time receiving and considering objections to the Draft Plan. This is why in other jurisdictions interim development controls are put in place, thereby freezing the status of applicable planning regulations until such time as the new (draft) plan is made law.

Our planning application might also be criticised for

the fact that planning officers can have a high degree of influence on the outcome of applications. The Board's work-load has increased significantly in recent years, which has resulted in Members becoming more dependent on recommendations made by its planning officers. Recommendations may appear at times to be rubber-stamped by the Board. This is of particular concern bearing in mind the (usual) composition of board membership, as mentioned above. It is essential that the Board's decision-making process be free, and be seen by the public to be free, from bias or bureaucratic influence.

One suggestion made at the *Forum* is that perhaps consideration could be given to re-vamping the membership of the Board to allow elected members of District Boards, for example, to sit on planning applications. To take that a step further, ordinary members of the public (i.e. without sectional interests) could be appointed to the Board. However, the obvious disadvantage with "democratising" the Board is that members would not necessarily have any background or expertise in town planning matters, whereas, in theory at least, currently people with that expertise or experience are appointed.

A further element of the lack of public participation is that members of the public have not right of "reverse representation", on applications, i.e. the right to lodge objections with the Board to individual planning applications. The applicant may submit representations to the Board, of course, and the Board is also entitled to carry out and take into account any investigations of its own (by way of its planning officers).

In other jurisdictions it is common for third parties to have the right to make representations to the tribunal hearing a planning application. The jurisdiction is that planning decisions affect the whole street, neighbourhood or community generally. Whilst there may be some concern on the part of developers and the government that introducing third parties' representations to the planning application process may open the door to commercially inspired objections by competitors, that concern may be adequately taken care of by a statutory or jurisprudential rule requiring dismissal of any third party objection (or appeal) which the relevant tribunal deems to be mainly commercially motivated. This principle is applied by the courts in the State of South Australia, for example.

According to Mr. Lam, reluctance on the part of the government and business to open up the planning system to public participation stems from the perception that public participation a) would lengthen the application process, b) create additional uncertainties in the process (which does suggest a rubber-stamp mentality) and c) represents a change in long established practice, which is that usually developers do not notify tenants or adjoining occupiers / owners of proposals to develop a building. Developers are generally opposed to a notification requirement being written into the planning application process (as invariably exists in other jurisdictions) because of the fear that this might increase the cost of land acquisitions.

In view of the government's obvious reluctance to embrace any of the major changes to the planning process covered by previous reviews and, particularly,

the White Bill, it would be unrealistic to expect that third party rights of objection and appeal will be introduced in the near future. However, as Mr. Lam put it, surely at least we could be hopeful that one small step towards modernising our planning system, namely opening up Board meetings to the public, will be accepted as desirable by the Board and the government in the near future.

DIGEST OF LEGISLATION

Water Pollution Control (Sewerage) (Amendment) Regulation 1998 (L.S. No.2 to Gazette No.29/1998 p.B2847)

(1) Part I of Schedule 1 to the Water Pollution Control (Sewerage) Regulation (Cap.358 sub. leg.) is amended, in column 3 of item 9, by repealing paragraph (ii) and substituting -

"(ii) professional fees and expenses,

which loss, expense, fees and expenses are attributable solely to compliance with the amendment required or the condition imposed."

(2) Application of the Roads (Works, Use and Compensation) Ordinance

Schedule 2 is amended -

(a) in Part I, by repealing ".3,5":

(b) in Part II -

(i) in paragraph 1(1), by adding ",4" before ",5";

(ii) in paragraph 3, by adding "(except section 4)" after "section";

(iii) under the heading "Particular Modifications and Additions"-

(A) by adding -

"4 (a) Repeal subsection (1)(a).

(b) In subsection (3), repeal "this Ordinance" and substitute "the Water Pollution Control (Sewerage) Regulation (Cap.358 sub. leg.)";

(B) in respect of the reference to section 5, by repealing paragraph (a);

(C) in respect of the reference to section 36 -

(I) by repealing paragraph (a);

(II) in paragraph (b), by adding "(i)" after "(c)".

HONG KONG BRIEFING

1. A \$40 million, two-year study aimed at creating "sustainable development" got off to a poor start after several environment groups complained that key issues were being ignored. Among the complaints are that no study is being made into whether there should be a limit to growth, such as attempting to limit Hong Kong's population.

Friends of the Earth spokesman, Plato Yip Kwong-to, said that the group was "disappointed" with the study, which the Government

says will be used "to balance the economic, social and environmental needs of the community". The group has written to Deputy Director of Planning, Bosco Fung Chee-keung, disputing aspects of its terms of reference. In addition, the group lodged a complaint against the Government's consultants, ERM, which it accuses of dismissing the achievements of environmental organisations.

Hong Kong-based Greenpeace China director Ho Wai-chi said his group was one of many that had contributed "negative feedback". He said Hong Kong's small size meant limits to growth had to be studied, whereas larger countries might not need to do so as part of their sustainable development policies.

The study should be completed by the end of next year. The resultant framework will be used to check all government policies, particularly planning, to ensure they are not creating significant environmental problems.

(3 August 1998 SCMP)

2. The Transport Bureau has received thousands of objections to the controversial proposed infrastructural work on Greig Road and Mount Parker Road in Quarry Bay, the area surrounding Woodside House.

Residents and green campaigners joined forces with legislators to oppose the work, which heralds the beginning of the proposed destruction of turn-of-the-century Woodside House to make way for a Home Ownership Scheme development.

The objections will be passed onto the Civil Engineer Department, the project proponent, which will liaise with objectors. Under the Roads (Works, Use and Comensation) Ordinance (Cap.370), the proposal must be put to the Executive Council by May of next year, nine months from the deadline for objections at 13 August 1998.

Noel Chan Wai-wah of the Conservancy Association said that surrounding woods are home to many wildlife species, including a protected species of bat. The Association met legislators in an effort to win support against the project.

The next step for the Green Action group is to urge the government to amend the plan to preserve the woodland area.

(9 August 1998 HKS)

3. The pollution index reached "very high" levels of more than 135 on 21 September 1998 and 138 on 20 September 1998 in Causeway Bay, taken to be representative of any traffic-congested urban high-rise area. EPD officials described

the latest developments in air quality as "reasonably serious". The elderly and those with respiratory and heart illnesses have been urged to stay indoors. People have been advised not to engage in strenuous outdoor activities or to stay at roadsides longer than necessary.

Tse Chin-wan, assistant director of the EPD's air section, said that toxic ozone, comprising hydrocarbons synthesised by sun-light, had been blown in by northerly winds from the mainland. Once the ozone reached Hong Kong's urban areas it became trapped in areas of high-rise buildings and reacted with diesel fumes to form a suffocating mix of nitrogen dioxide. As southern China became more polluted it would continue to have an environmental impact on Hong Kong.

Citizens Party environment spokeswoman, Lisa Hopkinson, called on the Government to stop "piecemeal" reforms and address the problem with large-scale pedestrianisation and enforcement of LPG use. She said that the government needs to be much more proactive instead of its usual softly-softly approach. (22 September 1998 SCMP)

4. The government is considering passing a law requiring motorists to switch off their engines while waiting. EPD director Robert Law said this was one of the measures aimed at reducing air pollution, which has soared to record levels in

urban centres. Mr Law said that the plan was still at a "very preliminary stage" and that at the moment what they were doing was gathering information of what had been done in other countries in coping with the same problem (of pollution). In other countries, he said, a time frame is set as to how long a motorist should keep the engine running or when it should be switched off.

Green groups welcomed the government plan. Plato Yi Kwong-to, director of Friends of the Earth, hailed the initiative of the government. He further said that enforcement of such a law would not be difficult.

Public transport drivers' associations said they had advised their members to switch off their engines while waiting because this would not only reduce pollution but also lower fuel consumption. The proposal should not affect their business operations.

(24 September 1998 HKS)

PLANNING ISSUES

Objections raised to the Central Reclamation Draft Outline Zoning Plan

The draft Outline Zoning Plan, endorsed by the Town Planning Board on May 1998, concerning Central-Wanchai reclamation has met with fierce objections. More than 70 representations have been lodged with the Town Planning Board objecting the government's plans for the third phase of the

Central reclamation ("the Plan"). The Plan involves filling in the harbour between the outlying island ferry piers and the Convention and Exhibition Centre Extension, and would create an extra 34 hectares of land.

Objections were raised by a diverse range of groups, such as Hong Kong Institute of Engineers ("HKIE"), Hong Kong Institute of Planners ("HKIP"), Society for the Protection of the Harbour ("SPH") and various property developers. Even the Urban Council and Legislative Council have passed motions objecting to the Plan. The government is called to either substantially scale down or abandon its Plan.

The government's - government's main argument is that land is much needed in the harbour area for commercial buildings and transport infrastructure such as the MTR North Island Line. With the creation of an extra 34 hectares of land, business growth can be sustained and the environment can be improved, it argues.

Opposing arguments can be divided into three broad categories. Each looks at the Plan from different perspective : namely, the planning and environmental protection, property market conditions and sentiment for the Victoria Harbour.

The HKIP suggested that instead of reclaiming to provide more land in our Central business district, the Government should consider other alternatives, like the creation of a 'second Central' The President of HKIP, Mr. Andrew Lam said, "Even if we went ahead with this reclamation, we would still have to face the same question in about 10 years' time on where else Central

business district can go." Mr. Lam added that as decentralisation of business district is inevitable, more reclamation now would reduce the attractiveness of the creation of a second business district in the future.

From the environmental protection perspective, Friends of the Earth argued that the Plan will not relieve existing pressure on the Central and Wanchai district. Instead, such development would add to existing congestion. This view was echoed by property developers. Mr. Lo Ka-shui, the deputy Chairman and managing director of a property developer Golden Eagle Holdings Ltd., argued further that while extra open space will be provided for in the Plan (and it was claimed that such extra open space can improve the environment) the harbour itself was an environmental friendly open space. Therefore the reclamation may be unnecessary for the purpose of improving the environment.

Property developers are concerned that excessive supply of land for commercial properties will create further downward pressure on the already weak commercial property market. At present, the supply of the grade-A offices is excessive and will continue to be excessive in the coming years. Landlords are now offering low rents and long rent-free periods in order to attract prospective tenants. In addition, businesses are moving away from Central business district to areas such as Quarry Bay to reduce their rental expenses. Therefore the creation of another 10.38 hectares of land for commercial properties in Central is unnecessary. Mr. Lo Ka-shui suggested that commercial land, if required, could be generated from old and dilapidated industrial areas or in new towns and newly developed areas.

The people of Hong Kong have a sentimental attachment to Victoria Harbour. As a large part of the harbour area will be filled, Hong Kong will lose its famous harbour heritage. A Councillor in the Urban Council, Mr. Wong Kwok Hing, said that, "We may lose Victoria Harbour to continuing reclamation, leaving us only with Victoria Canal." Although the Protection of the Harbour Ordinance ("the Ordinance") was enacted in 1997 and establishes the principle of 'presumption against reclamation', the Ordinance suffers two deficiencies. Firstly, the Ordinance merely presumes against but does not prohibit reclamation. Therefore reclamation is still possible if there are justifications for it. Secondly, only part of Victoria Harbour is covered by the Ordinance, as the harbour area defined by the Ordinance is limited to the area between Western Harbour Crossing and the Cross Harbour Tunnel. The SPH is keen to see the harbour area redefined to include all of Victoria Harbour.

After a meeting with the SPH, the Chief Executive Mr. Tung Chee Hwa has given an assurance that the Plan "remains merely a proposal" intended for public consultation and the Town Planning Board has held hearings for submission opposing the Plan. (Sources : SCMP articles dated 2 July 1998, 8 July 1998, 21 July 1998, 24 July 1998, 29 August 1998, 30 August 1998)

AIRPORT AUTHORITY UPDATE

After a difficult start Hong Kong International Airport (HKIA) is now showing its true potential. Passengers and other airport users have expressed a high degree of customer satisfaction with services,

according to an independent survey.

Passenger services have been improving since the first week of airport operations : the average waiting time for baggage is now about 10 minutes, and about 80 per cent of flights are leaving within 15 minutes of schedule. The Airport Authority (AA) felt it was time, therefore, to find out more about how its customers felt about the product.

The AA commissioned Dr Li Pang-kwong, Director of Lingnan College's Research and Survey Programme, to conduct the survey seven weeks after airport opening. A total of 4,038 respondents were interviewed in five areas of the passenger terminal.

Features that rated very favourably were general cleanliness, lighting, and queuing time at Immigration and Customs. Areas of concern were the number of telephones, moving walkways, and washrooms (washroom cleanliness was also an issue), travelling distance to distant parts of the terminal, the clarity of announcements and catering and food and beverage prices.

Passengers held generally positive views about signage, although some aspects of it received mixed responses. For example, there were comments that there were not enough signs in the Ground Transportation Centre, and that they should be made easier to understand.

Analysis shows that the findings compare favourably with those for Kai Tak. The survey of the new airport covers all areas surveyed in the 1997 Passenger Satisfaction Study at Kai Tak, with additional relevant items.

(Newsletter, Airport Authority Hong Kong, August 1998)

The new Hong Kong International Airport incorporates an advanced airfield lighting and control system. Basic elements include more than 7,000 lights on the approach, runway, taxiways and aprons. All lights are connected via more than 600km of high voltage power cables originating from two vaults, A and B, located at either end of the runway. Control is effected via 71 Constant Current Regulations located inside the vaults. The regulators control, monitor and change the intensity of the lights.

The airfield is also equipped with airport "smart" equipment that controls stopbars, holdbars and "follow-me" lights. This heightens airport safety and maintains optimum traffic control which, in conjunction with the movement area guidance signs, assists pilots with entry onto the runway as well as taxiway movements. Overall control is effected by programmable logic controllers in each vault.

These controllers interface with the regulations and smart equipment and then, via ethernet communication links, with the Air Traffic Control Tower, where operators regulate aircraft movements, changes of runway direction, and visual range changes (categories 1 and 2). Other subordinate control stations are located in the aircraft maintenance base, the central computer centre and the vaults' maintenance stations. Several levels of control are provided by these various stations. There is also a manual back-up control station which is the final fall back should all other control stations fail.

(Newsletter, Airport Authority Hong Kong, June 1998)

CASELAW UPDATE

HKSAR v Paul Y-ITC Construction Ltd [1998] 3 HKC 189 (Court of Appeal)

Environmental - Noise - Noise from powered mechanical equipment on construction site - No construction noise permit authorizing use of equipment during restricted hours - Strict liability offences - Appeal against conviction - Mens rea displaced where statute intended to protect issue of social concern - Noise Control Ordinance (Cap 400) ss 4(2), 6(1), (2).

Facts

The appellant was found guilty of causing the use of powered mechanical equipment during restricted hours without a construction noise permit, contrary to s6(1)(a) of the Noise Control Ordinance (Cap 400) ("NCO"), and causing construction work to be carried out during restricted hours without a construction noise permit, contrary to s 6(2)(a) NCO.

Two Environmental Protection Inspectors went to the construction site on a Sunday in response to a complaint. They found two persons operating a steel bar bender which was generating noise. At the site was also an employee of the appellant who admitted that he was required to work on that Sunday, and that no noise permit had been obtained in respect of the alleged activities.

The magistrate decided that the offences were strict liability offences, and the appellant had caused the prohibited acts. He convicted the appellant and fined it \$10,000 on each of the two offences. The appellant appealed against conviction contending, firstly, that the two sections created no strict liability offences. Secondly, the magistrate failed to consider the meaning of the word 'causes' in the sections. Thirdly, it was contended that the magistrate failed to consider the defence of reasonable but mistaken belief of the appellant that no construction work was being carried out at the material time.

Held

- To determine the true intention of a penal provision, the test was to apply Lord Scarman's five propositions in *Gammon (HK) Ltd & Ors v A-G*. In relation to offences under s 6(1)(a) and (2)(a) NCO, the court found that the legislation did not intend that proof of knowledge on the part of the accused was necessary. In any event the offences were intended to be of strict liability to reference to s4(2) in that the legislation had deliberately chosen to omit 'knowingly' from the offences under s6. Applying Lord Scarman's rules of construction, the offences which were alleged to have committed were one of strict liability and were consistent with art 11(1) of the Bills of Rights.
- The word 'cause' was to be given its ordinary and common sense meaning which was a question of fact for the magistrate. The appellant, as the main

contractor on the construction site, had 'caused' the construction work to be carried out.

3. It would be a defence for the appellant to prove on balance of probabilities that it believed for good and sufficient reason, though erroneously, that there had been compliance with the Ordinance. However, neither such defence was attempted nor did the appellant call evidence. It was therefore wholly unnecessary for the magistrate to consider this aspect as a possible defence.

Obiter

This was the 15th occasion in four years that the appellant company had breached NCO. Had there been an appeal against the sentence, the court would have considered the fines imposed manifestly too low. In a society like Hong Kong, there should be sensible control over pollution of whatever kind. Penalties for breaches of offences under the Ordinance should properly reflect society's concern.

ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

The Advisory Council on the Environment (ACE) met on 27th April 1998 to discuss, inter alia, the implementation of the demand site management of electricity (DSM) by reference to the DSM Agreements which the government has signed with the two local power companies.

In answer to a member's question

on Hong Kong's target for saving electricity consumption, Assistant Director of the Energy Efficiency, Electrical and Mechanical Services Department ("Assistant Director"), replied that the original target was to achieve a 8% saving in electricity consumption over a period of 10 years. However, the two local electricity suppliers considered this target too high and requested a lower target be set.

A member of the ACE committee commented that as the primary objective of a DSM programme is to improve energy efficiency, there are other means to achieve the same purpose besides implementing a DSM programme. It would be more effective to achieve that objective by encouraging the use of natural gas to replace coal as the fuel for generating electricity, rather than through the DSM programme. Moreover, since energy prices were relatively low in Hong Kong, the cost of energy consumption did not constitute a significant portion of the total operating costs of a business. There was little incentive for local businessmen to conserve energy as a means to save costs.

When asked by a member of the ACE committee why the local power companies were allowed to earn a minimum level of return under the DSM Agreements, Principal Assistant Secretary (Economic Services) of the Economic Services Bureau (the Secretary), replied that since the power companies had invested a lot on generators, they should not be made worse off because they were required by the administration to encourage people to save electricity.

Whether the energy cost per unit would become higher in future if the total amount of electricity

consumed by the community decreased as a result of the implementation of the DSM programmes, the Secretary replied that this could not happen since implementation of DSM programmes would reduce or slow down the extent and pace of new capital investment by the local power companies in the long term.

According to the DSM Agreements, the implementation costs of the DSM programmes to be borne by consumers would not exceed 2% of the electricity charge payable by them. ACE queried who would bear the remaining part of the costs if the total implementation costs exceeded the 2% ceiling. The Assistant Director replied that the shareholders of the power companies would be required to bear the amount in excess of the allowable budget limit.

In conclusion, ACE committee welcomed implementation of the DSM programmes in Hong Kong.

REGIONAL AND INTERNATIONAL

CHINA

China is expected to spend 450 billion yuan (US\$54 billion) on pollution control and environment protection programmes during the Ninth Five-Year Plan (1996-2000) period. The government will raise part of the funds by increasing levies on industrial waste discharge this year to cover the costs of industrial pollution treatment. The higher levy will boost funding for China's expanded pollution control and environment protection programmes.

Data from the State Environmental

Protection Administration showed that last year some 4.5 billion yuan (US\$542 million) was collected through waste discharge levies. Most of this has been used for pollution treatment and prevention works. The central government has decided to increase its financial support for basic pollution control facilities, such as urban waste water treatment plants. While sticking to the "polluter pays" principle, the government will give policy-and-credit support to some major pollution treatment projects. It is hoped that international co-operation could be extended to attract more foreign funds and technology for anti-pollution programmes. China plans to use US\$4 billion in foreign loans and grants during the 1996-2000 period for this purpose. To date, some US\$2 billion has been raised.

With regard to Sino-US co-operation in environmental protection, the two countries have collaborated in this field since the 1980s but future co-operation still has great potential.

As the world's richest developed country, the United States has extensive experience in coping with environmental problems, while China, the world's largest developing country, is faced with severe environmental challenges to its economic development.

(China Daily, 25/06/98)

JAPAN

Urgent research has begun into environmental pollution, prompted by fears that it may be responsible for Japan's rapidly shrinking birth rate. Research has raised the possibility that one of the reasons for Japan's low birth rate is that

there are more people who want to have children but are unable to do so. The problem is the Government does not have enough data yet.

A government survey released on the May 5 Children's Day holiday revealed that Japan had the lowest number of children in its population since organised census-taking began in 1920. The drop in numbers in the nought-to-three age range was especially severe, the survey showed.

Recent surveys found that 33 out of 34 healthy men between the ages of 20-26 had sperm counts that failed to meet levels recommended as normal by the World Health Organisation, and also there was a sharp increase in the amount of women with abnormalities and growth in the womb. Other surveys have also found dangerously high levels of the toxic substance dioxin in mothers' milk.

Experts stressed that it would be premature to make a definitive link between environmental pollution and the shrinking birth-rate. They said that it was only one possible factor out of many that were behind Japan's rapidly plunging birth rate.

The Environmental Protection Agency will investigate soil and water sample from 400 locations in Japan in order to find out how pervasive environmental hormones are in Japan. Environmental hormones are chemical substances that may affect fertility in humans and animals by mimicking the effects of natural hormones.

(SCMP, 09/05/98)

MALAYSIA

The fine for open burning will be dramatically increased in an effort to clear up smog. The Attorney-General had approved amendments to the Environmental Quality Act which increased the penalty for open burning from M\$100,000 (HK\$203,200) to M\$500,000. Drought conditions caused by the El Nino weather factor or have sparked forest fires around the region, combining with land clearing activity to produce smog. Changes to the Act also made landowners responsible for fires on their lands, preventing them from shifting the blame to employees and contractors. The Government was also reportedly considering installing water sprinklers on tall buildings, and air purifiers at busy road junctions to reduce dust particles in the atmosphere.

(SCMP, 02/05/98)

SPAIN

On 25 April, a cracked water-treatment reservoir sent five million cubic metres of highly acidic water flowing into the rivers of Andalusia, southern Spain, affecting crop and killing wildlife. The water and mud, contaminated with toxic heavy metals from a pyrites mine owned by the Swedish Boliden group at Aznalcollar, near Seville, ravaged 20 kilometres of the Guadiamar river, badly polluted the Guadalquivir and still threatens Donana national park, a world heritage site. Regional officials admitted on 1 May that more than 12 tonnes of dead fish were pulled out of the rivers, while insisting the level of acidity in the Guadalquivir was almost back to normal.

(Hong Kong Standard, 03/05/98)

THAILAND

At least 1,153 primary schools in Thailand are located in pollution areas and many of their students and teachers risk lung ailments. The results of a survey by the government's primary education commission showed that hundreds of schools are blanketed by dust from roads, quarries, mines, mills and factories. Hundreds more endure stench and noise entitled by factories and 25 schools are exposed to smoke from burning rubbish.

(Hong Kong Standard, 04/06/98)

AUSTRALIA (South Australia)

Environment Protection Policies

There are currently six Environment Protection Policies ("EPP's") in operation under the South Australian Environment Protection Act. These deal separately with air quality; burning; industrial noise; machine noise; the marine environment; and waste management. To a large degree, these EPP's embrace material which was previously contained in regulations under a number of Acts that were replaced by the Environment Protection Act.

The Environment Protection Authority ("EPA") currently has three new EPP's at a draft stage. These relate to water quality; landfill depots; and guidelines for composing works and organic waste treatment depots.

A separate and less formal approach is being pursued by the EPA through the preparation of Codes of Practice. There are two codes presently in draft form; one for stormwater polluting

prevention for industrial, retail and commercial premises, the other for the building and construction industries regarding stormwater and noise.

The National Environment Protection Council ("NEPC") produces National Environment Protection Measures ("NEPM's") which come into operation as EPP's under the South Australian Act. In February 1998, the Council adopted its first NEPM, concerning the National Pollutant Inventory. A meeting of the Council in 1998 is likely to see two more NEPM's adopted - one relating to ambient air quality and the other to the movement of controlled wastes. The Council is also working on draft NEMP's concerning the assessment of contaminated sites and the recycling and reuse of packaging materials.

A substantial amount of policy instruments are being developed quite rapidly under State and National environment protection laws. Formal policies are being complemented by codes of practice directed at particular sectors. Given that these various types of instruments can be both detailed and prescriptive it is important to keep informed about their content.

Developing water resources : the precautionary principle

In the recent case of *Dukalskis v the Minister for Environment and Heritage* the Environment, Resources & Development Court considered an application for a licence to take underground water from the Comaum-Caroline proclaimed region, close to Mount Gambier's Blue Lake. Section 6 of the Water Resources Act 1997 ("the Act") required the Court to further the Object of the Act which

contains the principle of ecologically sustainable development. The Object includes a requirement of caution in the use of water resources and the prevention of their degradation. It also includes a requirement that the use and management of water sustain the physical, economic and social well-being, and facilitate the economic development of the State. While there was uncertainty about precisely how the application would affect the Blue Lake, there was clear evidence that the lake level has been steadily decreasing, especially over the last 25 years. The Court refused the application, due to the precautionary approach and the requirement to prevent degradation of the resource, both contained in the Act's Object. The Court also commented on the use of Water Allocation Plans and Catchment Water Management Plans to address under utilised water allocations. Referring to the Object of the Act the Court stated :-

"..... consideration should be given to addressing, in the policy, the total or partial revocation of allocations which remain either unused or inadequately used over an extensive period and the re-allocation of that water to people who will use it. Such a course would surely be beneficial to the economic development of the State".

This decision is one of the first to apply the principles of ecologically sustainable development embodied in the new Act. It shows the importance of these principles in environmental legislation and the way that they can be practically applied to promote the sustainable use of the States' natural resources.

(Planning & Environment Briefly, July 1998, Norman Waterhouse, Solicitors, Adelaide)

The *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 the *Quarterly* should be directed to *Fred Kan & Co. (Mr. Fred Kan or Mr. Brian Baillie)*.

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Comparative Table of Environmental Convictions:
April - June 1998

	Number	1st Offence	2nd Offence	3rd + Offence	Highest Fine
APCO	22	8	3	11	\$ 40,000
	29	16	5	8	\$ 25,000
	20	10	4	6	\$ 20,000
WPCO	23	12	4	7	\$150,000
	19	14	1	4	\$ 60,000
	22	17	-	5	\$ 45,000
NCO	23	4	1	18	\$147,000
	29	19	2	8	\$ 65,000
	17	6	-	11	\$120,000
OLPO	2	2	-	-	\$ 15,000
	-	-	-	-	-
	-	-	-	-	-
DASO	-	-	-	-	-
	-	-	-	-	-
	-	-	-	-	-
WDO	26	22	3	1	\$ 25,000
	24	21	2	1	\$ 15,000
	19	18	1	-	\$ 15,000
Total	96	48	11	37	
	101	70	10	21	
	78	51	5	22	

ABBREVIATIONS

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

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.

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