

FRED KAN & CO.

Solicitors & Notaries

URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

簡 家 聽 律 師 行 · 城 規 環 保 簡 訊

Our feature article in our June 1996 issue concerning the alleged lack of effective enforcement of Hong Kong's anti-pollution laws, drew an immediate response from Mr. M. Stokoe, Assistant Director of the Environment Protection Department. His letter (14th October, 1996) is reprinted here in full, together with the General Editor's response.

The Editors

CONTENTS

Page

FEATURE:

Letter From Mr. M.J. Stokoe . . .	1
General Editor's Reply	2
LEGISLATION DIGEST	6
PLANNING DECISIONS	7
HONG KONG BRIEFING	8
PADS UPDATE	9
ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)	10
REGIONAL AND INTERNATIONAL	10
PROSECUTION	
STATISTICS	12
ABBREVIATIONS	12

Letter from Mr. M. J. Stokoe

Mr. Fred Kan
Fred Kan & Co.

Dear Mr. Kan,

You kindly continue to send us your quarterly publication on urban planning and environmental law. I am not sure of the extent to which you are involved in the editorial content of the publication, but as the editors apparently wish to remain anonymous, I have addressed to you this letter raising my concerns with the front-page article in the June 1996 issue, which incidentally we received only a few days ago.

The headline of the article is, "Are Hong Kong's Anti-pollution Laws Effectively Enforced", and its thesis is that they are not effectively enforced. The evidence used to support that thesis does not stand up to close examination, but the casual reader is bound to be left with a conclusion that Hong Kong's environment is poorly fostered by the authority for enforcing environmental legislation, the Environmental Protection Department (EPD).

The first charge laid against EPD is that "the level of pollution of our air, water and land has dramatically

increased since the anti-pollution laws were enacted". That simply is not true. In overall terms the air is now much cleaner than before the sulphur in Fuel Regulation was made in 1990; noise from construction activities is far less intrusive than before the Noise Control Ordinance was enacted in 1988; the waters in and around Hong Kong are now considerably cleaner than they were before the first implementation of the Water Pollution Control Ordinance in 1988, particularly in Tolo Harbour, where the steady decline of water quality has been halted and turned around, and our rivers and streams, many of which now support fish where ten years ago they conveyed high-strength livestock waste into the sea. However, in some areas there is still much to be done (eg in tackling vehicle emissions), and in others we have not yet reaped the benefit of major environmental projects (eg the Strategic Sewage Disposal Scheme in cleaning up the harbour waters).

The second charge is that EPD has a policy of "educating rather than penalising potential offenders". Again, this is not correct. Our policy, which is explained carefully to all staff of the enforcement units, is that where a breach of the environmental legislation is suspected, appropriate evidence

should be gathered and a case prepared for prosecution in the appropriate court. The anonymous authors/editors go on to allege that the number of convictions under environmental laws reveals only a marginal increase. This is not so; over the last four years, the aggregate number of convictions has steadily increased from 626 in 1993 to 705 for the first nine months of this year, 940 grossed up to twelve months. The aggregate value of the fines levied has increased during the same period from \$5.7 million in 1993 to \$11.9 million for the first nine months of this year, equivalent to \$15.8 million over twelve months. In other words, the average number of prosecutions is running at 50% more than four years ago and the total fines have almost trebled. This is hardly the "low rate of strikes" claimed in the article. On the contrary, I would claim that our enforcement record stands proud in comparison with environmental enforcement authorities world-wide.

A further charge in the article against the Hong Kong system of environmental protection legislation, is that it does not provide for private citizens' litigation or representation, whereas in the USA citizens are able to prosecute both "offenders" (sic) and government agencies, both provisions apparently aimed at remedying deficiencies in the environmental enforcement agencies' carrying out of their duties. On this issue, the authors, whilst seemingly familiar with American practice and procedures in environmental law, are less well briefed when it comes to the arrangements in Hong Kong. The prosecution of professional enforcement agencies is not a feature of the Hong Kong system. Instead, there is provision for individuals to forward a submission to the Commissioner for Administrative Complaints (COMAC) claiming maladministration. A few such claims had been made to COMAC concerning EPDs activities over the last few years, and the fact that some of the points have been upheld by

COMAC, in itself demonstrates that the system has real effect.

The initiation of prosecutions under the environmental laws in force in Hong Kong, may sound attractive on the face of it, but it is not only the need to obtain the consent of the Attorney General that impedes the progress of such actions. Most environmental laws in Hong Kong are framed so that offences, whether resulting from a direct breach of regulation or of a licence condition, require the gathering of evidence. In most circumstances, this would require the entry onto private or Government land, and into private premises, in order to investigate, take samples, or to use scientific equipment. Clearly, the enforcement agency is far better placed than an ordinary citizen to carry out such investigations, because provisions in the legislation specifically permit the EPD to gain entry to premises, to investigate, to take samples, and generally to do what is needed to gather evidence for a prosecution. The EPD's policy in relation to proposed prosecutions by private citizens is to encourage them to cooperate with EPD in an action, where the private citizen would be a witness.

Several references are made in the paper to inaction in the face of persistent pollution, eg "blatant documented instances of persistent polluting activity" and "EPD's preferred approach of consultation, advising and warning - when breaches of the law have clearly occurred or are occurring". None of these references is backed with a description or case history. I must conclude that they are no better than scurrilous attempts to damage EPD's reputation. If your editor has evidence of such alleged maladministration I would welcome seeing it.

The article concludes that "the chances of Hong Kong's environmental laws actually protecting (and improving?) its environment are bleak - and that assessment leaves aside the change in sovereignty factor!" Not a single

piece of factual evidence is provided to support that assertion. We in the EPD are proud of our track record of developing environmental laws to suit Hong Kong's conditions and problems (rather than simply importing ideas from elsewhere), and then enforcing them fairly, consistently, and without fear or favour. We are now on track to a much better environment for Hong Kong, and do not believe that the handover to the SARG will cause a deviation from that course. However, far greater potential damage to the future of Hong Kong could result from a perception that its environment is past praying for, and that its enforcement authorities are doing nothing to remedy the situation. This is precisely the view advanced in the article.

Finally, I find it especially frustrating that the authors and editors in your publication hide behind a cloak of anonymity. If the views advanced are genuinely held, then the authors/editors should have the courage to append their names to the article.

Yours sincerely,
M J Stokoe
Deputy Director
for Director of Environmental
Protection

General Editor's Reply

Mr. M. J. Stokoe
Deputy Director
Environmental Protection
Department

Dear Mr. Stokoe,

This refers to your letter to Mr. Fred Kan dated 14th October, 1996.

As the General Editor of our Urban Planning and Environmental Law Quarterly ("UPELQ"), and author of the article to which your letter relates, I shall respond to your criticism of that article as briefly as possible.

It should be noted at the outset that other commentators have previously made the same point as

the article. For example, a well known Hong Kong environmental lawyer, Terri Mottershead, wrote in the *Asia Pacific Forum Newsletter* (Winter 1994, pp. 11-12):

"The reluctance of the Hong Kong government to enact anti-pollution legislation, the consistent refusal by industry to self regulate and decrease its pollution output and the poor record of legislative enforcement, have been major factors in the escalating pollution problem in Hong Kong."

And, at an international environmental law conference in Hawaii (June 1996) Ms. Mottershead observed:

"There is, therefore, a comprehensive body of anti-pollution legislation [in Hong Kong]; it is not, however, ever enforced with any predictable consistency or regularity, despite the numerous first and repeat offences which are committed daily."

May I then dispose of your allegation (repeated a number of times) that I have chosen to hide behind "a cloak of anonymity". As you are aware, I wrote to the EPD on 24th June, 1995 advising that I had been appointed General Editor of the UPELQ as from 1st January, 1995. Since that letter, I have received, each month, correspondence from the EPD addressed to me (by name) as *General Editor* of the UPELQ. By letter of 19th November, 1996 my fellow Editor, Mr. Fred Kan, pointed this out to you. He also pointed out that prestigious publications such as *The Economist* do not name their authors or article writers. Mr. Kan then invited you to withdraw what is an offensive and unfair and, obviously, entirely baseless allegation. We regret that you have not seen fit to do so, for whatever reason.

As to your substantive criticisms:

The first 'charge':

Hong Kong's anti-pollution laws

date from 1980, *not* 1990, or some other, later year. You appear to have misread the article in that critical aspect (inter alia). However, even if we take a later date as the base-year, say 1990, I simply disagree that, for example, "... the air is now much cleaner ...". Frankly, it is difficult to believe you are serious in making that statement. You need only observe the now almost daily haze of smog, pollutants and dust particles (as so many people point out in frequent letters to our daily newspapers, including a recent excellent letter from well-known Hong Kong environmental expert, Edward Stokes: *Air Pollution - greatest long term menace*, SCMP, 8th January, 1997) to realise that air quality has declined sharply, even in the last several years. It is impossible to reconcile your claim with frequent announcements of record air-pollution levels. For example:

- *Respiratory disease soars with pollution:*

"Respiratory disease killed nearly 1,000 more people last year than at the beginning of the 1990s as air pollutants soared. Thousands more people were forced into hospital. Department of Health figures showed that after falling in 1994 from levels reached in the previous two years, deaths rose by 469 in 1995 to 5,707. Between 1991 and last year, pollutants which the Environmental Protection Department has blamed for respiratory disease and deaths rose 14 per cent. Other toxic gases increased by 27 per cent. In the same period, respiratory diseases killed 22,192 people and sent almost half a million to hospital." (emphasis added) (SCMP, 27th December, 1996)

- "Today's air is likely to be the *unhealthiest on record ...*" (emphasis added) (SCMP, 10th November, 1995)

- *Cancer-causing fumes at 'alarming' level*

"Hong Kong people are breathing in up to 10 times more cancer-causing pollutants than their counter parts in Japanese cities,

tests show." (SCMP, 26th October, 1996)

- In August 1996 a short item appeared in the SCMP noting that "Hong Kong has registered its *highest pollution levels since records began more than 10 years ago ...*" (emphasis added). The source quoted for that piece of information was the EPD!
- EPD's annual report, *Environment Hong Kong*, is testimony to the serious and, compared to 1980 or 1990, worsening air pollution problems faced by Hong Kong today. In the 1995 report, the significant detrimental effects of vehicles' emissions (admitted, impliedly, by you) are blamed for placing Hong Kong "... in danger of developing a Los Angeles type photochemical smog problem." (p.32).
- The Assistant Director (Air) of the EPD, C.W. Tse, very recently described Hong Kong's air quality as "poor" (letter to the SCMP, 2nd January, 1997).

Water quality, you say, has improved since 1988 (again, *not* the base year I used). I and many others would disagree. Once again, the frequent warnings in Hong Kong's press of deteriorating marine water conditions are difficult to reconcile with your claims. For example, in the SCMP (25th May, 1996) it was reported:

"Water quality at beaches has worsened over the past five years despite tougher pollution controls and clean-up efforts, the 1995 beach water quality report shows."

In ECCO (the Bulletin of the Environmental Campaign Committee) (June 1992) you yourself were quoted as advising that "... any luckless Dragon Boat rower who falls into Victoria Harbour should seek medical examination immediately".

Scientific experts now warn us to avoid Hong Kong's shellfish (and fish generally) entirely (eg: *Lifting the lid on shellfish*, SCMP 24th September, 1995 and *Toxic shark*

fin claims, SCMP, 22nd September, 1996). I suggest that in 1980, or even 1990, that was not their advice.

Your own yearly report, *Environment Hong Kong*, simply does not support your broad claim that Hong Kong's water quality has improved. For example, the 1991 report, stated:

"The growing population around Victoria Harbour has caused its water quality to decline steadily since full records began in 1972". (p.51, 3.13)

In the 1993 report the following comment on general water quality levels appeared:

"Tonnes of sewage and industrial waste water is generated each day in Hong Kong and discharged into the sea, so it is no surprise that *most of the territory's waters are heavily polluted*." (emphasis added). (p.14,1.58)

The 1995 report made *exactly the same* comments, word for word!! (p.17, 1.76)

You point out, there have been some recent success as such as water quality improvement in Tolo Harbour. However, as *Environment Hong Kong 1995* records (p.155):

"A dramatic deterioration in water quality took place in the early 1980's, coinciding with the first influx of population to the new towns. The deterioration continued throughout the 1980's, as evidenced by the high levels of red tides and low dissolved oxygen levels." (emphasis added)

I would argue that the Tolo Harbour water quality has improved since the late 1980's, but *not* in comparison to 1980.

You mention that many rivers and streams *now* support fish. The assumption must be that they did *not* in 1980. [Ironically, you do not give specific details of these rejuvenated rivers, yet you criticize UPELQ for failing to give "case history" of EPD's alleged failures to prosecute.] In *Environment Hong Kong 1995* one example of river water quality improvement documented is the River Indus (pp. 86-87). However, no mention is made of fish returning to the river and the improvement claimed is only from "very bad" to "bad", which illustrates the enormous task the EPD — indeed, the entire Hong Kong community — has in redressing the environmental damage to our rivers and streams.

As far as noise pollution is concerned, the EPD has certainly been active in trying to bring about substantial improvements. Nevertheless, with vastly increased levels of construction as compared to 1980 I doubt that we are exposed today to less noise than in 1980. This seems to be borne out by a dramatic increase in noise complaints to the EPD: 85% more complaints in 1995 compared to 1993. The Department of Planning, Environment and Lands

describes Hong Kong as "... perhaps one of the noisiest cities in the world.": *The Hong Kong Environment: A Green Challenge for the Community (1993)* (p.68, 6.64)

The second 'charge':

Again, I submit that your statements simply do not align with the facts. Most significantly, the *EPD Enforcement Manual* (as amended 1993) states (in part):

"*Prosecution is a means, not an aim, and it will be a last resort*. Other measures, such as persuasion, education, publicity, liaison with industrial associations, incentives and encouragement should be used to achieve the objectives of pollution abatement where appropriate." (emphasis added) (p.83)

At a seminar for Magistrates (May 1996) the EPD *confirmed* that its policy remains that prosecution of offenders is *the last resort*. (The seminar included senior EPD staff, including the Director).

“Prosecution is a means, not an aim, and it will be a last resort”

You cite an increase of 50% in prosecutions over the last 4 years, with (then) projected fines of \$15.8 million for 1996 as evidence of efficient enforcement. Yes, that is an increase on 1980 (when there were no prosecutions). But, a total of \$15.8 million (the price of a very modest mid-levels flat) is hardly impressive. And how does it compare to the *billions* of dollars needed to clean up the environment?

I would accept that the low level of fines is in large part a result of the courts' lamentably uninformed attitude to environmental offences. However, the EPD has never sought a review of any penalty (in the High Court, or Court of Appeal). Further, the EPD directs most prosecutions to the court of lowest penalty jurisdiction, namely, Special Magistrates (or, Lay Magistrates).

It must also be remembered that more water quality zones, for example, have been declared and environmental laws toughened generally (e.g. in the area of licensed discharges) in the 1990's, which should lead to some increase in prosecutions in the ordinary course of events.

Further, the number of prosecutions is a drop in the ocean of public complaints about polluting activities. The 1995 *Environmental Hong Kong* cites a 36% increase in the number of complaints in 1994, compared to 1993, to a total of 10,505! (pp. 170-171)

You have also refrained from explaining why the EPD has *never* used its powers under Sec. 13 or 13A to recover pollution clean-up costs from offenders. The fact that those potentially effective legislative powers have not been availed of reflects concisely our submission that the EPD (and, the government at large) is unwilling to prosecute environmental offenders rigorously.

The third 'charge':

As a member of the Ombudsman's Panel of Legal Advisers, and having advised the Office of the Ombudsman from time to time on its powers and obligations under the *Ombudsman Ordinance (O.O.)*, I believe that I am familiar with that legislation. I therefore can say that to compare the legislative scheme encompassed by the *O.O.* with the kind of US legislation referred to in the article is like comparing apples with pears. The provisions of the *O.O.* do *not* give citizens direct access to the courts for enforcement of environmental regulations. You have completely misunderstood the article on this point (inter alia). US legislation is effective because it *does* give citizens a *cause of action* against polluters (plus defaulting agencies). The Ombudsman may merely make recommendations to the government in respect of government agency maladministration. He has no jurisdiction at all in respect of private individuals or companies. However, I agree the Ombudsman does a fine job of exposing government agencies' maladministration, and I know that his Office is more than willing to pursue complaints concerning environmental issues. But he *cannot* give a legally binding adjudication and remedy. That is the huge difference between Hong Kong and American law.

Your other comments as to the difficulties private prosecutors face in Hong Kong merely re-state the very point I was making. Certainly there are evidential problems, but that is an ancillary matter that could be dealt with in the unlikely event the government enacted US style private prosecution rights (eg by also enacting *meaningful* freedom of information legislation).

The "inaction charge"

Your conclusion (that the inaction by EPD charge is nothing more than a "scurrilous attempt to damage EPD's reputation") is incorrect. Much could be said on the topic of the EPD's failures to prosecute. The following will

suffice:

- Hong Kong's floating and land-based docks are discharging tributyl tin (TBT) paint (or residues thereof) directly into Hong Kong's marine waters (see, eg, the last edition of the UPELQ, under "ACE"). TBT paint is so lethal that many countries have banned its use, and even banned ships which have used it from their waters. For example, the state of New South Wales, Australia, banned the use of TBT paints in 1988 "... following evidence that *even low concentrations* of TBT were affecting oysters, fish and crustaceans." (emphasis added) (*Rock oysters return after toxic paint ban*, SCMP 1st January, 1997). In 1992 Hong Kong banned TBT use on vessels less than 25 metres long.

In the 1995 *Environment Hong Kong* your own senior water pollution officer, Dr. Malcolm Broom, says of TBT:

"Given its extreme toxicity to marine life, proper handling of TBT is critically important. *On no account can it be allowed to be dumped in the water.*" (emphasis added) (pp. 72-73)

And yet that is precisely what the EPD is allowing!

In case it should be suggested that the effects of TBT discharges are still an unknown (in Hong Kong) (which is the argument EPD is apparently trying to put to ACE) it should be noted that several research environmental scientists presented papers at the recent Asia Pacific Conference on Science and Management of Coastal Environment (University of Science and Technology, 25-28 June 1996) testifying to the highly toxic effects of TBT on marine ecosystems: e.g.

"Organotin [i.e. TBT base chemical] had a *major impact* on the reproductive capability of *N. awatschensis* [the indicator subject species]. The number of

juveniles decreased by 86% and 90% when exposed to organotin at concentrations of 1 ppb [parts per billion] and 2 ppb respectively" (emphasis added): (*Life cycle bioassay for marine contamination due to organotin in anti-fouling paints*, Yau, Tian et al, *Institute of Oceanology, Academia Sinica*, 286071, China, Paper S3)

Despite Dr. Broom's (and, I assume, EPD's) stance on the undesirability of allowing TBT to be discharged into Hong Kong's water, (which accords with the views of environmental authorities world-wide) at the ACE EIA Sub-Committee meeting (9th September, 1996) (see December 1996 UPELQ) the EPD *endorsed* an EIA submitted by one of the floating dock operators, notwithstanding the EIA committed the operator to only a 70% removal of TBT from waste water residues dumped into Hong Kong's marine waters. More significantly, the EPD continues to allow two or three companies operating floating dock yards, *plus* another approximately 19 land-based dock yards (refer December 1996 ACE minutes) to continue discharging these toxic wastes with impunity!!

- Many "blackspots" of illegal wastes discharge have occurred, and continue to exist, without prosecutions being instigated: e.g., see *One Earth*, Spring 1995, pp. 20 ff.)
- Even industry gurus complain of the lack of enforcement of our environmental laws: e.g., *Getting down to environmental business*. (SCMP 4th November, 1996)
- The EPD regularly warns of environmental degradation but does not prosecute, because proof of the offence is said to be difficult (inter alia), or, in earlier days, that it had no statutory powers to prosecute. Yet common law powers have always existed and are easily applicable

to, especially, flagrant acts of public nuisance or illegal activity: e.g. the Tuen Mun River was destroyed by 15 years of illegal dumping of wastes, despite the common law power of the Attorney General (EPD) to prosecute and to obtain the necessary injunctions. Conclusive scientific evidence is *not* mandatory for successful prosecutions under our anti-pollution laws, especially as most offences are strict or quasi-strict liability offences.

- The 'cancer-causing fumes' discharged by hospital incinerators (see above) were reported by the SCMP as 'probably breaking strict regulations' in the eyes of according to the EPD. Prosecution did not occur because the EPD considered it did not have the necessary equipment to measure the discharge (notwithstanding that black smoke emission per se is an offence).
- The Green Lantau Association has reported that:
 - (i) the Architectural Services Department (ASD) has allowed contractors on the Tai Che Tung microwave Ling Relay Station project to engage in "... illegal and environmentally damaging activities,"(by way of inter alia, dumping rubbish);
 - (ii) Sunshine Island was used illegally for incinerating confiscated Vietnamese boats by the Marine Department, yet the EPD declined to prosecute, despite complaints by Lantau residents. (1995 Autumn Newsletter, No. 17, Green Lantau Association)
- The pollution complaints statistics (*Environment Hong Kong* (1995) (pp. 170 ff)) show a significant number of complaints with few prosecutions resulting: e.g. in 1994, 143 complaints of livestock waste were received, resulting in the prosecution and conviction of 5 offenders, who were fined a total of \$7,600! Yet

live stock waste disposal is consistently cited by the EPD as a major water polluting activity! (e.g. *The Hong Kong Environment*, above, pp. 56-58)

Your concluding paragraphs are at odds with both the record and EPD's own statements on the state of health of Hong Kong's environment made from time to time. If the EPD is proud of its record, then it is, with respect, perhaps too easily satisfied. As to statements of intention concerning future action, at the same Magistrates' seminar (referred to above) the EPD declared that the best it could do was to hold pollution at the current levels! I accept that is probably an accurate forecast, particularly given Hong Kong's shameful apathy towards environmental issues.

Finally, your accusation that we are doing a disservice to the environment by our article is, at best, bizarre. We do not, and did not, say that Hong Kong's environment is "past praying for". Quite the reverse, we have gone to the time and trouble of raising these issues for serious discussion simply because we believe that Hong Kong's environment could and should be "saved", or at the very least, its present rate of degradation should be halted. I recognise that there are many committed, professional people in the EPD who are working to that end, and without whose efforts Hong Kong's environment could well be in an even more deplorable state. But you do not help them, the public or the environment by perpetuating the myth that Hong Kong is winning its battle against environmental degradation.

Yours sincerely,
Brian G. Baillie

Digest of LEGISLATION

Waste Disposal (Chemical Waste) (General)(Amendment)Regulation on 1996 (L.S. No 2 to Gazette No.

48/1996/L.N. 493 of 1996 pB2108) Section 7(5) of the Waste Disposal (Chemical Waste)(General) Regulation(Cap.354 sub. leg.) is amended by repealing "\$240" and "\$125" and substituting "\$305" and "\$150" respectively. The amendment came into operation on 10 January 1997.

Noise Control (Air Compressors) (Amendment) Regulation 1996

(L.S. No. 2 to Gazette No.48/1996 dated 29 November 1996/L.N. 497 of 1996 p.B2116)

Regulation 8(1) and (2)(c) of the Noise Control (Air Compressors) Regulations (Cap. 400 sub. leg.) is amended by repealing "\$120" and Substituting "\$215" and Schedule 3 is amended in Note 4 of Form 1, by repealing "\$120" and substituting "\$215". The amendment applies from 10 January 1997.

Noise Control (Hand Held Percussive Breakers) (Amendment) Regulation 1996

(L.S. No.2 to Gazette No. 48/1996 dated 29 November 1996/ L.N. 498 of 1996 p.B2118)

Regulation 8(1) and (2) (c) of the Noise Control (Hand Held Percussive Breakers) Regulations (Cap.400 sub. leg.) is amended by repealing "\$120" and substituting "\$215" and Schedule 3 is amended in Note 4 of Form 1, by repealing "\$120" and substituting "\$215". The amendment applies from 10 January 1997.

Ozone Layer Protection (Fees) (Amendment) Regulation 1996

(L.S. No. 2 To Gazette No.48/1996 dated 29 November 1996/ L.N. 501 of 1996 p.B2124)

Regulation 2 of the Ozone Layer Protection (Fees) Regulations (Cap. 403 sub. leg.) is amended by repealing "\$1,505" and "\$755" and substituting "\$2090" and "\$850" respectively. The amended Regulation came into operation on 10 January 1997.

Dumpling At Sea (Fees) Regulation

(L.S. No 2 to Gazette No 48/1996 dated 29 November 1996/ L.N.502 of 1996 p.B2126)

The Determination of Licence Fees

(L.N. 283 of 1994) is repealed as from 10 January 1997.

Ozone Layer Protection (Amendment) Ordinance No. 6 of 1997 (Ord. No. 6 of 1997 p.A184) made various amendments and additions to the Ozone Layer Protection Ordinance (Cap. 403) ("the Ordinance"). Section 2 of the ordinance is amended by adding:

"Advisory Council on the Environment" means the advisory body established by the Governor to advise on matters relating to pollution control and sustainability of the environment; and

"Secretary" means the Secretary for Planning, Environment and Lands." Section 14A: "Claims for the return of a thing forfeited under Section 14(4A)", "Section 15A: "Protection of public officers" and Section 18: "Application of Ordinance to Government" are added to the Ordinance. In addition, amendments have been made to Section 8, 14, 16 and 17 of the ordinance.

Hong Kong Airport (Control of Obstructions) Order 1997 (L.S. No.2 to Gazette No 3/1997 dated 17 January 1997/L.N. 16 of 1997 p.B60) is made under Section 3(1AA) and (1A) of the Hong Kong Airport (Control of Obstructions) Ordinance (Cap. 301) on the advice of the Director of Civil Aviation. It prohibits the buildings in the areas delineated in red on the plans specified in subsection (2) from exceeding the height above the principal datum (referred to in the plans as "the restricted height"). In subsection (2), the plans are specified as plans numbered COO/500A/96, COO/500B/96, COO/75A/96 to COO/75H/96 inclusive, COO/75J/96 to COO/75N/96 inclusive and COO/75P/96 to COO/75S/96 inclusive.

The Order will come into operation on a day to be appointed by the Secretary for Planning, Environment and Lands by notice in the Gazette.

PLANNING DECISIONS

Town Planning Appeal No.22 of 1995: Lucky Gain Development Limited

Application for planning permission for the construction of a 30-storey commercial/office building - the site already zoned industrial - whether an appeal by the appellant against a refusal of the application should be allowed.

Summary of the facts of the case

The appellant applied to the Town Planning Board (TPB) for planning permission for a 30-storey commercial/office building with a plot ratio of 15 to be built on Aberdeen Inland Lots 278 and 280 ("the Site"). The Site was zoned industrial in the draft Aberdeen and Ap Lei Chau Outline Zoning Plan No.S/H15/6 (OZP) and was designated part of the Wong Chuk Hang Industrial Area. In or under the OZP, the TPB has already made provision or approved a total of 131,440m² commercial/office or industrial related office space in the Wong Chuk Hang Industrial Area.

Submissions of the Appellant

Counsel for the Appellant made the following submissions:

- the TPB Guidelines for application for office building in industrial zone are for general reference and have no statutory effect;
- the purpose of the Town Planning Ordinance is to promote the health, safety, convenience and general welfare of the Community, and permission should accordingly be granted if the proposed development promotes the health, safety, convenience and general welfare of the Community even though the development does not satisfy the Guidelines in whole or in part;
- there is a demonstrated shortfall in the provision of commercial/office floor space in the area;
- there is a vacancy rate of 5.25% for flatted factory indicating that there is a surfeit of industrial premises in the area;
- the District Lands Officer/Hong Kong South has no objection to the proposed development and supports

the idea of retail space on the ground floor as there is a need for retail space in the area;

f. an office/commercial building would alleviate traffic congestion because an industrial development requires 12 bays for lorries whereas a commercial office development requires 5 bays;

g. the proposed development will induce significant improvements to the general amenity and environment of the district as a whole and a commercial/office building will be beneficial as a buffer because the nearby Aberdeen Technical School and the football field are environmentally sensitive uses; and

h. the proposed provision of some retail floor space is a significant improvement and would justify the planning permission sought.

Decision of the Appeal Board

The Appeal Board determined that:-

- the Guidelines are based on common sense and indicate good reasons for planning permission to be granted or refused though they are not statutory in nature;
- the application must be considered in the context of the relevant statutory plan. Even though the construction of a commercial/office building will promote convenience and general welfare of the Community, it cannot mean that permission must be granted;
- the Board considered the evidence on vacancy rates unhelpful and opined that there is no evidence that there is a demonstrated shortfall of factory space in the district;
- the lack of objection or support by some Government Departments is not conclusive;
- although there may be less lorry traffic, a commercial office development may well generate other kinds of vehicular traffic; therefore the improvement in terms of traffic may not be significant;
- the Board do not believe the appellant has even begun to show that there would be any significant or meaningful improvements to the general amenity and environment of the district as a whole; and
- the Board do not agree that the

proposed provision of some retail floor space constitutes a significant improvement or would justify the planning permission sought.

The appeal was dismissed.

Town Planning Appeal No.4 of 1996: Container System Limited

Application for planning permission to use a site and certain adjacent Government land for open storage of containers for 3 years - an adjacent container storage yard already exists - the site is zoned "Undetermined" in the draft OZP - whether an appeal against a refusal of the s.16 application should be allowed.

Summary of the facts of the case

Container System Limited (Container System) was the owner of a container storage yard ("the Yard"). It applied to the Rural and New Town Planning Committee under s.16 of the Town Planning Ordinance for planning permission to use a site and certain adjacent Government land at Ping Ha Road, Ha Tsuen, Yuen Long, ("the Site") for open storage of containers for 3 years. The application was rejected by the Committee. Subsequently, Container System applied to the Town Planning Board for a review under s.17 of the Ordinance. The application was also rejected. Finally, Container System appealed to the Town Planning Appeal Board under s.17B of the Ordinance on 6th March 1996.

Submissions of the Appellant

The Managing Director of Container System gave evidence in support of the appellant's submissions, which can be summarized as follows:

a. Container System is eager to improve the container depot working system and the safety of the staff working in the depot and to have a model container storage yard. In order to improve the environment and the safety of the workers, the appellant has introduced a container stacker system in the place of the traditional mobile or tower crane in

the Yard and therefore more manoeuvring space is required for the operation of the system.

b. The inclusion of the Site would not increase the volume of containers stored in the expanded container depot in that the increase in the floor area would be set off by the reduction in the storage area and the tiers of containers on the Yard and therefore the inclusion will not cause the container traffic to worsen; and

c. The extension is conducive to other improvements to the environment of the area such as drainage, better visual impact and better noise barrier, better surface so as to reduce dust, more parking spaces, waiting areas and better room for manoeuvring of the container vehicles which should reduce the onstreet parking or traffic congestion along Ping Ha Road on the assumption that the total capacity of the combined Yard and Site will remain about the same.

Decision of the Appeal Board

a. The Board pointed out that they found the appellant's evidence highly unsatisfactory and that far from being full and frank in his evidence, certain aspects of the evidence were misleading. For example, evidence as to the average number of TEU masked the fact that on many occasions the daily TEU substantially exceeded 3,500 (e.g. 5,467 on 23-9-1995 and 5,490 on 13-6-1996). Further, it was only on questioning by the Board that he claimed that the Site was under separate management and that there was an oral agreement to run the Site together with the Yard only if the appeal succeeded. For these reasons, the Appeal Board did not believe it can proceed on the basis that if planning permission were granted, there would be no increased capacity. It has to proceed on the basis that if the appeal were allowed, it was probable that increased number of TEU would result. In addition, the Board do not think it could impose effective conditions.

b. The Appeal Board accepted the evidence from the Town Planning

Board which showed that with an almost doubling of the area, the number of TEU stored at the combined Yard and Site could easily double. In addition, evidence would generate additional container traffic which access roads would not handle was accepted by the Board.

c. The Appeal Board was of the view that it would be contrary to the planning intention stated in ES. 8.12.2, to permit the Site to be used for open storage of container, albeit only for 3 years. Given the traffic and environmental constraints, the Appeal Board concluded that it was intended that an area zoned "U" should be used for open storage of containers.

d. The Appeal Board accepted that the additional container traffic will have an appreciable adverse impact on traffic volumes and would be unacceptable.

The appeal was dismissed.

Note re costs: the Town Planning Board (the respondent) asked for its costs of the appeal. However, the Board refused to order costs to the respondent on the ground that it has not been the practice to award costs to a successful party in planning appeals.

HONG KONG Briefing

1. Concern for the safety of 500 employees has stopped work on the controversial HK\$1.3 billion Strategic Sewage Disposal Scheme. The stoppage followed a dispute between contractors and the Government over safety fears for the workers after ground water seeped into a section of the tunnel near Tseung Kwan O. Deputy Director of Drainage Services Chung Kwok-leung said British experts believed work could continue safely in the tunnels and talks to resolve differences were under way.

Legislators fear the dispute will increase costs. Democrat Dr. John Tse Wing-ling said geological

assessments of the rock before work began might have been insufficient. Mr. Chung admitted contractors could claim for extra costs should problems hold up projects.

The department paid the firm an extra \$150 million in March to accelerate construction after delays caused to other contractors by poor ground conditions in the project's early stages. (SCMP 23/10/96)

2. Hong Kong and Shenzhen need to work together to halt environmental destruction and pollution of the border area. Dr. Lew Young, manager of the World Wildlife Fundpark in the northwest New Territories, commented that there is an unco-ordinated approach to development from both the Hong Kong and Shenzhen sides. He also criticised random construction on land in the border area and said a co-ordinated overseeing of development should be undertaken by the Hong Kong/Guangdong Joint Environmental Protection Liaison Group. (SCMP 10/10/96)

3. The Agriculture and Fisheries Department is to call for a 20-fold rise in fines from \$10,000.00 to \$200,000.00 for the use of explosives in fishing, known as "fish bombing." District Commander of Marine Outer Water, David O'Brien, will reveal the extent of the problem at a marine conservation conference this weekend. He said fish bombing fell within the Marine Police remit of preventing crime and ensuring safety at sea.

Fish bombs - crude devices mainly consisting of a fistful of dynamite - are used by Hong Kong fisher folk using sampans to ply the waters of the northeast New Territories around Double Haven and Kat O. Possession of explosives carries a 14-year prison sentence but prosecuting the culprits is difficult because fishermen can throw the evidence overboard. If police find no explosives and only the dead fish on board, fisherman can only be charged under the Fisheries

Protection Ordinance, which carries a maximum fine of \$10,000.00 and six months' imprisonment. (SCMP 23/10/96)

4. A study shows that the territory has one of the lowest levels of environmental concern in the world. The territory's 19 percent (of those surveyed) of professed greenies compared with 69 percent in Denmark, 59 percent in Norway, and 52 percent in China.

The study also reveals that four out of five Hong Kong people thought the pollution problems needed to be tackled urgently and that Government should increase spending on the environment. But less than half were willing to pay more taxes to fund the clean-up.

Friends of the Earth spokesman Lisa Hopkinson described the results as "very depressing" and that there needs to be far more education in the territory about the harm a declining environment does to our quality of life, health and future economic prosperity. (SCMP 08/12/96)

5. Environmentalists claimed yesterday that lack of funding is making it impossible for government departments to create country parks. Green groups hit out at the Agriculture and Fisheries Department for having failed to secure a top-priority project to extend North Lantau Country Park, as suggested in 1990. Department spokesman said work could not start until the Government gave the \$26.5 million necessary. He also said 14 potential country parks were identified in 1993 but only 2 had been designated so far. The Planning, Environment and Land Branch said North Lantau Country Park would be considered in the 1997-98 budget round. (SCMP 06/01/97)

PADS UPDATE

The Airport Authority has announced the award of \$1.7 billion worth of nominated sub-contracts

for finishing work at the Chek Lap Kok Airport Terminal building. The authority appointed construction companies to work on the 17 finishing works packages but these firms will work as sub-contractors on the \$10.1 billion terminal master contract. The largest of the contracts, worth \$199.84 million, is for check-in stands, and was awarded to Nederlandsa Kunst Industria of the Netherlands. Permastellisa of Italy was the largest single winner, picking up internal cladding contracts for both the West and East areas, worth a combined HK\$354.76 million.

The Town Planning Board has announced the publication of the new draft Chek Lap Kok Outline Zoning Plan (OZP). The main purpose of the plan is to provide a broad land use zoning and transport framework for the development of the new airport and associated facilities. The Plan covers a total area of about 1,266 hectares including land produced by levelling of hill slopes and by reclamation from the sea around the then Chek Lap Kok and Lam Chau Islands. About 1,017 hectares of land has been designated for the accommodation of airport operational and supporting facilities including two runways, air traffic control towers, air passenger terminal and concourses, air cargo handling, aircraft fuelling and aircraft maintenance facilities. Some 45 hectares and 116 hectares of land have been earmarked for business park and commercial development respectively. Access to the airport will be mainly via the North Lantau Expressway and Airport Railway. An area on the north-eastern coast of the airport island has been reserved for pier development to facilitate sea transport.

The new Airport Railway Station at Tai Kok Tsui is officially named *Olympic Station*. The station will be a three-level above-ground structure situated on reclaimed land at the southwest corner of Tai Kok Tsui. It will serve the Lantau Line, a domestic mass transit system

bringing the much needed relief to the congestion along the Nathan Road Corridor. The station is the first Airport Railway station to have been structurally completed in 1996.

The Governor-in-Council has authorised construction of roads to provide access to developments on Ma Wan Island. The main feature of the project is the construction of two six-metre wide elevated slip roads with one land in each direction from the Lantau Link (formerly known as Lantau Fixed Crossing) to Ma Wan. The project will support the proposed developments shown on the Ma Wan Outline Zoning Plan and provide a road network for traffic circulation, emergency access and pedestrian movements on Ma Wan Island. The project will involve resumption of some private land on Ma Wan Island. Affected land owners and person will be compensated in accordance with provisions under the Roads (Works, Use and Compensation) Ordinance. The project will commence in the middle of next year and takes about four years to complete.

The Government will charge a \$60 toll on the Lantau Fixed Crossing. The toll will only be collected once, but will be for crossing in both directions. Mass Transit Railway Corporation (MTRC) understood to be charging about \$90 for a one-way ticket from Central to Chek Lap Kok on the Airport Railway. The MTRC is also considering the issue of a day-return ticket for the Airport Railway which would cost only a few dollars more.

ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

EIA Study for Rural Drainage Rehabilitation Scheme

The Environmental Impact Assessment (EIA) Sub-Committee of ACE met on 14 October 1996 to

consider, inter alia, a project which was part of the overall programme on "river training" for flood prevention covering mainly secondary water courses in the northwest New Territories and the upper reaches of Rivers Indus & Beas in the northeast New Territories. The project was the result of the recommendations from the TELAFLOCROSS-2 study completed in August 1993.

It was noted that natural river channels should not be "trained" and turned into artificial channels unless it was absolutely necessary. On this point, it was said by Mr. Chow, Senior Engineer, Project Manager of the Drainage Services Department that the justifications for the training programme were firmly established by the two phases of the TELAFLOCROSS study. These studies defined the risks of flooding and the sections of river channels that needed to be trained. The Chairman of the meeting commented that the point was that the government should not do more than was required for flood alleviation.

On this issue, it was suggested that any work on ecologically sensitive sections would cause disturbances. The ecological survey carried out classified the water courses as either high, medium, or low in terms of ecological value. The consultant had re-considered the ones with high values, especially those in the upper reaches, to see if these water courses could be maintained whilst still offering a reasonable level of flood protection. The EIA had recommended that nothing should be done if the objectives of flood protection would not be achieved in the matter. This was being developed further in the detailed design stage. River sections would be withdrawn from the scheme if the ecology would be disturbed to an unacceptable level. Sha Po Tsuen River and Mai Po River are examples where river training works were curtailed in response to the environmental findings.

It was commented by Ms. Hopkinson of the Friends of the Earth that the EIA report contained a number of good recommendations to minimise ecological impacts. However, it was not clear from the report where and when these recommendations would be implemented and it was hoped that a list of the recommendations that would be incorporated for each stream and river in the Rural Drainage Rehabilitation Scheme would be issued.

REGIONAL AND INTERNATIONAL

China

China's tougher stand against pollution is reflected by the closure of thousands of companies responsible for causing pollution. However, in Hebei and elsewhere in China, tens of thousands of rural enterprises have either closed down or gone bankrupt. Many of the chimneys of factories which had brought wealth to some local peasants are no longer belching smoke.

In Wuji county, rapid expansion of the rural and township enterprises had turned this county into a provincial economic model. In the past few years 21,000 small and medium-sized paper plants opened, creating jobs for 1.17 million. Many of these small enterprises have now been shut down, (for environmental reasons).

Locals workers are philosophical about closures, hoping the nationwide anti-pollution campaign launched a year ago will die down.

As part of the campaign, launched late last year, the State Council ordered the closure of all paper mills with an annual yield of less than 5,000 tonnes and tanneries with less than a yearly output of 100,000 pieces of leather. The privately-owned Wuji United Paper Mill is one of 10,400 small factories in Hebei which have been shut down according to reports just

published by the National Environmental Protection Agency (NEPA).

To bolster the campaign, the national media were ordered to expose the immense damage to the environment which all these small-time factories were responsible for. The China Youth Daily published a photograph of a desperate 60-year-old peasant kneeling in front of Xie Zhenhua, director of the NEPA,

pleading for him to save the livelihood of fishermen. Discharges from thousands of small factories in Henan and Anhui had made the waters of the Huaihe River not only toxic for fish and humans but had also poisoned the crops grown along its banks.

The government has now set specific quotas for the reduction of hard wastes and waste water

discharge, which rural industries must meet by the turn of the century. By singling out rural enterprises as the chief culprits instead of the equally dirty and larger state-run factories, the government is, in effect, undermining the privileged position enjoyed by township enterprises under Deng Xiaoping's patronage. (SCMP, 13/12/1996)

This quarterly does not constitute legal advice given on any particular matter. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors and omissions. Further information and enquiries in respect of this quarterly should be directed to Fred Kan & Co. or any of our following associate firms:

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 2° Andar
Macau
Tel: (853) 712770
Fax: (853) 713855

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



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) 4646516
Fax: (91)(11) 4646958

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, Phillipines

HERRERA TEEHANKEE & FAYLONA
5/F, SGV II Building, 6758 Ayala
Avenue, Makati Metro Manila 1200
Phillippines
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) 439798
Fax: (94) (1) 448002

Comparative Table of Environmental Convictions:
October - December 1996

	Number	1st Offence	2nd Offence	3rd + Offence	Highest Fine
APCO	33	12	7	14	\$ 20,000
	13	10	2	1	\$ 25,000
	17	9	3	5	\$ 20,000
WPCO	25	14	8	3	\$ 90,000
	38	27	4	7	\$160,000
	17	15	1	1	\$ 90,000
NCO	18	10	5	3	\$100,000
	12	6	3	3	\$ 50,000
	14	5	1	8	\$ 150,000
OLPO	-	-	-	-	-
	3	2	1	-	\$ 40,000
	2	1	1	-	\$ 25,000
DASO	-	-	-	-	-
	-	-	-	-	-
	2	2	-	-	\$ 30,000
WDO	10	9	1	-	\$ 12,000
	8	8	-	-	\$ 15,000
	6	5	1	-	\$ 20,000
Total	86	45	21	20	
	74	53	10	11	
	58	37	7	14	

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

October figures appear on the first line, November figures on the second, and December figures on the third of each item. Source: EPD, Anti-Pollution Prosecution Figures.

Fred Kan & Co.
Suite 3104-06 Central Plaza
18 Harbour Road
Wanchai
Hong Kong

Printed Matter