

Paper No. 2/2004  
For discussion  
on 6 May 2004

## **Harbour-front Enhancement Committee**

### **Protection of the Harbour Ordinance and the Court of Final Appeal Judgment**

#### **PURPOSE**

This paper sets out the requirements of the Protection of the Harbour Ordinance (“PHO”), Cap. 531, and the Court of Final Appeal’s (“CFA”) interpretation of section 3 “Presumption against reclamation in the harbour” of the PHO as contained in the CFA judgment of 9 January 2004.

#### **PROTECTION OF THE HARBOUR ORDINANCE**

2. In the summer of 1996, the Society for Protection of the Harbour Limited (“SPH”) presented the Protection of the Harbour Bill 1996 to the Legislative Council as a Private Member’s Bill through the Hon. Miss Christine Loh. On 27 June 1997, the Bill was passed to become the PHO. By then the PHO only applied to the Central Harbour. On 3 November 1999, the then Secretary for Planning, Environment and Lands moved an amendment to the PHO. The effect of the amendment is to extend the geographical scope under the PHO to cover the whole Victoria Harbour. Subsequent to that amendment, the PHO now applies to the entire Victoria Harbour.<sup>1</sup>

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<sup>1</sup> The boundaries of the harbour are defined by Schedule 3 of the Interpretation and General Clauses Ordinance, Cap. 1: “On the east – A straight line drawn from the westernmost extremity of Siu Chau Wan Point to the westernmost extremity of Ah Kung Ngam Point (sometimes known as Kung Am). On the west – a straight line drawn from the westernmost point of Island of Hong Kong to the westernmost point of Green Island, thence a straight line drawn from the

3. Section 3 of the PHO provides that –

(a) “The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.” [*section 3(1)*]

(b) “All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them.” [*section 3(2)*]

4. Section 3(1) of the PHO establishes a statutory principle recognizing the harbour as a special public asset and a natural heritage of Hong Kong people and prescribing it to be protected and preserved.

5. Section 3(2) imposes a specific legal duty on public officers and public bodies to abide by the legal principle stated in section 3(1) in the exercise of any powers vested in them.

### **SPH’s challenge and the High Court judgment of 8 July 2003**

6. On 27 February 2003 the SPH commenced legal proceedings and applied for judicial review (“JR”) of the decisions of the Town Planning Board (“TPB”) made in connection with the draft Wan Chai North Outline Zoning Plan. Madam Justice Chu of the High Court delivered the judgment on 8 July 2003 in respect of the JR. In the judgment, with regard to the presumption against reclamation under section 3 of the PHO, the following three tests were laid down –

“...the purpose and extent of each proposed reclamation ought to be individually assessed by reference to the three tests of –

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westernmost point of Green Island to the south-easternmost point of Tsing Yi, thence along the eastern and northern coast lines of Tsing Yi to the westernmost extremity of Tsing Yi and thence a straight line drawn true north therefrom to the mainland.”

- compelling, overriding and present need;
- no viable alternative; and
- minimum impairment.”

7. The effect was that the presumption against reclamation under the PHO could only be rebutted when these three tests were met. This interpretation of the PHO would apply to all future planning of the harbour-front areas involving reclamation. The TPB was concerned that the highly restrictive interpretation of PHO as laid down by the High Court could have far-reaching implications on future planning and development of the harbourfront areas and lodged an appeal, aiming at seeking a clarification of the legal principles behind the Ordinance.

#### **CFA Judgment of 9 January 2004**

8. The CFA handed down its judgment on 9 January 2004. A copy of the CFA judgment (in English only) and its gist (in both English and Chinese) is at Annex A. The CFA holds that the statutory principle of protection and preservation of the Harbour is a strong and vigorous one. The statutory presumption against reclamation in the Harbour is to implement the principle of protection and preservation. It does not prohibit reclamation altogether. As a presumption, it is capable of being rebutted.

9. The CFA judgment gives a definitive interpretation on the principles found in the PHO to protect and preserve the Harbour as a special public asset and a natural heritage of Hong Kong people, and a formulation of the “overriding public need test” to replace Madam Justice Chu’s “three test”. According to the CFA, the presumption against reclamation under section 3 of the PHO can only be rebutted by satisfying a single test of “overriding public need”, which by nature is a “demanding” test.

10. As stated in the CFA judgment, a need should only be regarded as overriding if it is a compelling and present need. The compelling need is far beyond “something nice to have, desirable, preferable or beneficial” but does not go as far as the “last resort” or something that the public “cannot do without”. The present need is “taking into account the timescale of

planning exercises, the need would arise within a definite and reasonable time frame”. In addition, where there is a reasonable alternative to reclamation, there is no overriding need for reclamation. All circumstances should be considered as to whether there is any reasonable alternative and they would include the economic, environmental and social implications of each alternative. It is also relevant to take into account the cost, time and delay involved in respect of each alternative.

11. In order to satisfy the overriding public need test, there must be cogent and convincing materials before the decision-maker to establish an overriding public need for reclamation and rebut the presumption against reclamation. The burden to rebut such presumption is a heavy one and it falls on a public officer or public body in considering the exercise of any power in relation to any reclamation proposal. Finally, as regards the extent of the proposed reclamation, the CFA also stated that it should not go beyond the minimum of that which is required by the overriding need. Each area proposed to be reclaimed must be justified.

## **GOVERNMENT’S POSITION ON THE ISSUE OF RECLAMATION IN THE HARBOUR**

12. The Government fully recognizes the statutory duty to protect and preserve the harbour placed on all public bodies and officers and has committed to do so. The Secretary for Housing, Planning and Lands (“SHPL”) has pledged on various occasions that other than Central Reclamation Phase III (“CRIII”) and proposed reclamation schemes in Wan Chai North and Southeast Kowloon, there will be no more reclamations inside the harbour. This pledge is reiterated in SHPL’s Policy commitment in the 2004 Policy Address.

## **ADVICE SOUGHT**

13. Members are requested to note the contents of this paper.

Secretariat, Harbour-front Enhancement Committee  
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