

The Environmental Impact Assessment Bill

— One Step Forward or Two Steps Back?

by Terri Mottershead

Background

In 1980, the first pieces of anti-pollution legislation were introduced in Hong Kong. The proposed *Environmental Impact Assessment Bill* ("the Bill") and the proposed amendments to the *Town Planning Ordinance* should be the most significant additions to environmental legislation since that date. However, those who have seen what has been released in these new proposed pieces of legislation are concerned that they may not live up to expectation. Past errors appear to have been repeated with little prospect that these will be corrected before the legislation is enacted.

On 1 October 1994, the six-week consultancy period for the Bill closed. Although a number of representative bodies were consulted, these were mostly from industry and excluded any direct contact with lawyers. The comments received by the government will therefore strongly reflect industry's point of view. The government will not learn from the mistakes and difficulties encountered in other jurisdictions where litigation has decided issues relating to environmental impact assessment.

Environmental impact assessment

Under the terms of the Bill, environmental impact assessment will take place either pursuant to the provisions of the Bill itself or with reference to the Environmental Protection Department ("EPD").

The Bill states that all "designated projects", ie those projects capable of causing significant environmental impact, as defined under the Bill, will require an environmental permit. To obtain this permit, the project proponent must prepare an initial environmental report. The EPD then decides whether or not the project requires a detailed environmental impact study. After receiving the initial environmental report and/or the

environmental impact study, the EPD will then decide whether or not to issue a permit. However, before a permit is issued the EPD will make the report available to the public and, in certain instances, to the Advisory Council on the Environment, for comment. The ability of the proponent or the public to challenge the decision of the EPD to grant or refuse a permit is unclear.



The Legal Eagle



Does the Environmental Impact Assessment Bill adequately tackle HK's problems?

The terms of reference for both the initial environmental report and the environmental impact study will be detailed in technical memoranda ("TM"). The TM will be laid before LegCo. However, it is unclear at what stage (if at all) the TM will be made available for public comment, or if it will form part of the Bill. If it does not form part of the Bill, the public will not know what is required of either an initial environmental report or an environmental impact study. Proponents will be particularly disadvantaged because if they do not cover all aspects expected of them, they may find themselves penalised by unacceptable permit conditions.

Veto of consultants

Developers and environmental consultants are also concerned by the provision which gives the EPD the right to veto consultants chosen by proponents to prepare either the initial environmental report or environmental impact study. No detailed criteria exist, setting out the basis upon which a consultant is deemed to be acceptable. However, the proponent does have the right to appeal against the EPD's decision. This provision will greatly affect the relationship organisations have with their consultants and will impact even more on the consultants themselves. The government seems to be hinting at an informal consultant licensing system on the one hand, without providing the comfort that a formal licensing system would guarantee on the other.

Liability under the Bill

It is proposed that carrying out designated projects without a permit, or contrary to the conditions of the permit, will constitute an offence with a maximum fine of HK\$5 million, plus a term of imprisonment. If an offence results in damage to the environment, the EPD will be permitted to clean up the damage and claim against the polluter for costs incurred. The scope of liability otherwise remains uncertain. Clearly there should be consistency with other anti-pollution legislation in terms of the categories of person to whom liability could be extended. The issue of whether the Hong Kong Government will itself be bound remains unclear.

Enforcement

Of further concern is that there is no provision for monitoring permits once granted. Also, there is no indication that permits will be granted for a limited time only. If the burden of monitoring is to fall on the government then there must be a system to ensure that the monitoring takes place. If not, there is no prospect of enforcement and any penalty proposed, severe or otherwise, is in reality, no penalty at all. As the imposition of a penalty has been the only incentive which ensures industry's compliance with environmental legislation in Hong Kong, the absence of any real prospect of enforcement, will result in there being no real prospect of compliance.

Town Planning Ordinance

Some commonality is proposed between the Bill and the amendments to the *Town Planning Ordinance*. This focuses on the necessity for an initial environmental report and/or environmental impact study, and the use of this information for planning and environment protection purposes. However, there is other legislation that needs to be considered, in order to avoid a multiplicity of permits and formalities. Much more should have been done and needs to be done to integrate all aspects of land development with the environment, or to put it more simply, to ensure sustainable development.

Environmental court

In keeping with this theme of integration and sustainability and in recognition of the fact that the present system is not working and must be overhauled, perhaps the government should consider setting up an Environmental Court or Tribunal. This would decide on the practicalities of an environmental impact assessment system and would adjudicate on all matters arising from



The Lovell White Durrant environmental and planning team, l-r Tony Marshall, Rona Westgate, Terri Mottershead and Martin David

it, or anything else affecting the environment.

Such a court or tribunal should also have some jurisdiction over planning law. As the *Town Planning Ordinance* is being reviewed, perhaps now is the time to consider combining the unique requirements of adjudicating environmental matters with their planning counterparts and have them dealt with by one court or tribunal. The government would have to undertake a proper feasibility study to establish the viability of such a court or tribunal. However, some of the possible benefits include the fact that multi-disciplinary adjudicators could be chosen, it could adopt a mediation and arbitration role, it could relax the strict rules of evidence and of standing, so the public could have ready access to it, it would allow real expertise and precedents to be acquired through a body of decision-making, and it could allow legal representation for the opponents of development schemes.

Conclusion

We have waited a long time for the proposed legislation on environmental impact assessment and the review of the *Town Planning Ordinance*. These brief comments cannot address all of the issues that need to be considered. However, they do highlight the sorts of matters that still need to be dealt with by the government. Reviewing these concerns may result in further delay, but would be considered time well spent for Hong Kong's environment if the government seizes the opportunity to get it right the second time around. We need this review to be comprehensive — as given the rate of deterioration in Hong Kong's environment, we cannot afford personally or financially to ignore a second chance! ♦

Terri Mottershead is a Lecturer in the Faculty of Law, The University of Hong Kong, and a Consultant to Lovell White Durrant, Hong Kong

VIEWPOINT

The Town Planning Ordinance — Help or Hindrance?

by Graeme Roberts

A revised *Town Planning Ordinance* (Cap 131) is expected to be ready for public consultation as part of the legislative process in early 1995. Will this be a help or a hindrance to the development process and are we going in the right direction?

The current situation

The current *Town Planning Ordinance* (Cap 131) was originally enacted in 1939 and has only been sparingly modified since that date. It is, therefore, reasonable to assume that as a piece of legislation it may no longer be suited to the needs of a modern Asian city. In its defence, however, let me say that I believe that it has served us well, largely as a result of its simplicity. It has two major virtues, in my opinion:

- firstly, it is simple enough to be understood by laypersons
- secondly, the plans prepared under it are similarly simple and applications for planning consent, when necessary, are relatively straightforward.

This means that property owners, developers and investors clearly know what their rights and/or obligations are with respect to planning requirements. We do not have a maze of codified documentation which requires legal assistance to decipher. In general, professional assistance from a qualified planner will facilitate negotiation of the system, but unless you need planning consent or wish to object to a statutory plan, you don't even need that.

The need for review

In September 1987, in recognition of the need for reform, ExCo ordered that a thorough review be undertaken of the existing ordinance with a view to

the introduction of new legislation. In July 1991, the newly formed Planning Department published a consultative document setting out the proposed areas of change to the existing ordinance for public comment. The consultation period ended on 30 November

1991 and since that date little has been heard outside the Planning Department of the revised legislation. As such, speculation on what might be in a white bill, once it emerges in the legislative process, is nothing more than that. There are, however, a few common themes which have emerged from the consultation document and public reaction to it, which are potentially illuminating.

The speed of the planning process

Two aspects are relevant here:

- The speed with which new plans are formulated and amendments to plans are promulgated. In general, I feel we can expect to see both processes take even longer than at present. I say this for two reasons. Firstly, the plan making and amendment process is likely to get more professionally demanding in terms of the supporting information, documentation and justification required. While in some senses this is to be welcomed, in that the public will have more information to judge whether or not the planners have got it right, in other respects the longer process will cause its own problems. For example, legitimate development initiatives may be rejected because the planning process has not been completed. The second reason I consider the process may take longer is related to the number of persons potentially involved. This will arise due to wider rights of public participation and consultation during the process. This can also be viewed as a generally positive development in open government with potentially negative consequences for the development process.
- The second area where I believe there will be significant change is in respect of applications for planning consent. At present under s16 *Town Planning Ordinance* an application for a

VIEWPOINT

'use' contained within an Outline Zoning Plan (OZP) must be considered by the Town Planning Board (TPB) within two months of its submission. It has been proposed that the revised ordinance should provide for public notification and comments on planning applications. If this provision makes it into the legislation, I believe we will very quickly see the paralysis in our planning system that we see in other jurisdictions. The prospect of commercially motivated objections to applications for planning consent is a worrying possibility. The TPB has very wisely looked after the public interest for almost 43 years since it first met in 1951, why not let them continue to do so?

Enforcement powers

At present the *Town Planning Ordinance* only provides enforcement powers for land within Development Permission Area (DPA) plans in the New Territories. These powers, introduced by an amendment in 1991, will be carried forward as those DPA plans are replaced by OZPs.

It is quite clear from the consultative document that enforcement powers are going to be sought for all areas, regardless of the plan type. In practical terms this may mean that in addition to Lands Department enforcement actions under the land lease, the Planning Department will have considerable enforcement powers which may override the less restrictive provisions of the lease. This section of the new ordinance is likely to be closely scrutinised and will attract considerable debate.

The TPB as judge and jury

Under the current *Town Planning Ordinance*, objections to draft Outline Zoning Plans which have been gazetted for public inspection are considered by the Town Planning Board. Initially this occurs in the absence of the objector and then subsequently, if the objection is not accepted, the objector can request further consideration of his objection at a meeting of the board. At that meeting he may, if he desires, be heard. There has been a legal view expressed that this provision and practice is contrary to Article 10 *Bill of Rights*. Article 10 states, *inter alia*, that "...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The legal view is that as the TPB has caused the OZP to be prepared (s3(1)) and then approved for publication (s5), it can not then be viewed as *independent and impartial* in considering objections to the plan.

In 1991, the *Town Planning Ordinance* was amended to provide for an independent Appeal Board which was to review decisions of the TPB arising from applications for planning consent. Interestingly, the Appeal Board is not permitted to review decisions in respect of objection procedures. The requirements of Article 10 *Bill of Rights* would, therefore, appear to be met in respect of applications, but not for objections. The reasons for this distinction, if indeed there are any, have not been made explicit.

The proposals for the revised ordinance outlined in the consultative document did not make provision for the removal of this anomaly. I would be very surprised, particularly if a judicial challenge on this point is successful, if this is not amended in the draft legislation.

This article updates part of an address on "The Role of Government" given at a Legal Business in Asia seminar on Current Issues and Developments in Commercial and Residential Property, earlier this year.

Graeme Roberts is a Registered Professional Planner and Director of Townland Consultants Ltd