

ITEM FOR FINANCE COMMITTEE

HEAD 154 – GOVERNMENT SECRETARIAT : ENVIRONMENT AND FOOD BUREAU

Subhead 149 General departmental expenses

Members are invited to approve a remuneration package for the Chairman of the Environmental Impact Assessment Appeal Board appointed by the Chief Executive to hear the appeal case on the Kowloon-Canton Railway Corporation Sheung Shui to Lok Ma Chau Spur Line project.

BACKGROUND

On 5 January 2001, the Administration invited Members to approve the proposal in Paper FCR(2000-01)61, for a remuneration package for the Chairman of the Environmental Impact Assessment (EIA) Appeal Board (the Appal Board) appointed to hear the appeal case on the Kowloon-Canton Railway Corporation (KCRC) Sheung Shui to Lok Ma Chau Spur Line project (the Spur Line). In view of concern expressed by Members at the meeting, we withdrew the proposal for further consideration. We now re-submit FCR(2000-01)61 (the Enclosure) for Members' consideration and approval in the light of the information provided in this paper.

APPOINTMENT OF THE EIA APPEAL BOARD CHAIRMAN

2. The Chairman and the Deputy Chairman of the EIA Appeal Board panel have disengaged themselves from considering the Spur Line case. Section 20 of the EIA Ordinance (Cap. 499) empowers the Chief Executive (CE) to appoint a person qualified for appointment as a District Court Judge to act as a Chairman in case the Chairman and Deputy Chairman of the EIA Appeal Board panel could not discharge their functions. The appointment is essential to enable the hearing of the KCRC's appeal to proceed.

3. In making this appointment, the Administration had taken into account the following factors including -

(a) Qualifications

The EIA Ordinance provides that persons appointed as Chairman of the EIA Appeal Board panel must be qualified for appointment as a District Court Judge. This is a minimum standard. There is no bar on appointing a better qualified person. Given the complexity and importance of the case, the Administration considers that there is merit in appointing someone with extensive judicial experience in civil proceedings.

We have to take particular care to ensure that the person appointed is perceived to be neutral and impartial, with no affiliation to any stakeholders, and that the person has extensive experience in the conduct of such hearings. A serving or retired member of the judiciary best meets these criteria.

(b) Urgency of the matter and availability of suitable candidate

The KCRC appeal case is of significant public interest, having implications for the future conduct of EIA studies and their consideration by the Director of Environmental Protection (DEP), as well as for this particular railway development project.

The Spur Line development has been put on hold pending the appeal hearing. It is in the public interest for the hearings on the case to be conducted as soon as possible so that the appellant could take into account the decision of the Appeal Board in determining the best way forward in meeting the growing demand for cross-border rail services.

To prepare for the hearings, both the appellant and the respondent (DEP) have raised a number of issues which require decisions of the Appeal Board Chairman before a date for holding the hearings can be set.

Given the large number of witnesses and submissions that are anticipated in this case, and the need for the hearings to be held expeditiously, we need to appoint a Chairman who will be available for at least two months for early hearing of the case.

/CONSIDERATION

**CONSIDERATION OF POINTS MADE BY FINANCE COMMITTEE
ON 5 JANUARY 2001**

4. Some Members asked us to consider whether it was appropriate to appoint a senior judicial officer as Chairman of the Appeal Board. While this is not very common, the Administration does appoint senior judges to serve on appeal boards set up under other ordinances. For example, the Municipal Services Appeals Board and the Administrative Appeals Board are both chaired by a High Court Judge.

5. There is also a long-standing arrangement whereby Judges of the Court of Appeal of the High Court can serve as Judges in cases heard in the Court of First Instance of the High Court. Any appeal against rulings made in such cases would be heard by the Court of Appeal of the High Court. Furthermore, there are precedents for non-permanent members of the Court of Final Appeal (CFA) undertaking appointments as an arbitrator or enquiry panel chairmanship.

6. Any judge appointed to chair an appeal board serves as the chairman of the board for the course of the hearings, and issues the findings of the board in that capacity, not as a judge. Judges in Hong Kong have a well-established tradition of formulating their own opinions on the basis of their understanding of the facts of a particular case and interpretation of the relevant provisions of the law when considering a case before them.

7. It was suggested that locally resident persons should have been considered in preference to a retired judge living overseas. We would like to make clear that consideration was given to all non-permanent members of the CFA, irrespective of their place of residence. The final selection was made on the basis of the person with most relevant and recent judicial experience and who would be available for at least two months for early hearing of the case.

8. In the light of comments made by some Members on 5 January 2001, we have reverted to the Judiciary on whether a serving judge can be released to sit as the Chairman of the Appeal Board. The Judiciary has re-affirmed its position that due to the existing heavy caseload, it could not release a serving judge in the foreseeable future for this purpose. Enquiries have also been made among Recorders¹ as to whether any of them would be available and willing to consider taking up the case. However, none of them is able to make commitment to set aside up to two months within the coming few months to take up this case.

/LONGER

¹ Recorders are Senior Counsel in private practice who are appointed by the CE to serve as Judges at the Court of First Instance of the High Court for at least four weeks each year. There are at present 11 Recorders. Their daily wage is \$8,435 per working day.

LONGER TERM MEASURES

9. As pointed out in FCR(2000-01)61, the circumstances leading to the need for appointing a new Chairman to hear the Spur Line case are unique and will not be taken as a precedent in future arrangements. The current three-year term of the EIA Appeal Board panel will expire on 31 March 2001. We are now reviewing the membership of the EIA Appeal Board panel in the light of the experience gained in handling the arrangements for the appeal in the Spur Line case. One of the measures we are considering is to include in the EIA Appeal Board panel more persons with the required qualification for chairmanship of an EIA Appeal Board, should the appointed Chairman and Deputy Chairman of the EIA Appeal Board panel be unable to act.

Environment and Food Bureau
January 2001

For discussion
on 5 January 2001

FCR(2000-01)61

ITEM FOR FINANCE COMMITTEE

**HEAD 154 – GOVERNMENT SECRETARIAT : ENVIRONMENT
AND FOOD BUREAU**
Subhead 149 General departmental expenses

Members are invited to approve the proposed remuneration package for the Chairman of the Environmental Impact Assessment Appeal Board, appointed to hear the appeal case on the Sheung Shui to Lok Ma Chau Spur Line project.

PROBLEM

We need to remunerate the Chairman appointed to chair the Environmental Impact Assessment (EIA) Appeal Board (the Appeal Board) to hear the appeal lodged by the Kowloon-Canton Railway Corporation (KCRC) against the decision of the Director of Environmental Protection (DEP) to reject the EIA report submitted for the Sheung Shui to Lok Ma Chau Spur Line (Spur Line) and refuse to issue an environmental permit.

PROPOSAL

2. We propose that the remuneration for the Chairman appointed to chair the Appeal Board on the Spur Line case should consist of an honorarium for the time spent on the case, at a daily rate of \$7,025¹, and the fee of \$8,870 for writing the decision. Since the person appointed to chair the Appeal Board is not resident in Hong Kong, we will also provide a return air fare (estimated at \$48,000) and an estimated allowance of \$1,600 a night for hotel accommodation.

/JUSTIFICATION

¹ This is comparable to the pay he would receive were he sitting as a Judge in the Court of Final Appeal. It covers time spent on the case as well as in hearings.

JUSTIFICATION

3. The EIA Ordinance (Cap. 499) provides that all project proponents of designated projects² must submit an EIA report to the DEP to assess the potential impact of a proposed project on the environment during its construction and operation, and to propose mitigation measures to avoid, reduce or remedy the adverse impact. Work cannot start until and unless the DEP has approved the EIA report and has issued the environmental permit.

4. Under the EIA Ordinance, aggrieved project proponents can appeal to an EIA Appeal Board, which should comprise at least three members from the EIA Appeal Board panel (the Appeal Board panel), one of whom must be either the Chairman or Deputy Chairman of the Appeal Board panel. The Chairman and Deputy Chairman of the Appeal Board panel must be persons qualified for appointment as a District Court Judge. One of them would normally serve as Chairman of the Appeal Board set up to determine an appeal case. The work of the Chairman of the Appeal Board includes preparation before the hearing, chairing the hearing and writing the decision after the hearing.

5. Upon receipt of the KCRC's notice of appeal against DEP's decision to reject the EIA report and not to issue an environmental permit for the Spur Line project, the Chairman of the Appeal Board panel declared that he had expressed a personal opinion on this subject before the appeal had been lodged, and that he disqualified himself from sitting as the Chairman of the Appeal Board on this appeal case. The Deputy Chairman of the Appeal Board panel subsequently also disengaged himself.

6. Under the EIA Ordinance, if both the Chairman and the Deputy Chairman of the Appeal Board panel are precluded from exercising their functions, the Chief Executive (CE) may appoint a person qualified for appointment as a District Court Judge to act as Chairman and to exercise and perform all the functions of the Chairman during the period of his appointment. In identifying candidates for such appointment by the CE, we have sought the advice of the Judiciary. Having regard to its present heavy workload, the Judiciary advised that it would not be in a position to release a serving judge at the level of District Court Judge or above.

7. Given the above, and having regard to the weight of the case, a non-permanent Hong Kong Judge of the Court of Final Appeal (CFA) was considered

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² Designated projects are projects listed in Schedules 2 and 3 of the EIA Ordinance that are required to undergo an environmental impact assessment process. These projects could only start work after having obtained an environmental permit from the DEP.

an appropriate choice and one particular CFA Judge was recommended on the basis of his experience and availability. The Judiciary is content with the proposal. Accordingly, the CE has exercised his authority under the EIA Ordinance and appointed this CFA Judge to chair the Appeal Board to handle the Spur Line case. In announcing the appointment we have said that we would consult the Legislative Council Panel on Environmental Affairs on the remuneration package for the Chairman of this Appeal Board and seek approval from the Finance Committee (FC).

8. Because the Chairman appointed to hear the Spur Line case is not resident in Hong Kong, we propose that he should be provided with the proposed return air fare and allowance for hotel accommodation. As for honorarium, the proposed daily rate of \$7,025 is based on the pay a CFA Judge receives, which covers time spent in hearings as well as on the case. The proposed fee of \$8,870 for writing the case is the same as in other remuneration packages previously approved by Members for the other environment-related appeal boards (please see paragraph 12 below).

FINANCIAL IMPLICATIONS

9. The exact financial implications of the proposal depends on the time taken to complete the case. It is difficult, before the Chairman has been able to assess the information provided by the appellant and the DEP, to give a firm estimate as to the time that the appeal hearing may take. For illustration, on the working assumption that the case takes up to two months, the financial implications for implementing the proposal are -

	Estimated cost
	\$
(a) Two-months' pay (\$7,025 x 60 days)	421,500
(b) Fee for writing the decision	8,870
(c) Hotel accommodation (\$1,600 x 60 days)	96,000
(d) Air fare (business class UK -HK- UK)	48,000
	<hr/>
	574,370
	Say 580,000

The actual amount of the remuneration may exceed or fall below the figure suggested above, depending on the actual duration of the appeal proceedings.

10. The Environment and Food Bureau has sufficient provision in the 2000-01 Estimates to meet the cost of the proposal.

/BACKGROUND

BACKGROUND INFORMATION

11. On 5 March 1993, Members agreed vide FCR(92-93)148 that the principles adopted since 1980 for remunerating non-official members serving on all boards and committees set up by the Government should continue to apply. The general principle was that such service is voluntary and normally unremunerated. Where remuneration is considered appropriate having regard to the merits of an individual case, it should normally be in respect of payment of expenses and/or for compensation for earnings forgone.

12. Members approved on 6 March 1992 vide FCR(91-92)169 the payment of an honorarium³ to the Chairman of the three appeal boards appointed under the Air Pollution Control Ordinance, the Water Pollution Control Ordinance and the Noise Control Ordinance. Vide FCR(94-95)45 and FCR(95-96)63, Members approved on 8 July 1994 and 27 October 1995 the payment of an honorarium³ to the Chairman of the appeal board appointed under the Waste Disposal Ordinance and the Dumping at Sea Ordinance respectively.

13. We issued a press release on 15 December 2000 announcing the appointment of the Chairman of the EIA Appeal Board by the CE. We will consult the Legislative Council Panel on Environmental Affairs on the proposed remuneration for the Chairman on 2 January 2001.

14. The term of office of the current EIA Appeal Board panel will expire on 31 March 2001. The Environment and Food Bureau is now conducting a review of the membership of the EIA Appeal Board panel and the remuneration package for the Chairman in the light of the experience gained in the Spur Line case. We will revert separately to FC, if necessary, on the general remuneration package for the Chairman of the EIA Appeal Board panel. The Spur Line project is the only appeal case being handled by the EIA Appeal Board panel at the moment. We have not received any other appeal cases under the EIA Ordinance.

Environment and Food Bureau
December 2000

³ The Chairman of the other environmental appeal boards is a person qualified to act as a District Court Judge. The remuneration package comprises an annual retainer of \$86,520 (since the person is not appointed just for a particular case but is expected to be available for any case that may come up), a fee of \$4,440 for each sitting of an appeal board hearing, and a fee of \$8,870 for writing a decision.