

**立法會**  
**Legislative Council**

LC Paper No. LS96/06-07

**Paper for the Panel on Planning, Lands and Works**

**Compensation for diminution of development rights due to planning actions**

At the Panel meeting on 27 March 2007, Members requested the Legislative Council Secretariat to prepare some information on the subject including a legal opinion on whether the imposition of planning restrictions amounting to diminution of development rights and without compensation was in breach of Article 105 of the Basic Law.<sup>1</sup>

The Administration's Paper

2. The Administration has prepared a paper "Amendments to Outline Zoning Plans Made by the Town Planning Board to Impose Development Restrictions" (Ref: LC Paper No. CB(1)1643/06-07(04)). Paragraph 13 of the Administration paper sets out the Administration's view on whether the development restrictions in Outline Zoning Plans are in breach of Articles 6 and 105 of the Basic Law. The Administration relies on the judgment of *Fine Tower Associations Ltd v. Town Planning Board* [2006] HKCFI 819 and is of the view that "the Outline Zoning Plans does not constitute a de facto taking of property and it follows that there has been no contravention of Article 105. Although the case is now subject to appeal, the said court judgment is still valid unless it is overturned."

The Judgment of *Fine Tower Associates Ltd v. Town Planning Board* – [2006] HKCFI 819

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3. The Court considered the issue that "suppose that a proposed zoning of the area in which an owner's land is situated would prevent the owner from carrying out any of the uses permitted by the relevant conditions, can the owner claim that there has been a "deprivation of property" entitling him to compensation from the Government under Article 105 of the Basic Law?"

4. The general principle of law set out by the Court is that "restrictions on user imposed by regulations (including zoning laws) can amount to a 'deprivation of

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<sup>1</sup> Basic Law Article 105 provides that:-

"The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property."

property'. It is possible that, in substance, a law has the effect of so restricting the use to which land can be put that a person's title to land becomes worthless or practically so. In that case, it can be said that there has been a de facto expropriation of an owner's title to land. In such instance, compensation would be payable under Article 105. Whether or not there has been de facto expropriation of title is a question of degree. The Court looks at all relevant circumstances to ascertain whether the substantial effect of a regulation is to remove any meaningful claim of entitlement to a piece of land as a whole."<sup>2</sup> "The question is one of determining whether in fact the attributes of ownership have been so nullified as to render one's title to land meaningless."

5. The Court has considered the impact of the planning restrictions on the development potential<sup>3</sup> of the land when determining whether there is deprivation of property under Article 105 and was of the view that "If someone is prepared to pay something for land because of the possibility of modifying lease restrictions and developing the land along the lines of a draft Outline Zoning Plan, then the title to the land is not valueless. The owner can sell the land on the open market and realize its development potential into cash."

### Conclusion

6. Whether the imposition of planning restrictions amounts to diminution of development potential depends on the facts of the particular case, namely, whether the planning restrictions have an adverse effect on the development potential of the property. If the planning restrictions have an adverse impact on the development potential of the property, whether they amount to a 'taking' or 'deprivation' of property which entitle the owner to compensation under Article 105 is a question of magnitude which depends on the facts of the particular case.

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<sup>2</sup> The Court has considered the following in making its judgment that the draft Outline Zoning Plan does not constitute an actual or de facto taking of property: First, the draft Outline Zoning Plan allows the owner of the land to use its 2 lots in their present state. Second, the 2 lots have economic value. They are not valueless. They are capable of being sold for more than a nominal sum in the open market. Third, the Government affirms that, subject to payment of a premium, it is prepared to process a lease modification in respect of the lots.

<sup>3</sup> In *Director of Lands v. Yin Shuen Enterprises Ltd.* (2003) 6 HKCFAR 1, the Court of Final Appeal defined development potential as the difference between the value of land subject to restrictions and its open market value which takes account of the prospects and costs of obtaining a modification of ... the lease.