

立法會
Legislative Council

LC Paper No. CB(1) 2121/99-00
(These minutes have been seen
by the Administration and cleared
by the Chairman)

Ref : CB1/BC/8/99/2

Bills Committee on Town Planning Bill

Minutes of the eighth meeting
held on Wednesday, 26 April 2000, at 10:45 am
in the Chamber of the Legislative Council Building

Members present : Hon James TO Kun-sun (Chairman)
Hon Edward HO Sing-tin, SBS, JP
Hon LEE Wing-tat
Hon Ronald ARCULLI, JP
Hon Christine LOH
Hon CHAN Yuen-han
Hon WONG Yung-kan

Members absent : Hon HO Sai-chu, SBS, JP
Hon Emily LAU Wai-hing, JP
Dr Hon TANG Siu-tong, JP

Public officers attending : **Planning and Lands Bureau**

Mr Wilson FUNG
Principal Assistant Secretary/Planning

Mr David LAM
Assistant Secretary/Planning

Planning Department

Mr P K CHUNG
Assistant Director of Planning/Technical Services (Acting)

Ms Brenda AU
Senior Town Planner/Ordinance Review

Department of Justice

Mr J D SCOTT
Senior Assistant Law Draftsman

Miss Shandy W M LIU
Senior Government Counsel

Clerk in attendance : Mrs Mary TANG
Chief Assistant Secretary (1)6

Staff in attendance : Ms Bernice WONG
Assistant Legal Adviser 1

Ms Sarah YUEN
Senior Assistant Secretary (1)4

I Meeting with the Administration
(LC Paper Nos. 1392/99-00(01) and (02))

Common law principles on compensation for planning actions

The Senior Town Planner/Ordinance Review (STP/OR) briefed members on the salient points of the Administration's paper entitled "Common Law Principles on Compensation for Planning Actions", which concluded that the infringement of contractual rights of land ownership by planning actions was justified on grounds of promoting public interest. It was a means to ensure that overall planning initiatives for the interest of the community would not be frustrated unduly by individual rights. Otherwise, the whole purpose of planning legislation would be defeated. The absence of statutory provisions for compensation for planning actions hence did not in any way deviate from the common law principles.

2. At the Chairman's invitation, the Assistant Legal Adviser 1 (ALA1) made the following points in response to the Administration's paper –

- (a) The distinction between expropriation of property and regulatory limitations on the use of property formed the basis for the common law principles in determining whether compensation was payable. As the distinction was usually seen as a matter of degree, it could not be made on a mechanical or conceptual basis. In some jurisdictions, regulatory limitations could be classified as effective expropriations and compensated, if they had gone too far.

- (b) The Administration's paper did not make reference to the Basic Law. It only referred to the report of the Special Committee on Compensation and Betterment published in March 1992 (the Report) which stated that "under the doctrine of parliamentary sovereignty and in the absence of a written constitution, courts may not declare statutes invalid on the grounds of being unconstitutional or unreasonable". After 1997, the discussion would not be complete unless implications of the Basic Law had been considered. Article 8 of the Basic Law had provided, inter alia, that the common law should be maintained, except for any that contravened the Basic Law, and subject to any amendment by the legislature of Hong Kong. Articles 6 and 105 protected the right of private ownership of property.
- (c) While no case law in Hong Kong could be found on the implications of the Basic Law on the Town Planning Ordinance (TPO), in the case of Discreet Limited vs Secretary for Justice for and on behalf of the Town Planning Board [HCAL 112 of 1997] quoted in the Administration's paper, the Judge had commented that the question of whether section 4(3) of the existing TPO could stand in the face of a new Constitutional order was an interesting one.
- (d) The United States (US) recognized the grey area between the two categories of regulation and expropriation. The Fifth Amendment of the United States Constitution provided that private property should not be "taken for public use without just compensation". On this basis, the US courts had developed the doctrine of inverse condemnation, which might be invoked in cases where the value of land had been destroyed or diminished by regulation even though the land was not compulsorily taken. When all other remedies had been exhausted, an application might be made for the grant of constitutionally based compensation. Such constitutional provisions had been held to be self-executing, so they were not dependent on the enactment of specific legislation. (ALA1 drew Members' attention that the US constitution protected private property rights in wider terms than the Basic Law.)
- (e) The doctrine of inverse condemnation had not been recognized in other jurisdictions such as Northern Ireland, France, Germany and Italy. In the United Kingdom, the Town and Country Planning Act as amended by the Planning and Compensation Act 1991 provided that compensation should be paid in relation to certain planning actions.

3. As a conclusion of the above, ALA1 pointed out that it was a matter for members to decide whether clause 6(3) or (4) of the Bill, which allowed for the imposition of planning control without compensation, was acceptable, and if not, how it should be amended. However, should members decide to move Committee Stage

amendments to provide for compensation, the proposed amendment would probably have “charging effect” and would be subject to the restriction under Rule 57(6) of the Rules of Procedure.

- ALA1 4. At the Chairman’s request, ALA1 agreed to provide a paper to further elaborate on the above points. In response to Mr LEE Wing-tat, she also agreed to attach an extract of the Town and Country Planning Act to her paper.

(Post-meeting note: The required paper was circulated vide LC Paper No. CB(1)1527/99-00.)

- Admin 5. In reply to the Chairman on the implications of the Basic Law on the Bill, PAS/PL(P) assured members that the Basic Law experts consulted had confirmed that the Bill did not conflict with any provision of the Basic Law. Nonetheless, he undertook to provide an information paper setting out the legal basis of the above conclusion in the light of ALA1’s comments.

- Admin 6. As to Mr LEE Wing-tat’s request for background information on the Planning and Compensation Act 1991, STP/OR agreed to assist in this regard and pointed out that the Planning and Compensation Act 1991 was in fact introduced to limit rather than expand the scope of planning actions payable by compensation. This was because various problems had been encountered ever since the UK started to introduce a comprehensive system of compensation in 1947. She further highlighted the need to consider the local situation against overseas practices in determining whether compensation should be paid for planning actions.

Concerns about the abuse of planning actions

7. Members were concerned about the extent of power conferred upon the Town Planning Board (TPB) under clauses 7 and 9, in particular clauses 9(1)(h) and (i) on the designation of special design areas. This was because under clause 6(4), affected landowners whose development rights had been diminished due to planning actions would not be entitled to any compensation. Mr Ronald ARCULLI also noted with concern that the power of the Chief Executive under clause 6(5) to give to TPB “such directions in writing as he thinks fit in respect of the exercise of its powers and functions, either generally or in any particular case” was equally wide.

8. In response, PAS/PL(P) stressed that the power conferred upon TPB under clause 6(4) had to be looked at in conjunction with the whole plan-making process whose openness and fairness had been enhanced by the Bill. Members noted that under the more open planning process, draft plans would be gazetted for public comments, which would be processed according to a set procedure. If unwithdrawn, these would be submitted to the Chief Executive in Council for final decision. As such, adequate consideration of private rights as against the public interest could be ensured and there was no need to specifically limit TPB’s power under clause 6(4).

9. Mr LEE Wing-tat was still concerned about the possibility of abuse, and highlighted complaints where the development potential of rural land was affected by planning actions, and complaints about Government imposing planning control before land resumption on purpose to reduce the value of the land concerned and hence the amount of compensation.

10. Responding to the former type of complaints, PAS/PL(P) pointed out that these mostly involved the designation of farmland as green belts and conservation areas. Since such uses did not fall under the scope of public interests according to the Lands Resumption Ordinance, even though the Administration would like to resume the land concerned and pay compensation, it was not empowered to do so. As for the latter type of complaints, PAS/PL(P) confirmed that there were no such cases. In response, Mr LEE Wing-tat undertook to refer these cases to the Administration.

11. PAS/PL(P) further explained that in many complaint cases, the claim on infringement of contractual rights of land ownership by planning actions was made on the assumption that the relevant lease entitled the owner to develop his land in whatever way. This however was not true in most cases, especially where rural land was concerned. It was therefore irrelevant to say that planning control had led to planning blights. Mr LEE Wing-tat however pointed out that with planning control, a landowner's rezoning request would likely be refused and hence there was genuine cause for complaints. In response, PAS/PL(P) said that such applications might not necessarily be granted but would be examined with regard to various factors such as town planning considerations and infrastructural capacity constraints. As such, there was difficulty in assessing such assumed land values and pay compensation.

12. Focusing on urban sites instead, Mr LEE Wing-tat referred to legal proceedings regarding the imposition of plot ratio (PR) restrictions in Kowloon and New Kowloon through amendments to 16 Outline Zoning Plans (OZPs), and enquired about the outcome. Highlighting this case as an example of unreasonable planning action on the part of the Government, Mr Ronald ARCULLI said that it was unfair that the Peak should be given special treatment so that redevelopment there was permitted up to the existing bulk or the new permissible PR, whichever was the greater. In response, STP/OR clarified that the Peak was not the only district enjoying preferential treatment but all existing developments could in general retain their PR when redeveloped. Mr ARCULLI however cast doubt on the Administration's response. Mr Edward HO also said that the retention of the original PR was only true on the Peak and Jardine's Lookout but not in Kowloon as exemplified by the case of the Chungking Mansions on Nathan Road. To clear up any misunderstanding, PAS/PL(P) agreed to provide information on the judicial review on the amendments made to the PR of the 16 OZPs in Kowloon and New Kowloon and other above-quoted cases concerning the scaling down of developments through amendments to PR.

13. As to the Pok Fu Lam moratorium quoted by Mr Ronald ARCULLI as another example of unreasonable planning actions, STP/OR explained that the moratorium had been imposed as an administrative measure only and was not related to the exercise of planning control by TPB. PAS/PL(P) supplemented that the moratorium only suspended land sale and processing of lease amendment applications in relation to the Pok Fu Lam area, and was imposed by the Executive Council in 1972 as a necessary measure to address the traffic congestion problem there. Mr ARCULLI was unconvinced of the Administration's explanation and claimed that the moratorium had unreasonably frozen all developments.

Concerns about the lack of compensation

14. Mr Edward HO pointed out that while the development rights of many sites were unclear and there was difficulty in establishing whether they had been diminished by planning control or not, new leases had clear indications of the permitted uses of the land concerned. He sought to know whether compensation would be paid for the diminution of development rights by planning actions concerning new leases.

15. In response, STP/OR elaborated on the general principle adhered to by the Administration in considering whether compensation should be paid. Members noted that in the case of Discreet Limited vs Secretary for Justice for and on behalf of the Town Planning Board [HCAL 112 of 1997] regarding a site on Fei Ngo Shan, whose PR had been reduced by the subsequent imposition of PR restrictions, the court's judgement was that planning or other statutory powers affecting lessees' rights did not amount to any derogation from grant for which compensation was payable. Referring to the case of Molton Builders Ltd. vs City of Westminster L.B.C. [1975] 30 P & CR 182, which involved a conflict between statute law and the contractual provisions of the lease, she also claimed the case had established that the grantees' rights to use their lands according to the leases were always subject to the controls under the planning law in existence at the time. According to her, the above cases had shown that the general principle that statutory provisions should prevail over contractual provisions without compensation had already been established by the courts locally and in other common law jurisdictions.

16. Mr Edward HO was unconvinced that compensation needed not be paid for the above cases having regard that the case of Discreet Limited vs Secretary for Justice for and on behalf of the Town Planning Board [HCAL 112 of 1997] actually involved the reduction of the existing permissible PR. In his view, if Government would ask a landowner to make up for the shortfall in land premium when the PR of his land was relaxed, it followed that it should also pay compensation to a landowner if the PR of his land was tightened, or else it would be unfair even though the control was imposed for such purpose as preserving heritage. His views were shared by the Chairman and Mr LEE Wing-tat, who opined that compensation should be paid for regulating the use of private land because the act would affect the development potential of the land concerned.

17. In response, PAS/PL(P) reported that despite Government's position that overall planning initiatives for the interests of the community should not be frustrated unduly by individual rights and hence compensation would not be paid for planning actions, an internal working group had been set up to examine possible compensation schemes for exceptional cases, in particular cases where planning control was imposed for the purpose of preserving the environment or heritage, and extreme cases wherein the property rights under the lease were affected. In his view, in the latter cases where the Government was acting unreasonably, the affected landowner should be able to pursue judicial review to protect his rights. He also assured members that such extreme cases were very rare and mostly involved urban sites only.

The way ahead

18. Mr Edward HO cast doubt on how scrutiny of the Bill could continue pending completion of the work of the above-mentioned internal working group to shed light on the compensation issue. In response, PAS/PL(P) stressed the need for early enactment of the Bill, which had taken more than ten years to work out. Pointing out that there were always problems to address at different times, he considered it impracticable to hold up scrutiny of the Bill until all issues had been resolved, especially as other relevant bureaux were involved in reviewing the compensation issue and as such the process would take time. As the recommendations of the internal working group could be incorporated at a later stage, he urged members to endorse the Bill first, and entrust the Administration to make legislative amendments as necessary after the working group had completed its work.

19. Mr Edward HO however maintained that members would need to be ascertained of the scope of clause 6(4) and hence its implications on whether compensation was payable before endorsing the Bill. The Chairman, Miss CHAN Yuen-han and Mr LEE Wing-tat shared his views. Proposing an alternative, the Chairman said that it might be advisable to enact the Bill to open the planning process first without clauses 6(4), 7 and 9, which could be added to the Bill after the working group had finished its work.

20. In response, PAS/PL(P) stressed that according to the existing TPO, TPB already had the power to impose planning control by designating green belts, wetlands etc. regardless of whether there would be compensation. As such, the issue of compensation should be reviewed in an exercise separate from the Bill to facilitate careful examination of its financial implications. Nonetheless, he agreed to seriously consider and give a specific response to the Chairman's proposal at the next meeting of the Bills Committee.

Response to members' concerns raised at the meeting on 14 April 2000

21. In response to members' concerns raised at the meeting of the Bills Committee on 14 April 2000, PAS/PL(P) made the following points -

- (a) As regards members' request for an interface mechanism between TPB and the Country and Marine Parks Board (CMPB) to ensure co-ordination in the designation of country parks, it had to be noted that TPB and CMPB were two independent statutory bodies each exercising its power according to its own legislation. Nearly all country parks were designated on the basis of territorial and sub-regional planning studies conducted by the Planning Department (Plan D). As Plan D would consult both TPB and CMPB during the studies, TPB and CMPB were aware of each other's plans at the study stage.
- (b) On the need to introduce sanctions for disclosure of confidential information relating to the plan making and approval processes, it had to be noted that TPB members already had to examine planning proposals according to TPB's Procedures and Practice which required them to keep all relevant information confidential. All newly appointed TPB members would also be briefed on such confidentiality requirements. Should any TPB member fail to comply with these requirements, the Chief Executive could consider imposing sanctions or might even terminate his/her appointment according to the provisions of the Interpretation and General Clauses Ordinance (Cap.1). As for staff of Plan D, they were governed by the internal Planning Manual containing similar confidentiality requirements. Provisions of the Civil Service Regulations on conduct and discipline also contained confidentiality requirements, and failure to comply would result in disciplinary actions. Moreover, there was also the Prevention of Bribery Ordinance, which applied to TPB members and Plan D staff alike. As such, there should be sufficient safeguards against disclosure of confidential information by TPB members and Plan D staff and there was absolutely no need to introduce criminal liabilities.
- (c) Regarding the confidentiality safeguards in the Executive Council, as understood from its Secretariat, all Executive Council members had to swear to keep all discussion papers confidential according to the Oaths and Declarations Ordinance (Cap.11). In addition, they were also subject to the control of Cap. 1 and their appointment could be terminated if they failed to comply with the confidentiality requirements.

22. Noting the above interface arrangement between TPB and CMPB, Mr Edward HO considered it undesirable that an administrative-led approach should be adopted, under which Plan D would act as the middleman, and the two bodies were only consulted and were not actually taking part in formulating the relevant planning proposals. In his view, unless the designation of country parks and the planning process could be conducted in parallel, the problem of one body pre-empting the decision of the other could not be solved.

23. In response, PAS/PL(P) stressed that Plan D did not make all planning proposals by itself but had to work closely with other relevant departments such as the Agriculture, Fisheries and Conservation Department (AFCD) so as to take into consideration all related factors and to ensure co-ordination. In fact, all planning proposals would have to be agreed upon by all relevant bureaux and departments before they could be finalized. Moreover, all developments would ultimately be submitted to the Executive Council where all dissenting views would be examined for making a final decision. In this regard, should TPB find a particular proposal on designation of country parks undesirable, it could always submit its objections under the Country Parks Ordinance for the Executive Council to consider. To further assure members, PAS/PL(P) undertook to consider requesting AFCD to consult TPB before submitting proposals on designation of country parks to CMPB.

24. Mr Edward HO commented that consultation at the planning stage was of little use because the boundaries of country parks were still undetermined at that stage. In reply, PAS/PL(P) said that at the sub-regional planning study stage, the boundaries would more or less be finalized after clearing up any possibility of overlapping or conflicting with other land uses in consultation with all relevant departments.

II Any other business

25. Members agreed that the ninth, tenth and eleventh meetings of the Bills Committee should be held as follows -

Date	Time
Thursday, 4 May 2000	4:30 pm
Tuesday, 9 May 2000	4:30 pm
Monday, 16 May 2000	2:30 pm

(Post-meeting note: The Bills Committee was subsequently dissolved and the last two meetings scheduled were cancelled.)

26. The meeting ended at 12:45 pm.

Legislative Council Secretariat

2 November 2000