

Common Law Principles on Compensation for Planning Actions

Background

At the Bills Committee meeting held on 28.3.2000, Heung Yee Kuk raised concern about the lack of compensation for planning actions. The relationship between statute law and contractual provisions of leases was briefly discussed. The Administration agreed to prepare a paper on the common law principles on compensation.

2. The lack of compensation provisions in the existing Town Planning Ordinance has long been a contentious issue, particularly after the enactment of the Town Planning (Amendment) Ordinance 1991 which extended statutory planning control to the rural New Territories. A Special Committee on Compensation and Betterment (SCCB) was set up in July 1991 to consider the complex issues of compensation and betterment. The SCCB examined the situations in other countries in detail and a report was published in March 1992. This paper has made reference to the SCCB report.

Common Law

3. Although resumption and compensation provisions in Hong Kong are based on statute, the common law is also applicable. The historical reports of judgments of the superior courts in Hong Kong and other common law jurisdictions comprise the common law.

4. Where a statute provides for the compulsory acquisition of private land, it may provide for payment of compensation. The provisions relating to compensation under clauses 6(3) and 6(4) of the Town Planning Bill are examples. These two clauses of the Bill follow closely the wording in sections 4(2) and 4(3) of the existing Town Planning Ordinance. Where the statute on the right to compensation is unclear, the common law provides certain principles to assist in the interpretation and application of statutory rights and powers. The common law presumes that compensation is payable for the taking of private land, unless there is a clear contrary intention.

5. Where statute law merely regulates the use of private land, the common law principle is that compensation is not payable, unless there is a clear statutory provision. Regulatory powers may restrict or prohibit development but do not deprive the private owner of his title to the land. The doctrine that the public interest should prevail over private interest without compensation except in extreme cases has long been a feature of law in Civil Law countries.

6. Nearly all privately owned land in Hong Kong is held from the Government under leases. The contractual rights of both the Government as lessor and private owners as lessees are subject to statute law. Whenever there is a conflict between statute law and the contractual provisions of leases, the statute law prevails. This is in line with the general principle that statutory provisions prevail over contractual provisions, as established by the

courts locally and in other common law jurisdictions such as England and Australia. Some examples include *Discreet Ltd. v. Town Planning Board* [HCAL 112 of 1997] and *Molton Builders Ltd. v. City of Westminster L.B.C.* [1975] 30 P & CR 182. These cases have established that the grantees' rights to use their land according to the leases are always subject to the control under the planning law in existence at the time. The position has also been applied in practice locally in respect of a large number of statutory provisions, including those in the Buildings Ordinance and pollution legislation, which affect and may reduce lessees' rights. The courts have also held that planning or other statutory powers affecting lessees' rights do not amount to any derogation from grant. This is because those restrictions are not imposed by the Government in its contractual capacity as lessor but are a consequence of the exercise of its legislative power, as held in the judgment of *Lam Kwok-leung v. AG* [1979] HKLR 145.

7. Both the existing Town Planning Ordinance and the Town Planning Bill have no provision for compensation for diminution of development rights due to planning actions except in the case of resumption under the Lands Resumption Ordinance. The present system has been operating in Hong Kong for many years and it is a system generally adopted in other common law jurisdictions. The SCCB has considered this controversial issue very thoroughly in 1991 and recommended that the best approach would be to build on the existing system of providing no compensation for partial loss of development rights due to planning actions but improve the planning process such that adequate consideration of private rights as against the public interest could be ensured. To this end, various proposals to enhance the openness and fairness of the plan-making process have been included in the Town Planning Bill.

Administration's View

8. The infringement of contractual rights of ownership of land by planning actions is justified on the grounds of promoting public interest. It is 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 does not in any way deviate from the common law principles.

Planning Department
April 2000

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