

For information

Bills Committee on Town Planning (Amendment) Bill 2003

**Follow-up Actions arising from Discussion
at the Meeting on 20 November 2003**

Purpose

At the Bills Committee meeting held on 20 November 2003, Members requested the Administration to -

- (a) advise whether there were any precedents of judicial review on decisions of the Chief Executive in Council (CE in C) and on draft plans made by the Town Planning Board (TPB);
- (b) provide a paper to address the following concerns in relation to the requirement of obtaining the consent of or notifying the owner by an applicant for amendment of plan under s.12A or planning permission under s.16 –
 - (i) whether the policy intention is to require an applicant to obtain the consent, or to notify the land owner for amendment of plan and planning permission if the applicant is not the owner of the site concerned;
 - (ii) whether the Town Planning Board (the TPB) will verify the claim of the applicant that the consent of the land owner has been obtained or the landowner has been notified. If the answer is in the affirmative, please advise how the claim will be verified;
 - (iii) if the answer to (b) is in the negative, whether the TPB will be held liable if the claim is found out to be false;
 - (iv) the circumstances under which prior notice will and will not be given to the land owner concerned in making a draft plan and/or amendment to plan by TPB; and

- (v) the merit for providing an exemption clause to the proposed sections 12A(3) and 16(2)(a) to address cases such as where the application for amendment of plan or planning permission is made by a non-profit making body in the public interest and where the application involves sensitive information.

This paper provides the required information.

Judicial review on decisions of the Chief Executive in Council and draft plans made by the Town Planning Board

2. There are a number of precedents on judicial review on decisions of the CE in C. One example is Sha Lo Tung Development Co. Ltd. v Chief Executive in Council [2001] HKEC 23 which is directly related to the Town Planning Ordinance (Cap.131). In that case, the applicant sought a judicial review on the CE in C's decision to extend the effective period of an approved development permission area plan for one additional year pending its replacement by a draft outline zoning plan. In that case, the Judge held that the CE in C's decision was lawful and rational, and the application for the judicial review was dismissed.

3. There are other precedents on judicial review on decisions of the CE in C relating to the lack of opportunity to make representations to the CE in C under the Roads (Works, Use and Compensation) Ordinance (Cap. 370), the then Land Development Corporation Ordinance (Cap. 15) and the then Crown Lands Resumption Ordinance (Cap. 124). Examples are Caltex Oil Hong Kong Co. Ltd. v Governor in Council [1995] 1 HKLR 122, Ma Wan Farming Ltd. v Chief Executive in Council & Another [1998] 1 HKLRD 514, Silver Mountain Investments Ltd. & Another v The Attorney General & Another [1994] 2 HKLR 297, Fok Lai Ying v Governor in Council & Others [1997] HKLRD 810, Leung Man Cheung & Others v Secretary for Planning & Lands & Others [2000] HKEC 991 and Dawood Khan & Others v Secretary for Planning & Lands & Another [2000] HKEC 1059. With the exception of the first case where the Judge held that the CE in C's decision should be quashed as part of the applicant's submission was not presented to the CE in C, the other cases were dismissed.

4. There are also judicial review cases relating to the draft plans prepared by the TPB. All of them are concerned with the plan-making procedures. The

more recent ones include Auburntown Ltd. v Town Planning Board [1994] 2 HKLR 272, Kwan Kong Co. Ltd. v Town Planning Board [1996] 2 HKLR 363, R v The Town Planning Board ex parte The Real Estate Developers Association of Hong Kong [1996] 2 HKLR 267 and Society For Protection of the Harbour Ltd v Town Planning Board [2003] 2 HKLRD 787.

Requirement of obtaining the consent of or notifying the owner by an applicant for amendment of plan under s.12A or planning permission under s.16

Policy Intention of the New Provision

5. The policy intention of the proposal is to ensure that the affected land owner would be made aware of any proposed development on his land initiated by a third party before an application is made, so that the land owner would have an opportunity to submit to the TPB his comment on the application if he wishes to. In consulting the stakeholders at the drafting stage of the Bill, there were divergent views on the proposal to require the applicant to obtain the consent of or notify the land owner. Whilst some considered that notification to owner would suffice, others opined that owner's consent should be made a mandatory requirement. Some holding the latter view were concerned about the instances of land being trespassed and applied for open storage use without the knowledge of the land owner.

6. In recognition of the divergent views on the requirement and the practical difficulties in obtaining owner's consent in cases involving multiple ownership or a very large tract of land, etc., we have decided to provide options in the Bill. It is at the applicant's choice to obtain the consent of the land owner or to notify the land owner. In some applications for rezoning a piece of land, the implementability of the proposed scheme would be a consideration of the TPB. In such cases, the applicant may wish to substantiate his application by demonstrating to the TPB that owner's consent to the application has been obtained.

Verification of the Applicant's Claim

7. The Bill provides that the TPB may require the applicant to verify any matter or particulars set out or included in the application, whether by

statutory declaration or otherwise [s.12A(4) and s.16(2A)]. According to legal advice, if the applicant knowingly or willfully makes a false declaration or statement, he would be liable to an offence under s.36 of the Crimes Ordinance, Cap. 200. However, committing a criminal offence of false declaration or statement may not automatically render the decision void at the outset but may be voidable if it is established by the land owner that the TPB would have refused to consider the application had there been true declaration or admission by the applicant that there was no consent of, or notification to, the land owner or no reasonable steps taken to secure either.

Whether the TPB would notify the land owner in making a draft plan and/or amending a plan

8. Under the Town Planning Ordinance (the TPO), the TPB has a statutory duty to prepare plans to promote health, safety, convenience and general welfare of community. The law also entrusts the Director of Planning with the responsibility of preparing plans at the direction of the TPB. Whilst there is no statutory provision that requires the TPB to notify individual land owners in making or amending a plan, the Planning Department, being the executive arm of the TPB, has been proactively consulting the affected community (such as the District Council, the Rural Committee and the local residents, etc.) before making or amending a plan. In addition, new plans and major amendments to plans are usually preceded by planning studies for which extensive public consultation would be conducted throughout the study. To attract a wide audience, information for consultation purpose would be disseminated through various means, such as through the website, consultation booklets, District Office, organization of public forums, meetings with the District Council and other local groups. All these measures aim at reaching out to the affected persons to solicit their views. All views solicited are reported to the TPB for its consideration before the plan or the amendment is finalized.

9. The above consultation practice is adopted unless sensitive information is involved, such as the preparation of a new Development Permission Area Plan which would introduce planning enforcement control to the plan area and/or impose height and plot ratio restrictions. Since premature disclosure of the sensitive information may lead to actions which will nullify the effectiveness of the proposed development controls, consultation will only be undertaken after gazetting of the draft plan or amendment.

Whether an application made by a non-profit making body in the public interest and involving sensitive information should be exempted from the requirement of seeking owner's consent or notification

10. The intention of the proposal to obtain owner's consent or notify the owner is to ensure that the affected owner would be aware of any proposed development on his land before an application is made. This serves to respect the land owner's right to know or be informed of any development proposals that would affect his interest in the land. This is particularly important in case of rezoning proposals submitted by a third party, e.g. a green group proposing a conservation-related zoning on private land, and in case of temporary development that can be implemented without the knowledge of the land owner, e.g. open storage or car-park in the rural New Territories. On this premise, the requirement for owner's consent or notification should apply to all applications for amendment of plan and for planning permission, regardless of who the applicant is.

11. Regarding the concern on disclosure of sensitive information, when considering an application for amendment of plan or planning permission, the TPB would take into account the nature of the applied use, the broad development parameters and the assessment of the impacts arising from the proposed development. Such information should not involve high sensitivity.

Housing, Planning and Lands Bureau
Planning Department
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