

For Information

Bills Committee on Town Planning (Amendment) Bill 2003

Justifications of the Proposed New Section 23(9A) on Elements of Proof of the Prosecution

Purpose

At the Bills Committee meeting on 18 March 2004, Members requested the Administration to elaborate on the rationale for the proposed s.23(9A) in the Bill, and to illustrate with examples the difficulties encountered by the Prosecution in proving the constitution or existence of unauthorized developments (UDs). The purpose of the paper is to provide the requested information.

Background

2. In criminal proceedings, a Defendant is presumed to be innocent unless the Prosecution can prove beyond all reasonable doubts that the defendant has committed an offence. Normally, the Defendant, in order to be acquitted, has no legal burden to prove anything unless required by the common law or statute. If such a burden exists, the standard of proof by the Defendant is on balance of probabilities, which is lighter than that of the Prosecution.

3. Under s.23(1) of the existing Town Planning Ordinance (TPO), if there is or was a UD, the Planning Authority may serve a notice on the land owner, the occupier and/or a person responsible for the UD to request for discontinuation of the UD or planning permission be obtained by a specified date. Failure to comply with the requirement in the notice will constitute a criminal offence under s.23(6) of TPO.

4. Under S.23(6) of the existing TPO, the Prosecution has to prove beyond reasonable doubt that there is/was a UD and it has not been discontinued, or steps have not been taken by the defendant as required in the notice.

5. On the other hand, the defendant can, under s.23(9) of the TPO, prove on balance of probabilities that he has taken all reasonable steps to comply with the notice, or that the development was an “existing use”, or the development is permitted under the concerned statutory plan, or planning permission has been obtained. In other words, the Prosecution and the defendant are actually required to prove “two sides of the same coin”, but on a different standard of proof.

Proposed Amendments in the Bill and Justifications

6. Under s.23(1) of the Bill, it is proposed that where, in the opinion of the Authority, that there is or there was a UD, the Authority may serve a notice on the land owner, the occupier or the person who is responsible for the UD. The notice would require for a discontinuation of the UD by a specified date.

7. S.23(9A) is proposed to be **added** to clarify that the Prosecution would not need to prove the existence of the UD for the offence under s.23(6).

8. The above amendments are proposed under the following considerations:

- (a) defences under s.23(9)(b), (c) and (d) provide that the Defendant can be acquitted if he can prove the matters alleged in the notice do/did not constitute an UD. For subsection (9)(b), the proof is related to “existing use”, i.e. the use of the land or building in existence before the date of gazette of the relevant Interim Development Permission Area (IDPA) Plan/Development Permission Area (DPA) Plan. In some cases, the Defendant should have better knowledge of this “existing use” than the Prosecution. Examples are cases where the uses are underneath built structures or dense vegetation which cannot be shown on the aerial photos taken on the date of gazette of the relevant IDPA Plan/DPA Plan, or cases when the “existing use” surveys were

carried out after the gazette of the relevant IDPA Plan/DPA Plan. In these cases, it is relatively easy for the Defendant, as compared to the Prosecution, to prove that the concerned UD is an “existing use”, and it is considered reasonable to put the burden of proof on the Defendant rather than the Prosecution; and

- (b) the alleged offence under s.23(6) is for non-compliance with a notice. The major consideration is whether the notice recipient has complied with the requirements of the notice. In view of the nature of the offence, the burden of proof imposed on the Prosecution under the existing TPO (i.e. to prove beyond all reasonable doubts that the matters alleged in the notice constitute or constituted an UD) is considered unduly onerous.

9. Notwithstanding the new s.23(9A), the Prosecution would still be required to prove beyond reasonable doubts the following seven main elements for a s.23(6) offence under the Bill:

- (a) that prior to the service of the notice, the Planning Authority was in the opinion that there is or was an UD;
- (b) that prior to the service of the notice, the Authority was in the opinion that certain “relevant matters” constituted the concerned UD;
- (c) that a notice was served as a result of the Authority’s opinions under (a) and (b) above;
- (d) that the “relevant matters” mentioned in (b) was specified in the notice;
- (e) that the notice served on the defendant specified a date by which the “relevant matters” were to be discontinued;
- (f) that at the time of the service of the notice, the defendant was either the owner of the land, the occupier of the land, or the person responsible for the UD; and

- (g) that by the date specified in the notice, the “relevant matters” had not been discontinued as required by the notice.

10. S.23(11) is also proposed to be **added** to specify the matters that the Authority may have regard to when forming the opinion of a UD. These include any photograph of land, or any copy of a photograph of land; any draft or approved plan exhibited under the Ordinance; and any other information or thing which appears to the Authority to be relevant to the exercise of the power or the performance of the duty.

Housing, Planning and Lands Bureau
Planning Department
May 2004