



Submission to the Legislative Council Bills Committee Town Planning Amendment Bill

1. Introduction

Kadoorie Farm and Botanic Garden welcomes the amendment of the Town Planning Ordinance in order to improve the town planning function. It is our view, both from inspection of the proposed bill and from our direct experience in the town planning process that there is a great need for a complete overhaul of the town planning function.

We further believe that the current town planning process is flawed on two levels. This Bill appears to deal with one level – the “less controversial flaws” and minor amendments that aim to improve the ongoing work of the Town Planning Board.

More importantly, the town planning function is beset with “fundamental” flaws. These relate to the transparency, public accountability and conflict of interest in the relationship between the Town Planning Board, Planning Department and the Housing, Planning and Lands Bureau. Good governance requires a system of checks and balances. These appear to be lacking from the current town planning function, where the Administration’s role is dominant. As a result of several widely publicised cases highlighting the absence of these governance structures, there is a lack of public confidence in the fairness of the town planning process and the sincerity of those responsible for its execution.

We recognize that a previous attempt to reform the town planning function in 2000 came to nothing, and that the three-stage approach to reform is an attempt to bring some less controversial amendments into operation. In this regard we welcome the proposed opening of hearings to the public and the strengthening of the enforcement function.

The whole reform process appears still to be dependent upon the willingness of the Housing, Planning and Lands Bureau, as proponents of the amendments, and Planning Department to separate themselves from the decision-making processes of the Town Planning Board. We believe the treatment of these “less-controversial” concerns before addressing the core governance issues is regrettable. We believe that until the fundamental problems are addressed, the value of any “less controversial” improvements will be deeply compromised by the continued existence of these fundamental flaws.

In order to advance the debate rather than repeat what has already been said we will:

- Comment on “The Administration’s Response to Public Submissions”
- Present a short case study highlighting some of these fundamental concerns.
- Present our own general comments on the Bill and town-planning function
- Present, but not read out comments on specific clauses in the Bill

2. “The Administration’s Response to Public Submissions” KFBG Comments

2.1 Paragraph 3

We welcome the statement in the Explanatory Memorandum of the Bill:

Explanatory Memorandum

*The main purpose of this Bill is to amend the Town Planning Ordinance (Cap. 131) (the "principal Ordinance"), so as to streamline the town planning procedures **while enhancing public involvement in the town planning process**, and to strengthen enforcement powers in respect of unauthorized developments not permitted under the principal Ordinance.*

However, we believe that the true attitude of the Administration towards public participation is reflected in paragraph 3 of “The Administration’s Response to Public Submissions” (cf. CB(1)2456/02-03(01)).

“ The proposed one-month plan exhibition period is to strike a reasonable balance between public participation and efficiency in the plan-making process.”

It is clear from this statement that public participation is seen as an inhibition to efficiency, rather than the source of positive contributions which improve the quality and degree of public consensus in the plan-making process! Further public participation is the cornerstone of effective implementation of sustainable development – a stated goal of the current Administration.

We agree with the opinion of the Association of Planning Consultants of Hong Kong that “. . . *the actual effect [of the Bill] is to strengthen the Government’s control over the process[and] limit opportunities for public views to be properly considered*”

2.2 Paragraph 6

We disagree. Full consultation may be a fact for huge studies such as Hong Kong 2030. It certainly does not apply to all important studies. One example is the introduction of the OU(RU) zoning mechanism, which was only released to selected financially interested organisations and still withheld from the public and key interested parties including environmental NGOs. It should be noted that OU(RU) has the potential to affect up to 3,000 hectares of controversially-zoned land across Hong Kong.

Note the absence of the word “major” in the last sentence. This implies that because PlanD conducts public consultations in some “major” projects, it should be exempted from doing so in projects which PlanD itself determines are not “major”.

2.3 Paragraph 6 (further comments)

When considering the merits of specific objections, the related studies (eg traffic, drainage, ecological, sewerage) provide the key information that should be open for review and comment by the public. Contrary to the PD assertion, legislative amendment is essential to ensure transparent and quality debate, which will in turn result in good planning decisions.

At present, requests for surveys and reports and supporting information are routinely denied on the basis that these are the property of the developer/applicant and they have refused permission for these to be provided to objectors or the public. Without timely provision of all supporting documentation, there can be little useful improvement in efficiency and quality of planning decision.

These documents are prepared to secure a private advantage from the public. The public should have every right to access such material. (cf. EIAO)

2.4 Paragraph 8

All so-called minor proposed amendments should be referred to objectors, allowing sufficient time to make full representations should they so wish.

2.5 Paragraph 9

If a such a review is permitted to the applicant, the objector should enjoy the same right. Furthermore, bearing in mind the current bias against conservation and the difficulty in separating TPB from PlanD and the HPL Bureau, we believe that the right for representers to appeal to the Town Planning Appeal Board must also be made available.

3. General comments on the Bill

3.1 Preamble

We are relieved to note that main purpose of the Ordinance reinforces the Preamble and Main purpose (section 3) of the TPO (Cap.131).

We further propose that section 3 of TPO be amended “ . . .the general welfare of the community *and the conservation of the cultural and natural heritage of Hong Kong.*”

We believe that this will raise general awareness in the planning process of the role of conservation as a fundamental tool in the application of sustainable development,

3.2 Notification of landowners of applications and amendments

In relation to advising the landowner of an application please provide a clear indication of “all reasonable steps”(cf. Roads (Works Use and Compensation) Ordinance (Cap370) section 8(3)(d) or section 18(1).

3.3 Recognition of conservation, ecology experts as interested parties

Where conservation and ecological issues are material to plan-making or applications, environmental NGOs or conservation bodies should be considered as experts and consulted at the same stage as other expert groups such as architects, planners and surveyors.

3.4 Justification for streamlining

In light of comments of the Association of Planning Consultants of Hong Kong in paras2.2.1 (a) and 3.3, please present justification of need for “streamlining” and “expediting”, showing where bottlenecks occur, the cause of the bottleneck, and how the process has been streamlined and expedited over the last 15 years.

We would also welcome comments from the Administration on:

- How it might reduce the timeline of its own review process?
- What benefits are to be derived from shorter timelines?
- What might be lost by reducing the time for public consultation?
- How it might encourage public consultation which will itself benefit, streamline and expedite the planning process?

3.4 Facilitating greater public consultation

In general we are opposed to any shortening of either the window for lodging an objection or the total time allowed for the public to comment.

We welcome the advances made in presenting information for public inspection on the TPB and Planning Department websites and would

encourage further use in order to increase access to information and reduce costs.

4. Case study

KFBG's objection to the introduction of the Other Uses (Rural Uses) zoning mechanism in outline zoning plans

In the course of our objection to the introduction of OU(RU) KFBG experienced and documented a number of examples of poor administrative practices, bias against conservation, conflict of interest, misrepresentation and withholding of information at the hands of the Planning Department (PlanD), the Town Planning Board Secretariat (Secretariat) and the Town Planning Board (TPB) itself.

The purpose of highlighting these in this document is to illustrate the extent of the “fundamental” flaws within the town planning function. In the list below a brief outline is given for each point of concern. Regrettably the list of complaints and examples given below is not exhaustive, mainly indicative of the concerns of KFBG in respect of the planning function.

The responsible party is noted in brackets after each point. For the sake of brevity only selective references are included. Full documentation can be supplied to the Bills Committee or other appropriate government body upon request.

1. Minutes circulated for information, not for approval (Secretariat, TPB) and presentation of inaccurate minutes which omitted key information (Secretariat)

Relevant elements in responses by KFBG to questions from the Board during the objection hearing not included in minutes (KFBG “Letter of Regret” paragraphs 3-7, 5 April, 2003)

2. Failure to answer questions or provision of partial answers (Secretariat)
See responses to various letters and preparation of Summary of Objection

3. Demonstrated bias against conservation zonings and experts (TPB, PlanD)

- A) In 7 years 469 ha of CA-zoned land were rezoned without compensation. (TPB) “Review of Rural Land Uses in Northern New Territories – A summary of Findings.”(RRLU) Table 2 Planning Department 2001.
- B) No attempt has been made to redress this loss despite the requirement in the Chapter 10 of the Planning Standards and Guidelines Section 2 Principles of Conservation 2.1(iv) to “create, where possible, new conservation zones in compensation for areas of conservation value which are lost to development.”
- C) Despite the statement in para. 3 of RRLU that Agricultural land was controversial because of the conflict between ecological and development considerations, no consultation was made with ecological experts or environmental NGOs.(PlanD)
- D) Rejection without consideration of “Restoring the Balance” proposal by 11 Green Groups as “outside the purview of TPB” (TPB Paper 6628)

4. Selective application of conflict of interest in discussing objection (TPB)

TPB members with affiliations to environmental NGOs were required to leave the room. Members of Planning Department (which proposed OU(RU)) were not, and even participated in the debate in support of the Administration's position! The Chair was filled by the Bureau responsible for Planning Department!

5. Failure to provide conflict of interest guidelines upon request (TPB, Secretariat)

When KFBG wrote pointing out the confused conflict of interest position and seeking clarification, no answer was provided by the Board or Secretariat.

6. Biased presentation of objector's case – recommendation to reject (Secretariat, PlanD)

The objection of KFBG was summarised and a recommendation for rejecting the objection was prepared by Planning Department as Secretariat for TPB. (TPB Paper 6638)

7. Introduction of new planning mechanism without completing full documentation (PlanD, Secretariat, TPB)

OU(RU) was implemented in Draft Tai Tong OZP before RRLU was released, before guidelines had been drafted, and before the OU(RU) Note outlining the approved uses and the planning intention had been approved. (Various papers in relation to OU(RU))

8. Misuse of vocabulary, refusal to provide definitions of terms (Secretariat, PlanD)

No definitions supplied for key words despite repeated requests and despite moving goalposts and variable interpretations. Various papers in relation to OU(RU)

9. Unbalanced and inappropriate consultation

According to the then Secretary for Housing Planning and Lands (Michael Suen) only Yuen Long District Council was consulted before the implementation of OU(RU), a zoning which has now been approved for use in all rural areas in Hong Kong. We were also informed informally that other interested parties such as professional groups were also consulted, and news reports in favour of OU(RU) confirmed this. No environmental NGOs or farmers' associations were consulted.

5. Specific Comments of Town Planning Amendment Bill

Short Title: Amend to Town and Country Planning Ordinance (to reflect true role)

Bill Clause 3: Appointment of the Board

- 2 (5) (a) We object to delegation of powers to committees under sections 12A, 16A. These are major new sections concerning amendments which can be made without adequate (or, in fact, any) public consultation.
- In the context of the current composition of the Board, which has institutionalised conflict of interest, it is inherently unsafe to rely on committees, which further reduce transparency and accountability.
- 2 (5) (b) Delegation to a public officer are even more objectionable as they devolve too much discretion and power in an individual where a subjective opinion and discretion can be unpredictable and unsafe.
- 2 (6) This is too vague. The Board's rules must be published and formulated to comply with the main purpose of the bill, which is stated to be "enhancing public involvement in the town planning process"

Bill Clause 4: Appointment of committees by the Board

- 2A (1) Committees should not have the authority to determine important matters, (section 6D and 17) and representations, as this will have the effect of reducing public participation.

Bill Clause 5: Transaction of business by circulation of papers

- 2B We support the amendment

Bill Clause 6: Exhibition of draft plans

1. The reduction of the exhibition time by half from two months to one is unacceptable, having regard to the extra burdens and responsibilities from the need to consider sustainable options and alternatives and the need to fully evaluate and investigate ecological, cultural and landscape impacts and alternatives.

The two-month time-frame for raising an objection is necessary in light of the voluntary nature of the contribution of many NGO representatives and the commensurate limited availability and ability to respond.

As a practical consideration, should an application or plan be presented when a key individual was away from Hong Kong (for example August or Christmas) a crucial public voice may go unheard.

Bill Clause 7: Representations relating to draft plans

- 6 (3) This section is unnecessarily rigid and inflexible, could be unjust and places undue pressure for compliance on a primarily voluntary NGO sector.
- 6(4) These representations should continue to be available for inspection until the planning process is complete – not disappear from view halfway through the process!
- 6 (4,5) In addition, notices should be prominently posted on-site or nearby public rights of way (cf Cap 370 section 8). This should be made more efficient still by also providing public inspection and notice via the TPB website and the Gazette.
- 6 (6) See above. In addition, the notice must contain a description of the general nature of the plan or of the nature and extent of any amendment (cf. Cap 370 Section 8(2)).

Where detailed reports on ecology, traffic, sewerage etc. are not provided, a detailed description of the nature of the plan or amendment must be provided

Bill Clause 6A: Comments on representations

- 6A (1,2,3) A mixture of excessive vagueness and excessive rigidity. The Board's requirements under 6A(2) must be spelled out and section 6A(3) is unnecessarily rigid.

These representations should continue to be available for inspection until the planning process is complete – not disappear from view halfway through the process!

Bill Clause 6B: Further information to supplement representations

- 6B (3) These representations should continue to be available for inspection until the planning process is complete – not disappear from view halfway through the process!

Bill Clause 6C: Withdrawal of representations etc

- 6C (2) Any point that has been withdrawn should remain on The record of the plan/application, but could be marked as “withdrawn”.

NB It is common practice for the TPB Secretariat to encourage objectors to withdraw their objections. In order for the full facts of the situation to remain a) apparent to the decision-maker, and b) available for inspection by the public, the representation **MUST** remain as part of the record.

This has significance where the developer proceeds by a series of applications which can be withdrawn for tactical reasons.

Bill Clause 6D: Consideration of representation

- 6D All decisions, supported by reasons and relevant discussion, should be recorded in writing and communicated to all relevant parties. Where verbal submissions have been heard, minutes shall be **circulated for approval** by all in attendance.

Bill Clause 10: Submission of draft plan to CE in Council

- There is no material advantage to the shortening of the period for extension (NB No justification for doing so has been provided by the Administration)

Bill Clause 12: Revocation, replacement and amendment of approved plans

- 12 The ability of the CE in Council to revoke any new plan upon the request of the Board must be preceded by proper notice and consultation for an appropriate period.

Bill Clause 13: Amendment of plans on application to the Board

- 12A (6) These representations should continue to be available for inspection until the planning process is complete – not disappear from view halfway through the process!
- 12A(7) Notices should be posted in all locations (including points of public access to the site), not simply one or other of the stated locations or media proposed. Posting on the TPB website and the Gazette should also be required.
- 12A (10,11) A mixture of excessive vagueness and excessive rigidity. The Board’s requirements under 12A(10) must be spelled out, and section 12A(11) is unnecessarily rigid.
- 12A (12) The late addition of information to an application is completely unacceptable if it avoids timely public consultation (cf. Lok Ma Chau Spur Line Appeal Decision)
- 12A (16,20) Provision must be made for representations to attend and be heard in order to fulfil the main objective of the Amendment, which is “ . . . enhancing public involvement . . . ”. It is not sufficient “to take into account any comment made” under 12A(20)

Bill Clause14: Power to make regulations

- 14 (2-5) NGOs, registered charities and those acting “in the public interest” should be exempt from fees so as to be compatible with the special provision make for exemption of Government departments (cf.14(5)).

We are concerned that the levelling of costs against representers will inhibit the freedom of expression and right of the public to comment. We refer again to a main purpose in the Explanatory Memorandum: “...enhancing public involvement in the town planning process,....”

Bill Clause 16: Applications for permission in respect of plans

- 16 (2A) The requirement to “verify any matter or particulars,. . . whether by statutory declaration or otherwise” is supported. However it is insufficient.

All documents should be signed and attributable in order to enhance personal accountability and good governance so as to ensure the presentation of reliable evidence to the Board.

In particular, the declaration of the truth, accuracy and completeness of the report, particularly of an expert report, should be according to the “Duties and responsibilities of expert witnesses per “Hong Kong Civil Procedure 2002” 38/4/3.

Such requirements must equally apply to all assertions made by Government in the plan making process, including all technical reports, explanatory statements and summaries and to all representations and comments.

16(2B) We welcome the requirement to notify the landowner of an application, but consider this to be insufficient. The notice must be accompanied by an adequate description of the application with simple plans, coupled with the offer to make available any relevant surveys and reports upon request (cf. Cap 370 section (8)(2).

We believe that obtaining consent for an application is unnecessary and impractical.

16(2C) There is a practice of making repeated applications in respect of the same site or nearby sites to achieve incremental or creeping planning advantages. Thus previous applications, representations and decisions must be referred to and made available for inspection upon request.

16(2D) The posting should also be made on the closest public access routes. Advertisement in a local newspaper and posting to the TPB website and the Gazette should not be alternative, but mandatory media for advising the public.

16(2E) In order to properly alert and “. . . enhance the participation. . .” of the public (cf Explanatory Memorandum) the notice must be accompanied by an adequate description of the application with simple plans, coupled with the offer to make available any relevant surveys and reports upon request (cf. Cap 370 section (8)(2).

16(2H) As above, this is unnecessarily rigid and will discourage public participation. Some discretion and flexibility should be built in as mentioned above for similar provisions (cf. 12A (10,11))

16 (2I) The late addition of information to an application is completely unacceptable if it avoids timely public consultation (cf. Lok Ma Chau Spur Line Appeal Decision).

Any material changes to the scale, impacts, nature, construction methods, timelines and mitigation should lead to the withdrawal of the faulty/incomplete application and the submission of a new application so as to safeguard the limited time available to the public to consider the “full” application in context.

We recognize, welcome and encourage dialogue between all parties PRIOR to the formal submission of an application in order to address potential causes for objection before they enter the critical path of the application.

It should be noted that such discussions are increasingly increasing used in the preparation of submissions under the Environmental Impact Assessment Ordinance and have played an important role in accelerating the approval process.

16 (2J)(b) This clause omits subsection (2A), which is the vital requirement for verification of the truth of the “additional” information. It is even more essential for “afterthoughts” to be verified if they are not subject to public scrutiny.

Bill Clause 17:

Section 16A. Amendments to permissions in respect of plans

16A Section 16A is objectionable in permitting amendments without application, notice to commenters, consultation and consideration of commenters’ submissions, and without even notification of the decision. The result is that significant amendments can take place behind the backs of commenters and the public in general without notice or information.

It is thus totally contrary to the principle of public participation to be enshrined in this bill.

- 16 (1,2) Such laxity must not apply to or prejudice any matters or which have already been the subject of representations or comments.
- 16A(5,6) The late addition of information to an application is completely unacceptable if it avoids timely public consultation (cf. Lok Ma Chau Spur Line Appeal Decision).
- Any material changes to the scale, impacts, nature, construction methods, timelines and mitigation should lead to the withdrawal of the faulty/incomplete application and the submission of a new application so as to safeguard the limited time available to the public to consider the “full application in context.
- We recognize, welcome and encourage dialogue between all parties PRIOR to the formal submission of an application in order to address potential causes for objection before they enter the critical path of the application.
- It should be noted that such discussions are increasingly increasing used in the preparation of submissions under the Environmental Impact Assessment Ordinance and have played an important role in accelerating the approval process.
- 16A(7) There must also be a provision for notice such as in section 16.
- There must also be a provision such as in section 16 (3A) that the Board shall also consider and take into account any comment made in respect of the amendment.
- 16A(10) Provision must also be made for notifying commenters of any changes. It is unacceptable that changes can be made behind the backs of objectors or commenters, and even worse that they should not be notified.
- This is completely contrary to the principles of public participation to be enshrined in this Ordinance.
- 16A (11) This point is totally incomprehensible!

Bill Clause 18: Right of Review

This section is fundamentally defective in not providing a like right for notice to commenters or the public, similar to the existing 17(2), or for them to attend and make representations similar to the existing 17(3), provides to the applicant.

We refer again to a main purpose in the Explanatory Memorandum: "...enhancing public involvement in the town planning process,...."

- 17 (2A) (cf previous points on sections 12A and 16)
- 17 (2B) The posting should also be made on the closest public access routes. Advertisement in a local newspaper and posting to the TPB website and the Gazette should not be alternative, but mandatory media for advising the public.
- 17 (2C) Description etc reqd
- 17 (2E,F) A mixture of excessive vagueness and excessive rigidity. The Board's requirements under 17(2E must be spelled out, and section 17(2F)) is unnecessarily rigid.
- 17(2G) Any material changes to the scale, impacts, nature, construction methods, timelines and mitigation should lead to the withdrawal of the faulty/incomplete application and the submission of a new application so as to safeguard the limited time available to the public to consider the "full application in context.

We recognize, welcome and encourage dialogue between all parties PRIOR to formal submission of an application in order to address potential causes for objection before they enter the critical path of the application.

It should be noted that such discussions are increasingly increasing used in the preparation of submissions under the Environmental Impact Assessment Ordinance, and have played an important role in accelerating the approval process.

Bill Clause 19: Power to inspect and require provision of information

- 22 This could be expanded to require landowners to provide for the installation and maintenance of continuous monitoring devices to ensure evidence collection and compliance.

Bill Clause 20: Strengthening enforcement control against unauthorised developments

To aid enforcement in respect of unauthorised developments on agricultural land, further provisions must be considered. The frequent practice is to fill in fields and claim to be doing this for agricultural purposes.

In such a situation a presumption should be created whereby in the absence of genuine farming activities being performed for a period of time, the development on the agricultural land is deemed to be unauthorised, and restoration of the land to its original state must be made.

The owner would have the onus of proving that his activity had a genuine had a genuine agricultural purpose.

- 20 (a) (iii)** We strongly support any strengthening of enforcement action against unauthorised development or unauthorised uses.