

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST  
NO.19 OF 2003**

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IN THE MATTER of an Application  
for Judicial Review by The Society  
for Protection of The Harbour  
Limited pursuant to Order 53 of the  
Rules of the High Court

and

IN THE MATTER of the Protection  
of The Harbour Ordinance  
(Cap.531)

and

IN THE MATTER of the decisions  
of the Town Planning Board with  
regard to the Draft Wan Chai North  
Outline Zoning Plan No.S/H25/1  
made on 6 December 2002 and  
14 February 2003 pursuant to the  
Town Planning Ordinance  
(Cap.131)

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A  
BETWEEN

SOCIETY FOR PROTECTION OF THE HARBOUR LIMITED Applicant

and

TOWN PLANNING BOARD

Respondent

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F Before : Hon Chu J in Court

G Dates of Hearing : 7-11 and 14-15 April 2003

H Date of Judgment : 8 July 2003

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J U D G M E N T  
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K 1. In these proceedings, the applicant, the Protection of Harbour  
L Society Limited, applies to judicial review two decisions of the respondent,  
M the Town Planning Board, made on 6 December 2002 and 14 February 2003  
N in connection with the Draft Wan Chai North District Outline Zoning Plan  
No.S/H25/1.

O *I. BACKGROUND*

P *(1) The applicant*

Q 2. The applicant was incorporated on 17 July 1998 to take over  
R and carry out the activities of the Society for Protection of the Harbour (“the  
S Society”) that was formed in November 1995. The Society as well as the  
T applicant maintain a close interest in the protection and preservation of the  
U Victoria Harbour (“the Harbour”). The main objects for which the applicant  
V

A was established include taking legal action for the protection of the Harbour  
B and to take lawful action to stop reclamation of the Harbour which it  
C considers to be contrary to public interest. There is no issue in these  
D proceedings as to the *locus standi* of the applicant in bringing the  
E application for judicial review.

F (2) *The Town Planning Board ("the Board")*

G 3. The Board is a public body established under the Town  
H Planning Ordinance, Cap.131. Members of the Board were appointed by the  
I Chief Executive and comprised both government officials and members  
J drawn from the community. Currently, it has 40 members, comprising  
K 7 official members and 33 unofficial members. The Permanent Secretary  
L for Planning and Lands and the Director of Planning are respectively the  
M Chairman and Vice-Chairman of the Board. The Deputy Director of  
N Planning/District is the Secretary to the Board.

O 4. Section 3(1) of the Town Planning Ordinance prescribes the  
P functions of the Board. It reads :

Q "With a view to the promotion of the health, safety, convenience  
R and general welfare of the community, the Board shall undertake  
S the systematic preparation of-

T (a) draft plans for the lay-out of such areas of Hong Kong  
U as the Chief Executive may direct, as well as for the types  
V of building suitable for erection therein; and

(b) draft development permission area plans of such areas  
of Hong Kong as the Chief Executive may direct."

(3) *The Protection of Harbour Ordinance ("PHO"), Cap.531*

5. In about 1995 and 1996, the Society undertook a "Save Our Harbour" Campaign to oppose the government's proposals to further reclaim the Harbour. On 13 March 1996, a motion proposed by the Society's Deputy Chairperson, Miss Christine Loh, was passed by the Legislative Council. Miss Loh is now a director and member of the applicant. The motion primarily called upon the government to withdraw plans for reclamation in the Harbour and to take urgent measures to protect and preserve the Harbour.

6. In summer 1996, the Society presented the Protection of the Harbour Bill 1996 as a Private Member's Bill through Miss Loh. The Bill did not have the support of the government. On 27 June 1997, the Bill was passed and became the PHO. Although the Bill when proposed was intended to apply to the entire harbour of Hong Kong as defined in section 3 of the Interpretation and General Clauses Ordinance, Cap.1, the Ordinance that was passed only applied to the Central Harbour as a result of amendments introduced by other legislator during Committee stage. The amendments were occasioned by concerns to ensure that major public housing development on certain proposed reclamation sites would not be frustrated by the enactment of the PHO.

7. On 3 November 1999, the then Secretary for Planning Environment and Lands moved an amendment to the PHO. The effect of the amendment is to extend the geographical scope under the PHO to cover the whole Victoria Harbour. Consequential upon the 1999 Amendment Ordinance, PHO now extends to the entire Victoria Harbour.

*II. THE TOWN PLANNING ORDINANCE ("TPO")*

8. Under section 3(1)(a) of the TPO, the Board assumes the duty of preparing draft plans for the lay-out of such areas as the Chief Executive may direct. Under Regulation 2 of Town Planning Regulations, the Chairman of the Board may require the Director of Planning to prepare a plan under the direction of the Board in relation to any area subject to a direction of the Chief Executive under section 3.

9. Section 5 of the TPO provides that any draft plan prepared under the direction of the Board and which the Board deems suitable for publication shall be exhibited for public inspection for two months.

10. Under sections 6(1) and (2), any person affected by the draft plan so exhibited may send to the Board within the two months' period a written statement of his objections, setting out the nature and reasons for the objection and any proposed alteration to the draft plan.

11. Sections 6(3) to (5) provide that the Board may give preliminary consideration to the objection and may propose amendments to the draft plan to meet the objection. After being notified by the Board of any proposed amendment, the objector may withdraw the objection and give notice of such withdrawal.

12. Section 6(6) further provides that where the Board does not propose amendments to the draft plan or the objection is not withdrawn, the Board shall consider the written statement of objection at a meeting. The objector shall be given reasonable notice of the meeting and be invited to attend if he desires to be heard. Under section 6(6A), different objections to

A the same draft plan may be dealt with at the same meeting, whether  
B individually or collectively.

C  
D 13. Where the Board makes an amendment to meet an objection  
E and the amendment appears to the Board to affect any land, section 6(7)  
F requires the Board to give notice of the amendment. Under section 6(8), any  
G written objection received in the 14 days' notification period shall be  
H considered at a meeting of the Board and the objector may attend the  
I meeting to make representations.

J  
K 14. Section 6(9) provides that upon consideration of an objection  
L in accordance with section 6(6) or 6(8), the Board may reject the objection  
M in whole or in part or may make amendments to the draft plan to meet the  
N objection.

O  
P 15. Section 8 of the TPO requires the Board, after considering all  
Q objections, to submit the draft plan (with or without amendments) to the  
R Chief Executive in Council for approval, together with a schedule of the  
S objections not withdrawn and a schedule of amendments, if any, for meeting  
T the objections. The time within which the submission has to be made is  
U prescribed under section 8(2) to be nine months from the expiration of the  
V exhibition period. The Chief Executive may however extend the time for  
submission for up to a period of six months.

16. Under section 9 of the TPO, the Chief Executive in Council  
may approve or reject the draft plan or may refer it to the Board for further  
consideration and amendment. Upon approval, the draft plan becomes an  
approved plan and has to be exhibited for public inspection and the approval

has also to be gazetted. Section 13 obliges all public officers and bodies to use the approved plan as guidance in the exercise of their powers.

*III. BACKGROUND LEADING TO THE WAN CHAI NORTH OUTLINE ZONING PLAN NO.S/H25/1*

17. Between March 1982 and October 1983, the Harbour Reclamation and Urban Growth Study (“SHRUG”) was undertaken. The study recommended reclamation be carried out at several parts of the Harbour to provide land to meet the growth requirements of Hong Kong. The recommendations form part of the basis of the Territory Development Strategy (“TDS”). In September 1991, the Executive Council endorsed the Metroplan Selected Strategy, which recommended various reclamation projects in the Harbour areas.

18. The Central and Wan Chai Reclamation was part of the recommendations of SHRUG that was affirmed by the TDS in 1984 and then endorsed by the 1991 Metroplan. In 1987, the Territory Development Department (“TDD”) commissioned the Central and Wan Chai Reclamation Feasibility Study (“CWRFS”), which was completed in September 1989. The CWRFS recommended the reclamation of some 108 hectares along the waterfront from Central to Causeway Bay. The main objective of the proposed reclamation was said to provide land for the Central – Wan Chai Bypass (“the CW Bypass”), the Island Eastern Corridor Link (“IEC Link”), the MTR North Hong Kong Island line and to improve the existing waterfront by making it more pedestrian-friendly and easily accessible by the public.

19. The CWRFS proposed a recommended outline development plan to guide the development of the reclamation area and further proposed that the development be carried out in five phases. Three of the five phases had already been completed and one is in progress. The 5<sup>th</sup> phase forms the subject of the present proceedings. A summary of the five phases appears below :

- (1) Central Reclamation Phase 1 for accommodating the Hong Kong Station of the Airport Railway; completed in June 1998.
- (2) Central Reclamation Phase II, reclaiming the previous Tamar Basin; completed in September 1997.
- (3) Wan Chai Reclamation Phase I, for the extension of the Hong Kong Convention & Exhibition Centre; completed in July 1997.
- (4) Central Reclamation Phase III; just started.
- (5) Wan Chai Reclamation Phase II; pending.

20. In June 1999, TDD commissioned Maunsell Consultants Asia Ltd ("Maunsell") to conduct a Comprehensive Feasibility Study ("WDII Study") of the Wan Chai Development Phase II (formerly Wan Chai Reclamation Phase II) project ("WDII").

21. In the first phase of the WDII Study, eight Trunk Road Options were generated. Three Trunk Road Options and their conceptual land use proposals were shortlisted for consultations and further considerations. Apart from a Public Consultation Forum held by TDD on 1 February 2000, the shortlisted options and associated conceptual land use proposals were



A also presented to the Legislative Council Panel on Planning, Lands and  
B Works (“LegCo Panel”) and also the Wan Chai District Council and Eastern  
C District Council for consultations. On 10 March 2000, the options and  
D proposals were presented to the Board under TPB Paper 5555. Option A of  
E the three shortlisted Trunk Road Options was selected as the preferred  
F option and taken forward for further study and detailed engineering  
assessment.

G 22. During the second phase of the WDII Study, an urban design  
H framework was established for the WDII area and the land use proposals  
I were incorporated in a recommended Outline Development Plan (“the  
J ODP”). The findings of the further study and the detailed assessment,  
K together with the recommended ODP were presented by Maunsell in its  
L final report produced in August 2001. On the basis of the findings of the  
M WDII Study and in particular the ODP for the WDII, a new draft Wan Chai  
North Outline Zoning Plan No.S/H25/C was prepared, which deals with the  
proposed new reclamation area along the Wan Chai and Causeway Bay  
waterfront.

N 23. On 11 July 2001, the then Secretary for Planning and Lands,  
O under the delegated authority of the Chief Executive and pursuant to  
P section 3(1) of the TPO, directed the Board to prepare a new draft outline  
zoning plan for the WDII area.

Q 24. On 24 August 2001, the principal findings of the WDII Study  
R as contained in Maunsell’s final report was presented to the Board under  
S TBP Paper 6050. At the same meeting, the Board was also presented with  
T  
U  
V

the draft Wan Chai North Outline Zoning Plan No.S/H25/C, its Notes and Explanatory Statement under TPB Paper 6051.

25. At this meeting on 24 August 2001, the Board agreed that the land use proposals of the WDII Study, together with the comments expressed by the Board members at the meeting, could be used as a basis for the new draft Wan Chai North Outline Zoning Plan. The Board also held discussions on the draft Outline Zoning Plan No.S/H25/C and agreed to the land use proposals shown on it. The Board further agreed that the draft plan, its Notes and Explanatory Statement were suitable for submission to the Wan Chai and Eastern District Councils for consultations.

26. After the draft Wan Chai North Outline Zoning Plan No.S/H25/C was presented to the LegCo Panel and the Wan Chai and Eastern District Councils for consultations, the Board further considered the draft Outline Zoning Plan at its meeting on 22 March 2002. At the meeting, the Board agreed that the draft Outline Zoning Plan with the incorporation of a harbour park (and renumbered S/H25/1), together with its Notes and Explanatory Statement were suitable for exhibition under section 5 of the TPO.

27. On 13 April 2002, the Secretary for Planning and Lands, under the delegated authority of the Chief Executive, extended the planning scheme area of the draft Outline Zoning Plan to accommodate the proposed harbour park.

28. On 19 April 2002, the Wan Chai North Outline Zoning Plan No.S/H25/1 (“the Plan”) together with its Notes and Explanatory Statement were exhibited for public inspection under section 5 of the TPO.

*IV. EVENTS LEADING TO THESE PROCEEDINGS*

29. During the two months exhibition period, a total of 770 valid objections were received, one of which was subsequently withdrawn. 753 of these objections appear in the form of a standard letter. The applicant also sent in an objection by letter dated 18 June 2002.

30. After giving preliminary considerations to the objections at its meeting on 6 September 2002, the Board proceeded to the further consideration of the unwithdrawn objections under section 6(6) of the TPO.

31. The Board heard the applicant together with the other objectors on their objections at its meeting on 29 November 2002. The deliberations of the Board took place at its meeting on 6 December 2002. The Board decided to propose amendments to the draft OZP to meet one objection and to partially meet 10 objections, including that of the applicant with regard to building height restrictions. The rest of the applicants’ objections were rejected. At its meeting on 20 December 2002, the Board resolved to propose five amendments to the Plan. The Board’s decision was communicated to the applicant by letter dated 20 December 2002.

32. On 3 January 2003, the proposed amendments to the Plan were exhibited for public inspection under section 6(7) of the TPO. One further objection and two further representations from two original objections on the Amended Plan were received during the two weeks’ notification period.

33. At its meeting on 14 February 2003, the Board heard the further objector on the further objection. The original objectors to the CDA site, including the applicant, were also heard at the same meeting. After deliberations, the Board resolved to further amend item A of the amendment by lowering the maximum building height restriction of the CDA site, and to incorporate this further amendment into the Plan pursuant to section 6(9) of the TPO. The Board also decided that the Plan as amended is suitable for submission to the Chief Executive in Council for approval under section 8 of the TPO. The Board's decision was communicated to the applicant by letter dated 14 February 2003.

34. On 27 February 2003, the applicant commenced these proceedings. On 28 February 2003, Hartmann J granted leave for judicial review. The applicant issued the Notice of Motion on 3 March 2003. On 14 March 2003, upon the applicant's application, Hartmann J ordered a stay of the submission of the draft OZP as amended to the Chief Executive in Council, pending the final determination of the judicial review proceedings herein.

*V. THE APPLICATION FOR JUDICIAL REVIEW*

35. In the Notice of Application for leave, three grounds were put forward as the basis of the application for judicial review. They are :

- (1) The Board has made an error in law in reaching the two decisions in that it had misinterpreted the PHO and had failed to apply the correct legal principles;
- (2) The two decisions are irrational; and

(3) There were procedural improprieties and irregularities in the decision-making process in connection to the presentations made by a staff of the PD at the Board's meeting on 6 December 2003.

36. At the hearing, the third ground was not pursued.

37. The relief sought by the applicant as set out in the Amended Notice of Originating Motion are as follows :

- (1) An order of *certiorari* to quash the said decisions of the Town Planning Board;
- (2) Further or alternatively, a declaration that the said decisions of the Town Planning Board were unlawful and/or unreasonable and irrational;
- (3) Further, an order that the cause be remitted to the respondent to require the respondent to reconsider the Plan and the objections thereto according to law, in particular, the PHO, namely, to consider whether the reclamation set out in the Plan is justified in that :
  - (i) The reclamation does meet compelling and present public needs which override the special legal status of the Harbour;
  - (ii) There is no alternative to any part of the reclamation;
  - (iii) The reclamation is restricted to the scale strictly necessary to meet the needs identified in (i) and (ii); and
  - (iv) All the above prerequisites are demonstrated by clear, cogent and persuasive evidence.

VI. *THE WAN CHAI NORTH OUTLINE ZONING PLAN NO.S/H25/1*

38. The Planning Scheme Area of the Plan is approximately 76.54 hectares. It is bounded by Hing Fat Street to the east, Victoria Park Road and Gloucester Road to the south and Expo Drive to the west. It includes the existing Wan Chai area to the north of Gloucester Road and IEC and the proposed reclamation area to the north of the existing seawall.

39. About 26 hectares of the area is proposed to be reclaimed from the Harbour along the Wan Chai Harbour Front. According to the evidence filed by the Board in these proceedings, which includes a presentation made to the LegCo Panel on 24 February 2000, the reclamation is for the following purposes :

- (a) Construction of the Trunk Road that starts from the existing Ramsey Street Flyover joining up to the existing IEC. The Trunk Road consists of the CW Bypass and the IEC Link.
- (b) Water quality improvement of the elimination of dead corners at east of HKCEC Extension and the Typhoon Shelter.
- (c) Provisioning of intercepting culvert at the Typhoon Shelter.
- (d) Reprovisioning of existing facilities that include reprovisioning the Typhoon Shelter and the provision of a marina.
- (e) Provision of a waterfront promenade.

40. In terms of urban design, the area covered by the Plan is divided into two major zones, namely, the Convention and Exhibition Zone,

which includes the HKCEC Extension and a proposed new waterfront promenade, and the Causeway Bay Waterfront Zone, which includes the Hong Kong Yacht Club, the Typhoon Shelter and a new waterfront to the North Point Breakwater. Within the Causeway Bay Waterfront Zone is the proposal for a harbour park along the existing Typhoon Shelter breakwater.

41. As for the land use proposals for the area under the OZP, they fall into five zones :

- (a) Commercial
- (b) Comprehensive Development Area (CDA)
- (c) Government, institution or community (G/IC)
- (d) Open space (O)
- (e) Other specified uses (OU)

42. Insofar as is relevant to these proceedings, the Plan contains the following features with regard to the land use proposals :

(1) CDA

Before amendment to the Plan, a site to the north of Harbour Road and west of Wan Chai Sports Ground is zoned as CDA and is intended for exhibition and entertainment development. The Exhibition Station of the North Hong Kong Island Line is intended to be housed underneath the CDA site. A maximum non-domestic gross floor area of 128,100m<sup>2</sup> with a plot ratio of about 5 and a maximum building height of 100mPD are imposed on development in the CDA. Under item A of the

amendment to the Plan, the area of the CDA will be enlarged to include a substantial part of the Open Space (1) zone and a part of the "OU" zone annotated for "Elevated Walkway" and "Road".

To partially meet the objections of the applicant and some other objectors, the Board resolved to amend the maximum building height restriction to 50mPD. This was met with objection from Hong Kong Trade Development Council. Upon deliberation, the Board resolved on 14 February 2003 to further amend the maximum building height restriction to 64mPD.

(2) Open Space (O)

Before amendment, the O zone had a total area of 16.6 hectares. It includes a continuous waterfront promenade extending all the way from Central to the Causeway Bay Typhoon Shelter. For the O(1) zone adjacent to the HKCEC Extension, it is intended to house an underground exhibition hall with supporting facilities and carpark, with open space development above ground. Under item A of the amendment to the Plan, part of the O(1) area was rezoned to become CDA.

(3) The Plan further proposes to construct a Harbour Park along the existing Causeway Bay Typhoon Shelter breakwater, which involves the reclamation of about two hectares of the Harbour.

*VII. SECTION 3 OF THE PHO*

43. Section 3 of the PHO provides as follows :

"3. Presumption against reclamation in the harbour

(1) The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for



that purpose there shall be a presumption against reclamation in the harbour.

(2) All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them.”

44. The primary issue in this application relates to the construction and application of section 3 of the PHO. The principal arguments of the applicant are that :

(1) The Board has failed to comply with section 3 of the PHO in providing layouts in the Plan and the amendments thereto necessitating reclamation inconsistent with their duty to preserve and protect the Harbour, and as a result, the decision to refuse to amend the Plan is contrary to section 3;

(2) The Board has also failed to take account of section 3 of the PHO and their own vision statement in refusing to amend the Plan such that the decision was *Wednesbury* unreasonable.

(1) *The applicant's interpretation*

45. Mr Neoh SC submits that in meeting the obligation imposed under section 3(2) to have regard to the principle and presumption against reclamation in section 3(1), the Board, being a public body, must submit the proposed reclamation to three tests :

(1) The compelling, overriding and present need test

The presumption against reclamation in section 3(1) can only be displaced by a greater public need which clearly outweighs the public need to protect and preserve the Harbour as a special public asset and a natural heritage of Hong Kong people.

There has to be clear cogent persuasive and objective evidence that the competing public need is truly exceptional, so urgent

and compelling that it ought to override the public need to protect and preserve the Harbour.

(2) The no alternative test

The proposed reclamation must additionally be shown by clear cogent and persuasive evidence to be unavoidable in that there is no other alternative available to implement the undertaking for which the reclamation is proposed.

(3) The minimum impairment test

Further, the scale of the reclamation proposed should be restricted to what is strictly necessary to implement the undertaking.

46. The applicant contends that such a construction of section 3 can be reached via six routes :

- (1) A purposive construction of the plain words of section 3;
- (2) Construction based on the context leading to the enactment of the PHO as a whole and section 3 in particular;
- (3) Construction derived from remedying the specific mischief rule of reclamation and subsequent rezoning;
- (4) Construction based on the post-enactment statements of Government officials, planning policies and public commitments made by the Government in protecting and preserving the Harbour;
- (5) Construction consistent with the international obligation of the Government to protect and preserve natural heritage; and

(6) Construction consistent with the *sui generis* nature of section 3 as a fundamental principle of law protecting peoples' right to enjoyment of the harbour.

(2) *The Board's arguments*

47. Mr Tang SC, on the other hand, argues that a common sense approach should be adopted in construing section 3 of PHO. The Board considers that the presumption under section 3(1) merely creates a compulsory material consideration, and that public officers or public bodies are required to pay due regard to this material consideration. The Board takes the view that under section 3, public officers or public bodies are required to undertake a weighing exercise. Where the public benefits of the proposed reclamation are so important that they outweigh the need to preserve every part of the Harbour, then the presumption against reclamation is rebutted.

48. The Board's understanding and construction of section 3 of PHO is reflected in these terms :

"... there should not be a rule that reclamation should be treated as a last resort. That would give too much weight to presumption. All that section 3 of the Harbour Ordinance did was to make the 'presumption principle' a further compulsory material consideration in the making of all decisions and the exercise of all powers relating to reclamation of the harbour. Provided that the decision was taken or the power exercised with the material consideration fully and properly considered and weighed, the public officer or public body, whatever its actual decision or resolution, would have complied with the Harbour Ordinance and had acted lawfully. In this respect, the body had to give proper regard to the presumption against reclamation, and if the body nevertheless decided in favour of reclamation it had to do so for some rational and intelligible reason, e.g. some substantial public benefit which would be obtained by the reclamation"

paragraph 46(d) of the minutes of the Board's meeting on  
6 December 2002.

49. Additionally, Mr Tang SC submits that in conducting the weighing exercise, the Board should weigh the public benefits of a scheme as a whole against the presumption against reclamation and that it is not necessary to consider the individual components requiring reclamation separately and individually. It is further submitted that the proposed reclamation must be essential in the sense that the public benefit must be sufficient to countervail the protection and preservation of the Harbour. Reclamation that enhances or helps the presentation of the Harbour as a special public asset and a natural heritage of Hong Kong people may be permitted. Mr Tang SC accepts that reclamation cannot be justified if there is a reasonable alternative for it, and that the reclamation proposed must not be excessive. In its letter to the applicant dated 28 May 2002, however, the Board took the view that whether the reclamation was essential and whether there was no reasonable alternatives were not necessary prerequisites for rebutting the presumption, although they would add weight to the justification for reclamation.

(3) *The plain wordings of section 3*

50. The starting point in any interpretation must be the plain and ordinary meaning of the statute itself. A plain reading of section 3 shows that it comprises three things :

- (1) it declares that the Harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people;

- (2) it creates a presumption against reclamation; and
- (3) it obliges all public officers and public bodies to have regard to the declared principle of protecting and preserving the Harbour and the presumption in exercising their powers.

Evidently, section 3 places a fetter on a public officer or public body in the exercise of its powers by requiring it to have regard to the duty to protect and preserve the Harbour and the presumption against reclamation. The question is what must be done to satisfy the requirement and what would be required to rebut the presumption.

(4) *Purposive construction*

51. Section 19 of the Interpretation and General Clauses Ordinance, Cap.1 provides that :

“An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.”

52. In *Friends of Hin. hinbrook Society Inc. v. Minister for the Environment* (1997) 147 ALR 607, at 627, the Federal Court of Australia, in construing section 13(1) of the World Heritage Properties Conservation Action 1983, which provides that in determining whether to give planning consent to a development, the Minister shall have regard only to the protection, conservation and presentation, within the meaning of the conventions of the property, held that the words “shall have regard” imposed an obligation to take the specified matters into account and to give weight to them as a fundamental element in making his determination.

53. In *South Lakeland DC v. Secretary of State for the Environment* [1992] 2 AC 141, the House of Lords had to consider the effect of section 277(8) of the Town and Country Planning Act 1971 which stated that :

“Where any area is for the time being designated as a conservation area, special attention shall be paid to the desirability of preserving or enhancing its character or appearance in the exercise, with respect to any buildings or other land in that area, of any powers under this Act, Part I of the Historic Buildings and Ancient Monuments Act 1953 or the Local Authorities (Historic Buildings) Act 1962.”

Lord Bridge, with whose judgment the other members of the House agreed, took the view that under the section, the objective of preserving or enhancing the character or appearance of conservation areas was afforded a high priority. Accordingly, “[i]f any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest” : at p.146.

54. With regard to the effect of a statutory presumption in a town planning context, Deputy Judge Widdicombe, QC in *St Albans District Council v. Secretary for the Environment* [1993] 1 PLR 88 held that a public official, when faced with the *de facto* statutory presumption under section 54A of the Town and Country Planning Act, had to make it clear that proper consideration was given to the presumption as a starting point in the decision-making process, rather than engaging in a mere balancing of interests exercise.

55. There can be no doubt that the PHO was enacted with the objective of preserving and protecting the Harbour against reclamation. The objective is enshrined in section 3 and by the creation of the presumption. When fulfilling the objective, a public official or public body is required to give proper consideration to the need to preserve and protect the Harbour as a special public asset and natural heritage of Hong Kong people as well as the presumption against reclamation. The duty and the presumption should form the basic tenets or starting point in its decision-making process. They are not just one of the material considerations to be taken into account. Had it been otherwise, there would have no need for the presumption against reclamation. Clearly, in deliberating upon a decision that affects the Harbour, the preservation of the Harbour must be a material consideration to be taken into account. The statutory presumption takes the need of protecting and preserving the Harbour beyond a matter of mere materiality. With the presumption, the public official or public body has to be additionally satisfied that a case exists for displacing the presumption against reclamation. Therefore, in order to give recognition to the presumption, it must be shown that there are material considerations justifying a departure from the requirement to protect and preserve the Harbour. To displace the public interest requiring protection and preservation of the Harbour, the decision-maker has to be persuaded that there is another public interest so overwhelming as to override the duty to protect and preserve. It would not be sufficient for the competing public interest or material consideration to be something preferable or desirable. In my view, a purposive construction of section 3 and the PHO requires that the presumption against reclamation will only be rebutted where there is a compelling and overriding need for reclamation. It is also a necessary

corollary that such a compelling and overriding need must be demonstrated by clear, cogent and objective evidence.

(5) *The mischief rule*

56. In *Attorney General v. Prince Ernest Augustus of Hanover* [1957] AC 436, at 461, Viscount Simonds stated that :

“... words and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use ‘context’ in its widest sense ... its preamble, the existing state of the law, other statutes in pari material, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy ... I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word.”

In construing section 3, a consideration of the mischief that the PHO intends to address is both legitimate and appropriate.

57. It cannot be doubted that the PHO was enacted against a background of resorting to reclamation for the provision of land for housing, economic and social purposes. The enactment was preceded by a motion condemning excessive reclamation of the Harbour that was carried in the Legislative Council in March 1996. It is thus fair to say that the mischief of the Ordinance and section 3 set out to remedy is excessive and unnecessary reclamation of the Harbour.

58. The applicant further argues that the PHO also sets out to tackle the problem of reclamation and subsequent rezoning of land reclaimed. It is pointed out there were a number of instances in the past where the reclamation was proposed to meet community needs, but after land was



A reclaimed, it was rezoned for development or commercial use. In the  
B present case, even before the draft Outline Zoning Plan was finalized,  
C proposals to rezone some of the reclaimed land has already been approved.  
D The applicant submits that the PHO was enacted to put a halt to such  
E approach to reclamation, and the specific mischief can only be addressed by  
F a stringent scrutiny of the proposed reclamation. A compelling, overriding  
G and present need to reclaim the Harbour must be shown. There should also  
H be no other alternative to reclamation and the extent of reclamation must be  
I reduced to the minimum.

H 59. I agree with Mr Tang SC that the material before the court does  
I not show that the PHO is directed at the mischief of rezoning. Plainly, the  
J PHO does not extend to rezoning, which is entirely within the remit of the  
K Board.

L 60. That said, however, I accept that the purpose for which the  
M reclaimed land is proposed to be used is a relevant factor in considering  
N whether a case of compelling and overriding need has been made out for  
O rebutting the presumption against reclamation. The zoning of the reclaimed  
P land provides objective evidence as to the compelling nature of the need for  
Q reclamation or the lack of it. In order that it is a compelling and overriding  
R need, it has to be a present need not in the sense that it is immediate or  
S imminent, but is a need reasonably anticipated to arise such that it evidences  
T a present commitment on the part of the public body to implement the public  
U undertaking requiring reclamation within a clearly defined time frame.

S 61. In the context of preventing excessive reclamation, it will be  
T necessary to show that the need for reclamation cannot be met by other  
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alternative and that the extent of reclamation is kept to the minimum. Indeed, the Board accepts that it must be shown that there is no reasonable alternative and that the reclamation must not be excessive. It is not the applicant's case that the reclamation has to be the last resort. The applicant's argument is that whether there is another alternative has to be considered in the context of proportionality. The applicant's stance is that if the present need, though compelling and overriding, can be addressed without reclamation, then reclamation should not be undertaken. This is so even though the alternative involves a more costly method. It is only when the consequence of no reclamation is proportionately greater than the harm of reclamation that the alternative should be ignored.

62. For my part, considering that the declared objective of PHO is to protect the Harbour against excessive reclamation and to preserve the Harbour as a special asset and natural heritage, I am of the view that reclamation ought not to be undertaken where there is a viable alternative. The alternative will not be a viable one if it involves incurring costs or paying a price that is disproportionate to the harm of carrying out the proposed reclamation. In the context of judicial review, whether there is an alternative that is proportionate to the consequences of reclamation is not an issue for the court. In determining whether the decision is rational, the court is concerned with whether the decision-maker has properly considered or attempted other viable alternatives.

(6) *The Board's Vision Statement for the Harbour and Statement of Intent on Reclamation*

63. The applicant further argues that the three tests it advocates are consistent with the Board's Vision Statement for the Harbour ("Vision

Statement”) and its Statement of Intent on Reclamation (“Statement of Intent”), which are in these terms :

**“ Vision Statement for the Victoria Harbour**

**Our Vision for Victoria Harbour**

To make Victoria Harbour attractive, vibrant, accessible and symbolic of Hong Kong.

- *a harbour for the people and a harbour of life.*

**Our Goals for the Harbour**

1. To bring the people to the Harbour and the Harbour to the people.
2. To enhance the scenic views of the Harbour and maintain visual access to the harbour-front.
3. To enhance the Harbour as a unique attraction for our people and tourists.
4. To create a quality harbour-front through encouraging innovative building design and a variety of tourist, retail, leisure and recreational activities, and providing an integrated network of open space and pedestrian links.
5. To facilitate the improvement of the water quality of the Harbour.
6. To maintain a safe and efficient harbour for the transport of people and goods and for the operation of an international hub port.

**Statement of Intent on Reclamation**

The Harbour is to be protected and preserved as a special public asset and a natural heritage of the people of Hong Kong. Reclamation in the Harbour should only be carried out to meet essential community needs and public aspirations. It has to be environmentally acceptable and compatible with the principle of sustainable development and the principle of presumption against reclamation in the Harbour.”

64. In my view, the Vision Statement and the Statement of Intent of the Board should be read together and as a whole. They are to be read as complementary to each other, and to reflect the Board's understanding of the law with regard to reclamation. It will be unreasonable to read the vision and goals set out in the Vision Statement as overriding the principles governing reclamation in the Statement of Intent. Thus, a proposed reclamation that meets the vision or one or some of the goals in the Vision Statement but fails the principles in the Statement of Intent cannot be justified under the PHO. Embedded in the Statement of Intent are the principles that :

- (1) Reclamation is only for essential community needs and to meet public aspirations;
- (2) Reclamation has to be environmentally acceptable; and
- (3) Reclamation has to be compatible with the principle of sustainable development and the statutory presumption against reclamation in the Harbour.

The Board's mind has to be directed to these principles when deliberating on a proposed reclamation. I shall return later to deal with the principles of environmental acceptability and sustainable development.

65. The principles in the Statement of Intent were reflected in public statements made by the then Secretary for Planning, Lands and Environment in November 1997 and by the Chief Executive in his 1999 Policy Address. Departmental and Bureau papers prepared between 1998 and 2001 on WDII Study also echoed these principles. They acknowledged that priority should be given to the preservation and protection of the Harbour and that reclamation is exceptional. The construction that the

applicant seeks to put on section 3 is consistent with the principles expressed in the Public statements of the Board and of the Government. A mere balancing or weighing exercising does not fit in well.

(7) *International treaty and obligations*

66. In May 1984, the United Kingdom ratified the Convention for the Protection of the World Cultural and Natural Heritage 1972 (“the Convention”) and extended it to Hong Kong. The PRC also ratified the Convention in December 1985. The Convention remains in force in relation to Hong Kong after 1997.

67. Article 2 of the Convention defines “natural heritage” to include, *inter alia*, “natural sites ... of outstanding universal value from the point of view of science, conservation or natural beauty.” Article 4 of the Convention provides that each State Party undertakes the duty of ensuring, to the utmost of its own resources, the identification, protection, conservation, presentation and transmission to future generations of natural heritage. Article 5 requires the State Party to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of natural heritage. Article 6 further requires the State Party not to take any deliberate measures which might damage directly or indirectly the natural heritage. Article 12 provides that the fact that a property belonging to natural heritage has not been included in the World Heritage List in Article 11 does not mean that it does not have an outstanding universal value that deserves to be protected, conserved and transmitted to future generations.

68. In *Queensland v. The Commonwealth* (1989) 167 CLR 232, the High Court of Australia held that the Convention imposed a legal duty to take measures for the protection, conservation, presentation and transmission to future generations of the cultural heritage and natural heritage. This obligation arises out of an identification by the contracting state of its cultural or natural heritage, and does not depend on whether the site is listed on the World Heritage List. Under Article 4 of the Convention, a contracting state is under a duty to make identification of cultural or natural heritage.

69. In October 1999, the UNESCO 12<sup>th</sup> General Assembly of State Parties to the Convention adopted a resolution that invites the contracting parties to “give the highest priority to the adoption of a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programme according to Article 5 of the Convention”.

70. The applicant contends that by the enactment of the PHO and the terms of section 3(1), the Hong Kong legislature is regarded to have identified the Harbour as a natural heritage. Both by the terms of section 3(2) and under the Convention, public officials and public bodies are under a positive duty to protect and conserve the Harbour and a negative duty not to damage directly or indirectly the Harbour. Having regard to the treaty obligation under the Convention, the presumption can only be rebutted by compelling public need that cannot otherwise be accommodated.

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71. Mr Tang SC, however, argues that the Convention and international treaty obligations have no relevance. It is firstly said that the Harbour does not come within the definition of natural heritage in the Convention. Secondly, the PHO was not enacted to implement the Convention or any international treaty obligations. Thirdly, section 3(1) of PHO does not amount to an identification of natural heritage pursuant to Article 4 of the Convention.

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72. In *Salomon v. Customs and Excise Commissioners* [1967] 2 QB 116 at 144E-F, Diplock LJ observed that :

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“...If from extrinsic evidence it is plain that the enactment was intended to fulfil Her Majesty’s Government’s obligations under a particular convention, it matters not that there is no express reference to the convention in the statute. One must not presume that Parliament intends to break an international convention merely because it does not say expressly that it is intending to observe it. Of course the court must not merely guess that the statute was intended to give effect to a particular international convention. The extrinsic evidence of the connection must be cogent. ...”

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73. In the present case, there is no evidence to show a connection between the PHO and the Convention and any treaty obligations. It cannot be said that the Ordinance was enacted to fulfill the obligations under the Convention or other international treaty. Similarly, the evidence does not show that section 3 amounts to an identification of the Harbour as a natural heritage for the purpose of Article 4 of the Convention. Therefore irrespective of whether the Harbour is a natural site of outstanding universal value within the definition of Article 2 of the Convention, it would not be permissible to consult the terms of the Convention to resolve any ambiguities or obscurities in the PHO.

74. In fact, as pointed out by Diplock LJ in *Salomon* at pp.143D-144A, it will only be necessary to consult international law and treaty obligations where the terms of the statute are lacking in clarity. But as the preceding part of this judgment shows, there is no ambiguity in the terms of section 3 of the PHO. The meaning of the section can be readily ascertained from a purposive construction or by reference to the mischief rule. There is thus no need to consult the Convention and other treaties.

(8) *Fundamental principle of law*

75. The applicant further argues, as its 6<sup>th</sup> route of construction, that the three tests it propounds is consistent with the *sui generis* nature of section 3 as a fundamental principle of law protecting the right of Hong Kong people to the enjoyment of the Harbour. The applicant contends that section 3 confers a special status on the Harbour by recognizing that it is a special public asset and a natural heritage. Accordingly, the section both establishes and sets out to protect the right of Hong Kong people and their future generations to the enjoyment of the Harbour as a special public asset and a natural heritage. It is said that the right is a fundamental right, being within the category of human rights classified as “people’s rights”. Reliance is placed on the decision of the Supreme Court of India in *AP Pollution Control Board-II v. Nayudu (Retd)* [2001] 57 LRI 4 and the cases cited therein as showing that national courts have recognized the right to a clean and healthy environment as a fundamental human right that the court should protect.

76. The Board disagrees that section 3 creates a constitutional right. It is argued that the bulk of Constitutional decisions of overseas jurisdictions



referred to by the applicant are no aid to interpretation of section 3. Further, if the PHO does not give rise to any constitutional right, there is no basis for the test of compelling, overriding and present need to arise.

77. For my part, I have reservations as to whether section 3 falls within a category *sui generis* with a constitutional principle. No doubt, the section operates as a fetter on the power of public officials and public bodies, but whether it correspondingly creates a right to enjoy the Harbour and that is analogous to a right to a generally satisfactory environment or one that can be classified as falling within people's rights is another matter. It is doubtful whether the mere descriptions of the Harbour as a "special public asset" and a "natural heritage" is sufficient to create a constitutional right or a fundamental right. If the PHO or section 3 does not involve any constitutional right, then the principles of "due process" and "narrow tailoring" and the jurisprudence on constitutional and human rights law with regard to the standard required to override a fundamental right will have no application. I however do not accept that in the absence of a constitutional right, there is no room for the compelling overriding and present need test to arise. Such a test is consistent with a purposive construction of section 3 and the mischief rule in construction.

(9) *The Board's interpretation*

78. The Board, based upon legal advice obtained through the Department of Justice, approached section 3 on the basis that it involves weighing and balancing all the material considerations, and the presumption against reclamation is one of the mandatory material considerations to be taken into account. The Board further took the view that the presumption

would be rebutted if the reclamation resulted in some substantial public benefits that outweigh the need to preserve the Harbour.

79. I have already pointed out that the approach of weighing material considerations does not satisfy the duty to give due regard to the presumption created by section 3(1). Mr Tang SC argues that there is in fact little or no difference between the applicant's approach and the Board's approach. In my view, there is a fundamental difference between the two approaches. If the presumption is regarded as one of the material considerations that a public body must take into account, then the presumption will be given the same status and weight as many other material considerations that the public body can or should take into account. The applicant's approach, on the contrary, will require the public body to take as its basic premises, the duty to protect and preserve the Harbour as a special public asset and a natural heritage of the community. In assessing a development that involves reclamation, the public body will have to start with the presumption against reclamation, and to identify or consider whether there are other material considerations that override the objection to reclamation. The applicant's approach therefore necessitates viewing reclamation as an exception that can only be justified by compelling and overriding public needs. The standard required to rebut the presumption will be much more onerous on the applicant's approach. Recognition of the more onerous nature of the requirement is important in deciding what sort of public interests is sufficient to justify reclamation. Mr Tang SC submits that what is sufficient public benefit for the purpose of countervailing the protection and preservation of the Harbour is impossible of definition; one recognizes it when one sees it. Thus, he submits, essential infrastructure work like the CW Bypass and the IEC Link would surely qualify. But the

A question is : beyond essential infrastructure work, what else or is there  
B anything else that can amount to sufficient public interest as to justify  
C reclamation?

D 80. The reference to public benefits that outweigh the need to  
E preserve and protect the Harbour is also unsatisfactory. The notion of public  
F benefits necessarily involves a subjective perception and appraisal on the  
G part of the decision-maker as to what is beneficial to the community. The  
H creation of a presumption under section 3(1), however, is to build in an  
I element of objectivity in the decision-making process. Public benefit has a  
J wider compass than public need. A development that is perceived to be  
K beneficial to the community may not be an essential need of the community.  
L If indeed a development is only beneficial but not one that the community  
M cannot do without, then it is merely desirable or preferable. To allow  
N reclamation for such a development will be failing the statutory duty to  
O protect and preserve the Harbour. Although the decision is for the public  
P body to make and the public body is expected to use its expertise and  
Q knowledge in arriving at a decision, the decision should be founded upon  
R objective and cogent evidence before the statutory duty can be said to be  
S properly discharged.

T 81. No doubt, need is a matter of degree. The resort to objective  
U evidence answers the query as to who shall decide whether something is or  
V is not a public need. On the contrary, a decision not based on an objectively  
demonstrated need but upon a subjective perception or a policy preference  
will be arbitrary and irrational.

82. It is also Mr Tang SC's submissions that historically reclamation has not been something exceptional. As a matter of fact, Hong Kong has throughout her history depended on reclaimed land for development. The PHO should not now receive an interpretation to the contrary. I readily agree that Hong Kong owes much of the present development to reclamation. As Mr Tang SC points out, land is a scant commodity in Hong Kong. With the large influx of migrants from the Mainland since the 1930s, land had to be found to provide housing, transportation, infrastructure and other essential facilities for the expanding population. Much of urban Hong Kong is built upon reclaimed land.

83. Notwithstanding that, there is much force in Mr Neoh SC's submissions that reclamation in present time should no longer be regarded as a convenient and ready-at-hand option to obtain additional land. In as much as land available for development was scanty in the past, the waters in the Harbour is also becoming precious in present time. It is further worth noting that what is involved in the present case is a strategic part of the Harbour. Precisely because Hong Kong owes much of her present achievement to reclamation in the Harbour, it is incumbent upon public officials and authorities to treasure what is now left of the Harbour. The ability of the waters in the Harbour and the Harbour front to sustain into the future is a highly pertinent consideration. The significance of the PHO and the presumption under section 3(1) have to be understood in these perspectives.

84. With the enactment of the PHO and the creation of the presumption in section 3(1), the issue of reclamation has to be approached with sensitivity. A different approach is also called for with the advent of the concept of sustainable development which requires decision-maker to

look to the future when contemplating and planning for development. The principle of sustainable development has in fact been expressly incorporated in the Statement of Intent of the Board.

85. The position is succinctly encapsulated in the judgment of the International Court of Justice in *The Case Concerning the Gabčíkovo-Nagymaros Dam (Hungary v. Slovakia)* 1997 ICJ Rep 7 at 78 para.140 as follows :

“ Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”

86. The case of *Gabčíkovo-Dagymaros Dam* is the first occasion for the concept of sustainable development to receive attention in the jurisprudence of the International Court of Justice. The concept enables the Court to hold a balance between environmental protection and development considerations. Given that the concept is part of the Board’s Statement of Intent and had been acknowledged by government officials since the enactment of PHO, it is right that the court should have regard to the concept and take note of the international jurisprudence relating thereto in interpreting section 3. The Board does not dispute that it is proper to

consider the concept of sustainable development, which is also part of the government policy.

87. Sustainable development requires that development must meet the needs of the present without compromising the ability of future generations to meet their own needs. It follows that any attempt to deplete what may be regarded as a natural heritage, has to be justified by compelling overriding public need. The Board's approach towards reclamation and the presumption under section 3 of the PHO, seen in this light, is clearly inadequate.

88. The Board was heavily influenced by the legal advice it has received through the Department of Justice. The Board viewed the duty to protect and preserve the Harbour as no more than a compulsory material consideration that can be overridden by other public benefits. On this basis, the Board had refused the objections of the applicant and approved the Plan and its amendments. The Board's understanding and interpretation of section 3 of the PHO is, however, erroneous. The two decisions now challenged, being based upon a mis-interpretation and misunderstanding of the law, must also be flawed as a matter of law, and I so find.

#### *VIII. RATIONALITY OF THE BOARD'S DECISIONS*

89. Apart from challenging the correctness of the Board's interpretation of section 3 of the PHO, the applicant also challenges the Board's decisions as being irrational. In particular, it is considered that some of the proposed reclamations under the Plan and its amendments cannot be justified under the terms of section 3.

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90. Before launching into this issue of rationality, it is important to bear in mind the limited role of the court in judicial review proceedings. The court is not called upon and is not entitled to make judgments on planning merits. Similarly, the court should not make any findings of fact as to the extent of justifiable reclamation. These are matters for the Board. The court's task is confined to determining whether in the decision-making process, the Board had been properly directed in law and whether it can be shown that the ultimate decision was made with proper regard to the requirements of the PHO.

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91. Broadly speaking, the Plan and its amendments intend to serve two objectives, namely, to provide for essential infrastructure and to permit the development of a waterfront promenade of international standard with amenities and facilities that will enhance the accessibility of the Harbour.

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92. In Mr Tang SC's submissions, the court should look at the Plan as a scheme. It is said that so long as reclamation can be justified by, for instance, essential infrastructure and the ultimate decision made is not *Wednesbury* unreasonable, it is not necessary to look at the proposed reclamations under the Plan individually and to consider the justifications separately. Similarly, Mr Tang SC submits, when the Board deliberated on the Plan and its amendments, the Board needed only be aware that there would be reclamation of the Harbour and be concerned with the extent and purposes of the proposed reclamation as a scheme. The Board needed not be concerned with the extent of reclamation for each purpose.

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93. In my view, this is where the Board fell into error. The Board had perceived the need to reclaim land for the Trunk Road system and

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essential infrastructure work as a planning opportunity to develop the  
Harbour into a world class waterfront. Additional proposed reclamation  
was justified on the basis that it fulfilled the Board's vision for the Harbour.  
In so doing, the Board had not accorded the need to preserve and protect the  
Harbour and the presumption against reclamation with due priority.

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94. The approach advocated by Mr Tang SC and adopted by the  
Board effectively means that provided there exists one compelling need for  
reclamation, reclamation for other less or non-compelling needs can be  
justified by reason of their being put forward as part of the same scheme or  
plan. A proposed reclamation is therefore not being justified on its own  
merits, but by association with a compelling purpose. This cannot be the  
right approach to the obligation under section 3 of the PHO.

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95. In my view, the purpose and extent of each proposed  
reclamation ought to be individually assessed by reference to the three tests  
of (1) compelling overriding and present need, (2) no viable alternative and  
(3) minimum impairment.

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96. In the present case, the Plan and its amendments contain  
several proposed reclamations. The applicant accepts that reclamations  
necessary for meeting essential infrastructure work may constitute a  
compelling overriding and present need justifying the displacement of the  
presumption against reclamation. The applicant, however, contends that the  
Plan has gone beyond this. In its written objections dated 18 June 2002, the  
applicant set out a total of 10 particular objections. At the hearing of these  
proceedings, the main focus of the applicant is on the following features of  
the Plan :



- (1) Harbour park;
- (2) Waterfront promenade; and
- (3) Rezoning and extension of CDA site; and
- (4) Maximum building height restriction for development in CDA site.

97. I do not intend to deal with the last two items as they primarily relate to land use and zoning issues, which fall outside the PHO and the scope of this application. Sufficient for me to say that insofar as reclamations for these sites are put on the basis that they are to eliminate dead corners and to improve tidal waters, the evidence does not show how the Board came to be satisfied that there was no viable alternative and the extent of reclamation was the minimum.

*(1) Essential infrastructure work*

98. The applicant is prepared to accept that as a matter of principle at least, reclamation for the CW Bypass and the IEC Link may be able to satisfy the three tests propounded by the applicant. The applicant however considers that there is insufficient factual basis for determining what precisely is the scale of justifiable reclamation. The applicant also says that the Board does not appear to have considered other viable alternatives for solving the local traffic problems.

99. I agree that it is not altogether clear from the materials before the court as to what is precisely the extent of reclamation required for the Trunk Road System, the CW Bypass and other essential infrastructure work. It is not possible to form any view as to whether the proposed reclamation

for this objective has been kept to the minimum. There is for instance some uncertainties as to the justifications for the construction of the road connections to the existing road system in Wan Chai North. But the fact is the Trunk Road System and the CW Bypass are all part of a road system that had been considered and approved during the Central Reclamation and prior to the WDII reclamation consultation exercise. Part of the construction work had also commenced. It is essentially a foregone conclusion by the time the Board came to consider the Plan and its amendments. That being the case and from a practical perspective at least, the Board's decision to approve this part of the Plan cannot be said to be irrational.

(2) *Harbour Park*

100. The proposed construction of the harbour park involves the additional reclamation of some 2.7 hectares. The idea of a harbour park first went out for public consultation during the Public Consultation Forum held on 1 February 2000. Very little support, in fact only one support, was received. In the consultations of the LegCo Panel and the Wanchai and Causeway Bay District Boards that followed, the need for the Harbour Park or Island Park was also queried. Objections to the proposal were in fact overwhelming. In Maunsell's report of August 2001, the proposal of a harbour park was removed and a widened marina breakwater was proposed in its stead to provide an environmentally attractive public promenade. In TPB Paper 6050, the removal of the proposal was said to be in response to the views collected during public consultation. The draft Outline Zoning Plan appended to TPB Paper 6051 did not include a harbour park.

101. At the Board's meeting on 22 March 2002, however, one member on behalf of other absent members, raised objection to the

A exclusion of the harbour park. It was said that the objections to the inclusion  
B of the harbour park by the public was due to cautious reactions against  
C future reclamation. Other members took the view that the harbour park  
D would bring people to the Harbour and the Harbour to the people. The idea  
E being for public good, it was said that two more hectares of reclamation was  
F justified. As a result, the Board resolved to include a harbour park in the  
G Plan. It is important to note that included in TPB Paper 6261, which was  
H prepared by the PD for this meeting, was a summary of the views on the  
I harbour park received during consultations. As mentioned in the paper itself,  
J the majority held opposing view for the reason that the park was considered  
K unwarranted and contrary to the spirit of PHO and that reclamation should  
L only be carried out to meet essential infrastructural needs. The Hong Kong  
M Tourist Association in particular doubted the justification for the harbour  
N park and its attractiveness.

L 102. The applicant says that the inclusion of the harbour park and  
M the Board's decisions to approve the Plan with the park and to refuse the  
N applicant's objection is a clear instance of irrationality. Mr Tang SC  
O defends the decisions on the basis that the harbour park is to meet public  
P aspiration of an international waterfront. Specifically, he draws support  
Q from Maunsell's Report on the merits and demerits of the harbour park  
R prepared in May 2000.

Q 103. In this report, Maunsell sets out several merits of the harbour  
R park, including providing pollution free open space with unrestricted views  
S across the water, reconnection with Victoria Park and land for waterfront  
T recreational use and facilities. Among the demerits identified are  
U reclamation, reduction in mooring areas and its physical remoteness with  
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limited pedestrian access. Maunsell also points out in this report that it is not clear whether the harbour park proposal contravenes the spirit of the PHO.

104. Plainly, there is no objective evidence of a compelling overriding and present need for the harbour park. Neither does the proposal satisfy the tests of no viable alternative and of minimum repairment. The deliberation process of the Board clearly falls foul of giving due recognition to the presumption against reclamation. The reference to public benefit and public aspiration, even by the test formulated by the Board based on its legal advice, cannot have justified the proposal. The evidence does not demonstrate that the harbour park proposal carries with it substantial public benefits that outweigh the need to preserve the Harbour. A case for rebutting the presumption is not present. In any case, given the large number of objections to the proposal from both within and outside the Board, it is difficult to see what objective and persuasive evidence the Board has in concluding that the harbour park proposal is to give effect to public aspirations.

105. The harbour park proposal by any view cannot be justified. The decisions of the Board to approve an additional 2.7 hectares of reclamation for its construction is both contrary to the PHO and unreasonable in the public law sense.

*(3) Waterfront Promenade*

106. The applicant does not as a matter of principle object to the provision of a promenade along the waterfront. What the applicant objects is the extent of reclamation proposed for the purpose of the promenade. A

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promenade is also provided in the Central Reclamation and it will be linked up to the promenade proposed in the Plan. The intention is to have a promenade that extends all the way from Central to North Point. The Board's case is that additional reclamation is necessary for this promenade to be built. It is considered that the promenade proposed under the Plan is designed to achieve a world class waterfront that brings the Harbour to the people and the people to the Harbour, and which can be enjoyed by future generations.

107. Clearly, the promenade is not a mere byproduct of the reclamation needed for the trunk road system but involves additional reclamation. It is being justified as a public benefit that outweighs the need to preserve the Harbour. Whether the promenade should be of the width now proposed or narrower, or whether it should contain the kind of amenities currently proposed are matters for the Board and not for the court. What the court is concerned with is the process whereby the Board came to the conclusion that the extent of additional reclamation to meet the present design and proposal of the promenade is justified under section 3 of the PHO.

108. It would appear from the deliberations of the Board and from Mr Tang SC's submissions that an international waterfront necessarily encompasses a promenade of the kind proposed. The evidence does not demonstrate that the Board had considered other alternative that does not involve reclamation for achieving a world class harbour front. The objective of having a world class harbour front is no doubt compatible with the Board's vision for the Harbour. But the Board must additionally consider whether the means of achieving the desired waterfront is also

compatible with its Statement of Intent on Reclamation and with the presumption against reclamation. If after considering the needs for the proposed promenade, the other viable alternatives and the extent of reclamation proposed, the Board is satisfied that the proposed reclamation for the promenade satisfies the three tests, then the Board's decision cannot be questioned as being irrational. Unfortunately, in the present case, the evidence does not show that the Board had undergone the process.

109. What the Board appeared to have done is to make use of the opportunity of reclaiming land for essential infrastructure to make zoning and planning provisions for developing the Harbour. In so doing, the Board had not separately considered the need for and the extent of reclamation for the promenade to see if they satisfy the PHO. The failure in this regard renders the Board's decisions unreasonable.

### *CONCLUSION*

110. For the reasons aforesaid, the Board has failed to comply with section 3 of the PHO in proposing the scale of reclamation of the Harbour set out in the Plan as amended. The Board's decisions rejecting the applicant's objections and refusing to amend the Plan and its amendments are erroneous in law, being in contravention of section 3 of the PHO. Further, by failing to have regard to the considerations relevant to section 3, the Board's decisions are *Wednesbury* unreasonable.

111. There will accordingly be an order of *certiorari* to quash the decisions of the Board. There will further be an order that the cause be remitted to the Board to reconsider the Plan and the objections thereto according to law, in particular, the PHO.

112. The applicant has asked that the law be specifically stated in the relief granted. Having considered the matter, I do not consider it necessary to do so; the relevant principles have already been set out in this judgment. An order in the usual terms is sufficient.

113. There will also be an order *nisi* that the costs of these proceedings be the applicant against the respondent with certificate for two counsel.

( C. Chu )  
Judge of the Court of First Instance,  
High Court

Mr Anthony Neoh SC, Professor Johannes Chan and Mr Pao Jin Long,  
instructed by Messrs Winston Chu and Co., for the Applicant

Mr Robert Tang SC and Mr Nicholas Cooney,  
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