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HPLB(CR)(PL)51/28/2(2003)

22 November 2003

Miss Odelia Leung
Clerk to Panel on Planning, Lands and Works
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Miss Leung,

**Panel on Planning, Lands and Works
and Panel on Environmental Affairs
Follow-up to joint meeting on 13 October 2003**

Thank you for your letter of 15 October 2003. The following is our response to your request for follow-up.

- (a) **Transcripts of the hearing on application for interim injunction over Central Reclamation Phase III works**

Please see Annex A.

- (b) **Affirmations submitted by the Government to the Court for the above case**

Please see Annex B.

- (c) **Timetable specified in the relevant works contract for dredging and filling up works**

Please see Annex C.

(d) Latest traffic forecasts in Central

Please see Annex D.

(e) Cost-effectiveness of CWB and Road P2 network

Please see Annex E.

(f) Feasibility of using fresh water for water-cooled air-conditioning system

Please see Annex F.

Yours sincerely,

(Andrew Cheung)
for Secretary for Housing, Planning and Lands

c.c.

SETW (Attn: Ms Ernestina Wong, Mr Raistlin Lau)
D of J (Attn: Mr Simon Lee)
DTD (Attn: Mr John Chai, Mr Cheung Tai-yan)
D of Plan (Attn: Mr C K Li, Miss Ophelia Wong)
C for T (Attn: Mr K K Lau)

Annex A

(a) Transcripts of the hearing on application for interim injunction over Central Reclamation Phase III works

Regarding your request for transcripts of the hearing on application for interim injunction over Central Reclamation Phase III (“CRIII”) works, we enclose for Members’ consideration a lever-arch file (at Appendix A-1) containing copies of the hearing transcripts and the 1st, 2nd and 3rd Affirmations of Mr Cheung Tai-yan, Project Manager (Hong Kong Island and Islands) of the Territory Development Department together with exhibits thereto.

As further requested, the relevant sections of the transcripts containing Ms Teresa Cheng SC’s submissions have been highlighted as follows –

- (i) the parts dealing with the progress of the CRIII reclamation works and their reversibility are highlighted in *orange*;
- (ii) the parts dealing with the financial implications of suspending the works (as opposed to allowing them to proceed but having them scaled back or removed later on) are highlighted in *green*; and
- (iii) the parts dealing with the relationship (if any) between Wan Chai Development Phase II (“WDII”) and CRIII, the three tests laid down by Madam Justice Chu in respect of WDII, and the lawfulness or otherwise of the Central District (Extension) Outline Zoning Plan, are highlighted in *pink*.

We need to draw to Members’ attention that the Department of Justice has advised that transcripts and affirmations are documents prepared specifically for purposes related to legal proceedings and are in general not documents for public consumption. The Administration has agreed to provide them to LegCo in response to your specific request for the same, bearing in mind the particular questions of Members and the exceptional amount of public interest and media attention related to CRIII. It should not be taken to suggest that in all future legal proceedings to which the Government is a party the Administration will necessarily accede to request by LegCo for the production of relevant Court documents. In this regard, you may wish to refer to and draw Members’ attention to paragraphs 11-16 of LC Paper No.LS8/03-04 (“LC Paper”) (at Appendix A-2, English only) in which the Legal Service Division of the LegCo Secretariat explains the implications of the *sub judice* rule. Members should be respectfully reminded of the need to refrain from engaging in any discussion or activity that is likely –

- (a) to generate a campaign of pressure so great that would reasonably be perceived as intending to exert or having the effect of exerting pressure on a judge, and/or
- (b) to be perceived by the public as an effective usurpation by LegCo of the Court's judicial functions.

Finally, we note it is your intention to upload the transcripts and the affirmations onto the LegCo website, and to make them available to members of the press and the public. In this regard, we draw your attention to paragraph 15 of the LC Paper, which rightly points out that the transcripts, and affirmations should primarily be used for the specific purposes of ascertaining what information was given to the Court, and not for the purpose of reviewing the court proceedings. We trust you will bear in mind the legal advice contained in the LC Paper in deciding whether or not to allow unconditional access to the relevant Court documents.

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Legislative Council

LC Paper No. LS8/03-04

Paper for the Panel on Planning, Lands and Works and Panel on Environmental Affairs

Examination of the implications of the *Sub Judice* Rule for meeting with deputations on Central Reclamation Phase III or Wanchai Development Phase II

At the Joint Panel meeting on 13 October 2003, members asked for legal advice on the application of the *sub judice* rule in meeting with deputations to receive views on Wanchai Development Phase II or Central Reclamation Phase III.

Background

2. On 8 July 2003, in the application for judicial review by The Society for Protection of the Harbour Limited (SPH), the Court of First Instance quashed the decision of the Town Planning Board (TPB) with regard to the Outline Zoning Plan in connection with Wanchai Development Phase II (WDII) and ordered TPB to reconsider the plan and the objections thereto. TPB decided to appeal against the judgment and by consent of TPB and SPH, the appeal has been scheduled for hearing by the Hong Kong Court of Final Appeal on 9 December 2003.

3. As for Central Reclamation Phase III (CRIII):

- (a) on 6 October 2003, the Court of First Instance dismissed the application for interim injunction and according to the Rules of the High Court (Cap. 4 sub. leg.), an appeal may be lodged on or before 31 October 2003 (i.e. within 14 days from the date on which the order is sealed); and
- (b) leave to apply for judicial review has been granted on 26 September 2003 and the hearing would take place on 9 February 2004.

Contempt of Court

4. At common law, words spoken or otherwise published, or acts done, outside court which are intended or likely to interfere with or obstruct the fair administration of justice are punishable as criminal contempts of court. Some of the commonest examples of such contempts are :

- (a) publications which are intended or likely to prejudice the fair trial or conduct of criminal or civil proceedings; and
- (b) publications which scandalise, or otherwise lower the authority of, the court.

5. In civil proceedings, publications may also be punishable as a contempt of court if they have the effect of deterring or inhibiting parties in the conduct of their proceedings by prejudicial discussion of the merits or facts of the case before the proceedings have been determined by a court of law. Although there is no clear authority, civil proceedings would appear to be pending until an appeal has been heard or the time within which an appeal may be lodged has expired.

6. It is not necessary that a fair trial or the conduct of the proceedings is actually prejudiced. The test is whether there is a real risk of prejudice. It seems that a risk of prejudice to the administration of justice as a whole will suffice. Contempt of court is unlikely where the risk of prejudice is slight, for example, if the proceedings are to be tried by a judge or heard by an appellate court.

Legislative Council (Powers and Privileges) Ordinance

7. Section 3 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) provides Members with the freedom of speech and debate in the Council. Such freedom of speech and debate is not liable to be questioned in any court or place outside the Council. Under section 4 of the same ordinance, no civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to the Council or a committee, or by reason of any matter brought by him therein by petition, bill, resolution, motion or otherwise. Although not expressly provided, sections 3 and 4 do not apply to conduct outside of the proceedings of the Council or its committee.

8. Section 8A of the same Ordinance extends the same privileges and immunities in sections 3 and 4 to any public officer designated by the Chief Executive

for the purpose of attending sittings of the Council or any committee, while so designated and attending any such sitting. Members will note that the privileges and immunities do not extend to deputations addressing the committee nor their written submissions.

Rules of Procedure

9. The Legislative Council has imposed upon itself certain restrictions in relation to contents of speeches in Rule 41(2) of the Rules of Procedure, which provides -

"Reference shall not be made to a case pending in a court of law in such a way as, in the opinion of the President or Chairman, might prejudice that case."

The rule reflects what is commonly known as the *sub judice* rule or convention in legislative assemblies of some other jurisdictions. By Rule 43 of the Rules of Procedure, the above rule applies to proceedings in a committee (which includes a panel) unless the chairman of the committee orders otherwise.

10. The Council has not formulated any further general guidelines beyond what has been expressly provided in the Rules of Procedure. The precise application of the rule is at the discretion of the Chairman of the joint panel meeting, being the person who is to rule on such matters whenever they arise. However, the following principles from the past application of the rule locally and from practices and procedures in other jurisdictions may be helpful :

- (a) references to matters awaiting adjudication in a court of law should be excluded if there is a risk that they might prejudice its adjudication;
- (b) references would include comment on, inquiry into and the making of findings on such matters; and
- (c) matters awaiting adjudication would include matters in respect of which a charge has been laid or proceedings have been initiated by the filing of the appropriate documents;
- (d) prejudice might arise from an element of explicit or implicit prejudgment in the proceedings of the legislature in two possible ways -

- (i) the references might hinder the court in reaching the right conclusion or lead it to reach other than the right conclusion; and
- (ii) whether the court is affected in its conclusion or not, the references might amount to an effective usurpation of the court's judicial functions.

Application of the *sub judice* rule

11. In cases involving an appeal or judicial review by a judge such as the present one, it is rare that a publication will be held to constitute a contempt of court as it is accepted judges are capable of guarding against allowing any prejudicial matter to influence them. Even for jury trials, the court tends to approach the question in practical rather than absolute terms and placed its faith primarily in the efficacy of measures available to overcome any potential unfairness.

12. The principle is demonstrated in the recent case of *HKSAR v Lee Ming Tee & Another [2001] 4 HKCFAR 133*, in which the Hong Kong Court of Final Appeal placed its faith in the jury, properly directed, to secure a fair trial.

13. In the same case, the Hong Kong Court of Final Appeal acknowledged that special care must be taken to counteract the possible effects of prejudicial publicity. Comments made in public on pending proceedings may affect witnesses or the parties themselves in the conduct of their proceedings. Such comments may also be so strong as to amount to a campaign of pressure so great that would reasonably be perceived as intending to exert or having the effect of exerting pressure on a judge.

14. With regard to inviting deputations, *Equal Opportunities Commission v Apple Daily Limited [1998] 1 HKC 260 at 266* would be relevant. In this case, a District Court judge has commented, by way of obiter dictum, that a party who starts and invites the media to report discussions and expressions of opinions on the case, and thus allows the publications of a prejudiced impression to the public may amount to a contempt of court. Members may wish to consider the consequence of inviting deputations to express their views in public meetings while proceedings are pending, discussion at which would very likely be reported by the media.

15. Even if the court might not be affected in its conclusion, members may also need to assess the likelihood of proceedings of the Council amounting to an effective usurpation of the court's judicial functions. Members have requested, and

the Administration has agreed, at the last joint panel meeting to provide transcripts of the hearing for application of interim injunction in connection with CRIII and the affirmations filed with the court. Whilst the transcripts and affirmations would primarily be used for ascertaining what information was given to the Court, it would be advisable to make clear that the exercise was for purposes other than reviewing the court proceedings.

Conclusion

16. As a matter of law and practice of this Council, there is no absolute restriction against members holding a meeting with deputations to receive their views on the policy issues relating to WDII or CRIII while those court proceedings presently instituted are pending. However, should members decide to hold such a meeting, it would be advisable to consider measures to guard against the likelihood of (a) generating a campaign of pressure so great that would reasonably be perceived as intending to exert or having the effect of exerting pressure on a judge, and (b) the public perceiving such meeting as amounting to an effective usurpation of the court's judicial functions. Such measures may be considered necessary, from the constitutional point of view, in order that the independence of the judiciary would not be undermined and to avoid the interests of the parties to the pending judicial proceedings from being unfairly prejudiced.

17. Such measures may include a warning by the Chairman to all members and deputations present at the start of the joint panel meeting stating clearly the objective of the meeting and the approach to be adopted. Members and deputations could be asked to exercise self-restraint respectively in their questions and responses. In the course of the meeting, the Chairman may also exercise his discretion in preventing references to be made to issues pending adjudication in the appeal or judicial review. This had been the practice when witnesses involved in criminal investigations or judicial proceedings attended before the Select Committee on Building Problems of Public Housing Units.

Prepared by

Legal Service Division
Legislative Council Secretariat
28 October 2003

Annex B

(b) Affirmations submitted by the Government to the Court

Please see Appendix A-1 of Annex A.

(c) Timetable specified in the relevant works contract for dredging and filling up works

The CRIII works contract, i.e. “Contract HK12/02: Central Reclamation Phase III – Engineering Works”, is scheduled to last for 55 months counting from the commencement date of 28 February 2003. While there are broad key dates for completing various stages of reclamation, individual activities such as dredging and rock filling are not specified. Therefore, there is no timetable on the dredging and filling up works in the contract.

Although the High Court ruled on 6 October 2003 in the Government’s favour in respect of the Society for Protection of the Harbour Limited’s application for interim injunction over the CRIII works and allowed for continuance of the works, the Government has not ordered full resumption of all marine works. Instead, only those works that will not cause any irreparable damages to the Harbour such as dredging and rockfilling works have been resumed. The following is a programme of works from now until end March 2004 –

	<i>Works items</i>	<i>Duration</i>
(i)	Dredging in Initial Reclamation Area West (“IRAW”)	On-going till late December 2003
(ii)	Rockfilling to dredged trench in IRAW	On-going till January 2004
(iii)	Dredging in Initial Reclamation Area East (“IRAE”)	Early November 2003 till end March 2004
(iv)	Rockfilling to dredged trench in IRAE	Late November 2003 till end March 2004

(d) Latest traffic forecasts in Central

At present, the Connaught Road Central – Harcourt Road – Gloucester Road corridor is the main road accommodating the east-west traffic at Central and Wanchai. The corridor is operating over its capacity and there is regular traffic congestion. The Central-Wanchai Bypass (“CWB”) is a strategic road linking the Rumsey Street Flyover with the Island Eastern Corridor via the Island Eastern Corridor Link. CWB and the associated Road P2 network will supplement the current corridor and provide urgent relief to the traffic congestion problem in Central and the whole northern shore of the Hong Kong Island.

The following table shows the predicted volume to capacity (“v/c”) ratio at various locations along the abovementioned corridor at years 2011 and 2016 –

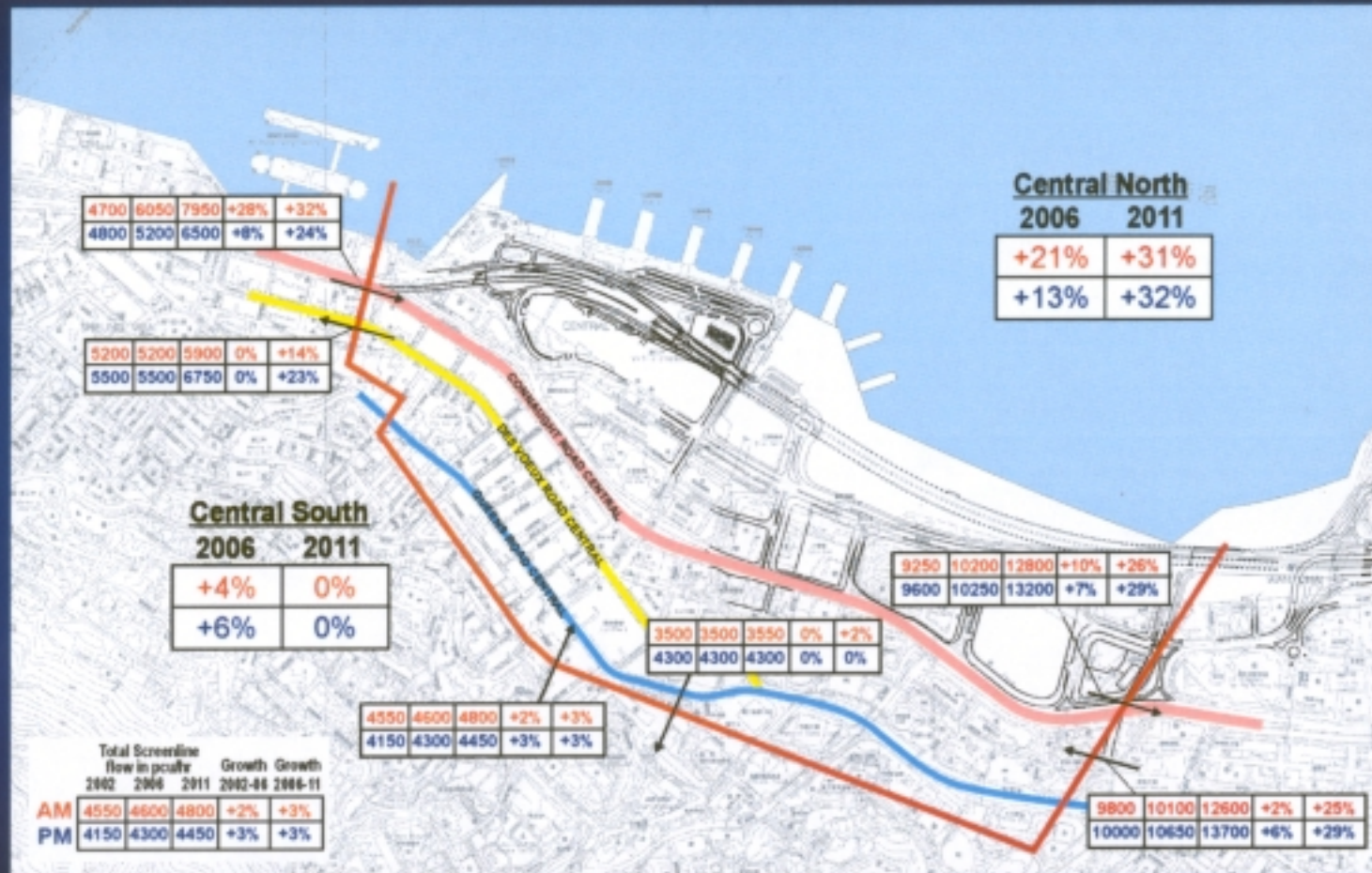
Location	Without CWB and P2		With CWB and P2	
	2011	2016	2011	2016
Connaught Road Central	1.3	1.3	0.8	0.9
Harcourt Road	1.3	1.3	0.8	0.9
Gloucester Road	1.3	1.3	0.9	0.9
CWB	-	-	0.7	0.7

A v/c ratio is an indicator that reflects the performance of a road. A v/c ratio equals to or is less than 1.0 means that a road has sufficient capacity to cope with the volume of vehicular traffic and the resultant traffic will flow smoothly. A v/c ratio above 1.0 indicates the onset of congestion. A v/c ratio above 1.2 indicates more serious congestion. Traffic speed deteriorates progressively with further increases in traffic.

A plan showing the 2002 / 2006 / 2011 a.m. and p.m. peak hours passenger car unit figures across the internal cordon screenline of the Central Business District, based on the assumption that CWB will be in use by 2012, is at Appendix D-1.

A more detailed paper on the traffic and transport justification for the CWB will separately be submitted to the Panel for Members’ information.

Traffic Growth Across HK Internal Cordon Screenline 2001 - 2011



(e) Cost-effectiveness of CWB and Road P2 network

Usually, only a trunk road like CWB will be considered for cost effectiveness. As Road P2 is just a distributor road, no estimation on its Economic Internal Rate of Return (“EIRR”) has been conducted.

The Government looks at the overall benefit brought to the community by a project. For transport infrastructure, the bulk of such benefit refers to the saving in travelling time for the public and congestion relief to adjacent roads. The EIRR therefore measures the overall cost effectiveness of the project to the community as a whole.

For CWB, the EIRR is estimated to be 28%, based on the following assumptions –

1. Capital cost = \$8,706 million
2. Recurrent cost = \$102 million per year
3. Operation life = 40 years
4. By relieving the road congestion, time saved by road users = 2,193 million minutes per year
5. Equivalent cost of the time saved = \$2,193 million

In other words, the annual discount rate which makes the total return from this project over its project life just equal to the total investment is 28%. According to the Environment, Transport and Works Bureau, an EIRR of 28% is considered as generally cost effective. For reference, the EIRR generated by Route 9 is around 18% to 20%.

(f) Feasibility of using fresh water for water-cooled air-conditioning system

Switching to fresh water cooling towers from the existing seawater systems serving the buildings affected by the CRIII project is technically problematic. It requires additional floor space in the affected buildings. This is also constrained by the structural load capacity of the buildings, especially on the rooftop. Moreover, as the fresh water cooling towers are less energy-efficient than sea water systems, additional plants may need to be installed to provide the same amount of cooling. The additional floor space for plants and equipment may not be available in the affected buildings. Certain major components of the existing seawater cooled systems would need to be replaced to suit the new fresh water cooling tower systems. With these technical constraints, the alternative of using fresh water for water-cooled air-conditioning in the affected buildings is considered not feasible.