

OPINION re PROPOSED HELIPORT

1. It is clear that if and insofar as the proposed commercial heliport will require land to be reclaimed from the sea-bed or foreshore of the harbour, reclamation works to form that land can only lawfully be approved by public officers and public bodies if there is a public need for reclamation which overrides the statutory presumption against reclamation. This is broadly the effect of section 3 of the Protection of Harbour Ordinance Cap. 531 as judicially interpreted.
2. The provisions of this Ordinance have recently been considered by the Court of Final Appeal in Town Planning Board v. Society for the Protection of the Harbour [2004] 1 HKLRD 396. The Court took the opportunity to spell out the meaning of the Ordinance by reference to the intention behind the legislation, and the mischief that it was addressing. The Court did this by stating a ‘demanding test’ that must be met in order to rebut the statutory presumption against further reclamation. There are three main elements.

Overriding public need. The decision-maker must be shown cogent and convincing materials that demonstrate a public need (in the form of some economic, social and/or environmental communal need) so compelling and present as to prevail over the strong public need for protecting and preserving the heritage of the harbour which is explicitly recognised by the statute. Only in that way can the statutory ‘presumption’ against reclamation be rebutted.

No reasonable alternative. It is inherent in that approach that it must be shown that in all the circumstances (including economic, environmental and social implications, and the cost and time involved) there is no reasonable alternative to the reclamation.

Minimal impairment. It is also inherent in that concept that it must be shown that reclamation is not beyond the minimum of that which is needed so that the harbour is impaired by the reclamation to the least possible extent.

3. The 'position paper' prepared by the Working Group appears to me to demonstrate a sound case for a commercial heliport in Central that would satisfy the demanding test articulated by the Court of Final Appeal to justify harbour reclamation works. The arguments and data put forward demonstrate cogently and convincingly that the proposed heliport would meet the CFA criteria for lawful reclamation. There is a clear and obvious communal need for such a facility in this location for good economic, social and environmental reasons.
4. HKG already asserts the need for a heliport in that location to serve the needs of passengers travelling on official business. Meeting the modern travel needs of public servants is but a small part of meeting the modern travel needs of the community at large, including investors and traders, those whose business takes them to and fro the Pearl River Delta, tourists and other travellers whose time is precious. The public need for a commercial heliport for general usage must be even stronger and more compelling than the need for a helicopter facility for use by public servants only.
5. It is difficult to see how there can be any reasonable alternative to a heliport adjacent to the harbour somewhere in the Central area of Hong Kong to secure optimum access to transport links, to avoid over-flying the congested town centre, and to satisfy safety and noise control standards. The HKG plan suggests the need for an area of only 720 m. The proposed works of reclamation to form land for the construction of a heliport are therefore relatively small in extent (compared with the 2.7 hectares for the harbour park or the waterfront promenade in the CFA case), and would result in no more than a minor extension of the existing reclaimed land presently occupied by the Convention Centre. There would be minimal impairment of the harbour.

6. The proposal for a heliport contemplates that it should either be built upon reclaimed land, or instead built as a platform structure standing upon piling driven in to the sea bed. If it were to be said that the latter design provides a 'reasonable alternative' to the reclamation contemplated by the former design, the additional costs of a piled structure, both in construction and in subsequent maintenance, can properly be prayed in aid to show that piling is not a reasonable alternative to reclamation. The CFA acknowledges that costs are relevant in the consideration of a reasonable alternative.

7. It also seems to me that the latter design (if adopted) would not fall within the scope of the Protection of the Harbour Ordinance and therefore would not be subject to the statutory presumption. The Ordinance precludes 'reclamation' of the harbour in order to protect and preserve the harbour. 'Reclamation' is specifically defined by section 2 to mean 'any works carried out or intended to be carried out for the purpose of forming land from the sea-bed or foreshore.' These words are not apt to include the construction of a platform or pier supported upon the existing sea-bed by piling. In that design, no 'land' has been formed by reclamation works. The only relevant 'land' is the existing sea-bed in its unchanged state. The nature and extent of the harbour remains for all practical purposes the same. The works are not irreversible in the same way as land formed at the expense of the harbour.

8. I have been reminded that in different statutory contexts and for other purposes, 'land' has often been defined to include buildings or structures erected upon land. There are many such instances in the Laws of Hong Kong. But that is not to the point. Cap. 531 is not directed at the use of land, or any use made of the bed of the harbour, but at the formation of land 'from the sea-bed or the foreshore'. It is reclamation that is the mischief. Land formed by reclamation negates the protection and preservation of the harbour. There is nothing in the Ordinance to suggest a presumption against piers and structures mounted over the sea-bed. On the contrary, these have always enabled harbours to be used and enjoyed.

24 January 2005

Michael Thomas Q.C.