

Society for Protection of the Harbour Limited

保護海港協會有限公司

*Winston Ka-Sun Chu, Adviser
2006, One Pacific Place,
88 Queensway, Hong Kong*

Tel. (852) 2845-8138

Fax. (852) 2845-5964

Legislative Council,
8 Jackson Road, Central,
Hong Kong

U R G E N T

29th January 2005

Dear Honourable Legislative Councillor,

Re: Helipad

We respectfully refer you to the following documents which are enclosed herewith for your kind attention:-

1. The Protection of the Harbour Ordinance (“Harbour Ordinance”).
2. Summary of the Judgment of the Honourable Madam Justice Chu (“High Court Judgment”).
3. Summary of the Court of Final Appeal Judgment (“CFA Judgment”).

Section 3(1) of the Harbour Ordinance set out below prescribes a very stringent duty to protect and preserve the harbour against excessive reclamation.

(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.

Section 3(1) was explained by the High Court Judgment and the CFA Judgment which prescribed the following four tests:-

1. **Overriding Public Need** – means a compelling and present need which has the requisite force to prevail over the strong public need for protection and preservation
2. **Present** – means that the need must arise within a definite and reasonable time frame
3. **Minimum** – means not to go beyond what is required
4. **No Reasonable Alternative** – where costs, time and delay would be relevant

Section 3(2) of the Harbour Ordinance set out below imposes a duty upon all public officers and public bodies including the Legislative Council and the Honourable Members thereof to observe Section 3(1).

(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.

In the circumstance, we respectfully propose that the present application be considered in accordance with the law and our Society strongly opposes any application for reclamation of the harbour unless the tests prescribed by the Ordinance and the above Judgments are fully satisfied.

Yours faithfully,

Winston K.S. Chu,
Adviser

CHAPTER 531

PROTECTION OF THE HARBOUR

An Ordinance to protect and preserve the harbour by establishing a presumption against reclamation in the harbour.

(Replaced 9 of 1998 s. 2. Amended 75 of 1999 s. 2)

[30 June 1997]

1. Short title

This Ordinance may be cited as the Protection of the Harbour Ordinance.

2. Interpretation

In this Ordinance, unless the context otherwise requires—

“reclamation” (填海) means any works carried out or intended to be carried out for the purpose of forming land from the sea-bed or foreshore;
(Added 9 of 1998 s. 3)

“relevant Ordinance” (有關條例) means—

- (a) the Foreshore and Sea-bed (Reclamations) Ordinance (Cap. 127);
- (b) the Cross-Harbour Tunnel Ordinance (Cap. 203)*;
- (c) the Eastern Harbour Crossing Ordinance (Cap. 215);
- (d) the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap. 276);
- (e) the Roads (Works, Use and Compensation) Ordinance (Cap. 370);
- (f) the Western Harbour Crossing Ordinance (Cap. 436); or
- (g) any other Ordinance under which reclamation is authorized or which otherwise provides for reclamation.

(Amended 9 of 1998 s. 3; 75 of 1999 s. 3)

3. Presumption against reclamation in the harbour

(Amended 9 of 1998 s. 4)

(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. *(Amended 75 of 1999 s. 4)*

(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.

4. Transitional

(1) This Ordinance does not apply to any reclamation authorized under a relevant Ordinance before the commencement of this Ordinance. *(Amended 75 of 1999 s. 5)*

(2) The Protection of the Harbour (Amendment) Ordinance 1999 (75 of 1999) (“the Amendment Ordinance”) does not apply to any reclamation authorized under a relevant Ordinance before the commencement of the Amendment Ordinance. *(Added 75 of 1999 s. 5)*

SCHEDULE 1

(Repealed 75 of 1999 s. 6)

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**Summary of Judgment of Madam Justice Chu,
As confirmed by the Judgment of the Court of Final Appeal
Interpretation of Protection of the Harbour Ordinance**

Effect of Judgment – The High Court pronounced that the decision of the Town Planning Board in refusing to amend the Wanchai Outline Zoning Plan to be erroneous in law and in contravention of Section 3 of the Protection of the Harbour Ordinance (“the Ordinance”). The Court ordered that the decisions be quashed and the cause be remitted to the Board to reconsider the Plan and the objections thereto according to law, in particular, the Ordinance.

Importance 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. Reclamation should no longer be regarded as a convenient and ready-at-hand option to obtain additional land.”

The Three Tests – “The purpose and extent of each proposed reclamation ought to be individually assessed by reference to the following 3 tests :-”

1. **Compelling Overriding and Present Need**
2. **No Viable Alternative**
3. **Minimum Impairment**

Clear, Cogent & Objective Evidence – “Such compelling and overriding need must be demonstrated by clear, cogent and objective evidence.” “The decision should be founded upon objective and cogent evidence”.

Duty of Public Officers – “In assessing a development that involves reclamation, the officers will have to start with the presumption against reclamation.” “The duty of public officer to protect and preserve the Harbour form the basic tenets or starting point in their decision-making process.”

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Summary Of Court of Final Appeal Judgment
Interpretation of Protection of the Harbour Ordinance

Effect of Judgment - The CFA pronounced on 9th January 2004 that the Town Planning Board had erred in law in the correct interpretation of the Harbour Ordinance; that the Board's decisions must be quashed; that the Wanchai Outline Zoning Plan must be remitted back to the Board for reconsideration; and that the Judgment applies to any reclamation proposal in the Harbour.

Importance of Harbour - The CFA pronounced that the Harbour is undoubtedly a central part of Hong Kong's identity. It is the heart of the metropolis and something extraordinary to be transmitted from generation to generation. Reclamation that had already taken place renders what remains of the Harbour even more precious and makes the need to protect and preserve it more important and compelling.

Legislative Intention - The Harbour Ordinance accords to the Harbour a unique legal status. There is a great public need to protect and preserve it having regard to its unique character. There must be preservation which means maintenance and conservation in its present state. It must be kept from harm, defended and guarded. Such a principle is strong and vigorous.

Overriding Public Need Test - The presumption prescribed by the Harbour Ordinance can only be rebutted by establishing an overriding public need for reclamation. Such need must be of greater public importance than the importance of the Harbour.

Overriding – means a compelling and present need which has the requisite force to prevail over the strong public need for protection and preservation

Present – means that the need must arise within a definite and reasonable time frame

Public needs – include economic, environmental and social needs of the community

Minimum – means not to go beyond what is required

No Reasonable Alternative – where costs, time and delay would be relevant

Rebuttal of Presumption - Each area proposed to be reclaimed must be justified. It is imperative that there shall be no reclamation unless the Overriding Public Need Test is satisfied. The Test is by its nature a demanding one and the burden to rebut the presumption is therefore a heavy one.

Cogent & Convincing Materials - Due to the demanding nature of the Test, it is not sufficient to incant the Test or just to pay lip service to it. The materials relied on must be cogent and convincing.

終審法院判詞撮要

保護海港條例之詮釋

判詞之影響 – 終審法院於2004年1月9日之判詞宣佈，因為城市規劃委員會錯誤詮釋保護海港條例；城規會之決定必須被取消；灣仔分區計劃大綱圖須發還城規會重新考慮。此判詞就保護海港條例之詮釋乃適用於任何填海建議。

海港之重要性 – 終審法院表明，海港無疑地是香港身份的主要象徵。她是都市的心臟，並且是必須世代相傳的特別資產。過往的填海令海港僅餘的部份更為珍貴，亦令到保護和保存海港的需要更重要和迫切。

立法宗旨 – 保護海港條例給予了海港一個獨特的法律地位。由於她有獨特之地位，所以有極大公眾需要來把她保護和保存。海港必須被保存，即必須保持其現有的狀況，免受到侵害。此原則是強力和強烈的。

凌駕性的公眾需要測試準則 – 要推翻保護海港條例的推定，必須證明填海工程具有凌駕性的公眾需要。此需要必須比海港有更大的公眾重要性。

凌駕性 – 即指足以壓倒保護和保存海港的公眾需要之當前迫切需要。

迫切 – 即指在一特定和合理時限內的需要。

公眾需要 – 包括經濟，環境和社會性的社群需要。

最低限度 – 即指不應超越所需的。

沒有另一合理解決方法 – 成本，時間和引致的延誤也是有關連的考慮。

推翻該法定推定 – 填海建議的每部份都要有充份理據支持，除非符合“凌駕性公眾需要的測試準則”，否則不應進行填海。此測試準則是嚴格的，故舉證推翻推定的責任是沉重的。

有力和令人信服的資料 – 有鑑於該測試準則的嚴格性質，不可以只說已經遵守了測試，所依賴的資料必須是有力和令人信服的。