

# 立法會 *Legislative Council*

立法會LS38/05-06號文件

## 《 2006年廢物處置條例(修訂附表4)公告 》 及《 2006年公眾衛生(動物及禽鳥) (禽畜飼養的發牌)(修訂)規例 》小組委員會文件

### 背景

在《 2006 年廢物處置條例(修訂附表 4)公告 》及《 2006 年公眾衛生(動物及禽鳥)(禽畜飼養的發牌)(修訂)規例 》小組委員會會議上，委員要求法律事務部就兩項附屬法例的法例修訂是否符合《基本法》第一百零五條所保障的財產權，提供法律意見。

### 《基本法》

2. 《基本法》下述條文與保障財產權有關——
  - (a) 《基本法》第六條訂明香港特別行政區依法保護私有財產權；及
  - (b) 《基本法》第一百零五(一)條訂明，香港特別行政區依法保護私人 and 法人財產的取得、使用、處置和繼承的權利，以及依法徵用私人 and 法人財產時被徵用財產的所有人得到補償的權利。

《基本法》第一百零五(二)條訂明，徵用財產的補償應相當於該財產當時的實際價值，可自由兌換，不得無故遲延支付。

3. 《基本法》第六條是保障私有財產權的概括陳述。《基本法》第一百零五條就依法徵用財產訂定補償。

### 徵用財產

4. 九龍雞鴨欄同業商會 訴 律政司(代表香港特別行政區漁農自然護理署署長(CACV 1521/2001)(附件)一案曾討論《基本法》第一百零五條。在該個案中，上訴法庭討論《基本法》第一百零五條內有關“徵用財產”的釋義。該案屬上訴個案，對原訟法庭拒絕九龍雞鴨欄同業商會(下稱“商會”)要求取得司法覆核許可的決定提出上訴。商會是家禽批發商協會，代表 10 個家禽批發商戶或“欄”，該等商戶或“欄”由 1994 至 1997 年期間租用長沙灣臨時家禽批發市場的攤檔，售賣雞隻和水禽(包括鴨鵝)，直至 1997 年 12 月爆發禽流感。由於爆發禽流感，政府制

訂法例，規定在另一處地點售賣鴨鵝及其他水禽，與售賣雞隻的地點分開。另一處地點是西環副食品批發市場，申訴人可在該處售賣水禽。商會聲稱，由於政府決定將售賣雞隻和水禽的地點分開，令其會員在財政上損失慘重，而政府拒絕就該項決定向他們作出補償。上訴法庭其中一項須裁決的問題是，法官拒絕商會進行司法覆核的申請，所持的理由是根據《基本法》第一百零五條，商會並沒有被徵用財產，有關決定是否正確。

5. 法庭基於下述理由駁回上訴：商會沒有被徵用其向政府租用的長沙灣臨時家禽批發市場的土地。商會仍可在該處售賣雞隻。新法例只禁止商會在該處售賣水禽。此舉並非徵用，而是管制土地的用途。政府已向商會另外提供地點售賣水禽，即西環副食品批發市場。此外，就售賣水禽的業務而言，新法例沒有剝奪商會的業務。利潤減少(如有的話)並非因“徵用財產”導致。

6. 法庭在九龍雞鴨欄同業商會一案中，把下述概念加以區分：徵用財產及事實徵收。法庭引用 *Baner v Sweden* 一案，App No.11763/1985，60 DR 128，第 139 至 140<sup>1</sup> 的論述，並認同有關意見。在引用的論述中，徵用財產及事實徵收的釋義如下——

- (a) 徵用財產指財產被正式徵收，即財產的所有權已轉移；及
- (b) 申訴所針對的措施對於財產實質影響的程度，事實上等同徵收有關財產，或者申訴所針對的措施“可視同徵用財物”，則亦可構成“徵用”。

### 管制財產的用途

7. “徵收”財產的釋義較狹窄，“管制”財產的概念則相應較廣泛。<sup>2</sup> 根據歐洲人權法庭的法理學觀點，必須對社會整體利益(對財產權作出的干擾或管制必須以維護社會整體利益為目的)和保障個人財產權之間，取得“公正平衡”<sup>3</sup>。根據這項準則，對財產作出的任何管制，必須

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<sup>1</sup> 這個案關乎《歐洲人權公約第 1 號議定書》第 1 條。該條文訂明：  
“每一個自然人或法人均有權和平地享用其財物。除非是為了公眾利益並符合法律與國際法的一般原則所規定的條件，任何人不得被剝奪財物。  
然而，上述規定不得對國家為按照普遍利益管制財產用途或為收取稅款或其他供款或罰款而執行其認為所需的法例的權利，造成任何形式的損害。”  
第 1 號議定書第 1 條採用的字眼與《基本法》第一百零五條有差別。然而，上訴法庭在九龍雞鴨欄同業商會一案中，並無提述有關的差別，反而強調法例的一般性質。

<sup>2</sup> *Eg Pine Valley Developments v Ireland* 一案，A222 第 55 至 56 頁(1991)，法庭認為，未能重新確認被法庭裁定為無效的規劃許可，以致土地價值大幅下降，並不屬於事實徵用，而是屬於管制用途。

<sup>3</sup> 歐洲人權法庭自從就 *Sporrong and Lonnroth v Sweden* [1982] EHRR35 一案作出決定後，在考慮個案是否符合第 1 號議定書第 1 條下的規定時，傾向採用“公正平衡”準則。  
請亦參閱 *Law of the European Convention on Human Rights*, Harris, O’Boyle and Warbrick, 1995, 521-2 頁及 523 頁。

確保作出管制的方法與希望達至的目標相稱，兩者之間要有合理的關係。<sup>4</sup>

8. 雖然本港法院至今尚未正式採納“公正平衡”的準則，但相信本港法院在這問題上，很可能會考慮歐洲人權法庭的法理學觀點。雖然《基本法》第六條及第一百零五條並沒有就限制財產權作出明確的規定，但該兩項條文內“依法”一詞，表示條文所保障的財產權受法例所訂的限制，該等限制符合《基本法》及根據《基本法》第三十九條適用於香港特別行政區的國際公約<sup>5</sup>。該等限制須合理及與公眾的一般利益相稱。

#### 《2006年廢物處置條例(修訂附表4)公告》及《2006年公眾衛生(動物及禽鳥)(禽畜飼養的發牌)(修訂)規例》

9. 該兩項附屬法例旨在禁止任何人在《廢物處置條例》(第354章)及《公眾衛生(動物及禽鳥)(禽畜飼養的發牌)規例》(第139章，附屬法例L)指定的地方飼養不超過20隻家禽(界定為雞、鴨、鵝、鵪鶉及鸚鵡)。

10. 兩項附屬法例於2006年2月8日在憲報刊登，並於2006年2月13日生效。

#### 分析

11. 在分析根據《基本法》第一百零五條提出的申索時，將一如審理九龍雞鴨欄同業商會一案，法庭會考慮有關的法例修訂是否導致徵用財產或事實徵收財產。

12. 似乎法庭不太可能認為徵用財產的論點成立，原因是法例修訂本身並不要求把家禽的所有權轉予政府。

13. 就事實徵收財產而言，政府在提交小組委員會的文件(立法會CB(2)1226/05-06(04)號文件)第14及15段中指出，並不存在事實徵用財產的情況。政府當局解釋，受法例修訂影響的家禽擁有人可選擇以不同方式處置其家禽。舉例而言，家禽擁有人可宰殺家禽，供私人食用；至於賽鴿及寵物家禽，擁有人可申請展覽牌照；賽鴿的擁有人可將其禽鳥售予本港或海外的賽鴿組織。然而，亦可辯稱存在事實徵收財產的情況。論點是可供家禽擁有人選擇的方案不切實際，例如展覽家禽牌照費用過高、准許家禽擁有人處置家禽的時間過短(附屬法例在

<sup>4</sup> 九龍雞鴨欄同業商會一案在高等法院審理時，申訴人的律師承認，申訴人成員的業務是否被剝奪，最終視乎政府把鴨鵝業務搬往西環副食品批發市場是否合理。在上訴時，申訴人指出，法官把根據《基本法》第一百零五條獲得補償的權利與政府把售賣雞隻和水禽的地點分開的做法是否合理連繫起來，是錯誤的。然而，上訴法庭在審理上訴時沒有特別處理這問題。

<sup>5</sup> 請參閱 Lord Woolf 在 *Ag v Lee Kwong Kut* [1993]3HKPLP72 一案中的說話，內容有關《香港人權法案條例》第十一(一)條(假定無罪)，指此類一般適用的條文經常受隱含限制的規限。

2006年2月8日刊登憲報，在2006年2月13日生效)。因此，財產不再有任何有意義的替代用途。在目前的個案中，法例修訂是否導致事實徵收財產，屬於程度上的問題，須由法庭裁決。須注意的是，由於擁有人的權利沒有被正式消除，法庭將採取審慎的態度，判定是否存在第1號議定書第1條有關“徵用”規定的事實徵收財產情況<sup>6</sup>。因此，似乎不會輕易把目前的個案判定為事實徵收財產。

14. 若法庭認為根據歐洲人權法庭的法理學觀點，徵用或事實徵收財產的情況均不成立，可能認為法例修訂屬於管制財產的用途，因為在處所內飼養不超過20隻家禽的人士，須在法例修訂生效前處置該等家禽。若以“公正平衡”的準則來審理現行個案，法庭會考慮禁止在處所飼養不超過20隻家禽與預防本港爆發禽流感的目的是否相稱。政府在立法會參考資料摘要(檔號：HWF(F)5.6.1，由衛生福利及食物局及漁農自然護理署於2006年2月7日發出)第3至6段解釋提出法例修訂的理據，在立法會CB(2)1226/05-06(04)號文件附件B第6段亦加以解釋。若法庭接納政府提出的制訂立法措施的理據，則很可能會認為該等立法措施合理及相稱。

## 總結

15. 就《基本法》第六條及第一百零五條而言，若將上述原則應用於《2006年廢物處置條例(修訂附表4)公告》及《2006年公眾衛生(動物及禽鳥)(禽畜飼養的發牌)(修訂)規例》——

- (a) 似乎並無徵用財產；
- (b) 似乎不容易確立存在事實徵收財產的情況；及
- (c) 若法庭接納政府提出的制訂立法措施的理據，則很可能會認為該等立法措施合理及相稱。

## 連附件

法律事務部  
立法會秘書處  
2006年2月23日

<sup>6</sup> 舉例而言，在 *Papamichalopoulos* 一案中，法庭認為，實際被佔用的土地面積非常廣泛，同時以任何方式處理的可能性甚低，因而判定屬事實徵收。

Law of the European Convention on Human Rights, Harris, O'Boyle and Warbrick, 1995, 528 頁

CACV001521/2001

CACV1521/2001

IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF APPEAL

CIVIL APPEAL NO.1521 OF 2001

(ON APPEAL FROM HCAL NO.2630 OF 2000)

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BETWEEN

**KOWLOON POULTRY LAAN MERCHANTS ASSOCIATION Applicant**  
**(Appellant)**

AND

**DEPARTMENT OF JUSTICE for and on behalf of**  
**DIRECTOR OF AGRICULTURE FISHERIES**  
**CONSERVATION DEPARTMENT OF HKSAR Respondent**

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**Coram: Hon Mayo VP and Hon Suffiad J in Court**

**Date of Hearing: 10 July 2002**

**Date of Judgment: 10 July 2002**

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**J U D G M E N T**

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**Hon Suffiad J : (Giving the judgment of the court)**

**1. This is an appeal by the appellant, originally the applicant, against the decision of Chung J given on 15 June 2001, whereby the judge refused the applicant's application for leave for judicial review.**

**Background**

**2. The appellants are a poultry wholesalers' association representing 10 poultry wholesaling businesses or "laans" who from 1974 to 1997 rented stalls in Cheung Sha Wan Temporary Poultry Market where they sold chicken as well as water birds, that is ducks and geese, until the outbreak of the "bird flu" in December 1997.**

**3. As a result of the outbreak of "bird flu", the Public Health (Animals and Birds) (Amendment) (No.2) Regulations was enacted on 27 February 1998, whereby ducks and geese and other water birds were required to be traded at a separate location from chicken. These regulations reflected scientific advice that avian flu was carried by ducks and geese and could spread from them to chicken and then to humans. As a result, they were not allowed to sell water birds from their stalls in Cheung Sha Wan Temporary Poultry Market but only chicken.**

**4. Another location in the Western Wholesale Food Market was made available to them from which to sell water birds. The appellants have been compensated for the slaughter of their poultry in December 1997. It is alleged by the appellants that each of them have suffered severe financial loss as a result of the decision to separate the locations for selling chicken and for selling water birds. The appellants say that this is due to the fact of the alternative site for selling water birds at the Western Wholesale Food Market offered by the Government is not practical because of its distance from customers and the small size of the stalls offered. This, they say, has resulted in their having to close down the duck and geese wholesaling side of their businesses. However, Government decided that no compensation would be paid to them for the decision to separate the locations for selling chicken and for selling water birds.**

**5. The judge below found that this decision by the Government not to compensate them was made in August 1998. It is against this decision of**

the Government not to compensate them that the appellants seek judicial review. The hearing for leave to issue judicial review came before Chung J who refused leave to the appellants and it is against that decision of Chung J which they now appeal.

6. The judge below refused leave to the appellants on the basis that he did not consider that the appellants had been deprived of their property, under Article 105 of the Basic Law. In so holding the judge below had this to say :

"Counsel argued that 'property' in Art. 105 should include a business or trade. She submitted that by requiring the Applicant's members to move the ducks and geese operation to the Western Wholesale Market, Government has 'deprived' them of their businesses, even though this was done in accordance with the amended Regulations and By-laws. The putative respondent denied that the businesses of the Applicants' members had been deprived and contended that they could continue their businesses in the new market. Applicant's Counsel accepted that in the light of this argument, the issue of whether the businesses of the Applicant's members had been deprived, turns at the end on whether it was reasonable for Government to move the ducks/geese operation to the Western Wholesale Food Market. I have already found against the Applicant on this point. In such case, even if 'property' should include a trade or business, I do not consider that the Applicant has been deprived of its property."

7. The appellants put forward two grounds of appeal. Firstly, the judge erred in finding that there is no deprivation of the appellant's property pursuant to Article 105 from the Basic Law; and secondly, the judge was wrong not to grant the appellant an extension of time to apply for leave for judicial review. Article 105 of the Basic Law provides as follows :

"The [HKSAR] shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay."

**The appellant's argument**

**8. Firstly, the appellants relied on the definition given to "property" by the Interpretation and General Clauses Ordinance (Cap. 1) which provides that :**

**"property includes :**

**(a) money, goods, choses in action and land; and**

**(b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition;"**

**9. It is submitted by the appellants that the reduction of profit, as a result of being deprived of continuing their duck and geese wholesaling businesses at the Cheung Sha Wan Temporary Poultry Market is a deprivation of property within the meaning of Article 105 of the Basic Law which entitles the appellants to compensation.**

**10. It is further submitted by the appellants that the judge below erred when he linked entitlement to compensation under Article 105 with the issue of whether the Government's action of segregating the operation of chicken and water birds was reasonable. They say that even if such action was reasonable on the part of the Government, the appellants are still entitled to compensation under Article 105 if there had been a deprivation of the property.**

**11. The appellants further complained that the judge should not have penalized the appellants for the delay by refusing to extend time because the intervening period between October 1998 and August 2000 was taken up with attempts by the appellants to persuade the Government to reconsider its position and it is commendable that the appellants should attempt to resolve the matter by negotiation before resorting to litigation.**

**The respondent's arguments**

**12. The respondent was not called upon at the hearing. The argument presented by the respondent contained in their skeleton argument is quite simply that there is here no deprivation of property but that the new regulations and By-laws control the use of the land rented by the Government to the appellants. They say that there has been no taking away of the land used by the appellants and that the appellants are still**



enjoying the use of that land in the Cheung Sha Wan Temporary Poultry Market to sell chicken, albeit that they cannot sell water birds there.

13. They further submit that since there was delay of some two years, the burden is on the appellants to show good reason why the court should extend time for leave to issue judicial review. In the absence of any good reason advanced, the court should not exercise its discretion in the appellants' favour.

#### **Decision**

14. It is accepted that the test for leave to issue judicial review has a low threshold and that it depends on the potential arguability of the matter brought by the applicant.

15. The crux of this dispute as we see it is whether or not the appellant had made out an arguable case that they have suffered a "deprivation of property" as it is understood in Article 105 of the Basic Law such that they should be given leave for judicial review. Accepting for present purposes that the profit, business or goodwill, even relating to the future, can amount to "property" has there been any deprivation? In our view, there has not been any deprivation made out in this case for the following reasons. The appellants have not been deprived of the use of the land rented to them by the Government at the Cheung Sha Wan Temporary Poultry Market. They are still selling chicken there. They are prohibited by the new regulations and By-laws to sell water birds there. That is not deprivation but rather control of use of land. Moreover and so far as their businesses of selling water birds is concerned, they have not been deprived of that business either by the new regulations and/or by the new By-laws. Their reduction of profit, if any, does not result from any "deprivation of property".

16. Indeed, Government has provided them with an alternative location, namely the Western Wholesale Food Market, from which to sell water birds. In that sense, there is no deprivation. Even if they have suffered a reduction of profit selling water birds at this alternative location for the reasons advanced by them, that does not equate with a "deprivation of property" under Article 105 of the Basic Law. To that extent, we agree with the judge below that the appellants have not made out any case to show that there has been a deprivation of property under Article 105.

17. If authority be needed for the view which we have taken above, that is to be found in the judgment of the European commission, which made the following observations and the case of *Baner v. Sweden*, App. No.11763/1985, 60 D.R. 128 at pages 139-140 :

" As regards the question whether the applicant has been deprived of property, the Commission recalls that, according to the established case-law, deprivation of property within the meaning of Article 1 of Protocol No.1 is not limited to cases where property is formally expropriated, i.e. where there is a transfer of the title to the property. 'Deprivation' may also exist where the measure complained of affects the substance of the property to such a degree that there has been a de facto expropriation or where the measure complained of 'can be assimilated to a deprivation of possessions' (cf. Eur. Court H.R., *Sporrong and Lonnroth* judgment of 23 September 1982, Series A no.52 p. 24 para. 63).

It is clear that the applicant has not been formally deprived of his property. He still retains the title to it. The applicant has also not been deprived of his right to fish, including the right to fish with hand-held tackle. What he has lost is his right to exclude others from fishing with hand-held tackle.

Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away. There are many examples in the Contracting States that the right to property is redefined as a result of legislative acts. Indeed, the wording of Article 1 para. 2 shows that general rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in the national laws of many countries which make a clear distinction between, on the one hand, general legislation redefining the content of the property right and expropriation, on the other.

The Commission has for the same reasons in cases concerning rent regulations, which have seriously affected the right to property, nevertheless held that such regulations fall to be considered under the 'control of use' rule (cf. *Mellacher and Others v. Austria*, Comm. Report 11.7.88, at present pending before the European Court of Human Rights)."

18. The view that we have taken can be tested in a very simple way. If the appellant be correct in the view that they have taken, then it follows that

**future legislative restrictions on land use, such as planning control and zoning, can amount to "deprivation of property" and would have to be compensated for under Article 105. That cannot be correct and underlines the fallacy of the argument presented by the appellants. Having reached the decision above that the appellants have not made out any case as to deprivation, the arguments as to the failure of the judge below to extend time for leave to judicial review falls away. We cannot see how the judge could be faulted for refusing to extend time in this matter.**

**19. For the reasons given above, the appeal is dismissed.**

**(Simon Mayo) (A.R. Suffiad)  
Vice-President Judge of the Court of First Instance,  
High Court**

**Representation:**

**Mr Paul Wu and Miss Lorinda Lau, instructed by**

**Messrs Lawrence K.Y. Lo & Co., for the Applicant (Appellant)**

**Mr Kwok Sui Hay, instructed by Secretary for Justice, for the Respondent**