BL 105 and Backyard Poultry Farming

This paper provides more detailed explanation as to why the recent legislative amendments to prohibit backyard poultry farming are considered to be consistent with the property right guarantee under BL 105. BL 105 protects, among other things, the "right to compensation for lawful deprivation of … property".

Legislative Amendments

2. Having regard to the overriding public interest in protecting public health (particularly the H5N1 threat), the legislative amendments were introduced by the SARG on an urgent basis through the Waste Disposal Ordinance (Amendment of Fourth Schedule) Notice 2006 (LN 19 of 2006 - "the Amendment Notice") and the Public Health (Animals and Birds) (Licensing of Livestock Keeping)(Amendment) Regulation 2006 (LN 20 of 2006 - "the Amendment Regulation"). These two legislative instruments were made by the Chief Executive in Council respectively under s 37 of the Waste Disposal ordinance (Cap 354) and s 3 of the Public Health (Animals and Birds) Ordinance (Cap 139) on 7 February 2006, gazetted on 8 February 2006 and came into operation on 13 February 2006.

3. The purpose of the legislative amendments is to ban backyard poultry keeping in the HKSAR. More specifically,

(a) The Amendment Notice amends the Fourth Schedule to the Waste Disposal Ordinance (Cap. 354) so that a person who owns or keeps poultry of not more than 20 in number in or on his premises in any livestock waste prohibition area, livestock waste control area or livestock waste restriction area is no longer an exempt person under the Ordinance.

(b) The Amendment Regulation amends the Public Health (Animals and Birds) (Licensing of Livestock Keeping) Regulation (Cap 139L) to provide, among other things, that the Director of Agriculture, Fishers and Conservation shall not grant a licence for the keeping of livestock in or on any premises in a livestock waste control area unless he is

satisfied that the number of poultry, if any, to be kept in or on the premises will be more than 20.

BL 105 and Deprivation

4. It is considered that BL 105 does not impose any legal obligation on the SARG to pay compensation under the legislative amendments. The matter turns critically on the meaning of "deprivation" under BL 105.

5. BL 105 guarantees the right to real value compensation for lawful deprivation of property. It reads as follows:

> "The Hong Kong Special Administrative Region 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. ..." (emphasis added)

6. The concept of "deprivation" was discussed in *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277. In that case, the appellants were prohibited by new subsidiary legislation to sell water birds in their rented stalls. The Court of Appeal held that it was not deprivation but rather control of use of land. The following observations made by the European Commission in the case of *Baner v Sweden* (App No.11763/1985, 60 DR 128) were cited with approval (at para 17):

> "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)." (emphasis added)

7. Although the doctrine of de facto deprivation was alluded to by the Court in the *Kowloon Poultry* case, it did not adopt and apply the doctrine in its decision. However, in *Fine Tower Associates Ltd v Town Planning Board* HCAL 5/2004, the CFI, for the first time in local jurisprudence, recognized that restrictions imposed by a draft Outline Zoning Plan are capable in law of constituting a de facto deprivation of property (para 56).

8. In the light of local and comparative constitutional jurisprudence, deprivation of property could therefore take place under the following two situations:

(a) where property is formally expropriated, i.e. where there is a transfer of the title to the property; and
(b) 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'.

9. On the concept of de facto deprivation or expropriation, it appears from comparative constitutional jurisprudence (European and US) that a de facto deprivation would not arise unless the property affected is left without any **meaningful alternative use** or the restrictions have denied all **economically viable use** of the property. A note on "Comparative Jurisprudence on the Doctrine of De Facto Deprivation" is at **Annex A**.

Formal Deprivation

10. In the present case, there is no deprivation in the formal sense (para 8(a) above). The legislative amendments do not by themselves

effect any transfer of title of the poultry to the SARG. Nor do they extinguish the title of poultry owners to their property.

De Facto Deprivation

11. However, the banning of backyard poultry keeping is underpinned by the offence provision in s 3 of the Public Health (Animals and Birds) (Licensing of Livestock Keeping) Regulation (Cap 139L) (in respect of "livestock waste control area" which corresponds roughly to the New Territories but excluding such new towns as Tuen Mun and Yuen Long), as well as ss 15 and 15AA of the Waste Disposal Ordinance (Cap 354) (in respect of "livestock waste prohibition area" (ie corresponding roughly to urban areas in the HKSAR) and "livestock waste restriction area" (ie correspondingly roughly to such new towns in the NT as Tuen Mun and Yuen Long) respectively). As such, after commencement of the amendment legislation, it would be an offence for existing poultry owners to continue to keep poultry acquired by them prior to the legislative amendments, unless they are exempted or have obtained an appropriate licence under relevant legislation.

12. It is relevant to note that in the current exercise no order to slaughter existing poultry by the Director of Agriculture, Fisheries and Conservation has been issued under s 6 of Cap 139 to complement the proposed ban (so that statutory compensation would be payable under s 6 of Cap 139). Therefore, under the doctrine of de facto deprivation, the critical issue is whether, having regard to the extent of interference with the substance of the property in question (ie the poultry), the property is left without any "meaningful alternative use" or the restrictions have denied all economically viable use of the property after the commencement of the legislative amendments.

13. Applying the test of whether there is any meaningful alternative use of the property in question, it is considered that, for the following reasons, there is no de facto deprivation arising from the statutory prohibition against backyard poultry farming under the legislative amendments.

14. In respect of backyard poultry farming (eg the keeping of chickens), the small number of poultry kept by a particular owner could be slaughtered for private consumption (which was in line with the purpose of backyard farming) in anticipation of the commencement of the legislative amendments. (By definition, an owner of poultry in backyard farms would possess no more than 20 poultry in order to qualify under the law before the legislative amendments as an "exempt person"). Given the availability of this option, it is considered that neither -

(a) the voluntary surrender of poultry by owners to the Government prior to the commencement of the legislative amendments; or
(b) the seizure (pursuant to the relevant legislation) of poultry kept by persons reasonably suspected to be in breach of such amendments,

would amount to a de facto deprivation.

15. Turning to the special cases of racing pigeons and pet poultry, it is considered that there is no de facto deprivation of the property of owners. In such cases, it is open to the owners to apply for an exhibition licence under the Public Health (Animals and Birds) (Exhibitions) Regulations (Cap 139F) and the relevant licence under the Public Health (Animals and Birds)(Licensing of Livestock Keeping) Regulation (Cap 139L). Moreover, owners of racing pigeons could also sell their birds to local and overseas racing pigeons associations. It would therefore be difficult in such cases to argue that the property affected is left without any meaningful alternative use or the restrictions have denied all economically viable use of the property.

Fair Balance

16. On the assumption that SAR courts would apply the "fair balance" test in respect of interference with or control of property rights under BL 105 in non-deprivation cases, a note explaining why it is considered that the legislative amendments would satisfy the fair balance test is at **Annex B**.

Conclusion

17. To conclude, the legislative amendments to prohibit backyard poultry farming (ie the Amendment Notice and the Amendment Regulation) are considered to be consistent with the property right guarantee under BL 105. Therefore, BL 105 does not impose any legal obligation on the SARG to pay compensation under the legislative amendments. There is neither formal nor de facto deprivation of the property of the poultry owners within the meaning of BL 105. Moreover, the legislative amendments would satisfy the fair balance test, should this be applied in the case of interference with or control of property in non-deprivation cases under BL 105, having regard to the overriding public interest in protecting public health (particularly the H5N1 threat).

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Annex A

Comparative Jurisprudence on the doctrine of De Facto Deprivation

This note sets out a review of the Hong Kong, European and American jurisprudence on the issue of de facto deprivation.

Local Jurisprudence

2. In *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002]4 HKC 277, the appellants were prohibited by new subsidiary legislation to sell water birds in their rented stalls. The Court of Appeal held that this was not deprivation but rather control of use of land. The following observations made by the European Commission in the case of *Baner v Sweden* (App No.11763/1985, 60 DR 128) were cited with approval (at para 17):

> "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....."

3. The Court of Appeal, at para 18, further held:

> "… 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 art 105. That cannot be correct and underlines the fallacy of the argument presented by the appellants."

4. In *Kaisilk Development Ltd v Urban Renewal Authority* [2004] 1 HKLRD 907, the Court of Appeal considered again the effect of restrictions imposed by general regulatory laws on the use of property. The case concerned the now repealed Land Development Corporation Ordinance under which the Land Development Corporation ("LDC") could prepare development scheme for approval by the Town Planning Board and request the Secretary for Planning, Environment and Lands to make a recommendation that land be resumed if the LDC was unable to acquire the land which was subject to the urban renewal project.

5. The plaintiff there argued that it was deprived of the right to use and dispose of its property by the "blighting effect" of the LDC scheme approved by the Town Planning Board in 1995 by reason of which it could no longer develop, mortgage or sell the property under the threat of resumption. The plaintiff sought to argue that BL105 supported its claim that the blighting effect of the LDC's development scheme on its property assisted in creating a cause of action against LDC for breach of statutory duty. The Court of Appeal rejected this argument.

6. The Court of Appeal (para 33 at 920I) referred to the following opinion of Lord Hoffmann in the Privy Council case of *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583C:

> "It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. The best example is planning control....."

7. The Court of Appeal (para 40 at 922D) further held that:

> "There is then the fact that the so-called blight amounts at the most to a restriction: it does not amount to an acquisition by the defendant of the plaintiff is property. The plaintiff's property is acquired on resumption....."

8. Although the doctrine of de facto deprivation was alluded to in the *Kowloon Poultry* case, neither of the above two cases adopts and applies the doctrine in the relevant decisions. Instead, they have found that restrictions on the use of property by general regulatory laws do not constitute a deprivation. However, in *Fine Tower Associates Ltd v Town Planning Board* HCAL 5/2004, the CFI, for the first time in local jurisprudence, has recognized that restrictions imposed by a draft OZP is capable in law of constituting a de facto deprivation of property (para 56).

9. In that case, Hartmann J, after citing the statement by Lord Hoffmann in the case of *Grape Bay Limited v Attorney General of Bermuda* [2001] 1 WLR 574, held (at para 52) that whether there has been a deprivation of property is a matter of substance not a matter of formality. He also pointed out that this principle was expressed in the European Commission of Human Rights's judgment in *Baner v Sweden* (see para 2 above). He further held (at para 53) that whether the restrictions in each case do or do not amount to a deprivation of property is a matter of degree. Although the CFI does not set out in very clear terms what the threshold is before the doctrine of de facto deprivation can be invoked, Hartmann J (at para 54) has made the following comments,

> "If measures restricting the use and enjoyment of property **go too far** that will be recognised under long-enshrined common law principles as constituting a taking; that is, a deprivation, in respect of which compensation must be paid." (emphasis added)

10. He then referred to the leading US case of *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) and concluded that "the question depends on the particular facts".

11. By referring to the Privy Council's decision in *Grape Bay Limited*, the European Commission's decision in *Baner v Sweden* as well as the US Supreme

Court's decision in *Pennsylvania Coal Co*, the test for de facto deprivation would involve consideration of the following –

(a) whether as a matter of substance (rather than formality), there is any deprivation of property;

(b) whether the measures complained of affects the substance of the property to such a degree that there is a de facto deprivation; and

(c) whether the measures restricting the use and enjoyment of property go too far, having regard to the extent of the diminution.

12. It appears that the threshold for finding de facto deprivation should be very high.

13. It would be useful to refer to overseas jurisprudence in this area in the light of the comparative jurisprudence relied on by Hartmann J.

European Jurisprudence – doctrine of de facto deprivation

14. Article 1 of the First Protocol of the European Convention of Human Rights provides for the protection of property right in the following terms:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of the property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

15. The most obvious example of a "deprivation" of property within the meaning of Article 1 of the First Protocol is expropriation by the state. In certain circumstances, the loss of "rights", or a substantial part of rights over property that falls short of expropriation, may nevertheless amount to a deprivation. (see Simor & Emmerson (eds), *Human Rights Practice* (2005)

para 15.021)

16. The Court will look at the reality of the situation, rather than at the legal formalities. In *Sporrong and Lönnorth v Sweden* (1982) 5 EHRR 35, the Court held that :

> "In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearance and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether that situation amounted to a *de facto* expropriation, as was argued by the applicants."

17. Under the European jurisprudence, the concept of "deprivation" thus includes measures which can be equated with a deprivation of possessions or which detract from the substance of ownership to such an extent that they are equivalent to expropriation. One of the issues in *Sporrong and Lönnorth v Sweden* was whether expropriation permits and building restrictions in force for considerable periods had interfered with the applicants' enjoyment of their land to such an extent that they amounted to a *de facto* deprivation of property. The Court considered that they had not, since, although the restrictions had made it more difficult for the applicants to sell their property, the possibility still remained, and they were in any event still able to use the property in question.

18. In the following cases, no de facto deprivation was found by the European Court of Human Rights. In *Pine Valley Development Ltd v Ireland* (1991) 14 EHRR 319, the applicants from Ireland purchased a plot of land relying on an existing grant of outline planning permission for industrial development. The planning permission was later invalidated as having been ultra vires and void *ad initio* by the Irish Supreme Court. The applicants argued that the Irish Supreme Court's decision holding the outline planning permission to be invalid, the State's alleged failure to validate that permission retrospectively or its failure to compensate for the reduction in value of their property infringed their property rights under Article I of the First Protocol of the European Convention.

19. The European Court of Human Rights held (at para 56) that there was no formal expropriation of property or de facto deprivation. The impugned measure was basically designed to ensure that the land was used in conformity

with the relevant planning laws and title remained vested in the applicants, whose powers to take decisions concerning the property were unaffected. The land was not left **without any meaningful alternative** use, for it could have been farmed or leased. Finally, although the value of the site was substantially reduced, it was not rendered worthless, as is evidenced by the fact that it was subsequently sold in the open market. The European Court also held that interference in this case must be considered as a control of use of property.

20. In *Matos e Silva, Lda and Others v Portugal* (1996) 24 EHRR 573, the applicant owned a piece of land which was affected by the creation of a nature reserve. The applicant challenged measures taken by the Portuguese Government affecting the land. Those measures included restrictions on development of farming, fish-farming and salt production as well as a ban on building and easements. The applicant submitted that the effect of the measures had resulted in a de facto expropriation of their possessions and that it was impossible to sell the land because potential purchasers would be deterred by the legal position.

21. In the opinion of the European Court (at para 85), there was no formal or de facto expropriation in the present case. The effects of the measures were not such that they could be equated with deprivation of possessions. The restrictions on the right to property stemmed from the reduced ability to dispose of the property and from the damage sustained by reason of the fact that expropriation was contemplated. **Although the rights in question had lost some of its substance, it had not disappeared** and the situation is not irreversible. The European Court noted, for example, that all reasonable manner of exploiting the property had not disappeared, seeing that the applicant continued to work the land.

22. In *Elia Srl v Italy* (2003) 36 EHRR 9, the applicant owned a plot of land for which the commune of Pomezia had approved plans for building to be carried out. Later, the Pomezia Municipal Authorities resolved to adopt a master development and town planning scheme, earmarking the applicant's land for the creation of a public park. Restrictions on building were subsequently imposed on the land. The applicant claimed that it was the victim of a de facto expropriation due to the combined effect of the prohibitions on construction for the purpose of expropriation of the land, which reduced the value thereof and the opportunity of using it to zero.

23. The European Court held (at para 56) that there was no formal or de facto deprivation or expropriation. All the effects complained of by the applicant stemmed from the reduction of the possibility of disposing of the property concerned. Those effects were occasioned by limitations imposed on the right of property and from the consequences of those limitations on the value of the premises. However, **although the right in question lost some of its substance, it did not disappear**. The effects of the measures involved were not such that they could be assimilated to a deprivation of possessions. The Court observed that the applicant neither lost access to the land nor control over it and that in principle, although it became more difficult to sell the land, the possibility of selling subsisted.

24. The above three cases may be contrasted with the following example of de facto deprivation. In *Papamichalopoulos v Greece* (1993) 16 EHRR 440, the applicants owned a piece of land in Greece, which was transferred to the Navy Fund during the dictatorship established in 1967. After democracy had been restored, the authorities recognized the Applicants as the land owners and proposed an exchange scheme for that piece of land. Nevertheless, no suitable land was ever nominated for the exchange. The applicants could not restore their land and were not awarded any compensation. Since the applicants were unable either to make use of their property or to sell, bequeath, mortgage or make a gift of it and they were even refused to access to it, the European Court held (at para 45) that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions.

American Jurisprudence – doctrine of regulatory takings

25. Under the U.S. Constitution, protection of property right is provided for under the Fifth Amendment and the Fourteenth Amendment. The Fifth Amendment provides that "..... nor shall private property be taken for public use, without just compensation." Under the Fourteenth Amendment, it is provided that "..... nor shall any State deprive any person of life, liberty, or property, without due process of law ..... ."

26. Traditionally, US courts limited "taking" to situations where the government expropriated property or physically occupied it. However, the landmark case of *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) (cited by Hartmann J in *Fine Tower Associated Ltd v Town Planning Board* (see para 54)) introduced the doctrine of regulatory takings (similar to the notion of de facto deprivation under European jurisprudence). The current rule on regulatory takings, however, was laid down by the Supreme Court in *Penn Central Transportation Co. v City of New York* 438 US 104 (1978) (cited by the Court of Appeal in *Kaisilk Development Ltd v Urban Renewal Authority,* at 921 E-J).

27. In *Pennsylvania Coal Co. v Mahon*, Pennsylvania Coal Co. executed in 1878 a deed conveying rights in the surface of a parcel of land. By the terms of the deed, the company had the right to mine under the surface and the grantee assumed all the risk of subsidence caused by the mining. In 1921, the Pennsylvania legislature enacted the Kohler Act, which prohibited mining in a way that would cause the subsidence of a structure used for human habitation. The grantee of the deed attempted to use this new Act to restrict Pennsylvania Coal from mining under their surface land. The US Supreme Court held that the Act was unconstitutional. Justice Holmes opined that the regulation of property would be recognized as a taking **if it went too far**. He concluded that the Pennsylvania Act was a taking because it made it **commercially impracticable** to mine certain coal.

28. In *Penn Central Transportation Company v City of New York*, the New York City adopted a Landmarks Preservation Law in 1965. By the time the case reached the Supreme Court, 31 historic districts and over 400 individual landmarks had been designated including the petitioner's property, the Grand Central Terminal. Penn Central challenged the denial of its application for permission to construct an office building atop the Terminal. The question presented to the Supreme Court was whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by the Grand Central Terminal had taken the petitioner's property in violation of the Fifth and Fourteenth Amendments to the US Constitution. The Supreme Court found that the application of New York's Landmarks Preservation Law was not a taking. It emphasized that the Law **did not deny the owners all profitable use of the building** and **had not even precluded all development of the air rights above the building**. It also found that designating the building as a historic landmark had the effect only of decreasing the value of the property and the loss could be mitigated if the petitioner sold its transferable development

rights.

29. *Penn Central* may be contrasted with *Lucas v South Carolina Coastal Council* 505 US 1003 (1992). In the *Lucas* case, the South Carolina Legislature enacted in 1988 the Breachfront Management Act which barred Lucas from building any permanent habitable structures on his land. According to the state trial court, the Act had the effect of making his land valueless. The Supreme Court of South Carolina found Lucas' planned building to be public nuisance and ruled that the State's police power allowed the government to stop him without paying compensation. The US Supreme Court disagreed and found that a regulation that prohibited **all economically beneficial or productive use of land** to be a taking per se.

30. It thus is clear that, at the very least, there is not a regulatory taking when the government's action leaves **reasonable economically viable use** of the property. (see Chemerinsky, *Constitutional Law : Principles and Policies* (2nd Ed, 2002) p 624) A number of US Supreme Court decisions in the area of planning control are particularly relevant. In *Euclid v Amber Realty Co.* 272 US 365 (1926), a tract of vacant land was zoned for industrial uses and had a market value of about $10,000 per acre. The land was rezoned so that it could be used only for residential purposes, and its value was reduced to about $2,500 an acre. The Supreme Court rejected a due process challenge to the revised zoning ordinance. In *Goldblatt v Town of Hempstead* 369 US 590 (1962), a city's zoning ordinance prevented further excavation of a stone and gravel quarry that had been in operation for over 30 years. The Supreme Court rejected the takings claim because there was no evidence which even remotely suggested that prohibition of further development would reduce the value of the lot in question. The fact that the ordinance deprived the property of its **most beneficial use** did not render it unconstitutional.

31. In *Agins v Tiburon* 447 US 255 (1980), the Supreme Court rejected a takings clause challenge to a zoning ordinance that required that property be used for single family homes rather than multiple family dwellings. Whereas previously the owners might have constructed apartment or condominium buildings, the City of Tiburon adopted a zoning ordinance limiting construction to single family homes. The effect of the ordinance was to substantially reduce the value of the property. But the Supreme Court concluded that there was not a taking because the owner still had **reasonable economically viable use** of the property.

32. In *Palazzolo v Rhode Island* 533 US 606 (2001), Palazzolo formed a company to purchase and develop coastal property in Rhode Island. After several proposals for development were rejected by the state, the corporation stopped functioning and ultimately was dissolved under the state's law. Palazzolo was deemed the owner under the terms of this law. Subsequently, he presented additional proposals for development, which were denied by the Coastal Commission. He sued claiming a taking because the government was preventing all development of his property. The Supreme Court found that there was not a taking when environmental protection laws prevented development of property **because some economically viable use remained**. Although coastal protection laws prevented most development of the property, the owner was still allowed to build a residence on an 18-acre parcel worth about $200,000. This was enough to preclude a finding of a regulatory taking even though far more valuable developments were prevented.

Summary

33. It can be seen from the cases discussed above that the European Court of Human Rights has, since the case of *Pine Valley Developments Ltd*, adopted a high threshold in considering whether a de facto deprivation exists for the purpose of Article 1 of Protocol No.1 of the European Convention of Human Rights. The European Court has been very cautious about accepting that a de facto deprivation has been established. It is clear that the European Court would find a de facto deprivation if the property is left without any meaningful alternative use[1] (see para 19 above). However, if the right in question has only lost some of its substance, but has not disappeared, there will not be any de facto deprivation. The European Court would take into account whether all reasonable manner of exploiting the property has disappeared or whether any

[1] In *Pine Valley Developments Ltd*, the European Court also considered (at para 56) that, although the value of the site was substantially reduced, it was not rendered worthless, as is evidenced by the fact that it was subsequently sold in the open market. This aspect of the case is noted in Leigh-Ann Mulcahy, *Human Rights and Civil Practice* (2001) para 16.72. However, this aspect of the case, i.e. whether the property in question was rendered worthless, has not been further developed in the subsequent cases such as *Matos e Silva, Lda and Others v Portugal* and *Elia Srl v Italy*. It would be prudent to wait and see how this aspect of *Pine Valley Developments Ltd* would be developed in later decisions of the European Court before this aspect of the case be relied on as a separate ground for deciding whether there is de facto deprivation.

possibility of selling the property still subsists. (see para 21 and 23 above)

34. As regards the position in the U.S., since the US Supreme Court decision in *Penn Central Transportation Co*., it seems very difficult, in particular in the area of planning control, to persuade the Supreme Court that restrictions on use of property constitute a taking (a notion similar to deprivation) unless the restrictions have denied all economically viable use of property, as was the situation in *Lucas v South Carolina Coastal Council* (see para 29 above). There would not be a taking if the owner still has reasonable economically viable use of the property (see para 31 and 32 above).

35. In the absence of authoritative local jurisprudence on the question of de facto deprivation, it is very likely that Hong Kong courts would give due regard to the jurisprudence developed by the European Court of Human Rights and the US Supreme Court in the light of the CFI's comparative approach in the case of *Fine Tower Associates Ltd*. Hong Kong courts would likely refuse to find that a de facto deprivation exists unless the property affected is left without any meaningful alternative use or the restrictions have denied all economically viable use of the property.

Legal Policy Division
Department of Justice
February 2006

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Annex B

Fair Balance Test

The legislative amendments do not amount to formal or de facto deprivation for the purposes of BL 105. They have constituted an interference with or control of the property rights of owners in the poultry affected. There is a further question, therefore, as to whether such interference or control would satisfy the fair balance test should SAR courts apply it in non-deprivation cases under BL 105.

2. The term "in accordance with law" in BL 105 indicates that the property rights protected are subject to restrictions provided by the law and which are consistent with the Basic Law.

3. Although local courts so far have not formally embraced the "fair balance" test developed under European jurisprudence, it would be prudent to apply this test as an implicit requirement of BL 105 for interference with private property rights. Under this test, any interference with property rights must strike a fair balance between the demands of the general interest of the society – which any interference with property rights must aim to serve – and the requirements of the protection of the individual's rights. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

4. Where property rights are concerned, states have a considerable margin of appreciation in determining the existence of a problem of general public concern and in implementing measures designed to meet it. In certain areas such as housing, the European Court and Commission have stated that they will only intervene where a State has exercised its judgment in a manifestly unreasonable way. The availability of alternative means of achieving an aim does not of itself render the contested legislation or act unjustified, so long as the method chosen remains within the state's margin of appreciation. In *Mellacher v Austria* ((1989) 12 EHRR 391 (para 53)) the Court states that :

> The possible existence of an alternative solution does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of

appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.

5. It is clear that the legislative amendments aim at banning backyard poultry is in the interests of safeguarding public health. Past incidents of avian influenza outbreaks in poultry in the Mainland, Asia and other parts of the world showed that many outbreaks started in backyard farms where there were little or no effective means to prevent wild birds (which could be infected with avian influenza viruses) from direct contacts with domestic poultry. Besides, the recent surveillance conducted by the Agriculture, Fisheries and Conservation Department has detected H5N1 in different species of wild birds which increase the chance of cross infection with live poultry reared at backyards of households. Unlike licensed farms, there is no biosecurity arrangement nor systematic vaccination for poultry to prevent the outbreak of avian influenza hence backyard farming is a huge threat to public health.

6. The Administration is of the view that the legislative amendments satisfy the fair balance test for the following reasons :

(a) The legislative amendments serve to control a possible source of the H5N1 virus.

(b) Owners of the poultry affected are prohibited to keep the poultry unless they are exempted or have obtained an appropriate licence under the relevant legislation.

(c) The legislative amendments are reasonable in order to ban backyard poultry keeping as backyard poultry keeping are found to be the source of many avian influenza outbreaks took place in the Mainland, Asia and other parts of the world in the past. Most importantly, a dead chicken kept by an individual household in a rural village in Sha Tau Kok was tested to be H5N1 positive on 1 February 2006. This indicates that the threat of an avian influenza outbreak

arising from backyard poultry keeping in Hong Kong is imminent and that swift action is required to eradicate the risk factor.

Legal Policy Division
Department of Justice
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