

CB(1) 1163/08-09(01)

TEMPLE CHAMBERS

16TH FLOOR, ONE PACIFIC PLACE
88 QUEENSWAY, HONG KONG
TEL : 2523 2003
FAX : 2810 0302

The Legislative Council Panel on Environmental Affairs

26th March 2009

Attn: Clerk, Miss Becky Yu,
By hand and by fax no: 2869 6794

Dear Sirs,

Re: Failures of the New Nature Conservation Policy and the Sha Lo Tung Project

1. The failure of this policy to achieve conservation for Priority Areas is exemplified by the failure to comply with the EIA Ordinance and the Sha Lo Tung case.
2. It has been found that the Authorities failed to comply with the EIA Ordinance. The Sha Lo Tung Project, consisting of road, sewage, columbarium and conservation was a Project which included a Conservation Area and hence was a Designated Project under Section 4 and Schedule 2 Section Q. Enclosed are copies of the correspondence:
 - a. my letter 2nd October 2008 to the Secretary of the Environment, Edward Yau with attachment extract from EAR,
 - b. interim reply 10th October 2008 from EPD which promises a substantive reply,
 - c. my reminder to Edward Yau, 8th January 2009.
 - d. There has been no reply received to date.
3. Despite this failure, Paragraph 8 of the EPD/AFCD Paper CB(1) 1123/08-09(06) continues to mislead LegCo. The definition of Designated Projects in Schedule 2 Section Q is not based on "the scope of the proposed works" but whether the Project includes a Conservation Area. My letter reveals that
 - a. Government has acted contrary to the EIA Ordinance,
 - b. Governance and conflict of interest errors which have emerged.
4. The failure to apply the Ordinance in the context of a conflict of interest results in
 - a. facilitation of the development,
 - b. removal of the safe-guards provided under statute,
 - c. a non-statutory EAR of Sha Lo Tung which was below the standard required for a statutory EIA,
 - d. removal of public transparency and public participation in the Statutory process, instead there is an unknown and discretionary administrative process behind closed doors, and
 - e. no institution is responsible for protecting the environment by enforcing the EIA Ordinance and its process.
5. Legco has been misled when it was told that the Ordinance did not apply. This must be corrected and withdrawn. However Paragraph 9 of the EPD Paper which indicates that an EIA under the Ordinance may be required is a helpful first step but this must be made into a clear commitment, enforced and followed up.
6. Other aspects of concern. The Review highlights the SSSI. It is encouraging that 2 new places have been zoned but SSSI in Hong Kong have been the subject of review for years but still fail to follow international principles and the Ratcliffe Criteria and

principles upon which the concept was based, and the guidelines from the Nature Conservancy Council. The current HK practice is arbitrary and non-scientific. This is a complicated subject which requires specialized review and public consultation.

7. Poor enforcement. When clear examples of countryside destruction take place the enforcement is spread for example, between DLO for land damage and excavation, EPD for earthworks within the EIAO, AFCD for vegetation damage and PD for land use. Thus the results are not co-ordinated and usually no enforcement action is taken for alleged lack of evidence. Past experience shows that it is the public which has to tell the departments what has happened and what each department is doing or should be doing. A pro active professional approach to environmental crimes in the countryside is needed as sometimes these are done when unsuitable property developments are being planned.
8. I look forward to your acknowledgement and response.

Yours sincerely,



Ruy Barretto S.C.

[7534.rb]

TEMPLE CHAMBERS

16TH FLOOR, ONE PACIFIC PLACE
88 QUEENSWAY, HONG KONG
TEL: 2523 2003
FAX: 2810 0302

Mr Edward Yau
Secretary for the Environment
Environment Bureau
46/F, Revenue Tower
5 Gloucester Road
Wanchai
Hong Kong

2nd October 2008

Dear Mr Yau,

Re: Sha Lo Tung and the failure to comply with the
Environmental Impact Assessment Ordinance, Cap 499

1. I have been advised to send to you direct my comments and objections letter together with this covering letter so that you are personally aware of the errors that have occurred and the solutions to the current situation. Most seriously, this decision making will be seen in the context of Government's Commitment to "facilitating" the Project which is asserted by the Proponent in its EA, at Overview page 3, Part X, (copy enclosed). Poor governance combined with errors in law cast doubt on the past and future decision making process in the Sha Lo Tung case.
2. The Private-public Partnership Scheme is flawed because it contributes to this poor result as follows. It introduces a conflict of interest into the decision making process for nature conservation. The conflict arises because the Administration, in particular the Environment Bureau, becomes a partner with the developer to facilitate a project in conservation areas although the EPD should be the regulator who impartially upholds the law relating to protecting the environment. To make matter worse, the Permanent Secretary of the Bureau, Anissa Wong, is also the Director of Environmental Protection.
3. This creates a situation conducive to poor governance, wrong decisions and allegations of collusion.
4. In consequence errors have been made in this case. EPD as part of this conflicted process and a member of the PPP Task Force has failed to assert that the Project is a Designated Project and demand compliance with the EIA Ordinance. In consequence a process detrimental to the conservation purposes of the policy is facilitated.
5. As a result there is no transparent statutory process whereby errors made in secret meetings to the detriment of the conservation purpose can be revealed to the public. The safeguards of the EIA Ordinance have been avoided. This is poor governance, especially in such a controversial project with a history of Government error in favour of development.
6. Further to my Comments of 3rd September 2008, and subject to the limited amount of information available so far, the legal situation is summarized herein. There has

been a failure to consider that the Project, which consists of at least 3 components, is partly in conservation areas and thus is a Designated Project under Section 4 and Schedule 2 Part Q.1 of the EIA Ordinance Cap.499.

- (a) In consequence there have been failures to apply for a Study Brief under Section 5 and other requirements under the Ordinance.
 - (b) In consequence a voluntary EA Report has been issued but which does not meet normal EIA TM requirements.
 - (c) There has been no process which can lead to a hearing in which the public can be heard on the deficiencies of the Report.
 - (d) The result will be a Project the impacts for which will not be statutorily assessed, regulated or enforceable to the detriment of the public interest in conservation of the Sha Lo Tung area and the nearby Country Park.
 - (e) This is because there has been a failure to comply with the EIA Ordinance.
7. **Errors in Law.** In order to meet the Government Policy Criteria to be a PPP Scheme Project, it has to be a Project as defined in the Policy, not a series of separate works. So the works are packaged into the Project, as the Proponent has done in the Project Description and Project Site definitions in the Environmental Assessment (EA). The EA Project Description at EA 3.1 **states the Project has 3 components**, the Ecological Reserve, the building Development Site (at the entrance to the valley abutting the SSSI streams,) and the Road (which has the Sewer along this alignment etc). The EA defines the Project Site at 4.8 in similar words.
8. **The Guide to Application for Pilot Conservation Proposals under Public Private Partnership** issued by ETWB December 2004, ie the PPP Guide, states under the "Nature of Projects."
 "1.2.2 Developments at an agreed scale will be allowed at the less sensitive portions of a site PROVIDED THAT the proponent undertakes to conserve and manage the rest of the site that is ecologically more sensitive on a long-term basis." Applied to this case this means that the PP Project is the WHOLE Site, not just the pieces in the valley and conservation areas. On this definition the whole Site comprises at least the conservation areas in the valley and the allegedly less sensitive ridge top building site at the entrance. The PPP Application Documents would confirm this approach but we do not have these. The Project Description and Project Site definition in the EA are clear anyway.
9. The PPP Guide states at 1.2.3 "To implement a selected pilot PPP project, the proponent will still be required to fulfil the statutory requirements for the development, which may include application for change in land use zoning or application for planning permission where appropriate in accordance with the Town Planning Ordinance, and application for an environmental permit under the Environmental Impact Assessment Ordinance." So the expected norm of the PPP Policy is to comply with the Ordinances. The rule of law is expected to be followed, not subjective preference. "Facilitating" should not be permitted. The Government and EPD under law and normal governance principles is the regulator and enforcer and not a partner in any legal sense. At this stage the Government must not be seen to be giving a facilitating hand to speculators and developers of rural lands in or near conservation areas by means of the PPP Scheme.

10. The EIA Ordinance is Project based. The Proponent packages the works or components and site into a Project, because that is what the EIA Ordinance in Section 4 and the TM requires. Then you have to look at the EIA Ordinance to see how it applies. Schedule 2, Part Q.1 in essence says **All projects including new access roads, sewers, earthworks etc other building works wholly or partly in conservation areas are Designated Projects, except for some common sense exceptions which are usual works in our countryside, such as minor works, foot paths, and some things done by Country Parks Authority.** Please note that Part Q.1 consistently with Section 4, and throughout the Technical Memorandum, deals with the components on a Project basis, not on a pieces of work basis, so therefore Q.1 states "All projects...wholly or partly in...conservation area." etc, it does Not say... "All works...wholly or partly in... conservation area" etc.
11. Thus the definitions of The Sha Lo Tung Project cover areas both inside and outside the conservation areas and thus make the Sha Lo Tung Project a Designated Project as follows:
- Definition of the Project Site as per the PPP definition, contains proposed Buildings (and the beginning part of the Sewer, and a short part of the road) in the allegedly "less sensitive portions of a site" and the Ecological Reserve in "the rest of the site that is ecologically more sensitive";
 - Definition as per the EA Project Description at 3.1 and EA Project Site at 4.8 is bigger in area, having the 3 components package, which has the above and additionally the rest of the 2 km Sewer and the 2 km Road as well. (The sewers may actually be a 4th component.)
 - Thus the PP Project Site and the EA Project Description and Project Site cover and include some areas which are conservation areas and some areas which are not.
12. Under the EIA Ordinance, if the Project is wholly or partly in conservation areas, then it is a Designated Project. The Project Site defined following the PPP definition and as defined in the Project Description and Project Site in the EA, the Project as defined contains the ridge with other Building works and part of the Sewer which very clearly make it a Designated Project. If one uses the package per the EA Project Description /Project Site it includes the rest of the 2 km of sewer, so all the more reasons for the Project being a Designated Project.
13. The road may be a Designated Project additionally because it is either a new access road under Schedule 2 Part Q, or "improvement to existing road" under Schedule 2 Part A.1 which per the Interpretation schedule 1 "means a physical addition, alteration or realignment to existing roads which results in an adverse environmental impact as defined in the Technical Memorandum". This proposed road clearly does result in the Environmental Changes and Effects as listed in Annex 3.
14. Contradictory approaches have been used to avoid the EIA Ordinance.
- At the PPP vetting stage somebody must have vetted the Project Proposal and found it was a PPP Scheme case because the Project Site as a whole had some area to be conserved and some area to be developed.
 - At the EIA vetting stage, if this ever occurred, despite the PPP Scheme and despite the EA Project Description and Project Site of 3 components, it seems

that somebody wrongly now 'broke apart the Project Site package', disregarded the EIA Ordinance "All Projects...." or 'projects based' approach, and instead wrongly considered the 'building piece of work' in isolation from the Project. There has been a failure to see that the actual Project really consisted of at least 3 components. This was wrong in law and contrary to the facts.

- (c) It is contrary to EIA principles and practice to NOT have a statutory assessment process when the Project has building works etc and they are up hill and right next to the SSSI stream conservation areas.
15. It is not known how Government became so mistaken. Can you explain how the decision or errors came about? With hindsight, because we are able now to compare and see together and in context what was said in LegCo together with the PPP Guide and the EA Project Description, we can understand the wrong approach used in the explanation by Anissa Wong to Mrs Anson Chan in LegCo on 28th April 2008 at para 9. Anissa Wong said that the Columbarium complex was not a Designated Project under the Ordinance and said there were no works to be undertaken in the ecologically sensitive sites in the SLT valley. She revealed the failure to follow the Project based approach in the Ordinance. She has treated the Columbarium etc building works as separate from the Project consisting of 3 components. She was wrong. The Project Description shows there is only ONE Project with 3 components, not split up into 2 or 3 separate stand alone projects. If she had been properly advised, and knowing by then that the Project Description and Project Site definition had 3 components, Anissa Wong should have told LegCo that the Project consisted of the building works and conservation works and road/sewer works, the Project covered or contained some conservation areas, and thus the Project was a Designated Project. Mrs Anson Chan and LegCo have been misled.
16. The Ordinance is not so unrealistic as to require that for example the sewer works part of the Project have to be actually inside the SSSI before it is a Designated Project requiring a statutory protection process. Obviously this would lead to abuse through a loop hole where a developer of a site routes a sewer works just beside but outside the SSSI, but which could just as easily lead to pollution of the SSSI. Instead the Ordinance and its Technical Memorandum is based on Projects, not works, and states that all Projects wholly or partly in conservation areas are Designated Projects and have the statutory process to protect the environment. In this case the Ordinance ensures that the impact of the Project as a whole is assessed, not just the impact of sewers and buildings upstream. It ensures that the whole of the impacts are statutorily considered and enforced in perpetuity.
17. **Errors in Governance.** This inconsistent and contradictory approach provides a significant and unfair advantage for the Project Proponent who therefore had avoided the transparent legal process of public consultation and EPD statutory vetting following the legally binding Technical Memorandum
- (a) by means of applying for a Study Brief from the EPD under TM Section 2 Annexe 1,
 - (b) by means of submitting an Application in a proper form with a Project Profile which complies with the TM Section 3 Annex 3, and
 - (c) which leads to consultation and publication to ACE and the public, so that a suitable and binding Study Brief is prepared and imposed by EPD.

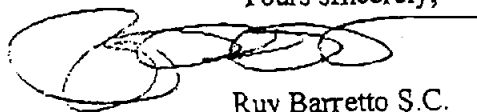
- (d) This leads to a suitably designed EIA Report which should deal with the real impacts of the Project as demanded by the Study Brief.
 - (e) Only after this is reviewed by the public will the EPD decide on rejection or acceptance or impose appropriate conditions in the Environmental Permit for the Project.
 - (f) Then there can be statutory hearing to which the public has access and see that the matter is fairly and competently handled.
18. By avoiding the Ordinance there are no enforceable safe guards for vetting the Project Profile, making legally binding the terms of the Study Brief, so as to achieve an EIA which meets the TM standards. These have been sidestepped.
- (a) There are no statutory conditions to be imposed and then enforced via the statutory Environmental Permit. Thus the developer achieves minimal restrictions and enforcement afterwards is difficult or unlikely as there is no statutory back up.
 - (b) Instead of conditions imposed and enforced by statute, at best there are negotiated "pledged measures" which are voluntary and only civilly actionable.
 - (c) The EPD regulator, instead of regulating and enforcing, becomes the facilitator.
 - (d) Normal statutory safeguards are lost. Instead of clear enforcement, compliance becomes voluntary, negotiable and uncertain and depending on the Proponent's goodwill, instead of depending on the EPD acting in the public interest per the Ordinance.
 - (e) By avoiding the Ordinance the Public and Public Interest is being removed even further from the so called Public Private Partnership.
19. For Government officials there are no statute based decisions to make as to accept or reject the EIA, no hearings, no enforcement, less responsibility, and without the statute based scrutiny or challenge to the flawed pilot PPP. In consequence, the public has been deprived of the clear statutory safeguards. The Project will carry on being facilitated depending on the hope that the errors will continue to get past ACE, get past LegCo and get facilitated through TPB and so on, with no chance for proper scrutiny of the evidence in a fairly and transparently conducted hearing as in the Long Valley KCR Case EIA Appeal Board No 2 of 2000.
20. There has been a material error in law and administration which could have major impacts on Sha Lo Tung. If other cases under PPP are piloted with a precedent like this, there will be adverse consequences for the future conduct of habitat conservation. Hong Kong will fail our National and international obligations for conserving a place meeting world standards for heritage, outstanding natural beauty, and biodiversity. Hong Kong will endanger a site of national importance under the Convention on Biological Diversity. Our environmental governance will have no credibility.
21. Consequences of the Errors. I have been advised that the Environmental Assessment document is inadequate or below standard in material respects and would be rejected if this were a normal and fairly conducted EIA Report done under the TM and Ordinance.

- (a) Instead of being an objective assessment, parts of the document read like a promotion exercise.
- (b) Technically it is deficient. The Management Plan does not meet normal EIA standards and would be rejected.
- (c) The birds, for example are inadequately considered and without reference to basic texts.
- (d) The moths are not considered and yet I am informed by Hong Kong's leading expert that there is a unique suite of species in Sha Lo Tung unlike anywhere else.
- (e) These and other issues show that the document cannot be relied upon for decision making or the drafting of conditions to protect the environment and subsequent action.
- (f) My Comments only noted some serious errors, such as the failure to evaluate the "no- go alternative" as per TM Ecological Assessment Annex 16 at 5.4, or the failure to consider the impact on walkers and hikers on the major route for Visual Impact Assessment as per TM Annex 18 at 7.2.
22. As it is seen by responsible persons in this field, the only solution is to follow the Ordinance, state that having seen the EA Project Description and Project Site definition, the legally correct and environmentally responsible solution is to require the Proponent to submit a Project Profile and apply for a Study Brief as defined by the TM under Section 5 and permit the EPD do their professional job as usual.
23. **Damage to the Nature Conservation Policy and good governance.** The present situation whereby the developer gets to write their own terms of reference and contractual terms for the environment instead of having them professionally and independently imposed by EPD via the Ordinance, will be seen together with the EA's assertion that Government's Commitment and role in the Private Public Partnership Scheme includes "**facilitating departmental processing of planning, environmental and building submissions on conservation and institutional development proposals**" see EA at Overview page 3, Summary Points Part X. From this it appears that a private developer has secured a commitment from Government to facilitating this Project. Without knowing what has been really happening, questions will be raised as to whether this indicates evidence of unacceptable collusion. The developer having cast the Government as being an "active partner", expects the Government at various levels and departments "**to facilitate administrative approvals and ExCo endorsement**" as its part of the PPP role. **This is unacceptable as I am sure you will agree.** Good governance in these cases requires the Government to be clearly seen as the impartial Regulator operating under the various Ordinances, not as the Facilitator operating under the developer's influence and partnership. The Policy should not be seen as only being feasible because it depends on "facilitating" to permit unsuitable developments in beautiful and rich areas contrary to the Technical Memorandum and normal Planning Standards and Guidelines.
24. **The way to mitigate this poor impression is through using the proper transparent system provided by law.** Let us make use of the Ordinance and do things legally and professionally following the rule of law rather than official or subjective preference and facilitation. Let us follow the evidence once it has been obtained by the statutory and fair process, rather than via some subjective non statutory promotional type of

material. This is all the more important bearing in mind that this is supposed to be a pilot project for the Policy. Let us get it right.

25. Now that you are aware of these worrying errors of law and errors of governance, Sha Lo Tung is far too important both scientifically and far too beautiful to be the subject of mistakes under your jurisdiction which will damage it forever. The only course which is in the public interest is to sincerely deal with the mistake, take the lead to use the Ordinance and process this case as a Designated Project in the normal way.
26. I think you will realize that if there is no correction of the error by yourself, then others will take up and consider the matter. For example the Ombudsman upheld the complaint in the 1st SENT Landfill in Country Park case OCAC 35/93 in December 1993. It is better to deal with it without delay by yourself.
27. It is not good administration to leave mistakes to cause other problems later on. Within 2 weeks, please could you let me know
- Whether you agree that this Sha Lo Tung Project is and should be a Designated Project, and if not, the reasons why you disagree.
 - What actions you propose to take to remedy the situation.
 - The legal advice you received on the subject so we can see whether the remedy is acceptable.
28. At this stage, I suggest that you freeze the Project, inform LegCo, ACE and the public, and announce the intention and steps to properly comply with the EIA Ordinance in the normal way and by so doing demonstrate that that there will be no "facilitating" of the Project as asserted by the EA Overview Summary Points at Part X. This actual or potential conflict of interest situation combined with errors in law are serious governance failings. Right thinking persons will question whether the decision making process has been affected. The development of Sha Lo Tung has already seen evidence of Government errors in the past, eg Sha Lo Tung Judicial Review, MP 273 of 1992, decision quashed by Consent Order dated 13th April 1992. A pattern of errors in favour of development in this special place is regrettable. All this contradicts the true purpose of the Nature Conservation Policy. Failure to do these things properly will lead to the impression that our natural heritage is being abused to facilitate decisions which are flawed in principle and fact, and wrong in law.
29. In order to deal with this in a satisfactory way I would look forward to discussing this in person with you at a time which is mutually convenient. In any event, I look forward to your early reply.

Yours sincerely,



Ruy Barretto S.C.

[7372.rb]

Pilot Project for Public-Private Partnership Conservation Scheme, Sha Lo Tung Valley, Tai Po

- preservation of selected Hakka Houses in Cheung Uk Village to enhance public appreciation of cultural heritage within the Valley.

Designating Sha Lo Tung Valley as a "PPP Project" under the new Conservation Policy establishes the institutional partnership between the SLTDC, the Government and Green Power for conservation, educational and recreational activities in the Valley and the necessary arrangements for upfront and long term funding of such activities.

- (vii) Injection of HK\$120 million by the SLTDC to the SLT Conservation Trust Fund to provide:
- Annual income would be drawdown from the interest generated from the Conservation Trust Fund to cover recurrent expenditure on conservation operations in the Valley.
- (viii) More importantly, at the end of the first ten years' of conservation operations by Green Power and management by the SCMB, the SLTDC will handover all facilities built in the SLT Ecological Reserve to the Sha Lo Tung Management Board (SCMB).
- **Green Power's Commitment to Conservation Management & Education**
- (ix) Green Power (the NGO) accepts long-term management responsibility for the SLT Ecological Reserve, subject to upfront funding of facilities and infrastructure costs and establishment and management of a conservation trust fund with an invested capital of HK\$120 million to cover annual operational costs of the conservation management plan. Green Power's duties include conservation management, resource management and nature education within the Valley.
- **Government's Commitment to Implementation of the New Conservation Policy**
- (x) The Government plays an equally important role in the Private-public Partnership Scheme in:
- To facilitate administrative approvals and ExCo endorsement;
 - Facilitating departmental processing of planning, environmental and building submissions on conservation and institutional development proposals;
 - Early completion of the land exchange to the SLTDC and handover of the SLT Ecological Reserve to the SCMB;
 - Realistic assessment of premium payable on development concessions granted;
 - Co-ordinating access road improvements to single track access standard; and
 - Facilitating temporary access to cater for peak flows on festival days.

Time frame for Implementation of Conservation Management

- (xi) The Project can be implemented immediately following EXCO endorsement under the new Conservation Policy, approval of amendments required to the Sha Lo Tung Outline Zoning Plan and completion of land exchange and environmental assessment procedures. It is intended that the SLT Ecological Reserve be granted to the Sha Lo Tung Conservation Management Board (SCMB). In doing so, long-term responsibility for the conservation of the Valley will lie with the SCMB rather than a private company i.e. the SLTDC. The SLTDC will be granted only the Development Site.

TEMPLE CHAMBERS

16TH FLOOR, ONE PACIFIC PLACE
88 QUEENSWAY, HONG KONG
TEL : 2523 2003
FAX : 2810 0302

Mr Edward Yau
Secretary for the Environment
Environment Bureau
46/F, Revenue Tower
5 Gloucester Road
Wanchai
Hong Kong

8th January 2009

Dear Mr Yau,

Re: Sha Lo Tung and the failure to comply with the
Environmental Impact Assessment Ordinance, Cap 499

1. Further to my letter of 2nd October 2008, I was informed by your reply of 10th October 2008 that you will be giving me a substantive reply in due course.
2. I am looking forward to receiving a detailed and properly considered reply to my letter, in particular the questions raised in paragraph 27.
3. I sincerely hope that having taken advice, you can now realize that this is a Designated Project under the EIA Ordinance and therefore the Ordinance must apply and so the developer or proponent must comply if the Project is to go ahead.
4. I look forward to your reply to my letter of 2nd October 2008.

Yours sincerely,



Ruy Barretto S.C.

[7484.rb]