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50th ANNIVERSARY

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Your Ref: ( ) in PELB (UR) 70/41 110 (99)

1st December, 1999.

The Secretary for Planning, Environment
and Lands Bureau
The Government of the HKSAR
9/F Murray Building
Garden Road
Hong Kong

Attn: Mr. J.J. Austin

Dear Mr. Austin,

Re: Public Consultation on the Urban Renewal Authority Bill

Further to your letter of 22nd October 1999, we are pleased to attach herewith the comments of the Hong Kong Bar Association on the White Bill.

The Bar takes a keen interest in this important subject.

We should therefore be grateful to receive the administration's responses on the particular points we raise, ~~any~~ amendments that may be proposed and the progress of the Bill generally.

Would you also be so kind as to place a copy of our paper before the Chairman of the relevant Bills Committee.

Thank you for your kind attention.

Yours sincerely,

Ambrose Ho
Acting Hon. Secretary

NK/al

HONG KONG BAR ASSOCIATION
COMMENTS ON
URBAN RENEWAL AUTHORITY BILL

Introduction

1. This Bill has been relatively well-publicised. It has a number of political aspects, one or two of which may already be known to Government. We note below the relevant legal issues upon which the Bar wishes to comment and make recommendations.

A. Ss. 5 & 6: Purposes and powers of the Authority (URA)

2. The statutory purposes for which the URA is established are set out in *s.5* : copy at Attachment 1. Those set out in *s.5(a)(b)(c)&(d)* are unexceptional and tie in with the general "urban renewal" purposes of the Ordinance. However, ***purpose (e)*** is extremely wide and does not necessarily tie in at all with those purposes. No other "purpose" section in the Bill restricts its broad scope.

3. *S.6(1)* firstly empowers the URA to do anything "expedient ..... conducive ..... or incidental to the attainment of [the *s.5*] purposes", - again on extremely broad provision. The second limb of *s.6(1)* purports to restrict the exercise of those powers to the narrower intended effect of improvement "of ..... housing and the built environment ..... by way of development."

4. It seems to me that the non-specific purpose in *s.5(e)* is prima facie objectionable as drawn. The URA, if ordered or assigned an activity or duty by the Chief Executive (after consultation with the URA Board that he has appointed) can engage in "such other activities" and "perform such other duties" as the CE may permit or assign to it.

5. The second limb of *S.6(1)* is, I believe no answer. It appears to me to pose a further unnecessary and awkward issue of construction and *vires*. An express statutory purpose [*s.5(e)*] and the broad express power to do anything to carry out that purpose [*s.6(1)*] cannot generally be fettered by a consequent restriction on the intended effect, as found in the second limb of *s.6(1)*. As drafted, it also appears to be a subjective test for the

URA to decide whether any particular exercise of its powers would fall within the *s. 5* purposes, making such decisions significantly less amenable to judicial review.

6. I also apprehend a further problem with the second limb of *s.6[1]* : improvement by "development" is not necessarily congruent with the URA's statutory purpose in *s.5(d)* of preventing the decay of existing buildings by maintenance and improvement.

Recommendation A

7. The Bar believes that:

(a) if the Administration cannot give a cogent reason for *s.5(e)* or confine it to an express purpose, that subsection seems unnecessary and should go;

(b) similarly, the draftsman needs to take a hard look at s.6(1), both as a matter of legislative scheme and policy, and drafting.

B. <u>"Blight": Resumption and Compensation</u>

8. Three points need to be noted here. Firstly, although the Bill does not *prima facie* affect the *Basic Law* prohibition or the common law presumption against taking without compensation. Hong Kong's various compensation statutes expressly exclude rights to compensation for the lost opportunity of redevelopment by excluding both "hope value" and the value of continuation or renewal of existing government leases or licences, under which many hold land in Hong Kong. The Bill will continue this statutory restriction on compensation to owners; the "development gain" accrues the benefit of the URA and its large developer partners or proxies.

9. Secondly, historically there has never been compensation for planning blight in Hong Kong, unlike other developed countries such as the UK, Australia, New Zealand, Canada or the U.S. In 1995, the Privy Council in *Shun Fung* [1995] 2 HKLR 501 looked askance at this aspect of this area of Hong Kong's law. It found a way to award such compensation to owners of resumed land who operated a business by holding that

losses caused to a business by the "shadow of resumption" fell within *s.10(2)* of the *Land Resumption Ordinance, Cap. 124 (LRO)*. However, *Shun Fung* does not alleviate the lot of a resumed residential owner, notwithstanding the Privy Council's affirmation of the perceived ratio of *Prasad v Wolverhampton*. This is prima facie inequitable and calls for reform rather than extension.

10. In 1992, the Report of the Special Committee on Compensation and Betterment recommended the introduction of a system of blight notices, similar to those used in the UK and elsewhere, by which an owner of land blighted by a statutory plan could compel the government to resume. This proposal was not adopted, except for a small class of owners affected by gazetted resumptions under the *Roads, etc Ordinance, Cap. 370* and the *Railways Ordinance, Cap. 519*. No reason has been forthcoming why this should not also have been extended to other resumptions; residential owners remain without any remedy or compensation for blight.

11. The Bill's proposals may well exacerbate this inequality and have the further undesirable effect of denying residential owners the opportunity to sell in the market to developers seeking to assemble sites by blighting their area up to over 6 years ahead of resumption and, thirdly denying them an opportunity to sell their property at a "fair price". The proposals may also have the further, presumably unintended effect of discouraging smaller developers from assembling sites.

12. The blight effects may occur this way. By *s.18*, every year the URA must submit to the Financial Secretary (FS), for his approval or otherwise, a draft 5 year plan including its programme of proposals to be implemented by way of development schemes (to which there can be no objection) or by way of development projects, in both cases setting out proposed commencement dates, together with a related business plan.

13. It is difficult to conceive that the areas the subject of those proposals will not become known, particularly once approved by the FS. Blight will in practice run at least from around the date of the 5 year plan identifying the area, as the ultimate compensation payable for taking the land thereafter cannot exceed the *LRO* measure, as may be assessed by the Lands Tribunal - *s.24(4)*.

14. Thereafter nothing need be done by the URA for 5 years. It can then publish a project under *S. 20*, after which objections must be made within one month; the URA will then have 3 months to consider and decide whether to seek authority to proceed and pass the matter to SPEL for a decision. Once SPEL authorises the project to proceed as a *S. 23* development project, SPEL has another 12 months in which to recommend resumption to ExCo *[ss. 21(4) and 24(1)]*. The effective blight period could be over 6 years.

15. If the URA's business plan *is* kept secret until the Authority gazettes a project by way of development project there is still no guarantee that there will be no blight. Owners may have only one month to object to URA and URA then has 3 months to pass the matter to SPEL with its own decision for him to consider (*s.21(3)*) but SPEL then has no time limit for his consideration and decision *(s.21(4))*. Only after that SPEL decision does the new 12 months run for SPEL's approval and for URA to ask SPEL to recommend resumption. If the process is speeded up to reduce *URAO* blight for owners of land affected by *ss.20/21* development projects, that will also decrease any incentive for the LDC to pay anything more than *LRO, Cap.124* compensation.

16. In keeping with the position under the existing *Town Planning Ordinance Cap.131 (TPO)*, owners of land affected by a *s.22* development scheme will have only their rights of objection under *TPO*. These objections are rarely successful. Again, *s.24(2)* provides that SPEL's resumption request must be made within 12 months of ExCo approving the URA's scheme plan once prepared (i.e. put up for approval) by the Town Planning Board.

17. Unlike the present LDC, the URA will be under no statutory duty whatsoever to negotiate acquisitions from owners prior to being able to seek resumption. At present, the LDC must offer a "fair and reasonable price" under *S. 15 (3) (b)* of the present Ordinance and SPEL must be satisfied that LDC has done so (if necessary, and usually, taking independent valuation advice) before he can recommend resumption to ExCo - *S. 13 (5)*. In the past, the LDC's offers have been seen to increase dramatically just before LDC went to SPEL to seek resumption.

18. It is this duty, this period and this review which therefore act as a spur for an *ex-gratia* payment by the LDC to owners of interests in land taken or affected by resumption as part of that "fair and reasonable price" offered. Those *ex-gratia* payments, at a well-known fixed rate, often go a long way towards bringing the LDC's payment nearer the value of the property as it would have been but for the resumption ***and*** including a pre-blight development or "hope" element for which no *LRO* compensation may be awarded. There is therefore no incentive under the Bill for URA to hurry along the process until it is ready, nor for LDC or its partners to share any part of the development gain with owners, who will be denied any such share in the LT by the provisions of the *LRO*.

19. The Explanatory Memorandum gives no reason why owners affected by URA acquisition should not continue to benefit from a negotiated purchase prior to resumption, on resumption terms plus the incentive of an *ex-gratia* payment, prior to the initiated of resumption by ExCo. This seems inequitable, notwithstanding that *s.6* of the *LRO* will apply once resumption has been initiated. It is by no means clear that the Director of Lands will continue to offer such terms for URA-requested resumptions when making *S.4A* or *S.6 LRO* offers.

20. As a result of those measures, it is possible to foresee a large increase in applications to the Lands Tribunal, an under-provided judicial organ.

21. It does not seem inappropriate that these new provisions in favour of URA and accelerated resumption for renewal be balanced by a right of blighted owners to compel resumption.

Recommendation B

22. The Bar believes that:

(a) The Bill should provide for a continuing duty upon the URA to negotiate in good faith to purchase land affected by or within a URA project, at a commercial price and as if there were no URA project, up to say 14 days before the date of an application to SPEL under *S.24(1)*.

(b) The legislation should be redrafted to avoid the possibility of long periods of blight and especially 5- or 6-years';

(c) The Administration should take the opportunity to enact comprehensive provisions amending the *LRO, Cap. 124* to provide fair compensation for blight at the same time as its enacting this legislation;

(d) Alternatively to (b) above, the Bill and/or *Cap 124* should be amended to provide for limited compensation for URA project blight (although this might seem unfair to those suffering from, say, *TPO* blight but uncompensated unless resumption takes place);

C. Miscellaneous: Transitional Provisions and Bylaws

23. *S. 30 (8)* provides for an "instant transfer" for existing LDC redevelopment schemes to the new *URA Ordinance* régime. This provision, whilst technically not retrospective, is of similar effect. The existing rights of owners within an LDC scheme area to be offered a "fair and reasonable price" and the requirement for SPEL to be satisfied on independent (usually valuation) evidence that this was so, pursuant to *S.15(3)(b)* and *5* of the *LDC Ordinance* are taken away. In my view this is *prima facie* wrong: those rights had accrued and should not be taken away without compensation. This provision is not referred to or justified in the Explanatory Memorandum. There should at least be a period for the offer system to be wound down during which affected owners can still negotiate and expect to receive a fair price for their property.

24. *S. 29* provides for the URA to make **bylaws** for property it owns or holds. Oddly, while *S. 29 (2) (d)* provides that the bylaws shall be available for purchase, it makes no other provision requiring their publication, even to its own tenants, contractors or occupiers. Why should URA not be required to make its bylaws freely available for inspection? Or to post relevant bylaws on site? As this section presently stands, a visitor to URA property may be prosecuted for an offence under a bylaw which he may never have been able to see unless he paid to buy a printed copy of all bylaws. This is unjust.

Recommendation C

25. The Bar believes that:

(a) that *S. 30 (8)* should be deleted from the Bill to preserve existing rights, at least for a reasonable period;

(b) *S. 29* should be amended to provide for the bylaws to be gazetted as if they were subsidiary legislation and that a copy should in any event be made available for inspection upon request at each of the URA's offices.

1st December, 1999.