

No. S. 51. — It is hereby notified that the following Sale of Crown Land by Public Auction will be held at the District Office, South, Queen's Building, 2nd floor, Hong Kong, at 11 a.m., on Friday, the 16th day of February, 1940.

The Lots are sold for the term of seventy-five years from the 1st day of July, 1898, with the right of renewal for a further term of 24 years less the last 3 days at a re-assessed Crown Rent Serial Nos. 1 to 3 as Building Lots, and Serial Nos. 4 to 12 as Agricultural Lots, subject to the General Conditions of Sale published in Government Notification No. 364 of 1934, Serial Nos. 1 to 3 are further subject to Special Conditions Nos. 2 (a) and (b), and Serial Nos. 4 to 12 are further subject to Special Conditions Nos. 1 (a) and (b), in the above Government Notification.

The amounts to be spent on the building lots in Serial Nos. 1 to 3 in rateable improvements under the General Condition No. 5 are \$1,500, \$250 and \$1,750 respectively.

Full Particulars and Conditions may be obtained at this Office.

PARTICULARS OF THE LOTS.

Registry No.	No. D.D. Lot.	Locality	Boundary Measurements				Contents in Acres or Square feet	Upset price	Annual Crown Rent
			N.	S.	E.	W.			
1	441 106	Tsing I.	As per plan deposited in the District office, South.				2,500 S.F.	\$ 50	\$ ct. 6.00
2	2 577	Mui Wo.	"				435 "	9	.50
3	4 605	"	"				2750 "	55	3.50
4	" 606	"	"				.08 acre.	8	.10
5	2 578	"	"				.06 "	7	.10
6	445 409	Ha Kwai Chung.	"				.13 "	29	.20
7	" 668	"	"				.12 "	25	.20
8	" 670	"	"				.58 "	126	.60
9	451 129	Lo Wai.	"				.18 "	39	.20
10	453 915	I Pe Chun.	"				.28 "	61	.30
11	453 892	"	"				.44 "	96	.50
12	" 893	"	"				.06 "	13	.10

H. J. CRUTTWELL,
District Officer, Southern District

2nd February, 1940.

Figure 3.2 Typical Government Notification (GN) for Sale of Land

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THE SINO-BRITISH JOINT DECLARATION 1984 AND BASIC LAW 1990

The Joint Declaration

The principal reason behind the negotiations that resulted in the signing of this document on 19 December 1984 was the fact that the NT, which comprises 92% of the total land area of the territory, was held on a fixed lease that was to expire on 30 June 1997. Paragraph five of the Introduction to the *White Paper* published by the British government on 26 September 1984 (which coincided with the initialling of the Draft Agreement) inviting public comments on the agreement spells out the background position very clearly:

In the later 1970s, as the period before the termination of the New Territories lease continued to shorten, concern about the future of Hong Kong began to be expressed both in the territory itself and among foreign investors. In particular there was increasing realization of the problem posed by individual land leases granted in the New Territories, all of which are set to expire three days before the expiry of the New Territories lease in 1997. It was clear that the steadily shortening span of these leases and the inability of the Hong Kong Government to grant new ones extending beyond 1997 would be likely to deter investment and damage confidence.

In other words, because of the fundamental basis of the leasehold land system, Britain had no option but to formally ask the PRC that the question of the expiring NT lease be resolved. Keeping Hong Kong Island and Kowloon Peninsula on their own was completely untenable and therefore the issue had to be addressed so that there would be a legal basis for continuing to grant extended land leases.

The Joint Declaration states that the rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the

property concerned, freely convertible and paid without undue delay) shall continue to be protected by law.

The significance of land in the overall negotiations is reinforced by the fact that an entire annex was required to set out in detail how land leases were to be dealt with and to state the new policies that were to apply to the treatment of land leases which were due to expire on or before 30 June 1997. Due to its importance, Annex III is reproduced in full below:

Land leases

The Government of the United Kingdom and the Government of the People's Republic of China have agreed that, with effect from the entry into force of the Joint Declaration, (27th May 1985) land leases in Hong Kong other related matters shall be dealt with in accordance with the following provisions :

1. All leases of land granted or decided upon before the entry into force of the Joint Declaration and those granted thereafter in accordance with paragraph 2 or 3 of this Annex, and which extend beyond 30 June 1997, and all rights in relation to such leases shall continue to be recognized and protected under the law of the Hong Kong Special Administrative Region.
2. All leases of land granted by the British Hong Kong Government not containing a right of renewal that expire before 30 June 1997, except short term tenancies and leases for special purposes, may be extended if the lessee so wishes for a period expiring not later than 30 June 2047 without payment of an additional premium. An annual rent shall be charged from the date, adjusted in step with any changes in the ratable value thereafter. In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, the property is granted to, a person descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the rent shall remain unchanged so long as the property is held by that person or by one of his lawful successors in the male line. Where leases of land not having a right of renewal expire after 30 June 1997, they shall be dealt with in accordance with the relevant land laws and policies of the Hong Kong Special Administrative Region.
3. From the entry into force of the Joint Declaration until 30 June 1997, new leases of land may be granted by the British Hong Kong Government for terms expiring not later than 30 June 2047. Such leases shall be granted at a premium and nominal rental until 30 June 1997, after which date they shall not require payment of an additional premium but an annual rent equivalent to 3 per cent of the ratable value of the property at that date, adjusted in step with changes in the ratable value thereafter, shall be charged.
4. The total amount of new land to be granted under paragraph 3 of this Annex shall be limited to 50 hectares a year (excluding land to be granted to the Hong Kong Housing Authority for public rental housing) from the entry into force of the Joint Declaration until 30 June 1997.
5. Modifications of the conditions specified in leases granted by the British Hong Kong Government may continue to be granted before 1 July 1997 at a premium equivalent to the difference between the value of the land under the previous conditions and its value under the modified conditions.

6. From the entry into force of the Joint Declaration until 30 June 1997, premium income obtained by the British Hong Kong Government from land transactions shall, after deduction of the average cost of land production, be shared equally between the British Hong Kong Government and the future Hong Kong Special Administrative Region Government. All the income obtained by the British Hong Kong Government, including the amount of the above mentioned deduction, shall be put into the Capital Works Reserve Fund for the financing of land development and public works in Hong Kong. The Hong Kong Special Administrative Region Government's share of the premium income shall be deposited in banks incorporated in Hong Kong and shall not be drawn on except for the financing of land development and public works in Hong Kong in accordance with the provision of paragraph 7(d) of this Annex.
7. A Land Commission shall be established in Hong Kong immediately upon the entry into force of the Joint Declaration. The Land Commission shall be composed of an equal number of officials designated respectively by the Government of the United Kingdom and the Government of the People's Republic of China together with necessary supporting staff. The officials of the two sides shall be responsible to their respective governments. The Land Commission shall be dissolved on 30 June 1997. The terms of reference of the Land Commission shall be:
 - a) to conduct consultations on the implementation of this Annex;
 - b) to monitor observance of the limit specified in paragraph 4 of this Annex, the amount of land granted to the Hong Kong Housing Authority for public rental housing, and the division and use of premium income referred to in paragraph 6 of this Annex;
 - c) to consider and decide on proposals from the British Hong Kong Government for increasing the limit referred to in paragraph 4 of this Annex;
 - d) to examine proposals for drawing on the Hong Kong Special Administrative Region Government's share of premium income referred to in paragraph 6 of this Annex and to make recommendations to the Chinese side for decision.

Matters on which there is disagreement in the Land Commission shall be referred to the Government of the United Kingdom and the Government of the People's Republic of China for decision.
8. Special details regarding the establishment of the Land Commission shall be finalized separately by the two sides through consultations.

The establishment of the Land Commission in 1985 gave the PRC a good and lengthy insight into how land was administered in Hong Kong. Arguably it was the organization that operated the most efficiently during the transition period during which time they probably came to understand why Britain had no choice but to formally approach them on the question of the expiring NT lease. It had plenty of work to accomplish starting with the vetting of the legislative changes that were required to implement the policies that had been agreed.

Lease Extensions

The only practical way of extending all the leases in the NT was by legislation. On 21 January 1988, the New Territories Leases (Extension) Ordinance (Cap. 150) was enacted which automatically extended all leases in the NT, with the exception of short-term tenancies and leases for special purposes, from their existing expiry dates until 30 June 2047 without requiring payment of a premium, but with an annual rent to be charged as described in paragraph 2 of Annex III.

On 1 February 1990, the Lands Administration Office issued Practice Note 1/1990 to Authorized Persons, Solicitors and Chartered Surveyors reminding them of the general policy that was to be applied to *the extension of leases not containing a right of renewal in the urban areas*, it reads as follows:

The purpose of this Practice Note is to remove any doubt relating to the general policy on the treatment of Government leases not containing a right of renewal that expire before 30 June 1997 in the urban area and which are not 'short term tenancies' or 'lease for special purposes'. This policy is that such leases will normally be extended beyond their expiry date unless the site is required for a foreseen Government use or other public purpose. There has been no change in this policy since the entry into force of the Sino-British Joint Declaration.

Annex III of the Joint Declaration provides that the term of such leases may be extended, if the lessee so wishes, for a period expiring not later than 30 June 2047 without payment of an additional premium but subject to an annual rent from the date of extension equivalent to 3% of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter. (Prior to the Joint Declaration, if leases not containing a right of renewal were re-granted, this was done on payment of a full market value land premium.) The Joint Declaration enables the Government to extend such leases in the way described above but does not oblige it to do so.

For the purposes short term tenancies are defined as leases which were originally granted for a term of not more than seven years, and special purpose leases are defined as those which contain a permanent prohibition against assignment.¹ There were 842 special purpose leases, granted by private treaty for specific purposes such as public utilities, special industries, schools, welfare facilities, recreational clubs, churches and so on. Each of these leases was examined individually, and virtually all of them were extended, without premium, but on payment of the new annual rent. The very few that were not extended had either ceased to be using the land for the original purpose it was granted, or the land was needed for some known public purpose.

The enactment of this legislation was a significant step in implementing one of the major principles laid down in the Joint Declaration.

The Hong Kong Special Administrative Region Government (HKSARG) currently collects over \$5 billion annually as a result of these revised rents. It is not an insignificant sum that will go some way to compensate for the fact that Britain occupied the NT for 99 years rent free!

The 50-Hectare Quota

Paragraph 4 of Annex III limited the amount of new land that could be granted in any one year to 50 hectares. However, paragraph 7 b) and 7 c) of the same Annex set out the terms of reference for the Land Commission; they clearly indicated that with proper consultation additional areas beyond the stated limit could be approved. The British had asked for a higher figure when negotiating the agreement, but it is understood the PRC was insistent on the 50-hectare limit. They knew that, by insisting on this limit, there would, every year, be requests for extra quota. By requiring that all additional quota had to be justified to the Land Commission, they could exercise a major influence on how and when land was granted. In the event, as Figure 4.1 indicates, the 50-hectare quota was exceeded in every year of the transition; this shows that a prudent and practical approach was adopted.

There were comments expressed from time to time that the 50-hectare quota was an artificial constraint on land supply. Apart from the land for luxury housing, the facts do not bear this out because during the 12 years of transition, the property market was, by and large, growing steadily with none of the dramatic fluctuations that were experienced in 1973-4 and 1981-2. There were some relatively minor setbacks to the market in 1989-91 and also 1993-4, which were reflected in the lower take-up rate of land. But more importantly, when the property market started to experience much stronger growth in the last two years of the transition, the Land Commission responded by agreeing to a significantly higher quota for sale, particularly in the residential sector.

However, there was one weakness in the system as the land quota was given in terms of land area rather than permitted gross floor area. As a consequence, the Lands Department were naturally reluctant to sell sites with a low density of development as they would consume comparatively more of the quota. This fact probably contributed to the shortage of supply at the luxury end of the market experienced in 1996 and 1997.

The financial implications were not lost sight of either. At the time the Joint Declaration was signed, it was estimated that the Land Fund established under paragraph 6 of Annex III would, with interest accrued, probably reach \$25 billion at prices then prevailing. By the time the Land Commission ceased to

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TOWN PLANNING CONTROLS AND DEVELOPMENT RESTRICTIONS IN LEASE CONDITIONS

The first TPO was not enacted until 1939, but because of the Second World War, it was not brought into effect until 1947. The Ordinance applied to the urban areas of Hong Kong Island and Kowloon as the NT was still essentially rural and undeveloped.

Until 1973 the planning restrictions that did exist were confined to controlling the use that land could be put to with no attempt to control the density or volume of development. The density of development was controlled either by the lease conditions or, in the case of unrestricted leases, by the First Schedule to the Building (Planning) Regulations Cap. 123.

Where lease conditions could be used to regulate and control the density of development, broad Density Control Areas were designated together with some specific Areas of Special Control whereby the predecessor to the Lands Department, the former Crown Lands and Survey Office, could administratively control the density and volume of development that was permitted. For example in some areas such as the Mid-Levels, no modifications were permitted that would result in more intensive development.

The obvious weakness in this system of administrative control arose in those older urban areas where the lease conditions were unrestricted. On 13 April 1973, the Draft Peak Area Outline Zoning Plan was exhibited and became the first area where the government introduced statutory density control specifying a maximum plot ratio of 0.5, or if the bulk of the existing buildings was higher than 0.5 pr, then the redevelopment would be allowed to equal the existing plot ratio. Coincidentally, during 1973 outline zoning plans for three new towns in the NT were also exhibited thus introducing statutory planning control there for the first time.

The power of the government to impose statutory plot ratio controls under the TPO was immediately challenged and in the case of *Crozet Ltd. v Attorney*

General (unreported MP No. 409/1973); the Courts upheld the government's position. The same question arose in the Court of Appeal decision in the case of *Attorney General v CC Tse (Estate) Ltd.* [1982] HKLR 7 (CA) when again the government's position was upheld.

With the backing of these two decisions, it became the government's policy for all the old Density Control Areas and Areas of Special Control to be incorporated into their respective Outline Zoning Plans (OZP) and this has been achieved progressively. The current practice is to specify the maximum permissible plot ratio, site coverage, building height or any combination of them in the 'Remarks' column of the Notes to each statutory plan. In this way, even if the lease is unrestricted, any building proposals which contravene the stated development restrictions will be rejected by the Building Authority under the provisions of Section 16 (1) (d) of Cap. 123.

As the authority of the Planning Department has increased, the authority of the Lands Department has been reduced as gradually the full effect of statutory planning control took over from the previous arrangements for administrative control. However, where a proposed development is permitted under the draft or approved plan but would contravene a covenant in the lease, the developer must still apply for a variation of the lease and may have to pay a premium for such variation. In the words of Deputy Judge Cruden in *Mexx Consolidated (Far East) Ltd v The Attorney General* [1987] HKLR 1210:

No matter what approval the Town Planning Board may have given under its statutory powers, that would not have affected or reduced the Crown's contractual powers under the Crown lease. They are two quite distinct concepts . . . if the Town Planning Board — which is a wholly Government administrative body and not a judicial or quasi-judicial tribunal — approved or the changed use, the Crown might then, in its contractual capacity, more favourably deal with an application by the lessee for the waiver or modification of the user covenant.

Similarly, even if consent to build is given under the Buildings Ordinance (Cap. 123), such consent will not serve as a waiver of any restrictive term in the government lease or conditions.

Section 14(2) of the Buildings Ordinance says:

Subject to section 28B(4), neither the approval of any plans nor the consent to the commencement of any building works or street works shall be deemed . . .

(b) to act as a waiver of any term in any lease or licence.

The wording of Deputy Judge Cruden's decision is worth close examination. The critical section is ' . . . the Crown *might* then, in its contractual capacity, more favourably deal with an application by the lessee for the waiver or modification

of the user covenant'. However, in view of the much quoted decision in *Hang Wah Chong Investment Co. Ltd. v Attorney General* [1981] HKLR 336, the government as the land authority equally *might not* favourably consider such an application and, not having the need to act reasonably, could frustrate a scheme which had received planning approval.

Conversely there could be situations when, for example, as a result of a rezoning exercise or amendments are made to an OZP, the TPB's decision could result in a landowner's development rights as stated in the lease being diminished. At the moment, there are no statutory provisions for compensation in the event of an adverse or down-zoning situation unless the new zoning is for a public purpose in which case the government can usually be persuaded to resume. The question of compensation for partial loss of development rights was one of the topics considered by the Special Committee on Compensation and Betterment, chaired by Mr John Todd, a former senior Hong Kong Government Officer, whose report, published in March 1992, concluded that the status quo should remain and that in general there should be no compensation paid in such circumstances. It seems to be inequitable that on the one hand when there is a change in a statutory plan that results in an increase in development potential, the government is only too happy to permit that to happen and collect a land premium for any lease modification that may be required. However, when the reverse occurs, they refuse to pay any compensation, relying on the decision in the case of *Lam Kwok Leung v Attorney General* [1979] HKLR 145, when it was held that planning or other statutory powers adversely affecting a lessee's rights do not amount to any derogation of grant.

The other way of tackling this problem is to challenge the validity of the change in land use zoning in the first place, where it would bring the owner into a conflict with the user as permitted under the lease. In the case of *Fine Tower Association Ltd. v Town Planning Board* [2006] 2 HKC 507, the applicant sought a Judicial Review of the TPB rejection of their objection to the planning limitations proposed to be imposed on their land. The following extracts from the case report are considered to be relevant:

1. The applicant's two pieces of land, which are adjacent to each other, are leasehold properties. They are subject to restrictive covenants which include the following:
 - (i) the land may only be used for industrial and/or godown purposes, this to include the bulk storage and distribution of petroleum products;
 - (ii) one of the pieces of land may only initially be developed as an oil depot, and
 - (iii) any structures built on the land may not exceed a maximum height of 85.19mPD.

2. The restrictive covenants state that any failure to abide by these (and other) restrictions will entitle the Government, as landlord, to enter upon and take back the land without obligation to pay compensation. The Government, as landlord, constrained by private not public law, may of course agree to a variation of the special conditions but it is not obliged to do so. Any variation must be the result of commercial negotiations. If such negotiations are successful – and that must always be uncertain – I understand that they will invariably involve the payment by the applicant of premium.
3. When the applicant acquired the two pieces of land they were zoned for 'industrial' and government, institution or community' use on the Draft Quarry Bay Outline Zoning Plan No. S/H21/6.
4. In April 2003, the Draft OZP was exhibited for public inspection under s.5 of the Town Planning Ordinance.
5. In terms of the Draft OZP, the zoning of the applicant's two pieces of land was changed so that 44% of their total area was to be designated as 'open space' while the balance of 56% was to be designated as 'other unspecified use', more specifically, as the explanatory statement to the Draft OZP explained, for the purposes of 'cultural and/or commercial, leisure and tourism related uses.'

So one of the applicant's principal objections was that the limitations imposed by the Draft OZP in respect of the permitted uses of the two pieces of land were directly at odds with the uses permitted by the covenants (i.e. the special conditions of exchange) governing the applicant's ownership of the land. The conditions of the Draft OZP, if approved, would prohibit the applicant from using its two pieces of land in accordance with the covenants while the conditions of the land grants prohibited it from using the land in accordance with the Draft OZP. Accordingly, so it was argued, the limitations as to use imposed by the Draft OZP, allied with other limitations (such as the more rigorous height limitation), prevented the applicant from developing its two pieces of land and amounted to a *de facto* deprivation of the applicant's rights in that land.

On the question of deprivation of property, paragraph 51 of the decision includes a very useful reference to the principle involved:

As a statement of relevant principle, I do not believe it is possible to improve on the words of Lord Hoffmann in the Privy Council judgement of *Grape Bay Limited v Attorney General of Bermuda* [2000] 1 WLR 574, at 583:

'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 (*Westminster Bank Ltd. v Beverley Borough Council*

[1971] A.C. 508) or, in American terminology, zoning laws (*Village of Euclid v Ambler Realty Co.* (1926) 272 U.S. 365). The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as will inevitably be the case, the legislation in general terms affects some people more than others. For example, rent control legislation restricts only the rights of those who happen to be landlords but nevertheless falls within the general principle that compensation will be payable. Likewise in *Penn Central Transportation Co. v New York City* (1978) 438 U.S. 104, the New York City's Landmarks Preservation Law restricted only the rights of those people whose buildings happened to have been designated historic landmarks. Nevertheless the Supreme Court of the United States held that it was a general law passed in the public interest which did not violate the Fifth Amendment prohibition on taking private property without compensation.

Whether a law or exercise of an administrative power does amount to a deprivation of property depends of course on the substance of the matter rather than upon the form in which the law is drafted.

So whether there has been a deprivation of property is, therefore, to use the words of Lord Hoffmann, a matter to substance not a matter of formality.

The following points are also made in paragraphs 59 and 60:

But indeed what must be remembered is that the applicant has no right in law to demand a change in the restrictive covenants nor has the Government any obligation to act reasonably in considering any request for change. In this regard, the definitive statement as to the position has been given by Lord Millett NPJ in *Director of Lands v Yin Shuen Enterprises Ltd. and Another* [2003] 2 HKC 490, at 500:

'Two further considerations are relevant at this point. First, the user covenants in the Crown leases are absolute. They are not qualified by any requirement that the Crown's consent is not to be unreasonably withheld; and the statute law of Hong Kong does not subject user covenants in leases to any such requirement. Secondly, in deciding whether to grant or withhold its consent to a modification of the terms of a lease, the Government does not exercise a public law function but acts in its private capacity as landlord: see *Hang Wah Chong Investment Co. Ltd. v A-G* [1981] HKLR 336 (PC). It thus has an absolute right if it chooses to demand a premium, however large, for granting a modification of the terms of the lease, or to withhold its consent altogether, however unreasonably: see *Tredgar (Viscount) v Harwood* [1929] AC 72.'

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HOW PLANNING AND LAND POLICY COULD BE USED TO ENHANCE CONSERVATION IN HONG KONG

An appropriate starting point is to understand Hong Kong's conservation obligations under international treaties which may be summarized as follows:

In May 1984, the United Kingdom ratified the Convention for the Protection of the World Cultural and Natural Heritage 1972 ('the Convention') and extended it to Hong Kong. The PRC also ratified the Convention in December 1985. The Convention remains in force in relation to Hong Kong after 1997.

Article 2 of the Convention defines 'natural heritage' to include, *inter alia*, 'natural sites of outstanding universal value from the point of view of science, conservation or natural beauty.' Article 4 of the Convention provides that each State Party undertakes the duty of ensuring, to the utmost of its own resources, the identification, protection, conservation, presentation and transmission to future generations of natural heritage. Article 5 requires the State Party to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of natural heritage. Article 6 further requires the State Party not to take any deliberate measures which might damage directly or indirectly the natural heritage. Article 12 provides that the fact that a property belonging to natural heritage has not been included in the World Heritage List in Article 11 does not mean that it does not have an outstanding universal value that deserves to be protected, conserved and transmitted to future generations.

In *Queensland v The Commonwealth* (1989) 167 CLR 232, the High Court of Australia held that the Convention imposed a legal duty to take measures for the protection, conservation, presentation and transmission to future generations of the cultural heritage and natural heritage. This obligation arises out of identification by the contracting state of its cultural or natural heritage, and does not depend on whether the site is listed on the World Heritage List. Under Article 4 of the Convention, a contracting state is under a duty to make identification of cultural or natural heritage.

In October 1999, the UNESCO 12th General Assembly of State Parties to the Convention adopted a resolution that invites the contracting parties to give the highest priority to the adoption of a general policy which aims to give the cultural and natural heritage a function in the life of the community and to

integrate the protection of that heritage into comprehensive planning programme according to Article 5 of the Convention.¹

Very recently, and most significantly, the Central People's Government on 9 May 2011 extended the decisions and Conferences of the Parties to the Convention of Biological Diversity (CBD), that was originally ratified in 1993, to Hong Kong which will demand a complete rethink of Government's policies particularly with regard to the criteria for designating Country Parks, the proposed measures for protecting Country Park enclaves and the treatment of privately held land associated with these activities.

In July 2003, the government published its review of Nature Conservation Policy in a document entitled 'Nature Outlook' which can be downloaded from the website of the Environment, Transport and Works Bureau.² The Review is presented as follows:

- Introduction — setting the scene
- Review of Existing Policy and Measures
- Improvement Proposals
- Public Support and Consultation
- The Annex sets out options considered impractical.

The situation today is probably not as bad as some environmentalists and green groups would have us believe, considering that since the enactment of the Country Parks Ordinance (Cap. 208) in 1976, we now have 24 Country Parks (CPs) plus 22 special areas for not use conservation which cover some 40% of the territory's total land mass. The Land Utilization map on the inside back cover also helps to clarify our understanding of the position.

Country Parks are designated for the purpose of nature conservation, countryside recreation and outdoor education. Special Areas are created mainly for the purpose of nature conservation. They now attract over 12 million visitors annually.

In 1995 the Marine Parks Ordinance (Cap. 76) was enacted which provides for the designation, control and management of Marine Parks and Marine Reserves. Currently there are four such parks and one reserve so designated.

Interestingly this 1995 legislation has provision for the government to resume private land for the purposes of marine parks or reserves and such resumptions are deemed to be for a 'public purpose'.

Surely the same logic and principles should now be applied to the Country Parks Ordinance particularly in the light of recent events described below.

Under the existing Environmental Impact Assessment (EIA) Ordinance (Cap. 499), designated project proponents are required to obtain environmental

permits (EP) from the Director of Environmental Protection (DEP) before construction or operation of the project commences. In October and November 2000, the DEP rejected two applications for an EP. One application was for the proposed Lantau N-S link between Tai Ho Wan and Mui Wo cutting through the Lantau Country Park. The other, more famous case, was for the former Kowloon Canton Railway Corporation (KCRC) proposal to construct a spur line from Sheung Shui Station to the new border crossing at Lok Ma Chau which involved passing through Long Valley. The KCRC appealed against the DEP's decision and in September 2001 the Environmental Impact Assessment Appeal Board dismissed KCRC's appeal.

The Appeal Board's decision included the following relevant paragraphs:

1. During the public consultation period for the KCRC, EIA the DEP received 225 submissions from the public each of which opposed the project;
2. Under the paragraph entitled 'The Implementation of the EIA Process' the following words occur:

There are two main matters of public interest involved. Both are important. The first is the public interest in the protection of the environment upon which the quality of life in Hong Kong will increasingly depend. The second is the public interest in ensuring that major designated projects are brought to fruition in a timely and efficient manner. ...'

In the light of all these events we can safely say that the protection of the environment, which must include conservation, is now a 'public purpose'. It would not have been possible to make this suggestion ten or even five years ago but today we can. This subtle shift from public interest to public purpose is most important because 'public purpose' is one of the criteria under the Land Resumptions Ordinance (Cap. 124) that can trigger a compulsory acquisition of private interests by the government, and in any new policy initiative the government must recognize and acknowledge it may need to use this tool to achieve effective conservation. It is regrettable that the government has failed to do so in this review.

The purpose of the EIA Ordinance is expressed in its title: to provide for assessing the impact on the environment of certain projects and proposals, for protecting the environment and for incidental matters. However, it does not cover conservation *per se* where no development is intended and it is this gap which needs to be addressed by any new policy.

The present conservation framework is well described by the Conservancy Association's August 2000 paper entitled 'Achieving Conservation – A Positive Conservation Policy for Hong Kong',³ and is echoed in the government's consultation document, as follows:

The current legal framework for conservation is embodied primarily in the Country Parks Ordinance and the Town Planning Ordinance. In the case of country parks, conservation is the stated objective and this objective is by and large served by the Ordinance. For areas of conservation interest which fall outside Country Parks, the conservation intention is expressed through zoning the sites as Conservation Area (CA) under the Town Planning Ordinance. Both Country Parks and CA zones can cover large areas. Within these areas some specific sites may be designated Sites of Special Scientific Interests (SSSI), which provides more stringent control over land use, and hence greater protection of the sites from disturbance. The Agriculture, Fisheries and Conservation Department (AFCD) are the expert department within government for conservation, country park management and the designation of SSSIs. In fact these CA/SSSI zones now cover over 6600 hectares which is a further 5% of HK's land area so together with the Country Parks some 43% of our total land area is now protected.

Unfortunately this framework is too simplistic and ineffective because, first, it does not cover areas with high conservation value that fall under other zonings. A case in point are areas zoned Agriculture, which may consist of areas of high cultural or ecological value but which would not be protected because conservation is not the stated intention of the agriculture zone. Similarly, other zoning such as the Village zone and the Residential zones may contain buildings of high heritage or cultural value which may not be protected under their respective zonings.

Second, even for areas zoned CA or SSSI, the planning intention of conservation may not be realized if the conservation value is progressively diminished, either through willful destruction (e.g. war games) or as a result of natural degradation or by the misuse of pesticides. In other words, although conservation is the stated objective, such objective can be defeated either by lack of land management or by the inability of enforcement over destructive or inappropriate uses.

Third, even if the conservation objective is well served (naturally or through active management), the areas may still yield to development due to competing uses, such as improvement in transport or demand for housing (for example, to accommodate the rising demand for houses for indigenous villagers). There are strong advocates within the government for these competing objectives, all of which are backed by strong policy frameworks. By contrast, the present conservation framework is incomplete and does not provide a strong enough basis for the conservation department (AFCD) to be an effective advocate for the conservation objective commensurate with its value to society.

It is important to consider the land use zoning in the context of land ownership because in recent years there has been a subtle but significant shift in the way the Planning Department deals with new land use zoning. Consider

that when the Country Parks were originally set up 30 years ago, they only ever covered government owned land. Private land, usually village land, was excluded. Today the position has changed; the Planning Department is prepared to rezone large areas of privately owned land, usually described for agricultural purposes on the Block Government Lease, usually to CA or conservation zoning. A lot of this land is lying fallow and unused and with the CA zoning that is how it will remain. Agricultural activities can often be incompatible with Conservation objectives and the ownership rights must be respected and treated fairly. Under this system they are not. At Wu Kau Tang in July 2000, 87 hectares out of a total area of 103 hectares had been zoned CA; similarly at Tai Long Wan in October 2001, 46.5 hectares out of 50.5 had also been zoned CA. In both cases large percentages are privately owned.

Let us also consider the new Outline Zoning Plan (OZP) that in February 2002 was approved for Sha Lo Tung,⁴ which was designed to protect its important ecological (currently 68 species of dragon flies are recorded in the area) and cultural features. The 57 ha area designated in the OZP comprises about 22 ha as SSSI (covering the streams, a 30 m buffer on either side and freshwater marshes in the northeast of the site), about 12 ha of conservation area covering the freshwater marsh, fung shui woodland behind Cheung Uk and mature tree clusters behind Lei Uk and Lo Wai, about 22 ha of green belt covering foothills, lower hill slopes, spurs, isolated knolls, woodland or vegetated land, and about 2 ha of village type development. Provision of sewerage and emergency vehicle access may be necessary for the village development areas. To preserve the Hakka village houses any demolition, addition, alteration to the existing village houses require planning permission.

The fundamental weakness in the present framework can be summed up by saying that conservation by zoning alone is far too passive. Further, because these zonings now include large tracts of private land, for conservation to be done in a meaningful way it requires mechanisms for active management and/or a system for bringing private land into the scheme. This may, or may not, involve resumption but the private land owners should be assured of adequate compensation or encouraged to actively participate.

THE WAY FORWARD

As Civic Exchange concluded in their Nature Conservation – A New Policy Framework for Hong Kong, January 2011, 2010 will be remembered as a landmark year for conservation in Hong Kong. Over 80,000 people joined a Facebook site to protest against a development of a private site in Tai Long Wan