

Re: Amendments to the Draft Central District (Extension)

Outline Zoning Plan No. S/H24/7

ADVICE

Background

1. I am asked to advise the Society for the Protection of the Harbour (“the Society”) whether the Town Planning Board could lawfully make the amendments to the above plan in the following manner:
 - (i) Item A - Amendment to the zoning of a strip of waterfront site to north of the People’s Liberation Army Hong Kong Garrison Headquarters from “Open Space” to “Other Specified Uses” annotated “Military Use (1)”.
 - (ii) Item the B - Deletion of the straight line with annotation ‘150m Military Berth (subject to detailed design)’ from OZP.
2. The zoning in Item A is for a strip of land fronting the harbor 150 metres long and 20 metres deep with no restrictions as to any building thereon except as to height. This zone I am instructed is intended to be an enclosed area, although the Government has indicated that the PLA will allow public access to the area when it is not required.
3. By Paper Legislative Council Panel on Development No. CB(1) 1077/12-13(03), the Development Bureau of the HKSAR Government indicated that the zoning was intended to delineate an area for the construction of a military dock in order to comply with the 1994 Exchange of Notes between the Government of the United Kingdom and Northern Ireland (“UK Government”) and the Government of the People’s Republic of China on Arrangements for the Future Use of the Military Sites in Hong Kong (the Defence Land Agreement or “DLA”).
4. This paper also sets out some of the prehistory of the proposed zoning and the proposed scale of construction of the dock buildings. According to this paper, there will be “four small single-storey

structure (including office facilities, fire services pump house and electricity supply facilities) with a total area of 220m² and about 4 metres high, as opposed to a three storey massive building taking up the whole site...". The paper says that the Central Military Dock ("CMD") will be designed to integrate with the promenade and the CMD itself will be open to public use when it is not closed for military use.

5. In light of this background, it is necessary to look at the nature of the international obligation undertaken under the DLA, whether the HKSAR is bound by such international obligation and if so, what municipal law obligations are imposed on the HKSAR.

The international obligations

6. Let us first consider the international obligations.
7. By an Exchange of Notes dated 11 November 1994 between the Governments of the United Kingdom ("UK Government") and the People's Republic of China ("PRC Government") made after discussions between representatives of the two Governments pursuant to the Sino-British Joint Declaration, it was agreed inter alia that certain military lands would be handed back to the PRC Government for military use only, that certain military sites would be handed to the Hong Kong Government for disposal, and that certain military buildings would be reprovisioned for the Chinese Garrison. This exchange of Notes is dubbed the Defence Lands Agreement ("DLA"). Under the rubric of Annex III of the DLA, it was agreed as follows:

"5. Waterfront to be left free at the Central and Wanchai Reclamation, Hong Kong Island, for the construction of a military dock.

The Hong Kong Government will leave free 150 metres of the eventual permanent waterfront in the plans for the Central and Wanchai Reclamation at a place close to the Prince of Wales Barracks for the construction of a military dock after 1997".

8. As the DLA is part of an international treaty, it is to be interpreted in accordance with international norms. The primary interpretative norm

is the Vienna Convention on the Law of Treaties which came into effect in 1980.

9. Article 31 of the Convention states inter alia as follows:
 - “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
10. Article 31 of the Convention also states that in interpreting a treaty, there shall be taken into account, together with the context,
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement regarding its interpretation;
 - (c) any relevant rules of international law applicable in relations between the parties.
11. One must consider what is a “dock” in the context of the item 5 of Annex III of the DLA. It cannot be the same as the old HMS Tamar, as under item 1 of Annex III of the DLA, the facilities at Tamar were to be reprovisioned in Stonecutters Island which was one of the facilities to be handed over as military facilities under Annex I of the DLA.
12. Thus in the context of the knowledge that Central and Wanchai would be reclaimed for public purposes, the understanding must have been a facility which is sufficient to dock military vessels but would not take up more public space of the future HKSAR than is absolutely necessary for the purpose of docking. This is confirmed by the reservation of a sea frontage of 150 metres in length with no width reserved. The accent it would appear was on the sea frontage and not on the use of land on shore in light of the reprovisioning at Stonecutters Island under item 1 of Annex III.
13. A water frontage with berthing facilities which does not occupy enclosed land is consistent with a good faith interpretation of the DLA, given that the purpose of the exercise is to enable military vessels to berth near the Prince of Wales Building, which was going to be the

headquarters of the future PLA Garrison. It is also confirmed by the agreement that the docking facilities in HMS Tamar are to be reprovisioned at Stonecutters Island.

14. It is also clear that the obligations under the Note in relation to the military dock are to be performed by the pre 1997 Hong Kong Government, as the Chinese text makes clear: “香港英國政府將在中區 - - 灣仔填海計劃內的最終永久性岸綫靠近威爾斯親王軍營處預留 150 米長岸綫，以供一九九七年后軍用碼頭使用”
15. The Note clearly envisages that all obligations of the UK and pre-1997 Government must be complied with before 1 July 1997, because upon resumption of the exercise of Sovereignty over Hong Kong by the PRC Government, the UK Government and its colonial Government would have no right to remain in Hong Kong to implement their obligations.
16. It is well known that the military lands set out in Annex I of the DLA were handed over and the reprovisioning of military facilities under Annex III of the DLA were completed before 1 July 1997.
17. Since the DLA has to be implemented prior to 1 July 1997, there are no residual obligations after that date. Furthermore, any unperformed obligations of the UK Government (assuming they exist) must be left to the PRC Government to enforce against the UK Government. But since the UK Government has no more control over Hong Kong 1997, there is no point in this. The HKSAR Government has no obligations under the DLA.
18. The HKSAR’s insistence that it is complying with an international obligation is therefore simply a misconception of the nature of the DLA and its own constitutional status.

Obligations of the HKSAR Government under Municipal Law

19. Any actions now taken by the HKSAR in Hong Kong in relation to land use in Hong Kong (whether for the military or otherwise) are subject only to municipal law. As to this, the Town Planning Ordinance is relevant. Also, the Town Planning Board has to comply

with the strict requirements of S.3 of the Protection of the Harbour Ordinance as interpreted by the Court of Final Appeal¹.

20. From the Notes accompanying OZP No. S/H24/7, it may be seen a draft plan for the central reclamation was first published in 1998. The plan was approved by the Chief Executive in Council on 22nd February 2000, by which time item (b) had already been in place.
21. Further amendments were made to the approved central reclamation zoning plan. OZP No.S/H24/6 was challenged by the Society and a hearing took place before Mr. Justice Hartmann (as he then was) between 9-16 February 2004. This plan was challenged for the extensiveness of the reclamation planned but not for item (b) which at that stage was no more than a line of 150m along the water front with the shore zoned as open space. At the time of the hearing, the reclamation had proceeded. The Society did not succeed in this challenge. A key consideration of the Court was that Leading Counsel for the HKSAR Government confirmed in the High Court at this hearing that the Chief Executive in Council was satisfied that the Central Reclamation did meet the requirements of s. 3 of the Protection of the Harbour Ordinance².
22. The Society understands that along the 150 metre water frontage designed for the military berth on the shoreline of the central reclamation, bollards have been constructed to enable berthing. In OZP No. s/H24/6, there was no mention at all of buildings to be constructed for a military dock. Indeed the space adjoining the 150 shoreline designed for berthing of military vessels was zoned as "open space". This would be completely consistent with what was envisaged in the DLA.
23. The construction of a dock in the manner now envisaged in item (a) under the current OZP would not have passed muster under S.3 of the Protection of the Harbour Ordinance, because there is no justification at all for the construction of buildings to accommodate the berthing of military vessels. All necessary facilities (such as water pumping for

¹ See: Town Planning Board v. Society for the Protection of the Harbour Lt FACV14/2003, reported (2004) HKCFAR 1.

² See: para. 13 of the decision of Mr. Justice Hartmann (as he then was) in Society for Protection of the Harbour Ltd v. Chief Executive in Council & Ors HCAL 102/2003, reported in [2004] 2 HKLRD 902

fire-fighting or fresh water supply and electricity supply) can easily be accommodated underground and there is no need for an office.

24. The CFA's interpretation of the Protection of the Harbour Ordinance requires the Chief Executive Council to consider whether there is an over-riding public need (in other words a need which is important enough to override the strong public need to protect and preserve harbor). A need should only be over-riding if there is a compelling and present need, and where there is a reasonable alternative, an over-riding need is not made out³.
25. When the Chief Executive in Council considered the approval of OZP No.S/H24/6 of the Central Reclamation, it could not have envisaged a zoning as item (a) but rather a berthing facility which need not occupy any land on the reclamation, as that was all that is necessary to provide berthing for military vessels. When such vessels are berthed, temporary closure measures of the open space could be adopted.
26. Furthermore, quite apart from having to observe S.3 of the Protection of the Harbour Ordinance, the Town Planning Board is required under the Town Planning Ordinance to undertake the systematic preparation of draft plans, among other things, "with a view to the promotion of health, safety, convenience and general welfare of the community". The question is whether these amendments fall within these parameters.
27. The zoning cannot be said to be necessary for the welfare of the community. Although no doubt there is to be allowed a wide margin of appreciation to the Town Planning Board in performing its statutory duty, compliance with a non-existent international obligation is certainly not for the benefit of the community. As a berthing facility with bollards has already been constructed, that will clearly be sufficient for docking of military vessels, thus zoning 30,000 sq. ft of land and depriving the community of this amount of open space in a prime scenic area is clearly not for the benefit of the community.

Conclusion

28. In conclusion, my advice is as follows:

³ See: paras. 44- 49 of the Decision of the CFA, *ibid*.

- a. The obligations under the DLA are international obligations undertaken by the UK Government to the PRC Government ;
- b. These obligations are clearly envisaged to be implemented before 1 July 1997;
- c. The UK Government cannot be asked to implement any residual obligations after 1 July 1997;
- d. The HKSAR has no international obligation under the DLA;
- e. In undertaking the zoning, the HKSAR has to comply with municipal law, namely the Protection of the Harbour Ordinance and the Town Planning Ordinance;
- f. The construction of the waterfront with bollards is already suitable for berthing of vessels without the need for an area on land specially reserved for the purpose, and any facilities for electricity and water supply can easily be accommodated underground without the need for buildings on the open space.
- g. There is hence no necessity for any buildings;
- h. When military vessels are berthed along the waterfront, temporary measures could be taken to close part of the open space; and
- i. The zoning cannot therefore comply with both the Protection of the Harbour Ordinance and the Town Planning Ordinance.

Dated this nd 23 day of May 2013.



Anthony Neoh, SC

Re: OU (MU)1 Zoning in the Draft Central District (Extension) Outline
Zoning Plan No. S/H24/7

FURTHER ADVICE

1. I rendered to the Society for the Protection of the Harbour (“SPH”) an Advice dated 23rd May 2013 (“Advice”) on the DLA and the zoning under the captioned OZP. This Further Advice is intended to be read in conjunction with the Advice.

2. I am now asked to further advise whether the Response of the Planning Department in TPB Paper No. 9491 may be sustained in law. In particular, I am asked to comment on the following responses in the said TPB paper:
 - (a) 5.4.2 (a) – (d), (r) and (t). These paragraphs address the Planning Department’s understanding of the DLA and its application to the HKSAR.

 - (b) 5.4.2 (u) to (x). These paragraphs address the Planning Department’s understanding of compliance with the PHO and the TPO.

 - (c) 5.4.2 (gg). This paragraph addresses the wording of the ES for the zoning in question.

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Compliance with the DLA

3. As I have explained in the Advice, the obligations under the DLA are to be undertaken by the British Hong Kong Government, as the following language of the DLA (which I reproduced at paragraph 14) makes clear:

“香港英国政府将在中环区 — 湾仔填海计划内的最终永久性岸线靠近威尔斯亲王军营处预留 150 米长岸线，以供一九九七年后建军用码头使用” (emphasis added).
4. As I have also explained in the Advice, these obligations have expired on 1 July 1997, when the PRC resumed sovereignty over the territory coinciding with the formation of the HKSAR.
5. It would appear that the Planning Department still relies on the DLA, citing this as the reason as to why the HKSAR has taken up the construction of the dock in purported compliance with the DLA. As I have also explained in the Advice (at paragraphs 11-14), interpreted in accordance with general principles applicable to international treaties, the term “dock” in the English version of the DLA and “码头” in the Chinese version of the DLA can only mean a berthing facility occupying only a water frontage of 150 metres.
6. The Planning Department states that the “CMD, which is situated close to the Central Barracks, is a re-provisioning of the dock facilities for the previous Prince of Wales Barracks” (para. 5.4.2 (b)). That is a misinterpretation of the Treaty, as the dock facilities have already been re-provisioned at Stonecutters Island. What the DLA clearly envisages

is a berthing facility that is only to be used on the occasions when the Stonecutters dock facilities cannot be used. A comparison of the berthing facilities of the former Prince of Wales Barracks is therefore misleading.

7. Since the international obligations are no longer applicable, if the HKSAR Government wishes to take up the construction of the CMD, it has to observe the requirements of Municipal Law. As to this, the HKSAR Government would have to comply with both the constitutional processes stipulated under the Basic Law and the requirements of Hong Kong statutory law.
8. The Planning Department also states: "The CMD and its ancillary facilities are designed to meet the defence requirements of the Garrison" (para. 5.4.2 (c)).
9. Under Article 14 of the Basic Law, the Central People's Government shall be responsible for the Defence of the HKSAR. Thus, it would be necessary for the Central Government to make a determination or decision as to whether it would wish to implement the unexecuted portion of the DLA after 1 July 1997. I am given to understand that the SPH has asked the HKSAR Government for a copy of such determination or decision and has not yet received any substantive reply as to this.
10. Thus, until a determination or decision is made by the Central Government as to whether the zoned land is required for defence purposes and such determination or decision is communicated to the HKSAR, the HKSAR Government has no legal powers to execute any works for defence purposes.

Compliance with the TPO and PHO

11. Assuming that the HKSAR Government has received such a determination or decision, it would still have to observe the statutory law of Hong Kong.
12. Article 64 of the Basic Law states that the HKSAR Government must abide by the law and be accountable to the Legislative Council of the Region: it shall implement the laws passed by the Council. Thus, in constructing any public facility, the HKSAR Government is to be guided in its actions by the Town Planning Ordinance¹ and the Protection of the Harbour Ordinance².
13. In paragraphs 19- 27 of the Advice, I have set out the history of the zoning and conclude that the zoning for military use cannot be said to be necessary for the welfare of the community. The Planning Department has not it seems responded to this conclusion.

The Planning Department's Proposals

14. In paragraph 5.4.2 (gg), the Planning Department states that the Notes and ES have already clearly stated the planning intention and objectives of the "OU(MU)1" zoning, and that the proposed inclusion of a statement of allowing public access to the zone wherever there is

¹ Section 13 of the Town Planning Ordinance states: "Approved plans shall be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them".

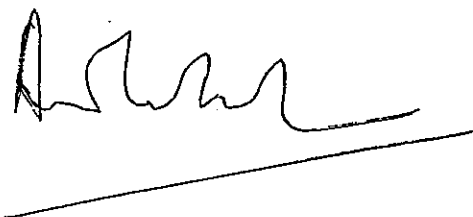
² Section 3 states: "(1) The harbor is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbor; and (2) All public officers and public bodies shall have regard to the principle stated in section (1) for guidance in the exercise of any powers vested in them."

no military activity in the OZP is irrelevant in assisting the understanding or reflecting the planning intention of the OZP or the Notes.

15. The above proposition disregards the background against which the zoning was sought, namely that the zoned land would be available for public use. It also disregards the terms of Article 5 of the Garrison Law, which states that among other duties, the local garrison shall take charge of military installations. It has been pointed out, by the SPH and others, that it is unclear as to when and for long would the zoned land to be used for public purposes. No Central Government Document or any Document has so far been produced.
16. I would respectfully suggest that the Town Planning Board would not be performing its duties under Section 3 of the TPO if it did not require at least the production of evidence there is a direction by the Central Government that the zoned land is required for military purposes and that the military installation would be opened to the public whenever it is not required for military purposes.
17. In the absence of concrete evidence of a direction by the Central Government, the Town Planning Board should have no other option than to revert to its previous zoning, because that would preserve the options of the Central Government and at the same time, ensure that the zoned land is available as public open space. On the other hand, if the TPB were to retain the zoning, then at the very least, a statement of such intent to make the space open to the public should properly be included in the Notes or the Explanatory Statement of the Plan

18. Please feel free to contact me if there is any other matter that I can be of assistance.

Dated this rd 21 day of November 2013

A handwritten signature in black ink, appearing to read 'Anthony Neoh', written over a horizontal line.

Anthony Neoh, SC

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To: Messrs. Winston Chu & Co,
Solicitors,
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