

Harbourfront Commission

For discussion
on 13 December 2016

HC/15/2016

Setting Up of a Working Group on the Protection of the Harbour Ordinance (PHO)

PURPOSE

This paper seeks Members' endorsement on the proposed terms of reference, membership, mode of operation and workflow for a new Working Group to be established under the Harbourfront Commission ("HC") to examine the Protection of Harbour Ordinance ("PHO") (Cap. 531) and matters arising from its application.

BACKGROUND

2. At the HC meeting held on 21 June 2016, the HC Secretariat presented HC paper 08/2016, which was a background information note on PHO (at **Appendix I**). The paper covered the legislative background of PHO, related judicial review cases and the Court of Final Appeal's ruling on PHO. The paper also went through a list of projects that involved the PHO and were discussed at HC.

3. At the meeting, Members expressed a general consensus that it was time to consider how best to proceed with worthwhile projects that might involve minor reclamation. Members also agreed to consider setting up a dedicated working group under the aegis of HC to examine matters arising from PHO and conduct suitable reviews.

PROPOSED TERMS OF REFERENCE

4. Subject to the agreement of HC in setting up the Working Group, the proposed terms of reference is set out as follows –

“The Working Group aims to review the implementation of PHO with a view to –

- (a) identify issues under existing arrangements that may not be conducive to the fulfilment of the original intent and purpose of PHO, which is that the harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people; and
- (b) study possible solutions to the issues as identified in (a) with public enjoyment of the Harbour and its

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harbourfront in mind as the objective;

- (c) provide recommendations to the Government with the goal of removing hurdles faced by harbourfront enhancement initiatives, implementation of which would be in the interest of the public.”

PROPOSED MEMBERSHIP AND MODE OF OPERATION

5. On membership, it is proposed that all Members of HC be invited to join. The Chairman of HC would chair the Working Group. The Civil Engineering and Development Department and the Marine Department could be invited to meetings to give a detailed account on the technical and administrative hurdles encountered in taking forward harbourfront related initiatives and provide technical advice as appropriate. Representatives from other Departments may also be invited on a need-basis. Should legal advice be required arising from any of the discussion, the Development Bureau shall seek legal advice from the Department of Justice. Meetings are proposed to be held on a bi-monthly basis and the Working Group would report its progress to HC at each of its meeting.

PROPOSED WORKFLOW FOR DISCUSSION

6. Subject to further discussions of the Working Group, a proposed workflow is at **Appendix II** for consideration. It is envisioned that the review would require three meetings hence an estimated six months for recommendations to become available for the Government.

ADVICE SOUGHT

7. Subject to the agreement of HC in setting up the Working Group, Members are invited to endorse the proposed terms of reference, membership and mode of operation as set out in paragraphs 4 to 5. Members are also invited to note and comment on the workflow proposed for taking forward the work of the Group.

**Secretariat
Harbourfront Commission
December 2016**

Harbourfront Commission

For discussion
On 21 June 2016

HC/08/2016

Background Information Note on Protection of the Harbour Ordinance

PURPOSE

At the meeting of the Task Force on Harbourfront Developments in Kowloon, Tsuen Wan and Kwai Tsing on 9 March 2016, a member commented that the Protection of the Harbour Ordinance (PHO) (Cap. 531) had not been facilitating the implementation of various harbourfront enhancement initiatives. The Task Force considered that the issue should be raised at the Commission for discussion and deliberation on possible way forward. This paper sets out background information on PHO to facilitate discussion by the Commission.

BACKGROUND OF PHO

2. PHO first came into force on 30 June 1997. It originated as a private member's bill introduced in 1996 by a Legislative Council Member who was the Deputy Chairperson of the Society for Protection of the Harbour (SPH) then. The Chairman of the Bills Committee for the Protection of Harbour Bill 1997 described in his report to the Legislative Council on 27 June 1997 that the purpose of PHO was –

“...to ensure that Victoria Harbour will be protected against excessive reclamation. It establishes a presumption against reclamation in the harbour...”

3. The application of PHO, when it was enacted in June 1997, was limited to the central part of Victoria Harbour. Subsequently, PHO was further amended in December 1999 by expanding its scope to cover the whole of Victoria Harbour¹. The 1999 amendment also originated from a private member's bill proposed by the same Legislative Council Member but the bill was eventually taken over by the Government. The amended

¹ The boundaries of the Harbour are set out in Schedule 3 of the Interpretative and General Clauses Ordinance (Cap. 1) as – “On the east - A straight line drawn from the westernmost extremity of Siu Chau Wan Point to the westernmost extremity of Ah Kung Ngam Point (sometimes known as Kung Am); On the west - A straight line drawn from the westernmost point of Island of Hong Kong to the westernmost point of Green Island, thence a straight line drawn from the westernmost point of Green Island to the south-easternmost point of Tsing Yi, thence along the eastern and northern coast lines of Tsing Yi to the westernmost extremity of Tsing Yi and thence a straight line drawn true north therefrom to the mainland.” A map showing the extent of the Victoria Harbour as defined is shown in **Annex A** for ease of reference.

PHO has continued to remain in force since. A copy of the PHO in force is at **Annex B**.

THE PROVISIONS OF PHO

4. The long title of PHO provided that the Ordinance is -

“(t)o protect and preserve the harbour by establishing a presumption against reclamation in the harbour...”

5. PHO consisted of 4 sections and one schedule (the schedule was repealed in the 1999 amendment exercise). Section 1 is the short title. Section 2 is interpretation, which provides for the definition of various terms. In particular, “reclamation” is defined to mean –

“any works carried out or intended to be carried out for the purpose of forming land from the sea-bed or foreshore”

which refers to all reclamations regardless of their scale, nature or purpose, temporary or permanent.

6. Section 3 of PHO sets out the presumption against reclamation in the harbour and the duty of public officers and public bodies –

“(1) The harbour 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 harbour.

(2) All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them.”

7. Section 4 deals with transitional matters, i.e. PHO does not apply to reclamation authorized before the commencement of PHO.

JUDICIAL REVIEW IN RELATION TO PHO

8. Under the proposed Central Reclamation Phase III, reclamation would need to be carried out within the Victoria Harbour. The land to be formed by the proposed reclamation would serve the following purposes, including –

- (a) the provision of roads, namely a trunk road (Central-Wan Chai Bypass) and a road complex (Road P2, providing road connections between the trunk road and the existing road network in Wan Chai);
- (b) the provision of a waterfront promenade;
- (c) the elimination of "dead corners" in the harbour and the provision of an intercepting box culvert to enable stormwater to be discharged outside the typhoon shelter;
- (d) the provision of a harbour park; and
- (e) the reprovisioning of various facilities.

9. In connection with the proposed Central Reclamation Phase III, the Town Planning Board (TPB) exhibited the Draft Wan Chai North Outline Zoning Plan No. S/H25/1 (the draft plan) on 19 April 2002 for public inspection. The draft plan covered an area of about 76.54 hectares in Wan Chai North and designated uses for various parts of the area. Many written representations and comments on the draft plan objecting to the proposed reclamation were received by TPB.

10. After hearing the representations and comments (including those from SPH) on 6 December 2002 and 14 February 2003, TPB decided (a) to make limited amendments to the draft plan to meet some objections; (b) not to amend the draft plan to meet other objections; and (c) to submit the draft plan as amended to the Chief Executive in Council for approval.

11. On 27 February 2003, SPH initiated a Judicial Review (JR) against the decision of TPB in respect of the draft plan, in particular TPB's decisions not to modify the proposed reclamation. The JR went all the way to the Court of Final Appeal (CFA) (see *Town Planning Board V Society for the Protection of Harbour Limited* (FACV No 14/2003)). CFA handed down its judgment on 9 January 2004.

CFA'S RULING ON PHO

12. In its judgment, CFA set out the legal principles behind PHO, the presumption against reclamation and the test that can rebut it were clarified. CFA considered that the Victoria Harbour was a special public asset and natural heritage that belonged to Hong Kong people, and that the purpose of PHO was –

“30. "to protect and preserve the harbour by

establishing a presumption against reclamation in the harbour". As succinctly and powerfully stated in the explanatory memorandum to the bill, the legislative purpose is "to ensure that [the harbour] will be protected against excessive reclamation". (emphasis added). The purpose is to make sure that the harbour will be so protected."

13. CFA further considered that –

"42 ... The legislative intent was to confer a unique legal status on the harbour by enacting a strong and vigorous principle that it is to be protected and preserved as a special asset and a natural heritage of Hong Kong people, a principle that all public officers and public bodies must have regard to in exercising their powers."

14. Having regard to the purpose and intent, CFA considered that the Harbour must be kept from harm and to be defended and guarded, and there must not merely be protection, but also preservation –

"The statutory principle of protection and preservation of the harbour

32. Section 3(1) establishes a statutory principle recognising the harbour as a special public asset and a natural heritage of Hong Kong people and prescribing that it is to be protected and preserved as such an asset and such a heritage. This principle was enacted in general terms.

33. As was observed at the outset, the harbour is undoubtedly a central part of Hong Kong's identity. It is at the heart of the metropolis both physically and metaphorically. The statute characterises this in the most distinctive terms. It is recognised not merely as a public asset but as a "special" one. It is something extraordinary. The recognition does not stop there. It is further acknowledged to be a natural heritage. "Natural" in that it was not created artificially by man but is part of nature. A "heritage" in that it is inherited as a legacy from previous generations and is to be transmitted from generation to generation. The harbour as a special public asset and natural heritage is declared to belong to Hong Kong people. This reinforces its character as a "public" asset. It is a community asset and as such, is to be enjoyed by the people of Hong Kong. By representing the harbour in such special terms in the statute, the legislature was giving legal recognition to its unique character.

34. It is because of its unique character that the harbour must be protected and preserved. The meaning of these words in the statutory principle is plain. There must be protection, that is, it must be kept from harm, defended and guarded. And there must be not merely protection. There must also be preservation. Preservation connotes maintenance and conservation in its present state. What must be emphasised is that under the principle, what is to be protected and preserved is the harbour as a special public asset and a natural heritage of Hong Kong people.

35. It is manifest that in enacting the statutory principle, the legislature was giving legal recognition to the great public need to protect and preserve the harbour having regard to its unique character. The principle is expressed in clear and unequivocal language. The legislative intent so expressed is to establish the principle as a strong and vigorous one. By prescribing such a principle, the legislature has accorded to the harbour a unique legal status.”

15. CFA considered that reclamation would result in permanent destruction and irreversible loss of what should be protected and preserved under the statutory principle. The legal effect of the statutory presumption against reclamation was not to impose an absolute bar against reclamation, but a presumption that could be rebutted –

“The statutory presumption against reclamation

36. ...

37. Reclamation would result in permanent destruction and irreversible loss of what should be protected and preserved under the statutory principle. The statutory presumption was therefore enacted to implement the principle of protection and preservation. It is a legal concept and is a means or method for achieving protection and preservation. Its legal effect is not to impose an absolute bar against any reclamation. It does not prohibit reclamation altogether. As a presumption, it is capable of being rebutted.

....

Rebutting the statutory presumption

40. The presumption is against reclamation. It is however rebuttable. It can be displaced. The critical question is: as a matter of statutory interpretation, what should be regarded as sufficient to rebut it?"

16. On rebutting the statutory presumption, CFA propounded a single and demanding test. The presumption against reclamation can only be rebutted by establishing an overriding public need for reclamation, i.e. "overriding public need test". To implement reclamation within the limit of the Victoria Harbour, the overriding public need test must be satisfied. Under the test, public needs are community needs, which include economic, environmental and social needs. A need should only be regarded as overriding if it is compelling and present and if there is no reasonable alternative to reclamation. In other words, even if any, the extent of reclamation should not go beyond the minimum which is required by the overriding public need -

"Overriding public need"

44. In order to implement the strong and vigorous statutory principle of protection and preservation, the presumption must be interpreted in such a way that it can only be rebutted by establishing an overriding public need for reclamation. This can conveniently be referred to as "the overriding public need test". The statute, in conferring on the harbour a unique legal status, recognises the strong public need to protect and preserve it. The statute envisages that irreversible loss to the extent of the reclamation would only be justified where there is a much stronger public need to override the statutory principle of protection and preservation.

45. Public needs would of course be community needs. They would include the economic, environmental and social needs of the community.

46. A need should only be regarded as overriding if it is a compelling and present need. The need has to be compelling so that it has the requisite force to prevail over the strong public need for protection and preservation. And it has to be a present need in the sense that taking into account the time scale of planning exercises, the need would arise within a definite and reasonable time frame. If the need would not arise over such a time frame, it would not have the strength to displace the presumption.

47. A compelling and present need goes far beyond something which is "nice to have", desirable, preferable or beneficial. But on the other hand, it would be going much too far to describe it as something in the nature of the last resort, or something which the public cannot do without.

48. Where there is a reasonable alternative to reclamation, an overriding need for reclamation would not be made out. There would be no such overriding need since the need could be met by the alternative means. In considering what is a reasonable alternative, all circumstances should be considered. These would include the economic, environmental and social implications of each alternative. The cost as well as the time and delay involved would be relevant. The extent of the proposed reclamation should not go beyond the minimum of that which is required by the overriding need. If it does, the overriding need for the proposed reclamation could not be established, since there would be no need for the reclamation to the extent proposed. It is necessary that each area proposed to be reclaimed must be justified.

49. What the legislation contemplates is the imperative that there shall not be any reclamation unless the overriding public need test is satisfied. The test as explained above should be regarded as a single test. It is by its nature a demanding one."

17. In addition, the decision that there is an overriding public need for reclamation must be based on cogent and convincing materials -

"Cogent and convincing materials"

50. In considering the exercise of any power in relation to any reclamation proposal, a public officer or a public body must apply the overriding public need test and decide whether it is satisfied. It would obviously not be sufficient for the decision-maker to incant the test and assert that the test has been met. This would only be paying lip service to the test. There must be materials before the decision-maker to satisfy him that there is an overriding public need for reclamation so as to rebut the presumption against it.

51. To enable him to be so satisfied, the materials in the case in question must be cogent and convincing. If they do not have this quality, they would not be of sufficient weight to enable the decision-maker to be satisfied that the test is

fulfilled. The requirement that the materials must be cogent and convincing flows from the demanding nature of the test.

The burden

52. Having regard to the demanding nature of the overriding public need test and the requirement that there must be cogent and convincing materials to satisfy the test, the burden on those seeking to rebut the presumption is a heavy one. That this is so is entirely commensurate with what is at stake: the irreversible loss to the extent of the reclamation of a special asset and a natural heritage belonging to the people of Hong Kong.”

APPLICATION OF PHO

18. Subsequent to CFA’s judgment, the Government set up the former Harbour-front Enhancement Committee (HEC) in May 2004 to advise the Government on, among others, planning, land uses and developments along the existing and new harbourfront of the Victoria Harbour, with a view to protecting the Harbour. One of its focuses was to provide feedback to and monitor the reviews on the remaining proposed reclamation within the harbour, namely the Wan Chai North and Southeast Kowloon reclamation proposals. In September 2004, the Government also made a public statement that there would be no new reclamation plan in the Victoria Harbour (apart from the CRIII and Wan Chai Development Phase II (WDII)).

19. To ensure compliance with PHO in the light of CFA’s judgment, the Government issued a Technical Circular in August 2004 setting out the requirements of PHO and providing guidance for public officers and public bodies in considering and approving reclamation proposals in the Victoria Harbour. In particular, the Technical Circular provided guidelines for consideration of reclamation proposals, e.g. the relevant questions to be considered in the decision making process, the need for public consultation, the invitation of independent expert advice when necessary; flow chart in decision making process and examples of materials to justify the overriding public need in different scenarios. A copy of the Technical Circular which remains in force is at **Annex C**.

PREVIOUS DISCUSSIONS RELEVANT TO PHO

20. After the establishment of the Harbourfront Commission, the subject of PHO and projects involving reclamation in the Harbour had

been raised under the aegis of various projects or discussion items. Based on a quick desktop research by the secretariat, which may not be exhaustive given the time constraint of the research, the subject of PHO and projects involving reclamation within the Harbour had been raised on the following occasions -

- (a) proposed bridge for linkage between Kwun Tong and the tip of the Kai Tak Runway – 1st and 5th Meeting of Task Force on Kai Tak Harbourfront Development (Kai Tak TF) on 7 September 2010 and 1 June 2011;
- (b) proposed water sports centre at Kai Tak – 6th meeting of Kai Tak TF on 3 August 2011;
- (c) Proportionality Principle² - 7th HC Meeting on 7 September 2011;
- (d) the proposed boardwalk underneath the Island Eastern Corridor – 8th, 11th, 13th, 14th, 18th, 19th, 22nd and 23rd Meeting of the Task Force on Harbourfront Developments on Hong Kong Island (HKTF) on 12 January 2012, 30 October 2012, 7 June 2013 and 24 October 2013, 10 February 2015, 5 May 2015, 29 February 2016 and 25 May 2016;
- (e) proposal from the Royal Hong Kong Yacht Club on activating the Wan Chai Waterfront - HC meeting on 15 October 2012;
- (f) proposed yacht centre at Yau Tong Bay - 11th Meeting of Task Force on Harbourfront Developments in Kowloon, Tsuen Wan and Kwai Tsing (Kowloon TF) on 20 November 2012;
- (g) Central Kowloon Route – Phase 2 Public Engagement Exercise – 12th HC Meeting on 7 January 2013;
- (h) proposal to widen the promenade and the proposed harbour terrace in the area fronting the New World Centre – 12th Meeting of Kowloon TF on 22 January 2013;

² SPH presented the Proportionality Principle at the meeting of the Harbourfront Commission on 7 September 2011. According to SPH, the proposed principle aims to ensure that “(t)he greater the adverse impact of the proposed reclamation on the harbour, the greater must be the justification; accordingly having established a public need, in deciding if such need overrides the importance of the harbour, the prime consideration is whether any enrichment of the public enjoyment of the harbour and any enhancement of the environmental, social and economic value of the harbour as a result of the reclamation would justify the loss and damage consequentially caused to the harbour.” In response, the Government has pointed out that on the basis of legal advice it received, the Proportionality Principle proposed by SPH is inconsistent with the current provisions of the PHO, which do not differentiate reclamations by their scale.

- (i) an overview of marina development in Hong Kong – 5th Meeting of Task Force on Water-land Interface (Water-land Interface TF) on 19 March 2013;
- (j) an overview of public landing facilities in West Kowloon Cultural District - 5th Meeting of Water-land Interface TF on 19 March 2013;
- (k) briefing on the Protection of the Harbour Ordinance – 6th Meeting Task Force on Water-land Interface on 13 December 2013;
- (l) discussion of public seawall within the Victoria Harbour – 10th Meeting of Water-land Interface TF on 19 May 2015;
- (m) enhancing the Tsim Sha Tsui waterfront – 22nd Meeting of Kowloon Task Force on 9 March 2016.

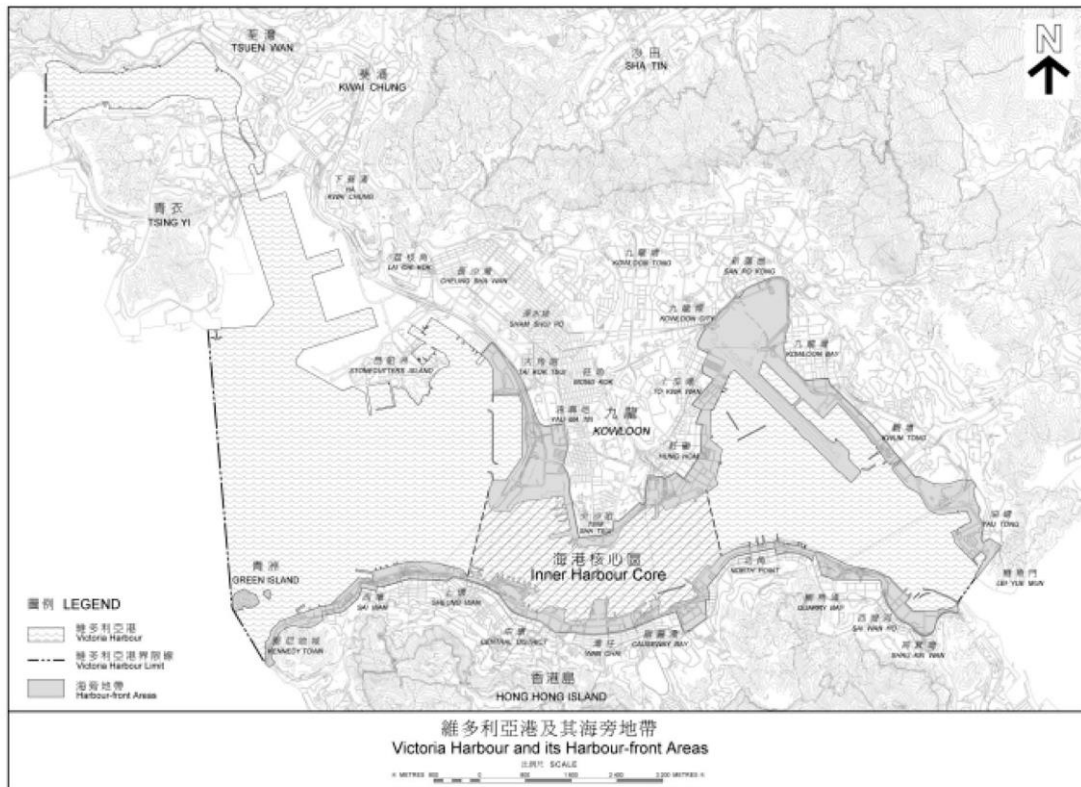
21. Since the CFA judgment in 2004, we are only aware of the following three projects that have fulfilled the overriding public need test in accordance with the Technical Circular –

- (a) CRIII and WDII (which involved permanent reclamation);
- (b) Shatin-Central Link (which involved temporary reclamation); and
- (c) Central Kowloon Route (which involved temporary reclamation).

22. Looking ahead, the proposed Boardwalk under the Island Eastern Corridor under planning would also involve reclamation. The Civil Engineering and Development Department commissioned an investigation study in March 2015 with the aim to, among others, review the feasibility of the proposed boardwalk and demonstrate its compliance with the PHO. CEDD is now assessing the views collected from stage one of the community engagement exercise as part of the process in preparing cogent and convincing materials with a view to deciding whether the project could satisfy the overriding public need test.

**Secretariat
Harbourfront Commission
June 2016**

A map showing the extent of the Victoria Harbour as defined in Schedule 3 of the Interpretative and General Clauses Ordinance (Cap. 1)



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|----------|-----|--------------------------------------------|----------------|--------------|
| Chapter: | 531 | PROTECTION OF THE HARBOUR ORDINANCE | Gazette Number | Version Date |
| | | Long title | 75 of 1999 | 03/12/1999 |

An Ordinance to protect and preserve the harbour by establishing a presumption against reclamation in the harbour.
(Replaced 9 of 1998 s. 2. Amended 75 of 1999 s. 2)

[30 June 1997]

(Originally 106 of 1997)

| | | | | |
|----------|---|--------------------|--|------------|
| Section: | 1 | Short title | | 30/06/1997 |
|----------|---|--------------------|--|------------|

This Ordinance may be cited as the Protection of the Harbour Ordinance.

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|----------|---|-----------------------|------------|------------|
| Section: | 2 | Interpretation | 75 of 1999 | 03/12/1999 |
|----------|---|-----------------------|------------|------------|

In this Ordinance, unless the context otherwise requires-
"reclamation" (填海) means any works carried out or intended to be carried out for the purpose of forming land from the sea-bed or foreshore; (Replaced 9 of 1998 s. 3)

"relevant Ordinance" (有關條例) means-

- (a) the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127);
- (b) the Cross-Harbour Tunnel Ordinance (Cap 203);*
- (c) the Eastern Harbour Crossing Ordinance (Cap 215);
- (d) the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap 276);
- (e) the Roads (Works, Use and Compensation) Ordinance (Cap 370);
- (f) the Western Harbour Crossing Ordinance (Cap 436); or
- (g) any other Ordinance under which reclamation is authorized or which otherwise provides for reclamation.

(Amended 9 of 1998 s. 3; 75 of 1999 s. 3)

Note:

* **Repealed — see 44 of 1999 s. 45.**

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|----------|---|-------------------------------------------------------|------------|------------|
| Section: | 3 | Presumption against reclamation in the harbour | 75 of 1999 | 03/12/1999 |
|----------|---|-------------------------------------------------------|------------|------------|

(1) The harbour 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 harbour. (Amended 75 of 1999 s. 4)

(2) All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them.

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|----------|---|---------------------|------------|------------|
| Section: | 4 | Transitional | 75 of 1999 | 03/12/1999 |
|----------|---|---------------------|------------|------------|

(1) This Ordinance does not apply to any reclamation authorized under a relevant Ordinance before the commencement of this Ordinance. (Amended 75 of 1999 s. 5)

(2) The Protection of the Harbour (Amendment) Ordinance 1999 (75 of 1999) ("the Amendment Ordinance") does not apply to any reclamation authorized under a relevant Ordinance before the commencement of the Amendment Ordinance. (Added 75 of 1999 s. 5)

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|-----------|---|-----------------------------------|------------|------------|
| Schedule: | 1 | (Repealed 75 of 1999 s. 6) | 75 of 1999 | 03/12/1999 |
|-----------|---|-----------------------------------|------------|------------|

19 August 2004

Housing, Planning and Lands Bureau
Technical Circular No. 1/04

Environment, Transport and Works Bureau
Technical Circular No. 1/04

Protection of the Harbour Ordinance

Purpose

This technical circular sets out the requirements of the Protection of the Harbour Ordinance (PHO) (Cap. 531) and provides guidance for public officers and public bodies to follow in considering and approving reclamation proposals.

Effective Date

2. This Circular takes immediate effect.

Effect on Existing Circulars

3. This Circular supersedes PELB Technical Circular No. 4/98 on Protection of the Harbour Ordinance and ETWB Technical Circular (Works) No. 32/2003 on Protection of the Harbour. However, the revised administrative arrangements for reclamation works as promulgated under PELB Technical Circular No. 3/97, Works Bureau Technical Circular No. 13/97 and 9/2001 shall remain in force.

Definition of Reclamation

4. The guidelines set out in this Circular apply to all reclamation proposals, regardless of scale, initiated by the Government or the private sector within the boundaries of the harbour as defined under section 3 of the Interpretation and General Clause Ordinance (Cap. 1) (see Annex A). According to section 2 of the PHO, reclamation means any works carried out or intended to be carried out for the purposes of forming land from the sea-bed or foreshore. In case of doubt on whether certain works would constitute reclamation, advice of the Department of
-

Justice should be sought.

Government's Position on Harbour Reclamation

5. The Government is committed to protecting and preserving the harbour and enhancing it for public enjoyment. Apart from the Central Reclamation Phase III and the reclamation proposals for Wan Chai North and South East Kowloon, the Government will not undertake any further reclamation in the harbour. These guidelines are therefore of particular relevance to the two proposed development projects of Wan Chai Development Phase II and South East Kowloon Development. Small-scale reclamations required for the construction of piers, landing steps, etc. not subject to the revised administrative arrangements promulgated in 1997 should also comply with these guidelines.

Protection of the Harbour Ordinance

6.1 Section 3 of the PHO provides that:

- (a) “The harbour 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 harbour.”
[*section 3(1)*]
- (b) “All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them.” [section 3(2)]

6.2 Section 3(1) of the PHO establishes a statutory principle recognizing the harbour as a special public asset and a natural heritage of Hong Kong people and prescribing it to be protected and preserved.

6.3 Section 3(2) imposes a specific legal duty on public officers and public bodies to abide by the legal principle stated in section 3(1) in the exercise of any powers vested in them. The legal burden to rebut the presumption is a heavy one. To overcome the presumption, all public officers and public bodies must follow the principles prescribed in the PHO and the CFA judgment conscientiously and decide whether it is complied with before coming to a decision.

Court of Final Appeal's Judgment

7.1 On 9.1.2004, the Court of Final Appeal (CFA) handed down its judgment on the Town Planning Board (TPB)'s appeal against the High Court's ruling in respect of the draft Wan Chai North Outline Zoning Plan, clarifying the interpretation of the legal principles behind the PHO. The CFA judgment and its Summary (FACV 14/2003) is viewable at the website of the Judiciary at www.judiciary.gov.hk.

7.2 According to the CFA, the harbour is a special public asset and natural heritage is declared to belong to Hong Kong people. It is a community asset and is to be enjoyed by the people of Hong Kong. It must be kept from harm, defended and guarded. There must be not merely protection. There must also be preservation.

7.3 Reclamation would result in permanent destruction and irreversible loss of what should be protected and preserved under the statutory principle. The statutory presumption against reclamation was therefore enacted to implement the principle of protection and preservation. It is a legal concept and is a means or method for achieving protection and preservation. Its legal effect is not to impose an absolute bar against reclamation. It does not prohibit reclamation altogether. As a presumption, it is capable of being rebutted.

7.4 The CFA propounded a single and demanding test. The presumption against reclamation can only be rebutted by establishing an overriding public need for reclamation, i.e. "the overriding public need test".

7.5 ***Public needs*** are community needs and include the economic, environmental and social needs of the community.

7.6 A need should only be regarded as ***overriding*** if it is compelling and present and if there is no reasonable alternative to reclamation, as follows:

- (a) a compelling need must have the requisite force to prevail over the strong public need for protection and preservation of the harbour;
- (b) the meaning of present need is that taking into account the time scale of planning exercises, the need would arise within a definite and

reasonable time frame;

- (c) all circumstances should be considered in considering whether there is a reasonable alternative to reclamation, including the economic, environmental and social implications of each alternative, the cost as well as the time and delay involved.

7.7 The extent of reclamation should not go beyond the minimum of that which is required by the overriding need. It is necessary that each area proposed to be reclaimed must be justified.

7.8 The decision that there is an overriding public need for reclamation must be based on cogent and convincing materials.

Guidelines for Consideration of Reclamation Proposals

8.1 Considerations in the Decision-making Process

8.1.1 Based on the CFA judgment, a flow chart highlighting the major considerations that should be taken into account by public officers and public bodies in the decision-making process on reclamation proposals is at Annex B. It applies to all stages of the process covering planning and engineering investigations, preparation of plan and reclamation/road schemes for gazetting, consideration of objections, approval/authorization under relevant ordinances, funding approval and detailed design of a reclamation project. However, it does not apply to the works implementation stage which is basically to implement the project already approved by all relevant authorities.

8.1.2 All public officers and public bodies that are involved from initial project inception to the planning and design stage are required to critically examine the need for the proposed reclamation project. The considerations and any decision on the reclamation project should be recorded fully in writing.

8.1.3 For each area of reclamation, three basic questions will need to be answered. The whole process including the decisions as to whether there is a compelling and present public need, whether there is any reasonable alternative, and whether the proposed reclamation extent is the minimum must be clearly documented and substantiated by cogent and convincing materials. It is the responsibility of the proponents of individual facilities (i.e. the client

bureaux/departments) to prove, with engineering input from the relevant works departments, that the proposals they put forward will meet “the overriding public need test”.

8.1.4 There is no hard-and-fast rule on what materials could be considered as cogent and convincing. It depends on the merit of each case. Provided that one takes account of all relevant matters and does not consider irrelevant matters, one’s decision could not be challenged as perverse, irrational or unreasonable.

Question 1 – Is there a compelling and present public need?

8.1.5 In assessing whether there is an overriding public need for providing certain infrastructure or facility which may involve reclamation, it will be necessary to establish that the need is a public need, and is compelling and present.

8.1.6 Public needs are community needs and include the economic, environmental and social needs of the community. The following are some examples of public needs:

Economic Needs

- sustain economic growth and prosperity of the economy (e.g. by providing or improving essential infrastructure such as roads, railways, drainage and sewerage facilities, or facilities which require a waterfront location such as cruise terminal);

Environmental Needs

- needs which are most substantial/formal (e.g. reclamation for constructing environmental infrastructures like sewage treatment plants);
- needs which are confirmed through proper environmental studies such that they are indeed environmental “needs” rather than ad hoc justifications for reclamation; and
- needs which are backed up by broad community consensus, instead of just some “wants” by the few to justify reclamation. The concepts of “needs” and “wants” are different and should not be mixed up.
- It will be up to the project proponent to carry out studies to justify the environmental needs. When considering the environmental needs for the proposed reclamation, the project proponent may also need to

examine the “net result” after taking into account the possible adverse environmental implications arising from the project or at least the reclamation itself.

Social Needs

- Improve quality of life of the community (e.g by providing more public amenities and promoting public accessibility to the harbour-front).

8.1.7 An overriding need must be compelling and justified by cogent and convincing materials. The exact type and extent of supporting materials depend on the nature and purpose of the project/facility. Annex C gives some examples of the materials that may be required for justifying certain projects.

8.1.8 An overriding need must also be present. To satisfy this requirement, there must be a sufficiently concrete programme of implementation and firm commitment from the concerned department and bureau, with endorsement by relevant authorities, where applicable. Annex D is a proforma for confirming the present need for a proposed facility involving reclamation.

8.1.9 In providing cogent and convincing materials to justify the urgent public need for reclamation, it is necessary to set out any adverse consequences of not meeting the public need in time, which may cover various aspects including the economic, environmental and social implications, as well as the time, cost and delay involved.

Question 2 – Is there any reasonable alternative to reclamation?

8.1.10 Alternatives to reclamation can be in various forms such as changing the policy choices, siting/reprovisioning a use/facility at an alternative location or adopting an alternative road/rail alignment, and employing different design and construction methods. Annex E gives some sample questions that need to be answered in considering whether there are alternatives to reclamation.

8.1.11 All alternatives, including those put forward by the public, should be clearly set out and carefully examined to assess whether they are reasonable alternatives. A “no reclamation” scenario must be taken as the starting point in considering alternatives. It is imperative to examine if an overriding public need can be met without any reclamation.

8.1.12 All circumstances should be considered in determining whether there is a reasonable alternative to reclamation, including the economic, social and environmental implications, cost and time incurred, and other relevant considerations.¹ The assessments should be properly documented, and where appropriate, subject to public scrutiny. If any reasonable alternative is available, the reclamation proposal should not be considered further. An alternative may be considered as “unreasonable” if it (the following is not exhaustive) –

- (a) could not achieve or substantially achieve the set objectives;
- (b) would have significantly adverse economic, social and environmental implications;
- (c) would cause unacceptable delay to achieving the objectives;
- (d) would result in prohibitively high cost; and/or
- (e) would involve employment of untested technology.

8.1.13 As a general rule, reprovisioning of affected facilities on reclaimed land should be justified on individual basis and should not be taken for granted. All reprovisioning requirements must be justified individually on their own by the concerned departments and bureaux. It is necessary to demonstrate that there is no reasonable alternative but to reprovision an affected facility on reclamation.

Question 3 – Is the proposed reclamation extent minimum?

8.1.14 If it can be established that there is no reasonable alternative to reclamation in meeting the overriding public need, the next step is to ensure that

¹ The range of indicators and criteria may include but not necessarily limit to the following:

- Economic Implications – economic growth and prosperity, overall cost of doing business, and employment opportunity;
- Social Implications – community need and aspiration, community support/consensus, healthy living, heritage preservation, social cohesion, and community identity;
- Environmental Implications – air quality, noise, water quality, waste disposal, energy efficiency, natural resources, landscape and visual impacts, and nature conservation;
- Cost – financial viability, return on investment/economic return, capital cost, and recurrent cost;
- Time – lead time of implementation, and time required to achieve the objectives; and
- Others – effectiveness of achieving the objectives, technical feasibility, and safety consideration.

reclamation must be restricted to only the amount strictly necessary to meet the overriding public need.

8.1.15 The extent of reclamation for each and every component must be fully justified on its own and minimized. Reclamation for a particular element/objective (e.g. reprovisioning of waterfront facilities affected by reclamation) cannot be justified by its association with the reclamation scheme, or individual components in the scheme, proposed for meeting certain overriding public needs (e.g. provision of essential road and railway infrastructure). The extent of reclamation may be considered as minimum if further reduction in reclamation would, for example –

- (a) significantly compromise the effectiveness and efficiency of a particular facility;
- (b) substantially increase the capital and running costs; and/or
- (c) unduly lengthen the construction time and result in unacceptable delay in provision of the required facilities and services.

8.1.16 The consideration leading to the decision of not selecting an alternative that may minimize the extent of reclamation because it does not pass the test of reasonableness should be documented as part of the cogent and convincing materials.

8.2 Public Consultation

8.2.1 It is of paramount importance to gauge the views of the public on the need identified by the Government as an overriding public need. Public consultation should therefore be conducted on any reclamation proposal in the harbour. A proactive approach should be adopted to encourage public involvement in the process to instill a sense of partnership between the Government, stakeholder groups and the community. All relevant parties, including the Legislative Council, Town Planning Board, Harbour-front Enhancement Committee, relevant District Councils, professional institutes, interest groups, relevant advisory committees and the general public, should be consulted as appropriate. The extent of public consultation should be determined with reference to the scale of the reclamation proposal.

8.2.2 To be effective and useful, the public consultation exercise should be well structured and a consultation strategy including the following major aspects should be formulated:

- (a) the scope and timing of consultation;
- (b) the target audience to be consulted;
- (c) the methods of consultation (e.g. informal sounding out; opinion polling/market research/questionnaire survey; exhibition; press conference/briefing/release; publication of consultation materials; presentation to relevant committees/bodies; public consultation forum, etc.);
- (d) the types of consultation and presentation materials to cater for different types of audience and events; and
- (e) the level of representation at various consultation events.

8.2.3 The public should be involved early in the planning process. For any reclamation proposal that requires the carrying out of a comprehensive planning and engineering feasibility study, the public should be consulted at various key stages of the feasibility study, for example, when the inception report is prepared, preliminary findings of the study are available, alternative conceptual schemes are formulated and the preferred scheme recommended under the study, before a final decision is made by the Government. In particular, it is useful to collect public views on whether the facilities proposed on reclamation are generally accepted as meeting “the overriding public need test”, and whether there are any alternatives to reclamation that need to be examined.

8.2.4 Public views gathered from consultation should be carefully analyzed and incorporated, where appropriate. All public views addressed to the Government should be suitably responded to, for example, by way of correspondence or a consolidated consultation report.

8.3 Independent Expert Advice

Where necessary, independent experts from outside the Government should be invited to ascertain if “the overriding public need test” has been satisfied, if the

reclamation are cogent and convincing.

Annexes

- Annex A The Boundaries of the Harbour
- Annex B Flow Chart on Major Considerations in Decision-making Process on Reclamation Proposals
- Annex C Examples of Materials to Justify the Overriding Public Need
- Annex D Proforma for Confirming the Present Need for Facility Involving Reclamation
- Annex E Examples of Questions that Need to be Answered on Alternatives to Reclamation



(Michael M.Y. Suen)

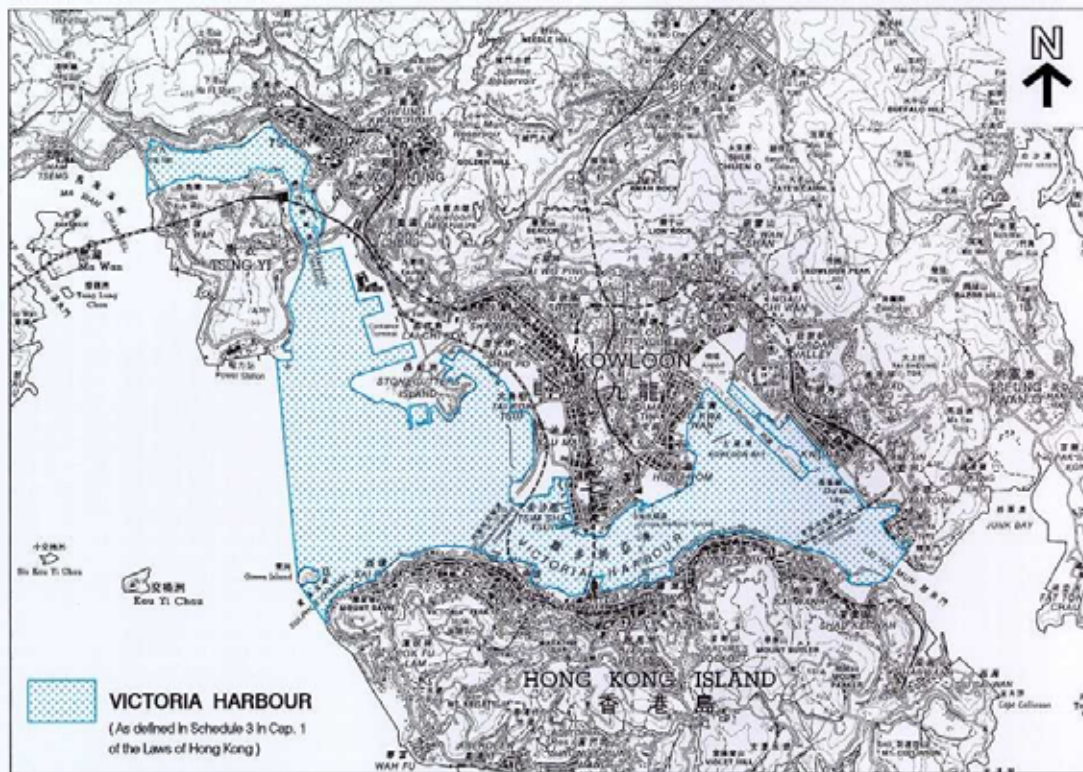
Secretary for Housing,
Planning and Lands



(Dr. Sarah Liao)

Secretary for the Environment,
Transport and Works

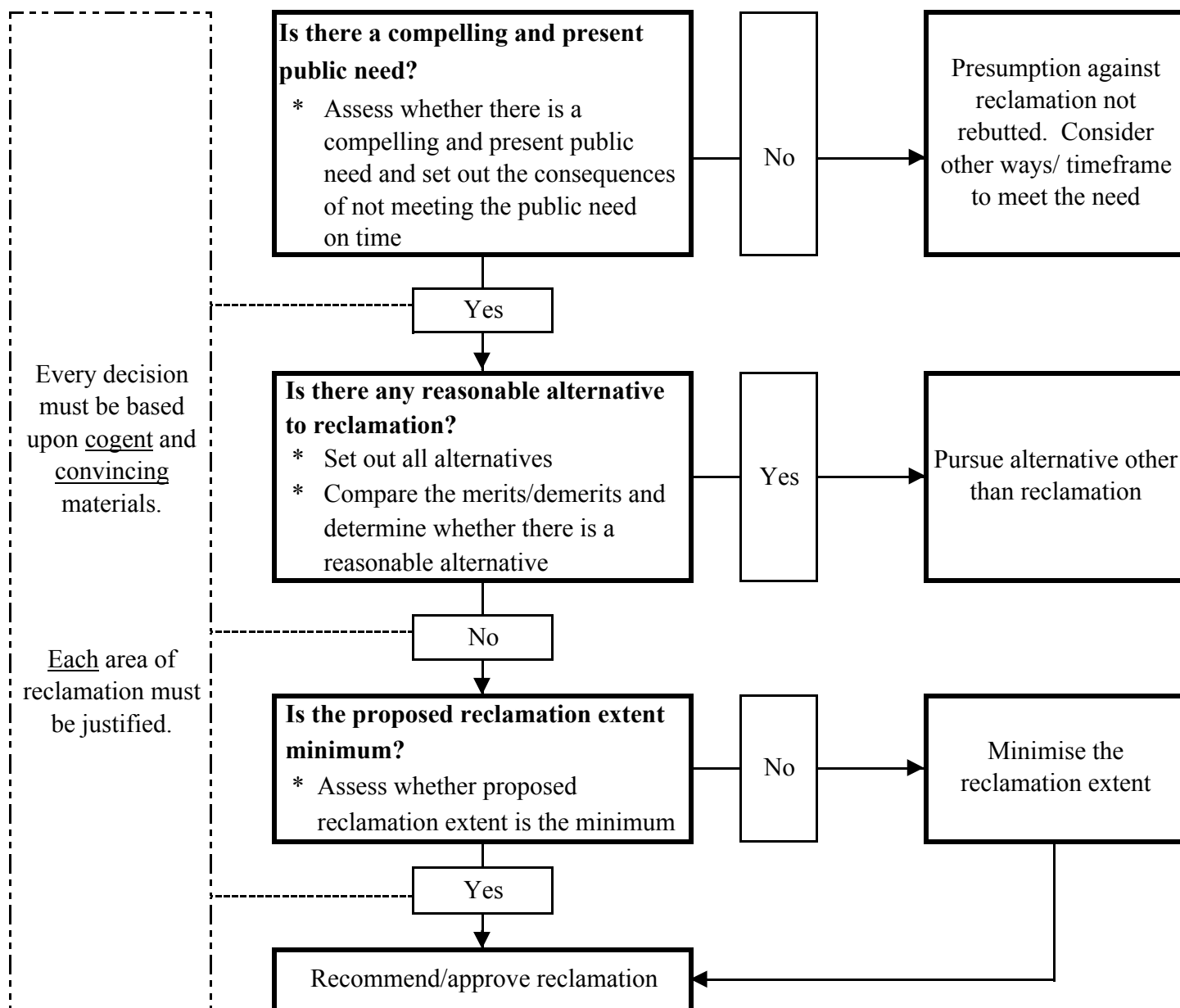
The Boundaries of the Harbour



According to the Interpretation and General Clauses Ordinance, the “Boundaries of Harbour” means the waters of Hong Kong between:

- (a) the eastern limit – a straight line drawn from the westernmost extremity of Siu Chau Wan Point to the westernmost extremity of Ah Kung Ngam Point; and*
- (b) the western limit – a straight line drawn from the westernmost point of Island of Hong Kong to the westernmost point of Green Island, thence a straight line drawn from the westernmost point of Green Island to the south-easternmost point of Tsing Yi, thence along the eastern and northern coast lines of Tsing Yi to the westernmost extremity of Tsing Yi, and thence a straight line drawn true north therefrom to the mainland.*

Flow Chart on Major Considerations in Decision-making Process on Reclamation Proposals



Footnote : The public will be consulted as necessary at various stages.

Examples of Materials to Justify the Overriding Public Need

Case 1: Trunk Road and Railway

Economic Aspect

- Findings and recommendations of updated transport studies
- Role of trunk road and railway in strategic transport network
- Road traffic forecasts in specific timeframe (e.g. volume/capacity ratios, speed of vehicular traffic)
- Congestion relief to adjacent roads
- Daily boardings, rail ridership, percentage of trips by rail
- Overloading of rail system and critical peak hour loadings
- Journey time
- Cost and benefit analysis
- Economic returns
- Economic loss due to congestion
- Effect on competitiveness of Hong Kong

Environmental Aspect

- Improvement in air quality
- Reduction in noise sensitive receivers exposed to excessive road traffic noise
- Reduction in energy consumption
- Improvements along other roads (by the relief in traffic provided by the new project)

Social Aspect

- Increase in mobility of passengers
- Improvement in living and working environment (may include qualitative assessment)
- Public support (may be established through public consultation)
- Improvement in living and working environment

Case 2: Drainage and Sewerage Facilities

Economic Aspect

- Resident/working population and domestic/non-domestic units to be served by the facilities
- Reduction in flooding risk inland
- Reduction in economic loss due to flooding

Environmental Aspect

- Improvement in water quality
- Reduction in expedient connections to stormwater drains

Social Aspect

- Improvement in healthy living and working environment (may include qualitative assessment)
- Public support (may be established through public consultation)

Case 3: Promenade

Economic Aspect

- Enhancing the image of Hong Kong as an international city and its competitiveness (may include qualitative assessment)
- Number of tourists visiting the promenade
- Number of major events using the promenade as venue

Environmental Aspect

- Improvement in visual quality and landscape character of the waterfront

Social Aspect

- Public support and aspiration for a high-quality waterfront promenade and supporting facilities (may be established through surveys and public consultation)
- Improvement in healthy living and working environment (may include qualitative assessment)

Proforma for Confirming the Present Need for Facility Involving Reclamation

(One proforma should be used for each proposed facility)

| | |
|---------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|
| Facility: | <i>(Specify the name of facility - e.g. sewage pumping station)</i> |
| 1. Date Required: | <i>(Specify the timing when the facility is required)</i> |
| 2. Justifications: | <i>(Explain why the facility must be provided at the above time)</i> |
| 3. Authority and Decision Date: | <i>(Specify the authority giving the endorsement to the provision of the facility and the date of decision)</i> |
| 4. Public Works/ Building Programme: | <i>(Specify the category of Public Works/Building Programme in which the facility falls, and relevant dates of inclusion/upgrading in the programme)</i> |
| 5. Public Views/ Support: | <i>(Give an account of the public views/support on the provision of the facility, including the dates when the consultations were undertaken)</i> |

Examples of Questions that Need to be Answered on Alternatives to Reclamation

Alternative Ways to Meet the Public Need (including policy choices)

- Should demand management measures be used instead of reclaiming the harbour to provide land for developing new facility?
- Can a change in policy effectively resolve the problem?
- Is there an alternative mode of operation/system that can achieve or substantially achieve the same objectives of the proposed reclamation?
- Can the existing facilities be improved or better utilized to reduce or postpone the need to provide the new facility on reclamation?
- Can cash compensation be paid in lieu of reprovisioning of affected facilities?
- Can pollution problem be controlled at source?

Alternative Locations of Use/Facility or Alternative Alignments

- Can a particular use or facility be located outside the proposed reclamation?
- Can an alternative road/railway alignment be adopted to obviate the need for or minimize reclamation?

Alternative Design and Construction Methods (more related to minimizing extent of reclamation)

- Can road tunnels be built instead of surface roads?
- Can the size and land requirement of a particular facility be further reduced to minimize reclamation?
- Can staging and work sequence of construction be varied to reduce the reclamation extent?
- Are there alternative construction/foundation methods for waterfront structures to minimize reclamation?

**Possible Workflow for the
Working Group on Protection of the Harbour Ordinance (PHO)**

(I) First Meeting

(i) Overview of the PHO

This was already covered by Harbourfront Commission (HC) paper 08/2016 that was presented at the last meeting in June 2016. The Working Group (WG) may wish to go through content of the paper as background information.

(ii) In-depth study of projects having PHO implications

The WG may like to study each of the past projects that had PHO implications, which have been listed out in HC paper 08/2016. This exercise could help the WG identify major hurdles faced by past projects in this regard.

(II) Second Meeting

Possible solutions to be recommended

(i) Administrative and Technical Solutions

- Review of relevant administrative guidelines as set out in Technical Circular No.1/2004 in considering reclamation proposals in the light of the requirements of PHO and the Court of Final Appeal judgment.

(ii) Legislative Solutions

- Review past application of PHO and look for ways in which clarifications could be made to allow reclamations of minor nature to proceed without subjecting to overriding public need test.

(III) Third Meeting

Conclusion of recommendations to be made to the Government.