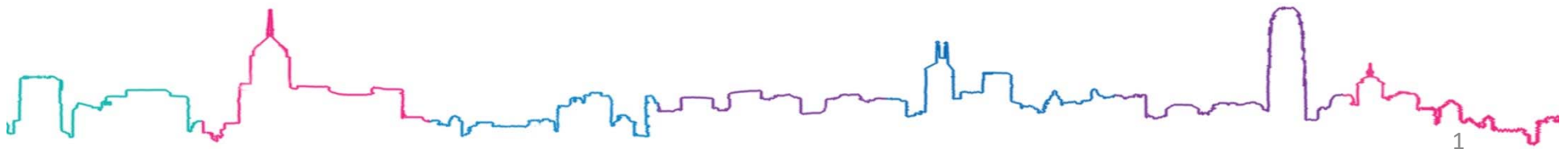


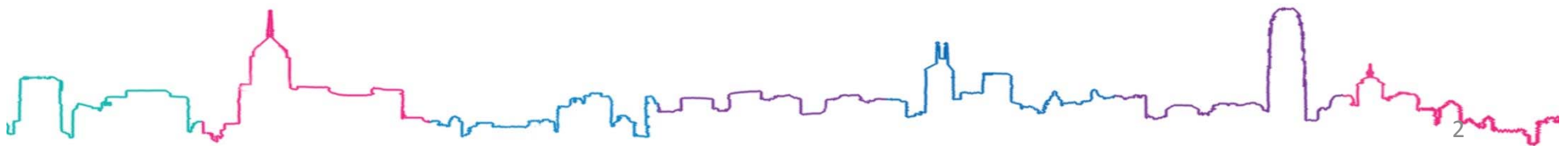
Protection of the Harbour Ordinance

June 2016



Purpose

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

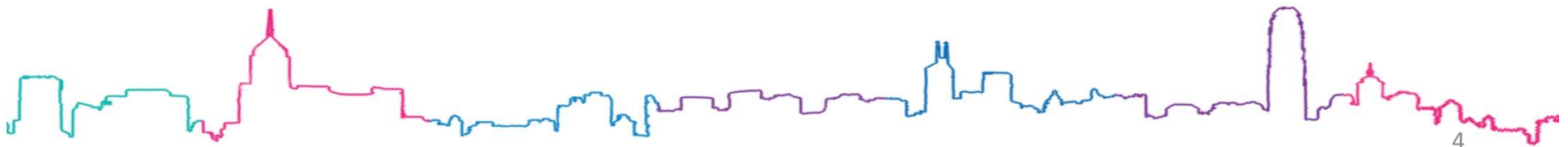


Background of PHO

- PHO first came into force on 30 June 1997. It originated as a private member's bill
- 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...”
- When first enacted, PHO applied only to the central part of Victoria Harbour. In December 1999, PHO was amended to expand its scope to cover the whole of Victoria Harbour

Provisions of PHO

- The long title of PHO provides that the Ordinance is -
“(t)o protect and preserve the harbour by establishing a presumption against reclamation in the harbour...”
- PHO consists of 4 sections

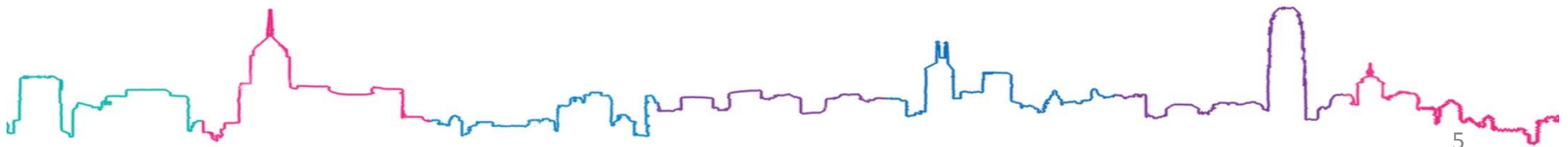


Provisions of PHO

- Section 1 is the short title
- Section 2 provides for the definition of terms.
“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”

The definition refers to all reclamations regardless of their scale, nature or purpose, temporary or permanent

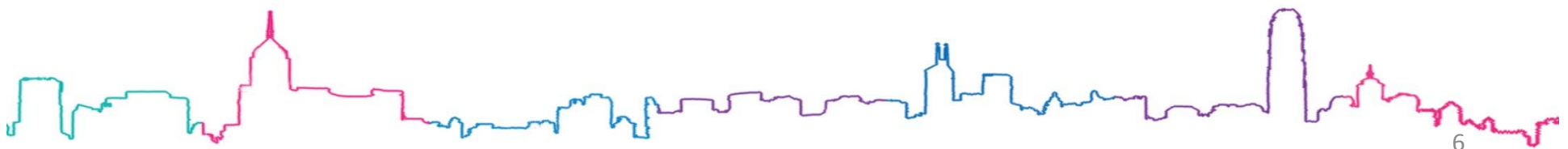


Provisions of PHO

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

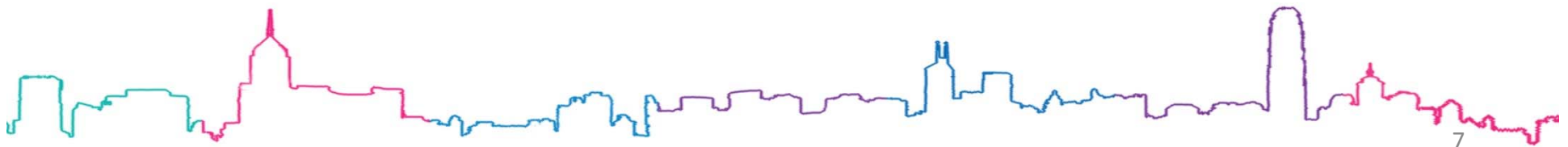
“(1) The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.

(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.”



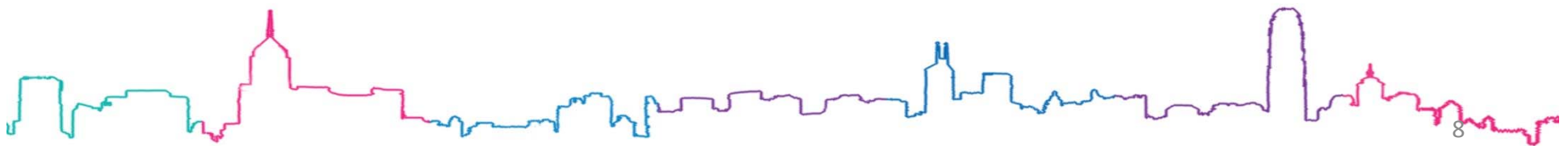
Provisions of PHO

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



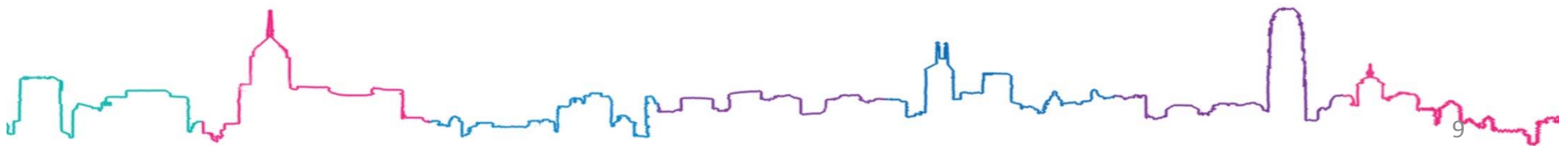
Judicial Review in relation to PHO

- Under the proposed Central Reclamation Phase III (CRIII), reclamation would need to be carried out within the Victoria Harbour
- In connection with CRIII, the Town Planning Board (TPB) exhibited the Draft Wan Chai North Outline Zoning Plan No. S/H25/1 on 19 April 2002 for public inspection



Judicial Review in relation to PHO

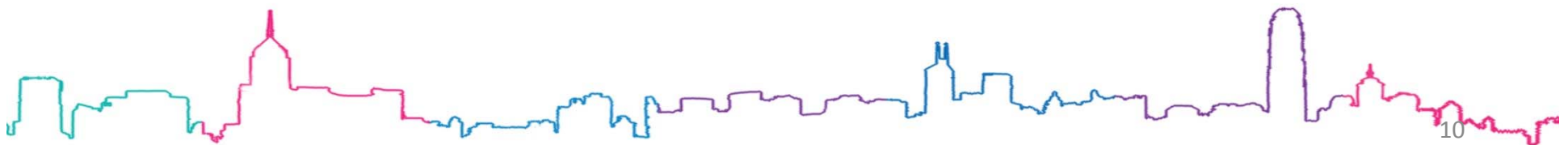
- Many written representations and comments on the draft plan objecting to the proposed reclamation were received by TPB
- On 27 February 2003, SPH initiated a Judicial Review (JR) against the decision of TPB in respect of the draft plan, in particular TPB's decisions not to modify the proposed reclamation. The JR went all the way to the Court of Final Appeal (CFA)



CFA's Ruling on PHO

- In its judgment, CFA set out the legal principles behind PHO, the presumption against reclamation and the test that can rebut it were also 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 –

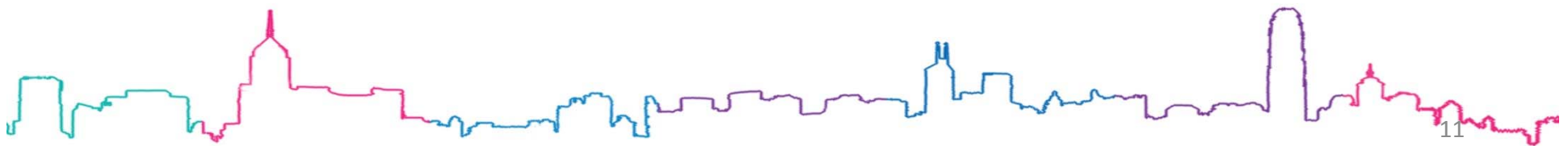
“30. "to protect and preserve the harbour by establishing a presumption against reclamation in the harbour". As succinctly and powerfully stated in the explanatory memorandum to the bill, the legislative purpose is "to ensure that [the harbour] will be protected against excessive reclamation". (emphasis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



Judicial Review in relation to PHO

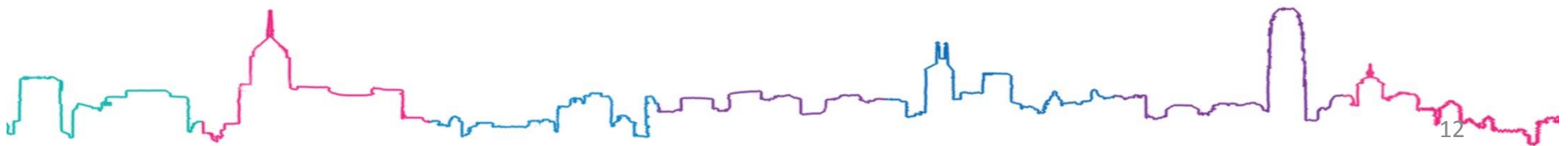
- CFA further considered that –

“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.”



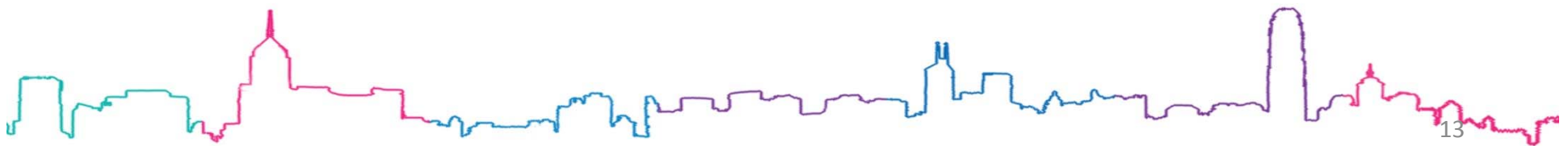
Judicial Review in relation to PHO

- 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
- 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



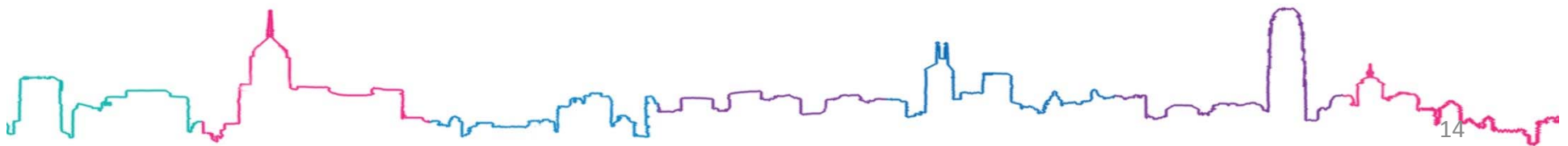
Judicial Review in relation to PHO

- 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”
- 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



Judicial Review in relation to PHO

- The extent of reclamation should not go beyond the minimum which is required by the overriding public need
- In addition, the decision that there is an overriding public need for reclamation must be based on cogent and convincing materials



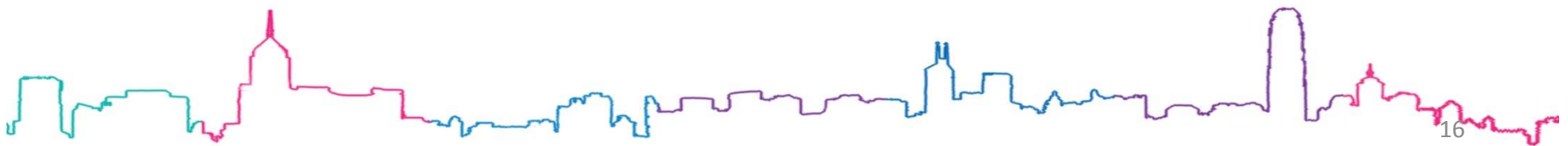
Application of PHO

- Subsequent to CFA's judgment in 2004, the Government –
 - set up the former Harbour-front Enhancement Committee (HEC) in May 2004
 - issued a Technical Circular in August 2004
 - made a public statement in September 2004 that there would be no new reclamation plan in the Victoria Harbour (apart from the Central Reclamation Phase III and Wan Chai Development Phase II)



Application of PHO

- After the establishment of the Harbourfront Commission, the subject of PHO and projects involving reclamation in the Harbour were raised under the aegis of various projects or discussion items –
 - a. proposed bridge for linkage between Kwun Tong and the tip of the Kai Tak Runway in 2010 and 2011;
 - b. proposed water sports centre at Kai Tak in 2011;
 - c. Proportionality Principle in 2011;
 - d. the proposed boardwalk underneath the Island Eastern Corridor in 2012, 2013, 2015 and 2016;
 - e. proposal from Royal Hong Kong Yacht Club on Activating the Wan Chai Waterfront in 2012;



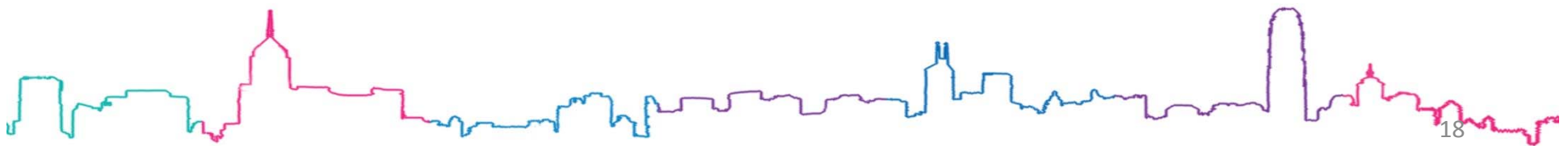
Application of PHO

- f. proposed yacht centre at Yau Tong Bay in 2012;
- g. Central Kowloon Route (Phase 2 Public Engagement Exercise) in 2013;
- h. proposal to widen the promenade and the proposed harbour terrace in the area fronting the New World Centre in 2013;
- i. an overview of marina development in Hong Kong in 2013;
- j. an overview of public landing facilities in West Kowloon Cultural District in 2013;
- k. briefing on the Protection of the Harbour Ordinance in 2013;
- l. discussion of public seawall within the Victoria Harbour in 2015;
and
- m. enhancing the Tsim Sha Tsui waterfront in 2016



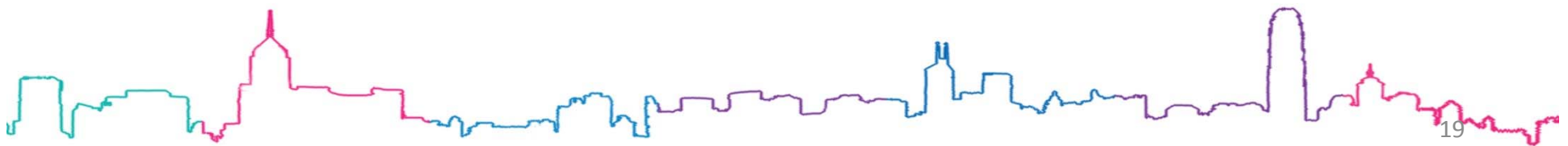
Application of PHO

- Since the CFA judgment in 2004, we are only aware of the following three projects that has 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)



Application of PHO

- 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 review the feasibility of the proposed boardwalk and demonstrate its compliance with the PHO
- CEDD is now assessing the views in preparing cogent and convincing materials with a view to deciding whether the project could satisfy the overriding public need test



Thank you

