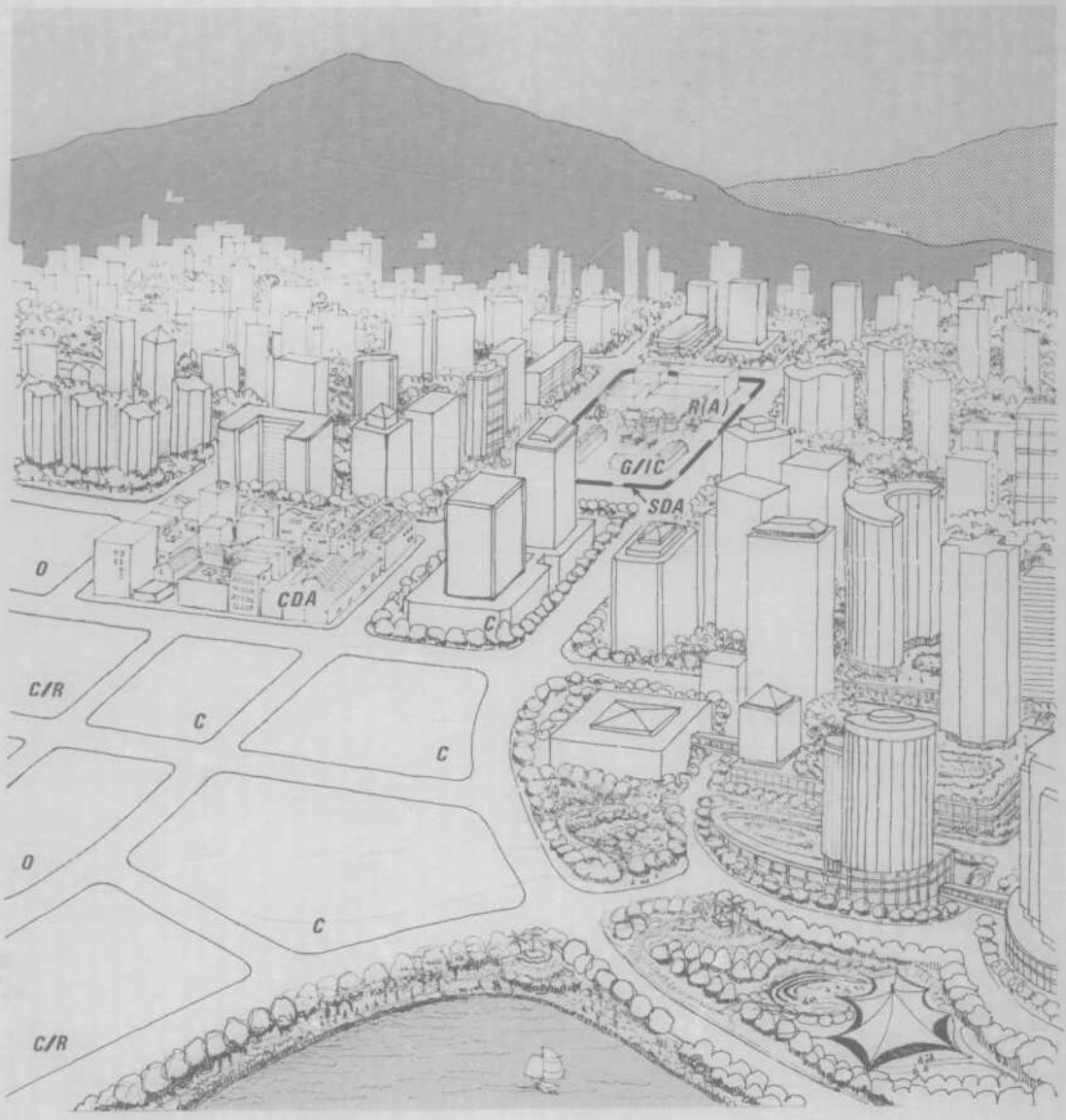

COMPREHENSIVE REVIEW OF THE TOWN PLANNING ORDINANCE

consultative document

JULY 1991

COMPREHENSIVE REVIEW OF THE TOWN PLANNING ORDINANCE

CONSULTATIVE DOCUMENT

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FOREWORD

The Town Planning Ordinance (Cap. 131) (the Ordinance) was enacted in 1939. Until the passage of the Town Planning (Amendment) Ordinance 1991, there had been no fundamental changes to the planning legislation for Hong Kong. With the significant changes in Hong Kong's political, social and economic circumstances in recent decades, the Ordinance is no longer able to provide the necessary degree of guidance and control for planning and development in Hong Kong.

2. In September 1987, the Executive Council ordered that an overall review of the Ordinance should be carried out with a view to introducing a new piece of legislation to replace the existing one. The review was undertaken by the Secretary for Planning, Environment and Lands (formerly the Secretary for Lands and Works) who was advised by an Advisory Group formed in early 1988 comprising both official and non-official members.

3. The Advisory Group spent a year studying thoroughly the problems in the existing planning system and procedures as well as the inadequacies of the Ordinance in coping with these problems. It completed a general review of the Ordinance and submitted a report to the then Secretary for Lands and Works.

4. While the Advisory Group report was being examined as a basis for developing proposals for the new planning legislation, some of the problems it highlighted were identified by the Government as requiring immediate action, and interim amendments to the Ordinance were introduced in the Town Planning (Amendment) Bill 1990 in advance of the completion of the comprehensive review of the Ordinance. The Bill was gazetted on 27 July 1990 together with the publication of a consultative document to seek the views of the public on the proposed interim changes. Having incorporated amendments put forward in response to the public submissions received, the Bill was subsequently passed in the Legislative Council on 23 January 1991.

5. The existing appeal system on planning applications has been a subject of public concern and criticism. The problems were discussed by the Legislative Council Ad Hoc Group set up to study the Amendment Bill 1990. The Group requested the early establishment of a separate independent appeal body to replace the Governor in Council in dealing with appeals against the Town Planning Board's decisions on planning applications. This is being addressed in the Town Planning (Amendment) Bill 1991 recently introduced into the Legislative Council.

6. The comprehensive review of the Ordinance has now been completed. The various changes proposed to the Ordinance are set out in this Document as the basis of public consultation. All comments from the public on the proposals outlined in this Consultative Document are welcome and should be sent by 30 November 1991 to :-

Town Planning Ordinance Review Unit,
Planning Department,
Murray Building,
Garden Road,
Hong Kong.

7. Because of its complexity and contentious nature, the issue of compensation and betterment has been treated differently from the other issues in the Consultative Document. Instead of proposing specific provisions for inclusion in the new Ordinance, a Special Committee on Compensation and Betterment will be formed to consider public submissions on the subject, with a view to making recommendations to the Governor on whether there is a requirement for provisions relating to compensation and betterment which should be included in the new Planning Ordinance. Written submissions and/or requests for a hearing on this issue should be made direct to the Special Committee at the following address :-

The Secretary,
Special Committee on Compensation and Betterment,
7th Floor, Club Lusitano,
Ice House Street,
Hong Kong.

The consultation period for this special issue will also end on 30 November 1991.

8. At the conclusion of the consultation period, the Government will take account of all the views collected before drawing up the new planning legislation for Hong Kong.

CHAPTER 1

INTRODUCTION

PURPOSE OF PLANNING

1.1 'Planning' as used in this Document is concerned with the use of land. Planning seeks to promote the right development in the right place and at the right time, so as to bring about a better organized, more efficient and more pleasant place in which to live and to work. This is achieved through the assessment of requirements for and designation of land for all types of uses, so as to provide a basis for public expenditure on community facilities and infrastructure and for private investment in building and other development.

1.2 The functions in paragraph 1.1 are primarily a duty of the Government. In addition, private individuals or organizations engage in planning activities whenever they take decisions and actions relating to the use or development of land. Clearly the interests of individuals may not always be the interests of the community. Land uses beneficial to individuals sometimes produce adverse effects on others. Examples include establishing car repairs and other industrial activities in residential neighbourhoods, operating an oil depot or cement plant next to residential buildings, running motels in residential neighbourhoods, scrapyards next to village houses, or developing individual buildings in excess of the capacity of the infrastructure of an area. There is thus an additional duty on the Government to control individual development activities within each type of land use to ensure that adverse effects on the neighbouring environment are minimized.

1.3 Taken together, the Government must ensure adequate forward planning and development control to protect the public interest and to ensure that community and social needs are met. This is not to say that private interests should always lose out in the name of the public interest. A good planning system is one which provides an appropriate means of balancing community and private interests in development by providing suitable safeguards for the rights and interests of individual parties as well as adequate powers to promote the public interest.

THE EXISTING PLANNING SYSTEM IN HONG KONG

Administrative and Statutory Processes

1.4 Planning in Hong Kong is carried out at three basic levels : territorial, sub-regional and local district planning. The top two levels - territorial planning (e.g. Port and Airport Development Strategy) and sub-regional planning (e.g. Metroplan) - are conceptual. At these levels overall requirements in terms of population, land use, transport and environment are determined and allocated to the Territory and its five sub-regions. Plan-making at these levels is currently an entirely administrative process, guided by the Land Development Policy Committee chaired by the Chief Secretary. Territorial and sub-regional plans are primarily policy statements concerned with broad development strategies. They may raise issues of widespread public interest, but they do not confer or restrict development rights. Thus although the Government will continue to consult the public on these plans, there is no need to bring them within a statutory framework.

1.5 The third level of the planning hierarchy, district planning, represents the translation of the overall requirements together with specific identified local needs into detailed plans, designating various parcels of land for various uses. These district plans include statutory outline zoning plans (OZPs) and development permission area (DPA) plans prepared under the provisions of the Town Planning Ordinance (the Ordinance), as well as departmental outline development plans and layout plans which are prepared and used administratively within the Government. Statutory OZPs and DPA plans, which form the basis for the exercise of legal powers relating to development control, are prepared under the direction of the Town Planning Board (TPB). The TPB is an independent body, most of whose members are non-officials. They are thus in a position to consider fairly, when conflicts arise, the balance of interest between public and private needs. Departmental outline development plans and layout plans are prepared within the framework of statutory plans to show planning proposals in greater details. Once approved by the Development Progress Committee, the departmental plans are used as guides by all Government departments in development programming, development control and the release of land for various public and private developments.

The Existing Statutory Planning System and Its Problems

1.6 Planning legislation establishes the legal framework through which planning functions are exercised by various planning bodies, and prescribes the statutory procedures for the resolution of conflicts over the use and development of land between private and public interests. It is important to have a piece of planning legislation that can serve adequately and efficiently the physical, social and economic needs of the community at large, and can balance fairly the interests of all parties involved in the land development process. As community needs and values change, so too must the planning legislation change. Apart from a number of piecemeal amendments, however, the Town Planning Ordinance in Hong Kong has remained largely in its original 1939 form until very recently when the Town Planning (Amendment) Ordinance 1991 (the Amendment Ordinance 1991) was enacted. It is hardly surprising that both the Government and the public perceive problems in the current statutory planning practice. The discussion below focuses on the problems inherent in the current system, while those problems relating primarily to procedures are examined further in Chapter 2.

1.7 Before the enactment of the Amendment Ordinance 1991, the Ordinance was very much a piece of procedural legislation which only provided for two main mechanisms in planning : the preparation of draft plans (OZPs) and the operation of a planning application system based on the zoning control framework laid down in the draft plans. The zoning system provides a reasonable degree of certainty to land owners and developers as to the types of use to which they can put their land or building, while flexibility is maintained through the planning application system to cope with changing needs. Unlike planning legislation in most other countries, there was no provision for direct enforcement against non-compliance in the Ordinance.

1.8 Until the Amendment Ordinance 1991 introduced direct enforcement provisions against unauthorized development (but only in DPAs), development control relied to a great extent on other pieces of legislation, particularly the Buildings Ordinance, and such legal instruments as the leases. The lack of enforcement provisions in the 1939 Ordinance led to the re-enactment of the Buildings Ordinance in 1955 which made it mandatory for the Building Authority to refuse consent for building works which contravened an approved or draft statutory plan. The Building (Planning) Regulations, which provided control over

building form and development intensity, were also first introduced at about the same period in 1956. The Buildings Ordinance and its Building (Planning) Regulations still have a major bearing on statutory planning work, particularly in relation to development control. Control through the Buildings Ordinance is effective only where submission of building plans is required. There is little control, in terms of planning, over development which does not involve new or major building works (e.g. change of use in an existing building).

1.9 Apart from the statutory provisions in the Building (Planning) Regulations, there are non-statutory instruments which control the nature and intensity of development, notably the density zoning policy approved by the Executive Council, the areas of special control designated by the Land Development Policy Committee, and the land leases. The first two instruments bear no statutory effect but provide administrative guidance for the Government. Because Hong Kong operates a leasehold system, it is possible, in drawing up lease conditions for new land grants or lease modifications, for the Government as the lessor (subject to negotiations with land owners and developers) to stipulate such development restrictions as user, development intensity, and design, disposition and building height on individual lots. Putting planning objectives or restrictions in lease conditions is very inflexible, as lease conditions, once executed, remain valid until the end of the lease period. They cannot be modified to include new development restrictions without mutual consent, and the opportunity or the need to negotiate new terms may never arise. This is particularly a problem with land held under the old leases which contain little or no development restrictions (the so-called unrestricted leases and Block Crown Lease).

1.10 Because the basic provisions of the Ordinance were set down in 1939, many contemporary issues relating to the use and development of land, such as assessment of environmental impact, civic design, conservation, and methods to deal with non-conforming existing uses, are not covered in the Ordinance. It is also common to find the control of individual aspects of development existing to varying degrees within other ordinances, which is very often the result of introducing new legislation to meet specific needs as circumstances so required. Such ordinances include the Roads (Works, Use and Compensation) Ordinance which allows highway engineers to proceed independently on road proposals which can

affect to varying extents the planning layout of an area, as well as the development potential of individual sites; the Country Parks Ordinance which controls the use and development of land in areas designated as Country Parks; the Antiquities and Monuments Ordinance which deals with the conservation and preservation of individual historical monuments; and the Land Development Corporation Ordinance which prescribes the procedures for the preparation and approval of development schemes prepared by the Corporation.

1.11 In the minds of many people a deficiency in the Ordinance is its 'silence' or 'ambiguity' on the question of compensation for planning restrictions or for planning blight caused by zoning for a future public purpose. Questions have also been raised as to what extent individuals' development rights should be sacrificed to the community interest and whether and how the loss of such rights should be compensated.

1.12 Another deficiency of the existing statutory planning system lies in the area of public involvement. The original 1939 Ordinance and subsequent amendments in 1969, which laid down the basic form of the statutory plan-making process, were introduced at times when our society was less concerned with planning proposals as issues which affect not only individuals but also the community at large. The emphasis was hence more on objections to draft plans to protect the rights of individuals, rather than on comments or suggestions as to how an area should be planned. Similarly, under the planning application system adopted in 1974, only the applicants were to be involved in the consideration of planning applications, excluding all other people who might be affected by the development proposals. Although consultation on statutory plans with District Boards has been undertaken on an administrative basis since 1982, the present provision for public involvement in the existing Ordinance is unable to meet growing public requirements for a more open planning process.

OBJECTIVES OF THE REVIEW

1.13 This comprehensive review of the Ordinance provides the opportunity to address the problems identified in the existing statutory planning system and to make proposals for improving the system and streamlining planning procedures. In formulating proposals for the new Ordinance, we have been guided by the objectives and principles outlined below :-

(a) Openness

Planning is carried out for the public good. It is only fair and logical in an open society that the public should be involved in the planning process. Public involvement provides a sounder basis for planning decisions. Greater public involvement in the plan-making process and planning application system, based on the dissemination of more information for public comments and discussion during various stages of the planning process, should be a guiding principle.

(b) Fairness

The statutory planning system and procedures must be fair to individuals affected by planning proposals. There is a need to improve the existing procedures for dealing with objections to statutory plans and appeals on planning applications to ensure that the principles of a fair and swift hearing are followed.

(c) Certainty

Planning affects investment decisions in the private sector. The existing zoning system provides a high degree of certainty to land owners and prospective developers and should be retained. Planning intentions and requirements should be stated more clearly in statutory plans. At the same time there must be a degree of flexibility in the system to deal with changing circumstances and new requirements.

(d) Efficiency

To potential developers and investors, time is a vital consideration. It is important to streamline statutory procedures as far as possible to minimize delay. More efficient operation will also help to contain administrative staff resources and costs.

(e) Effectiveness

Planning which cannot prevent incompatible development is a paper exercise. The review should aim at establishing an effective control framework to ensure that the objectives of the plans can be achieved. Development control is positive, in that by refusing or regulating what is undesirable, development is guided towards a more desirable and efficient land use pattern.

(f) Affordability

Planning must be affordable to the community as a whole. This relates to the cost of administering the system, and the financial and economic implications of planning proposals.

(g) Comprehensiveness

The planning system should recognize the growing aspirations of the community for a higher quality of life and a better environment, and should contain provisions for those aspects of planning (primarily assessment of environmental impact, civic design and conservation issues) which are not covered adequately by the existing planning or other legislation.

1.14 The principles or objectives set out above are sometimes in conflict. A more open and fairer statutory planning system might imply that more time would be required to complete the necessary procedures. More public involvement in the planning process might slow down development and there might be less certainty to development investors. More comprehensive planning and control might increase costs. So there is a need to strike a proper balance among these objectives when working out the new planning legislation for Hong Kong.

CHAPTER 2

THE EXISTING STATUTORY PLANNING PROCEDURES

INTRODUCTION

2.1 Chapter 1 has discussed the existing system of statutory planning and its inherent problems. This Chapter focuses on the existing procedures of statutory planning as laid down in the Town Planning Ordinance (the Ordinance). It gives an overview of the existing practice and provides a background for understanding the proposals for the new planning legislation in the following chapters.

PLAN-MAKING PROCESS

2.2 The existing Ordinance provides for the Governor to appoint a Town Planning Board (TPB) to prepare outline zoning plans (OZPs) and development permission area (DPA) plans. Definitive land use zones are shown on OZPs and the notes attached to each plan specify, for each zone, the uses which are always permitted and uses which may be permitted by the TPB, with or without conditions, upon application (Figure 2.1). DPA plans are transitional plans prepared after the enactment of the Town Planning (Amendment) Ordinance 1991 for areas which require immediate planning control but where time does not allow the preparation of OZPs. DPA plans will be replaced within three years by OZPs, subject to one year extension with the approval of the Governor in Council (G in C). Similar to OZPs, DPA plans may also indicate land use zones and are accompanied by a set of Notes which specify the types of development which are always permitted. Unlike OZPs, however, zonings on DPA plans are not comprehensive and there are many 'unspecified' areas on the DPA plans where planning permission is required for all types of development other than those listed as always permitted. Both OZPs and DPA plans are subject to the same exhibition and objection procedures prescribed under the Ordinance.

2.3 When a draft OZP or DPA plan is considered by the TPB as suitable for publication, it is exhibited for public inspection for two months, during which time any person affected by the draft plan may object. If the objector desires, he may appear before the TPB to explain his objection. In considering each objection, the TPB may make amendments to the draft plan to meet the objection or

otherwise. There is no express provision under the Ordinance for appeals to an independent party against the TPB's decision on the objections. However, after consideration and hearing of all objections, the TPB will submit the draft plan, together with details of all objections not withdrawn and reasons for the decisions of the TPB, to the G in C for approval. An objector may also exercise his right as a citizen to petition the Governor. Figure 2.2 shows the major steps in the current process of preparation and approval of a statutory plan.

2.4 Apart from the exhibition of draft plans for public inspection, public consultation on statutory plans is basically undertaken on an administrative rather than a legal basis. Current administrative practice is to consult the relevant District Boards before new plans, or major amendments to existing plans, are exhibited for public inspection. For the general public, however, it is only when the plans or amendments are exhibited that they are given a chance to express their views. Some people have criticized this to be too late, as by the time of plan exhibition the planning proposals and major projects might have been substantially committed and there might be little room to accommodate suggestions for changes.

PLANNING APPLICATIONS

2.5 Provisions for the operation of a planning application system were incorporated in the Ordinance in 1974. Attached to and forming part of each draft or approved plan is a schedule of Notes which sets out, for each zone, uses which are always permitted (Column 1) and uses which require planning permission from the TPB (Column 2). Section 16 of the Ordinance enables the TPB to grant permission for uses under Column 2 of the Notes. Within two months of the receipt of an application, the TPB will consider the application and may grant or refuse to grant the permission applied for. Any permission granted may be subject to such conditions as the TPB thinks fit.

2.6 If an application is refused, the applicant may, under section 17 of the Ordinance, apply to the TPB for a review of its decision. There is, however, no provision for review of conditions imposed by the TPB in planning permission if the applicant considers them unacceptable. The review for refusal will take place within three months of the receipt of the application for review. Any

person aggrieved by the decision of the TPB on a review may appeal by way of petition to the G in C whose decision on the appeal is final. Because petition procedures are cumbersome and there is no requirement under the existing Ordinance for the G in C to grant a hearing to the appellant, there have been calls for the setting up of an independent appeal body to replace the G in C to review the TPB's decision on planning applications. Legislative amendments are being introduced to provide for the setting up of such a body ahead of the comprehensive review of the Ordinance, and at the same time to allow the TPB to review the conditions imposed in granting planning permission.

2.7 At present, any person may submit a planning application in respect of any site or a change of use to an existing building. The person does not necessarily have to be the land owner and the application may be made without the owner's knowledge or consent, which is not a fair arrangement. Moreover, persons who may be affected by a development proposal are often not aware of it even after the TPB's permission has been granted, perhaps until such time as the proposal is implemented. There is no statutory provision for the public to comment on planning applications submitted to the TPB, and this is not entirely fair to the people who may be affected.

2.8 There is no statutory provision for application to the TPB to amend any draft or approved plan so as to allow certain development otherwise not permitted by the zoning or the Notes of the plan. Nor does the Ordinance allow any amendment to a planning permission already granted by the TPB. Once the permission is obtained, any subsequent change of details requires a fresh application, a procedure which is unnecessarily inflexible.

DEVELOPMENT CONTROL

2.9 Before the enactment of the Town Planning (Amendment) Ordinance 1991, there was no provision for direct enforcement against unauthorized development in the Ordinance. Under the Amendment Ordinance, enforcement provisions by way of the serving of enforcement, reinstatement and stop notices on the land owner/ occupier/person responsible for an unauthorized development are now applicable to DPAs (only in the non-urban areas), and these powers will remain in these areas after the DPA plans are replaced by individual OZPs.

2.10 Where there are reasonable grounds to believe that there is an unauthorized development, the Planning Authority (i.e. the Director of Planning) may serve an 'Enforcement Notice' requiring the unauthorized development to discontinue within a time limit unless planning permission from the TPB for the development has been obtained. If planning permission has not been obtained upon expiry of the period, or if permission has been refused and all rights of review or appeal have expired or been abandoned or exhausted, the Planning Authority may, in a 'Reinstatement Notice', require the land owner/occupier/responsible person to reinstate the land to the condition it was in immediately before the DPA becomes effective or to such other conditions, which will not be harsher to the person served than a total reinstatement of the land to its original state, as the Planning Authority considers satisfactory. If in specific cases the Planning Authority considers that continuance of the unauthorized development could constitute a health or safety hazard; adversely affect the environment; or make it impracticable or uneconomic to reinstate the land within a reasonable period, he may serve a 'Stop Notice' requiring immediate discontinuance of the unauthorized development, and requiring steps to be undertaken to prevent anything related to the unauthorized development from causing any such adverse effect. Any person who fails to comply with the requirements of the notices commits an offence and is liable to a fine.

2.11 These enforcement provisions however are not applicable to areas already covered by OZPs (mainly in the urban areas and the new towns) and this results in a dual control system for the urban and rural areas. The need for effective development control in the urban areas is clearly as important as in the rural areas.

RESUMPTION

2.12 At present, compensation is payable only when private land needed for roads, government, institution and community, open space or other public purposes is resumed by the Government. Section 4(2) of the Ordinance empowers the TPB to recommend to the G in C the resumption of any land that interferes with the layout of an area shown on a draft or approved plan or an approved master layout plan. Resumption to avoid such interference is deemed to be resumption for a public purpose under the Crown Lands Resumption Ordinance. However, there is no time limit for the implementation of resumption, and development on land zoned

for public purposes may be sterilized in the meantime. There is no existing statutory provision for the land owner affected to seek remedies from the Government for the planning blight produced.

CONCLUSION

2.13 The statutory planning system in Hong Kong has been in operation for over five decades and has been evolving, though somewhat slowly and in an ad hoc manner, to keep pace with changing social, economic and political developments. The existing system of statutory plans and planning applications is regarded as generally flexible and efficient, but there is plenty of room for improvement, particularly in its working procedures. Problems of existing practice are analyzed in greater details and proposals for changes are discussed in the following chapters.

EXPLANATORY STATEMENT

MID-LEVELS EAST OUTLINE ZONING PLAN NO. S/H12/2

(Being an Approved Plan for the Purposes of the Town Planning Ordinance)

Note: For the purpose of the Town Planning Ordinance, this statement shall not be deemed to constitute a part of the plan.

1. **AUTHORITY FOR THE PLAN AND PROCEDURE**

1.1 On 9 May 1984, the Governor under Section 3 of the Town Planning Ordinance directed the Town Planning Board to prepare draft plans for those parts of the main urban areas not then covered by statutory plans, including Mid-Levels East.

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MID-LEVELS EAST OUTLINE ZONING PLAN NO. S/H12/2

(Being an Approved Plan for the Purposes of the Town Planning Ordinance)

NOTES

(i) The Notes show the uses which are permitted at all times in the various zones on the Plan and the uses which may be permitted by the Town Planning Board, with or without conditions on application. Only the uses that are permitted in each zone are indicated in the Notes. Where the permission of the Town Planning Board for a use is necessary, the application for such permission should be addressed to the Secretary of the Town Planning Board, c/o Buildings and Lands Department, from whom the appropriate application forms may be obtained.

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S/H12/2

RESIDENTIAL (GROUP C)

Column 1 *Uses always permitted*	*Column 2* *Uses that may be permitted with or without conditions on application to Town Planning Board*
Ancillary Car Park	Ambulance Depot
Flat	Bank
Government Staff Quarters	Clinic/Polyclinic
House	Educational Institution
Police Reporting Centre	Fast Food Shop
Private Swimming Pool	Government Refuse Collection Point
Staff Quarters	Government Use (not elsewhere specified)
Utility Installation for Private Project	Hospital
	Hotel
	Petrol Filling Station
	Place of Recreation, Sports or Culture
	Private Club
	Public Car Park
	Public Transport Terminus or Station
	Public Utility Installation
	Religious Institution
	Residential Institution
	Restaurant
	Retail Shop
	School
	Social Welfare Facility

Remarks

On land designated 'Residential (Group C)', any new building(s), and any addition, alteration and/or modification to the existing building(s) should not result in a total development or redevelopment in excess of a maximum building height as specified for each sub-area as set out below or the height of the existing building(s) whichever is the higher.

Sub-area	*Restriction*
R(C)1	Maximum building height of 10.67 m
R(C)2	Maximum 12 storeys over 1 storey of carports.

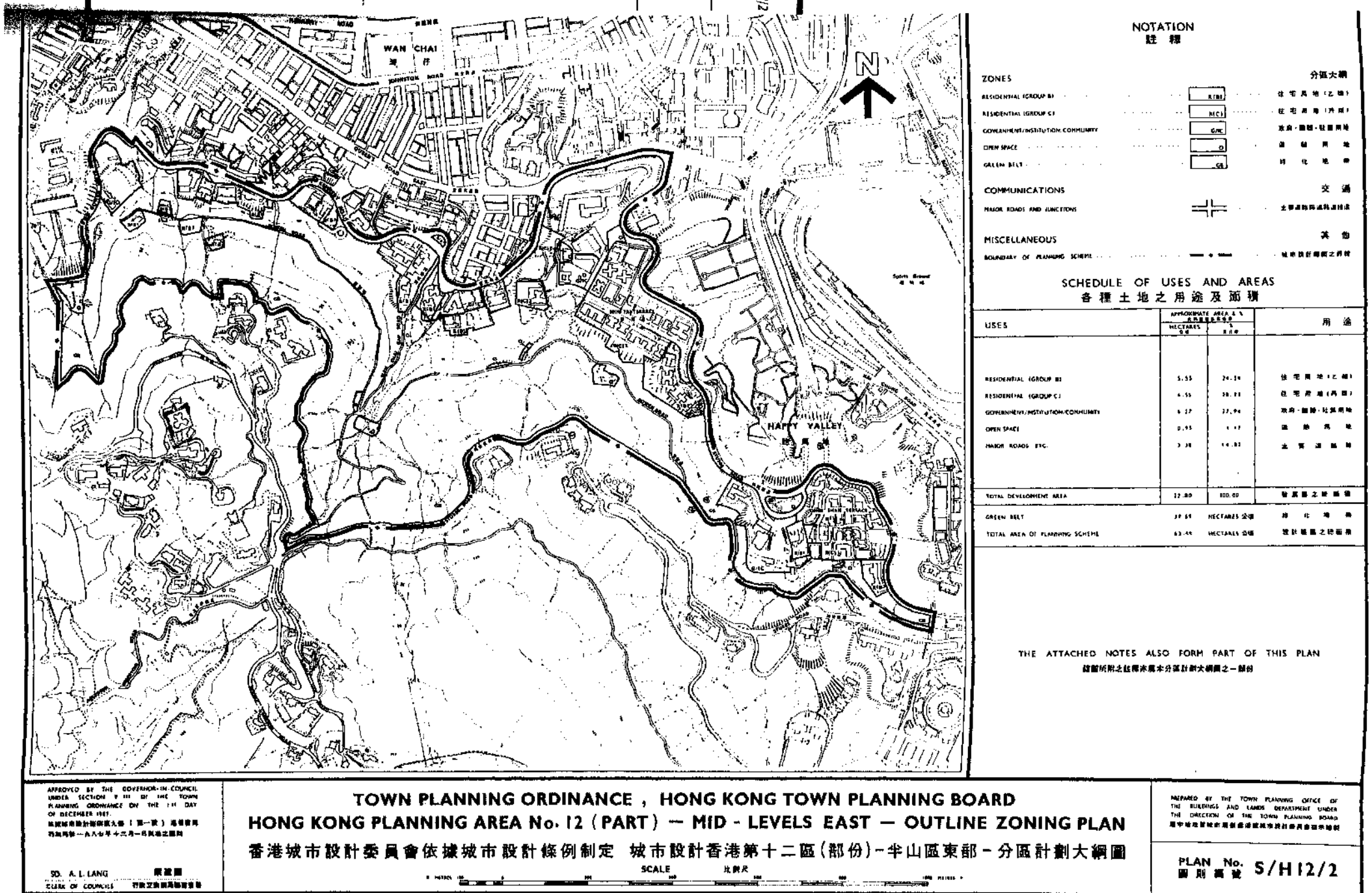
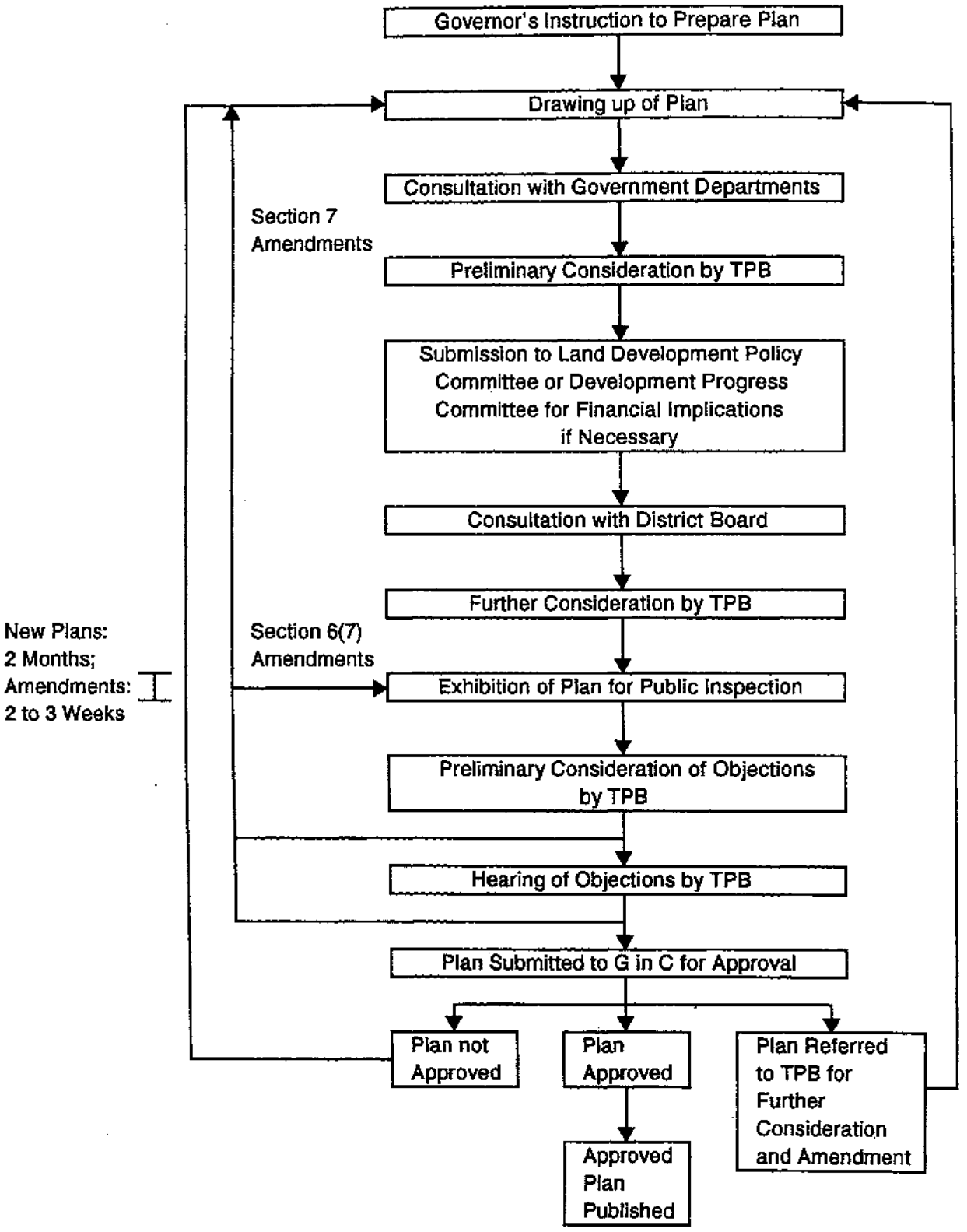


FIGURE 2.1 AN EXAMPLE OF OUTLINE ZONING PLAN

圖 2.1 分區計劃大綱圖示例

FIGURE 2.2 EXISTING STATUTORY PLAN-MAKING PROCESS



CHAPTER 3

THE PLAN-MAKING PROCESS

INTRODUCTION

3.1 This Chapter covers the plan-making process proposed in the new planning legislation. It first discusses the types and contents of statutory plans. Following an examination of the problems of the existing plan-making process, proposals for a new plan-making process are made and explained in detail.

TYPES OF STATUTORY PLANS

3.2 At present, there are two types of statutory plans prepared by the Town Planning Board (TPB), outline zoning plans (OZPs) and development permission area (DPA) plans. OZPs are district plans which show the proposed land uses and major road systems of individual planning scheme areas. Areas covered by such plans are, in general, zoned for such uses as residential, commercial, industrial, government/institution/community, open space, green belt or other specified purposes. OZPs thus provide guidance and control for public and private developments. DPA plans have been introduced with the enactment of the Town Planning (Amendment) Ordinance 1991 (the Amendment Ordinance 1991) for areas which require immediate planning control prior to the preparation of OZPs, mainly for the non-urban areas. DPA plans are interim control plans to allow time for the preparation of OZPs; they are to remain effective for only three years as they are intended to be eventually replaced by OZPs. No new DPA plans may be prepared for areas which have been covered by OZPs or DPA plans. Since the existing system of OZPs and DPA plans provides the necessary development guidance and control, it is proposed to be retained in the new planning system.

CONTENTS OF STATUTORY PLANS

3.3 The zonings to be used on statutory plans are presently specified under section 4(1) of the Ordinance. While the specification of such zonings provides certainty to land owners, developers and the public at large, the stipulation of a finite list of zones in the Ordinance is not always flexible enough to cope with changing circumstances. For example, when the scope of the

Ordinance was recently extended to the rural areas, new types of zoning had to be introduced through legislative amendments to cater for rural developments. To provide a less cumbersome procedure for introducing new zoning designations as and when circumstances so required, it is proposed that the new Ordinance should include only a general power to designate land use zoning on statutory plans to guide and control development. Detailed zoning specifications similar to those given under the present section 4(1) would instead be set out in the form of regulations to be made by the Governor in Council (G in C). This change would not affect the actual contents of particular OZPs. It would therefore provide the same degree of certainty with a greater degree of flexibility.

3.4 Section 3(1)(a) of the existing Ordinance empowers the TPB to undertake the systematic preparation of draft plans for the layout of such areas as the Governor may direct, 'as well as for the types of building suitable for erection therein'. The term 'types of building' had given rise to uncertainty in interpretation in the past, and was discussed in the courts(1). To avoid any future uncertainty, it is proposed that express provisions should be incorporated in the new Ordinance to confirm the Board's power in controlling all the relevant elements of development intended to be embraced by the term, notably plot ratio, site coverage, building height, location, flat size, floor area, spacing, character, external appearance and use of buildings.

3.5 There are also other aspects of development which are already matters of planning consideration under the existing planning practice. These include conservation; civic design; traffic impact and provision of parking, loading/unloading facilities in developments; provisions of services, facilities and amenities; and environmental impact assessment and the requirement of preventive or mitigating measures. To avoid ambiguity in the interpretation of the general power of development control, there should also be express provisions under the new Ordinance to confirm the power already exercised under the existing practice. Provisions should be incorporated to address the need for controlling non-conforming existing uses (see Chapter 8). These aspects of development control, including those elements set out in paragraph 3.4, should be applied

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Note (1) See, for example, Crozet Ltd. and others v. Attorney General, [1974] and Attorney General v. C.C. Tse (Estate) Ltd., [1981].

selectively where circumstances so required. They would be effected through special annotation of specific sites on statutory plans or special statements in the Notes for specific zonings on the plans.

PROBLEMS WITH THE EXISTING PLAN-MAKING PROCESS

3.6 A thorough examination of the existing plan-making process has revealed that there are three main problems that need to be addressed :-

(i) the objection and hearing procedures;

(ii) development during the objection process; and

(iii) public involvement.

The Objection and Hearing Procedures

3.7 One weakness inherent in the existing planning system lies in the objection and hearing procedures. Under the existing Ordinance, the TPB is the authority to prepare and publish draft plans, hear objections and submit draft plans to the G in C for approval. In approving the draft plan, the G in C takes into account the objections not withdrawn, among other things. The G in C does not actually consider whether individual objections should be upheld. The present procedures are based on the rationale that the 'objection' step is primarily a means through which the TPB seeks the views of the community on the plans it prepares. The procedures have the merit of providing a channel for direct dialogue and negotiation between the TPB and the objectors. If necessary, the TPB can make amendments to the draft plans to meet the objections after the hearing. The draft plans which the TPB submits to the G in C should thus represent a considered view which takes account of any objections.

3.8 The present objection and hearing procedures, however, are not satisfactory because of two basic problems. The first relates to the fundamental principle of the right to a fair hearing. The present system has been criticized as unfair in that the hearing of objections to draft plans is conducted by the same body (i.e. the TPB) which prepares the plans. It might thus be said that the TPB is judging its own cause. The second relates to the long drawn-out process of the hearing of objections. Under the existing Ordinance, the hearing

of objections is a two-stage process and there is no statutory time limit for the completion of the hearing procedure. The TPB will first give preliminary consideration to an objection in the absence of the objector before a hearing of the objection is held with the presence of the objector. If the TPB decides to amend the plan to meet the objection, the amendment has to be gazetted and made open to further objections. Should there be objections to the amendment, then a second hearing has to be held at which both the original objector and the objector(s) to the amendment will be invited to attend. This procedure is cumbersome and time-consuming, and past experience has shown that it can take up to two years or more to complete.

3.9 The problem of long hearing procedures would be compounded further if it was accepted that some form of interim control would be necessary during the objection process (see paragraph 3.10). To prevent this, there would be a need to simplify and streamline the hearing procedure so as to shorten the time required to complete the whole objection consideration and hearing process while maintaining fairness to all parties concerned.

Development during the Objection Process

3.10 At present, a draft plan takes statutory effect immediately upon its publication because there is a need for statutory development control as soon as zoning proposals of a certain area are gazetted. This procedure has the inherent problem that a developer can take advantage of that provision to proceed immediately with a development so long as it conforms to the zoning of the site, despite the fact that the zoning may be the subject of an objection under consideration by the TPB. The consideration and hearing procedures in respect of the objection as prescribed under the Ordinance are then largely academic and the TPB's decision on the objection can thus be pre-empted. To address this problem, some degree of interim control during the plan exhibition and objection period is necessary (see paragraphs 3.24 and 3.25 below, and paragraph 4.17 in Chapter 4).

Public Involvement

3.11 One cause of public complaint about the present plan-making process is insufficient public involvement. The public should have the right to let the plan-makers know what kind of community they want and how it should be

developed. Public consultation currently begins only when draft statutory plans are presented on an administrative basis to the District Boards and when the plans are exhibited for public inspection. For the general public, it is only when the plans are exhibited that the planning proposals are made known to them. There is a common and well-founded criticism that the public are involved only at a very late stage of the plan-making process.

3.12 Public involvement does not necessarily have to be negative in the form of submitting 'objections' to draft plans. The public should be encouraged to make comments, suggestions and representations concerning the planning objectives and proposals for an area. The existing Ordinance only provides for persons affected by a statutory plan to submit objections to the TPB and there is no provision for interested parties to make representations or suggestions in any form other than an objection. Although the objection period for new draft plans and amendments to approved plans is more than adequate at two months, the exhibition period for amendments to draft plans (i.e. three weeks) is too short for an objector to prepare a proper submission.

3.13 There are two lines of argument as far as public involvement in the planning process is concerned. At one extreme, it is argued that public involvement should start at the very initial stage, and should take place at every stage of the plan-making process. At the other extreme, there is an argument that unstructured public involvement might not be in the public interest as it would greatly delay the development process in Hong Kong. There is the problem of premature release of planning proposals which may defeat the purpose of development control. The question is thus how to strike a balance - how to encourage public participation in planning while at the same time ensuring that the plan-making process remains efficient and effective.

PLANNING STRUCTURE AND RESPONSIBILITIES

3.14 To rectify the problems outlined in the preceding paragraphs, a modified planning structure is proposed. It would consist of a Planning Board (PB), an Appeal Board (AB) and the G in C. Figure 3.1 shows the broad planning structure and functions of the various bodies in the new statutory planning system.

3.15 Since planning is an essential part of the process of formulating public policies by the Government, the G in C would remain as the approving authority for statutory plans. In this way, the G in C could ensure that the statutory plans approved did reflect the overall policy objectives, were within the planning framework laid down in strategic and sub-regional plans prepared within the Government machinery, and that the public sector proposals set out in the statutory plans were acceptable to the Government. In addition, provision should be made in the new Ordinance to allow the Governor to give directions to the PB in relation to the performance of its functions or the exercise of its powers, where he considered the public interest so required.

3.16 Like the existing TPB, the PB would be appointed by the Governor, and would consist of non-official members as well as public officers. It would undertake most of the existing functions performed by the TPB including the preparation and exhibition of draft plans (OZPs and DPA plans); consideration and hearing of objections or representations ('representations' being a better term because not all submissions with respect to a draft plan are objections in nature) to draft plans; the submission of draft plans to the G in C for approval; the consideration and review of planning applications; and the making of recommendations to the G in C with respect to the resumption of land to implement proposals contained in the plans. The PB might also submit advice to the Government on the overall planning of the Territory, sub-regions and other general planning matters if it so wished. As provided in the Amendment Ordinance 1991, the new PB would be given the power to delegate some of its functions to its committees and public officers, and the extent of delegation should be clearly set out in the Ordinance and governed by guidelines set by the PB. The Planning Authority would be the principal executive officer of the PB, preparing draft plans under the PB's direction, executing the decisions made by the PB and tendering professional planning advice when the PB so required.

3.17 Allowing the PB to consider and conduct hearing of representations on its plans would enable the PB to have direct negotiation and dialogue with the representers, thus retaining one of the major merits of the existing system. On the face of it, in hearing representations on its own plans, the PB might still be accused of judging its own cause. The difference is that under the new system the PB would not make final decisions on representations to draft plans i.e. the PB would not be making the decisions to reject the representations nor to amend

the draft plans to meet the representations after the hearing, as under the existing practice. Instead, the draft plans, together with all representations received (other than those which might have been withdrawn of the representers' own accord) and the PB's recommendations, would be submitted to the G in C for final decision. If necessary the G in C might request the AB to study the representations further or conduct another hearing and make recommendations to the Council for its final decision.

3.18 The AB would also be appointed by the Governor. It would decide on appeals against the PB's decisions on planning applications, and appeals against the Planning Authority's exercise of planning functions in respect of the serving of reinstatement notices (see paragraph 5.21 in Chapter 5) and amortization notices (see paragraph 8.10(b) in Chapter 8), as well as the refusal to issue planning certificates (see paragraph 5.26 in Chapter 5). The AB would also serve as a review body on representations on draft plans upon the G in C's request. The AB would not be a judicial body as such : that is to say, its function would be to carry out independent reviews of the PB's decisions on the merits of the cases brought to it, rather than to consider whether the PB had acted in accordance with the law (a matter for the courts). There would be no overlapping in membership of the two Boards, so each of them could work independently in the exercise of their respective planning functions. The AB would be served by a separate secretariat, independent of the Planning Authority.

THE NEW PLAN-MAKING PROCESS

3.19 The new plan-making process discussed below is an attempt to rationalize the process within the proposed modified planning structure. Except for the requirement for the preparation of a planning study (see paragraph 3.21), all steps in the plan-making procedure would apply to both draft OZPs and draft DPA plans. Figure 3.2 shows the major steps in the actual plan preparation process up to the exhibition of a draft plan. The subsequent procedures on consideration of representations and submission of the plan to the G in C are shown in Figure 3.3.

Instruction to Prepare Draft Plan

3.20 The existing provisions that the Governor may direct the PB to prepare draft plans for any area in the Territory should be retained.

Preparation of Planning Study

3.21 Express provision is proposed to be included in the new Ordinance to require the PB to prepare a planning study in the preparation of a draft plan other than a DPA plan. Basically formalizing an existing administrative practice of the TPB, this would apply to a new or a replacement plan, and if necessary to an amendment plan (e.g. where major amendments are proposed). This requirement would not extend to the preparation of a DPA plan because the designation of a DPA is intended to achieve immediate development control and to allow time for the preparation of an OZP including the planning study. A planning study would contain such background information as existing land uses and population of an area, an analysis of planning issues and a broad indication of planning intentions and proposals for the area. In particular, the planning study would include an analysis of existing and potential environmental problems, with suggestions to improve the environmental quality and to prevent developments from causing undesirable environmental impact. During the preparation of the study, the PB might also consult appropriate public authorities and local bodies.

3.22 It is proposed that the results of the planning study should be published by the PB for public inspection and comments for a period of three months. During this period, appropriate public authorities and local bodies would also be consulted. This would allow the PB to take account of public opinions before specific land use proposals were drawn up. Any person could, during the three-month period, make a written submission to the PB commenting on the findings of the planning study and the objectives and strategies to be adopted in the subsequent preparation of the draft plan for the area. But there would be no hearing arranged in respect of the comments submitted to the PB.

Preparation of Draft Plan

3.23 The PB should take account of the results and findings of the planning study, public opinions received and relevant Government policies in drawing up detailed planning proposals. In the actual preparation of a draft plan or major

amendments to a draft plan, the PB might also consult concerned public authorities or local bodies. Comments received would be considered and incorporated into the plan where appropriate.

Exhibition of Draft Plan

3.24 The draft plan would be exhibited for public inspection for a period of two months, as in the existing gazetting procedure. Within the exhibition period, any member of the public could submit to the PB a written statement of his representations concerning any proposal shown on the draft plan. The representations could be in the form of objections or suggestions. The draft plan, once gazetted, would have statutory effect for the purpose of development control. In order not to pre-empt any decision on objections to the draft plan, however, some form of interim development control would be required. The issue of a planning certificate (see paragraph 5.25 in Chapter 5) required for any new building development in the area covered by the draft plan (or affected by the amendments in the case of an amendment plan) would be withheld during the exhibition period. Similarly, the PB's decision on related planning applications would be deferred. Planning certificates and planning applications would however be processed in the usual manner in the intervening period so that upon the expiry of the exhibition period, planning decisions for sites where no objections had been received could be made with minimum delay. The detailed procedures are explained further in Chapters 4 and 5.

Publication of Objection Sites and Representations

3.25 At the close of the statutory exhibition period, the PB would examine the nature of the representations received. It would decide which representations were objections in nature, and publish a plan showing the locations of all the objection sites. The issue of planning certificates for new building development in respect of these objection sites would be withheld, and similarly, consideration of planning applications in respect of these sites further deferred, until decisions had been made by the G in C on the related objections.

3.26 The PB would publicize details of all representations, and invite the public to make written submissions on the representations if they so desired.

Preliminary Consideration of Representations

3.27 Similar to the existing objection consideration procedure, the PB would give preliminary consideration to the representations and any public submissions on the representations received to formulate views on the representations. The representers and persons who had made written submissions on the representations would be informed of the PB's preliminary views. If any person was not satisfied with the PB's preliminary view, he might request a hearing before the PB.

Hearing of Representations

3.28 The representers and persons who had made written submissions on the representations relating to the same subject matter would be invited to attend a hearing. During the hearing, all parties concerned could amplify their arguments and make responses to the PB's preliminary views. After the hearing, the PB would consider the representations further, taking into account the views expressed and could propose amendments to the draft plan to meet the representations or otherwise.

Submission of Draft Plan and Representations to Governor in Council

3.29 Unlike the existing system, the PB would not make a decision to reject the representations or to amend the draft plan to meet such representations. Instead, all representations, together with the PB's recommendations, would be submitted with the draft plan to the G in C for final decision. To avoid undue delay in the issue of planning certificates and the consideration of planning applications in respect of the objection sites which had been held up by the hearing procedure, all representations on a draft plan and the PB's recommendations would be required to be submitted with the draft plan to the G in C within nine months of the expiry of the plan exhibition period, unless the period was otherwise extended by the G in C.

Power of Governor in Council upon Submission

3.30 Upon submission of the representations, the G in C might, if necessary, refer all or part of the representations to the AB to study further or conduct another hearing, and make recommendations to the G in C on the

representations. The G in C might reject a representation in whole or in part or might decide to make amendments to the draft plan to meet the representation. The decisions of the G in C on the representations would be final. The representers and persons who had made written submissions on the representations would be informed of the G in C's decision. Where the G in C's decision was to amend a draft plan to satisfy a representation, the G in C would direct the PB to amend and exhibit the plan for public inspection. The exhibition of this amendment would be notified in the Gazette and newspapers. The amendment directed by the G in C would not be open to further public objection. This would avoid undue delay in the plan-making process caused by the possible unending cycle of amendment - objection - amendment - objection.

3.31 The G in C might, upon submission of a draft plan, approve it with or without amendment, refuse to approve it, or refer it to the PB for further consideration and amendment, similar to the provisions in the existing Ordinance. If a draft plan was refused, it would cease to have any statutory effect. Where there existed a published DPA plan or OZP immediately before the subject draft plan, the previous plan would be revived and come into force immediately. The revived plan would be effective for one year, unless the period was otherwise extended by the G in C. Where the G in C referred a draft plan to the PB for further consideration and amendment, the draft plan would remain effective for one year and an amendment plan should be prepared by the PB and published for public comments within the one-year period, unless the period was otherwise extended by the G in C.

Amendment of Draft Plan other than Consequent upon a Representation

3.32 In addition to the provision for amendment of a draft plan to meet representations, the new Ordinance would give the PB the power to consider amendments to a draft plan after the exhibition of the plan. To avoid the possibility of the PB amending a plan while representations on the plan were still under consideration, public exhibition of these amendments would only be undertaken after the G in C had considered all the representations on that plan.

3.33 A new provision is proposed to permit the public to make applications for amendments to a draft or approved plan for consideration by the PB. Such applications should, however, not be related to any site which was the subject of an objection yet to be considered and decided by the G in C. The PB might accept

in whole or in part or reject such applications. If accepted, the amendments would be gazetted for public comments in the usual manner subject to any approved plan being first referred back for amendment by the G in C (see paragraph 3.37). Since there would already be a separate procedure dealing with representations on a draft plan, there would be no right of appeal if an application for amendment to the plan was not accepted. Otherwise the plan amendment application procedure would become another form of representation or objection to a plan.

3.34 It is also proposed that the existing three-week exhibition period for amendments made to a draft plan should be extended to six weeks to allow ample time for the public to make representations.

Public Notification

3.35 The existing Ordinance requires an approved plan to be printed and exhibited for public inspection. Approval or refusal to approve is also notified in the Gazette and newspapers. These procedures should be retained, and public notification would be extended to a plan referred by the G in C to the PB for further consideration and amendment.

Deposit of Plans

3.36 Since both draft and approved plans have statutory effect on development, the existing provision to require approved plans to be deposited in the Land Office for inspection by the public should be extended to draft plans as well.

Revocation, Replacement and Amendment of Approved Plans

3.37 The existing provisions for revocation, replacement and amendment of approved plans should be retained. The G in C might thus revoke in whole or in part any approved plan; or refer any approved plan to the PB for replacement by a new plan or for amendment. In addition, the new Ordinance would allow the PB to request the G in C to refer any approved plan back to the PB for amendment.

SUMMARY OF PROPOSALS

3.38 To provide more flexibility for introducing new zoning designations as and when circumstances so required, the new Ordinance would only include a

general power to designate land use zonings on statutory plans to guide and control development. Detailed zoning specifications would instead be set out in the form of regulations to be made by the G in C (paragraph 3.3). Express provisions would also be incorporated in the new Ordinance to confirm the existing power of the TPB in controlling various aspects of development (paragraphs 3.4 and 3.5).

3.39 The existing hierarchy of planning organizations comprising the G in C, the TPB (to be retitled the PB) and its committees would be retained. To maintain negotiation and dialogue with representers, the new PB would continue the practice of the existing TPB in considering and hearing representations on statutory plans. Final decisions on the representations would be made by the G in C. An AB is proposed to provide separate independent consideration of appeals against decisions of the PB and the Planning Authority. There should be no overlapping in membership of the two Boards. The division of responsibilities among these various bodies would be :-

(a) The G in C would remain as the approving authority for statutory plans. It would decide on all representations not withdrawn on draft statutory plans. The direction to prepare statutory plans would still be given by the Governor. In addition, the Governor might, if he considered the public interest so required, give directions to the PB in relation to the performance of its functions or the exercise of its powers under the Ordinance (paragraphs 3.15, 3.17 and 3.20).

(b) The PB would prepare, amend and publish statutory plans (including OZPs and DPA plans); consider and hear representations on these plans; submit draft plans and any representations not withdrawn to the G in C; make recommendations on resumption of land to implement proposals contained in the plans; consider and review planning applications; and might advise the Government on the overall planning of the Territory. Some of the functions of the PB would be delegated to its committees and public officers within limits set down in the Ordinance. The Planning Authority would be the principal executive officer of the PB (paragraph 3.16).

(c) The AB would be appointed by the Governor to deal with appeals against the PB's decisions on planning applications and the Planning Authority's decisions on other planning matters. It would also serve as a review body on representations on draft plans upon the G in C's referral. It would be served by a secretariat independent of the Planning Authority (paragraph 3.18).

3.40 The following provisions would be made in the new Ordinance for a greater degree of public involvement in the plan-making process :-

(a) There would be publicity before a plan was actually drawn up. A planning study would be published in the course of preparation of a draft OZP for public comments for a period of three months (paragraph 3.22).

(b) Any member of the public would be able to submit representations (not just objections) on a draft plan when it was exhibited for public inspection for a period of two months. The representations received would also be publicized by the PB (paragraphs 3.24 and 3.26).

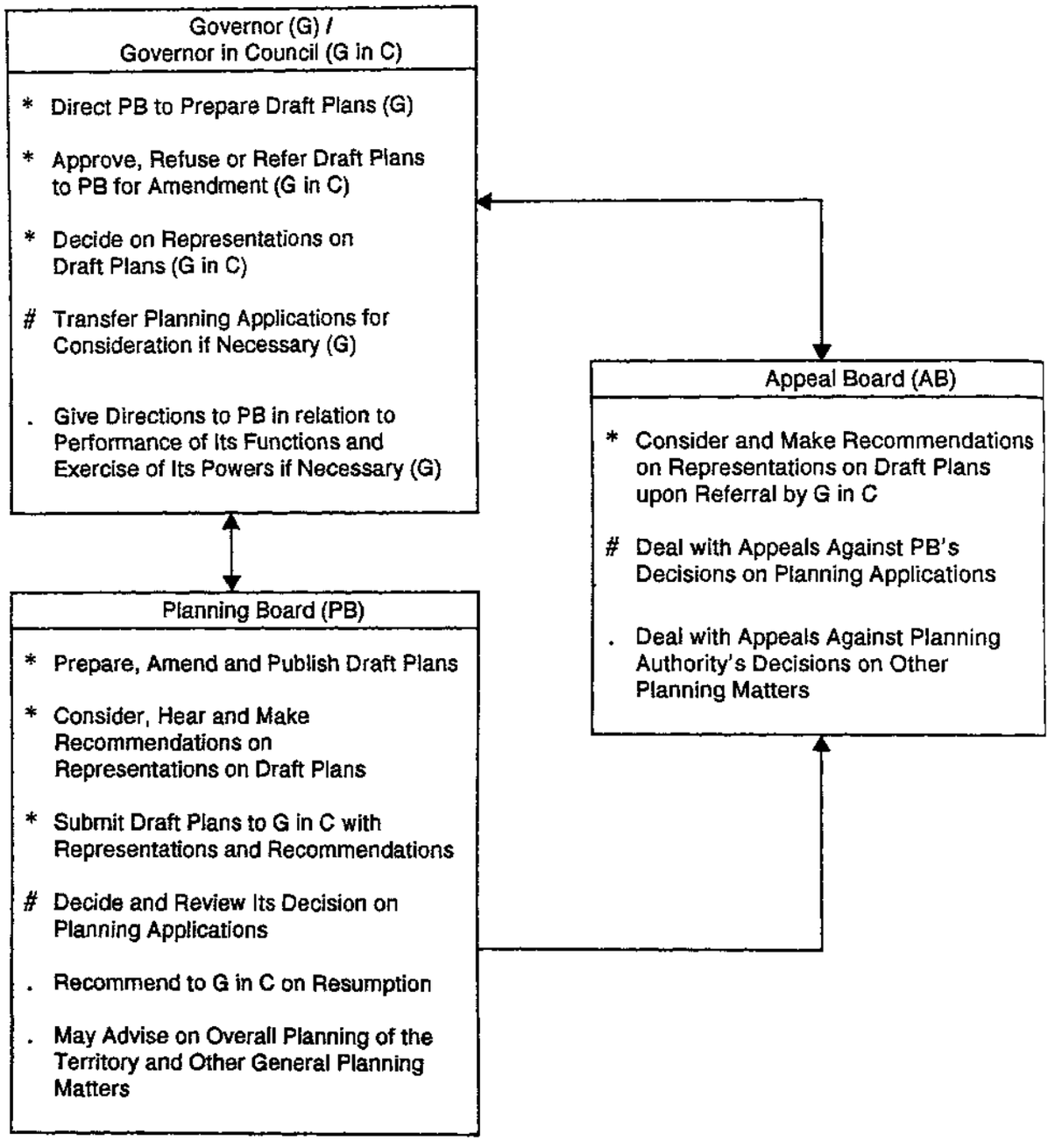
(c) The exhibition period for amendments made to a draft plan would be extended from three to six weeks to allow sufficient time for the public to make representations (paragraph 3.34).

3.41 In order not to pre-empt the decision on objections to a draft plan, no new development would be approved to commence on a site which was the subject of an objection. The issue of planning certificates (further discussed in Chapter 5) for all new building development within the area covered by the draft plan (for amendment plan, in the area(s) covered by the amendment item(s)) would be withheld and decisions on planning applications submitted under the plan would be deferred during the plan exhibition period and, if there were objections received, during the objection consideration period as well until all related objections were decided by the G in C. To avoid undue delay in the development process, all representations (including objections) received on a draft plan would be required to be submitted with the draft plan to the G in C within nine months of the expiry of the plan exhibition period (paragraphs 3.24, 3.25 and 3.29).

3.42 The objection hearing procedure would be streamlined. The PB would publicize details of all representations for public comments. Those who had made written submissions on the representations and the original representers would be informed of the PB's preliminary views on the representations before deciding whether or not to request a hearing before the PB. The PB would then hear the representations and make recommendations on the representations to the G in C for final decision. If considered necessary, the G in C might refer all or part of the representations to the AB to study further or conduct another hearing, and make recommendations to the G in C for its final decision (paragraphs 3.26 to 3.29).

3.43 The new Ordinance would allow the public to submit applications to the PB for amendments to a draft plan or an approved plan. Such applications should however not be related to any site which was a subject of objection yet to be decided on. There would be no right of appeal if such applications were not accepted by the PB (paragraph 3.33).

FIGURE 3.1 PROPOSED DIVISION OF STATUTORY PLANNING RESPONSIBILITIES



* Functions relating to Statutory Plan-making
\# Functions relating to Consideration of Planning Applications
. Other Planning Functions

FIGURE 3.2 PROPOSED PLAN PREPARATION PROCESS

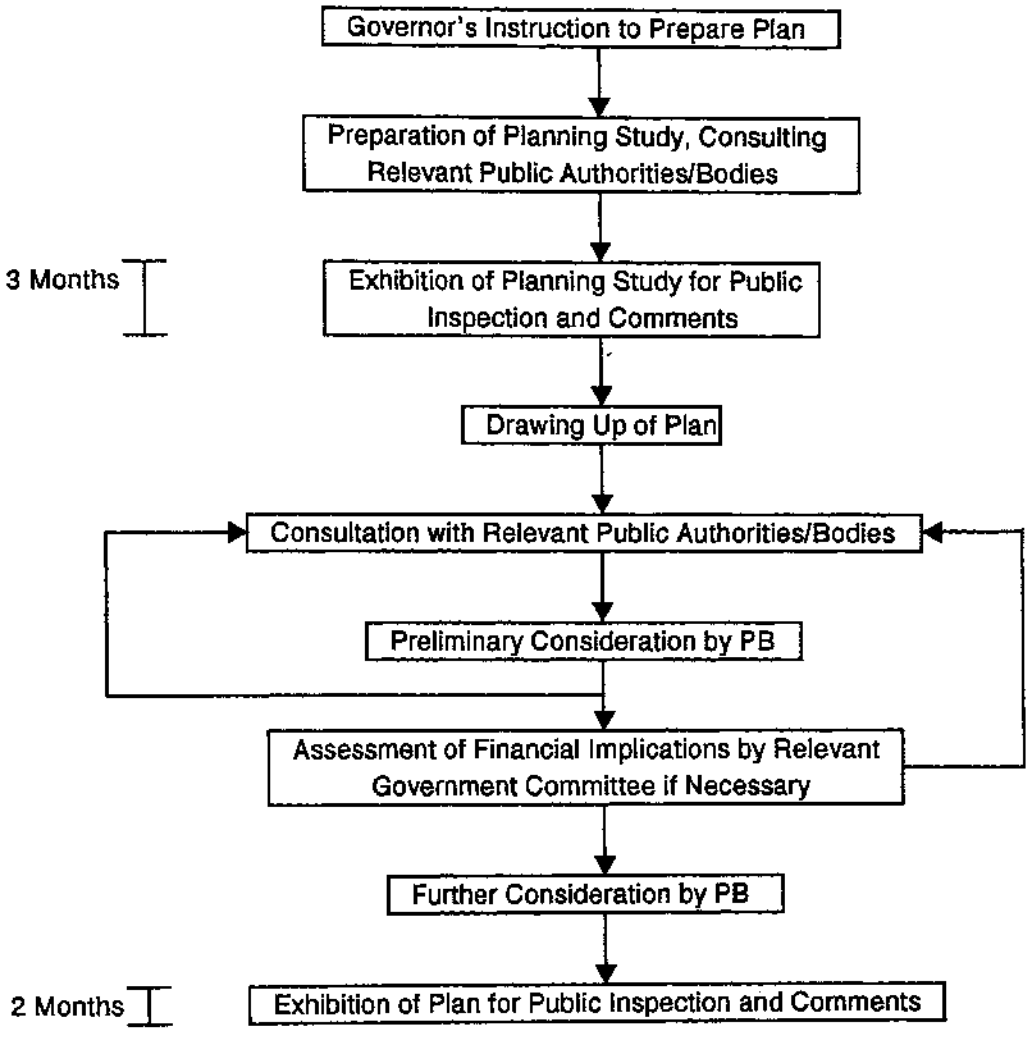
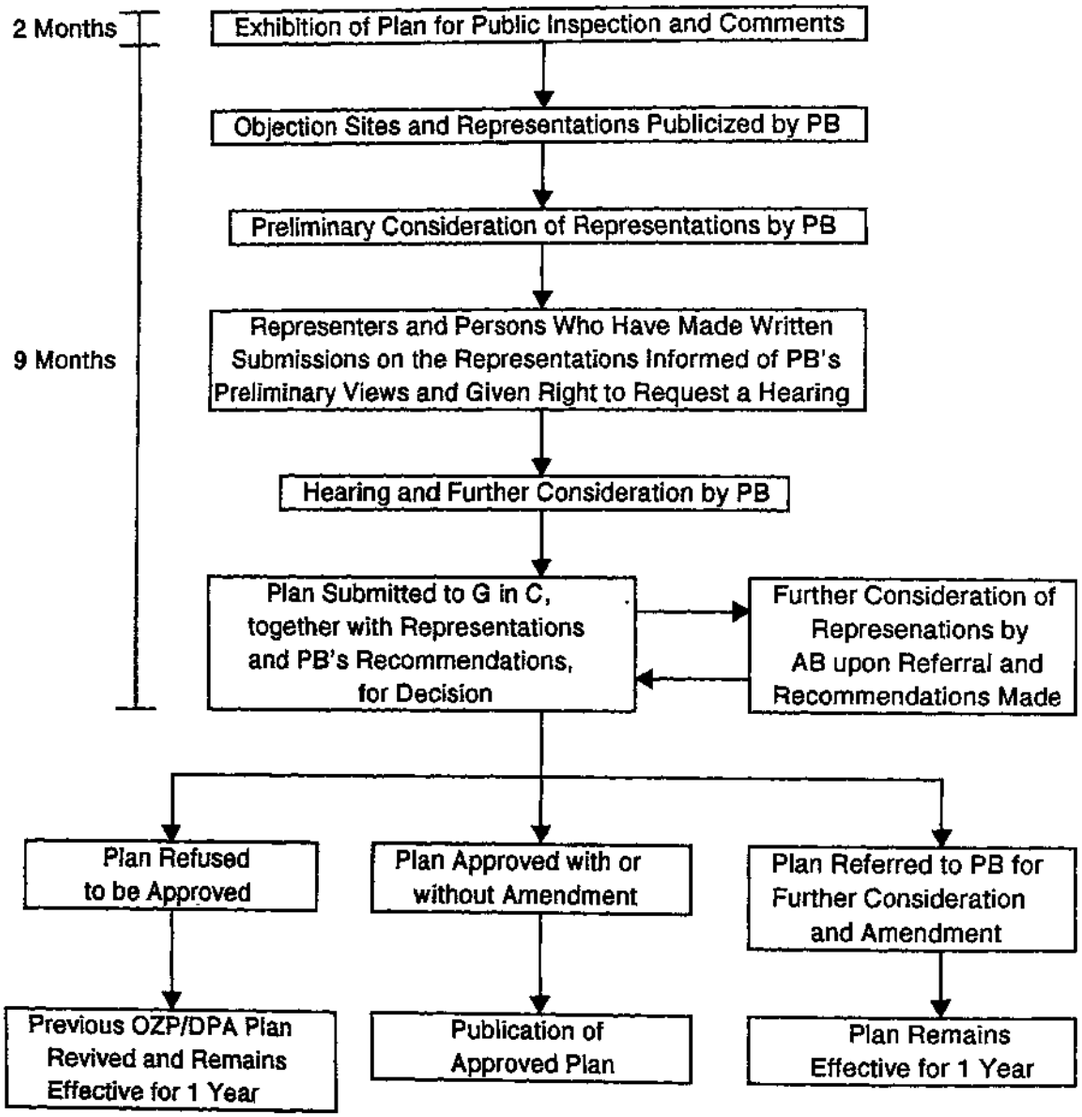


FIGURE 3.3 CONSIDERATION / HEARING OF REPRESENTATIONS AND SUBMISSION OF DRAFT PLAN TO GOVERNOR IN COUNCIL UNDER THE NEW SYSTEM



CHAPTER 4

PLANNING APPLICATIONS

INTRODUCTION

4.1 This Chapter outlines the proposals for a modified planning application system. The problems of the existing system are first discussed. It then goes on to explain the actual procedure for processing planning applications under the new system. Other provisions related to the planning application system which need to be incorporated in the new Ordinance are also examined.

THE PLANNING APPLICATION SYSTEM

4.2 The existing planning application system has been operated in areas covered by statutory outline zoning plans (OZPs) since 1974. Under the system, uses always permitted under a zoning on an OZP are listed under Column 1 of the Notes attached to the OZP while those which require planning permission from the Town Planning Board (TPB) are listed under Column 2. The existing use of building or land is permitted to continue until redevelopment or a change of use takes place. Redevelopment or change of use may only be carried out if it conforms to the plan or, if required, after planning permission has been obtained.

4.3 The Town Planning (Amendment) Ordinance 1991 extended the planning application system to development permission areas (DPAs). The Amendment Ordinance also clearly defines 'development' as 'carrying out building, engineering, mining or other operations in, on, over or under land, or making a material change in the use of land or buildings'. Attached to and forming part of each DPA plan is a set of Notes which sets out certain types of development which are always permitted. The plan may also indicate land use zones, and for each of these zones, Column 1 and Column 2 uses are stipulated similar to the Notes of an OZP. For areas without definitive zonings, any development other than an existing use or a use always permitted in terms of the Notes will require planning permission from the TPB. No distinction is made between temporary and permanent uses which are both subject to the same planning control.

EXISTING PROBLEMS

4.4 While being able to maintain a high degree of flexibility within the zoning control framework set by statutory plans, the existing planning application system has drawbacks in three main areas : public involvement, appeals and control of temporary uses.

Public Involvement

4.5 At present there is little public involvement in the planning application system. Planning applications are generally not publicized and the public are not given an opportunity to submit their views on the applications directly to the TPB. Public views are only channelled through the respective District Officer, as and when an administrative decision is made to seek public comments on an application or, in the case of the rural New Territories, in response to the long-standing practice of posting notices on the site of a proposed development. This arrangement is not satisfactory as the public may be affected by individual planning applications in various ways (e.g. having a refuse collection point or a massage parlour next to where one lives) and it is only fair that the public are given a chance to voice their opinions (Plates 4.1 and 4.2). This is particularly necessary because in order to maintain flexibility in the system there is a wide range of uses permissible (the Column 2 uses) under the planning application system.

Appeals

4.6 The appeals provision under the existing Ordinance is a subject of public concern. At present, when an application is rejected by the TPB, the applicant has the right to seek a review of the TPB's decision and has the right to a hearing by the TPB. There is further right of appeal against the TPB's decision on a review by way of petition to the Governor in Council (G in C). This system has three problems. First, the review is considered by the TPB itself which has made the initial decision, and there is no provision for appeal against the conditions imposed on planning permission. Secondly, the provision for appeals to the G in C is not very satisfactory because the G in C may not always give hearings to the aggrieved parties. Thirdly, in dealing with appeals against the TPB's decisions on planning applications, the G in C becomes involved in very detailed planning matters.

4.7 These problems are being addressed in the Town Planning (Amendment) Bill 1991 (the Amendment Bill 1991) recently introduced into the Legislative Council. Under the Bill, an independent Appeal Board (AB) will be set up to relieve the G in C's workload in dealing with s.17(7) appeals against the TPB's decisions on planning applications. The existing review procedure will be retained and the applicant will be given the right of review of the TPB's decision on both refusal and conditions of planning permission. Although the TPB will still be reviewing its initial decision, provision will be made for a second hearing by a separate independent AB which decision on the application will be final. Allowing the TPB to review its decision will permit direct contact and dialogue between the TPB and the applicant and at the same time, reduce the number of appeal cases to be submitted to the AB.

Control of Temporary Uses

4.8 There exist two different systems of control of temporary uses in areas covered by OZPs and in DPAs. In contrast to DPAs where no distinction is made between temporary and permanent uses, temporary uses of any building or land which are expected to last for five years or less are permitted in all land use zones in areas covered by OZPs as long as the TPB is satisfied that they are temporary in nature. Experience has shown that uses such as temporary housing areas, open storage and concrete batching operation, though temporary in nature, can cause considerable congruity and environmental problems (Plates 4.3 and 4.4). Planning control should therefore be based on the nature, rather than the duration, of use which is consistent with the existing system of control in DPAs. Moreover, there are problems in the current definition and application of the 'five-year rule'. The Notes of OZPs do not clearly state how the five-year period should be counted : whether it refers only to the length of period of each single tenancy, or whether the cumulative duration of several tenancies should be taken into consideration. The word 'expected' is another source of ambiguity. In many cases it is difficult to ascertain whether a use would or would not last for more than five years.

PROPOSED PROCEDURE FOR PROCESSING PLANNING APPLICATIONS

4.9 The proposed procedure for processing planning applications is shown in Figure 4.1 and elaborated below.

Submission of Applications

4.10 Applications for the grant of planning permission should be made to the Planning Board (PB). An application should be in such form and include such particulars as the PB thought fit. To avoid a situation where an application would be made without the owner's knowledge or consent, the new Ordinance would require that if an applicant was not the owner of the land/premises under application by the time he made an application, he should either have the prior consent of the owner in writing or had served a notice on the owner.

Publication of Applications

4.11 Under the existing Ordinance, there is no provision for public notification of planning applications, some of which may in effect amount to zoning amendments to statutory plans (e.g. an office building in an 'Industrial' zone, a commercial entertainment building in a 'Residential' zone, or a residential building in a 'Government, Institution and Community' zone). It is proposed that the new Ordinance should require the PB to notify the public of planning applications in the Gazette and newspapers prior to consideration. It would be unavoidable that public notification would lengthen the processing procedure to some extent. Two options are therefore proposed for public comments. Option I would require the PB to notify all planning applications and would have the obvious advantage that no application would be unknown to the public. The processing time for all applications would however have to be lengthened to a maximum of three months even for such simple applications as fast food shop or local provisions store in an 'Industrial' zone or nursery/playgroup in a 'Residential (Group B)' zone. Option II would allow the PB to have discretion in deciding which applications should be publicized. Simple applications would not be publicized and could be processed in slightly less than three months : more processing time than at present would still be necessary because of the need to refer all cases to the PB to decide whether public notification would be required. Where the PB decided, on preliminary consideration, to publicize an application it was likely that an additional one month would be necessary to complete the processing procedure. This would make it necessary to extend the maximum statutory period for all applications to four months.

4.12 Under both options, the public would be given the opportunity to make representations on the planning applications during the exhibition period of one month. Such representations would be taken into account by the PB, as it thought fit, in its consideration of the applications.

Consideration of Applications

4.13 In general, procedures for the consideration of applications would follow the existing practice. The consideration by the PB would be in the absence of the applicant. In determining a planning application, the PB would take into account all factors and aspects relevant to the proposed development, including any representations received. The PB might grant or refuse to grant the permission applied for; and any permission granted might be subject to such conditions as the PB thought fit. The applicant and persons who had submitted representations on the application would be notified of the PB's decision.

4.14 Similar to the existing practice, an applicant aggrieved by the PB's decision (extended to include both refusal and conditions of planning permission under the proposed provisions in the Amendment Bill 1991) would be able to seek a review of a decision by requesting a hearing before the PB, within twenty-one days of being notified of the PB's decision. The review should be conducted within three months of the receipt of application for review.

Appeals Against Decisions of Planning Board

4.15 To give an applicant aggrieved by the decision of the PB on a review a further hearing by a separate independent body other than the G in C, so as to relieve the latter's burden in having to consider detailed local planning matters, the applicant would be given the right to appeal against the PB's decision directly to an independent AB. No person involved in the original decision of the PB should sit on the AB.

4.16 An appeal against the PB's decision should be lodged by the applicant within sixty days of being notified of the PB's decision on the application; and within three months of receipt, the appeal should be considered by the AB. The appellant and the representative(s) of the PB would be invited to attend a hearing by the AB. The actual appeal and hearing procedures would be set out in

the form of regulations to be promulgated publicly. The general principles of a fair hearing would be adopted. These would include notification of the date, time and place of the hearing; notification in detail of the case to be considered; adequate time to prepare one's case in answer; access to all materials relevant to one's case; the right to present one's case; the right to be represented; the right to have one's case decided solely on the basis of materials available to the parties; and the right to a reasoned decision. After the hearing and full consideration by the AB, the appellant would be notified of the AB's decision which would be final. Persons who had earlier submitted representations on the application (see paragraph 4.12) would also be notified of the AB's decision in case the original decision of the PB had been reversed or varied.

Applications during the Exhibition of Statutory Plans and in respect of Objection Sites

4.17 The existing system allows for the separate processing of planning applications and consideration of objections to a draft plan/amendments made to a plan. Because of the problem explained in paragraph 3.10 of Chapter 3, it is proposed that consideration of planning applications for any development in the area or on sites affected by a draft plan or amendments to a draft plan be deferred during the plan exhibition period. Upon the expiry of this period, the representations on the draft plan or amendments made to the plan would be examined in the first instance, and those which were objections in nature would be singled out and published in a plan as described in paragraph 3.25 of Chapter 3. Where a planning application had been submitted and the site concerned was not the subject of an objection to the plan, the application would be considered by the PB in the usual manner. If there was an objection to the zoning of the application site, the consideration of the application would have to be deferred further pending a final decision on the objection. As proposed in Chapter 3, there would be express provision in the new Ordinance to require submission of the draft plan, together with all representations to it and the PB's recommendations, to the G in C within nine months of the expiry of the plan exhibition period. The consideration of outstanding planning applications would therefore not be unduly delayed. Figures 4.2 shows the procedure for processing such planning applications.

Transfer of Application for Consideration by the Governor

4.18 Intervention in the planning application process by the Administration might be required in certain special circumstances, such as where an application was for a development considered to be of territorial or security significance. The new Ordinance should empower the Governor to transfer such an application for his own decision which would be final. This call-in power is expected to be required very infrequently.

PUBLIC INVOLVEMENT

4.19 The proposals for public notification of planning applications and submission of representations on the applications would provide greater opportunity for public involvement in the planning application process. Public comments and representations received on the applications would be treated in the same manner as comments from Government departments, and the PB would have discretion to accept or reject them, either in whole or in part, as it thought appropriate.

4.20 In addition, the new Ordinance would provide for the establishment of a register of all planning applications for public inspection.

OTHER RELATED PROVISIONS

Provision of Public Facilities in Development Schemes

4.21 In other countries, to make improvements to a development proposal for the benefit of the community, a planning authority very often tries to impose on the developer an obligation to carry out certain works not included in the development proposal, or to require the developer to pay for certain public facilities or contribute to the cost of certain infrastructures which are related in scale and kind to the proposed development. These are usually secured either through imposing conditions on planning permission, or by entering into a planning agreement with the developer regarding the use or development of the land. Unlike conditions in planning permission which may be imposed unilaterally by the planning authority, planning agreement can be secured only by mutual consent between the planning authority and the developer.

4.22 In countries such as the United Kingdom, the planning agreement approach provides a formal basis for negotiation between a planning authority and the developer in respect of the required provision of public facilities in a development scheme. The planning authority, in such case, serves as both the development approval authority as well as the local government authority. The system, however, would not be applicable in the Hong Kong context because here there would be three parties involved in the planning process, namely the developer, the Government, and the PB. If a similar planning agreement approach were to be adopted in Hong Kong, the PB would negotiate with the developer and sign the agreement setting out the public facilities to be provided. It was the Government, however, and not the PB which would be primarily concerned with implementation and ensuring that the facilities agreed were actually provided by the developer. There would be the anomalous situation where the parties to the agreement were the PB and the developer, and yet the recipient of the favour of that agreement was an independent third party, namely the Government representing the community at large. This, for obvious reasons, would not be appropriate.

4.23 It is therefore proposed not to introduce the planning agreement approach in the new Ordinance. To achieve the same objective it is proposed to give the PB the power, where it considered that a development under application would or was likely to require the provision of, or increase the demand for, public facilities within the area, to grant permission subject to one or more of the following conditions :-

(a) the dedication of land free of cost for the required public facilities;

(b) the payment of a monetary contribution for the provision of the facilities; and

(c) the actual construction of the facilities.

It must be stressed that, under established legal principles, the power of the Board to impose conditions would not be limitless. Such conditions should be imposed for a planning purpose, fairly and reasonably related to the development, and would be subject to the test of reasonableness by the courts. Any applicant aggrieved by the decision of the PB with respect to the conditions imposed might also appeal directly to the AB. From past experience, applicants were often

willing to incorporate in their proposed developments certain required public facilities which would enhance the quality of their developments as well as the surrounding areas.

Minor Amendment to Approved Schemes

4.24 The existing Ordinance does not allow for any amendment to a development that has been granted planning permission, and any subsequent change of proposals requires a fresh application. The rigidity of this system may delay development. Under the new Ordinance, an applicant would be permitted to apply for minor amendment to his development scheme under a fast-track approach. Such applications would not require public notification and would be dealt with by the Planning Authority delegated with appropriate authority by the PB under simplified procedures to be set out in regulations. Examples of minor amendments would include revised proposals for recreational facilities or landscaping design in a residential development, addition of one storey or a small increase in the number of flats to a commercial/residential development without altering the general building design and the total gross floor area of the scheme approved. Any applicant aggrieved by the decision of the Planning Authority would have the right of review by the PB provided in the Ordinance. Major amendments would still be subject to the full application procedure, including public notification.

Control of Temporary Uses

4.25 In view of the problems relating to temporary uses in areas covered by OZPs (see paragraph 4.8), it is proposed that temporary uses should also be put under control in these areas as currently practised in DPAs. Any development, regardless of its duration, should conform to the Notes pertaining to the zoning of the specific site. It would always be permitted if it was a use under Column 1 of the Notes, and planning permission from the PB would be required if it fell within Column 2. To cater for genuine 'temporary' uses, a list of such uses as works areas for utility and road projects, and temporary structures erected for celebrating certain festivals which could be exempted from planning application would be spelt out in the Notes of a statutory plan. To allow for flexibility, an application for any other development on land involving no permanent structure but which did not fall within the uses under Column 1 and Column 2 of the zoning of the specific site might also be made to the PB. This, however, should not

apply to change of use in permanent buildings which should be subject to the normal zoning control set down in the Notes of the plan. Suitable amendments would need to be made to the Notes attached to OZPs.

4.26 To simplify procedures, consideration of applications for uses of a duration of six months or less would be undertaken by the Planning Authority delegated with such authority by the PB as allowed in the existing Ordinance. Other applications would continue to be considered by the PB.

Administrative Charges

4.27 The processing and consideration of planning applications requires much time and effort from the various planning bodies and Government departments involved. Since the law allows any person to submit a planning application and there is no limit to the number of applications that can be submitted for any one site, charging an administrative fee should help to prevent any possible abuse of the process. It is also a reasonable principle that those who use and potentially benefit from specific administrative processes should contribute to the cost of providing that service. Provision would therefore be made in the new Ordinance to allow the Planning Authority to charge a fee on a planning application. The fee scale, to be determined on the principle of cost recovery, would be related to the size and complexity of the development proposal under application, but with provision for exemption for developments which were of community benefit, such as schools or community centres. Details of the administrative charges would be set out in regulations to be promulgated under the Ordinance.

SUMMARY OF PROPOSALS

4.28 The broad structure of the existing planning application system is considered generally flexible and efficient and should be maintained. A number of modifications are proposed to make the system fairer and more efficient, including : -

(a) If an applicant was not the owner of the land/premises under application, he should either have obtained the written consent of the owner or have served a notice on the owner (paragraph 4.10).

(b) The PB should publicize planning applications for public inspection and comments prior to consideration. Two options are possible: either requiring the PB to publicize all planning applications, or allowing the PB the discretion to decide what planning applications should be publicized (paragraph 4.11).

(c) To allow sufficient time for public notification and comments, the maximum statutory period for consideration of planning applications by the PB would be extended from the existing two months to three months under the full public notification option. Under the limited notification option, it would be necessary to extend the statutory period for all applications to four months, although applications which required no notification would in practice be processed in less than three months (paragraph 4.11).

(d) An independent AB would be established to consider appeals against the PB's decisions on planning applications. An appeal should be lodged by the applicant within sixty days of being notified of the PB's decision, and should be considered by the AB within three months (paragraphs 4.15 and 4.16).

(e) Consideration of planning applications for any development on sites which were the subject of objections to a draft statutory plan would be deferred pending the G in C's decision on the related objections (paragraph 4.17).

(f) The Governor should have the reserve power to transfer an application from the PB for his own decision where the subject development was considered to be of territorial or security significance (paragraph 4.18).

(g) A register of all planning applications would be established and made available for public inspection (paragraph 4.20).

4.29 New provisions are also proposed to the effect that : -

(a) The PB should be empowered to impose conditions of planning permission requiring an applicant to make a reasonable dedication of land for the

provision of public facilities in a development scheme, to pay a monetary contribution for the provision, and/or to carry out actual construction of the facilities (paragraph 4.23).

(b) An applicant should be allowed to apply for minor amendment to a development that had been granted planning permission under a fast-track approach (paragraph 4.24).

(c) Control over development should be based on the nature, rather than the duration, of the development. All development, whether temporary or permanent, should be subject to the same zoning control. A list of temporary uses which could be exempted from planning application would be clearly spelt out in the Notes attached to statutory plans. Applications for any other development on land involving no permanent structure might also be made to the PB (paragraphs 4.25 and 4.26).

(d) The Planning Authority might charge an administrative fee on a planning application (paragraph 4.27).

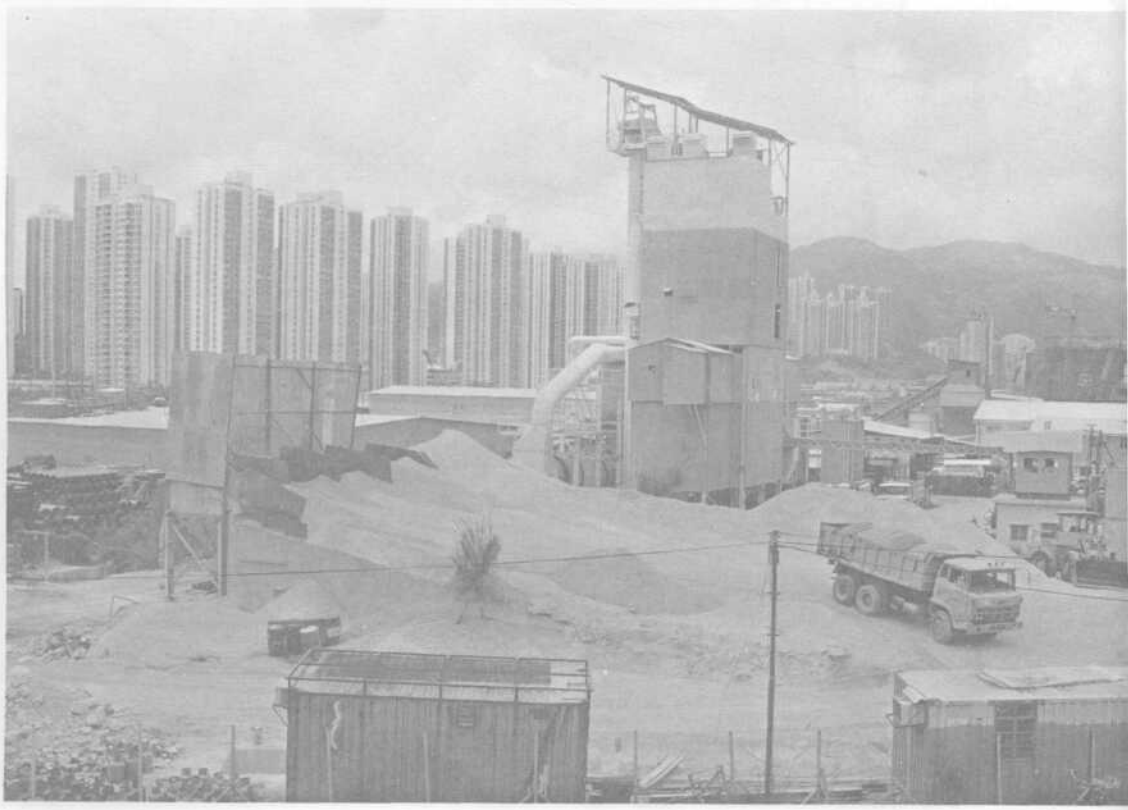
Planning applications might affect the public in various ways and the public should be given a chance to voice their opinions.

▲ Plate 4.1 A refuse collection point site under application - residents next door may not be aware of the proposal

▲ Plate 4.2 Protests against a proposed petrol filling station adjacent to a village

Temporary uses can cause considerable environmental problems.

▲ Plate 4.3 Temporary housing area incompatible with adjacent industrial buildings



▲ Plate 4.4 A concrete batching plant can cause nuisance

FIGURE 4.1 PROCEDURE FOR PROCESSING PLANNING APPLICATIONS

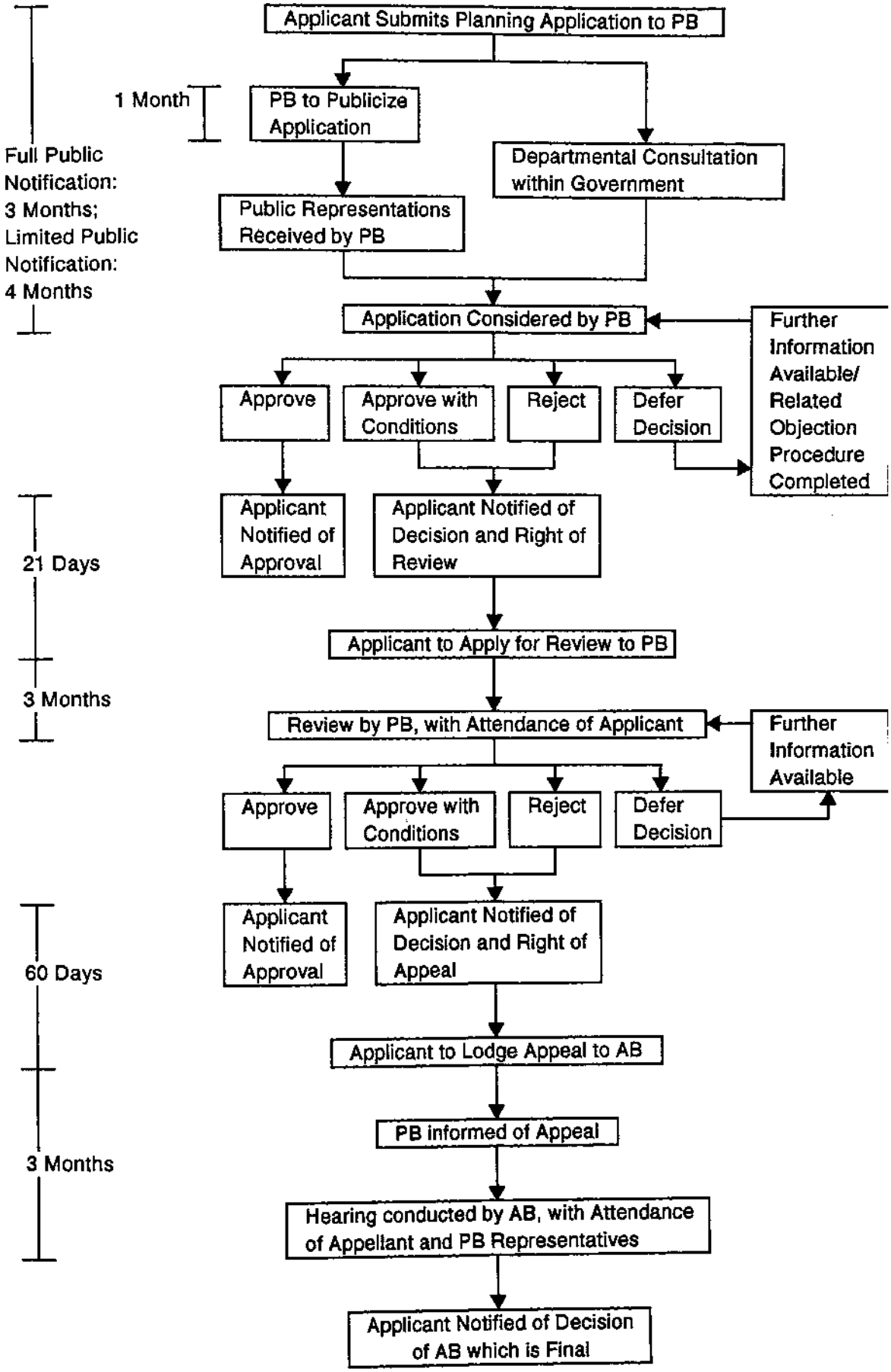
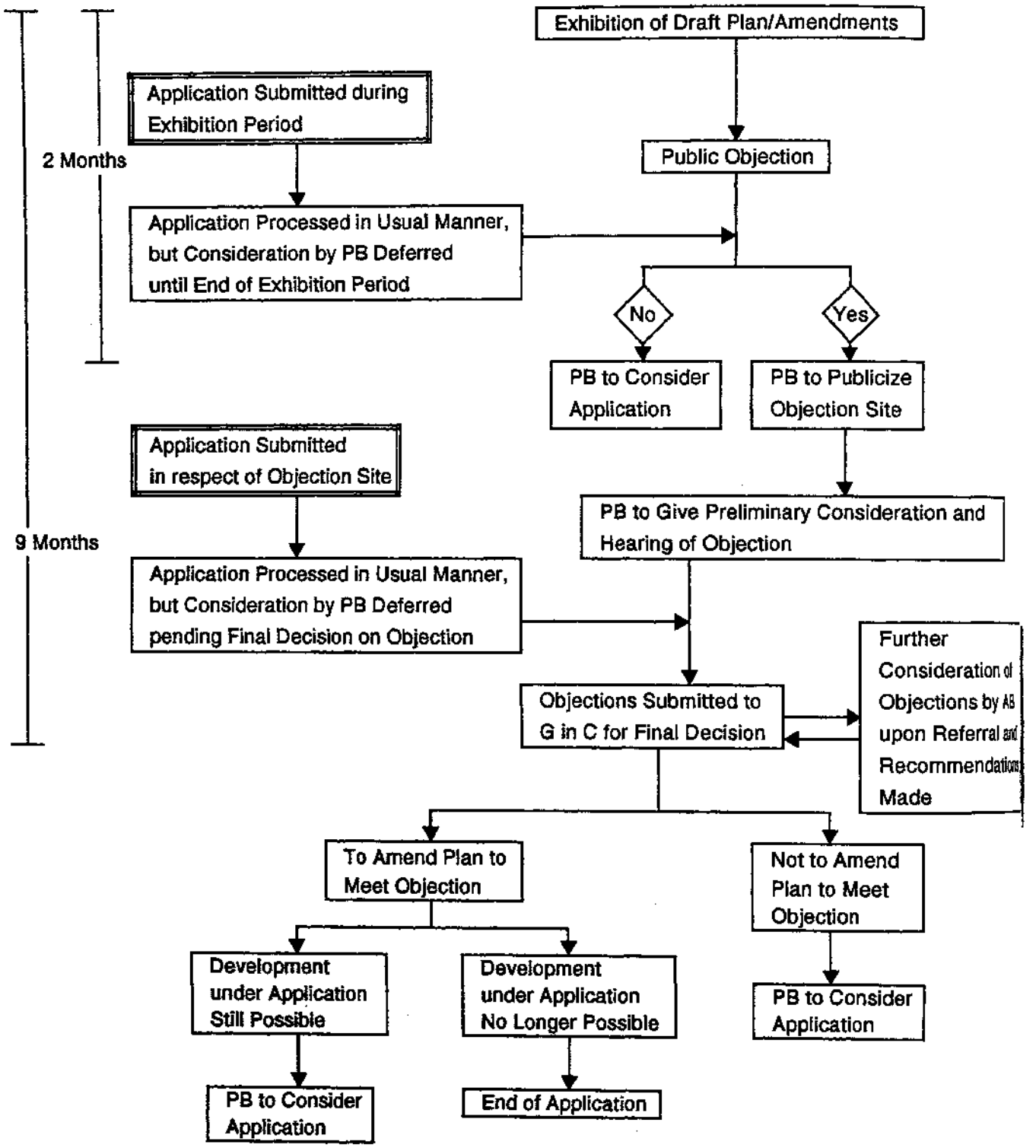


FIGURE 4.2 PROCEDURE FOR PROCESSING PLANNING APPLICATIONS DURING THE PLAN EXHIBITION / OBJECTION CONSIDERATION PERIOD



CHAPTER 5

DEVELOPMENT CONTROL

INTRODUCTION

5.1 The objectives of statutory plans will not be achieved unless the plans are implemented. Implementation of a plan involves not only the direction of public and private developments but also the control of these developments to ensure that they proceed only in accordance with the plan or with the necessary planning permission. To make development control effective, there must be means of enforcement and sanctions against non-compliance.

5.2 This Chapter first sets out the current means of development control and highlights the existing problems that need to be addressed in the comprehensive review of the planning legislation. It then outlines the proposed changes considered necessary to improve development control in Hong Kong.

EXISTING PROBLEMS

5.3 Unlike the planning legislation of many other countries which have specific enforcement provisions, development control in Hong Kong, until very recently, has been carried out mainly through the Buildings Ordinance and the leases. The Town Planning (Amendment) Ordinance 1991 (the Amendment Ordinance 1991) first introduced direct enforcement powers into Hong Kong's planning legislation, but the scope of such powers is restricted to areas covered by Development Permission Area (DPA) plans and areas where Outline Zoning Plans (OZPs) replace DPA plans. For areas not covered or not been covered by DPA plans, development control still relies mainly on the Buildings Ordinance and lease conditions.

Buildings Ordinance

5.4 Development control under the Buildings Ordinance is achieved mainly through the Building Authority's power to reject building plans if :-

(a) the building plans are not in conformity with a draft or approved plan prepared under the Town Planning Ordinance (section 16(1)(d));

(b) the building plans are not in conformity with a master layout plan approved by the Town Planning Board (TPB) for a comprehensive development area (section 16(1)(da));

(c) the building plans will result in a building differing in height, design, type or intended use from buildings in the immediate neighbourhood or previously existing on the same site (section 16(1)(g));

(d) the buildings are used for both domestic purposes and dangerous trades (section 16(1)(n)); or

(e) the building works are to be carried out on a site with no adequate connexion to a public street (section 16(1)(p)).

5.5 The Building Authority may also prohibit any change in the use of a building or require the owner/occupier to discontinue the present use if the building is not suitable by reason of its construction for its present or intended use (section 25).

5.6 Development control through the Buildings Ordinance is effective only in cases where submission of building plans is required. Where no new or major building works are involved or in the case of a change in use of building, development control cannot be implemented effectively. Under the Buildings Ordinance, a change in the use of a building will be allowed as long as the structure of the building is suitable for the intended use, even if such change contravenes the zoning on a statutory plan (Plates 5.1 and 5.2). A case in point is the conversion of some office premises in a composite commercial/residential building to light industrial use.

5.7 The Buildings Ordinance should be a law relating to the construction of buildings, not development control. The inclusion of planning-related provisions in the Buildings Ordinance has resulted in a blurring of the purpose of the Ordinance and an overlapping of responsibilities and functions between the Building Authority and the Planning Authority.

Building (Planning) Regulations

5.8 Control over development density is currently exercised through the Building (Planning) Regulations of the Buildings Ordinance, in some cases governed by the further constraints imposed in the leases and the statutory OZPs. Building (Planning) Regulations 19 to 23 restrict the plot ratio and site coverage of any building to the level specified in the First Schedule of the Regulations. Regulation 19(2) further gives the Building Authority discretionary power to determine the actual plot ratio and site coverage for a site not abutting a street or abutting a narrow street. The First Schedule sets out the maximum site coverages and plot ratios for different classes of site and heights of building, both domestic and non-domestic. This Schedule is designed primarily to control development density in Density Zone 1 areas (2). For Density Zones 2 and 3 areas, where lower densities are specified because of infrastructural constraints or the need to preserve amenities, the planning practice is to follow separate density schedules approved by the Executive Council and set out in the Hong Kong Planning Standards and Guidelines. The current practice is to incorporate the Zones 2 and 3 density control into the lease conditions and statutory OZPs as the opportunity arises. This has resulted in a dual system of statutory control on development density, one under the Building (Planning) Regulations of the Buildings Ordinance and another under the leases and the Town Planning Ordinance, causing complication and confusion to the public.

Lease

5.9 Another indirect means of development control is through the lease. In drawing up the lease conditions, the Government as the lessor can stipulate development restrictions such as user, building height, development intensity,

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Note (2) In relation to the control on development density, the main urban areas are divided into three zones: Density Zones 1, 2 and 3. Density Zone 1 covers the major part of the built-up areas of Hong Kong Island and Kowloon; Density Zone 2 covers a smaller area comprising the Mid-Levels of Hong Kong Island and the Waterloo Road/Argyle Street area of Kowloon; and Density Zone 3 covers the lower density residential areas e.g. the Peak, Repulse Bay, and north of Lung Cheung Road. Development density in Density Zones 1, 2 and 3 can be described as high, medium and low respectively.

design and disposition and other conditions on individual lots. Thus where the implementation of a development involves a new land grant or requires a lease modification, the planning restrictions specified on a statutory plan or in the conditions of a planning permission can be incorporated into the lease conditions and enforced through the sanction of re-entry.

5.10 But development control through lease conditions alone has inherent problems. It is extremely inflexible in that once a lease is written and executed, it remains effective until the end of the lease period or when the lease is modified. The conditions written into a lease in the middle of the nineteenth century are unlikely to reflect all the requirements of public interest established in the planning process today. The new requirements cannot be incorporated into the original lease conditions, unless the lease is modified by mutual consent. Many old leases are virtually unrestricted and no lease modification is required for redevelopment or change of use. The common occurrence of vehicle repair garages and motor vehicle showrooms in such residential areas as Tai Hang and Happy Valley is an example of non-conforming uses not controllable under unrestricted leases.

5.11 Even for restricted leases, the user restriction is usually not definitive. The term 'non-industrial uses', for example, can mean all kinds of commercial uses from retail shops to betting office, commercial bathhouses and massage establishments, some of which might cause undue disturbance to the occupants in composite commercial/residential buildings. The infiltration of motels and commercial guest houses into the Kowloon Tong Garden Estate is another example in point. Even in the event of a breach of the lease conditions, experience has shown that lease enforcement action is time-consuming and cumbersome.

Enforcement under Town Planning (Amendment) Ordinance 1991

5.12 In order to reduce confusion between controls under the building and the planning legislation, allow for the imposition of new development controls where necessary, and achieve more effective control, direct enforcement provisions are needed in the planning legislation.

5.13 A direct means of enforcement which satisfies these requirements has become available since the commencement of the Town Planning (Amendment)

Ordinance 1991. The Amendment Ordinance 1991 defines 'development' as building, engineering, mining or other operations in, on, over or under land, or making a material change in the use of land or buildings. Unauthorized development is also defined. It introduces, for the first time, enforcement provisions into Hong Kong's planning legislation.

5.14 The Amendment Ordinance 1991 provides that in areas covered by DPA plans (or in areas where a DPA plan has subsequently been replaced by an OZP), no person shall undertake or continue development unless :-

(a) the development is an existing use;

(b) the development is permitted under the DPA plan (or the replacement OZP); or

(c) permission to do so has been granted by the TPB.

Development not within these categories constitutes unauthorized development and is subject to enforcement action. The Planning Authority is empowered to serve Enforcement, Stop and Reinstatement Notices on the land owner/occupier/person responsible for the unauthorized development. Any person who fails to comply with the requirements of any of the notices commits an offence and is liable to a fine.

5.15 The enforcement provisions in the Amendment Ordinance 1991 are however only applicable in DPAs (mainly in the non-urban areas) and not in areas already covered by OZPs (i.e. the main urban areas and the new towns). In view of the existing inadequacy in development control through other legislation and the lease, the new Planning Ordinance should contain enforcement provisions which cover the entire Territory rather than in isolated areas as at present.

PROPOSALS

Enforcement Provisions

5.16 It is proposed that in any area covered by a statutory plan, irrespective whether it is an OZP or a DPA plan, no person should undertake or continue development unless :-

(a) the development was an existing use, which would be defined as a use of a building or land in existence immediately before the first publication of the subject DPA plan or OZP. In areas already covered by OZPs when the new Ordinance was enacted, if it could be proved by the owner or occupier that the use of a building or land had been in existence immediately prior to the commencement of the new Ordinance, such use would be regarded as an existing use and unless otherwise stated in the OZP concerned (see Chapter 8), would be permitted to continue;

(b) the development was permitted under the plan; or

(c) planning permission for the development had been obtained.

5.17 The procedures for the serving of Enforcement Notices, Stop Notices and Reinstatement Notices in all areas covered by statutory plans would be as set out currently in section 23 of the Ordinance in relation to DPAs (see paragraph 2.10 in Chapter 2).

5.18 It is envisaged that in practice the serving of Reinstatement Notices would largely be confined to areas covered by DPA plans and seldom to areas covered by OZPs. A DPA plan is an intermediate plan needed during the preparation of an OZP. Because significant parts of the plans are without definite zonings, the Reinstatement Notice provides a mechanism to protect the existing condition of land so as not to pre-empt the planning proposals to be made in the OZP under preparation for the area. Filling of fish ponds to make way for open storage uses is a case in point. In the main urban areas or new towns which are already covered by OZPs, there are definite zonings for each piece of land. As long as the unauthorized development was discontinued and the subsequent development conformed to the zoning on the plan, it would not be necessary to require reinstatement of the land to its original condition. Reinstatement Notices would be served in OZP areas only in very limited circumstances, e.g. felling of trees in areas zoned 'Green Belt' where the land owner/occupier/responsible person might be required to reinstate the land to the condition it had been in immediately before the gazetting of the OZP (i.e. in the example quoted, to replant trees). Similarly, the provisions in relation to the reinstatement of land in the Stop Notice would be applied mainly to areas covered by DPA plans, not OZPs.

5.19 Any person who failed to comply with the requirement of an Enforcement Notice, a Stop Notice or a Reinstatement Notice would commit an offence and be liable to a fine (including a daily fine for continuing offence). The level of fine would be comparable with other ordinances and would be proposed at the Bill drafting stage. Experience from the operation of the Amendment Ordinance 1991 would be taken into account.

5.20 As provided for in the Amendment Ordinance 1991, the Planning Authority would be empowered to enter the land and take such necessary steps to ensure the discontinuance of the unauthorized development, to prevent the adverse effects specified in a Stop Notice, or to reinstate the land. Costs should be recoverable from the offender.

5.21 Any person aggrieved by the Planning Authority's decision to serve a Reinstatement Notice would be able to appeal, within thirty days after service of the notice, to the Appeal Board (AB) established under the new Planning Ordinance (see Chapter 3) instead of the Secretary for Planning, Environment and Lands as at present. The appeal should be considered by the AB within three months on receipt of such application. The effect of the Reinstatement Notice would be suspended until a decision on the appeal was made.

5.22 As in the Amendment Ordinance 1991, there would be a provision in the new planning legislation such that where very serious or recurrent breaches of development control took place, the person who undertook or continued such unauthorized development might be charged immediately for the offence. The Planning Authority would not be obliged to serve the person first with an Enforcement Notice before taking immediate prosecution action.

5.23 To allow public access to all the records of Enforcement, Stop or Reinstatement Notices served in respect of a particular site, all such notices would be registered in the Land Office and kept in a register to be set up in the Planning Department, for public inspection.

Planning Certificate

5.24 In addition to the new provisions for enforcement under the planning legislation, it would still be necessary to provide for a close linkage between the operation of the Buildings Ordinance and the system of development control

under the Planning Ordinance to prevent the possibility of building works being carried out in contravention with planning requirements. Based on the principle that planning matters should be dealt with under the Planning Ordinance and the Buildings Ordinance should confine to matters relating to the construction and safety of buildings, it is proposed that planning-related sections in the Buildings Ordinance should be consolidated in the new Planning Ordinance and managed under a system of planning certificates.

5.25 Under the new system, a planning certificate, to be issued by the Planning Authority, would be required for all new building development (including material change of use). The planning certificate would in effect cover the current provisions under section 16(1)(d), (da), (g), (n) and (p) of the Buildings Ordinance and regulations 19 to 23 of the Building (Planning) Regulations. It would be made a pre-requisite for the approval of building plans by the Building Authority. To avoid abortive work for the developer, detailed building plans would not be required in applying for a planning certificate. Only sketch/concept plans needed to be submitted, setting out the planning aspects of a development, such as location, disposition, height, plot ratio, floor area, site coverage, use, provision of servicing facilities, emergency access and connection to public streets. Guidance notes would be issued to assist developers in preparing such sketch/concept plans. The Planning Authority would examine the plans and issue a planning certificate if the proposed building development met the following requirements :-

(a) compliance with a draft or approved statutory plan;

(b) compliance with the Planning Board's (PB's) permission and any conditions attached where the development was the subject of an earlier planning application;

(c) there was no outstanding public objection in respect of the development site (see paragraphs 3.24 and 3.25 of Chapter 3); and

(d) the Planning Authority was satisfied with such aspects as density, height, design, use and access as currently controlled under section 16(1)(g), (n) and (p) of the Buildings Ordinance and regulations 19 to 23 of the Building (Planning) Regulations.

Applications for a planning certificate should be considered and decided by the Planning Authority within a statutory time limit of sixty days, which is the same time period for processing building plans under the Buildings Ordinance. A developer would normally apply for a planning certificate before submission of detailed building plans to the Building Authority to ensure compliance with all planning requirements so as to avoid abortive work in the preparation of detailed building plans. But the new system would not stop him from submitting separate plans to the Building Authority for consideration concurrently to speed up the development process if he felt confident that a planning certificate would be issued. The Building Authority would nevertheless not approve any submitted building plans before a planning certificate had been obtained.

5.26 Any person aggrieved by the Planning Authority's decision to refuse issue of a planning certificate would have the right to appeal to the AB established under the new Planning Ordinance.

5.27 With the introduction of the planning certificate system, the present provisions under section 16(1)(d) (insofar as it is related to the Town Planning Ordinance), (da), (g), (n), (p) and related regulations on density control (see paragraph 5.29) would be consolidated in the new Planning Ordinance and the discretionary power currently exercised by the Building Authority under these provisions would be transferred to the Planning Authority. This would be a departure from the existing Town Planning Ordinance under which only the TPB, not the Planning Authority, would be given a discretionary power to consider and determine development applications. But the exercise of such a power by the Planning Authority would be necessary as it would not be practical to require the submission of all development plans to the PB for consideration, in view of the large number of building plans currently handled by the Building Authority. Consequential amendments to the Buildings Ordinance would be required.

5.28 No change to section 25 of the Buildings Ordinance is envisaged, as this is concerned basically with the structural suitability of a building for a proposed change in use, but the planning aspects of any material change of use would be dealt with under the new planning certificate system.

Density Control

5.29 It is proposed that control on development density currently provided in the Building (Planning) Regulations should be consolidated in the new Planning Ordinance. Regulations 19 to 23 and the First Schedule of the Building (Planning) Regulations would be transferred to the new planning legislation, and would be promulgated in the form of regulations under the Ordinance, to be made by the Governor in Council.

5.30 New schedules setting out the maximum plot ratio and site coverage for Density Zones 2 and 3 areas would also be incorporated as regulations in the new planning legislation.

SUMMARY OF PROPOSALS

5.31 To achieve effective development control, direct means of enforcement would need to be provided in the new Ordinance. In particular, the following provisions are proposed :-

Enforcement Provisions

(a) There would be enforcement provisions for areas covered by a statutory plan, whether an OZP or DPA plan. No person should undertake or continue development unless (a) the development was an existing use; (b) the development was permitted under the plan; or (c) the necessary planning permission had been obtained (paragraph 5.16).

(b) Existing use would be defined as a use of a building or land that was in existence immediately before the first publication of the subject DPA plan or OZP. In areas already covered by OZPs when the new Ordinance was enacted, existing use would be the use of a building or land that had been in existence immediately prior to the commencement of the new Ordinance (paragraph 5.16).

(c) The procedures for the serving of Enforcement Notices, Stop Notices and Reinstatement Notices in areas covered by statutory plans would be as set out currently in section 23 of the Ordinance in relation to DPAs (paragraph 5.17). Any person who failed to comply with the

requirement of such a notice would commit an offence and be liable to a fine (paragraph 5.19).

(d) The Planning Authority might enter the land and take such necessary steps, if considered necessary, to remedy the breach of development control and costs should be recoverable from the offender (paragraph 5.20).

(e) Any person aggrieved by the Planning Authority's decision to serve a Reinstatement Notice would be able to appeal, within thirty days after service of the Notice, to the AB, which would consider the appeal within three months (paragraph 5.21).

(f) All Enforcement, Stop and Reinstatement Notices would be registered in the Land Office and kept in a register to be set up in the Planning Department for public inspection (paragraph 5.23).

Planning Certificate

(g) Based on the principle that planning matters should be dealt with under the Planning Ordinance and that the Buildings Ordinance should be confined to matters relating to the construction of buildings, it is proposed that the planning-related provisions in the Buildings Ordinance should be consolidated in the new Planning Ordinance (paragraph 5.24).

(h) To prevent the possibility of building works being carried out in contravention with planning requirements, a planning certificate would be required for all new building development, and would cover matters contained in section 16(1)(d), (da), (g), (n), (p) of the Buildings Ordinance and regulations 19 to 23 of the Building (Planning) Regulations. To obtain a planning certificate, only sketch/concept plans setting out the planning aspects of a development would be required. The certificate would be issued by the Planning Authority if the proposed building development satisfied all planning requirements under the new Planning Ordinance. The certificate would be a pre-requisite for the Building Authority's approval of building plans under the Buildings Ordinance (paragraph 5.25).

(i) Applications for planning certificates would be considered by the Planning Authority within sixty days (paragraph 5.25).

(j) Any person aggrieved by the Planning Authority's refusal to issue a planning certificate could appeal to the AB (paragraph 5.26).

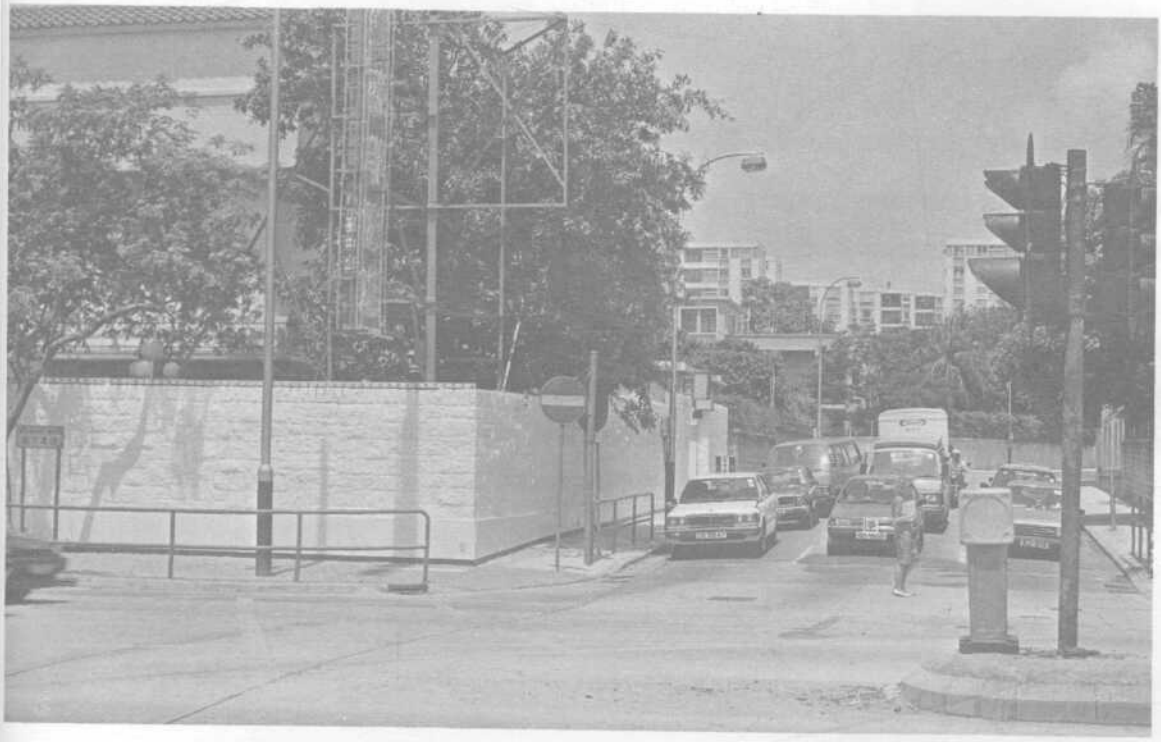
(k) Consequential amendments to the Buildings Ordinance would be required (paragraph 5.27).

Density Control

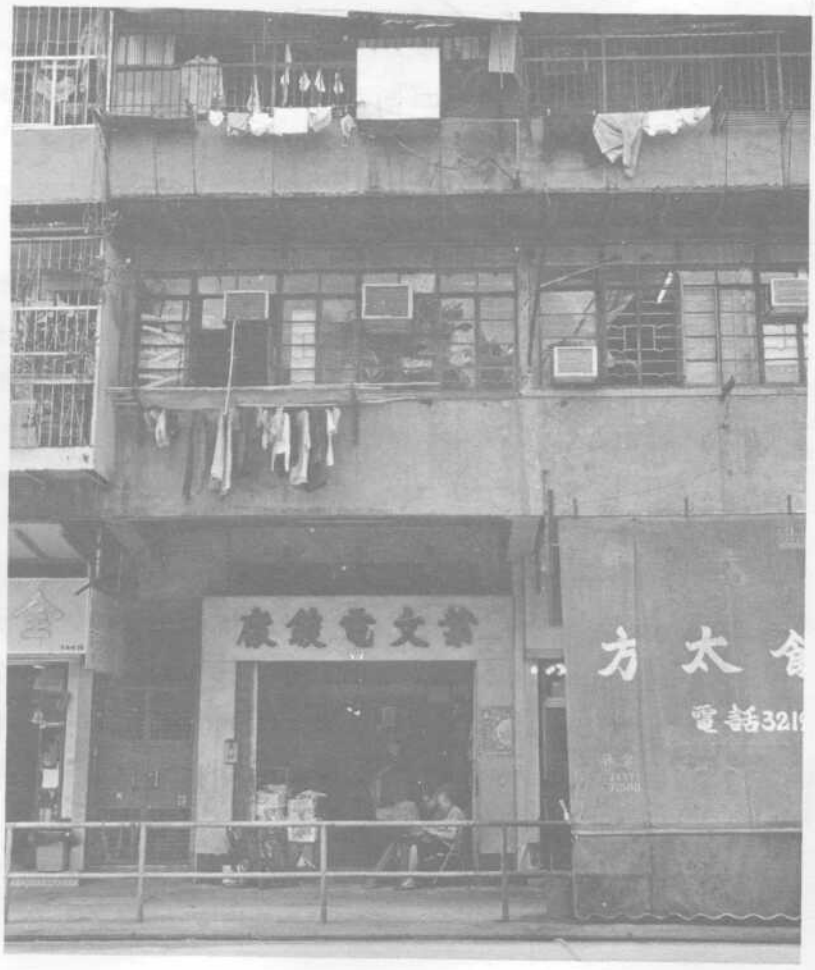
(l) Control on development density would be consolidated in the new Planning Ordinance by transferring regulations 19 to 23 and the First Schedule in the Building (Planning) Regulations to the new Planning Ordinance (paragraph 5.29).

(m) New schedules setting out the maximum plot ratio and site coverage for Density Zones 2 and 3 areas would be incorporated as regulations in the new planning legislation (paragraph 5.30).

Change in use is allowed under the Buildings Ordinance as long as the building is structurally suitable, even if such a change contravenes the statutory zoning.



▲ Plate 5.1 A house converted into 'motel' use in a residential neighbourhood



▲ Plate 5.2 An electro-plating workshop next to a restaurant in a residential building

CHAPTER 6

COMPENSATION AND BETTERMENT

INTRODUCTION

6.1 This Chapter examines the issue of compensation and betterment. The principles of compensation are first set out, and then discussed in the context of total removal and partial curtailment of development rights as a result of planning decisions. The principles and practical problems of betterment are then explained. A special committee will be set up to receive public submissions on the question of compensation and betterment and to advise the Governor on the need for related statutory provisions in the new Planning Ordinance.

COMPENSATION

Principles

6.2 Claims for compensation for development affected by planning may arise under two circumstances :-

(a) total removal of development rights - where the land is compulsorily acquired because of its statutory zoning for 'Government/Institution/ Community', 'Open Space' or other public purposes (Plate 6.1); and

(b) curtailment of development rights by planning restrictions - where the land is downzoned (i.e. zoned for a use which has a lower land value at that point in time) or where restrictions are imposed to limit development (e.g. building density and height) to less than that allowed under the lease (Plate 6.2).

6.3 On the total removal of development rights, the common law provides that where private property is taken over by the Government, there should be payment of compensation, although the basis of compensation is up to the law to prescribe. Extending this basic principle, when a piece of land is zoned for a public purpose, there is theoretically an implicit threat of compulsory purchase

although the timing of purchase is not known. If in the meantime, all development proposals are rejected because of the zoning and the land is rendered incapable of any reasonably beneficial use, this amounts to sterilization of the land in question and is a form of planning blight. The question is whether there should be some form of remedy against the sterilization of property rights for long periods without the properties having been acquired.

6.4 On the other hand, where the user of the property is restricted by Government regulations, the common law principle is that no compensation is payable unless such a right is expressly provided in the statute. Restrictions imposed by planning legislation generally fall within this category, i.e. regulatory rather than confiscatory. Thus, unless the restriction amounts to acquisition of the land itself, no compensation is payable as of right.

6.5 The basis for this common law principle is that ownership of land does not carry with it unrestricted use of land. The mere fact that a person owns the land does not mean that he can do whatever he likes on his land, even to the extent that the activities on, or use of, the land might cause hazard, nuisance or inconvenience to the community. The Government has the duty to regulate the use of land or property in the public interest, and it is the duty of the individual land owner to comply with such regulations. It is upon this premise that legislation on public health, environment, building as well as planning is built.

6.6 Although this principle may appear simple, it is often difficult to draw a line between regulation and total removal of development rights. It is based on the concept of 'duties of neighbourliness' that an individual owes to the community that restrictions are imposed without compensation; and it is also argued that the land owner is not deprived of any property or land interests merely because his land rights are limited by planning restrictions. But as the scope of the restrictions increases, a point may be reached when the restrictions imposed extend beyond the obligation of neighbourliness. The question is at what stage the restrictions amount to total removal of property rights and thus should carry a right to compensation. This is contentious especially as the obligation of neighbourliness often varies from place to place and from time to time.

Total Removal of Development Rights

Existing Provisions

6.7 Under the existing system, compensation is payable for total removal of development rights of land through resumption under the Crown Lands Resumption Ordinance (Cap. 124). Section 4(2) of the Town Planning Ordinance provides that the Town Planning Board (TPB) may recommend to the Governor in Council (G in C) the resumption of land which interferes with the layout of an area shown on a statutory plan or an approved master layout plan within a 'Comprehensive Development Area' (CDA). Resumption to avoid such interference is deemed to be for a public purpose within the meaning of the Crown Lands Resumption Ordinance. At present, there is no statutory time limit requirement for resumption of properties zoned for public purposes and the timing for land resumption usually ties to Government's own programme. There exists an administrative policy however for land owners to request the Government to resume their land. If a development proposal on land zoned for a public purpose (e.g. 'Government/ Institution/Community' or 'Open Space' use) is rejected by the TPB, and if further upon a petition to the G in C, the decision to reject the development proposal is still maintained, the Government will either acquire the property within the next financial year or permit the applicant to develop in accordance with the lease.

6.8 The principle that there should be payment of compensation when private land is taken over by the Government is well established. The outstanding question is how to remedy the planning blight that may be caused where land development rights are sterilized for long periods without any indication of forthcoming acquisition. The following examines two alternative methods in tackling this problem.

Option I : Existing Practice

6.9 A simple option would be to continue the existing administrative practice with no further statutory provisions to be introduced in the new Ordinance, apart from retaining the existing provision under section 4(2) in respect of land resumption for public purpose. The advantages of maintaining the status quo would be that it was simple to operate, and allowed each case to be considered in its own circumstances. To some people, however, an administrative

practice might not be as certain and open as a statutory provision written into the law.

Option Ii : Purchase Notice

6.10 The other option would be to replace the existing administrative practice with a similar but statutory provision through the introduction of a system of 'purchase notice' in the new Ordinance. This would provide land owners with a statutory right to require the Government to resume their land when the use of such land was sterilized by statutory zoning. The existing provision under section 4(2) would also be retained under this option.

6.11 Under this statutory system, it would be necessary to spell out the circumstances under which a land owner would be given the right to serve a purchase notice on the Government which would refer the matter to the G in C for a decision. To avoid abuse, it would be necessary for all the following three criteria to be satisfied :-

(a) The land should be zoned for a public purpose on a statutory plan. For the operation of this provision only, the zonings which would be specified as constituting public purposes would be 'Government/ Institution/Community' (uses such as school, fire station and hospital), 'Open Space' (uses such as public park), 'Green Belt', 'Sites of Special Scientific Interest', 'Coastal Protection Areas', and other zonings that would promote conservation or protection of the environment.

(b) Development of the land was permitted under the lease but was prohibited under the statutory plan or refused by the Appeal Board (AB). The land owner should demonstrate that he had the intention to develop his land in accordance with the use specified in the lease, and his development application had been rejected by the AB.

(c) The land was incapable of any reasonably beneficial use in its existing state. The land owner should demonstrate that his land was incapable of any other beneficial use, which was permitted either as of right under Column 1 or upon application under Column 2 of the

Notes of the statutory plan in question. The relevant factors for consideration would be the existing physical state of the land, its size, shape and surroundings as well as the general pattern of land uses in the surrounding area. The test would be whether the land was capable of yielding a reasonable return to the owner. The concept of beneficial use was not synonymous with profitable use and the absence of profit, however it was calculated, would not necessarily be material. Whether or not the land would be of less use to the owner in its present state than if developed to any other prospective use would not be a relevant point of consideration. Thus a use of relatively low value, say, agricultural use in the rural area, might be regarded as reasonably beneficial if such a use was common for similar land in the vicinity. Whether or not the land could be developed to a more profitable use under the lease, say, open storage use, if without statutory zoning would not be a point of consideration.

6.12 Within six months of receipt of a purchase notice, the Government should submit the notice and its recommendations to the G in C for consideration. The G in C would take one of the following courses of action:-

(a) order the purchase of the land for the designated public purpose within the next financial year from the date of decision;

(b) grant permission to the land owner to develop the land in accordance with the lease or rezone the land to permit other beneficial uses; or

(c) reject the purchase notice if

(i) the basic requirements for serving a purchase notice as set out in paragraph 6.11 had not been satisfied; or

(ii) the land would not be required for public development within five years and there existed a reasonable temporary beneficial use for the land during this five-year period. At the end of the period, the G in C would be obliged to either order purchase of the land, or rezone it, or grant permission to the land owner to develop the land in accordance with the lease.

6.13 With a statutory purchase notice system, the land owners' right to request the Government to resume land sterilized by statutory zoning would be clearly spelt out in the legislation. This system, however, might lead to a flood of purchase notices served on the Government. In addition, the criterion of 'incapable of any reasonably beneficial use' for serving a purchase notice could be subject to interpretation and arguments, and might lead to litigation.

Planning Restrictions

6.14 While the principle of compensating loss arising from total removal of development rights by planning action is well established, the issue of compensating loss arising from planning restrictions is more complicated and controversial. Under the existing Ordinance, there is no compensation payable for planning restrictions, except in the case of resumption. The following summarizes the main arguments 'for' and 'against' compensation for planning restrictions.

The Case 'for' Compensation

6.15 Advocates of compensation emphasize the fundamental principle of respecting individual property rights in a democratic society. They claim that it may be unfair for a land owner to be deprived of his rights by some unilateral or arbitrary action of the Government, unless he is adequately compensated. This argument is reinforced by the fact that land in Hong Kong is held under a leasehold system. A lease is a contract between the lessor and the lessee; and when the Government takes away some rights laid down in the lease which it has signed as the lessor, it actually contravenes the terms of the contract and is hence open to claims for compensation from the lessee for derogation of grant.

6.16 Advocates of compensation also hold that the land premium system in Hong Kong is, to a certain extent, equivalent to the 'betterment charges' in other countries (see paragraph 6.28). When owners modify their leases to allow for either more intensive development or for a different and more profitable use, premium is charged on any gain in development rights. They argue that it may be unfair to the land owners if on the one hand, the Government charges premium on gain in development rights while on the other, no compensation is payable when the same development rights are taken away through planning restrictions.

6.17 Some feel that compensation should be payable when a zoning makes developing the land less profitable. As an example, a site may be zoned 'Residential (Group C)' (R(C)) but with a specified plot ratio restriction of 5. If not because of the plot ratio restriction, the site could be developed to the extent permitted under the First Schedule of the Building (Planning) Regulations and the lease. Thus the development potential of the site will be reduced by the zoning restriction. In other cases, a development may be granted permission subject to planning conditions, e.g. residential development in a 'Government/ Institution/Community' (G/IC) zone. The conditions may require the provision of certain G/IC facilities which make the development less profitable.

6.18 Some equate the issue of compensation with simple hardship. To these people, no individual land owner should suffer for the sake of public interest, which is hard to define and determine, without any compensation for his hardship.

The Case 'against' Compensation

6.19 The main argument against payment of compensation for planning restrictions centres around the common law principle explained in paragraphs 6.3 and 6.4 and the premise that private interest should be subordinate to public interest. Each individual owes some obligations to society and since planning regulations are imposed in the public interest, the private individual should comply with such regulations, sometimes even at a cost to himself. The Government should not be liable to pay compensation for a mere restriction of individual rights which is imposed for the public good.

6.20 Another argument is that ownership of land does not confer an unlimited right of use. Apart from compliance with the conditions of the lease, land owners also have to comply with all relevant legislation - environmental, building, fire safety, planning and the like. An established principle is that legislation is drawn up for the benefit of the community as a whole and thus should always take precedence over leases, which are just contracts between two parties.

6.21 Most of the leases granted in the urban areas before the World War II virtually contain no restrictions on user nor building density. Even so, this has never meant that unlimited development could be put on the land. Development

is still subject to control under other legislation. Under the Buildings Ordinance 1932, domestic buildings were restricted to five storeys and other buildings up to three storeys generally. Such restrictions were relaxed in the Buildings Ordinance 1955 but in the Buildings Ordinance 1962, building density was again subject to more stringent plot ratio and site coverage control. In all these legislative changes, no matter whether restrictions were imposed or relaxed, neither a betterment charge nor compensation had ever been collected or paid. In this view, there is no reason why planning legislation, which is similar to the Buildings Ordinance in affecting development value, should be an exception.

6.22 Similarly in the case of the Block Crown Lease in the New Territories, no specific restriction as to user was set out in the lease when the lease was first granted - apart from the control over building structures and the establishment of 'noisy, noisome or offensive trade or business'. For a long time prior to the Melhado judgment in 1983, owners of land held under the Block Crown Lease had little expectation of development other than for agricultural use. The Melhado judgment changed that expectation and to many NT land owners, the change could not have been anticipated when the lease was first registered in 1905.

6.23 In this view, the examples of the unrestricted leases in the urban areas and the Block Crown Lease in the NT are held to show that where no specific development rights are written in the leases, development entitlements are basically the product of the prevailing legislation and the legal interpretation of the leases in question. Unrestricted leases do not necessarily imply unlimited development rights and hence there should not be any claim for compensation if the development rights are changed by subsequent legislation or legal interpretation.

6.24 One further argument raised against payment of compensation is obviously the financial implications for the community. Should compensation be payable for all planning restrictions which lead to a decrease in land value, the financial liability on the community would be so enormous as to make effective planning impossible. In addition, the assessment procedure for claims for compensation would probably be very complicated and protracted. Both the financial and procedural problems could be of such a scale as to make

compensation for planning restrictions impracticable. That is why there is no provision for compensation in most overseas planning legislation on which we have information (e.g. the United States, Canada, Singapore and New South Wales, Australia). In the very few examples where such compensation is provided, as in the case of the United Kingdom (3), the provision is made under a special set of circumstances and is limited to a very restrictive range of cases.

BETTERMENT

6.25 Closely linked to the issue of compensation is the issue of betterment. Betterment is usually taken to mean any increase in the value of land (including the buildings on it) arising from government action, whether positive (e.g. by the execution of public works or improvements), or negative (e.g. by the imposition of restrictions on other land). In this context, betterment is confined to land or property values enhanced by public sector activities and excludes increases in current use value of a site, and increases deriving from other causes, such as private sector activities on other land, general inflation, owners' improvement and general economic growth.

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Note (3) The provisions for compensation in the UK planning legislation are very much a historical legacy from the 1947 Town and Country Planning Act and various post-1947 enactments have resulted in a steady reduction in the obligation to pay compensation so as to ensure that effective planning can take place. The recently introduced Planning and Compensation Bill 1991 has proposed to repeal the right to compensation under Part V of the 1990 Town and Country Planning Act (compensation for restrictions on new development where land has an unexpended balance of development value) and Part VII of the 1972 Act (compensation in respect of planning decisions restricting new development), thus removing the liability for the Secretary of State to pay compensation under these provisions.

6.26 While the issue of betterment and the extent to which it should be regarded as recoverable by the government is highly controversial, it has been established by some legislatures (e.g. the United Kingdom, Australia and New Zealand) that it is fair and just for an authority carrying out public improvement works to recover at least some part of the betterment produced, and recoupment of betterment is not seen as causing undue hardship to the land owner whose land has increased in value due to no action of his own. This principle can be applied to the increase of property value as a result of planning decisions, e.g. by restricting the use or density of development on other land, both locally and generally; or by removing a previous planning restriction. In principle, betterment arising from planning decisions is not different from that arising from other public improvement works.

6.27 The principle of betterment may appear simple, but recoupment of betterment is extremely difficult in practice. It is difficult to establish, with certainty, which properties have increased in value due to a planning decision and if so, how much of the increased value is directly attributable to the planning decision, and how much is to other factors. This issue is further complicated by the fact that the increase in value is often an expectation value which may not materialize for years and by the time the development takes place, many other factors affecting value, tangible or intangible, may have come into play. These difficulties have led some countries (e.g. the United Kingdom, New Zealand, and New South Wales, Australia) which had previously levied direct betterment charges subsequently to discontinue such a practice, or to adopt other broader forms of recoupment of betterment, such as in the form of a tax (e.g. capital gains tax) or a levy on all land value increases, irrespective of whether the increase is due to government action or to other factors.

6.28 There are at present no direct betterment charges in Hong Kong, although in the view of some people there are various forms of tax or charge from which the Government can recoup indirectly part of the increase in land or property value due to government action which equate to betterment. These include :-

(a) Rates : Rates are a form of indirect tax levied on properties and are charged at a percentage of the estimated annual rental values and revised regularly.

(b) Property tax: Property tax is a form of direct tax on rental income chargeable on the owners of land and buildings. It is a source of general revenue for the operation of the Government.

(c) Land premium: Land premium is a form of revenue generated from land sales or from modification of leases to permit a higher value use or a higher development intensity.

None of these forms of taxes or charges is, however, truly equivalent to a betterment charge which is a much wider concept, as defined in paragraph 6.25. Rates are simply charges on properties and are paid irrespective of whether the subject premises are vacant or occupied and used. Property tax is charged on the basis of the actual rental income which may not necessarily reflect the increase in value due to public investment or planning action, and premises occupied by owners exclusively may be exempted from such tax. Land premium is collected from land owners only upon first sale or when there is a modification of the lease which increases the value of the property. There are many cases in which the Government cannot charge a premium on any gain in development rights as a result of planning decisions, such as in the case of the large number of unrestricted leases in the urban areas. The assertion that betterment charges are already levied in Hong Kong in the form of land premium (see paragraph 6.16) is therefore not entirely correct.

THE SPECIAL COMMITTEE

6.29 In view of the complexity and the contentious nature of the question of compensation and betterment, this issue is expected to receive much public attention and be a major subject of public debate in the consultation exercise. In order to maintain a fair balance of public and private interests, the issue will be referred to a Special Committee commissioned specifically for the purpose. The recommendations of this Committee would provide a basis on which the Government would make the final decision on the question of compensation and betterment in the planning legislation of Hong Kong.

6.30 The terms of reference of the Committee are :-

'Accepting the objectives of planning as set out in the Consultative Document, and working within the context of the planning structure proposed, and

having regard to -

(a) the principles of the common law, the provisions of the existing statute and any property rights created by leases as these relate to compensation;

(b) the extent to which the value of land and property is created by public investment in infrastructure and facilities;

(c) the extent to which the value of land and property is determined by plans and planning decisions affecting zoning, density and the quality of the physical environment;

(d) the need to ensure that the process of planning in Hong Kong remains affordable and is not constrained or impaired by the requirement to pay compensation; and

(e) the extent to which the total costs of any compensation requirements would need to be offset against the revenue from any betterment charges,

to receive submissions and to take expert advice on the general question of whether there should be compensation for planning restrictions and planning blight caused by the zoning of land for some future public purpose and betterment charges arising from planning enhancement; and to advise the Governor on whether there is a requirement for provisions relating to compensation and betterment to be included in the new Planning Ordinance and if so, to make appropriate recommendations.

In carrying out its work the Special Committee shall refer any important issues of public policy on which it needs direction to the Executive Council through the Secretary for Planning, Environment and Lands.'

6.31 Representatives from various interest bodies, professional institutions, Government departments and policy branches will be invited to form a panel of expert advisers. The task of this panel is to respond to questions raised and advise on matters relating to its area of interest as required by the

Committee. If necessary, the Committee may meet the panel members to discuss such matters, either individually or in groups. There is no need for the panel to reach a consensus opinion.

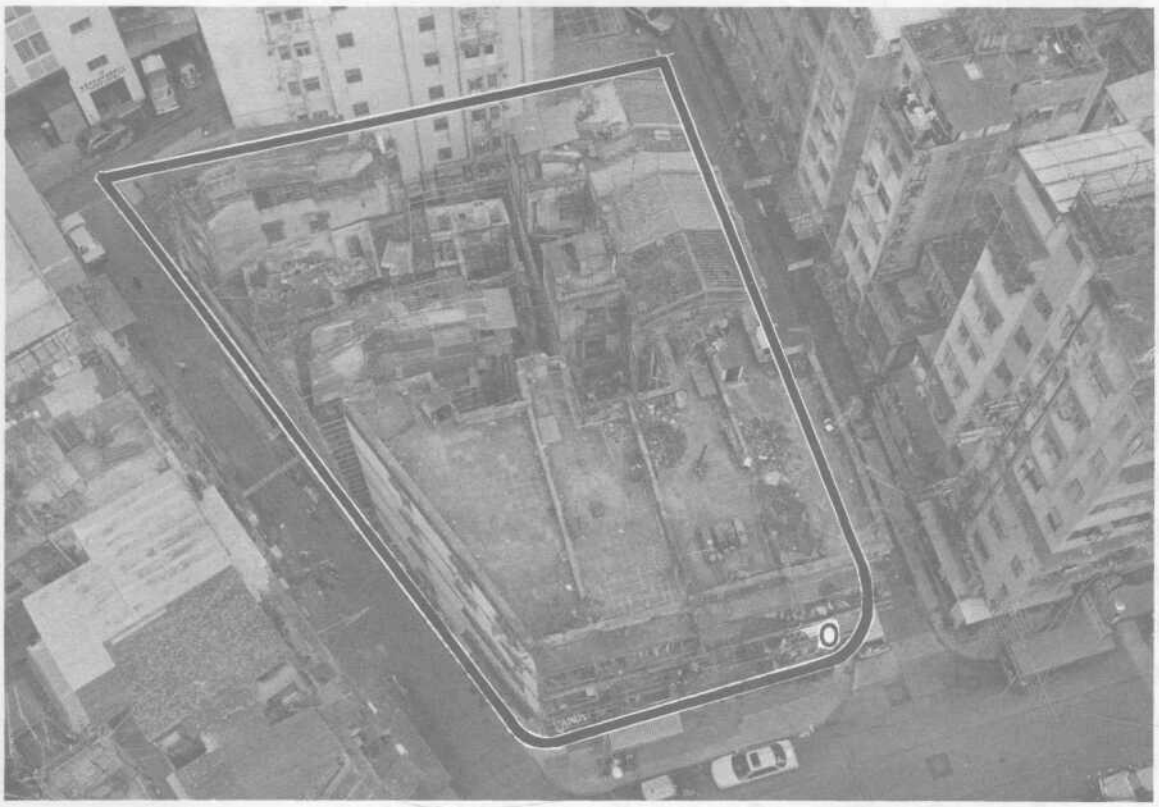
6.32 The Committee will be commissioned to run concurrently with the public consultation of the review. The Committee will submit a report to the Governor with recommendations on whether provisions relating to compensation and betterment should be included in the new Ordinance. This report will be published after consideration by the G in C.

HOW YOU CAN HELP

6.33 To facilitate the Special Committee in its deliberations, views and comments from the public are very important. Any member of the public may wish to reflect and comment on the ideas set out in this Chapter and put in a written submission direct to the Special Committee, and/or lodge a request for a hearing with the Committee. The consultation period for this special issue will end on 30 November 1991. Requests should be made to :-

The Secretary,
Special Committee on Compensation and Betterment,
7th Floor, Club Lusitano,
Ice House Street,
Hong Kong.

Claims for compensation may arise under two circumstances :



▲ Plate 6.1 Total removal of development rights - planning blight caused by 'Open Space' zoning without definite timing of acquisition

▲ Plate 6.2 Curtailment of development rights by planning restrictions - stepped height limits imposed to preserve the general character and amenity of the area

CHAPTER 7

AREAS OF SPECIAL CONTROL

INTRODUCTION

7.1 In addition to the general zoning control discussed in the previous chapters, there are other areas which require special control to meet growing aspirations for a higher quality of life and a better environment, namely, environment, conservation, and civic design. This Chapter first discusses the existing provisions of control in these areas and the need for specific provisions for control in the planning legislation. Proposals to establish a framework for effective control are then introduced.

ASSESSMENT OF ENVIRONMENTAL IMPACT

Problem

7.2 Assessment of the environmental impact of a development constitutes an integral component of planning. While environmental factors have long been a paramount concern for planners, there is no specific statutory provision in the existing Ordinance to require the inclusion of an assessment on environmental impact in the plan-making process nor in the planning application system. With increasing awareness of environmental problems and growing aspirations of the community towards a higher quality of life and better environment, it is clear that the new Ordinance should include provisions for effective statutory planning control on environmental aspects.

Proposals

General Provisions

7.3 The new Ordinance would provide that environmental considerations should be taken into account at the stage of plan-making as well as processing an application. An analysis of the environmental problems in an area and measures to alleviate the problems would be included in the planning study to be published before a statutory plan was drawn up. For all development proposals submitted

under the planning application system, a statement on environmental implications would be required. If the development proposal was a very simple one, then a correspondingly simple statement would suffice. If significant environmental problems were likely to be caused to or by the proposed development, then measures to mitigate any such environmental impact should be included in the statement. Guidance notes for such statements would be promulgated by the Planning Board (PB) to all applicants.

Designated Development

7.4 In addition to these general provisions, a special requirement would be necessary for developments that were substantial in size, potentially polluting/hazardous or located in environmentally sensitive areas. It is proposed that regulations should be made to declare specific class or description of development (whether by reference to the type, purpose or location of development or otherwise) to be 'designated development'. Typical examples of designated development include power plant, cement plant, refuse transfer station and concrete batching plant etc. (Plates 7.1 and 7.2). Any planning application in respect of a 'designated development' would be required to be accompanied by a full environmental impact assessment (EIA). The form of the EIA would be set out in administrative guidelines to be issued by the PB for public promulgation. The PB, in making a decision on the application, would take the EIA into consideration and would ensure that the surrounding environment would not be unduly affected by the proposed development.

CONSERVATION

Problem

7.5 There is a recognized need to conserve areas of special architectural, archaeological, palaeontological or historical interest. Under the Antiquities and Monuments Ordinance, the Secretary for Recreation and Culture may declare any place, building, site or structure which is considered to be of public interest by reason of its historical, archaeological or palaeontological significance, to be a monument. If such a declaration is made, no person shall undertake acts which are prohibited under section 6(1) of the Antiquities and Monuments Ordinance, such as to demolish or carry on building or other works, unless a permit is obtained.

7.6 The primary concern of the Antiquities and Monuments Ordinance is on the preservation of an individual place, building, site or structure rather than conservation of the surrounding built environment. Thus it is not uncommon to find historical monuments standing side by side with incongruous developments (Plate 7.3). In order to protect our built heritage and to ensure that a development is in harmony with a nearby monument in terms of character, scale, visual impact and general congruity, provision should be made in the new Ordinance to effect special control on the built environment (Plates 7.4 and 7.5).

Proposals

7.8 It is proposed that in the preparation of a statutory plan, the PB could designate any areas which were of special architectural or historical interest as 'Special Design Area' (SDA).

7.9 Before designating an area as SDA on a statutory plan, consultation with interested and related bodies such as the Antiquities Advisory Board would be made. The planning intention would be made known to the public when the planning study for the plan was published for public inspection and comments (see paragraph 3.22). When the planning proposals were finalized and the draft plan was gazetted for public inspection, the public could make representations on the designation of SDA and the procedures for considering and hearing representations discussed in Chapter 3 would be followed.

7.10 SDA would not be a zone in itself, but only a designated area on top of the land use zonings. Within a SDA, there might be zonings for 'Residential', 'Commercial' and 'Government/Institution/Community' or other uses. In other words, SDA would not prejudice the zoning on a specific site, nor would it prohibit development. It only required that planning permission should be obtained from the PB for all development unless otherwise exempted as specified in the Notes of a statutory plan. As a general rule, development in conformity with the zoning shown on the plan would be approved, provided that its design was acceptable to the PB, having regard to the character and appearance of the SDA in question. The applicant might be required to submit a civic design plan, landscape plan or master layout plan as and where considered necessary by the PB. The form and content of the landscape plan and master layout plan would be similar to those currently required under the CDA zoning. The civic design plan

would show the relationship of the development with the surrounding area and should include such information as the shape, bulk and height of the built form, cross-sections, perspectives, main elevations, street frontages, roof profiles and skyline. The procedures for planning application and appeals discussed in Chapter 4 would be followed.

CIVIC DESIGN

Problem

7.11 Civic design is another important aspect of planning. It involves the use of physical design methods to improve the quality of the environment. In general, the design of the built environment consists mainly of three parts: planning, civic design, and building design. Planning focuses mainly on the general disposition of land areas for various uses; civic design stresses the more specific laying out of roads and footpaths, buildings and other structures, landscaping and amenity features particularly in relation to the combination of and interplay between individual elements; and building design concentrates on the detailed design, including construction material and methods, of individual buildings, within the context of the overall planning and civic design framework.

7.12 The existing Town Planning Ordinance only provides that when the development falls within a comprehensive development area, the submission of a master layout plan may be required. Other than that, control on civic design relies mainly on the provisions of the lease, in particular the landscape and design, disposition and height (DD & H) clauses, and to a limited extent, through section 16(1)(g) of the Buildings Ordinance. Not all the leases contain the DD & H clause, however, and past experience has suggested that neither the lease nor the Buildings Ordinance is a very effective means of achieving control on civic design.

7.13 The existing means of control also tend to focus on individual buildings and developments rather than the totality of the wider area. But there may be certain areas of special civic design interest which require a comprehensive civic design framework to ensure that the design of individual buildings and the public spaces surrounding them properly relate to one another. In order to achieve the overall design objectives in such areas, special provisions in the planning legislation for control on civic design are necessary.

7.14 It must be stressed that the proposed control is not meant to impose rigid control on building design and thus discourage innovative ideas and resulting in a townscape of monotonous uniformity. It seeks instead to provide a broad design framework to complement and co-ordinate the individual efforts of architects in achieving a harmonious built environment.

Proposals

7.15 For areas of special civic design interest, such as prominent ridge lines or prominent and important sites on new reclamation areas, provisions similar to that of the conservation area would be applied (Plates 7.6 and 7.7). Thus these areas would also be designated as SDA on a statutory plan, within which planning permission would be required for all development unless otherwise exempted to ensure that it met special design objectives, e.g. in terms of the massing of buildings, building height, the dedication of land for public circulation and other uses, the landscaping requirement and the visual effect (Figure 7.1). These design objectives would be included in the planning study to seek the general views of the public, and would be clearly stated in the draft plan for public inspection and comments. The SDA would be subject to the same representation procedure as other land use zonings. In applying for the necessary planning permission, the applicant might be required to submit a civic design plan, landscape plan or master layout plan as appropriate, demonstrating to the PB that the design objectives could be met.

SUMMARY OF PROPOSALS

7.16 To supplement general zoning control, special controls are needed in three major areas, namely environment, conservation, and civic design :-

Environmental Assessment

(a) Environmental considerations should be taken into account at the stage of plan-making and processing an application (paragraph 7.3).

(b) Environmental considerations should be set out in the planning study published before a draft plan was drawn up (paragraph 7.3).

(c) A statement on environmental implications should be included in all planning applications (paragraph 7.3).

(d) Regulations would be made to declare specific class or description of development as 'designated development'. Planning application for such development should be accompanied by a full environmental impact assessment (paragraph 7.4).

Conservation

(e) To complement conservation efforts under the Antiquities and Monuments Ordinance, areas which were of special architectural or historical interest would be designated as SDA on a statutory plan, within which planning permission would be required for all developments to ensure that they were in harmony with the conservation objectives of the designated area (paragraphs 7.8 and 7.10).

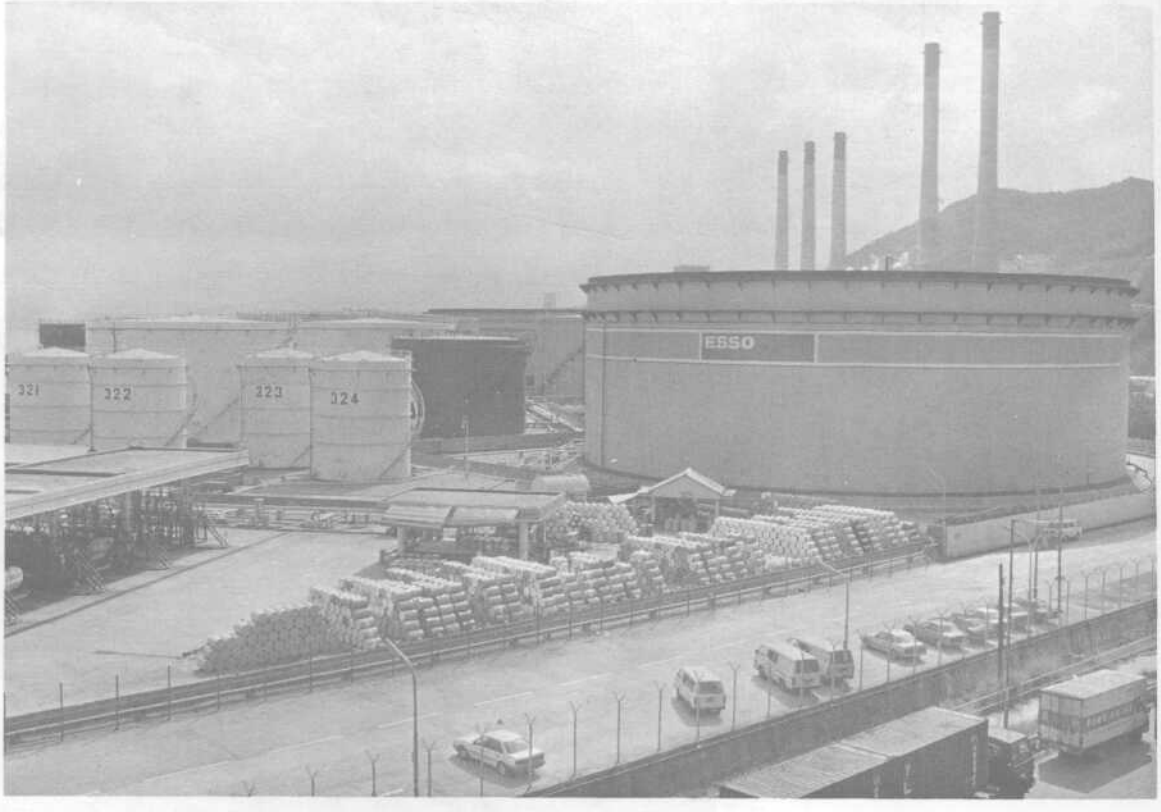
Civic Design

(f) To ensure that the layout and design of buildings in areas of special civic design interest would conform to the broad design objectives specified in a statutory plan, such areas would be designated as SDA, within which planning permission would be required for all developments (paragraph 7.15).

(g) The planning intention behind designating a SDA would be set out in the planning study. The public would be able to make representations on the designation of the SDA and the design objectives when the plan was gazetted for public inspection (paragraphs 7.9 and 7.15).

Typical examples of 'designated development' which require environmental impact assessment

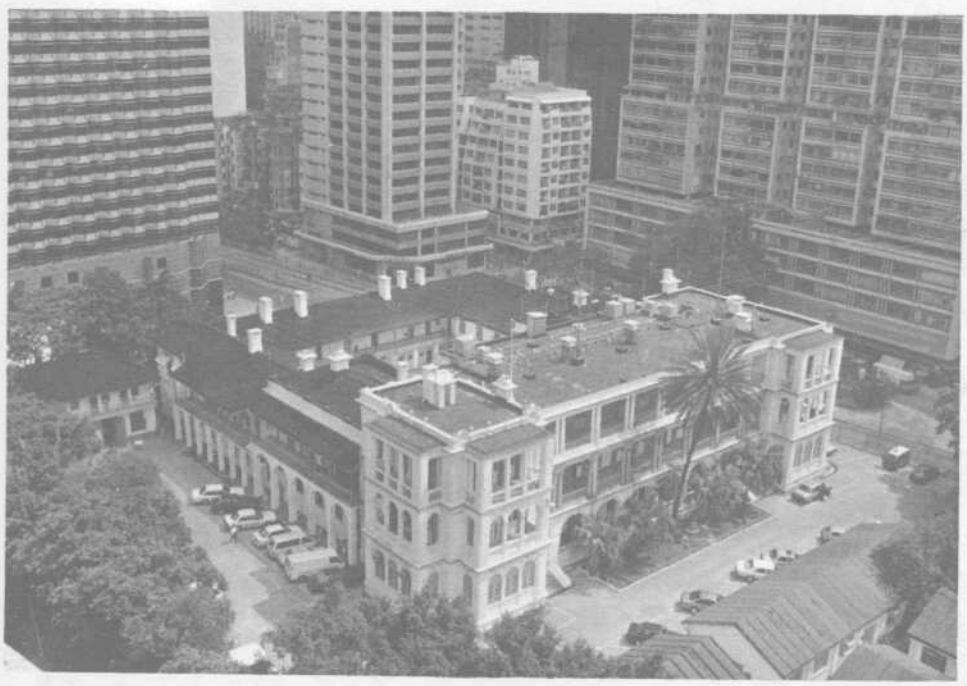
▲ Plate 7.1 A cement plant



▲ Plate 7.2 An oil depot

Development proposals should ensure harmony with a nearby monument/historical building in terms of character, scale, visual impact and general congruity.

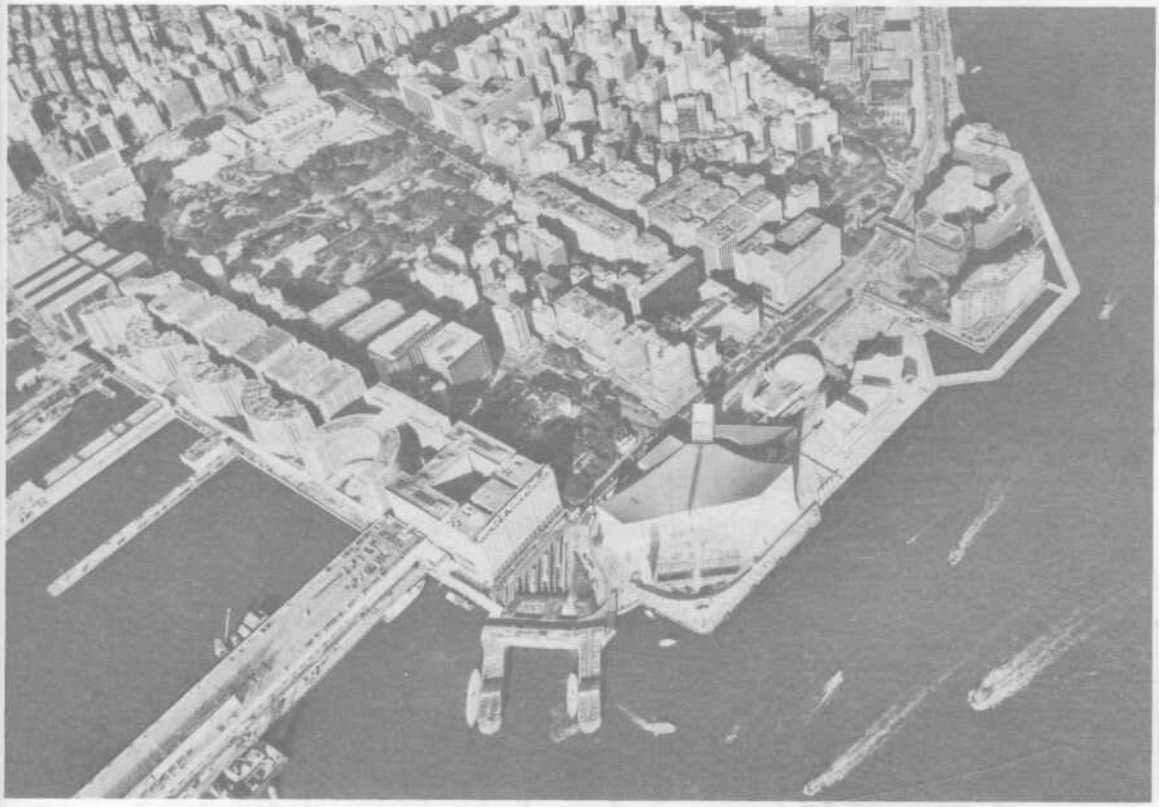
Plate 7.3 ▶
Western Market, Sheung Wan - standing side by side with incongruous developments



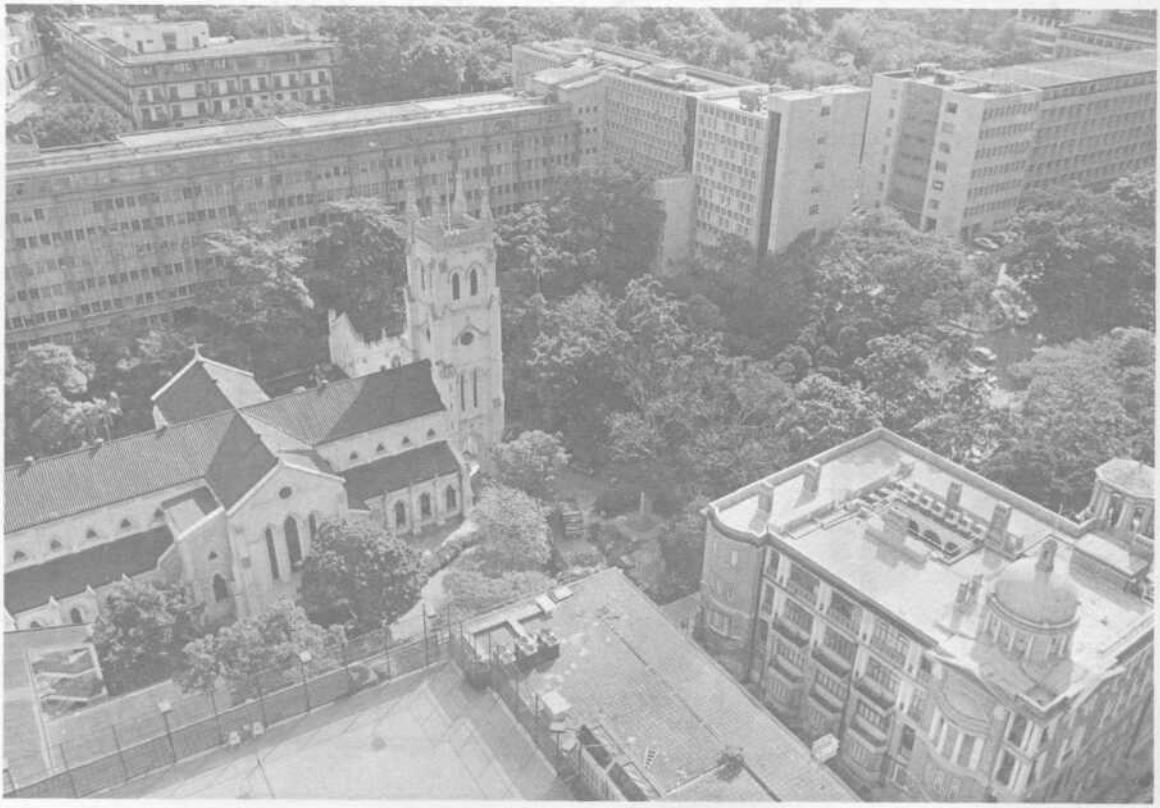
◀ Plate 7.4
Marine Police Headquarters, Tsim Sha Tsui - need for special control on design of the surrounding area?

Plate 7.5 ▶
Tsang Tai Uk, Sha Tin - an example of conservation efforts

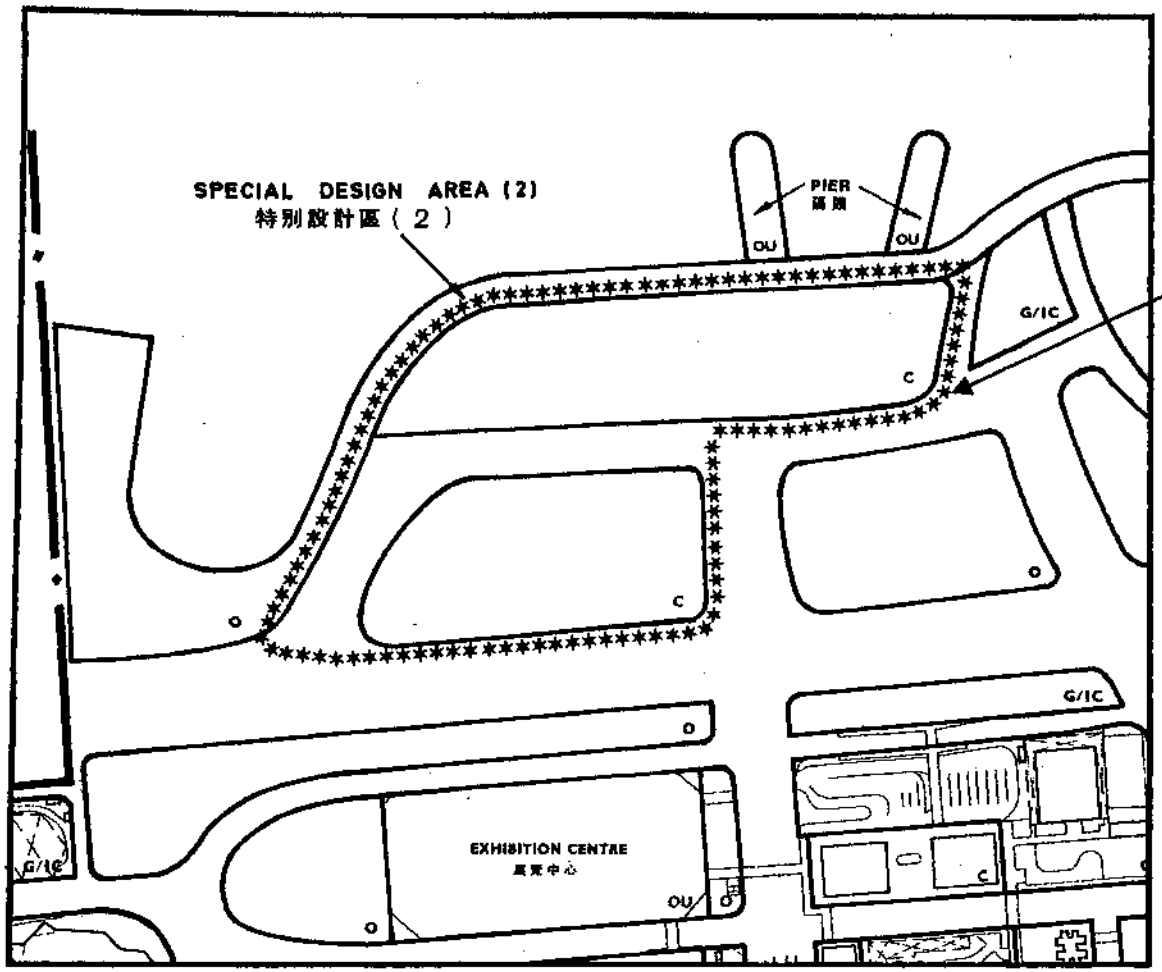
Areas of special civic design interest



▲ Plate 7.6 Prominent waterfront sites



▲ Plate 7.7 Important area which requires a comprehensive civic design framework to ensure that the totality of the area is considered



- Planning permission for all development within the designated Special Design Area to be obtained from the Planning Board to ensure compliance with the special design objectives for the area (to be set out in the Explanatory Statement of the plan)

- Planning application to be accompanied by a civic design plan and/or a master layout plan, the form and content of which to be set out in the Notes of the plan

FIGURE 7.1 DESIGNATION OF A SPECIAL DESIGN AREA IN A STATUTORY PLAN - AN ILLUSTRATION

CHAPTER 8

NON-CONFORMING EXISTING USES

INTRODUCTION

8.1 While the existing statutory zoning system in Hong Kong provides general guidance and control for new development, it is not geared towards controlling uses already in existence at the time when statutory zonings are introduced. Whenever there is a new statutory plan or where there are zoning amendments, some existing uses which do not conform to the zonings on the statutory plan are likely to arise. These non-conforming uses are not unauthorized uses because they are already in existence before the publication of the statutory plan, but they are not without problems. This Chapter examines the general problem of non-conforming uses and how they are dealt with by present legislative and administrative measures. It also explores other methods to eliminate some of the problems relating to non-conforming uses. Proposals to deal with the problems are then discussed.

EXISTING SITUATION

8.2 Under the existing practice, uses already in existence before the publication of a statutory plan are permitted to continue to exist, even if these uses do not conform to the statutory plan. Conformity is required only when there is a material change of use or upon redevelopment of the land or building in question. The elimination of these non-conforming uses depends on the initiatives of the owners of the land or building. While statutory zoning provides an effective basis to control the establishment of new uses on land and in buildings, it is not effective in eliminating non-conforming uses because of its inability to control the timing of their redevelopment. The timing of private redevelopment is basically a commercial decision which depends on the prevailing economy, property market and many other economic and financial factors.

8.3 The present practice of tolerating non-conforming uses is based on the need to maintain a stable environment for property investment as far as practicable. This practice recognizes the hardship that might be caused to operators by being forced to change the use of their land or buildings without any compensation. It is also based on the contention that any legislation or regulation which in effect penalizes someone for something done without any possible foreknowledge prior to its enactment may not be fair and should be avoided as far as possible.

8.4 On the other hand, there are calls for early termination of non-conforming uses which are causes of environmental nuisance, physical or social incongruity, and public health and safety problems. Typical examples include industrial buildings in juxtaposition with residential buildings, potentially hazardous installations such as an oil depot next to a housing estate, motels in good residential neighbourhoods and storage of wrecked cars adjacent to village houses. The continuing existence of these non-conforming uses may be against the public interest.

EXISTING METHODS

8.5 Although there is no provision in the existing Town Planning Ordinance to deal specifically with the problem of non-conforming uses, there are existing measures which have been used to help alleviate the problems of such uses. These measures, however, can only be applied in very limited circumstances :-

(a) Planning Incentives

In some cases, land is up-zoned to a 'higher-value' use (e.g. from industrial to commercial use) in order to provide an incentive for the early termination of a particular non-conforming use. Even with suitable planning incentives, however, the timing of redevelopment and thus termination of the non-conforming use cannot be guaranteed. Planning incentives alone cannot solve the problem especially when buildings in fragmented ownership are involved.

(b) Land Administration Measures

Where appropriate, land administration measures such as land exchange and transfer of development right to another site are adopted. In extreme cases it may be possible to resume land taken up by a non-conforming use causing problems by earmarking it for comprehensive redevelopment or development for a public purpose.

(c) Comprehensive Redevelopment

In some cases, especially when redevelopment of the non-conforming buildings is hindered by fragmented ownership and difficulties in site assembly, removal of such buildings may be brought about through a wider district comprehensive development by such agents as the Land Development Corporation and the Housing Society. This can be achieved by the 'Comprehensive Development Area' zoning provided under section 4A of the existing Ordinance.

(d) Licensing

Licensing can provide a form of regulatory control over certain non-conforming uses or operations. A licensing system is usually introduced when a particular type of use or operation is considered to be problematic and some form of regulatory control is necessary. There is already a long list of uses regulated by licensing. Typical examples are guest houses, restaurants, amusement game centres, massage parlours and nurseries, etc.

It should be emphasized however that licensing cannot be relied on by itself to solve the problem of non-conforming uses. Licensing can be effective in controlling specific uses or operations to ensure that such uses or operations, both existing and future, meet certain standards with regard to aspects such as public health and safety as well as their scope, nature, level and quality of services. Conditions for granting a licence are usually laid down precisely in advance, setting out the standards required for the operation of the specific use. Not all uses however can be subject to pre-determined

operatioal standards and it is often necessary to take account of not only the operational requirements of the use within a particular site or premises, but also its relationship with and possible effects on the surrounding area which are much more difficult to pre-define. Furthermore, being reactive in nature, licensing cannot promote the right use in the right place, nor can it provide positive guidance to development. It is not a substitute for land use planning and is not an effective means in eliminating all non-conforming uses. At most, a licensing system can only provide a form of control over a limited range of non-conforming uses.

ADDITIONAL METHODS

8.6 Since tackling the problem of non-conforming uses is a new domain of land use planning in Hong Kong, it is worthwhile to examine some concepts utilized abroad and to consider whether these could be applied to Hong Kong.

(a) The Concept of 'Amortization'

In some municipalities in the U.S.A., the concept of 'amortization' is adopted as a tool to eliminate non-conforming uses. 'Amortization' in this context refers to the compulsory termination without compensation of a non-conformity at the end of a specified period of time. The period is equated to the useful economic life of the non-conformity. The basic idea is to allow the operator of a non-conforming use a specified grace period to continue and amortize his investment, after which the non-conforming use must be discontinued or changed to conform to the zoning plan. Because the investment has been amortized, no compensation is payable. The 'amortization period' can be pre-set for certain classes of non-conformity or can be determined on a case by case basis. Typically, non-conforming uses which are on open land (e.g. junkyards or wrecking car yards) or within conforming buildings are given short amortization periods (from a few months to a few years), while those within non-conforming buildings (i.e. buildings which are specifically designed for the non-conforming use and cannot be converted for any conforming use) are allowed long amortization periods (up to fifty years or more). In San Francisco, for instance, a short amortization period of five years is prescribed for non-conforming

commercial or industrial land uses where no building is involved. A period of ten years is prescribed for non-conforming uses in a building within a residential district, the assessed value of which did not exceed a certain amount on the effective date of the Planning Code. For non-conforming buildings, a long amortization period, ranging from twenty to fifty years (depending on the type of building), is given.

Effective though it may be in some U.S. municipalities, elimination of non-conforming uses through amortization is not without problems. Apart from practical problems in enforcement, the effectiveness of the method is undermined by the long amortization period allowed for substantial non-conforming buildings and the failure to alleviate immediate neighbourhood problems. The long amortization period also makes no allowance for changes in the character of an area or other circumstances which may call for a different approach to the problem. In particular, there are difficulties in setting the length of amortization period for non-conforming buildings and this has been the subject of court challenges. While not wholly effective in eliminating non-conforming buildings, experience in the U.S.A. has shown that the amortization concept is effective in controlling non-conforming uses on open land, e.g. the termination of junkyards, where the investment is minimal and the amortization period is short.

(b) The Concept of Performance Standards

During the 'amortization period', the harmful effects of a non-conforming use would continue to exist. One method to overcome this problem is to require such a use to meet certain performance standards tailored made for each particular use so as to mitigate its deleterious effects on the neighbourhood. This method can be used jointly with the 'amortization' method. The actual performance standards to be imposed may vary with individual use and individual site. As illustrations, such measures may include removal of spraying activities from the vehicle repair garages in residential areas, removal of advertisement signs relating to motels in residential neighbourhoods, and provision of perimeter planting or other buffers between open storage use on agricultural land and other uses.

PROPOSALS

8.7 There is no single approach that can offer a complete solution to the problem of non-conforming uses. The most effective way to deal with the problem would be a synthesis of different approaches. The majority of non-conforming uses which did not seriously frustrate the planning intention or cause nuisance to public health, welfare, convenience and safety, could be allowed to remain until redevelopment or a change of use took place as in the existing practice. Any expansion, addition and intensification of the existing uses or change to other non-conforming uses would be controlled through the planning application system. It would be through gradual redevelopment and change of use that general conformity to the zoning plan would be achieved.

8.8 Non-conforming uses which require priority attention are those currently causing significant environmental and social nuisance. These can range from large hazardous installations (such as gas works, cement plants) or industrial buildings close to residential buildings, to motels in residential neighbourhoods, open storage of containers, construction materials, wrecked cars in juxtaposition to village houses or industrial/vehicle repair workshops within residential buildings. 'Amortization' could be employed to help eliminate some of these non-conforming uses (Plates 8.1 to 8.4).

8.9 In deciding the circumstances in which the 'amortization' method would be appropriate, it is necessary to distinguish between a non-conforming building and a non-conforming use on open land or occupying only part of a conforming building. Non-conforming buildings normally involve heavy investments. If the amortization concept were to be applied to such buildings, very long amortization periods would have to be set. As discussed in paragraph 8.6(a), this would be ineffective in solving immediate environmental problems and has many practical problems, which would be compounded further by the high degree of fragmented ownership in most multi-storey buildings in Hong Kong. Other measures such as upzoning, designation for comprehensive development, land exchange, transfer of development rights and possibly resumption might be more appropriate to encourage their early termination. In the interim, environmental nuisances caused by these non-conforming buildings would have to be controlled through other environmental legislation such as the Air Pollution Control Ordinance and the Noise Control

Ordinance. It is proposed that 'amortization' should only be applied in two circumstances : -

(a) to non-conforming uses on open land which did not involve substantial fixed investment and therefore could be subject to short amortization periods; and

(b) to non-conforming uses within conforming buildings which could be converted to conforming uses (e.g. vehicle repair garages within residential buildings) without substantial loss of investment which could therefore be subject to relatively short amortization periods.

8.10 It is proposed that provision be made in the new Ordinance for the application of amortization to non-conforming uses as dicussed below :-

(a) Amortization Area

The non-conforming use problem should be identified at the very outset and be integrated into the plan-making process. In the preparation of a statutory plan and its associated planning study, areas of non-conforming uses which were considered to be necessary for programmed termination should be identified. Areas should be designated as an 'Amortization Area' on the plan either where an entire site was involved (e.g. open storage in a rural area) or where a specific type of non-conforming use in a specific area was the subject problem (e.g. vehicle repair garages in a residential neighbourhood) (Figure 8.1). In the Notes to the plan, it would be stipulated that such non-conforming uses should be terminated within certain specified periods. The draft plan, together with the Notes, would then be gazetted and open for public representations in the usual manner (see Chapter 3).

(b) Amortization Notice

After the completion of the representation and hearing procedures, an 'Amortization Notice' might be served by the Planning Authority on an owner whose property was within the 'Amortization Area' and was

subject to amortization as indicated on the statutory plan. The 'Amortization Notice' would specify the date by which the non-conforming use should be terminated. Where considered necessary and appropriate, the Planning Authority might specify in the notice certain performance standards for the non-conforming use to comply with during the 'amortization period' in order to mitigate its harmful effects on the neighbourhood. Persons aggrieved by these performance standards would be able to appeal directly to the Appeal Board (AB). Failure to terminate the non-conforming use by the termination date or failure to comply with the performance standards would be subject to enforcment proceedings. The 'Amortization Notice' would be both registered in the Land Office and recorded in a register to be set up in the Planning Department for public inspection.

(c) Amortization Period

It is considered necessary that the time period allowed for a non-conforming use to terminate or to conform with the zoned use should be long enough for the owner/occupier to recover the cost of his initial investment in the development or building works and also to prepare for the change. This time limit would be site-specific or use-specific and determined at the time of preparation of the statutory plan.

SUMMARY OF PROPOSALS

8.11 While existing use should be respected, there is a need to introduce measures to eliminate, in a timely manner, those non-conforming existing uses that cause much harm to the public. A variety of approaches to deal with non-conforming uses are :-

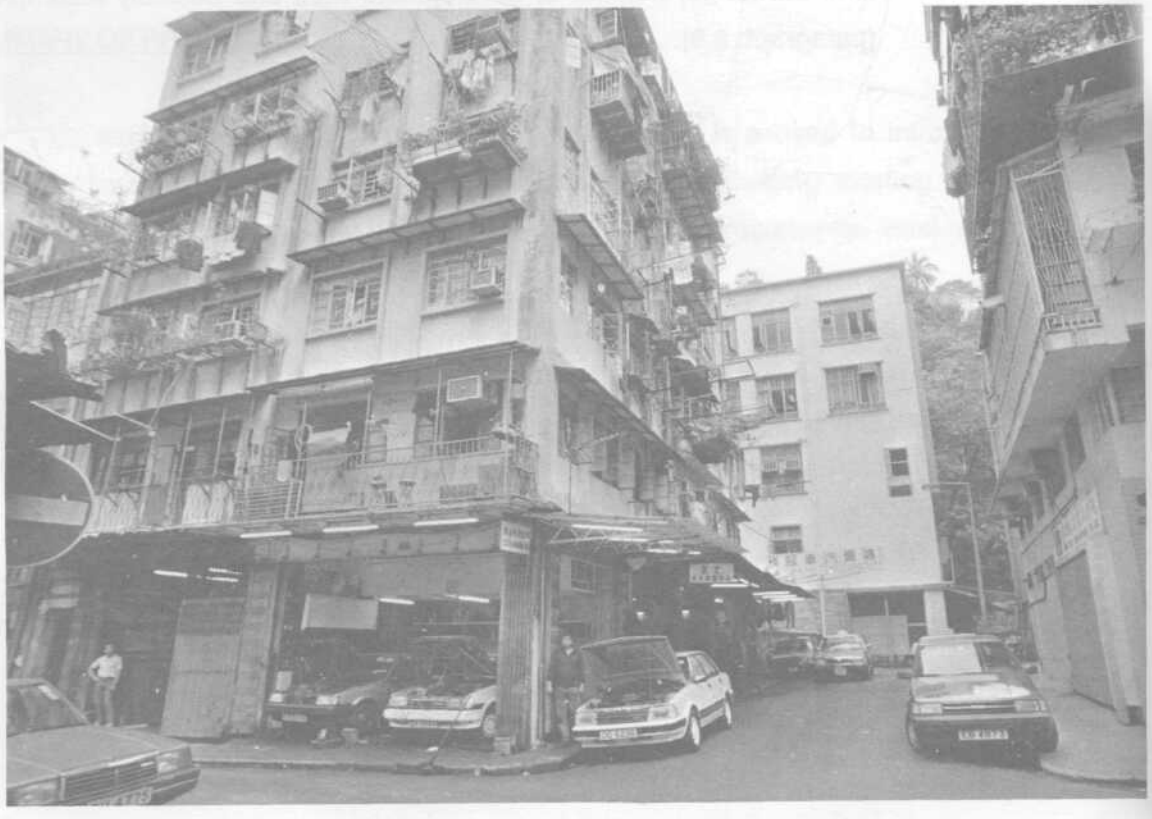
(a) The majority of non-conforming uses which did not cause serious problems would be permitted to continue to exist under the new Ordinance (paragraph 8.7).

(b) Non-conforming uses on open land or occupying parts of conforming buildings that critically frustrated the planning intention and had deleterious effects would be identified and designated as 'Amortization Area' on statutory plans and set out in the Notes attached to the plans. These non-conforming uses would then be required to terminate or change to conform to the zoned use within certain amortization periods as specified in the Notes. Amortization would form part of the plan-making process and would be subject to full public representation and hearing procedures (paragraph 8.10(a)). An 'Amortization Notice' would be served by the Planning Authority on the owner of a non-conforming use that was subject to amortization. In the Notice, certain performance standards might be specified which should be complied with during the amortization period in order to mitigate the harmful effects caused by the non-conforming use. Appeals against these requirements could be made to the AB (paragraph 8.10(b)). The amortization period would be site-specific or use-specific and long enough for the owner/occupier concerned to recoup his investment and prepare for the change (paragraph 8.10(c)).

(c) The concept of amortization would not apply to substantial non-conforming buildings which involved heavy private investments. To eliminate these non-conforming buildings, other measures would be used, such as upzoning, designation for comprehensive development, land exchange, transfer of development right and possibly resumption (paragraph 8.9).

Non-conforming uses on open land or occupying parts of conforming buildings would be required to terminate or change to conform to the zoned use within certain amortization periods.

▲ Plate 8.1 Storage of wrecked cars next to a Care and Attention Home

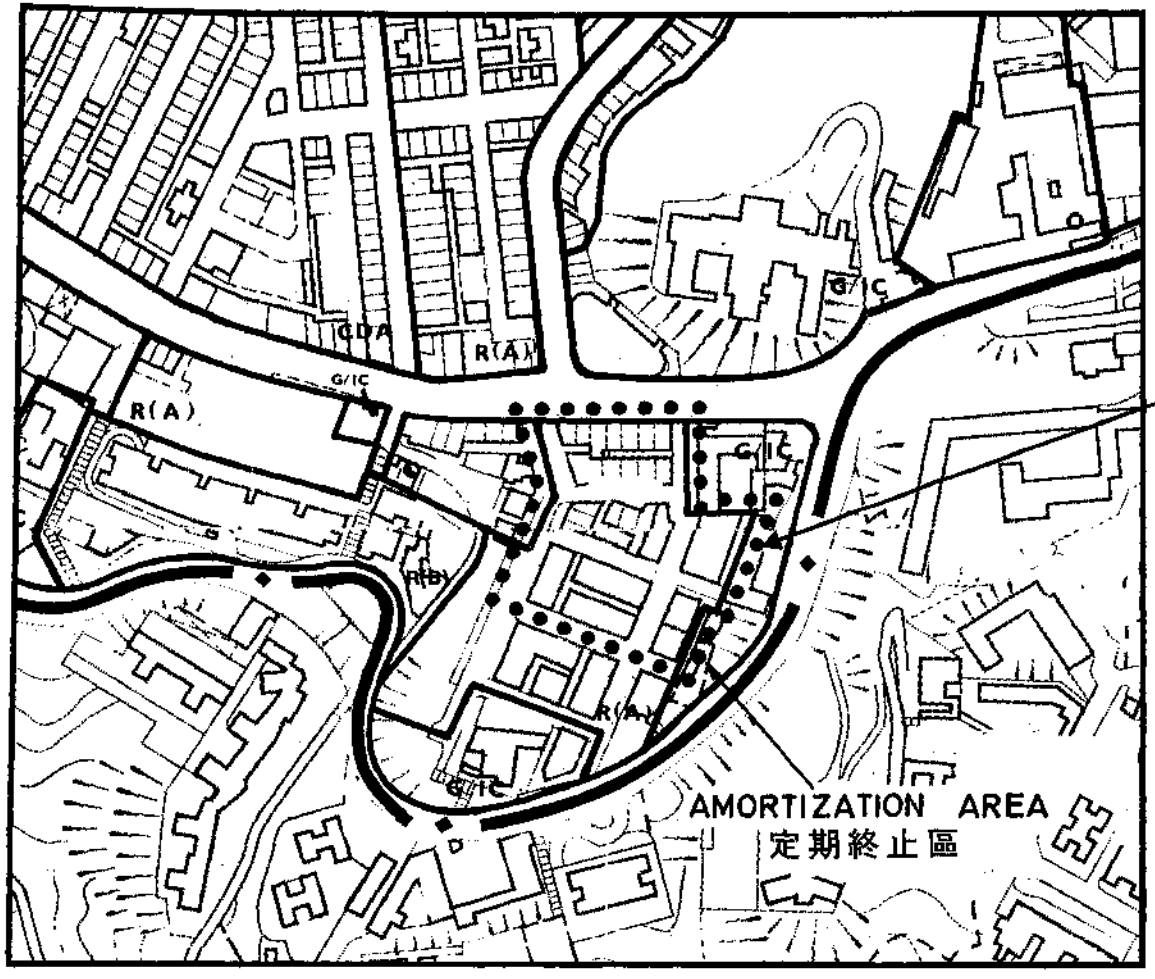


▲ Plate 8.2 Vehicle repair garages within residential buildings

Non-conforming buildings which involve heavy investments would be dealt with by other measures such as upzoning, designation for comprehensive development, land exchange, transfer of development right and possibly resumption.

▲ Plate 8.3 A gas works close to residential buildings

▲ Plate 8.4 A cement plant next to a housing estate



All vehicle repair garages within the designated Amortization Area to be terminated by _____ (a specified date)

FIGURE 8.1 DESIGNATION OF AN AMORTIZATION AREA IN A STATUTORY PLAN - AN ILLUSTRATION

CHAPTER 9

OTHER ISSUES

INTRODUCTION

9.1 The preceding Chapters have set out the basic problems in the existing statutory planning system and, apart from the general issue of compensation and betterment, have made proposals for change in the new planning legislation to overcome these problems. In the process of review of the existing Ordinance, a number of other issues have also been studied but for which no specific proposals are made, either because they are already covered by other legislation or because they require more public debate before definite proposals can be drawn up.

9.2 This Chapter gives an account of these issues, namely, tree preservation, control over advertisement signs and the need to facilitate comprehensive development.

TREE PRESERVATION

9.3 Trees are important for their aesthetic value and their function in enhancing the quality of the environment, e.g. as a buffer to screen off unsightly uses or to reduce noise and fume from sensitive uses and providing a habitat for birds and animals. Although not provided for expressly in the existing Town Planning Ordinance, the importance of tree preservation has long been recognized in planning practice. In drawing up layout plans, for example, consideration is given to the location of existing trees, and mature trees or trees of special species are preserved as far as possible.

9.4 Existing means of control over felling of trees on Government land can be achieved through a number of Ordinances such as the Country Parks Ordinance, Forests and Countryside Ordinance, Crimes Ordinance and Theft Ordinance. Under the Country Parks Ordinance, trees inside country parks or special areas are subject to statutory protection. It is the duty of the Director of Agriculture and Fisheries to take measures to protect vegetation and wild-life inside country parks and special areas. Similarly, the Forests and Countryside Ordinance

protects forests and plantations on all Government land. Trees on Government land are Government property and thus when serious damage, cutting or theft occurs, the Crimes Ordinance or Theft Ordinance have been applied.

9.5 Preservation of trees on private land can be achieved through lease conditions and as a condition of planning permission. A 'tree preservation' clause may be incorporated in the lease conditions, stipulating that trees cannot be felled without the prior consent of the appropriate authority. Preservation of trees may be included as a condition in a planning permission granted under the Town Planning Ordinance. In the Town Planning (Amendment) Ordinance 1991, there are provisions for zonings such as 'Green Belt', 'Site of Special Scientific Interest', 'Country Park', 'Coastal Protection Area' or other specified uses that promote conservation or protection of the environment. Trees are a major element to be protected within these zones.

9.6 As there is no general lack of control in tree preservation, no special provision in the new planning legislation is considered necessary.

ADVERTISEMENT SIGNS

9.7 There are a number of reasons for controlling advertisement signs, including :-

(a) to avoid adverse visual effect;

(b) to protect the amenities of a locality;

(c) to ensure structural safety of the signs or the buildings to which the signs are attached;

(d) to prevent or abate fire hazards;

(e) to prevent obstruction and nuisance;

(f) to ensure the safety of air, marine, vehicular and pedestrian traffic; and

(g) to prevent obscene, indecent or objectionable advertisement.

The main planning concern about advertisement signs lies in their possible adverse visual impact and their possible effect on the amenities of a locality.

9.8 There are a number of existing legislation which contain control, either direct or indirect, on advertisement signs - the Public Health and Municipal Services Ordinance and Advertisements By-Laws, Buildings Ordinance, Crown Lands Ordinance, Summary Offences Ordinance, Fire Services Ordinance and Country Parks Ordinance, to name just a few. Of these, the Public Health and Municipal Services Ordinance and its Advertisements By-Laws have provisions for restricting, regulating or prohibiting the exhibition of any advertisement which 'disfigures the natural beauty of any scenery or affects injuriously the amenities of any locality'. This already covers the main planning concern over control of advertisement signs.

9.9 Since adequate control has already been provided in other legislation, special provision to control advertisement signs in the Planning Ordinance is not considered necessary.

COMPREHENSIVE DEVELOPMENT

9.10 Planning seeks to promote co-ordinated and orderly development and this is best achieved through a comprehensive approach to the development of large areas through either Government or co-ordinated private sector efforts. Comprehensive planning and development has been commonly practised in new towns or new reclamation areas where new sites are formed or where large holdings of private land can be assembled relatively easily for development. In the older parts of the urban area, however, where land ownership is fragmented and site assembly difficult, comprehensive development has been difficult to realize (Plate 9.1). These areas have been left to decay and where redevelopment has occurred, small high-rise buildings have added to the overall congestion of the local area. Such piecemeal redevelopment can do little to eliminate problems such as obsolete street layout, incompatible land uses, lack of infrastructural services and community facilities, which are common problems in the old urban areas. In the rural areas, on the other hand, site assembly problems and the high cost of provision of infrastructural services have limited the availability of sites for comprehensive development, not only for low-density residential or industrial uses, but also for recreational and agricultural uses which are most suited to the rural environment. As a result, development in the rural areas has

been mostly scattered and sporadic, and much land is now found lying idle or covered by temporary uses.

9.11 The concept of planned comprehensive development provides an answer to the problem of redevelopment of old urban areas and opens up new opportunities for development in the rural areas. Comprehensive development usually refers to large-scale development or redevelopment of a sizeable area in accordance with a carefully formulated comprehensive plan. Apart from a comprehensive design, public facilities are usually included as part of a comprehensive development scheme, with improvement to road patterns and transport facilities, resulting in a more efficient use of land. Private comprehensive development schemes such as Taikoo Shing, Whampoa Garden, City One Shatin, Heng Fa Chuen, Kornhill, and Riviera Gardens (Tsuen Wan) are some notable examples of success (Plate 9.2).

9.12 One of the biggest obstacles to comprehensive development is the problem of site assembly. The existence of multiple ownership and absentee owners poses difficulties to land assembly. It is not uncommon to find good comprehensive development schemes frustrated by the reluctance of a few owners to sell their properties for redevelopment or to participate in the redevelopment schemes. To help solve the problem and to speed up the process of urban redevelopment, the Land Development Corporation (LDC) was established in 1987 to 'undertake, promote and facilitate' urban redevelopment. It is a statutory duty of the LDC to prepare, subject to the approval of the Secretary for Planning, Environment and Lands, development schemes for any area within which properties may be acquired. The Town Planning Ordinance was amended in 1988 to empower the Town Planning Board (TPB) to designate areas as 'comprehensive development area' (CDA) on statutory plans. Within a CDA, planning permission from the TPB is required for any development. A planning application to the TPB should be in the form of a master layout plan setting out such information as layout and disposition of buildings, floor area for each use, road and pedestrian networks, public facilities to be included, building development programmes and any other matters the TPB considers appropriate. To facilitate land assembly, the TPB may recommend to the Governor in Council (G in C) resumption of any land which interferes with an approved master layout plan. This power has not been widely used because of a concern to restrict as far as possible the use of resumption powers to cases where there is an immediate requirement for land to be used for the construction of public facilities.

9.13 In view of the benefits that can be brought to the community in areas of widespread urban and rural decay, it is a clear planning objective that comprehensive development should be encouraged as far as possible. The LDC is currently concentrating its efforts in redeveloping old residential and commercial areas in urban centres (Plate 9.3). But such efforts may not extend far enough. In the formulation of the Metroplan and the Rural Planning and Improvement Strategy, increasing attention has been drawn to both the problems of obsolete industrial areas in the Metroplan area and the need for more co-ordinated development in the rural areas. In view of the scale and magnitude of the problems, there appears to be a prima facie need to involve the private sector and possibly other development agencies, and some legislative and institutional changes may be necessary.

9.14 As discussed in paragraph 9.12, one of the major constraints to private sector participation in the comprehensive development/redevelopment process is the problem of site assembly. To overcome this constraint, one possible way could be for the Government to carry out compulsory acquisition of minority interests in a prospective comprehensive development area on behalf of a private developer who managed to acquire the majority of land holdings, if he could satisfy the Planning Board (PB) with an acceptable development scheme, demonstrating sufficient public planning gains and guaranteeing satisfactory compensation and rehousing arrangements for the people affected. Amendments to the Ordinance could be made to set out the circumstances under which a private developer could request the PB to recommend to the G in C resumption of private properties within a CDA.

9.15 The issue of facilitating private development through compulsory acquisition is a sensitive one, as it involves the transfer of development rights from one private party to another in the name of public interest and raises questions of profit sharing and compensation. Public debate on the issue is therefore necessary before any detailed legislative proposals can be made. It is still too early to ascertain the success of the LDC in implementing comprehensive redevelopment schemes, as the LDC Ordinance was only enacted in 1987 and the first batch of the LDC development schemes is still under active planning. The possible need for amendments to the new Planning Ordinance to introduce further mechanisms to facilitate comprehensive development should therefore be left to a second legislative phase, after soliciting views from the public and gaining more experience in implementing the LDC schemes.

9.16 Any views from the public on the general issue of comprehensive development, particularly on whether and how to encourage private sector participation, are welcome.

Comprehensive Development

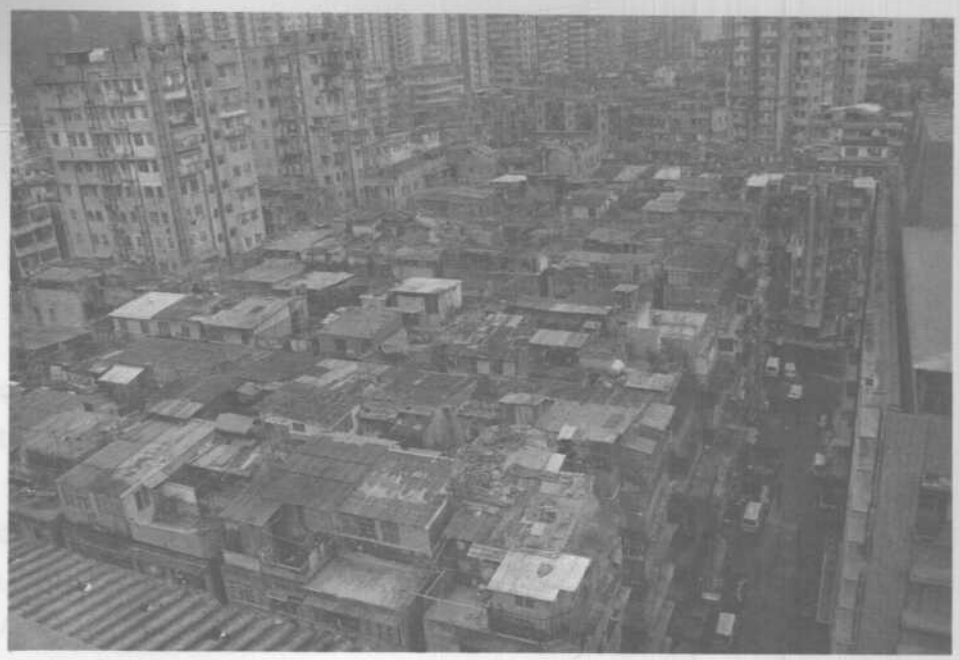


Plate 9.1 ▶
In the older parts of the urban area, where land ownership is fragmented and site assembly difficult, comprehensive development has been difficult to realize.

◀ Plate 9.2
Some notable examples of success - comprehensive development schemes of Taikoo Shing and Kornhill

Plate 9.3 ▶
The Land Development Corporation (LDC) is currently concentrating its efforts in redeveloping old residential and commercial areas in urban centres - approved LDC Scheme at Jubilee Street, Central.

CHAPTER 10

FINANCIAL IMPLICATIONS

INTRODUCTION

10.1 The proposals made in the preceding chapters would generate a considerable amount of planning activities in the years ahead. This Chapter attempts to give a broad indication of the general financial and resource implications arising from the proposals made, although no accurate assessment can be made at this stage.

FINANCIAL IMPLICATIONS OF PROPOSALS

New Planning Structure

10.2 Under the proposed planning structure, the new Planning Board (PB) would be just replacing the existing Town Planning Board. Since legislative amendments are being made to establish a separate independent Appeal Board under the Town Planning (Amendment) Bill 1991, no new statutory planning body would need to be created. Additional resources would likely be required for the expanded activities of the two boards and their secretariats under the new system.

Plan-making Process

10.3 While most areas of work in the proposed plan-making process would be based on the existing town planning machinery, there would be some new planning functions which have resource implications. These would include the exhibition of planning studies and consideration of public comments on the studies by the PB, publicity of objection sites and all representations, and deposition of draft plans in the Land Office for public inspection, all of which would be necessary steps towards a more open and fairer statutory planning system. On the other hand, proposals have been made to streamline some of the procedures such as the hearing procedure, so as to achieve some saving in resources, and the preparation of statutory plans would be spread out over the years ahead to avoid creating an acute short-term demand for resources.

Planning Application Procedures

10.4 The existing planning application system is proposed to be retained with modifications. Some of the modifications would involve additional planning work, such as the public notification of planning applications, and the proposed comprehensive control of temporary uses. Other new areas of work would mainly involve formalization of the existing administrative practice, such as the provisions for the setting up of a planning register. Proposals have been made to simplify and streamline existing procedures, as in the case of processing applications for minor amendment to approved schemes. The proposed provision in the new Ordinance for charging administrative fees to recover cost incurred in processing planning applications would also help to reduce the use of public funds.

Development Control

10.5 Enforcement would be an area of work which would have to be undertaken under the new Ordinance. Although enforcement provisions have already been introduced in development permission areas under the Town Planning (Amendment) Ordinance 1991, additional staff and resources would be required to establish existing use records and to extend enforcement to areas covered by existing outline zoning plans. Due to the large amount of work (such as the serving of notices, the setting up of a register on the notices served for public inspection, and subsequent enforcement and prosecution actions) and the extensiveness of the areas involved, implementation would be carried out in phases, depending on the seriousness of particular offences and the amount of enforcement resources available.

10.6 Other development control provisions proposed such as the introduction of a planning certificate system, transfer of planning-related provisions from the Buildings Ordinance to the Planning Ordinance, and the formalization of density control would mainly involve a transfer of responsibility of control within the Government.

Compensation and Betterment

10.7 On compensation and betterment, it is impossible to estimate the financial implications involved until the Government has made a decision based on the recommendations of the Special Committee.

Areas of Special Control

10.8 Proposals for special controls in areas of environment, conservation and civic design have also been made. The consideration of environmental impact in the plan-making process and the processing of planning applications has been an established planning practice. The proposals for designating 'Special Design Areas' for conservation and civic design purposes would not be widely applied and hence their costs could be absorbed.

Non-conforming Existing Uses

10.9 The proposal to adopt the concept of amortization in certain serious cases would generate an unquantifiable amount of additional work in enforcement and in handling appeals against performance standards set out in amortization notices.

CONCLUSION

10.10 Additional resources would be required to achieve a more open, fairer and more effective statutory planning system in Hong Kong. Proposals have however been made, where practicable, to streamline procedures and to recover costs. It is also clear that implementation of the various proposals would have to proceed by phases depending on availability of staff and other financial resources.

CHAPTER 11

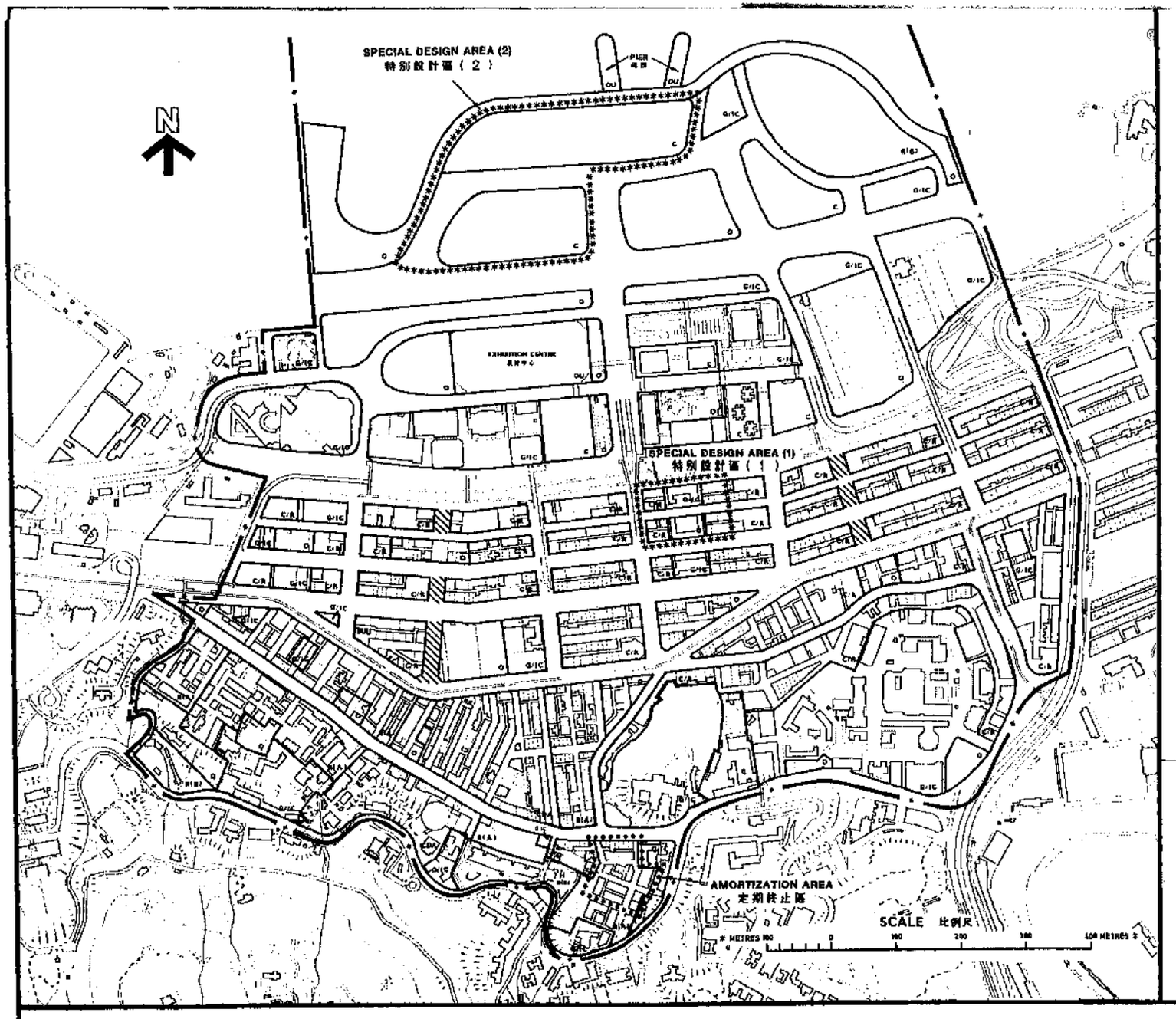
CONCLUSION

11.1 A more sophisticated approach to planning is required in Hong Kong to meet the rapid pace of development and the growing public concern about the quality of the physical and social environments. The present comprehensive review of the Town Planning Ordinance is a major step towards this end, by providing the necessary legislative framework for the carrying out of the various statutory planning functions. The review is not a simple task, particularly because of the need to strike a proper balance to achieve the many, often conflicting, objectives set out in Chapter 1 of this Document. The proposals made in the preceding chapters represent a compromise of all these objectives.

11.2 This Document attempts to analyze the problems of the existing statutory planning system and make proposals for the new planning legislation for Hong Kong. In general, the existing system of statutory plans and planning applications is considered to be sufficiently flexible and efficient and it is proposed that its basic form should be maintained. To improve the system and cope with the problems identified, specific proposals have been made on various aspects including the plan-making process, the planning application procedures, development control, environmental and civic design considerations, and measures to deal with non-conforming existing uses. However, in view of the complex and contentious nature of the issue of compensation and betterment, a Special Committee will be established to consider public submissions and hear testimonies on the subject so as to maintain a fair balance of public and private interests. The recommendations of the Committee will provide a basis for the Government to make a final decision on the question of compensation and betterment.

11.3 Some consequential amendments to other related ordinances such as the Buildings Ordinance and the Crown Lands Resumption Ordinance will become necessary at the drafting stage when the proposals for the new Ordinance are finalized. These are, however, basically technical changes and have not been fully set out in this Document.

11.4 Planning affects people's daily lives and their development rights. It is therefore important that the public be able to comment on how the planning process should be organized and conducted. This Document provides a basis for public consultation. All comments received will be fully considered by the Government in drawing up the new planning legislation for Hong Kong.



NOTATION
註釋

ZONES 分區大綱

COMMERCIAL	C	商業用地
COMPREHENSIVE DEVELOPMENT AREA	CDA	綜合性發展區
COMMERCIAL/RESIDENTIAL	C/R	商業、住宅混合用地
RESIDENTIAL (GROUP A)	R(A)	住宅用地（甲類）
RESIDENTIAL (GROUP B)	R(B)	住宅用地（乙類）
GOVERNMENT/INSTITUTION/COMMUNITY	G/IC	政府、團體、社區用地
OPEN SPACE	O	遊樂用地
OTHER SPECIFIED USES	OU	其他指定用途

COMMUNICATIONS 交通

MAJOR ROADS AND JUNCTIONS	主要道路與道路連接處
PROPOSED PEDESTRIAN STREETS	建議中之行人街道

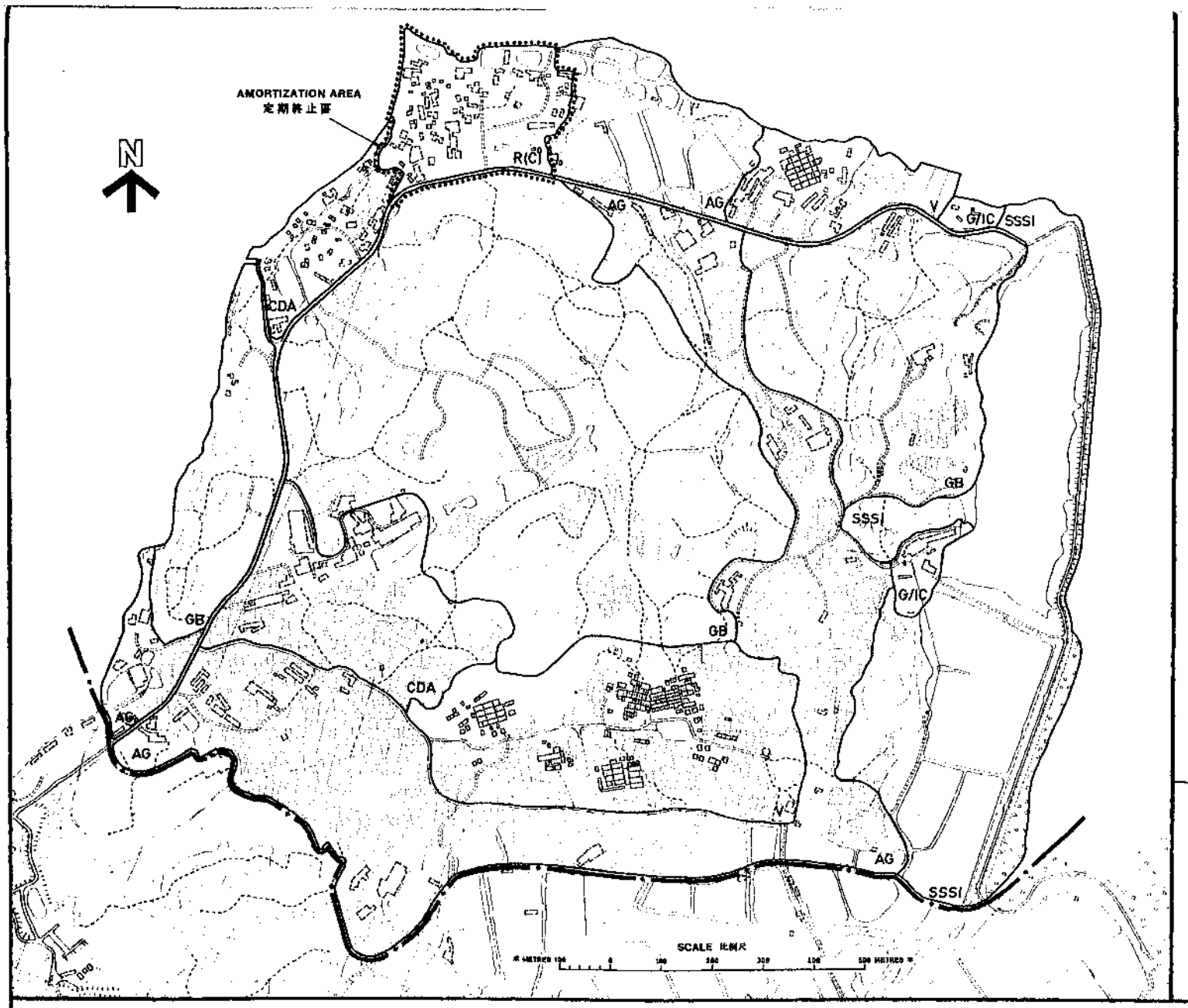
MISCELLANEOUS 其他

BOUNDARY OF PLANNING SCHEME	規劃範圍之界線
BOUNDARY OF AMORTIZATION AREA	定期終止區之界線
BOUNDARY OF SPECIAL DESIGN AREA	特別設計區之界線

THE ATTACHED NOTES ALSO FORM PART OF THIS PLAN
圖圖所附之註釋亦屬本分區計劃大綱圖之一部份

A HYPOTHETICAL OUTLINE ZONING PLAN PREPARED UNDER THE PROPOSED PLANNING ORDINANCE (URBAN AREA)
根據建議的規劃條例虛擬的分區計劃大綱圖（市區）

APPENDIX I
附件 I



NOTATION
註 釋

ZONES 分區大綱

COMPREHENSIVE DEVELOPMENT AREA	CDA	綜合性發展區
RESIDENTIAL (GROUP C)	R(C)	住宅用地(丙類)
VILLAGE TYPE DEVELOPMENT	V	鄉村發展用地
GOVERNMENT/INSTITUTION/COMMUNITY	G/IC	政府・機構・社區用地
AGRICULTURAL	AG	農業用地
SITE OF SPECIAL SCIENTIFIC INTEREST	SSSI	具特殊科學價值地點
GREEN BELT	GB	綠化地帶

COMMUNICATIONS 交通

MAJOR ROADS	主要道路

MISCELLANEOUS 其他

BOUNDARY OF PLANNING SCHEME	規劃範圍之界線
BOUNDARY OF AMORTIZATION AREA	定期終止區之界線

THE ATTACHED NOTES ALSO FORM PART OF THIS PLAN
隨圖所附之註釋亦屬本分區計劃大綱圖之一部份

A HYPOTHETICAL OUTLINE ZONING PLAN PREPARED UNDER THE PROPOSED PLANNING ORDINANCE (RURAL AREA)
根據建議的規劃條例虛擬的分區計劃大綱圖(新界)

APPENDIX II
附件 II

Comprehensive review of
the Term Pl...

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