

BOOK REVIEW

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HALSBURY'S LAWS OF HONG KONG: TOWN PLANNING. By Professor Anton Cooray, LLB, PhD (Lond), PhD (Colombo). Butterworths, Hong Kong and London: 2000

The United Kingdom, notorious for having an unwritten constitution, in divesting itself of its empire created a series of written constitutions which were bequeathed to the new independent states. The United States of America is, of course, one of the egregious exceptions, though whether Britain would have devised a better way of electing a President is very doubtful!

In his thoughtful treatise, Professor Anton Cooray, Professor, School of Law, City University of Hong Kong, examines town planning laws in Hong Kong, a more recent ex-British colony. In establishing Hong Kong's independence, the Sino-British Joint Declaration of 1984 called for the enactment of a Basic Law that would establish the governance of the new Special Administrative Region of the People's Republic of China.

This Basic Law, drawn up under Article 31 of the Constitution of the People's Republic of China, does not expressly set out town planning laws. Under Article 8 of the Constitution, however, the laws previously in force in Hong Kong are maintained except in so far as they contravene the Basic Law or are amended by new laws passed by the legislature of the Hong Kong Special Administrative Region.

Thus Hong Kong's town planning laws remain those applicable before the hand-over and are mainly in the form of ordinances made by the British Crown and the applicable common law of England. It might therefore be expected that the Hong Kong's system of Town Planning would mirror the United Kingdom system. The distinctive feature of the British system of town and country planning is that, although development plans set out policies for the different areas, the notations in the plans are not self-executing and in themselves provide no legal right to carry out development. Instead, under

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section 70 of the Town and Country Planning Act of 1990, the policies in the plans only need be regarded in determining whether a permit is to be granted or refused. More recently this duty to “have regard” has been strengthened under section 54A of the Act, establishing a legal presumption in favour of the policies in the plan. Those policies, however, can still be overridden if “material considerations indicate otherwise” and so the inherent flexibility remains.

Just as the United Kingdom set up written constitutions for its former colonies, in many cases it also created a more rigid zoning approach to planning for the colonies. Thus, in Hong Kong we find a system that is an amalgam of zoning and planning permission systems. Where a plan has been made under the Town Planning Ordinance (originally laid down in 1938), this plan will permit certain uses, while requiring the application for other uses to be made to the Town Planning Board. Professor Cooray sums up the position:

Specified zones are areas designated for specific uses such as residential, commercial, industrial, green belt, conservation or community uses. In respect of each of these zones the plan specifies a list of uses which are permitted as of right and a list of uses which, may be permitted by the Town Planning Board using a two column format. Column 1 lists uses always permitted and column 2 uses that may be permitted with or without conditions. Any use which is listed in Column 1 may be undertaken or continued without planning permission but must conform to any other relevant legislation and to the conditions of the Government Lease concerned.

See paragraph 385.233.

The last reference to the need for development to conform to the conditions of the Government Lease relates to a particular feature of Hong Kong’s planning system; its reliance on the Government’s power to control land-use and development through the law of landlord and tenant. Of course much early town planning was carried out through private law. In the case of London, the fact that large areas of land were owned by titled families enabled new housing estates to be laid out with restrictions on uses and new

buildings. These restrictions could be enforced by the superior landlord and even when the large estates were broken up, the law on restricted covenants evolved so that successors in land title could enforce the covenants against their neighbors.

In the case of Hong Kong, paradoxically, this private law control was transformed into what was, in substance, a public law control, as the Crown owned the freehold to all the land. As Professor Cooray points out, very early in Hong Kong history (1843) it was decided that land was not to be granted in perpetuity. Thus all private ownership of land is through the mechanism of a Government lease. Cooray argues that this situation has the advantage for the state that it can impose restrictions that could not be imposed under the Town Planning Ordinance. As he states succinctly: "A leasee has no choice: he must take the lease on the Government's terms or leave it." Making the leases renewable at the Government's pleasure increases this power.

On the other hand, Professor Cooray argues that the lease mechanism has the disadvantages of only being site-specific and, subject to renewal, cannot be varied at will. This ability to renegotiate the lease is an important power. Although in Hong Kong there is a general expectation that leases will be renewed upon expiration, where a lease has been granted for a specific purpose, say for an electricity supply plant, the lease will not be renewed if the land is no longer needed for that purpose. The point Cooray makes is that the Government is able to impose new terms of contract in the following three situations:

- (1) When the government grants a new lease;
- (2) When the lessee asks for a lease modification (e.g. the landowner may wish to modify a lease term restricting development to a residential building of not more than three storeys so that he can build a residential block of 20 storeys). The Government will, in addition to exacting an appropriate premium for increased property rights, insist on condition say for the protection of the environment.
- (3) Upon the expiration of lease, the Government might want to introduce new terms.

Also, when a lease modification or a new lease is sought after the grant of planning permission, the lease will incorporate planning conditions (for instance a condition requiring a community gain) in the lease. In this way the planning conditions become enforceable as lease conditions.

The extent of the control depends on the wording of the lease. The importance of the wording is illustrated by the case of *Attorney General v Melhado* [1983] HKLR 327, where the court held that the tenants were free to change the use and character of agricultural land let on a block lease in 1905 which had no express restriction on the uses to which the land could be put. As a result, because most lease were drafted in these terms in rural areas, there followed a widespread conversion of such agricultural land to open storage of containers and the dumping of cars.

The *Melhado* case revealed an important loophole in Hong Kong Town Planning law as, surprisingly, the zoning plans were not directly enforceable. This has not been a great problem in urban areas because of the link between the law on building regulation and town planning law. Cooray states that: "While primarily concerned with design and construction of individual buildings, the Building Ordinance also makes provision to ensure congruity of buildings with their surroundings and in this sense gives effect to planning considerations."

In particular, the Building authority has the power to refuse approval for any plans of building works that would contravene any approved or draft plan prepared under the Town Planning ordinance. It was once thought that the Building Authority had to refuse approval for works contrary to the plan, but Professor Cooray points out that the courts have recently affirmed that the use of the word "may" does give discretion and refusal is not mandatory. Nevertheless, it seems that it would only be in exceptional circumstances that approval would be given in such circumstances.

The Planning Ordinance was amended in 1991, both to increase the extent of planning control in Hong Kong territorially and to create enforcement powers. It is now a criminal offence to carry out unauthorised development while a development permission area is in force and there is a power to serve enforcement notices. This system is broadly based on the British system of enforcing planning control. The 1991 Ordinance was mainly aimed at the rural areas and there are still enforcement problems in the urban areas. In urban

areas there may be still no means of taking action against material changes of use that were contrary to the plans. If a material change of use of a building takes place, without any structural alterations, the enforcement mechanism of the Building Ordinance does not apply. So if a person changes his residential building into a motel, without doing any building work, there is no enforcement under the Buildings Ordinance. There is also no enforcement under the Town Planning Ordinance, because the new powers apply only in respect of areas governed by Development Permission Area plans and such Outline Zoning Plans (OZPs) as have replaced DPA plans. In urban areas there are no OZPs, which are first instance plans, and so no enforcement powers arise.

It will be seen therefore that land-use planning operates in Hong Kong through a complex matrix of different regulatory systems. In this short review it has only been possible to sketch out the broad outlines of the most fundamental laws. This work is the first comprehensive work on planning law and must have involved considerable research. Professor Cooray sets out in considerable detail the main regulatory systems and the many other more specialist regulations that apply such as advertisement and conservation control. The treatment follows the standard Halsbury formula with numbered paragraphs with extensive footnotes. The complex subject matter is set out clearly and logically. The reader is taken gently along in that the main principles are first set out and then there is further elaboration and explanation. Because of the format chosen by the author, the treatment is mainly descriptive and analytic though, as indicated, it does include an evaluation of the system. There are detailed footnotes that reveal the author's expert knowledge of both the United Kingdom and Hong Kong planning law. It is an essential source for anyone who wishes to understand town planning in Hong Kong.

This section on Town Planning runs to 255 pages and is one of the three titles (the others are Trade and Tort) appearing in Volume 25 of Halsbury's Laws of Hong Kong (Butterworths, Hong Kong and London, 2000).

