

**Land Administration and
Practice in Hong Kong**
Fourth Edition

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CONTENTS

Preface to the Fourth Edition	vii
Preface to the First Edition	viii
Introduction	x
Section I Historical Development of Land Administration	
1. The First Land Sales, 1841–1842	3
2. The Early Years, 1843–1898	9
3. 1898 Onwards: The New Territories Lease	16
4. The Sino-British Joint Declaration 1984 and the Basic Law 1990	26
5. Hong Kong Special Administrative Region Government	36
Section II Present-Day Land Administration	
6. Economic Background, Land Needs, and Reclamations	49
7. Lands Department Functions under Administrative Law	56
8. Land Exchange and Lease Modifications	71
9. Development Control in Older Lease Conditions	81
10. Access Arrangements and Rights-of-Way	91
11. Town Planning Controls and Development Restrictions in Lease Conditions	94
12. Land Management and Lease Enforcement	105
Section III Land Administration Problems and Practice Associated with the New Territories	
13. Land Exchange Entitlements (Also Known as Letters A/B)	121
14. Small House (丁屋) Policy and the 300-Foot Rule	127

15.	Limitations Ordinance, Adverse Possession, and the Principle of Encroachment	135
16.	<i>Tsos</i> (祖) and <i>Tongs</i> (堂) and Their Impact on Land Assembly	140
17.	Succession	143
18.	<i>Fung Shui</i> (風水) and Graves	145
19.	Boundary Disputes, Missing Lots, Missing Documents, and Secondary Evidence	148
 Section IV Future Developments in Land Administration		
20.	How Planning and Land Policy Could Be Used to Enhance Conservation in Hong Kong	155
21.	The Land Titles Ordinance 2004	165
Appendices		173
Glossary		207
Bibliography		210
Index		213

PREFACE TO THE FOURTH EDITION

I have been alternately moved, flattered, and pleasantly surprised by the overwhelmingly positive response that the earlier editions of this book have received since it first came out in 1998.

The nature of the topic is such that it will always be a work in progress because of the continuing stream of new departmental practice notes, policy reviews, court cases, and, not to mention, new legislation that can all touch on land. Only Section I, which relates to the historical aspects, remains unchanged. The other sections all have some substantial and significant updates and revisions.

The Hong Kong government is extremely well connected to the internet and all departments have comprehensive websites which have removed the necessity of copying each individual practice note as they are easily obtainable on the internet. The following websites are particularly useful:

Lands Department: www.landsd.gov.hk

Planning Department: www.pland.gov.hk

Development Bureau: www.devb.gov.hk

Buildings Department: www.bd.gov.hk

Rating and Valuation Department: www.rvd.gov.hk

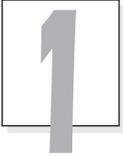
Legislation: www.legislation.gov.hk

As with all the previous editions, I am hugely grateful to my good friend John Davison for all his moral support and enthusiasm for the project as well as giving me access to his firm's legal library. Again, he has willingly acted as my proofreader to ensure the highest degree of accuracy in my legal interpretations. However, as before, if there are any mistakes they are entirely my responsibility.

INTRODUCTION

To assist readers the book has been organized in the following way:

- Section I This section contains five chapters which trace the historical development of land administration starting in 1841, through to the present day. This sets the scene to put in context the detail contained in the subsequent sections.
- Section II These chapters deal with the present-day land administration policies with particular reference to the functions of the Lands Department in respect of land disposal, modifications and exchanges with particular emphasis on the control of development through lease conditions. Land management and lease enforcement are also considered.
- Section III In these chapters, some of the more unusual problems associated with land work in the New Territories are investigated.
- Sction IV The section contains two new chapters, which reflect the latest development in land administration in Hong Kong.
- Appendices There are some documents which are so lengthy that they would clutter up the main text but nevertheless where a full reference is considered appropriate, the documents will be found in the appendices.



THE FIRST LAND SALES, 1841–1842

It is probable that the first auction of land held on Hong Kong Island on 14 June 1841, was *ultra vires*, not an auspicious start. Why? Although Captain Charles Elliot landed at what is very appropriately named Possession Point on 26 January 1841, under the terms of the Convention of Chuenpi, this was only a preliminary agreement which was never ratified. It was not until the Treaty of Nanking, which was ratified on 26 June 1843, that Hong Kong was formally ceded and the British occupation recognized as being permanent. So for the first two and a half years, the British occupation was temporary and makeshift with no proper authority to deal in land.

Until the spring of 1842, the British administrative centre for this area had remained in Macao. Elliot was recalled to England in August 1841 and was replaced as Superintendent of Trade by Sir Henry Pottinger who, having been convinced of the need to retain Hong Kong, in March 1842 moved his headquarters to Hong Kong and at the same time declared it a free port. It was about this time that Pottinger received instructions from Lord Aberdeen in England forbidding all further building and grants of land. Elliot, in his enthusiasm to get things started, was considered to have overstepped the limit of his authority.

Maybe Elliot did not have any choice but to take action in order to bring things under control. It appears that speculation in land in Hong Kong started right from the beginning. Immediately following the British possession of Hong Kong in January 1841, sites were occupied and building works started without any form of official approval. Land was sold by Chinese inhabitants without a proper Land Registry for purchasers to check title. The prospect of Hong Kong becoming a permanent British territory encouraged keen competition to get hold of the best sites; in other words, all the necessary ingredients for a speculative market were in place.

Obviously, some immediate action was required by the authorities to ensure a proper and orderly allocation of land for different uses. It was on 1 May 1841 that the principles of land disposal were first announced. Allotments were to be made at public auctions to the highest bidders for the payment of an annual rent, the rent being the subject of the bidding. Elliot safeguarded the rights of the Crown but promised that land holders would be allowed to purchase their allotments in freehold if the home government agreed. Furthermore, the purchasers of town lots could also buy suburban or country lots with choice of site.¹

The first land sales were announced to take place on 12 June: 'the dimensions of the respective lots will be specified and defined on the spot by the commanding officer of Engineers to whom the parties are referred for further particulars.' Buildings of a certain minimum value fixed at \$1,000 had to be built on the plots within six months of the date of sale, so it is evident that building covenants have existed from the very first land sales in Hong Kong. The biddings were to be for the annual rate of quit-rent and were to be made in pounds sterling. The upset price was fixed at £10 for each lot and biddings were to advance by 10s. The dollar in all payments was to be computed at the rate of 4s 4d.

The first auction programme was very ambitious as it was intended to offer 100 marine lots facing Queen's Road on the seaward side and 100 suburban lots on the opposite side of the road. Not surprisingly, there were difficulties in getting all the plots surveyed in time and although the sale was postponed two days to 14 June,² only 35 marine lots were ready for sale, each having 100 feet frontage along Queen's Road and varying in depth to the shore according to the shape of the coastline. It was later discovered that due to the haste with which the sales had been prepared, there were inaccuracies in the survey and the setting out of the lots which, not surprisingly, caused dissension and difficulties later.

Elliot also warned all those who had already begun buildings that all sales of land had to be made through an officer of the government and all native inhabitants claiming land would be required to prove their claims.

In the event, competition for the reduced number of lots was keen and all but one of the lots were sold. Bid rents ranged from £20 to £265 per lot depending on its depth to the sea and location. An article in *The China Mail* reporting retrospectively on this sale gives some insight into the proceedings: 'the first lot sold was numbered 15 in the list, it was knocked down to Mr. Webster at £20 not only without opposition but he was laughed at for giving so much. The next lot No. 14 however fetched £21 . . . The sale then proceeded along the Queen's Road at advancing rates which to a certain extent was owing to the less rugged character of the beach and the more central situation.' Lot 1 to 13 were sold for between £38.10s and £80 depending on size and location.

The sale was now moved to the ground that had been cleared by Messrs. Jardine, Matheson & Co., and which was for the most part occupied by their temporary buildings; and it must be noticed, that the proximity of that firm gave an additional value to land in its vicinity. The first lot put up was No. 20, upon which, as already noticed, a house was already in progress. Mr. Matheson begged that this might not impede bidders, and offered at once £150 (the upset price being £10) at which it was knocked down. The two adjoining lots were, after some competition, knocked down to him also at £185 and £230. The remaining ones in that locality were sold at £160, £140, £150, and £111. Prices then began to fall, and the six lots between this spot and what is now called Spring Gardens, ranged from £25 to £67, and all of them except one afterwards lapsed to Government. (*The China Mail*, quoted in Kyshe 1971, p. 267)

The remaining lots were then sold for rents bid between £75 and £265 per lot. The 34 lots realized a total bid rent of £3272.10s, an average of £96.5s per lot.

It was these unexpectedly high figures that three days later prompted Elliot to write to the two principal merchants, Jardine and Dent, saying that he would urge the home government to allow the land to pass to the purchasers outright, that is, freehold, on payment of one- or two-year purchase of the bid ground rent, or else at a nominal quit rent and asked them to circulate this letter to other interested firms. Elliot was obviously keen to establish an impression of permanency as early as possible and also to encourage more new merchants to set up their business in Hong Kong.

When the home government later refused to ratify these terms, it caused further discontent with accusations that Elliot has dishonoured his promises. It is not difficult to see why Elliot had to go and it was even rumoured that the disgruntled merchants had put a price on his head.

In spite of Lord Aberdeen's edict that all land sales were to cease with Pottinger away from Hong Kong, either from a misunderstanding or, more likely because of the intense pressure exerted by the merchant community, the administration announced on 15 October 1841 that 'it is now desirable that persons applying for lots of land for the purpose of building upon, should be at once accommodated upon terms which will be made known to them by application in person to the Land Officer'. The terms referred to were payment of Crown rent at the average rate realized at the first sale on 14 June 1841, and at a rate of £20 per annum per acre for town inland lots and £5 per quarter acre for suburban inland lots. The Land Officer, like the surveyors was a military appointment so as yet there appeared to be no legal input into land sale documents by qualified lawyers! The departure from sales by auction to sales by private treaty probably was to facilitate regularization of existing occupation. This would help avoid the occupier from having to overbid at auction in order to retain his site.

A fairly comprehensive scheme was adopted to classifying sites at appropriate prices into marine and suburban lots. A notification was made in November 1841 that purchasers of lots who failed to abide by the conditions would forfeit their deposits as well as their allotments. Marine lots were defined as those within 200 feet from high water; town lots as certain specified areas in Hong Kong, Wong Nei Chong (Happy Valley), Chek Chu (Stanley) and Chek Py Wan (Aberdeen); suburban lots were all the rest. In addition, some areas were marked out as bazaars to serve the Chinese population.

On his return to Hong Kong in December 1841, Pottinger was naturally displeased to see that his orders had been ignored, but was nevertheless impressed to see the speed of construction and settlement and recognized that in the interests of maintaining 'tranquillity and good government for all persons genuinely residing in the settlement', the administration had probably little or no choice in proceeding as it had done. In any event, he was now persuaded of the need to retain Hong Kong on a permanent basis and soon afterwards removed his headquarters to Hong Kong from Macao. He justified his actions in a letter to Lord Aberdeen saying, 'but I may declare that even that was forced on me by the extraordinary and unparalleled progress which this settlement had made.' He added, 'I had no predilection for raising a colony in Hong Kong or at any other place in China.' Elliot's actions had taken things beyond the point of no return as Pottinger went on to say, 'this Settlement has already advanced too far to admit of its ever being restored to the authority of the Emperor.'

The haste with which the first land sales had been prepared had, as already mentioned, resulted in inaccuracies which needed to be sorted out. On 22 March 1842, Pottinger declared his intention to appoint a committee to investigate any claim that might be pending regarding allotted allocations of ground of whatever description and finally to define and mark off the limits of all locations that had yet been sold or granted upon any other terms. At the same time, it was expressly notified that 'no purchases of ground, by private persons, from natives formerly or then in possession would be recognized or confirmed unless the previous sanction of the constituted authorities should have been obtained, it being the basis of the footing on which the island of Hong Kong had been taken possession of and was to be held pending the Queens Royal and Gracious Commands that the proprietary of the soil was vested in and appertained solely to the Crown.'

Until this time, no lease or other deed of grant of the lots that had been sold had been issued to purchasers. The 'grant' of the lot was simply an entry in a book kept by the Land Officer, showing only the name of the purchaser and the side measurements of the lot purchased. As sales of lots had already begun to take place from one holder to another, difficulties had arisen as to the liabilities

of the purchasers to the Crown. As a remedy for these difficulties and to provide for the registration of sales, the following Government Notification signed by the Land Officer was issued on 2 May 1842:

With a view to the prevention of future misunderstanding and difficulties, His Excellency Sir Henry Pottinger, Bart, is pleased to direct that no sales of land are to be made by the holders of grants to other parties except with the knowledge of the Land Officer, and that any sales that may have been made, or may be made in future, unless registered in the Land Office, shall be held to be invalid. (quoted in Kyshe 1971, p. 14)

Purchasers of grants from the individuals before holding them are to understand distinctly that they will be under the same liabilities to Government as the parties from whom they purchase.

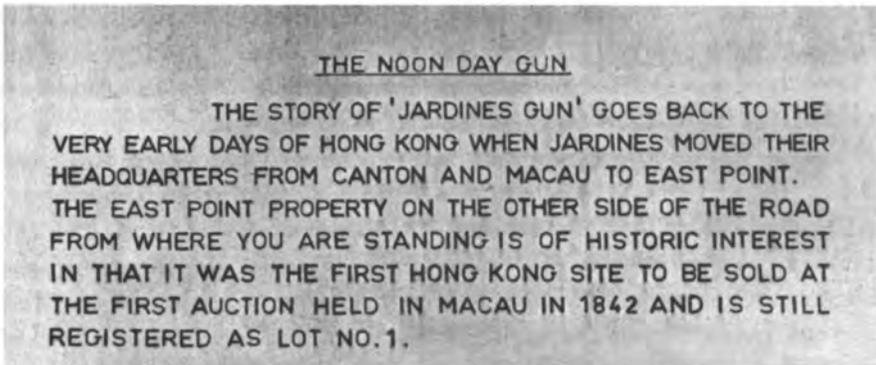
Only two weeks after this date, the appointment of Land Officer was temporarily abolished, and further grants of land were prohibited.

On 27 May 1842, a ‘Land and Road Inspector’ was appointed to do the work of the Land Officer. His instructions with reference to the Crown Lands of the colony stated that, as the existing prohibition against further grants of land was to continue in full force pending the receipt of commands from Her Majesty’s government, it would not even be necessary for him to bring any applications on that subject to the notice of the Deputy Superintendent who would be charged with the Civil Government of the island during the absence of Sir Henry Pottinger. The duties of the new Land and Road Inspector were to prevent encroachments on the unappropriated lands or on the roads, and to register all sales and transfers of land in conformity with the notification issued by the Land Officer on 2 May 1842.

It can be seen that land administration did not get off to a smooth start. The desire to establish a commercial settlement in Hong Kong as quickly as possible was not matched by the establishment of a proper administrative and legal framework to sell and record land titles; problems were thus created from the outset. However, it went a long way to rebut Lord Palmerston’s famous comment that Britain had acquired nothing more than a ‘barren rock with hardly a house upon it’!

Notes

1. The full text of the Public Notice is included in Appendix I.
2. The full text of the Public Notices dated 7 June 1841 and Terms of Sale dated 14 June 1841 are included in Appendix II; both are extracted from the *Report of the Land Commission, 1886–87*.



This plaque stands opposite to the World Trade Centre next to the Causeway Bay typhoon anchorage. It is open to the public just after noon each day following the firing of the gun. Note that both the location and the date are wrong!

Courtesy of Alan Macdonald of Architech Audio-Visual Ltd.

20

HOW PLANNING AND LAND POLICY COULD BE USED TO ENHANCE CONSERVATION IN HONG KONG

An appropriate starting point is to understand Hong Kong's conservation obligations under international treaties which may be summarized as follows:

In May 1984, the United Kingdom ratified the Convention for the Protection of the World Cultural and Natural Heritage 1972 ('the Convention') and extended it to Hong Kong. The PRC also ratified the Convention in December 1985. The Convention remains in force in relation to Hong Kong after 1997.

Article 2 of the Convention defines 'natural heritage' to include, *inter alia*, 'natural sites of outstanding universal value from the point of view of science, conservation or natural beauty.' Article 4 of the Convention provides that each State Party undertakes the duty of ensuring, to the utmost of its own resources, the identification, protection, conservation, presentation and transmission to future generations of natural heritage. Article 5 requires the State Party to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of natural heritage. Article 6 further requires the State Party not to take any deliberate measures which might damage directly or indirectly the natural heritage. Article 12 provides that the fact that a property belonging to natural heritage has not been included in the World Heritage List in Article 11 does not mean that it does not have an outstanding universal value that deserves to be protected, conserved and transmitted to future generations.

In *Queensland v The Commonwealth* (1989) 167 CLR 232, the High Court of Australia held that the Convention imposed a legal duty to take measures for the protection, conservation, presentation and transmission to future generations of the cultural heritage and natural heritage. This obligation arises out of identification by the contracting state of its cultural or natural heritage, and does not depend on whether the site is listed on the World Heritage List. Under Article 4 of the Convention, a contracting state is under a duty to make identification of cultural or natural heritage.

In October 1999, the UNESCO 12th General Assembly of State Parties to the Convention adopted a resolution that invites the contracting parties to give the highest priority to the adoption of a general policy which aims to give the cultural and natural heritage a function in the life of the community and to

integrate the protection of that heritage into comprehensive planning programme according to Article 5 of the Convention.¹

Very recently, and most significantly, the Central People's Government on 9 May 2011 extended the decisions and Conferences of the Parties to the Convention of Biological Diversity (CBD), that was originally ratified in 1993, to Hong Kong which will demand a complete rethink of government's policies particularly with regard to the criteria for designating country parks, the proposed measures for protecting country park enclaves and the treatment of privately held land associated with these activities.

Since the enactment of the Country Parks Ordinance (Cap. 208) in 1976, we now have 24 country parks (CPs) and 22 special areas, 11 of which fall within CP boundaries and 11 of which are outside. Together, these areas amount to 44,300 hectares, equivalent to 40% of Hong Kong's total land area. The land utilization map on the inside back cover helps clarify our understanding of the position.

Country parks are designated for the purpose of nature conservation, countryside recreation, and outdoor education. Special areas are created mainly for the purpose of nature conservation. In 2014, according to the Agricultural, Fisheries and Conservation Department, they attracted 11.2 million visitors.

In 1995 the Marine Parks Ordinance (Cap. 76) was enacted which provides for the designation, control and management of marine parks and marine reserves. Currently, there are four such parks and one reserve so designated.

Interestingly, this 1995 legislation has provision for the government to resume private land for the purposes of marine parks or reserves and such resumptions are deemed to be for a 'public purpose'.

Surely, the same logic and principles should now be applied to the Country Parks Ordinance particularly in the light of recent events described below.

Under the existing Environmental Impact Assessment (EIA) Ordinance (Cap. 499), designated project proponents are required to obtain environmental permits (EP) from the Director of Environmental Protection (DEP) before construction or operation of the project commences. In October and November 2000, the DEP rejected two applications for an EP. One application was for the proposed Lantau N-S link between Tai Ho Wan and Mui Wo cutting through the Lantau Country Park. The other, more famous case, was for the former Kowloon Canton Railway Corporation (KCRC) proposal to construct a spur line from Sheung Shui Station to the new border crossing at Lok Ma Chau which involved passing through Long Valley. The KCRC appealed against the DEP's decision and in September 2001 the Environmental Impact Assessment Appeal Board dismissed KCRC's appeal.

The Appeal Board's decision included the following relevant paragraphs:

1. During the public consultation period for the KCRC, EIA the DEP received 225 submissions from the public each of which opposed the project;
2. Under the paragraph entitled 'The Implementation of the EIA Process' the following words occur:

There are two main matters of public interest involved. Both are important. The first is the public interest in the protection of the environment upon which the quality of life in Hong Kong will increasingly depend. The second is the public interest in ensuring that major designated projects are brought to fruition in a timely and efficient manner.

The purpose of the EIA Ordinance is expressed in its title: to provide for assessing the impact on the environment of certain projects and proposals, for protecting the environment and for incidental matters. However, it does not cover conservation *per se* where no development is intended and it is this gap which needs to be addressed by any new policy.

The present conservation framework is well described by the Conservancy Association's August 2000 paper entitled 'Achieving Conservation: A Positive Conservation Policy for Hong Kong',² and is echoed in the government's consultation document, as follows:

The current legal framework for conservation is embodied primarily in the Country Parks Ordinance and the Town Planning Ordinance. In the case of country parks, conservation is the stated objective and this objective is by and large served by the Ordinance. For areas of conservation interest which fall outside Country Parks, the conservation intention is expressed through zoning the sites as Conservation Area (CA) under the Town Planning Ordinance. Both Country Parks and CA zones can cover large areas. Within these areas some specific sites may be designated Sites of Special Scientific Interests (SSSI), which provides more stringent control over land use, and hence greater protection of the sites from disturbance. The Agriculture, Fisheries and Conservation Department (AFCD) are the expert department within government for conservation, country park management and the designation of SSSIs. In fact these CA/SSSI zones now cover over 6600 hectares which is a further 5% of HK's land area so together with the Country Parks some 43% of our total land area is now protected.

Unfortunately, this framework is too simplistic and ineffective because, first, it does not cover areas with high conservation value that fall under other zonings. A case in point are areas zoned agriculture, which may consist of areas of high cultural or ecological value but which would not be protected because conservation is not the stated intention of the agriculture zone. Similarly, other zoning such as the village zone and the residential zones may contain buildings of high heritage or cultural value which may not be protected under their respective zonings.

Second, even for areas zoned CA or SSSI, the planning intention of conservation may not be realized if the conservation value is progressively

diminished, either through willful destruction (e.g., war games) or as a result of natural degradation or by the misuse of pesticides. In other words, although conservation is the stated objective, such objective can be defeated either by lack of land management or by the inability of enforcement over destructive or inappropriate uses.

Third, even if the conservation objective is well served (naturally or through active management), the areas may still yield to development due to competing uses, such as improvement in transport or demand for housing (for example, to accommodate the rising demand for houses for indigenous villagers). There are strong advocates within the government for these competing objectives, all of which are backed by strong policy frameworks. By contrast, the present conservation framework is incomplete and does not provide a strong enough basis for the conservation department (AFCD) to be an effective advocate for the conservation objective commensurate with its value to society.

It is important to consider the land use zoning in the context of landownership because in recent years there has been a subtle but significant shift in the way the Planning Department deals with new land use zoning. Consider that when the country parks were originally set up 30 years ago, they only ever covered government-owned land. Private land, usually village land, was excluded. Today the position has changed; the Planning Department is prepared to rezone large areas of privately owned land, usually described for agricultural purposes on the Block Government Lease, usually to CA or conservation zoning. A lot of this land is lying fallow and unused and with the CA zoning that is how it will remain. Agricultural activities can often be incompatible with conservation objectives and the ownership rights must be respected and treated fairly. Under this system they are not. For example, at Wu Kau Tang in July 2000, 87 hectares out of a total area of 103 hectares had been zoned CA; similarly at Tai Long Wan in October 2001, 46.5 hectares out of 50.5 had also been zoned CA. In both cases large percentages are privately owned.

The fundamental weakness in the present framework can be summed up by saying that conservation by zoning alone is far too passive. Further, because these zonings now include large tracts of private land, for conservation to be done in a meaningful way it requires mechanisms for active management and/or a system for bringing private land into the scheme. This may, or may not, involve resumption but the private landowners should be assured of adequate compensation or encouraged to actively participate.

In November 2004, following a consultation period taken place in the previous year, the government published its 'New Nature Conservation Policy' (NNCP). Under the new policy two schemes were introduced, namely the Management Agreement (MA) Scheme and the Public-Private Partnership

(PPP) Scheme. Two ongoing MA projects at Fung Yuen and Long Valley have successfully increased the abundance and diversity of butterfly and wildlife while a new MA project has recently been launched in 2012 to help restore and enhance the conservation value of fishponds that fall outside the Ramsar Site and Deep Bay Wetland.

There has been virtually no progress for schemes under the proposed PPP. The one at Sha Lo Tung, submitted in 2008, has run into major difficulties because of a seriously defective EIA, so an alternative proposal for a non-in-situ, value-for-value, land exchange has been mooted. Under the new policy such exchanges could, and should, be considered on a case-by-case basis.

Sha Lo Tung is, in fact, the second ranked site out of the twelve priority sites of high ecological value identified in the NNCP for possible PPP consideration. However, as it now transpires that seven of these twelve sites are situated in country park enclaves, in situ development is clearly inappropriate for most of the cases, so either cash compensation for sites in multiple ownership or a non-in situ land exchange, where most of the land is in one or two ownerships, should be considered to ensure that the existing landowners are properly and fairly compensated. To make any meaningful progress in these types of cases, the government needs to be much more proactive.

The Way Forward

As Civic Exchange concluded in their 'Nature Conservation – A New Policy Framework for Hong Kong, January 2011', 2010 will be remembered as a landmark year for conservation in Hong Kong. Over 80,000 people joined a Facebook site to protest against a development of a private site in Tai Long Wan in Sai Kung, heralding a new level of public involvement in nature conservation that social media marketing has unlocked. In fact, the owners had done nothing against the law but the existing passive approach to conservation, this site being outside the country park boundary with no land use zoning, is now clearly outdated and in the light of CBD needs to be radically rethought.

Following on from the Tai Long Wan case that first emerged in the summer of 2010, the government was stung into action that resulted in May 2011 with the Country and Marine Parks Board receiving a working paper entitled 'Review of the Criteria for Designating Country Parks and Proposed Measures for Protecting Country Park Enclaves'. The paper noted that there were 77 country park enclaves similar to Tai Long Wan with a total area of 2,076 hectares. Twenty-three of these sites were covered by OZPs and 54 were not. Subsequently, 36 of these sites have, as at June 2015, been covered by either DPA or OZP plans

gazetted under the TPO. Unfortunately, these zoning exercises have brought into focus the demands of the indigenous villagers for additional land for the building of small houses even though most of the original villages situated within the enclaves are now deserted and have a complete lack of facilities. This, of course, is in direct conflict with the conservation objectives of trying to protect these enclaves, but the government seems to be bowing to the pressure of the Heung Yee Kuk and the indigenous villagers by zoning significant areas of land within the enclaves for expanded villages! See also Chapter 14 where this subject is considered in more detail, paragraph 4 on page 124 being particularly relevant.

The updated criteria for designating country parks now state that conservation value, landscape and aesthetic value, and recreation potential remain as the three main themes of intrinsic criteria in identifying suitable areas for country park designation. Other factors such as size, proximity to existing country parks, land status, and existing land use are relevant to demarcating boundaries but, importantly, the mere existence of private land will not be automatically taken as a determining factor for exclusion from the boundary of a country park.

The year 2014 saw a considerable amount of work done by a wide range of leaders and experts in the conservation and related fields to assist the government in formulating a Biodiversity Strategy and Action Plan (BSAP) as required under the Convention on Biological Diversity (CBD).

The full range of work done can be reviewed at www.afcd.gov.hk/bsap, but the focus in this chapter is to examine the work and recommendations of the Legislative Focus Group, which I was privileged to be a member of, as we were required to stock-take legislation and administrative practices relevant to biodiversity and ecosystem services. As each BSAP is of five-year duration, we worked on the basis that the first BSAP, up until 2020, should focus on existing legislation as getting changes and amendments passed is likely to be difficult and time-consuming. We also focused on administrative arrangements as these are much more flexible, particularly in relation to land, and can be changed without the need for legislation. For the benefit of readers, reference will only be made to the four relevant land and planning recommended actions, out of a total of 15, as follows.

Action 1: Countryside and marine habitat conservation and sustainable use and Country Park Enclave Policy. These are now core areas of public expectation and include priorities to better implement the Country Park Enclave Policy of 2010–11, the integrity of country parks and protected areas, increased and improved CP extensions, improved zoning, reduction of development pressures and pollution together with improved connectivity. The target should be no net loss of CP areas with, hopefully, some new ones, such as Robins Nest, being added to the list.

Action 2: The 12 NNCP priority sites to be better protected and fair methods of increasing protected areas by means of resumption, land exchange, and transfer of development rights.

An important first step would be for the Chief Executive in Council to administratively declare that in recognition of our responsibilities under CBD as well as BSAP, these type of conservation land resumptions and other related in situ and non-in-situ land exchanges can now, confidently and safely, be deemed to be for a 'public purpose' in accordance with the Land Resumption Ordinance (Cap. 124).

Action 3: Restoring land administration and improving small house regulation to meet public expectations, policy and CBD obligations. The issues related to small house grants are discussed in Chapter 14. In addition, the Lands Department needs to be better resourced so that it can properly carry out its land management function to prevent unauthorized vegetation cutting, site formation and drainage works, unauthorized access tracks, and the like.

Action 4: Administrative improvements to relevant departments and bureaus, in particular town planning to implement integration and mainstreaming of CBD. Specific priorities for the Planning Department include improving zoning effectiveness by providing more controls and better management, all unprotected or unplanned areas to be protected with DPAs or OZPs within the coming five years with priority for areas of high biodiversity value and which are at risk. The Planning Department along with the Lands Department and the AFCD need to be better resourced so they can together better police, manage, and control all SSSI, CP, CPA, and other protected areas.

Built Heritage Conservation

In the urban areas the main focus on heritage conservation has been on government-owned buildings which are looked after by the Antiquities and Monuments Office (AMO) of the Leisure and Cultural Services Department.³ In the NT, there are a number of Chinese temples, usually sited on *tso* or *tong* land that have been repaired, upgraded, and preserved. Recently, the Ping Shan Tang Clan Gallery, housed in an AMO restored two-storey building built by the British in 1899 as the first police station in the NT, was opened. The project represents a desire of some indigenous villagers to support heritage conservation. As one local leader said, 'Conservation isn't just about preserving the past but also managing the pace of change. Too big a change can radically alter the character and appearance of the village, putting heritage at risk.'

Currently, the government's thinking on nature conservation of privately owned land is more advanced than that on heritage conservation. Again,

there is an ongoing public debate initiated by the issuing of the government's consultation document published in early 2004 entitled 'Review of Built Heritage Conservation Policy'.⁴

There are regrettably very few concrete solutions put forward in this document to assist the debate but this is, to some extent, understandable because of the overriding need to respect the existing development rights of the present owners and the need therefore to adequately compensate them for any loss that may arise should their land be taken. Although it is clear that the government wishes to find solutions without incurring payments, there has been a relatively recent precedent when in 2004 it acquired a building in the Mid-Levels known as Kam Tong Hall for \$53 million. This building was erected in 1914 and had been well maintained over the years with most of the original fittings surviving with minor alteration. In 1990 the Antiquities Advisory Board accorded a Grade II status to the building in recognition of its outstanding heritage value. The intention was to convert the building into a Dr. Sun Yat-sen Museum, which was opened in January 2007. So, a 'public purpose' must have been established to justify the acquisition?

An alternative to outright acquisition is the use of transfer of development rights (TDR) as an incentive to preserve other historical buildings. John C. Tsang, the then Secretary for Planning and Lands, addressed the Hong Kong Institute of Architects in December 2001 on this subject in the following clear and simple terms:

The success of Hong Kong is couched in the operation of market forces. We cannot expect the developers to turn away from their objective to maximize profits and to volunteer to preserve historical buildings in the community without any return. They just don't behave like that. Nor can we expect Government to acquire all the historical buildings in the open market or to resume them under the Lands Resumption Ordinance. That is not the best use of public revenue and is, any way, just too expensive. It would be better if we can employ market forces to pay for the preservation of these historical buildings. Providing an incentive for property owners to encourage them to preserve these historical buildings is one way and TDR could be such an incentive.

The purpose of a TDR scheme is to create a 'win-win' solution. With TDR, the owners of historical buildings of value will be able to keep their existing buildings, and use or sell the unused development rights as they see fit. The community would also benefit from the preservation of these buildings without having to buy or resume the properties.

TDR is nothing new. Many overseas cities and communities, such as New York City and Vancouver, operate such schemes. The question is: can TDR work in Hong Kong?

The existing framework of density control under the Buildings Ordinance and the statutory town plans does not allow any TDR to apply across sites that are not contiguous. At present, 'transfer' of development rights or permissible gross floor area (GFA) is only allowed between different parts of the same

development site. This method should actually be more accurately referred to as clustering of GFA, rather than transfer of GFA.

The idea of a TDR Scheme is to enable property owners to 'deed-restrict' their properties that are of historical value against future development, and to transfer the unused development rights to other sites of the same land use category in the same statutory town plan area, i.e. the area covered by an Outline Zoning Plan. In exceptional cases, the unused development rights could also be transferred to a contiguous Outline Zoning Plan.

The basic principle behind this idea is relatively simple. Under such a TDR scheme, historical buildings may be declared as monuments, and become eligible 'sending sites'. The owners of such properties could apply to modify their land leases against future redevelopment and obtain a right or entitlement to the unused development rights in exchange for the deed restriction or lease modification. The entitlement would be calculated by deducting the existing GFA of a historical building from the maximum GFA permitted under the land lease, the Outline Zoning Plan or the Buildings Ordinance, whichever is the least. The unused GFA permissible could then be transferred to other 'receiving sites'. A certificate of entitlement specifying the amount of transferable GFA, or GFA credits to be more precise, would be issued to the owner. These GFA credits could then be used in approved receiving sites or sold to other owners or developers.

By obtaining or buying such GFA credits, owners or developers could apply to a designated authority to use such rights to build at a higher density ratio, or plot ratio, than the development controls would normally permit for a building development on the receiving site.

The size of the building development should be commensurate with the size of the site in order to prevent excessive building bulk and should not overload infrastructural facilities. Under the proposed scheme, receiving sites would not be allowed to receive too much GFA credits. The total GFA of a building development on a receiving site should not exceed 20 per cent of the maximum GFA normally permitted.

This shows a very clear appreciation of the issues plus a very positive method of resolving the problem in a way that is cost-neutral. It is worthy of serious consideration in the generation of solutions to this problem. If TDR cannot be made to work, for example, if the owner of the subject property did not own any other suitable 'receiving' development sites, then a non-in-situ land exchange, as used in the case of King Yin Lei on Stubbs Road, proved to be a suitable alternative mechanism.

King Yin Lei, built around 1937, is a rare surviving example of Chinese Renaissance-style that reflected the design and construction excellence in both Chinese and Western architecture. It was declared a monument on 11 July 2008 and restoration works were completed in December 2010. The building was subsequently included in Batch IV of the Revitalization Buildings Through Partnership Scheme, but as at the time of writing, the administrators of the scheme are still searching for an acceptable/feasible conservation plan that meets their criteria which include social value, financial viability, and management capability.

If the government is reluctant to buy out any future high quality building(s) that justify preservation, then this method of offering a non-in-situ land exchange could be considered again.

Since the Commissioner for Heritage's Office, which comes under the Development Bureau, launched the Revitalization Historic Buildings Through Partnership Scheme in 2008, four batches of government-owned buildings, 20 in total, have been advertised inviting proposals for revitalization in the form of social enterprises. Where justified, the government will provide financial support to the selected organizations, including one-off grants to cover the cost of major renovation of the buildings, in part or in full, nominal rent for the buildings; and one-off grants to meet the starting costs and operating deficits of the social enterprises for a maximum of two years of operation at a ceiling of \$5 million per enterprise, on the prerequisite that the social enterprise proposal is projected to become self-sustaining after this initial period. Full details of how this will be applied to the three successful projects in Batch IV, where the government has earmarked \$120 million to renovate the three historic buildings and a further \$9 million for subsidizing the initial operation of the projects can be reviewed at www.heritage.gov.hk.

A robust and effective conservation policy is an essential ingredient of Hong Kong's ambition to become 'Asia's World City' and the proposals being suggested are consistent with contemporary international thinking that market-based conservation may well be the best hope for reconciling future economic growth with the need to preserve both our natural and built heritage.

Notes

1. Paras 66 to 69 of the judgment in HCAL 19/2003 in the matter of the Town Planning Board and Society for the Protection of Harbour Ltd.
2. The Conservancy Association Achieving Conservation: A Positive Conservation Policy for Hong Kong — August 2000. www.conservancy.org.hk.
3. www.amo.gov.hk.
4. www.hab.gov.hk/en/publications_and-press-releases/consultation.htm.

APPENDICES

APPENDIX I

Public Notice and Declaration of 1 May 1841

“The following Notice is published for general information. But the necessary particulars not having yet been obtained regarding the portions of land already surveyed, the blanks relating to number and extent of allotments and period of sale, cannot yet be filled up.

“Arrangements having been made for the permanent occupation of the Island of Hong kong it has become necessary to declare the principles and conditions upon which allotments of land will be made, pending Her Majesty’s further pleasure.

“With a view to the reservation to the Crown of as extensive a control over the lands as may be compatible with the immediate progress of the establishment, it is now declared that the number of allotments to be disposed of from time to time will be regulated with due regard to the actual public wants.

“It will be a condition of each title that a building of a certain value, hereafter to be fixed, must be erected within a reasonable period of time on the allotments; and there will be a general reservation of all Her Majesty’s rights. Pending Her Majesty’s further pleasure the lands will be allotted according to the principles and practice of British laws upon the tenure of quit rent to the Crown.

“Each allotment to be put up at public auction at a certain upset rate of quit rent and to be disposed of to the highest bidder: but it is engaged upon the part of Her Majesty’s Government, that persons taking land upon these terms shall have the privilege of purchasing in freehold (if that tenure shall hereafter be offered by Her Majesty’s Government), or of continuing to hold upon the original quit rent, if that condition be better liked.

“All arrangements with natives for the cession of lands, in cultivation, or substantially built upon, to be made only through an officer deputed by the Government of the Island; and no title will be valid, and no occupancy respected, unless the person claiming shall hold under an instrument granted by the Government of the Island, of which due registry must be made in the Government Office.

“It is distinctly to be understood, that all natives, in the actual occupancy of lands, in cultivation, or substantially built upon, will be constrained to establish their rights,

to the satisfaction of the land officer, and to take out titles, and have the same duly registered.

“In order to accelerate the establishment, notice is hereby given, that a sale of town allotments, having a water frontage of yards, and running back yards, will take place at Macao on the instant, by which time, it is hoped, plans, exhibiting the water front of the town, will be prepared.

“Persons purchasing town lots will be entitled to purchase suburban or country lots of square acres each, and will be permitted, for the present, to choose their own sites, subject to the approval of the Government of the Island.

“No run of water to be diverted from its course without permission of the Government.

(Signed). “CHARLES ELLIOT.”

“Macao, 1st May, 1841.”

[Hongkong Gazette, 1st and 15th May, 1841.]

APPENDIX II

Public Notice of 7 June 1841 and Terms of Sale on 14 June 1841

On the 7th June, 1841, a Notice under the hand of Sir CHARLES ELLIOT was advertised of the proposed sale of the annual quit rents of 100 lots of land with water frontage and of 100 town or suburban lots, as follows:-

PUBLIC NOTICE OF 7TH JUNE, 1841.

“Notice is hereby given, that a sale of the annual quit rent of 100 lots of land having water frontage will take place at Hongkong, on Saturday, the 12th instant, as also of 100 town or suburban lots. The dimensions of the respective lots will be specified and defined on the spot by the Commanding Officer of Engineers, to whom parties are referred for further particulars.

“The titles will be delivered on payment of the rent, and the minimum value of the buildings to be erected on the lots, and the period allowed for erection, will also be then declared.

(Signed), CHARLES ELLIOT,
Chief Superintendent,

charged with the Government of Hongkong.

“Macao, 7th June, 1841.”

The sale advertised for the 12th was postponed to the 14th June, 1841, when it had been found impossible to put up the number of lots (200) as advertised in the Government Advertisement of the 7th of that month, and only 50 lots having a sea frontage of 100 feet each, or nearly so, were offered for sale, and it will be observed, from the following copy of the terms of that sale, that not only was the frontage not defined, but the depth from the sea to the road (the present Queen’s Road), was stated to necessarily vary considerably, and that the parties, (intending purchasers), would have the opportunity of observing the extent for themselves.

TERMS OF SALE ON 14TH JUNE, 1841

“1. Upon a careful examination of the ground, it has been found impossible to put up the number of lots named in the Government Advertisement of the 7th instant, and only 50 lots, having a sea frontage of 100 feet each, can at present be offered for sale. These lots will all be on the seaward side of the road. Lots on the land side of it, and hill and suburban lots in general, it will yet require some time to mark out.

“2. Each lot will have a sea frontage of 100 feet, nearly. The depth from the sea to the road will necessarily vary considerably. The actual extent of each lot as nearly as it has been possible to ascertain it will be declared on the ground. And parties will also have the opportunity of observing the extent for themselves.

“3. The biddings are to be for annual rate of quit rent, and shall be made in pounds sterling, the dollar in all payments to be computed at the rate of 4s. 4d. The upset price will be £10 for each lot, the biddings to advance by 10s.

GLOSSARY

It is a feature of Hong Kong business both inside and outside of the government to use initials as a form of abbreviation. Land administration is no exception and some of those more frequently used are listed below:

AP	authorized person, usually an architect but can also be an engineer or surveyor
ALS	authorized land surveyor
BA/BOO	Building Authority, sometimes referred to as Buildings Ordinance Office
BC	building covenant, requirement under lease conditions
BCL/BGL	Block Crown Lease, now Block Government Lease (BGL), the first title documents used in the New Territories
BC3	Building Conference 3, the Lands Department's forum for considering plans under DDH or MLP conditions
BSAP	Biodiversity Strategic Action Plan
CA	conservation area
CBD	Convention of Biological Diversity
CC	Certificate of Compliance, requirement under lease condition
CDA	Comprehensive Development Areas, a planning land use zoning
C of E	Certificate of Exemption, applies to small houses in the New Territories
CPD	Colony Principal Datum, benchmark for measuring height, see also HKPD
DLC	District Land Conference, the Lands Department's principal decision-making forum
DB	District Boards, local advisory bodies
DD	Demarcation District, refer to the New Territories land registration

DDH	design, disposition, and height clause in lease conditions
DLO	District Lands Officer, the government's land administrators at district level
DO	District Officer, the government's district administrator of Home Affairs Department
D of L	Director of Lands, head of the Lands Department which includes LAO, LACO and SMO
DPA	Development Permission Areas, planning in the New Territories
EIA	Environmental Impact Assessment
ExCo	Chief Executive in Council, highest decision-making body in the government
FBL	free building licence, part of Small House Policy
FSI	Financial Secretary Incorporated, used in cases of re-entry
GFA (gfa)	gross floor area, development potential of a lot as may be specified in lease conditions
GIC	government, institute, or community uses, a planning use zoning
GN	Government/Gazette Notification, formal government announcements published in the weekly Gazette, usually on Fridays
HKPD	Hong Kong Principal Datum, benchmark for measuring height, also see CPD
HKSAR	Hong Kong Special Administration Region
HKSARG	Hong Kong Special Administration Region government, since 1 July 1997
HYK	Heung Yee Kuk, a New Territories organization representing the indigenous villagers
JPN	Joint Practice Note
LACO	Legal Advisory and Conveyancing Office, the Lands Department's in-house solicitors
LAO	Land Administration Office of the Lands Department
LEE	Land Exchange Entitlement also known as Letter A/B
MLP	Master Layout Plan requirements either under lease conditions or planning permission
MoT	modification of tenancy, pre-dates STWs
NNCP	New Nature Conservation Policy
NT	The New Territories
NTEH	New Territories Exempt House, exempt from the Building Ordinance
NWNT	Northwestern New Territories
OP	occupation permit issued under the Buildings Ordinance
OZP	Outline Zoning Plans as published by the Town Planning Board and approved by ExCo

PR (pr)	plot ratio, the multiplier applied to the site area of a lot to arrive at the permitted GFA
PTG	private treaty grant
RC	Rural Committees representing villages in the New Territories
REDA	Real Estate Developers Association
R of W	rights-of-way usually forming part of the lease conditions
SARS	Severe Acute Respiratory Syndrome
SC's	special conditions
SDU	Sustainable Development Unit
SHA	Secretary for Home Affairs, the government's policy bureau for DO's
SHP	Small House Policy applying only in the New Territories
SMO	Survey and Mapping Office of the Lands Department
SSSI	Sites of Special Scientific Interests
STT	short-term tenancy as granted by DLOs
STW	short-term waiver as granted by DLOs
TIA	Traffic Impact Assessment
TDR	transfer of development rights
TDS	Territorial Development Strategy, the government planning studies
TPB	Town Planning Board, considers and approves OZP, rezoning, and planning applications
URA	Urban Renewal Authority, formerly Land Development Corporation LDC
VC	Valuation Committee/Conference, the Lands Department's forum for premium assessments
VR	village representative who serves on the RC

INDEX

Ordinances

- Adaptation of Laws (Crown Land) Ordinance No. 29 of 1998, 40
- Building Management Ordinance (Cap. 344), 61
- Building (Planning) Regulation 19(2) (Cap. 123), 91–92
 - First Schedule, 94
- Building (Private Streets and Access Roads) Regulations (Cap. 123), 92
- Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121), 23, 128, 129, 133
- Buildings Ordinance (Cap. 123), 65, 81, 108, 127
 - Section 14 (2), 95
 - Section 16 (1) (d), 95, 129
- Conveyancing and Property Ordinance 1984 (Cap. 219)
 - Section 13, 150
 - Section 14, 63
- Country Parks Ordinance (Cap. 208), 107, 156, 157
- Environmental Impact Assessment Ordinance (Cap. 499), 156, 157
- Foreshore and Seabed (Reclamations) Ordinance (Cap. 127), 52
- Government Leases Ordinance (Cap. 40), 15, 40
- Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap. 126), 40, 90, 107, 109, 116
- Hong Kong Airport (Control of Obstructions) Ordinance (Cap. 301), 65
- Hong Kong Reunification Ordinance No. 110 of 1997, 36
- Interpretations and General Clauses Ordinance (Cap. 1), 17, 68
- Intestates Estates Ordinance (Cap. 73), 143, 144
- Land Acquisition (Possessory Title) Ordinance (Cap. 130), 137
- Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545), 102–4
- Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice 2010, 102
- Land (Miscellaneous Provisions) (Cap. 28), 40, 105, 106
 - Government Land Regulations, 105
- Land Registration Ordinance (Cap. 128), 166–71
- Lands Resumption Ordinance (Cap. 124), 20, 40, 121, 161

- Land Survey Ordinance (Cap. 473) 137, 148, 149, 166
- Land Titles Ordinance (Cap. 585), 165–71
- Limitations Ordinance (Cap. 347) 93, 135, 136, 138
- Marine Parks Ordinance (Cap. 76), 107, 156
- New Territories (Land Court) Ordinance 1900, 16
- New Territories Land Exchange Entitlements (Redemption) Ordinance (Cap. 495), 122
- New Territories Land (Exemption) Ordinance (Cap. 452), 143–44
- New Territories Leases (Extension) Ordinance 1988 (Cap. 150), 17, 29, 35, 39, 56, 136
- New Territories Ordinance (Cap. 97)
 Section 8, 20
 Section 13, 24, 140, 148
 Section 15, 141, 142, 143
 Section 17, 143, 144
 Section 18, 143
- New Territories (Renewable Government Leases) Ordinance (Cap. 152), 17, 40, 136
- Partition Ordinance (Cap. 352), 142
- Probate and Administration Ordinance (Cap. 10), 144
- Protection of the Harbour Ordinance (Cap. 531), 50, 53–55
- Public Finance Ordinance (Cap. 2), 32
- Roads (Works, Use and Compensation) Ordinance (Cap. 370), 76, 79
- Town Planning Ordinance (Cap. 131), 64, 65, 94, 101, 111, 129, 157
 Section 4 (2), 101, 104
 Section 16, 68, 111

Cases

- Anderson Asphalt Ltd and Secretary for Justice* [2011] 1 HKC 246, 57
- Attorney General of Hong Kong v Ng Yuen Shui* [1983] AC 629, 33, 99–100
- Attorney General v CC Tse (Estate) Ltd.* [1982] HKLR 7 (CA), 95
- Attorney General v Fairfax Ltd.* [1997] HKLRD 243, 114
- Attorney General v Melhado Investment Ltd.* HKLR [1983] 327, 18, 19
- Best Sheen Development v Official Receiver* [2001] 1 HKLRD 866, 131
- Brisilver Investment Ltd, v Wong Fat Tso & Another* [1999] 3 HKC 567, 141
- Canadian Overseas Development Co. Ltd. v Attorney General* [1991] 1 HKC 288, 64
- Capital Rich Development Ltd. & Anor v Town Planning Board* [2007] 2 HKLRD 155, 99
- Capital Well Limited v Bond Star Development Limited* FACV 4/2005, 103–4
- Cavendish Property Development Ltd. v Attorney General* [1988] HKCFI 53, 110
- Chan Tin Shi v Li Tin Sung & others* [2003] HKEC 54, 136; [2006] HKLRD 185, 136
- Chau Tam Yuet and Director of Lands* [2013] 3 HKLRD 169, 57
- Cheung Chi Fai v Wan Hang Ping* (HC 193/2002), 131
- Cheung Yat Fuk v Tang Tak Hong & others* [2004] 7 HKCFAR 70, 137
- Chong Ping v Hung Ling Yuen* (HCA 6481/1998), 128
- Chow Chi Keung v China Light and Power Co. Ltd.* LTMR 1/82, 146
- Chung Miu Teck v Hang Tak Buddhist Hall Association Ltd.* [2001] 2 HKLRD 471 (CA), 131

- Chung Ping Kwan & Ors v Lam Island Development Co. Ltd.* [1996] 2 HKC 447, 136
- Chung Yeung Hung & Others v Law Man Nga & Another, Court of Appeal* Nos. 29 to 32 [1997] HKLRD 1022, 137
- Citiword Ltd. v Tai Ping Wing* [1995] 2 HKC 181, 114
- Crozet Ltd. v Attorney General* (unreported M.P. No. 409/1973), 57, 66, 94–95
- Director of Lands v Yin Shuen Enterprises Limited and Nam Chung Investment Company Limited* [2003] 2 HKLRD 399, 76, 98
- Discreet Limited and Secretary for Transport* (LDMR 14/2002), 129
- Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 67
- Fine Tower Association Ltd. v Town Planning Board* [2006] 2 HKC 507, 96–97
- Fineway Properties Limited and Sin Ho Yuen, the Administrator of the Estate of Sin Yat* [2010] 4 HKLRD 1 (CA), 102
- Fully Profit (Asia) Ltd. v Secretary for Justice for and on Behalf of the Director of Lands* [2011] 3 HKLRD 434, 82–83; (2013) 16 HKCFAR 13, 83, 89
- Gold Shine Investments Ltd. v Secretary for Justice* [2010] 1 HKC 212, 81
- Hang Wah Chong Investment Co. Ltd. v Attorney General* [1981] HKLR, 366; [1981] WLR 1141, 41, 56, 57, 59, 64, 67, 80, 96, 98, 100, 109
- Ho Sum Keung v Director of Lands* [2005] HKCU 680; [2006] HKCU 423, 124
- Humphreys Estate (Queens Gardens) Ltd. v Attorney General and Another* [1986] HKLR 669, 79
- Hung Hing & 66 Others and Director of Lands* CACV 118/2015, 57
- Intelligent House Ltd v Chan Tung Shing & Ors* [2008] 4 HKC 421, 102
- International Traders Limited v Town Planning Appeal Board & Anor* [2009] HKC 411, 99
- Jasmine Enterprises Ltd. v Chan Yuk Hon* [1998] 2 HKLRD 131, 82
- Jumbo Gold Investment Ltd. v Yuen Chong Leung & Others* [2000] 1 HKLRD 763, 115–16
- Jumbo King Ltd v Faithful Properties Ltd & Ors* (1999) 2 HKCFAR 279, 89
- Kan Kam Cho and Kan Chiu Nam* (2008) 11 HKCFAR 538, 138
- Koon Ping Leung v Director of Lands* [2012] 2 HKC 329, 130, 133
- Lai Hay On and Commissioner for Rating and Valuation* [2010] 3 HKLRD 286, 144
- Lam Kwok Leung v Attorney General* [1979] HKLR 145, 96
- Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735, 89
- Leung Lai Fong and Ho Sin Ying* (2009) 12 HKCFAR 581, 144
- Li Sui-Yuet v Attorney General* [1070] HKLR 428, 108–9
- Lok On Co. Ltd v Attorney General* [1986] HKLR 857 (CA), 109
- Loi Po Investment Co. Ltd. v Real Reach Co. Ltd.* [1986] HKLR 643, 85
- Mexx Consolidated (Far East) Ltd. v The Attorney General* [1987] HKLR 1210, 95, 110, 111, 112, 113
- Mount Cook Land Ltd. v Joint London Holdings Ltd. and Market Place Investments Ltd.* [2006] IP and CR DG14 (CA), 87–88

- Mutual Luck Investment v Yeung Chi Kuen, Others (No. 2)* [2002] 1 HKC 90, 136
- New Mercury Holding Corporation v Secretary for Justice* [2014] HKCU 953, 89
- Peter and Angel Wong Co. Ltd. v Silver Era Ltd.* [1995] 3 HKC 411, 114–15
- Polorace Investments Ltd. v Director of Lands* [1997] HKC 373, 66–67, 100
- Raider Limited v Secretary for Justice* [2003] 3 HKLRD 300, 112–13
- Real Honest Investment Ltd. v Attorney General* [1997] HKLRD 880, 115
- Regal Shining Ltd v Secretary for Justice* [2014] 6 HKC 265, 88–89; CACV 230/2014, 90
- Rita Enterprises Co. Ltd. v District Land Officer, Tai Po* [1996] 4 HKC 410, 101, 129
- Secan Ltd. v Attorney General* [1995] 2 HKLR 523, 59
- Secretary for Justice v Chan Ka Chik Tso* [2013] 2 HKC 203, 139
- Shun Shing Hing Investment Co. Ltd. v Attorney General* [1983] HKLR 432, 60
- Sung Mei Chi v Stone Target Ltd.* [1995] HKLY 777, 135
- Sze To Chun Keung v Kung Kwok Wai David & Another, Privy Council Appeal No. 30* [1997] HKLRD 885, 137
- Tam Mo Yin v Attorney General* [1996] HKC 379, 149, 150
- Tang Kai-Chung v Tang Chik-Shang* [1970] HKLR 276, 140
- The Home Restaurant Ltd. v Attorney General* [1987] HKLR 237, 20, 32, 35
- The Hong Kong and China Gas Co. Ltd. v Director of Lands* [1997] HKLRD 1291, 56, 100
- Tong Yau Yi Tong v Tang Mou Shou Tso* [1995] HKLY 788, 141
- Town Planning Board v Society for Protection of the Harbour Ltd.* [2004] 1 HKLRD 396, 53–55
- T. S. Cheng & Sons Ltd. v Attorney General* [1986] HKC 607, 84
- Unijet Limited v Yiu Kwan Hoi* (HCA 13637 of 1998), 136
- Wah Yick Enterprise Co. Ltd. v Building Authority* [1997] HKLRD 1177, 82, 131
- Watford Construction Co. v Secretary for New Territories* [1978] HKLR 410, 18
- Winfat Enterprises (HK) Co. Ltd. v Attorney General* [1983] HKLR 211; Attorney General [1984] HKLR 32; Privy Council [1988] 1 HKLR 5, 19, 32, 35
- Winfat Enterprises (HK) Ltd. v Attorney General* [1985] AC 733, 32, 35
- Wisename Ltd. v The Secretary for Justice* [1998] 1 HKLRD 71, 93
- Wong Bei-Nei v Attorney General* [1973] HKLR 582, 84
- Wong Chim-ying v Cheng Kam-win* [1991] 2 HKLR 253, 167, 171
- Wong Lai Man v Wong Tat Kwong & Anor* [2010] 3 HKC 328, 138, 149
- Wong Tak Yue v Kung Kwok Wai & Another, Court of Final Appeal* [1998] 1 HKLRD 241, 137–38
- Wu Koon Tai and Another v Wu Yau Loi* [1996] 3 HKC 559, 143
- Wu Wing Kuen v Leung Kwai Lin Cindy and Ip Foo Keung Michael & Others v Chan Pak Kai* [1999] 3 HKLRD 738, 150
- Ying Ho Co. Ltd. and Others v Secretary for Justice* [2005] HKLRD 135, 67, 101

Terms

- 300-foot rule, 132–33
 50-hectare quota, 27, 30–32, 71, 73
 5-year rule (unwritten), 75
- abbreviated tender system, 106
 Aberdeen, Lord, 3, 5, 6
 access arrangements, 91–92
 administrative law, 48, 56–57
 adverse
 possession, 135–39, 150, 169
 zoning, 96–99
 ‘affordable’ housing, 44, 45
 ‘after’ value, 76–77, 92
 agricultural
 land, 18, 19, 105, 106, 128, 148,
 157–58
 to building land, 73
 Agricultural, Fisheries and Conservation
 Department (AFCD), 157, 158,
 161
 Airport Height Limit, 65
 amortization, 38
 ancillary office, 112–13
animus possidendi, 137
 Annex III of the Joint Declaration,
 27–35, 37, 71, 130, 133
 Antiquities and Monuments Office
 (AMO), 161
 Application List, 42, 43
 Areas of Special Control, 94, 95
 assignment, 128
 auction, 3–5, 8, 9, 12, 22, 25, 42
 Audit Commission, 131, 134
 authorized land surveyor (ALS), 148
 authorized person (AP), 61, 127, 128
- Basic Law 1990, 34–35, 40, 47, 130, 133
 ‘basic terms’, 79
 ‘before’ value, 76–77, 81, 92
 Biodiversity Strategic Action Plan (BSAP),
 160, 161
 Block Crown Lease, 17
 Block Government Lease, 17, 18, 19, 20,
 106, 148, 158
 benchmarks, 68
 breach of lease conditions, 107, 108, 110,
 112, 115–16
- British Parliament, 11
 boundary disputes, 148–49
 Boundary Street, 17
 ‘bring into operation’, 61
 ‘brownfield’ sites, 51, 55
 Building Authority/Department, 22, 23,
 61, 66, 70, 91, 92, 108, 115, 128
 Building Conference, 66
 building covenant (BC), 4, 58, 60–61, 75,
 109
 building height, 58, 65–66, 67, 86
 building land, 20, 122
 built heritage conservation, 161–64
 burials, 147
- Capital Works Reserve Fund, 28, 32, 45
 car parking, 58
 Carrian Group, 33
 Census and Statistics Department, 50
 Certificate of Compliance (CC), 61,
 62–63, 131
 Certificate of Exemption, 101, 128–29
 Chamberlain, Joseph, 14, 15
chap chiu, 17
 Chief Executive, 43, 47, 108, 161
 2014 Policy Address, 43
 Chief Executive in Council (ExCo), 59,
 102, 108, 161
China Mail, 4
 Chinese customary law, 17, 24, 135, 140,
 141–42, 143, 144
 Chinese custom or customary right, 140,
 142, 147, 169
chi tsai, 16, 17
 Civic Exchange, 134, 159
 Colony Principal Datum (CPD), 68
 columbaria, 24
 columbarium use, 88–90
 commercial/residential use, 58
 Commissioner for Heritage, 164
 Commissioner of Administrative
 Complaints, 40
 Commissioner of Rating and Valuation
 (CRV), 30
 Commitment Transfer Register, 124, 126
 Compensation Board, 121
 Comprehensive Development Areas
 (CDA), 101, 104
 conditions of exchange, 37, 39, 60, 75

- conditions of extension, 73
- conditions of grant, 60, 92, 150
- conditions of regrant, 60, 75
- Conservancy Association, 157, 164
- Conservation Area (CA), 157, 158, 161
- Consumer Council, 171
- contemporaneous exchange, 73–75
- Convention of Biological Diversity (CBD), 156, 159, 160, 161
- Convention of Chuenpi, 3
- Country and Marine Parks Authority/Board, 107, 159
- Country Parks (CP), 44, 55, 107, 159, 160
 - CP enclaves, 129, 159, 160
- Crown Lands and Survey Office, 23, 94
- Crown Land Permit, 137
- Crown lease(s), 13, 62, 98
- Crown rent, 5, 17

- deed of easement, 78
- deed of mutual covenant (DMC), 61–62, 170
- deed of variation, 72
- Demarcation Districts (DD), 17, 149, 150
- Density Control Areas, 94, 95
- Dent, 5
- deprivation of property rights, 97–99
- derogation of grant, 93, 96
- Design, Disposition and Height Clause (DDH), 58, 66–68, 86, 100
- Development Bureau, 77, 164
- Development Permission Area (DPA), 99, 132
- Director
 - of Agriculture, Fisheries and Conservation, 107
 - of Audit, 40, 41, 131, 134
 - of Census and Statistics, 50
 - of Environmental Protection, 156
 - of Highways, 62 63
 - of Lands, 36, 41, 47, 48, 56, 57, 59, 62, 66, 67, 70, 82, 88 100, 108, 130
 - of Public Works, 17
- Discovery Bay, 41
- Disneyland, 49, 59
- District Council, 76
- District Land Conference (DLC), 79
- District Lands Officer (DLO), 48, 60, 62, 63, 64, 66, 71, 74, 76, 78, 83, 90, 101, 106, 107, 108, 110, 115, 117, 128, 129, 130, 131
- District Officers (DO), 24, 25
- Duddell, George, 13
- dwelling house, 84

- easements, 78
- economic background, 47
- Elliot, Charles, 3–6, 10
- empirical premium, 77
- encroachment, the principle of, 139
- Environmental Protection Department (EPD)
 - ProPECC PN 5/93, 129
- equitable interest, 63
- established village, 27, 127, 131, 132
- estoppel, 114–16
- European-type residence, 85, 86
- exchange
 - contemporaneous, 73–75
 - ratio, 73–74
 - small houses, 128
- Executive Council (ExCo), 9, 36, 59, 102
- ‘existing bulk’, 91, 92, 94
- extension
 - of leases not containing a right of renewal in the urban areas, 27, 29
 - of special purpose leases, 29, 38–39
- extension letter/condition of extension, 73

- Facebook, 159
- Financial Secretary Incorporated (FSI), 108
- Financial Times*, 124
- forbearance fees, 110
- free building licence (FBL), 128, 131
- freehold, 4, 5, 13
- full offer of terms, 79
- fung shui*, 146–47

- garden lots/land, 73
- general conditions, 81, 88
- geomancers, 147
- Government, Institute and Community facilities (GIC facilities), 62

- Gladstone, 11
 godown, 110–1
 Government/Gazette Notifications (GNs),
 7, 12, 22, 23, 24, 25, 105, 151
 GN 1409, 23
 GN 364 of 1934, 22, 23, 118
 GN 365 of 1906, 22, 23
 GN 570 of 1924, 23
 GN 720, 123
 Government Land Regulations, 105
 government lease, 60, 85, 87
 government rent, 17, 20, 27
 ground rent, 44, 45
 Governor, 9, 17, 19, 20, 36
 graves, 145–47
 Green Belt (GB), 44, 55, 101, 129
 gross floor area (gfa), 41, 58, 59, 64, 65,
 70, 162–63
- height limits, 86
 heritage conservation, 161–64
 Heung Yee Kuk (HYK), 133, 143, 160,
 171
 ‘high land price policy’, 12, 45
 Home Ownership Scheme, 44
 Hong Kong 2030—Planning and Vision
 Strategy, 50, 51
 Hong Kong Charter, 9, 13
 Hong Kong Disneyland, 49, 59
 Hong Kong Housing Authority (HKHA),
 27, 107
 Hong Kong Housing Society, 107
 Hong Kong Institute of Certified Public
 Accountants, 38
 Hong Kong International Airport, 52
 Hong Kong Island, 3, 16, 24, 26, 51
 Hong Kong Letters Patent, 36
 Hong Kong Polytechnic University, 148
 Hong Kong Principal Datum (HKPD),
 68, 69
 Hong Kong Special Administrative Region
 (HKSAR), 27, 28, 34, 36, 48, 133
 Hong Kong Special Administrative
 Region Government (HKSARG),
 30, 32, 34, 35, 36, 37, 38, 39, 40,
 47
 houses, 82–83, 131
 Housing Department’s General Squatter
 Structure Survey, 106
- improvements of rights-of-way on
 government land to private lots,
 92–93
 incapable of reasonable separate
 alienation, 74
 Independent Commission Against
 Corruption (ICAC), 41
 Indian government, 16
 indigenous villagers, 125, 127, 128, 129,
 130, 131, 146, 147
 industrial/godown user, 110, 111
 ancillary offices, 113, 114
 building—special waiver, 75–76
 Industrial/Office (I/O), 113
 in-situ exchanges, 38, 74
 international agreements in domestic law,
 32
- Jardine, Matheson & Co. Ltd, 5, 8
 Joint Declaration, 15, 17, 26–28, 29, 32,
 33, 34, 35, 37, 71, 130, 133
 Joint Practice Notes (JPNs), 58, 65, 68,
 70
 judicial review (JR), 32, 56, 57, 67, 96,
 99
- Kai Tak Airport, 55, 65
 kerosene stores, 39
 Kowloon Canton Railway Corporation
 (KCRC), 156
 Kowloon Peninsula, 14, 16, 24, 26
 Kowloon Walled City, The, 20–22
- Land and Road Inspector, 7
 land assembly for redevelopment, 101–4
 Land Boundary Survey Committee, 68
 Land Commission
 Report 1886–87, 13, 14
 Sino-British 1985, 28, 30, 32
 Land Committee, 10, 12
 Land Courts, 16, 17, 21
 Land Disposal Programme, 31, 42–44
 tenders, 42, 43, 57, 58–59
 land exchange, 39, 40, 73–75, 83, 128
 entitlements (Letters A/B), 121–26
 ratios, 73–74, 122
 Land Fund, 30, 32
 land management, 105–7
 land needs, 50–51

- Land Officer, 5, 6, 7, 10, 11, 17, 24
- Land Officer's Consent Scheme, 62
- Land Registry, 3, 72, 107, 108, 126, 138, 149, 165, 171
- land revenue reform, 44–45
- Lands Administration Office/Lands Department
 - land disposal, 57–58
 - land sale programme, 42–44
 - missions and vision statements, 57
 - performance pledges, 57, 63, 64–65, 72, 130
- Practice Notes
 - APSS No. 2/94, 75
 - No. 1/1987, 63
 - No. 3/2000(A), 83
 - No. 4/2000(B), 59
 - No. 8/2000, 63
 - No. 9/2000, 79, 80
 - No. 2/2001, 114
 - No. 4/2001, 79
 - No. 6/2001, 70
 - No. 5/2002, 65
 - No. 2/2003, 111
 - No. 3/2003, 70
 - No. 5/2003, 61, 70
 - No. 6/2003, 58
 - No. 1/2004, 65
 - No. 1/2006, 78
 - No. 5/2006, 78
 - No. 1/2007, 42
 - No. 4/2007, 72
 - No. 5/2007, 78
 - No. 6/2007, 88
 - No. 7/2007, 58
 - No. 3/2008, 78
 - No. 5/2008, 75
 - No. 3/2009, 78
 - No. 4/2009, 78
 - No. 1/2010, 2010A, 2010B, 75
 - No. 2/2014, 111
 - No. 3/2014, 67
 - No. 4/2014, 65
 - No. 2/2015, 70
- landscaping and environmental requirements, 58
- Lands Tribunal, 102–4, 119, 129, 146
- 'Land Supply and the Housing Market', 43–44
- Land Titles Ordinance, 165–71
 - caution against conversion, 168
 - full conversion, 168
 - incubation period, 166, 167
 - indefeasibility of LTO land, 169–70
 - long leases, 170
 - preparing for the changeover, 170, 171
 - unwritten equities, 167–68
- Law Reform Commission, 138–39, 169
- lease conditions, 60–68
 - covered by franchises or operating licences, 37, 39
 - enforcement and control, 90, 107–11
 - extensions, 29–30, 73
 - for kerosene stores, 39
 - for petrol filling stations, 37, 39
 - for recreational leases, 37, 38
 - for special purposes, 38–39, 61
 - interpretation, 81, 89
 - modification, 37, 71–75, 77
 - premium, 28, 40, 76–78
 - technical, 75, 77
- Legal Advisory and Conveyancing Office (LACO), 48, 61, 62, 115
- legal estate, 63
- Legislative Council, 9, 14
- legitimate expectation, 33, 99–101
- letter of approval, 106
- Letters A/B, 121–26
 - exchange ratio, 122
 - Chart W, 123
 - modified, 124
 - operative date, 124
 - tenders, 123
- Letters Patent, 36
- licence, 78, 80, 106
- limitation period, 114, 135–39
- logistics, 110–11
- Macao, 3, 6, 8, 11, 51
- Marine Lot No. 1, 13, 14, 60
- marine lots, 4, 6, 52
- Mass Transit Railway Corporation (MTRC), 48, 59
- Master Layout Plan (MLP), 41, 58, 60, 63–65, 67
- maximum building heights, 65–66

- memorandum of re-entry, 107
- messages and tenements, 84
- Mid-Levels, 94, 114, 162
- misrepresentation, 132
- missing documents, 150–51
- missing lots, 149–50
- modification letter/deed of variation, 72
- modification of tenancy (MoT), 106

- Newcastle, Duke of, 14
- new grant lots, 22–24, 149
- New Kowloon, 17, 20
- new leases, 37
- New Nature Conservation Policy (NNCP), 158, 159, 161
- New Territories Exempted Houses (NTEHs), 129
- New Territories Land Court 1900–1905, 16, 17, 21
- New Town Development Areas, 121
 - new towns, 23, 50, 121, 125
- ‘Nina Tower’s’ case, 67
- non-industrial uses, 58
- non-in-situ exchange, 74, 159, 163
- non-profit-making organizations, 59
- non-renewable leases, 15, 27, 29, 34, 35, 37–40, 75
- no objection letter, 72–73
- Noon Day Gun, 8
- North West New Territories (NWNT), 19

- occupation permit (OP), 61, 62, 115, 128
- Ocean Terminal, 38
- offensive trade clause, 14, 17–18, 19, 86–88
- old schedule lots, 17, 27, 34
- open market value, 42
- open storage, 19
- other use (business) (OU(B)), 51, 77, 114
- Outline Zoning Plan (OZP), 58, 68, 71, 74, 94, 95, 96, 97, 99, 104, 132, 159, 161

- Pacific Place, 33
- Palmerston, Lord, 7
- Peak area, 94
- Pearl River Delta (PRD), 49, 51
- Peking Convention of 1898, 16, 19, 20

- People’s Republic of China (PRC), 22, 26, 28, 34, 49, 155
- petrol filling stations, 37, 39, 58, 59
- Planning Department, 50–51, 70, 99, 104, 132
- plot ratio (pr), 51, 66, 67, 71, 86, 94
 - for Sites Straddling Land Use Zones, 104
- Possession Point, 3
- Pottinger, Sir Henry, 3, 5, 6, 7, 9, 10, 11
- premium assessments, 41, 59, 60, 71, 73, 74, 75, 76–78, 79, 80, 128
 - appeals, 79
 - arbitration, 78
 - empirical, 77
- private dwelling house, 84
- private residence, 114–15
- private treaty grants (PTGs), 59, 128
- Privy Council, 19, 33, 99–100, 114, 115, 136, 137
- Public-Private Partnerships (PPP), 158–59
- ‘public purpose’, 156, 161, 162
- public utility companies, 30, 37, 59, 61

- Qing dynasty, 143

- rateable value 3%, 15, 27, 29, 33, 34, 37, 39, 44, 58
- rate and range clause, 85–86, 114
- reclamations, 51–55
- recreational
 - facilities, 58–59
 - leases, 37, 38, 61
- re-entry, 107–10, 116–17
- rent
 - annual, 4, 5, 9, 10, 11–13, 27, 29–30, 34, 37, 58, 130
 - Crown, 17
 - government, 17, 20, 30
 - ‘reserve list’, 33
- residence(s), 85, 114–15
- Rifleman’s Bolt*, 68, 69
- right-of-way, 91–93
- roads, 77
- Robinson, Sir Hercules G. R., 14
- Rural Committee, 76

- secondary evidence, 150, 151
- Second World War, 23, 44, 94, 150

- Secretary for Development, 47
 Secretary for Home Affairs (SHA), 141, 142
 Secretary for Housing, Planning and Lands, 134
 Secretary for Planning and Lands, 162
 Secretary for Planning, Environment and Lands, 39
 Secretary of State for the Colonies, 9, 10, 11, 12, 14–15
 Severe Acute Respiratory Syndrome (SARS), 44
 short-term tenancies (STT), 27, 29, 39, 106
 short-term waiver (STW), 106
 Sino-British Joint Declaration, 15, 17, 26–34, 35, 36
 Sir Y. K. Kan Committee Report, 122
 site coverage, 58, 65, 86
 Sites of Special Scientific Interest (SSSI), 157, 161
 slope maintenance section, 106–7
 Small House Policy (SHP), 127–34
 small houses, 28, 35, 129
 Society for the Protection of the Harbour Ltd. (SPH), 53–55
South China Morning Post (SCMP), 147
 Special Committee on Compensation and Betterment, 96
 special conditions (SC), 81
 special height limit, 65–66
 special purpose leases–extension, 27, 29, 38–39, 61, 100
 special waiver for conversion of an entire existing industrial building, 75–76
 statutory declaration, 131
 St John's Cathedral, 13
 'subject to contract', 80
 succession, 143–44
 Supreme Court, 143
 Survey and Mapping Office, 17, 48, 68, 69, 148
 Survey General's Office, 12
 sustainable development, 42, 76
 Territorial Development Strategy (TDS), 50
tongs, 140–42, 161
 Town Planning Board (TPB), 53–54, 68, 96, 99, 101, 104, 113, 129
 transfer of development rights, 162–63
 Treaty of Nanking, 3, 9, 13
 tree felling, 58
 Trustees of the Church of England, 13
tsos, 140–42, 161
ultra vires, 3, 20, 99
 upset price, 4
 urban renewal, 48
 vesting, 90, 107, 108–10
 vesting notice, 108
 Victoria Harbour, 53, 55
 villa, 84, 114
 residence, 84
 village environs, 128, 132
 zone, 101, 129, 131
 waiver/acquiescence by the government
 in respect of restrictive covenants
 in lease conditions, 114–17
 waiver fee, 75, 106, 111
 warehouse, 110–11
 Wesley-Smith, Peter, 22
 West Rail, 48
 Wharf Holdings Limited, 38
 years' purchase, 5, 33