



Protection of the Harbour (Amendment) Bill 2024

The Law Society's Submissions

1. The Protection of the Harbour (Amendment) Bill 2024 (the “**Bill**”) was gazetted on 6 December 2024. The Law Society has reviewed the Bill and the legislative proposals as set out in the Legislative Council Brief [DEVB \(PL-CR\) 1-10/84](#) dated 5 December 2024 (the “**LegCo Brief**”) and took note of the [LC Paper No. CB\(1\)841/2024\(03\)](#) and [LC Paper No. CB\(1\)841/2024\(04\)](#). The Law Society provides the following comments on the Bill.

THE BILL

General Comments

2. Paragraph 26 of the LegCo Brief states that the legislative amendments to The Protection of the Harbour Ordinance (Cap. 531) (“**Ordinance**”) are to “*improve harbourfront connectivity, enhance harbourfront areas for public enjoyment, and strengthen harbour functions, and not for reclamation to provide land for sale or housing, commercial or industrial developments, etc.*”
3. The existing Ordinance prescribes the “*presumption against reclamation*” in the Victoria Harbour (the “**Presumption**”). The Bill provides three criteria to rebut the Presumption:

“3A. **Criteria for rebutting presumption against reclamation**
The presumption against reclamation may only be rebutted for a harbour reclamation if—

 - (a) *there is an overriding public need for the reclamation and the need is compelling and present;*
 - (b) *there is no reasonable alternative to the reclamation; and*
 - (c) *the extent of the reclamation does not go beyond the minimum of that which is required by the overriding public need.*”
(hereinafter referred to as the “**Test**”)

4. The Bill also provides:
 - (a) statutory procedures to ascertain whether the Test is fulfilled by requiring an Overriding Public Need Assessment (“OPNA”) report to be made to set out the assessment to rebut the Presumption; and
 - (b) a streamlined procedure for
 - (i) small-scale harbour enhancement reclamations (“HER”); and
 - (ii) non-permanent reclamations (“NPR”) which may be exempted from the Presumption.
5. The LegCo Brief emphasises the anticipated public benefits through facilitating HER and NPR.
6. We, in general, welcome the introduction of the Test and the statutory stipulation for public consultation on non-exempted reclamations, which would cover, inter alia, large-scale reclamations. On the other hand, the proposed HER and NPR are not required to pass the Test. This constitutes a derogation from the statutory principle to protect and preserve the Victoria Harbour as a special public asset and a natural heritage of Hong Kong people (the “Principle”) (Para.15(a) of the LegCo Brief), and a deviation from the Presumption. Such derogation needs to be carefully justified, and its extent needs to be minimized.

Specific Comments

(A) Reasonable alternatives and minimising the proposed reclamations for HER and NPR

7. For the HER and NPR, although they will not be required to fulfil the Test for reclamation, in the interest of the public, we suggest that the 2nd and the 3rd components of the Test (in para. 3 above) should be preserved but adjusted to be more moderate. For example, for HER and NPR, (a) viable options and (b) ways to minimise reclamation should be considered.
8. Applicants who apply for exemptions for HER and NPR shall be required to include, and the Financial Secretary (“FS”) shall consider, information about what other options are available, if any, and the reasons for rejecting the options [ss. 3J(3) and 3L(2)(b) for HER and ss. 3M(3) and ss.3O(2) for NPR]. The economic, environmental and social impact of the proposed reclamations and the alternatives have to be assessed, and the reasons for choosing reclamation over other alternatives have to be considered in deciding whether the proposed reclamation is in the public interest. While the above considerations are not as stringent as having “*no reasonable alternative to the proposed reclamation*”, it should at least be shown that alternatives have been reasonably considered before reclaiming the harbour. This serves to encourage applicants to consider alternatives.
9. We also suggest applicants who apply for HER and NPR to be required to furnish their plan on how they are to minimize reclamation, and to provide an express reference on the

hectares of land to be reclaimed. While the requirement would not be as stringent as criteria 3 of the Test, i.e. *the extent of the proposed reclamation should not go beyond the minimum of that which is required by the overriding need*, efforts should be taken to minimising the proposed reclaimed area even if it does not go beyond the limit of 0.8 or 3 hectares (i.e. without taking 0.8 or 3 hectares for granted) and the proposed reclaimed area should be proportional to the anticipated public benefits.

(B) Minimise adverse impact of the proposed reclamation

10. In Annex A to LC Paper No. CB(1)841/2024(03): Summary of the fine-tuned proposed legislative amendments on “Factors for consideration”, one of the conditions the FS has to satisfy before exercising the discretion to grant the NPR exemption is that “(4) *the impact on the harbour by the proposed reclamation is minimized as far as reasonably practicable*”.
11. We welcome this condition. However, the first issue is that this condition has not been accurately reflected in the Bill. In s.3O(2) of the Bill, the reference to adverse impact on the harbour is only embedded in the consideration of public interest, i.e. *whether it is in the public interest to carry out the reclamation, having regard to all relevant matters including --- the adverse impact on the harbour caused by the reclamation (s.3O(2)(c)(ii))*. The above is a much more lenient formulation than requiring FS to be satisfied that the adverse impact is “*minimized as far as reasonably practicable*”, for example by considering the proposed mitigation measures proposed by the exemption applicants. We suggest that this condition (4) as stated in the above para. 10 be added as s.3O(2)(d).
12. Also, condition (4) (as stated above) is only proposed for NPR but not HER applicants. There is no obvious justification as to why HER applicants are not required to supply information about “*the adverse impact on the harbour caused by the reclamation and the proposed mitigation measures to minimize the impact*” (s.3M(3)(f) for NPR) as the NPR applicants do. Similarly, the requirement of minimising adverse impact as far as reasonably practicable should be added to HER. While the adverse impact of HER and NPR may be different, both should be minimised.

(C) Excessive and cumulative effect and the shape of the reclamation areas

13. Public concerns have been expressed over the excessive and cumulative effect of small-scale or non-permanent work, and the Government was asked to “*set a reasonable time interval in between projects, as well as limit the number of ongoing works in the vicinity at the same time, in order to alleviate accumulated impact of the works on the harbour*”¹.
14. A similar view was shared by some LegCo members, who stated in LC Paper No. CB(1)841/2024(04) that (i) for HER, “*a limit should be imposed on the total number of harbour enhancement projects that could be carried out in the entire Harbour, and “the shape of the reclamation areas should be regulated to prevent them from extending excessively to the centre of the Harbour*” (para. 11 thereto) and (ii) for NPR, “*a limit on*

¹ [Public Engagement Exercise - Executive Summary \(published by the Development Bureau\)](#)(Para. 2.5.5)

“the number and area of exempted non-permanent reclamations that could be carried out concurrently within a designated area should be stipulated” (para. 15 thereto).

15. The views in para. 14 are echoed here, and the issue remains in the Bill. We invite the Development Bureau to reconsider imposing the limit on the reclamations to HER and NPR.
16. Even if a limit cannot be imposed on the number and area or shape in specified terms, **these factors in general terms should be added to the list of the considerations** for FS in deciding whether the proposed reclamations warrant the HER or NPR exemptions.
17. In the Bill, one of the factors to be considered by FS when granting exemptions to HER is *“the relationship of the reclamation with any other reclamation in respect of which an HER exemption has previously been granted”* (s.3L(2)(b)(ii)). The concern expressed on the cumulative effect is not necessarily due to its relation with other reclamations. The reclamation works may be carried out independently but may still be overly detrimental to the integrity of the harbour by reason of their cumulative change to the harbour.
18. For HER, we suggest adding an express provision regarding the cumulative effect of the area and the shape of the harbour. For example, *“the impacts (including the anticipated impacts) of those reclamations on the harbour, including the cumulative effects, such as in respect of the shape and the total area, either individually or in combination, of all permanent and non-permanent reclamations at any relevant time [in comparison to status of the harbour at the time of enactment of the Ordinance]”* or any amendment to a similar effect, and to avoid a significant cumulative change to the harbour in the long run.
19. For NPR, a similar provision should be added. Even though they are non-permanent reclamation, 8 years is not a short period and 3 hectares is not a small area. The cumulative effect of NPR projects is unpredictable and should be clearly and expressly included as a public interest consideration, to avoid overcrowding the harbourfront at any given moment. Adding this consideration is not as restrictive as setting a limit on the number of projects, but it serves the purpose of public interest.

(D) Public interest and private development projects

20. Public concerns have been raised regarding private development projects which may take advantage of the HER exemption for building structures such as “viewing deck”, “harbour pool” or “landing steps” which are listed under the proposed Schedule 2 as eligible for HER exemption². In LC Paper No. CB(1)841/2024(04), the Administration simply claimed that it had *no intention* to exclude private development projects because one of the

²For example, see the article by Liber Research Community, https://liber-research.com/weakening_protection_of_habour_ordinance/ - including “整個修例框架卻「無差別豁免」公共和私人工程。至於為何私人海濱工程無須證明具「凌駕性公眾需要」，及為何值得為私人海濱工程推翻「不可填海推定」，文件卻無可任何解釋。”“...但「法定清單」卻包涵明顯沒有逼切性且龐大公眾需要的項目...事實上，過往亦有不少私人發展商申請在維港海濱的項目興建登岸台階等設施...至於為何私人海濱工程無須證明具「凌駕性公眾需要」，及為何值得為私人海濱工程推翻「不可填海推定」”

objectives of the Bill was to remove barriers to HER (Para 13 thereto). As challenged by the public, it is not apparent why private development projects should also be exempted from the requirement of showing overriding public needs, if they are appropriating the “*special public asset and a natural heritage of Hong Kong people*” for private gains. The legislative purpose of enhancing harbourfront areas for public enjoyment will not be served.

21. Even if some public space is reserved or required in private developments so that it is not a fully private project, the public benefits may well be limited in practice. As advised in a report by Civic Exchange dated 18 November 2021 on “*Private Development and Management of Public Open Spaces on the Victoria Harbour Waterfront*” (“**Report**”), the above private developments encompassing public benefits are not uncommon, and are subject to weaknesses and criticisms :

*“There have been several well-documented problems with [Public Open Spaces in Private Developments] in the past, such as developers using or renting out POSPDs for commercial purposes, managing public usage in a highly restrictive manner, making public access deliberately difficult, and substandard maintenance.”*³

*“[Public Open Spaces in Private Developments] waterfront promenades tend to provide basic passive space which is often restrictively managed...Active frontages are quite limited even in areas intended for tourism. Different stretches of promenade have inconsistent opening hours, which can impede connectivity at night.”*⁴

22. Therefore, effective safeguards must be put in place to avoid abuse of the HER exemption mechanism. As noted in the CFA Judgment handed down in 2003 (FACV 14/2003), the harbour is recognised as “*not merely as a public asset but as a “special” one...This reinforces its character as a “public” asset. It is a community asset and as such, is to be enjoyed by the people of Hong Kong.*” (Para. 33 of the CFA case).
23. It is particularly concerning that the HER is not open to any public consultation and public engagement. It should be noted that while the scale of HER is relatively small, the effect is permanent and irrevocable. It is suggested that public consultation should at least be added for HER as it involves permanent damage to this special public asset. The removal of the overriding public need requirement would already lower the threshold for HER reclamations and the Administration should show convincing justification for omitting any public consultation. This serves to partly address the concern against private development project as well, if the Administration insists on refusing to impose any limit on private development projects.
24. The suggestion of public consultation is in line with the legislative goal to enhance the harbour for public enjoyment, as well as the recommendations in the Civic Exchange report which calls for public engagement at an early stage to demonstrate transparency and understand community aspirations, particularly if there is any private sector involvement

³ P.4 of the Executive Summary of the Report

⁴ P.5 of the Executive Summary of the Report

and impact on public access to the waterfront. There is also an express warning that “*It cannot be assumed that consultation with district councillors only will be sufficient*”.

(E) Extension of NPR

25. Under the Bill, it is possible for FS to grant more than one extension of the permitted construction period under exceptional circumstances, and such an extension is not counted towards the 8-year limit (s.3T). It is suggested that FS should only grant the extension in the public interest and this requirement should be explicitly added.
26. Similarly, under s.3S(2), it is suggested to add the requirement for public interest should also be included in s.3S(2), i.e. “*It is reasonable and in the public interest to grant the extension.*”
27. We also agree to the requirement for NPRs to submit progress report annually and upon completion of works.

(F) Conclusion

28. In conclusion, it may be insightful to reaffirm the significance and the essence of the Principle and the Presumption as enunciated in the CFA Judgment⁵.

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

...

Reclamation would result in permanent destruction and irreversible loss of what should be protected and preserved under the statutory principle. ... [Para. 37 of the CFA Judgment]”

29. The adverse impact of reclamations, regardless of the size and duration, should not be underestimated. While the Administration claimed in the Brief that “*no irrevocable damage to the harbour area would be caused*” in NPR after reinstation (paragraph 16), various reclamation/waterfront projects in the past have been criticised by the public and notably environmental groups for issues such as environmental pollution during the construction works and construction of a scale inconsistent with the approval granted. It should not be easily assumed that NPR does not bring irrevocable damage or that the small scale of each individual reclamation does not bring much prejudice. The harbour is, after all, a natural heritage to be “*inherited as a legacy from previous generations and is to be transmitted from generation to generation*” (Para. 33 of the CFA Judgment).

⁵ [Town Planning Board v Society for the Protection of the Harbour Ltd \[FACV 14/2003\]](#)

30. It should also be borne in mind that it is given this unique and special status of the harbour and the irreversible nature of reclamations that the CFA decided that the required public need should “*go far beyond something which is “nice to have”, desirable, preferable or beneficial*” (Para. 47 of the CFA Judgment). While the proposed HER and NPR exemptions may be a compromise in providing public benefits, they fall short of the protection and preservation required under the Principle. Thus, any derogation should be scrutinised and minimised.

The Law Society of Hong Kong
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