

Executive Summary

Direct Investigation Government Measures to Protect Country Park Enclaves

Background and Ambit of Investigation

In June 2010, a number of complaints were received from the public against the development works on a country park enclave (“enclave”) at Sai Kung East Country Park (the “Sai Wan Incident”). The complainants alleged that Government had failed to prepare a statutory plan for the site, thereby creating a loophole for unauthorised development that caused damage to the land. Against this background, The Ombudsman initiated a direct investigation to examine whether:

- (1) Government had taken adequate measures to protect enclaves; and
- (2) the Administration had taken appropriate follow-up actions in respect of the Sai Wan Incident.

Country Park Enclaves

2. Enclaves are villages and agricultural lands adjacent to or surrounded by country parks. The Agriculture, Fisheries and Conservation Department (“AFCD”) considers that it is possible for villages and agricultural lands to blend in with the natural environment of country parks. In the designation of country parks, Government should not adversely affect the legitimate rights of villagers and landowners (including the right to build small houses) so as to avoid objections and compensation claims. When designating sites as country parks, therefore, AFCD has *hitherto* usually excluded villages and agricultural lands as well as some adjacent Government lands as the buffer area from the boundaries of country parks. The areas excluded thus become enclaves and there are a total of 77 such enclaves in Hong Kong.

Protection of Enclaves

3. Where necessary, the Administration can protect or conserve enclaves by incorporating them into country parks or through preparation of statutory plans for land planning control.

4. Statutory plans include Development Permission Area Plans (“DPAPs”) and Outline Zoning Plans (“OZPs”).

5. A DPAP is effective for a period of three years and may be extended for up to one year. Before the expiry of such period or extended period, the DPAP must be replaced by an OZP. Under the DPAP, developments other than those permitted by the Town Planning Board (“TPB”) or those generally permitted under the DPAP or “existing uses” are unauthorised uses and subject to enforcement action by the Planning Department (“Plan D”).

6. An OZP shows the “uses always permitted” and “other uses that require permission from TPB” within the planning area. All public officers and public bodies must follow the stipulations in OZPs in discharging their duties.

Government Discussions and Actions on Protection of Enclaves

7. In 1991, Government started internal discussions on protection of enclaves. Major ensuing events included:

Preliminary Discussions

- (1) In June 1994, the Environmental Protection Department (“EPD”) wrote to the Planning, Environment and Lands Branch regarding a residential and golf course development project on an enclave, stating that the departments concerned should protect the site through land planning control. In February 1996, EPD wrote to the Branch again to seek “a much clearer definition of the conservation status of (the) areas”.
- (2) Between 1996 and 1997, the Lands Department (“Lands D”) wrote to the Branch three times, echoing the views of EPD.
- (3) In August 1997, the Planning, Environment and Lands Bureau¹ (“PELB”) explained in its reply to Lands D that “Government policy is to extend the coverage of statutory plans to all areas in Hong Kong not now so covered. Implementing the policy is, as always, a

¹ The Planning, Environment and Lands Branch was renamed the Planning, Environment and Lands Bureau in 1997.

function of resources and time.”

Views of Policy Bureau

- (4) In February 1998, PELB requested Plan D to prepare statutory plans for those enclaves identified as priority sites and to set the priorities and timeframe for the preparation of statutory plans. Plan D wrote to PELB and other departments concerned in the same month, stating that “there is a need to prepare statutory plans to protect (12 country park enclaves) due to various considerations”, but it had to prioritise its work due to resource constraints. Sai Wan was not among the 12 enclaves.
- (5) In June 1998, Plan D amended its proposal: the statutory plans for 2 enclaves should be prepared first, while the remaining 10 enclaves would be protected by “other means”, such as incorporation into country parks.
- (6) In the same month, PELB indicated to Plan D that “it is not feasible to include the sites in country parks ... the option to resume private lands for conservation purpose (has been ruled out) ... there simply is no other feasible means besides statutory plans.” PELB requested Plan D to provide the timeframe for preparing statutory plans for the 12 enclaves. In August 1998, Plan D informed PELB and the departments concerned that their suggestions were under consideration.

Decision of Policy Bureau

- (7) In June 1999, Plan D indicated its wish to defer the completion of statutory plans in order to take into account the result of a Study on Wetland Compensation.
- (8) In the same month, PELB pointed out to Plan D that the Study on Wetland Compensation would not shed light on the protection of enclaves and that Plan D should give priority to 5 of the 12 selected enclaves with higher conservation value in its preparation of DPAPs.

- (9) In July, Plan D informed PELB that the statutory plan of 1 of the 5 enclaves had already been gazetted, while the plans of the remaining 4 were expected to be gazetted before 2002.

Subsequent Discussions

- (10) In April 2000, the Planning and Lands Bureau (“PLB”) sent a memorandum to the Environment and Food Bureau (“EFB”)², inviting the latter to attend an Inter-departmental Working Group meeting to review the compensation offered to people affected by development projects and planning control. In the memorandum, PLB stated that “putting aside the merits or otherwise of the decision taken by our predecessors, it is incumbent upon us to find the best possible means of protecting these enclaves.”
- (11) At the Working Group meeting held in the same month, the participants, including representatives from PLB, EFB, Plan D and AFCD, agreed that “a comprehensive approach to conservation was necessary and resumption should be the last resort in view of the financial implications ...”.

8. Up to May 2010 (i.e. just before the Sai Wan Incident), Plan D had prepared statutory plans for 8 of the 12 enclaves mentioned above, while 4 enclaves were not yet covered by any statutory plans. Of the 5 special priority sites cited in **para. 7(9)**, Plan D had prepared statutory plans for 2 sites.

The Sai Wan Incident

9. The actions taken by the Administration in respect of the Sai Wan Incident are detailed in the **Appendix**.

10. In view of the immediate development pressure on Sai Wan, the Secretary for Development, head of the Development Bureau³ (“DEVB”), directed TPB to designate Sai

² PELB was renamed PLB following the restructuring of Government in January 2000. The Environment Branch, formerly under PELB, was taken over by the newly established EFB.

³ The Government restructured its policy bureaux in July 2002 and July 2007. The function concerning “planning” formerly under PLB was taken over by the Housing, Planning and Lands Bureau (“HPLB”) and then by the Development Bureau (“DEVB”) established at those times.

Wan as a Development Permission Area on 26 July 2010.

Subsequent Measures

11. In October 2010, the Chief Executive announced in his Policy Address that Plan D and AFCD would protect those enclaves not yet covered by statutory plans according to the local situations, either by incorporating them into country parks or through statutory planning control.

12. In May 2011, the Country and Marine Parks Board (“CMPB”), advisers to the Director of Agriculture, Fisheries and Conservation, agreed to revise the criteria for designating country parks. Under the new criteria, the Administration will no longer automatically exclude private lands from the boundaries of country parks. Instead, it will determine whether the sites concerned should be incorporated into country parks after considering such factors as conservation value, geographical location, size of existing human settlements and the development pressure faced by the site.

Our Comments

13. As can be seen from the above, between 1998 and 2000, the relevant policy bureaux showed great concern about the issue of enclaves (**paras. 7(4), (6) and (8)**). After numerous discussions, PELB directed Plan D in June 1999 to give special priority to 5 enclaves with higher conservation value, out of the 12 selected for priority protection, in the preparation of DPAPs (**para. 7 (8)**).

14. At the Working Group meeting in April 2000, the policy bureaux and departments concerned agreed that the Administration should adopt “a comprehensive approach to conservation” (**para. 7(11)**). Since then, the policy bureaux responsible for “environment” and “planning” (including the present Environment Bureau (“ENB”)⁴ and DEVB) had only cared about the development of what was called the New Nature Conservation Policy, paying no further attention to the lack of expeditious follow-up action for the protection of enclaves, which was originally considered a priority task. As a result, before the Sai Wan Incident in 2010, Plan D had not yet prepared statutory plans for 4 of the 12 sites mentioned above (including 3 of the 5 sites assessed to deserve special priority action) (**para. 8**).

⁴ *The Government restructured its policy bureaux in July 2002 and July 2007. The function concerning “environment” formerly under EFB was taken over by the Environment, Transport and Works Bureau (“ETWB”) and then by ENB established at those times.*

15. This Office considered that the “comprehensive conservation policy” proposed in 2000 was just a preliminary concept. Without a specific new policy or measure for implementation, it should not be interpreted to mean that the original decision of giving special priority to 5 enclaves could be shelved.

16. The policy bureaux for environment protection (including ENB and its predecessors EFB and ETWB) have a responsibility to protect enclaves at the policy level. Nevertheless, between 2000 and 2010, the bureaux had failed to formulate other effective measures to protect the enclaves in need of priority action.

17. Up till the Sai Wan Incident, Plan D had completed statutory plans for only 2 of the 5 special priority sites. Its performance was far from satisfactory. The policy bureaux (including DEVB and its predecessors PLB and HPLB) overseeing Plan D had also failed to discharge their responsibility of supervising the Department’s action on the assigned tasks.

Handling of Sai Wan Incident

18. The Administration’s previous decision not to include Sai Wan in the 12 enclaves that needed priority protection was made according to the land condition at that time. It is difficult to assess now whether the judgement then was correct.

19. It was a relief that on learning about the allegedly unauthorised development works at Sai Wan, the departments concerned took timely and effective remedial measures: DEVB and Plan D took special action to deal with the emergency situation and quickly designated Sai Wan as a Development Permission Area, while Lands D, EPD and AFCD prosecuted the offenders, who were subsequently convicted by the Court (see **Appendix**). The Administration’s attitude in dealing with the incident should be commended.

Recommendations

20. In the light of **paras. 11** and **12** above, The Ombudsman recommends that:

- (a) **DEVB** and **ENB** should urge their executive departments to, as directed by the Chief Executive, expeditiously prepare statutory plans for those enclaves that are still unprotected or to incorporate them into country parks, in order to ensure that all enclaves are properly protected; and

- (b) **AFC**D should consider incorporating private lands that have conservation value into country parks in accordance with the revised CMPB criteria.

Office of The Ombudsman
September 2011

Handling of Sai Wan Incident by the Administration
Sequence of Events

Date	Events
2010	
1 June	AFCD received complaints from the public about unauthorised excavation works at Sai Wan.
2 June	AFCD inspection found that the subject site fell outside the boundary of the country park and was not subject to the Country Parks Ordinance.
3–4 June	AFCD enquired of the District Lands Office/Sai Kung (“DLO/SK”) of Lands D and learnt that DLO/SK had not given any permission to carry out development or redevelopment works on the private land in question.
9 June	DLO/SK issued a letter to the owners of the land, informing them that any construction works must be preceded by a development plan submitted to the relevant Government departments for consideration.
18 June	AFCD found that the adjacent Government land appeared to have been occupied and so notified the Drainage Services Department, EPD and DLO/SK for follow-up actions.
22 June	DLO/SK conducted a site inspection to ascertain the coverage of the works.
29 June	DLO/SK warned the engineering consultants that excavation was not allowed on the Government land without prior approval.
8 July	DLO/SK completed its survey report, confirming that the excavation concerned more than 5,000 square metres of Government land.
15 July	DLO/SK erected notices on the Government land to warn the public against unauthorised excavation or occupation of the land. It also enclosed part of the Government land that was surrounded by the private land.
15 and 19 July	EPD conducted inspections at the subject site and found no contravention of the pollution control law.
21 July	EPD telephoned the person-in-charge of the site, reminding him to take precautionary measures against overflow of mud water in case of heavy rain.
22 July to 6 August	DLO/SK stationed staff at the subject site to guard against unauthorised excavation and occupation of Government land.
23 July	EPD found that the water in the streams near the subject site had become murky.

26 July	The Secretary for Development directed TPB to designate Sai Wan as a Development Permission Area.
26 July	EPD wrote to the person-in-charge of the site, requiring him to take more effective mitigation measures to prevent discharge of mud water into the nearby streams and pollution of the streams.
30 July and 16 August	EPD conducted inspections at the subject site and found no contravention of the pollution control law.
6 August	Plan D gazetted a DPAP in respect of Sai Wan.
16 December	EPD prosecuted the person-in-charge of the site for violating the Water Pollution Control Ordinance. He was convicted and fined by the Court.
29 December	Lands D prosecuted 5 workers for violating the Land (Miscellaneous Provisions) Ordinance by conducting unauthorised excavation works on Government land. All five were convicted and fined by the Court.
2011	
6 January	AFCD prosecuted 7 workers for violating the Country Parks Ordinance. They were charged for driving or bringing a vehicle into a country park, or aiding, abetting counselling or procuring another person into bringing a vehicle into a country park without the consent of the Country and Marine Parks Authority. All seven were convicted and fined by the Court.