



# Rethinking the Small House Policy

by Lisa Hopkinson and Mandy Lao Man Lei



# **Rethinking the Small House Policy**

**By Lisa Hopkinson and Mandy Lao Man Lei**

**September 2003**

## ► Foreword

The Small House Policy (SHP) is a relic of a bygone era, when Hong Kong's rural areas were highly inaccessible and still largely populated by farming communities. Thirty years on, Hong Kong's New Territories (NT) have been completely altered by population growth, industrialisation, and new town development, and the communities the SHP was designed to preserve are in many cases unrecognizable. Yet there has not yet been a review of the fundamental objectives of the SHP, or an evaluation of its success.

This research grew out of an interest in the linkages between land use, conservation and planning and the way in which the SHP seemed to conflict with government policies in these areas. While the study thus initially focussed on land use, planning and environmental issues it quickly became apparent that any attempt to address these areas would also need to encompass the legal, political and historical issues, since the SHP touches upon every aspect of public administration. A research into the SHP is, in effect, a research into what makes Hong Kong tick.

The Administration is unwilling to risk confrontation with villagers on the one hand, while trying to appease critics and head off legal challenges to the policy on the other. It is little wonder that the SHP has become a political football for successive administrations, and a review originally intended to last a year has stretched on for over eight. Yet, the conflict between the SHP and the interests of the wider community has never been greater. As land in the NT is put under increasing pressure by conflicting demands for development and conservation, maintaining the status quo and extending suburban sprawl appears a poor use of Hong Kong's scarce land resources.

Much of the history of the policy is unwritten or confidential and the authors are indebted to those present and former administrators who filled in many of the gaps through interviews. We are also extremely grateful to all the people who provided views or information for the paper, on what is a highly controversial but fascinating issue. This paper, though lengthy, is really just a snapshot of the issues, with an attempt to present the information as objectively as possible. It is hoped that it provides enough background and information to help decision-makers debate the issues thoroughly and rationally.

Lisa Hopkinson  
Head of Research,  
Civic Exchange



▶ <b>Executive Summary</b> .....	<b>2-4</b>
<b>1. Introduction</b> .....	<b>5</b>
<b>2. History and Background</b> .....	<b>6-7</b>
2.1 The Pre-1972 Situation and Origin of the Small House Policy .....	6-7
2.2 The Introduction of the Policy .....	7
<b>3. The Small House Policy</b> .....	<b>8-12</b>
3.1 What is a Small House? .....	8
3.2 Where can Small Houses be Built? .....	8-9
3.3 Different Types of Small House Grants .....	9
3.4 Restriction on Alienation .....	10
3.5 Verifying Eligibility .....	10-11
3.6 Administrative Framework for the Small House Policy .....	11
3.7 Legal Framework for the Small House Policy .....	12
<b>4. Benefits of the Small House Policy</b> .....	<b>13</b>
<b>5. Problems with the Existing Small House Policy</b> .....	<b>14-27</b>
5.1 Sustainability/Land Use .....	14-15
5.2 Speculative Development .....	15-16
5.3 Corruption .....	16
5.4 Planning Issues .....	16-19
5.5 Illegal Occupation of Government Land .....	19
5.6 Processing Time for Small House Applications .....	20
5.7 Costs to Government .....	20-21
5.8 Heritage and Landscape Issues - Insensitive Design .....	21
5.9 Environmental Problems .....	22-23
5.10 Inequality .....	24-27
5.11 Change of Community Structure .....	27
<b>6. The Ongoing Government Review</b> .....	<b>28-29</b>
<b>7. The Rights of New Territories Indigenous Villagers</b> .....	<b>30-33</b>
<b>8. Policy Objectives</b> .....	<b>34</b>
<b>9. Proposed Modifications to the Small House Policy and Implications</b> .....	<b>35-42</b>
9.1 Do-nothing Option - Maintain Status Quo .....	35
9.2 Restrict Development to Remaining Village Area Only .....	35-36
9.3 Permanent Moratorium on Resale to Outsiders .....	36-37
9.4 Reduction in Space Entitlement .....	38
9.5 Multi-storey Buildings .....	38-40
9.6 Centralised Village Development .....	40-41
9.7 Other Facilitating Measures .....	41-42
<b>10. Repeal of the Small House Policy and Implications</b> .....	<b>43-46</b>
10.1 Compensation by Cash/Coupon .....	43-45
10.2 Compensation by Provision of Public Housing .....	45-46
<b>11. Conclusions and Recommendations</b> .....	<b>47-49</b>
<b>Acknowledgements</b> .....	<b>50</b>
<b>Glossary</b> .....	<b>51-52</b>
<b>Appendices</b> .....	<b>53-59</b>
Appendix 1: Town Planning Board Interim Criteria for Consideration of Application for New Territories Exempted House / Small House in New Territories .....	53
Appendix 2: Corruption Cases Investigated and Persons Charged for Involvement in Small House Cases (1998-March 2003) .....	54
Appendix 3: A Short History of New Territories Land Administration .....	55-59



## ► Executive Summary

Under the Small House Policy (SHP), introduced in 1972, every indigenous villager (as defined by the Government) is entitled to apply to build a small house on private land, or on government land at a concessionary premium, within their village. Provided the small house conforms with certain criteria, the owner is exempted from the need to submit formal building plans to Government, enabling the houses to be built very quickly with a significant saving in professional fees.

The SHP was originally conceived as a temporary measure to address housing needs in the New Territories, while a more comprehensive development plan for the rural NT could be developed. That policy has yet to appear, and the SHP remains in place, though it has been modified. With changing social and economic conditions the original justifications for the SHP have become outdated, and there are numerous problems associated with its implementation. These include:

- Fundamental unsustainability - the SHP commitment is open-ended. Each year the number of new potential applicants grows as more male villagers reach the age of 18. The area of land allocated for future small houses has been conservatively predicted to be fully developed within 10 years, and maybe even earlier.
- Discriminatory nature - it may contravene all three human rights instruments of the United Nations (UN) that apply to Hong Kong and has been criticised by various UN Committees as discriminatory. While specifically exempted from the Sex Discrimination Ordinance, it certainly breaches the spirit of that ordinance. However extending the SHP to women would exacerbate many of the other problems.
- The numerous ways it can be and has been abused - the Audit Commission highlighted the problem of villagers selling their houses as soon as they were able, thus cashing in on their eligibility for concessionary grants. The policy is also vulnerable to corruption.
- Ad hoc planning - the lack of detailed layout plans encourages haphazard village development and suburban sprawl.
- Loss of traditional vernacular and character of villages
- Drainage and water quality problems

The Government is fully aware of the problems and a confidential official review has been ongoing since 1995 to determine the future of the policy. In the preparation of this paper, however, it was found that very basic information, such as the amount of land available for small house development, or the number of eligible indigenous villagers, has still not been gathered.

This paper is an attempt to present all available information about the SHP as a stimulus to informed discussion: what statutory and administrative measures the SHP consists of, how it has changed since 1972, the benefits and problems associated with the policy and the implications of various options to amend or repeal the policy.

One of the key issues in any amendment or repeal of the policy is whether the building of a small house is an indigenous villagers' right that is protected by Hong Kong's Basic Law or which the Government is obliged to compensate for. This is a matter for the courts to decide though a superficial analysis of the evidence suggests that the SHP does not entitle indigenous villagers or confer a legitimate expectation of the grant of a small house. There is thus little grounds for compensation for villagers who have not already applied for a small house grant. However, the continuation of the policy has led many indigenous villagers to believe the SHP is an inalienable right, and the Government needs to deal with these political expectations.



Any review of the SHP needs to consider whether the objectives of the policy are still valid, how they can best be met and what the future policy objective for rural villages in the NT should be. In some cases certain societal objectives, such as conservation, need to override the SHP. It is thus essential that the SHP is not reviewed in isolation from other government policies and should be part of an over-arching review of rural land use and planning, including open storage, port back-up uses, agricultural policy and conservation.

Various options were considered for amending the policy including:

- Do-nothing - maintain status quo
- Restricting development to the remaining village areas only - with no new applications once village areas have reached capacity
- A permanent moratorium on resale of small houses - to prevent speculative development
- A reduction in space entitlement to 700 sq ft
- Multi-storey buildings in certain villages near the urban areas
- Centralised village development - villages with sufficient land would be used as central facilities for the development of small houses for all villagers within the same district

Other facilitating measures, comprising existing legal and administrative tools the Government could deploy to improve the administration of the policy, are also discussed. The most important of these include better planning controls, particularly detailed village layout plans, more effective controls on drainage and sewerage, and more effective heritage protection.

At some point, however, the Government has to return to the original plan: to replace the SHP with a comprehensive long-term rural land use plan.

If the Government felt obliged to offer compensation for repealing the policy for political reasons two general options for compensation were considered: compensation by cash/coupons and compensation in the form of public housing. Given the possibly huge sums of compensation involved, the political implications are significant: there will likely be many objections from the community, including possible legal challenges. This will be further aggravated if the Government decides to provide compensation to females to avoid legal challenge under the Sex Discrimination Ordinance.

The various implications associated with the options noted above are summarised in the Table overleaf. The list of options shows that none are entirely satisfactory, which suggests a composite solution may be best. A way forward for the Government would be to develop an inclusive public process for key stakeholders to establish individual and societal objectives and develop the optimal combination of options which best meets those objectives. Any policy decision that is made should be done through open and public debate based on complete and accurate information. The longer the Government delays making a decision on the SHP the harder the problem will be to deal with in the future.

# Rethinking the SHP

## Summary of the Implications of Different Policy Options for Amending or Compensating for the SHP

Policy Option	Existing IV rights	Legal barriers	Administrative Ease	Costs/Revenue to Government	Planning/Landuse	Environment/Heritage protection	Political acceptability
<b>Do Nothing</b>	■	◆◆(★)	■	▲	◆◆	◆◆	▲▲ (●) ◆◆ (non ●)
<b>Amending the SHP</b>							
Restrict development to remaining village area only	■ (short term) ◆◆ (long term)	■	◆◆ (short term) ▲▲ (long term)	◆ (short term) ▲ (long term)	◆◆	?	◆◆
Permanent moratorium on resale	■	■	▲▲	▲▲ (admin costs) ◆◆ (premium)	▲	▲	◆◆ (●) ▲▲ (non ●)
Reduction in space entitlement	◆	■	▲	◆	▲	▲	?
Multi storey buildings	■	◆	◆◆	◆	?	?	▲▲
Centralised village development	▲	?	◆◆	◆◆	?	?	▲
<b>Facilitating Measures</b>							
Better Planning Controls	■	■	◆	◆	▲▲	▲▲	◆
Better Environmental controls	■	■	◆	◆	▲	▲▲	◆
Better Heritage protection	■	■	◆	◆	▲▲	▲▲	? or ▲
Implement Audit recommendations	■	■	◆	◆	▲	▲	◆
<b>Compensation for the SHP</b>							
Cash/coupon compensation	■ (short term) ◆◆ (long term)	◆◆	◆◆	◆◆	?	?	▲▲ (●) ◆◆ (non ●)
Public housing compensation	◆◆ (long term)	◆◆	◆	◆ (short term)	▲	▲	◆◆ (●)

**Key** ★ = Possible conflict with existing ordinances  
 ◆ = slight negative effect  
 ◆◆ = indigenous villager  
 ◆◆ = significant negative effect  
 ■ = neutral/no change  
 ▲ = slight positive effect  
 ▲▲ = significant positive effect  
 ? = undetermined or unclear - could improve and/or worsen

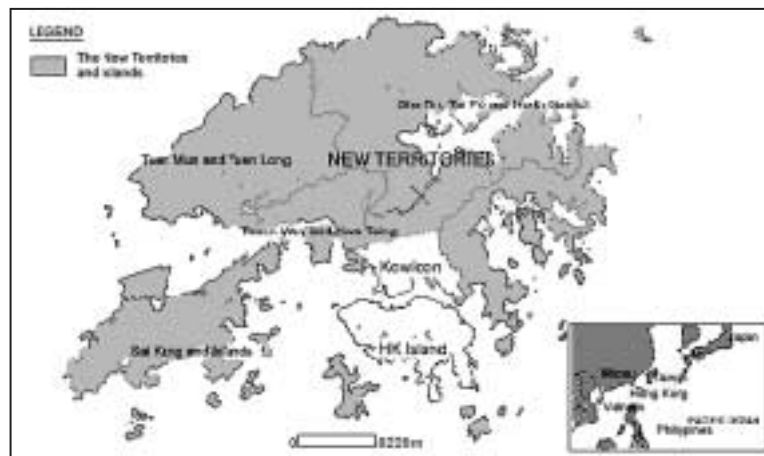


## ► Introduction

The Small House Policy (SHP) introduced in 1972, was formulated to "allow an indigenous villager to apply for permission to erect for himself during his lifetime a small house on a suitable site within his own village".<sup>1</sup> Under this policy, an indigenous male villager who is over 18 years and is descended through the male line from a resident in 1898 of a recognised village<sup>2</sup> is entitled to apply for one concessionary grant<sup>3</sup> during his lifetime to build one small house<sup>4</sup>, the so-called 'ding' (literally, male) right. Under this administrative land policy a small house can be applied for on any private land, or, in case the applicant has no land, on government land at a concessionary premium, provided that the site is within the so-called village environs (see Box 1) of a recognised village.<sup>5</sup> The rights of indigenous villagers are further enshrined in Article 40 of the Basic Law (see Section 7).

The stated aims of the SHP were to simplify rules, making it easier for a villager to apply for permission to erect for himself during his lifetime a small house within his own village, and making it possible for houses in rural areas of the New Territories (NT)<sup>6</sup> to be constructed to a higher health standard.<sup>7</sup> The policy was intended to regularise the traditional practices whereby the head of the family was allowed to build for himself and for each of his sons upon marriage a house within the village area, either on his own agricultural land or on village building lots acquired through auctions restricted to villagers of a particular village.<sup>8</sup>

**Figure 1: Map of Hong Kong and the New Territories**



Adapted from Planning Dept., HKSAR Government Maps

With changing social and economic conditions the original justifications for the SHP have become outdated. It is clear that the original objectives for the policy are no longer valid and there are numerous problems associated with its implementation. Government is fully aware of the problems and a confidential official review has been ongoing since 1995 to determine the future of the policy. However, while minor adjustments have been made to the policy over the years, to date no long-term solutions have been officially proposed. The purpose of this report is to examine the problems associated with the policy, the possible solutions that have been suggested and the implications of those solutions. It is hoped that this will contribute to a rational and informed debate among decision makers on the future of the policy.

- 1 Lands Department (2001), "The New Territories Small House Policy - How to Apply for a Small House Grant", page 7. <http://www.info.gov.hk/landsd/public/public.htm>
- 2 A 'recognised village' is one which is shown on the list of recognised villages approved by the Director of Lands. The Colonial Government officially recognised 636 villages in the New Territories (NT) excluding New Kowloon. Note: there are many villages in Hong Kong Island, Kowloon, Sai Kung Town, Peng Chau and Cheung Chau that are not 'recognised' even though settlements existed in these areas in 1898. In these non-recognised villages New Territories Exempted Houses (NTEH), which look similar to small houses, may be built by non-indigenous villagers although a full premium is charged by the Government, which is not the case with small houses.
- 3 "Small House Grant" refers to any Private Treaty Grant (PTG) (on Government land), Building Licence (on private land) or Exchange issued under the Small House Policy (SHP) since its implementation in December 1972.
- 4 Small houses may be built in existing village areas within 300 ft of the edge of the last house built before December 1972 or within village type development zones in Development Permission Areas (DPA) or Outline Zoning Plans (OZP). NT small houses may not exceed three storeys or 27 feet in height and 700 sq ft in the roofed over area.
- 5 Lai, W. C. and Ho, K. O. (2001). "Small is beautiful: a probit analysis of development control of small houses in Hong Kong,". *Environment and Planning B: Planning and Design* 2001, Vol. 28, pp.611-622.
- 6 The New Territories, leased to Britain from China in 1898 for a period of 99 years, comprises the area north of Boundary Street in Kowloon to the Shenzhen River, plus 260 islands. See Figure 1.
- 7 Bray, D. (1972). Letter to Heung Yee Kuk from D. C. Bray, District Commissioner, NT. 29 November 1972.
- 8 Bray, D., personal communication, May 2003.



## ► History and Background

### 2.1 The Pre-1972 Situation and Origin of the Small House Policy<sup>9</sup>

Up until World War II the custom in NT villages was that sons were able to build themselves village houses on their land in accordance with the orderly layout of the village. Daughters married outside the village and relied on their husbands to build for them. No building could take place on agricultural land without Government permission and villagers who did not own land suitable for building had to buy Government land. However by the early 1970s, it had become increasingly difficult for villagers to build houses in their villages. Government procedures at this time prohibited the granting of (Crown) land for village houses to those who needed it as the land had to be sold by public auction. In theory, anybody could bid but in practice, due to strong village traditions, "it was unthinkable that anyone not of the village clan could build a house in a village".<sup>10</sup> The rising price of land also meant that by the 1960's land cost more than the average villager could afford.<sup>11</sup> To get around these problems District Officers held public auctions in remote villages at dawn to prevent outsiders from taking part, or issued 'temporary structure' permits which could be issued without auction but gave no title to the land.

At the request of the Heung Yee Kuk<sup>12</sup> a review of the procedures for building village houses was started in 1971 and an agreement in principle was reached in March 1972.<sup>13</sup> Coming as it did after the 1967 riots, it has been suggested by numerous authors that the SHP was partly designed by the Administration to gain the support of the village elite to enable the former to retain control over the potentially influential rural population. However this is refuted by the original architect of the policy, Denis Bray<sup>14</sup>, and there is nothing in any official papers of the time to suggest it was anything but a well-meaning social policy.

The two main issues that the Colonial Government had to address in drawing up the policy were the provision of land for building and the definition of a village type house.<sup>15</sup> The need for the latter arose out of concern that large-scale development within the existing village and on any newly acquired land would cause the village to lose its character. The policy that was approved by the Executive Council later that year consisted of the Private Treaty Grant and the Free Building License.<sup>16</sup>

#### **Private Treaty Grant (PTG)**

Government agreed that auctions should not be required but that the only people who could be granted land by private treaty would be genuine villagers - a term that the Administration defined as referring to male descendents of villagers who were inhabitants of the village when the New Territories lease was signed in 1898.<sup>17</sup> The PTG provided indigenous villagers with a once in a lifetime entitlement to apply for a concessionary grant of land on which they could build a village house, subject to restrictions on size and location.

#### **Free Building License<sup>18</sup>**

Due to the lack of authorised architects and contractors in the NT it was decided to exempt village type houses from the Buildings Ordinance. The then District Commissioner for the NT, Denis Bray, suggested a definition of the 'small house' by fixing the maximum dimensions (700 square feet (sq ft) and 25 feet (ft) high) to allow a two-storey structure with a cock-loft (a penthouse in the pitched roof).<sup>19</sup> There were also

9 Bray, D. (2001), *Hong Kong Metamorphosis*, Hong Kong University Press.

10 Ibid.

11 Gibbs T. J. M. (2001), "The Small House Policy and its Impact on the Identity of a New Territories Village in the Hong Kong SAR." Thesis submitted for MA degree in International Studies in Vernacular Architecture, Oxford Brookes University.

12 Literally the Rural Congress. The principal representative body of the rural community in dealing with Government, established in 1926 in response to a taxation proposal for houses erected on farmland in the New Territories.

13 A list of demands from the Heung Yee Kuk was drawn up at a meeting of the entire body of village representatives from across the NT, numbering over 1000, and presented to Mr Denis Bray, the then District Commissioner, New Territories, in 1971. The main concerns were the government policy on land resumption and the freezing of land (i.e. a temporary prohibition on development) for development in layout areas. The main demands of the villagers were for private treaty grants and measures to deal with the frozen land. Bray, D., personal communication, May 2003.

14 Bray, D., personal communication, May 2003.

15 Gibbs (2001) see footnote 11.

16 ExCo Memorandum [XCR(72)219], 14 November 1972. *Policy with regard to Small Houses in Rural Areas of the NT*. This confidential memorandum had still not been released to the public as this report went to press.

17 Gibbs (2001), see footnote 11.

18 Free, in the sense that no land premium was charged for indigenous villagers who constructed small houses on their own private land within the VE, though a small administrative charge was levied.

19 Bray, D., personal communication, May 2003.

simple requirements for septic tanks. There were no general rules about the location of the houses but they were to be within the environs of the villages. As long as these maximum dimensions were not exceeded a Free Building Licence would be issued, allowing work to proceed without the employment of an Authorised Person (AP)<sup>20</sup> or approval of building plans by the Buildings Department.

## 2.2 The Introduction of the Policy

In November 1972 the then Governor-in-Council approved a Small House Policy for the rural areas of the NT. The same month Denis Bray, the then District Commissioner, New Territories, made a speech in the Legislative Council outlining the benefits of the policy as follows.<sup>21</sup>

1. Applications from villagers to build a new house in their own village would be processed more quickly;
2. More sophisticated health standards would be required;
3. No more permits for so-called temporary structures [for residential purposes] would be issued;
4. Owners of existing domestic temporary structures on private agricultural land and permit-holders for domestic structures authorised by Crown land permit or licence for at least 10 years would be allowed to redevelop their structures into small houses;
5. The areas in which small houses in the NT may be erected would be defined on a more logical basis and be based on uniform criteria throughout the NT.

In his speech Mr Bray noted:

*"Town dwellers looking for weekend bungalow sites or a way into the new towns will be disappointed in this policy... This policy is for people who need to live in the country now".<sup>22</sup>*

The SHP was worked out and implemented in about six weeks. At the time it was emphasised to the Heung Yee Kuk that *"if the scheme was abused, we should scrap the whole thing."*<sup>23</sup> A working group was set up between the Administration and the Heung Yee Kuk for ongoing implementation of the Policy.

A number of amendments have been made to the policy in the past 30 years. In 1974 it was agreed to allow the villagers to build 2.5 storeys, which was further extended to three storeys (not exceeding 25 feet) by 1975. This enabled a house with a flat roof to be built. Because this design of house was easier to build it facilitated the expansion of village housing, and prompted the construction of speculative properties to be sold to outsiders. This in turn led to an additional clause being added in 1976<sup>24</sup> so that villagers could not sell to outsiders within five years of obtaining a Certificate of Compliance (C of C).<sup>25</sup> In an amendment made in 1979, this non-assignment clause was permitted to be waived as long as the full market premium was paid to the Government by the owner. Following a report by the Audit Commission in 1986, a three-year moratorium on the removal of the non-alienation restriction was imposed in December 1987.

As the demand for village housing grew a Village Expansion Area (VEA) scheme was introduced in 1981 to resume private land outside the village environs.<sup>26</sup> In 1995, the Government initiated a review of the policy in response to criticisms by a United Nations (UN) Committee (See Section 5.10). New VEA projects have been held in abeyance since 1999 pending the SHP Review, which is still ongoing (see Section 6).<sup>27</sup> A second report by the Audit Commission in 2002 highlighted repeated abuses of the policy and the Government is currently in discussion with the Heung Yee Kuk over implementation of audit's recommendations.

20 As defined in the Buildings Ordinance Cap 123. Generally a registered architect or surveyor.

21 Hansard (1972). Meeting to discuss the Buildings Ordinance (Application to the NT) (Amendment) regulations 1972. 29 November 1972.

22 It is interesting to note the diversion of the modern application of the policy from its original intention. See sections 5.2 and 5.3.

23 Bray (2001), see footnote 9.

24 Gibbs (2001) see footnote 11.

25 The Certificate of Compliance (CoC) is an administrative measure whereby Lands Department confirms to registered owners that all conditions of the small house grant have been complied with. Indigenous villagers can only apply to sell their houses after the Certificate of Compliance has been issued.

26 Audit Commission (2002), "Small house grants in the New Territories," in Audit Report, 15 October 2002. <http://www.info.gov.hk/aud/english/e39ch08.pdf>

27 Lands Department, personal communication, May 2003.

## ► The Small House Policy

### 3.1 What is a Small House?

Under the Buildings Ordinance (Application to the New Territories) Ordinance, Cap 121, buildings in the New Territories (NT) are exempted (through a Certificate of Exemption (C of E)) from certain sections of the Buildings Ordinance in respect of building, site formation and drainage works, provided they conform to certain rules.<sup>28</sup> The main qualifications are that the building shall not exceed three storeys or 27 ft in height and the maximum roofed-over area of the house shall not exceed 700 sq ft.<sup>29</sup> This means that these houses can be built without the need to employ an Authorised Person (AP) and without the need to submit formal building plans to the Building Authority for approval.<sup>30</sup> It therefore enables houses to be built very quickly with a significant saving in professional fees.<sup>31</sup> Such houses are thus also referred to as New Territories Exempted Houses (NTEH). Small houses are a type of NTEH<sup>32</sup> but the term small house refers to those houses built by male indigenous villagers within the village environs under the so-called 'ding' right (see Appendix 3 for discussion on the origin of ding rights).

The applicant for a NTEH still has to obtain administrative permission from the land authority, which was originally the District Office, but since April 1982 has been the District Lands Office (DLO). In effect the introduction of the concept of NTEH circumvented the extension of the statutory regulation of buildings in Hong Kong to the NT.<sup>33</sup>

#### Why 700 sq ft and three storeys?<sup>34</sup>

After 1905 the British ruled that a traditional village house was 436 sq ft (one-hundredth of an acre, also known as yat fan dei in Cantonese or one traditional division of land) as all houses in the NT were close to those dimensions. Buildings were taxed to the nearest one hundredth of an acre (i.e. any building between 218 and 654 sq ft was counted as 436 sq ft). Traditionally most houses were one storey with a pitched roof containing a cock loft, though some wealthy villagers had two storey houses. The British allowed houses to be one or two storeys with a pitched roof and cock loft so that the house was effectively 2.5 storeys. The height restriction until World War II was to the top of the pitched roof. In the 1960s it became difficult to find the beams for pitched roofs and builders who could construct them and the Government agreed to the villagers' demands to allow houses with concrete flat roofs up to 25 ft to the top of the roof slab. Villagers then pressured Government for additional space and in the 1980s were given an extra 1ft 6in since the 25 ft height was now counted to the underside of the roof slab. The area of 700 sq ft is halfway between 436 sq ft (one-hundredth of an acre) and 872 sq ft (two one-hundredths of an acre) rounded to the nearest hundred feet. However, it has also been suggested that this is a coincidence and that 700 sq ft was simply the maximum area that the Government felt they were able to permit.<sup>35</sup>

### 3.2 Where can Small Houses be Built?

For areas not covered by statutory town plans, small houses may only be built within the environs of a recognised village (Village Environs or (VE)) or within a Village Expansion Area (VEA). For areas covered by statutory plans (Development Permission Areas (DPA) or Outline Zoning Plans (OZP)) (see box below)

28 These C of Es are issued by the DLO. However, where the proposed buildings are to be built on sloping ground, slopes with geotechnical problems, or are for more than a few houses a C of E for the site formation and drainage may not be given and a formal submission to the Building Authority will be required. In these cases DLO will only issue a C of E for the houses themselves once the site formation and drainage plans have been approved. Nissim, R. (1998) *Land Administration and Practice in Hong Kong*. Hong Kong University Press.

29 Note that small houses may be any size up to 700 sq ft and can be smaller, for example, where the lot of private land is too small for a 700 sq ft house. Lands Department (2001), "The New Territories Small House Policy - How to Apply for a Small House Grant", <http://www.info.gov.hk/landsd/public/public.htm>

30 Under the Buildings Ordinance building works are subject to three levels of supervision, namely by an Authorised Person (AP), a Registered Structural Engineer (RSE) and a registered contractor. This three-tier system of supervision applies to all urban buildings, which in most cases are multi-storey and complex in structure. Since NTEH are relatively simple in structure and design the Administration considered a three-tier system of supervision excessive. Director of Buildings, minutes of meeting of LegCo Panel on Planning, Lands and Works held on 13 May 1999, item VI, "New control measures for New Territories exempted houses (NTEH)".

31 Nissim, R. (1998), *Land Administration and Practice in Hong Kong*. Hong Kong University Press.

32 The term NTEH also includes buildings built by non-indigenous villagers on old house lots. Nissim (1998) see footnote 31.

33 Lai, W. C. (2000), "Housing indigenous villagers in a modern society," in *Third World Planning Review*, Vol. 22, No. 2, pp.207-230.

34 Hase, P., personal communication, May 2003.

35 The Heung Yee Kuk had pressed for 1000 sq ft. Bray, D., personal communication, June 2003.

small houses can be built without planning permission after approval by the District Lands Office (DLO), in "Village Type Development" or "V" zones.<sup>36</sup> Planning permission is required from the Town Planning Board for erection of small houses outside the V zones, most typically in Green Belt (GB) and Agriculture (AGR) zones (see Section 5.1) as well as approval by the DLO. DLO will not approve small house applications outside the VE.

With a few exceptions, such as where the existing leases of building lots do not specifically prohibit NTEH or where buildings are for charitable purposes within the 'V' zones, the Government has agreed as a general principle, since May 2002, that only small houses can be built within the village areas.<sup>37</sup>

Since 1977, for developments of ten or more small houses, the Lands Department (LandsD), in consultation with the Fire Services Department (FSD), requires Emergency Vehicle Access (EVA) not less than 4.5m wide within 30m of any building.<sup>38</sup> Even the development of one small house may require the provision of an EVA if it is located near a cluster of nine or more existing or approved houses. This limits the development of small houses in isolated villages which may not have EVAs.

### Village Environs and Village Zones

The Village Environs (VE) are typically defined as areas 300 ft from the outermost corner of the outermost house built before December 1972. For recognised villages that are not covered by statutory town plans (DPA or OZP), this is the area in which small house development is permitted. For recognised villages that are covered by statutory town plans small house development is permitted only in the Village or V zone.

When the Planning Department (PlanD) draws up a statutory plan for a village area, in drawing the boundaries for the V zone, they take into account the VE boundaries as well as a number of factors including topography, geotechnical constraints, outstanding small house applications as well as small house demand forecast. Areas of difficult terrain, dense vegetation, stream courses and burial grounds are usually avoided. The V zone does not necessarily follow the VE boundaries, for example, if part of the VE is not suitable for small house development then it will be excluded. Similarly, if land is suitable for small house development but outside the VE it may be included. The PlanD consults other government departments when drawing up the village boundaries as well as the views of the District Council and Village representative. When the DPA or OZP is gazetted, individuals have a chance to object to the boundaries. The Town Planning Board (TPB) may revise the V zone accordingly based on the objections.

### 3.3 Different Types of Small House Grants

The small house policy enables male indigenous villagers to apply for one small house grant in the form of either:

- A building licence/land exchange - An indigenous villager who owns private agricultural land within the village environs can apply for a building licence at nil premium or a land exchange for a building lot on government land (where the private land is not suitable shape); or
- A private treaty grant (PTG) - An indigenous villager who does not own land can apply for the grant of a site on government land at a concessionary premium of two-thirds of the full market value.<sup>39</sup>

In either case the villager has to pay for the construction cost of the small house. The free building licence restricts the assignment of interest in a house for five years whereas a PTG is for perpetuity (see Section 3.4). The restriction on the assignment of a PTG can be removed by the payment of the premium to the Government.<sup>40</sup> While indigenous villagers can build on their own land or Government land, most houses since 1972 (57%) have been built on private land.<sup>41</sup>

An administrative fee is levied for small house grants. Further, a premium at a concessionary rate is charged except where Free Building Licences are issued. Higher premiums are imposed (up to HK\$1.5 million at 2003 prices) for those sites (typically VEAs) where Government has spent money on resumption, clearance, site formation or infrastructure.

36 Other uses always permitted in V zones include agricultural use, restaurants, schools, rural committee buildings, retail shops, etc.

37 Lands Administration Office, Technical Circular No. 710, "Restriction on New Territories Exempt House (NTEH) Development to Land Grant Under the Small House Policy."

38 Lands Dept., (2001) "New Territories Exempted Houses; A Guide to Emergency Vehicular Access Requirements." [http://www.info.gov.hk/landsd/public/nteh\\_eva/eva.pdf](http://www.info.gov.hk/landsd/public/nteh_eva/eva.pdf)

39 Audit Commission (2002), see footnote 26.

40 Lai (2000), see footnote 33.

41 Lands Department, personal communication, May 2003.



### 3.4 Restriction on Alienation

All small house grants contain restriction clauses on alienation (i.e. the transfer of ownership of property). If an indigenous villager wants to assign his small house to a non-indigenous villager within the restriction period he has to pay a premium that is equivalent to the difference between the full market value of the lot at the date of application to the DLO and premium previously paid, if any. However the Lands Department applies a discounting factor to the premium computation. The restriction period on alienation is different for different types of small house grants, as summarised in Table 1 below:

**Table 1: Restriction on Alienation for Different Types of Small House Grants<sup>42</sup>**

Type of small house grant	Operative period of restriction	Removal of restriction		
		Within years 1 to 3	Within years 4 & 5	After 5 years
<b>Building licence</b>	Five years	Permitted, but upon the payment of full market value premium (a discounting factor is applied)	Same as years 1 to 3	No restriction
<b>Land exchange</b>	Five years	Permitted, but upon the payment of full market value premium (a discounting factor is applied)	Same as years 1 to 3	No restriction
<b>Private Treaty Grant (PTG) (VEA scheme)</b>	Perpetual	Not permitted, because of the moratorium during the first years	Permitted, but upon the payment of full market value premium	Same as years 4 & 5
<b>Other PTGs</b>	Perpetual	Permitted, but upon the payment of full market value premium	Same as years 1 to 3	Same as years 1 to 3

It can be seen that a three-year moratorium is applied on removal of the restriction on alienation for PTGs under the VEA schemes (i.e. no transfer of ownership within 3 years) while for building licence or land exchange, the payment of a premium is not required if the sale of the house to a non-indigenous villager takes place after five years from the date of the Certificate of Compliance (C of C). The Audit Commission has recommended the moratorium on removal of the restriction on alienation be extended to all types of small house grants (see Section 6).

### 3.5 Verifying Eligibility

A small house grant applicant has to submit a declaration, signed either by a village representative of his village or by a chairman/vice-chairman of the relevant rural committee, certifying that he is an indigenous villager of the village. In addition, a notice of the application is posted at the applicant's small house site, notice boards of his village and the Rural Committee Office, and at the relevant NT DLO. Since June 2001, the Lands Department have required that the Village Representative's declaration is witnessed either by a solicitor or an officer of the NT DLO.<sup>43</sup> The declaration forms signed by the applicant also make it clear that the selling, transfer, alienation or disposal of the indigenous villager's right to small house grants is not acceptable to the Government.<sup>44</sup>

<sup>42</sup> Audit Commission (2002), see footnote 26.

<sup>43</sup> Audit Commission (2002), see footnote 26.

<sup>44</sup> In the small house grant application, the indigenous villager must make a declaration that "I have never made and have no intention at present to make any private arrangements for my rights under the Small House Policy to be sold to other individual/ a developer" to the Lands Department as evidence of his bona fide intent to occupy the house.



The Lands Department keeps the Registers of Concessionary Grants for small houses (the Small House Registers) to ensure that an indigenous villager is given only one small house grant in his lifetime.

Further recommendations to improve the verification process have been made in the most recent Audit report (see Section 6).

### 3.6 Administrative Framework for the Small House Policy

Since 1982 the SHP has been administered chiefly by the Lands Department (responsibility was previously with the District Office). However a number of other government departments are involved as shown in Table 2.

**Table 2: The Different Government Departments Involved in Administration of the SHP and their Areas of Responsibility**

Department	Area of responsibility
Lands Department (LandsD)	Overall responsibility for administration including screening of applications; confirming land status; conducting land surveys and determining site boundaries; preparing grant documents, Certificates of Exemption and Certificates of Compliance; assessment of land premium.
Home Affairs Department (HAD)	Facilitate communication between the responsible bureaux/departments and villagers through assistance to and consultation with the rural community, including the Heung Yee Kuk, Rural Committees and Village Representatives.
Planning Department (PlanD)	Prepare Outline Zoning Plans (OZPs) including Village Type Development zones (V zones); prepare layout plans (mainly within new towns) for V zones; comment on applications for small houses that have planning implications; prepare guidelines for the Town Planning Board (TPB) for applications outside the V zone.
Fire Services Department (FSD)	Provide advice on Emergency Vehicle Access provision. Provide comments to LandsD on referred applications.
Water Supplies Department (WSD)	Provide water supplies to villages. Provide comments to LandsD on referred applications.
Drainage Services Department (DSD)	Monitor septic tanks. Provide comments to LandsD on referred applications.
Environmental Protection Department (EPD)	Enforcement of measures to prevent water pollution from small houses. Provide comments to LandsD on referred applications. Prepare and promulgate guidelines on design of septic tanks.
Agriculture, Fisheries & Conservation Department (AFCD)	Provide comments to LandsD on referred applications. Provide comments to PlanD on zoning boundaries for V zones.
Antiquities & Monuments Office (AMO)	Provide comments on small house applications that affect antiquities and monuments and OZPs for village areas.



### 3.7 Legal Framework for the Small House Policy

The SHP is an administrative policy, and for the most part does not require legislation. However, to exempt small houses from the provisions of the Buildings Ordinance, the **Buildings Ordinance (Application to the New Territories) Ordinance** (Cap 121), was enacted in 1972 and revised in 1987.

New administrative measures to improve building safety were introduced following the collapse of a balcony of a NTEH in December 1998.<sup>45</sup> The new **Technical Guidelines on the Design and Construction of NTEH (Technical Guidelines)** require a building owner to appoint a competent person to supervise the building contractor in the construction of the building. Further, if there are any critical structural elements, such as a balcony, the owner has to appoint a Registered Structural Engineer (RSE) or Registered Professional Engineer (RPE) to monitor the construction of such elements.<sup>46</sup>

Other legislation which has some bearing on the administration of the SHP includes the following:

- Under the **Town Planning Ordinance** new small houses are permitted under Column 1 of Village Type Development ("V") zoning, without the need for planning permission. Planning applications are necessary for construction outside the "V" zone.
- Schedule 5 to the Sex **Discrimination Ordinance (SDO)** (Cap. 480) provides that any discrimination between men and women arising from the SHP will be exempted from the SDO.
- The **New Territories Leases (Extension) Ordinance** (Cap 150) enacted on 21 January 1988 automatically extended all leases in the NT, with the exception of short-term tenancies and leases for special purposes, from their existing expiry dates until 30 June 2047, without requiring payment of a premium but with an annual rent to be charged as described in paragraph 2 of Annex III of the Joint Declaration.<sup>47</sup>
- The **New Territories Ordinance** (Cap 97), Section 13, provides *"In any proceedings in the High Court or District Court in relation to land in the New Territories, the court shall have power to recognise and enforce any Chinese custom or customary right affecting such land"*.
- In addition, **Article 40 of the Basic Law** states *"The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region"*.
- **Article 122 of the Basic Law** states *"In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, where the property is granted to, a lessee descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the previous rent shall remain unchanged so long as the property is held by that lessee or by one of his lawful successors in the male line"*.

45 While there was discussion in the Legislative Council in 1999 about the possibility of reviewing the Buildings (Application to the NT) Ordinance to introduce controls over other aspects apart from structural safety, this was never carried out.

46 Buildings Department, personal communication, June 2003.

47 Nissim (1998), see footnote 31.

## ► Benefits of the Small House Policy

The SHP was set up with the objectives of improving the standard of living and providing for the future housing needs of indigenous villagers. Although it was not a specific objective, one of the oft-cited benefits of the SHP is that of preserving the cohesiveness of the indigenous villager community. In addition, it can be argued that the SHP has helped to retain the rural village character, and provided some revenue to the Government.

### **Improving village living standards**

In terms of village living conditions, the SHP allowed for a substantial increase in space and required the provision of basic drainage and sewage disposal facilities. After the SHP was implemented it was noted that many of the 'temporary' structures were quickly replaced by modern houses, and 1,000 houses were built within the first nine months.<sup>48</sup> The SHP undoubtedly upgraded the quality of housing in the NT at that time.

### **Meeting housing needs**

In terms of meeting housing needs, the SHP provided low income housing for villagers and outsiders with no explicit subsidy from Government, and even some Government revenue from the premium (though the full premium is often not charged). Since 1972, over 28,000 small houses have been built, providing potential accommodation for over 300,000 people.

There is an argument that the resale of small houses by indigenous villagers helps solve financial difficulties and better utilises housing resources. In the 1997 Court of Appeal decision in *Sung Wai Kiu and Anor v. Wong Mei Ying* it was ruled that the buying and selling of small houses is not against public policy.<sup>49</sup> It was also stated that the free transaction of small houses helped to address the housing shortages of Hong Kong. Following this court decision the LandsD issued a brochure advising purchasers of small houses about procedure and requirements. Due to the difficulties in obtaining a bank mortgage for the construction of new small houses, it could be argued that villagers are sometimes forced to sell the houses (or at least some portion of the house in the form of flats) to pay for their construction.

### **Maintaining community cohesiveness**

Although not an explicit objective of the SHP, it has been argued that by encouraging indigenous villagers to remain in the village, either through the provision of land in close proximity to the existing village or in a village belonging to the same heung, this helped maintain community cohesiveness and preserve clan ties and customs.<sup>50</sup> Ironically those villages which are the best preserved in an architectural, historical or heritage sense (with no small houses), are often least well preserved in a social sense as the inhabitants have moved away. Conversely, often those villages which have benefited most from the SHP have managed to maintain strong clan ties.

One investigation into the impact of the SHP on the identity of a village within the NT concluded that the SHP has been successful in improving the standard of living of indigenous villagers and maintaining the cohesiveness of village communities.<sup>51</sup> However, it also concluded that the SHP has only been partially successful in providing for the future housing needs of the indigenous villagers due to the influx of non-indigenous villagers, which has created added pressure on available village land.

### **Maintaining rural village character**

It is further argued that while the SHP has not been successful in preserving the physical fabric of many NT villages it has been able to prevent the urbanisation of these areas.<sup>52</sup> While much of the private village land has been bought up by developers, the SHP has prevented this land from being developed as multi-storey buildings or extensive villa-type developments (though the latter has actually occurred in some instances it is technically not permitted under the SHP, see section 5.2). The policy of only allowing small house development within village areas has helped to maintain the rural village character in many areas (though admittedly in some villages little of the rural character remains, see Planning Issues, Section 5.4).

### **Revenue to Government**

In addition to the administrative fee for processing of small house grants, the premiums payable on the sale of certain types of small houses, means that this has produced significant revenue to Government over 30 years.

48 Bray (2001), see footnote 9.

49 Lai (2000), see footnote 33.

50 The term 'heung' refers to villages within walking distance of one another and related through lineage ties. Gibbs (2001), see footnote 11.

51 Ibid.

52 Ibid.



## ► Problems with the Existing Small House Policy

### 5.1 Sustainability / Land Use

The main problem with the SHP is its fundamental unsustainability. Since 1972, the LandsD has processed nearly 28,000 applications and as of 31 March 2002 there were 14,157 outstanding small house grant applications. Yet each year the number of new potential applicants grows as more male villagers reach the age of 18.

There is no estimate of the number of eligible indigenous male villagers who have yet to submit applications for building small houses. Neither the Census and Statistics Department nor the Home Affairs Department hold records or estimates of the total number of indigenous villagers with or without entitlements.<sup>53</sup> The Heung Yee Kuk's estimate of the number of indigenous villagers with entitlements is around 240,000.<sup>54</sup>

However, not all eligible male villagers will submit applications for various reasons such as migration overseas, and not all applications will be successful for various reasons such as land title problems and site constraints. Government records show that the rejection rate for small house applications is over 60%.<sup>55</sup>

However, if even a fraction of these entitlements result in the granting of a small house, this represents a potentially significant uptake of Hong Kong's valuable land resources. If all of the estimated 240,000 male villagers with entitlements were to be granted small houses this translates to 504 million sq ft of living space<sup>56</sup> or over 2,200 hectares (ha) (allowing for building space between houses) of land area.

It has been recognised for some years that there is a dwindling supply of land in village areas for small house development. Exact figures on how much land is still available for potential small house development are not known. It has been recommended that the LandsD with Planning Department conduct a survey to ascertain the exact amount of land remaining.<sup>57</sup>

The area of land left for future small houses has been estimated as 1,781 ha, equal to roughly 71,250 houses.<sup>58</sup> Based on the number of small houses projected for the period 1995-2005 in Yuen Long alone of 18,080, equal to 452 ha,<sup>59</sup> this would mean the zoned V land available would be fully developed by small houses within the next 10-20 years. However, assuming a lower density of houses and/or a much higher projected demand for small houses would mean the V land would be used up much more quickly.<sup>60</sup> In practice not all of the V zone is developable for small houses (less than 40%), the V zones are unevenly distributed, and there is an imbalance between supply of suitable land and demand for small houses.

**Figure 2: Small House Development Adjacent to Wetland**



Photo: Lisa Hopkinson

53 The only official figure available is the number of male electors for the 2003 Indigenous Inhabitant Representative Election, 41,043, which is limited to those male indigenous villagers who both live in a recognised village and who wish to vote. Home Affairs Department, personal communication, June 2003.

54 Leung, A. (2003), "Village Poll Electors Expected to Double," *South China Morning Post*, 12 February 2003.

55 Secretary for Planning, Environment and Lands (1999), Response to Legislative Question No. 8 by the Hon. Christine Loh, 27/10/99.

56 By comparison the total housing stock in the whole of Hong Kong is approximately 800 million sq ft. Van Der Kamp, J. (2002), "Time to Scrap Outdated Policy on Village Housing." *South China Morning Post*, 12 December 2002.

57 Real Estate Services Committee of the Hong Kong Coalition of Service Industries, Chairman, Nicholas Brooke, personal communication, April 2003.

58 This is based on the amount of land allocated for V zones in town plans as 2,800 ha, taking into account the existing 22,750 houses and the then 18,000 outstanding applications. It assumes a 250 sq m (2,690 sq ft) footprint per house (including area for open space and circulation) or density of 40 houses per hectare. Lai (2000), see footnote 33.

59 Planning Department (1994), "North West New Territories (Yuen Long District) development statements study final report, Vol. 1, Summary report" (unpublished internal report), quoted in Lai (2000), see footnote 33.

60 Lai (2000), see footnote 33.

Exacerbating the problem of lack of land for small house development is the fact that new VEA projects have been held in abeyance since 1999 pending the SHP Review.<sup>61</sup>

The pressure on the Town Planning Board (TPB) to enlarge the V zone or to grant small house development applications outside the V zone will continue to grow. In 2002 there were 126 applications to the TPB for small house developments outside the V zone of which 75% were approved (see Table 3 below). There was a similar number in 2001.

**Table 3: Number of Applications to the Town Planning Board (TPB) for Small House Developments Outside the V Zone Approved and Rejected in 2002<sup>62</sup>**

Application	Within Village Environs (VE)	Partly within VE	Outside VE	Total
Approved	67	19	9	95
Rejected	13	7	11	31
Total	80	26	20	126

The TPB has developed guidelines for considering applications for small houses and NTEH in the NT (See Appendix 1). These indicate that an application within the VE of a recognised village where there is a general shortage of land in the V zone, or within the VE and partly within the V zone even if there is no shortage of land, would be given sympathetic consideration. Development of small houses outside both the VE and V zone would not normally be approved unless under very exceptional circumstances, although the figures for 2002 show that over 75% of applications outside the V zone were actually approved.

The pressure on Green Belt (GB) zoned areas which often abut V zones is particularly high. Planning permission is required to build houses in GB zones. During the period 1975-1998 there were 422 planning applications for houses (including small houses) in GB zones.<sup>63</sup> The average success rate for village-type houses (mostly small houses) in GB zones was 60% while those for other residential uses (other types of houses that require building permission) was just 31%. There are similar figures for small house applications within Agriculture (AGR) zones.<sup>64</sup>

## 5.2 Speculative Development

Once isolated rural areas in the NT were opened up by the development of New Towns and transport infrastructure they became highly desirable suburbs and many village houses were thus developed and sold to outsiders. Reviews by the Audit Commission in 1987 and 2002 found that many indigenous villagers sell their small houses to outsiders, effectively cashing in on their eligibility for small house grants.<sup>65</sup>

A 1987 audit review of small house grants noted the problem of indigenous villagers selling their small houses soon after the issue of Certificates of Compliance (C of C). A later review in 2002 found the problem still exists. In 53 cases investigated by Audit, the small house applicants applied for permission to sell their small houses within an average of three days after the issue of the C of Cs.<sup>66</sup> Nearly all the flats were sold within about five months after the removal of the restriction on alienation. Audit concluded that indigenous villagers were thus cashing in on their eligibility for concessionary grants.

Another form of abuse occurs when qualified indigenous villagers are recruited by land owners (either individuals or companies) to sell their eligibility and sign declarations which misrepresent their intentions.<sup>67</sup> The land is carved out into sections and assigned to the indigenous villagers while some form of 'security

61 Lands Department, personal communication, May 2003.

62 Planning Department, personal communication, April 2003.

63 Lai, W.C. and Ho, K. O. (2001), "Low Rise Residential developments in Green Belts: A Hong Kong Empirical Study of Planning Applications," in *Planning Practice and Research*, Vol. 16, No. 3-4, pp.321-335.

64 Chau, K. W. and Lai, W. C. (unpublished), "Planned Conversion of Rural Land: A Case Study of Planning Applications for Housing and Open Storage Uses in Agriculture Zones." Unpublished research paper, Department of Real Estate and Construction, University of Hong Kong.

65 Audit Commission (2002), see footnote 20.

66 Ibid.

67 Ibid.

documentation' is drawn up together with the indigenous villagers to prevent them from taking full advantage of their title to the lot and ensure the lot is left to the developer in the event of their death. The indigenous villagers then complete the buildings licence application forms and make declarations to the LandsD that are in fact misrepresentations of their true situation. After the issue of building licences and completion of development, the indigenous villagers apply for the removal of restriction on alienation by paying the premium while assigning the small houses to the developers. The indigenous villagers thus gain monies/benefits for selling their small house right.

Due to the time difference between when the Government estimates the value for land premiums and when the property is sold, in a rising property market there is still an incentive to sell.<sup>68</sup> Thus there was tremendous speculative development of small houses (indeed of all property in Hong Kong) up until the 1990s and the restriction on sale was thus ineffective.

Under the LandsD guidelines, applications for small houses from villagers living overseas will be refused (unless it is for a small house grant on private land) unless the DLO is satisfied that the applicant intends to return and reside in his village. However, it may be difficult to determine whether an applicant is living overseas if the villagers provided a local address when the application was made. Further, there is little to stop a villager living overseas from signing a letter that he intends to return and reside in his village, but changing his mind after the small house is built. While this is not technically illegal, it does represent a serious abuse of the system. Indeed, it is well known that scouts are sent to the UK by developers to look for indigenous villagers with entitlements.

### 5.3 Corruption

The system for applying for small house rights is open to abuse and corruption. Previous studies by the Independent Commission Against Corruption (ICAC) identified two main areas of vulnerability:

- (a) Long waiting time prior to applications being approved
- (b) The certification of indigenous villager status

Under the existing system an elected village representative has to vet claimants for small house building permits and verify that the claimant is a genuine indigenous villager whose ancestors were living in that village in 1898. Because of the frequent lack of birth certificates for older residents and close clan ties it is often difficult for outsiders to verify the truth about land rights claims.

In recent years the ICAC have investigated a number of cases and made a number of arrests in connection with abuse of small house rights. Over the period from 1998 to March 2003, a total of 46 persons were convicted of various abuses with sentences ranging from community service orders to five years jail (see Appendix 2 for more details).

The ICAC's recommendations<sup>69</sup> for tightening the SHP to minimise corruption include:

- More detailed verification of applicants' indigenous villager status;
- LandsD to review the situation or deploy resources to clear the backlog of applications;
- Clearer instructions to LandsD staff for dealing with difficult cases;
- Closer supervision of small house case processing.

### 5.4 Planning Issues

*"In achieving improved housing, formidable planning problems will be created [by the small SHP]. It is considered that the areas designated for development and redevelopment of this type [of housing] should be more selective and based upon the systematic provision of access, services and community facilities".<sup>70</sup>*

68 District valuations were traditionally done twice a year in March and September, based on the open sale of land in the district over the previous 6 or 12 months and averaged out per square foot. In bigger districts separate valuations were done based on whether an area was road accessible or not etc. Hase, P., personal communication, May 2003.

69 Independent Commission Against Corruption, personal communication, May 2003.

70 Hadland, B. J. (1978), "Land policies in Hong Kong," in L. S. L. Wong (ed) *Housing in Hong Kong: A Multidisciplinary Study*, Hong Kong, Heinemann. Quoted in Lai (2000), see footnote 33.



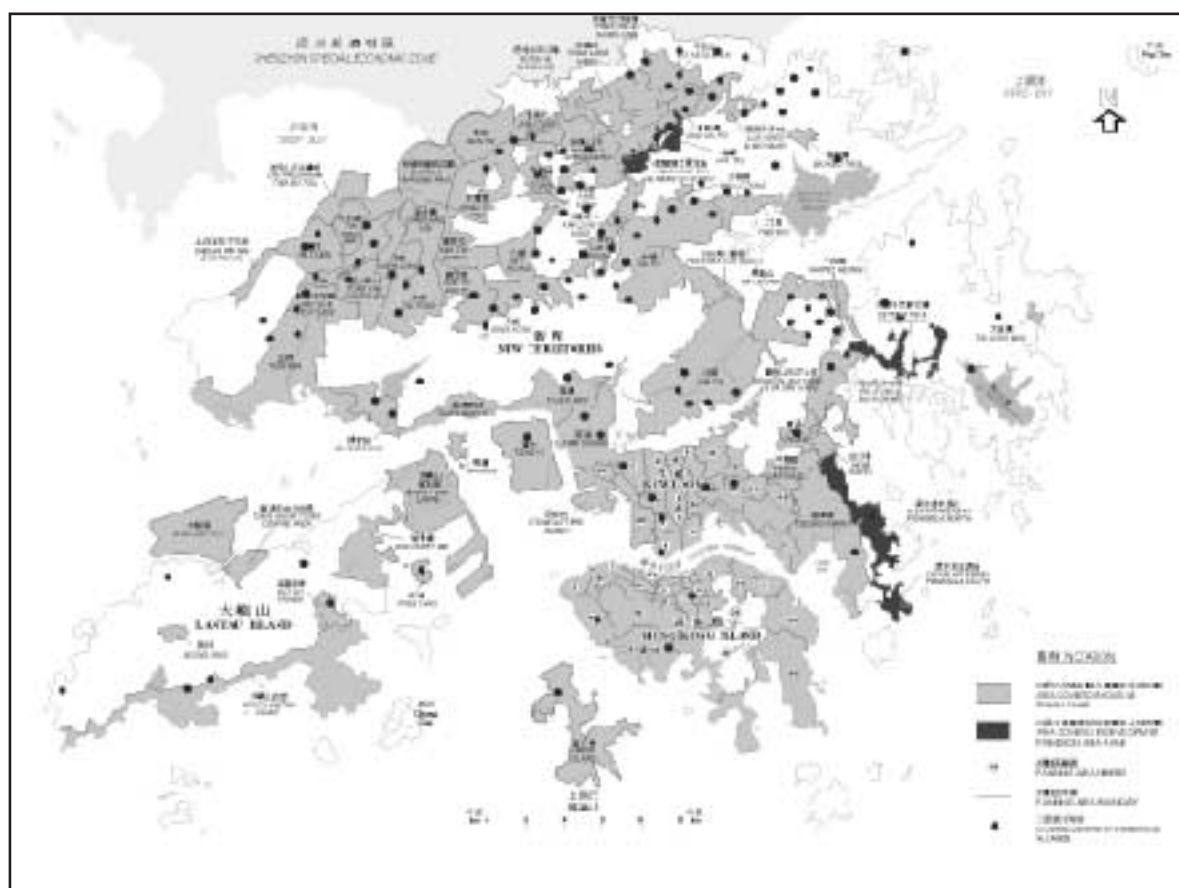
When the SHP was first introduced, one of the benefits cited was that the "areas in which new small houses may be erected will be defined on a more logical basis and will be based on uniform criteria throughout the New Territories. The main factors affecting the zoning will be future permanent development plans, the location of roads and other public works and areas of recreation potential. The zone boundaries will be reviewed annually.....I should emphasise that I do not see these measures as anything more than interim measures which will complement the major job of producing a comprehensive development plan for the rural New Territories".<sup>71</sup>

In reality, there has been little attempt to produce a comprehensive strategic development plan for the NT and the construction of small houses has gone on relatively unchecked and unmonitored by Government. There is little or no regulation or planning with respect to location, layout, facilities, transport or open space. The ad hoc nature of small house development means that future improvement of services or infrastructure on a rational or organised basis could become very problematic.

### Regional Planning - OZPs

While most of the urban and urban fringe areas are covered by regional statutory town plans (typically Outline Zoning Plans or OZPs), much of the rural NT, containing many recognised villages, still lacks statutory planning protection (see Figure 3).

**Figure 3: Distribution of Recognised Villages and Statutory Plans in the NT.**



Within the OZP construction of new small houses outside the area zoned for Village Type Development or "V" zone requires planning permission from the Town Planning Board (TPB). However, it should be noted that the "V" zone is a very specific residential zoning with a clearly-defined planning intention. As the character of a village changes, due to the proliferation of small houses, it can be argued that that planning intention is becoming outdated: in many cases V zones are becoming a substandard type of Residential Group C (low rise housing) zone.

Adapted from Planning Department, HKSAR Government Maps

<sup>71</sup> Hansard (1972), Meeting to discuss the Buildings Ordinance (Application to the NT) (Amendment) regulations 1972. 29 November 1972.





Indeed, some scholars have argued that the combination of a statutory zoning policy that does not provide for formal suburbanisation, and the Town Planning Board's permissive policy to approve small houses, has created a type of "urban sprawl".<sup>72</sup> Instead of a low rise 'garden city' type of development, a low rise 'Kowloon walled city' development has emerged instead. Among the individuals consulted for this report, the widespread view was that the planning of NT villages was not well coordinated or comprehensive, leading to 'suburban sprawl'.

**Village planning - village layout plans**

This lack of planning extends to the micro-planning level and detailed layout plans for the individual "V" zones themselves. For villages sited within the area of the New Towns, where it is easier to implement, detailed village layout plans are prepared. Originally this was done by the District Office, but since the 1980's has been done as part of the OZP by the Planning Department. Government would resume the land and provides the infrastructure, such as car parks, toilets, Refuse Collection Points, open space, etc, and the site would then be handed back to LandsD for allocation to the villagers. The cost for carrying out the infrastructure works would be reflected in the premium. Because the V zone within New Towns was usually constrained on all sides by other development, once the village area was full there could be no more expansion of the V zone. Examples of village layout plans include Tin Sum in Shatin where most houses have now been allocated and built.

However, outside the new towns only a few new village layout plans have been drawn up. Basic provisions such as car parking, access roads and proper sewerage and drainage are thus not always provided. The difference between a village with a detailed layout plan and one without is shown in Figures 4 & 5.

**Figure 4: Typical Village With Layout Plan**



Photo: Mandy Lao Man Lei

**Figure 5: Typical Village Without Layout Plan**



Photo: Mandy Lao Man Lei

Generally Government will not spend money outside New Towns to resume land and because there are no public works it is a low priority.<sup>73</sup> However, in those few cases where there is a detailed layout plan (e.g. Yung Shue Wan in Lamma Island) new small houses must conform to the OZP. The Government therefore often has to negotiate with the villagers to implement layout plans (for example if the Government has sited an Emergency Vehicle Access on private land it needs to secure the agreement of the landowner) which often leads to protracted arguments.<sup>74</sup>

However, as Government has the power to withhold permission for small house applications, it should be possible to implement detailed layout plans even in villages outside the New Towns. In retrospect, Government should have refused any more applications once a certain threshold was reached unless there was a detailed layout plan for a village.

### 5.5 Illegal Occupation of Government Land

An investigation by the South China Morning Post found a six storey "small" house built on Government land in Yuen Long. A subsequent survey found that one third of 200 houses at Lam Hau Tsuen occupied Government land.<sup>75</sup> However, according to the LandsD there has been only one instance of a small house built illegally *entirely* on Government land (in San Tin, Yuen Long).<sup>76</sup> There are no figures on how many houses have been built illegally *partly* on government land, though this is thought to be not uncommon.

**Figure 6: Illegal Small House Built on Government Land**



Photo: Lisa Hopkinson

<sup>73</sup> Planning Department, personal communication, April 2003.

<sup>74</sup> Planning Department, personal communication, April 2003.

<sup>75</sup> Cheung, C. F. (2002), "Pull Down Illegal Village Homes, Says Legislator," *South China Morning Post*, 21 December 2002.

<sup>76</sup> Lands Department, personal communication, May 2003.

## 5.6 Processing Time for Small House Applications

As at 31 March 2002 there were 14,157 outstanding small house grant applications and Lands Department had only completed 1,049 in the previous year. There was on average a three-year waiting period before the LandsD could commence working on an application. LandsD have a performance pledge to execute 1,200 small house grants/licences per annum. At the current rate, even if there were no new applications it would take nearly 13.5 years to clear the backlog.

Not only is this backlog creating opportunities for abuse and corruption, according to the ICAC, but it has also led to many indigenous villagers feeling aggrieved. It is commonly felt that outsiders are given priority over indigenous villagers in processing development applications. There are no figures to support whether LandsD are actually giving a higher priority to outsiders in processing developments in rural areas. An analysis of planning applications in Green Belt (GB) zones over the period 1975-1998 showed that the TPB discriminates against the development of ordinary houses (average 31% success), which require building permission, in favour of small house applications (average 60% success).<sup>77</sup> However, commercial and commercial/residential developments (80% and 78%) had a higher success rate of approval than small houses.

In his 2002 report Audit recommended the LandsD expedite the processing of small house grants. According to the previous Director of Lands, it is not possible for the LandsD to deploy additional staff to deal with small house applications in view of its other work commitments (land disposal, acquisition, lease enforcement, land control, etc.). However to speed up processing time and reduce outstanding backlogs the Department has introduced a "Workshop Approach" in some NT DLOs with large numbers of outstanding applications.<sup>78</sup>

## 5.7 Costs to Government

The SHP involves a number of costs to Government - both in terms of land premium foregone and the administrative costs in processing the grants.

Since the SHP was introduced in 1972 a total of 597,430 m<sup>2</sup> (about 60 ha) of government land has been granted.<sup>79</sup> This largely comprises small pockets of government land within the VE as well as the VEAs. This is equivalent to an area two and a half times the size of Tsim Sha Tsui East.

While figures on the total amount of premium foregone by the Government through concessionary premiums are not available, assuming 30% of small houses granted via a building licence or land exchange have subsequently been sold without a premium payable, provides a rough estimate of lost premium of HK\$2.8 billion (in 2003 prices)<sup>80</sup>

Further, LandsD deploys significant resources in vetting and processing small house applications. The administrative fees charged for processing applications recover only some of these costs. In 2000, the administrative fees were calculated to recover costs at an overall average rate of 18% only.<sup>81</sup>

For each small house application substantial staff resources from LandsD are involved, comprising in total about 245 staff in the year 2000, while the total cost of work related to small houses was estimated to be \$147.2 million in 2000-01.<sup>82</sup> In 2003, the total staff cost was estimated at HK\$136 million, less than 7% of the total estimated staff costs of the department in that year.<sup>83</sup> In addition, staff from a number of other departments (see Table 2) are also indirectly involved in implementing the policy.

However, it should be noted that the land area administered (within the V zone) covers 6% of the SAR. In other words, the resources deployed within the LandsD are roughly proportional to the land area administered.

77 Lai, W. C. and Ho, K. O. (2001), "Low Rise Residential developments in Green Belts: A Hong Kong Empirical Study of Planning Applications," in *Planning Practice and Research*, Vol. 16, No. 3-4, pp.321-335.

78 Pope, R. (2000), Director of Lands reply to written LegCo question by the Hon. Chan Kam-lam, in Examination of Draft Estimates of Expenditure 2000-01.

79 Lands Department, personal communication, May 2003.

80 Out of a total of 28,339 grants since 1972, a total of 19,152 have been granted via a building licence or land exchange where the premium is waived if the houses are not sold within five years. Lands Department, personal communication, May 2003. The ballpark estimate is based on the fact that 40% are sold within five years with payment of a premium, assumes that half of the remainder are sold, and further assumes a typical small house premium in 2003 is HK\$500,000.

81 Planning and Lands Bureau (2000). Supplementary Information Paper on Lands Department's Fee Increase Proposals. Paper to LegCo Panel on Planning, Lands and Works on 26 June 2000.

82 Ibid.

83 Lands Department, personal communication, June 2003.

To be fair, it should be noted that with almost half of Hong Kong's population living in public housing, the Government also spends significant resources on administering the public housing programme. By contrast, the villagers do not receive direct subsidies for the construction of small houses as they arrange their own resources to pay for the construction costs.<sup>84</sup>

### 5.8 Heritage and Landscape Issues - Insensitive Design

To many outsiders, the main visible problem with the SHP is the loss of vernacular architecture and character of the recognised villages, and the total erosion of landscape features caused by haphazard development and "rural sprawl".

Many traditional villages in the NT contain old Hakka<sup>85</sup> houses, vernacular buildings with unique architectural features, that are torn down to make way for new residential properties, and the heritage value of the village is diminished. It should be noted that in many cases the heritage value of a village is more than just the houses, but comprises the combination of houses, walls and common areas, the surrounding agricultural land, the woodland and its setting within the landscape.

There have been criticisms that when the Administration set up the SHP it did not review the vernacular architecture and character-defining features of existing villages to ensure that the traditional village pattern was maintained.<sup>86</sup> Even such simple changes as increasing the number of storeys and changing the building layout have negative impact on the traditional village pattern. The visual impact of new small houses on a village character varies from village to village depending on the topography and the siting and design of small houses. However, in general, the building of small houses seems to cause greatest impact on the landscape within walled villages, where a three storey house is more visually jarring<sup>87</sup> (see Figure 7).

**Figure 7: Small House Development Impinging on Heritage Village**



Photo: Antiquities & Monuments Office, HKSAR Government

While the "spanish villa" three storey village house has become a contemporary NT vernacular, heritage professionals believe that there is room for a more harmonious building design on the one hand, and more emphasis on rehabilitating existing village houses on the other.<sup>88</sup>

To preserve the Hakka village houses at Sha Lo Tung, which are vernacular buildings with unique architectural features and high group value, the Planning Department introduced a requirement in the OZP that any demolition and/or addition or alteration to existing village houses requires planning permission.<sup>89</sup> However, the OZP does not prevent the development of new village houses. In Tai Long Wan, Sai Kung, an area of outstanding natural beauty and heritage value, the whole village is considered to have group value and the OZP requires even new small houses to apply for planning permission.

<sup>84</sup> Lai (2000), see footnote 33.

<sup>85</sup> One of the four main ethnic groups of early settlers in Hong Kong.

<sup>86</sup> Distefano, L. and Ho, W. Y., personal communication, April 2003.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Sha Lo Tung Outline Zoning Plan, S/NE-SLT/2.



## 5.9 Environmental Problems

### **Ecological problems**

The main ecological problems associated with small house development include the following:

- Direct impacts from disturbance to ecologically valuable habitat within the village environs or village expansion areas (VEAs), especially fung shui woodland and streams;
- Direct impacts from sewage discharge from overflowing or poorly sited septic tanks into streams and rivers<sup>90</sup>;
- Indirect impacts from the induced development associated with village development such as construction of roads (authorised and unauthorised), rural projects works and other infrastructure projects (e.g. water pipes);
- Indirect impacts caused by pressure to develop green belt and conservation areas;
- Indirect impacts caused by waste dumping and degradation of surrounding areas

In general, the scale of development under the SHP is small and in most cases, small house developments are located within "Village Type Development" (V) zones, so areas under conservation-related zonings such as "Site of Special Scientific Interest" ("SSSI") and "Conservation Area" ("CA") are not directly affected.<sup>91</sup> When the Planning Department draws the boundaries for the V area it consults other departments, including the Agriculture, Fisheries & Conservation Department (AFCD), and takes into account the ecological value of the area. Ecologists agree that the impacts of small house development on ecology are generally not significant except in individual cases.<sup>92</sup> However, as village land for development becomes scarcer there is competition between land for small houses and land for habitats. Increasingly, remote villages are encroaching on fung shui woodland or abandoned farmland, which can be quite rich habitat. For villages which are located in rural areas with poor accessibility and/or surrounded by ecologically valuable habitats, the potential increase in such small house development to accommodate the population growth as well as the construction of associated infrastructures would result in significant localised impact on the natural environment.

The unregulated, ad hoc nature of small house development also causes ecological impacts. Small houses are exempt from the Environmental Impact Assessment process and there is little enforcement of planning and environmental laws in remote rural areas. Illegal roads and car parks (often involving tree felling) and waste dumping in wetlands have taken their toll on certain village habitats.

### **Drainage and water quality problems**

NT small houses have also created serious drainage and water quality problems. Their exemption from the Buildings Ordinance means they have often been built without adequate mains sewage or drainage.

#### *(a) Sewerage*

Septic tanks are generally the only form of sewage treatment provided in village areas<sup>93</sup>, many of which are still unsewered.<sup>94</sup> While septic tanks are, in theory, a perfectly adequate and low-tech form of sewage treatment, in practice the high density of development in many villages means there is seldom enough land to provide a septic tank of adequate size or for a soakaway pit<sup>95</sup> to function properly.<sup>96</sup> In the majority of cases the septic tanks will eventually overflow. Specific shortcomings of septic tanks in the local context include:

- Inadequate septic tank and soakaway pit leading to frequent overflow
- Soakaway pits located in unsuitable ground such as areas with a high water table or areas prone to flooding causing overflow
- High intensity of small house developments with soakaways located close to one another, hence overloading the soakaway capacity of the ground
- Restricted access preventing proper maintenance, e.g. removal of accumulated sewage solids, which will result in solids being carried into the soakaway pit causing clogging of the soil
- Lack of regular inspection and maintenance due to low awareness of owners

90 While discharges from small houses are subject to control under the Water Pollution Control Ordinance, the large number of village houses makes routine inspection impossible or impractical.

91 Although they are subject to upzoning. Between 1974 and 2001 the amount of land upzoned from CA, GB and AGR to V zoning was 10.91 ha, 6.35 ha and 41.2 ha respectively. Planning Department (2002), "Review of Rural Land Uses in Northern New Territories - A Summary of Findings." Hong Kong: HKSAR Government.

92 Hau, B., personal communication, April 2003.

93 DLO normally require owners to follow the Drainage and Health Requirements for Village Type Houses. These specify the basic design requirements for the construction of a conventional septic tank and soakaway that serves a household size of 8-10 persons. Environmental Protection Department, personal communication, June 2003.

94 The Environmental Protection Department estimates that 5% of the HKSAR population remains unsewered, equivalent to roughly 350,000 people. Of these, an estimated 90% are in the main villages. Even villages within the New Towns still rely on septic tanks despite the proximity of mains sewers.

95 A soakaway pit percolates wastewater from the septic tank discharge to the surrounding subsoil.

96 Septic tanks need regular de-sludging but many septic tanks in village areas are not easily accessible by tanker. A common practice is to decant overflowing septic tanks into neighbouring septic tanks. Environmental Protection Department, personal communication, May 2003.



In cases where the small houses are built close to rivers or beaches there are higher design and siting requirements.<sup>97</sup> While in these cases the Lands Department inspect the septic tank system before issuing the Certificate of Compliance, it still does not guarantee performance for those systems located in sites with inappropriate ground conditions, or which are not properly maintained. This causes particular problems where the village lies within a Water Gathering Ground, such as the Lam Tsuen valley, where septic tank overflows can result in contamination of reservoirs.

Capacity is also an issue, particularly for those small houses that are used as holiday homes, where the occupancy at weekends and during holiday periods is often far in excess of the capacity of the septic tank.<sup>98</sup> Many small houses are also used as restaurants, which causes problems with oil and grease discharge.<sup>99</sup> Further, many small houses have separate greywater (discharge from baths and sinks) systems which discharge directly into drains and streams.<sup>100</sup>

EPD's long term solution is to provide proper sewerage for the majority of villages with significant population. They have a rolling programme of Sewerage Master Plans (SMPs) which lay out the requirements and schedule for sewerage different areas of the SAR. In practice, lack of resources means that many areas will remain unsewered for many years to come.<sup>101</sup> Even when a mains sewer is provided to a village, this is not the end of the story. By law there is a requirement for owners to connect their houses to a mains sewer but in practice many owners appeal and a period of negotiation follows. In some cases there may be technical reasons which make connection difficult or expensive (e.g. the septic tank is located under the house itself) or it may be that the owner does not wish to be connected as he would then be liable for sewage charges.

#### *(b) Drainage*

Small houses are often built on agricultural land which may be located in low-lying flood prone areas. The conversion of agricultural land for building will exacerbate any flooding problems and local drains may become overloaded. While individual developments of small houses may not cause problems, the cumulative effect will have adverse impacts on the drainage of an area. In particular cluster developments of small houses are likely to involve considerable landfilling work which may affect the topography of the area and existing flow path.<sup>102</sup> For larger sites involving a group of small houses, or sites adjacent to or encompassing a major stream, channel or river, the drainage impact may be significant. In these cases, applicants for small houses would be required to submit a comprehensive drainage impact assessment and proposed drainage facilities.<sup>103</sup>

The Drainage Services Department (DSD) carries out major flood prevention projects for rural areas in the NT such as river training projects. For some low lying villages additional works are needed and 20 flood pumping schemes have been constructed to collect and pump water away during rainstorms, while seven more are planned or under construction.<sup>104</sup> While District Offices carry out improvement works for drains and watercourses within village areas, they need to obtain the owners' consent for works if private land is involved.

The drainage issue is one that is increasingly drawing Town Planning Board attention, especially in areas like Lam Tsuen. While the EPD has taken a strong stand against small house applications in flood-prone areas like Lam Tsuen, houses continue to be approved and built there.

To better manage the potential drainage impacts associated with small house development in the future, DSD sees a need for enabling procedures to control landfilling activities before the small house development proposal is submitted to the authority.<sup>105</sup>

97 These are promulgated by the EPD and include a requirement to undertake a percolation test to confirm the suitability of the ground to soak away the septic tank discharge. In addition no septic tanks and soakaways are allowed within 18 metres from any rivers or streams and no villages are allowed within a Water Gathering Ground. In practice though these more stringent conditions are not always followed and small houses are still approved by the Town Planning Board even within Water Gathering Grounds.

98 According to the guidelines the septic tanks are designed for an occupancy of 8-10 persons. However, where houses are rented out, especially as holiday homes, the occupancy can be double or triple this at weekends.

99 For small houses used as restaurants EPD requires the owners to install properly designed grease traps to complement the 'under-skin' type grease traps stipulated in the restaurant licence issued by the Food & Environmental Hygiene Department (FEHD). The latter licence does not specify the requirements for treatment of oil and grease and problems often occur at weekends when inspectors are absent.

100 Since 1984 all new village houses are required to connect greywater drainage to the septic tank but older houses may still have separate systems. Environmental Protection Department, personal communication, May 2003.

101 It generally takes six to seven years once funding is obtained to complete a sewerage programme, assuming it runs smoothly. With the current government cutbacks on spending, funding of the remaining SMPs is in doubt.

102 Drainage Services Department, personal communication, May 2003.

103 Ibid.

104 Ibid.

105 Ibid.

## 5.10 Inequality

The SHP is regarded as discriminatory on two separate grounds. The first is the discrimination against female indigenous villagers who are not entitled to apply for a small house grant (except in certain cases, such as when the husband is certified to be insane). The second is the discrimination against non-indigenous Hong Kong people who do not have the same privileges extended to them as indigenous villagers.

### (a) Discrimination against women

#### **The traditional custom of inheritance in indigenous villages<sup>106</sup>**

A traditional village in the NT was a collection of clans made up of people who all bore the same surname. Women would marry outside the clan and leave the village to join their husband's clan. Indigenous villagers regard land as part of a trust by the ancestors for their descendants which cannot be sold outside the family. Women formed part of the husband's trust, and women's rights were thus considered the rights of their husbands. Women were not allowed to inherit land because the village land would then belong to a villager bearing a different surname and the village would cease to be a clan village.

The discriminatory nature of the SHP has been publicly recognised since 1995 when a Report from the United Nations Committee on Economic, Social and Cultural Rights (CESCR) noted with concern that the SHP discriminated against women.<sup>107</sup> The response of the Administration at the time was that the differential treatment under the SHP was not discriminatory as there was an objective and reasonable justification for the treatment.<sup>108</sup> However, what this justification consisted of was never made clear.

Part 2 of Schedule 5 of the Sex Discrimination Ordinance (SDO) (Cap 480), which was enacted in 1996, specifically exempts the SHP from the provisions of the Ordinance on the grounds that the Administration was conducting a comprehensive review of the SHP.<sup>109</sup>

The Equal Opportunities Commission (EOC), a statutory body set up in 1996 to implement the SDO, has recommended repealing the exemption for the SHP in the Ordinance on the grounds of discrimination. According to the EOC the SHP may contravene all three human rights instruments of the UN that apply to Hong Kong, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (but for the reservation entered by the Government in its first submission to CEDAW in 1998, see below), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural rights (ICESCR).<sup>110</sup> In addition the policy may violate the Hong Kong Bill of Rights Ordinance (Bill of Rights), Articles 1 and 22, which were copied from the ICCPR.<sup>111</sup> Article 39 of the Basic Law also states that the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong SAR.

Under CEDAW State parties can enter a reservation limiting their obligations under the Convention. In the Hong Kong Government's first submission to CEDAW in 1998 the Government entered a "*reservation of the right to continue to apply laws enabling indigenous male villagers in the New Territories to exercise certain rights over property and to enjoy certain privileges in respect of land and property*". Legal scholars have recommended that this reservation be withdrawn in order to bring the Government's obligations in

<sup>106</sup> Hase, P., personal communication, May 2003.

<sup>107</sup> CESCR (1994). Concluding Observations. Committee on Economic, Cultural and Social Rights: United Kingdom of Great Britain and Northern Ireland. 21 December 1994.  
[http://www.unhchr.ch/tbs/doc.nsf/\[Symbol\]/13c09e245cae8a47c12563e8004995bf?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/[Symbol]/13c09e245cae8a47c12563e8004995bf?Opendocument)

<sup>108</sup> Minutes of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 13 January 1995. Hong Kong Legislative Council.

<sup>109</sup> Minutes of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 1 April 1997. Hong Kong Legislative Council.

<sup>110</sup> Equal Opportunities Commission, personal communication, April 2003.

<sup>111</sup> Article 1 states: The rights recognised in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Men and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights. Article 22 states: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

line with its existing obligations under the ICCPR.<sup>112</sup> In other words a continuation of the preferential benefits to male indigenous villagers under the SHP is considered to be a violation of obligations under CEDAW and also under other UN treaties.

In 1999, the CEDAW also noted the discriminatory nature of the SHP.<sup>113</sup> The Public Accounts Committee of the Legislative Council, in response to the Audit Commission's 2002 Report on the SHP, asked about the Administration's response to CEDAW. In his response the Secretary for Housing, Planning and Lands noted that there were problems in checking female indigenous villager status as, unlike male indigenous villagers, the clan book did not record the descendants of female indigenous villagers since 1898. Moreover, extending the eligibility for small houses to female villagers would create additional problems in terms of land demand and substantial increase in eligible villagers. In other words, the Secretary over-ruled the extension of the privilege to women on the grounds of administrative difficulties and overall social disbenefits.

While the EOC has welcomed the intent behind the latest government review of the SHP, they have advised that any possible options to resolve the matter should not discriminate on the grounds of sex.<sup>114</sup>

Interestingly there have not been any formal legal challenges to the SHP from indigenous women villagers themselves. There was reportedly one instance where a female indigenous villager was intimidated to prevent her taking the issue to court. However, there appear to have been no surveys of indigenous women to find out how they view the situation and whether they feel discriminated against. Possible reasons for the absence of any legal challenge are that women do not consider that they have a legitimate entitlement, are unwilling to go against the prevailing village patriarchal system or do not feel that they have a likely chance of success in the courts.

The (mainly male) Village Representatives appear to be divided on this issue. In a survey of 236 Village Representatives a slim majority (51%) believe that women cannot have the right to possess small houses while 41% disagree.<sup>115</sup>

According to the Heung Yee Kuk, before the introduction of the SHP in 1972, people of either sex, irrespective of whether they were indigenous villagers, who owned agricultural land in the NT could build houses to improve the standard of housing in rural areas.<sup>116</sup> The Heung Yee Kuk argue that the SHP restricted the right to build houses to male indigenous villagers. There is no clear documentation on whether women indigenous villagers could apply for small houses before the introduction of the SHP in 1972. The Administration's account of pre-1972 practices is that heads of families were allowed to build for themselves and for each son upon marriage a house within the village area, either on their own agricultural land or on village building lots acquired through auctions restricted to villagers of a particular village.<sup>117</sup> These heads were likely to be male.<sup>118</sup> However, the Administration's version of events is questioned by former officials who maintain there were no closed auctions (though it was sometimes made difficult for outsiders to get to the auction site in time) and that procedures were not so straightforward.<sup>119</sup>

Can it be argued that the small house policy reflects customary male-dominant rights and indigenous villager culture which are duly protected under Article 40 of the Basic Law? In the case of *Chan Wah v Hang Hau Rural Committee & Others* [1999]<sup>120</sup> the Court of First Instance ruled that it is against the SDO for a

112 Centre for Comparative and Public Law, University of Hong Kong (1998), "The Initial Report on the HKSAR under the CEDAW," Submission to LegCo Panel for Home Affairs, 9 November 1998. <http://www.hku.hk/ccpl/cedaw/ccplcedawsubmission.html>

113 CEDAW (1999). Concluding Observations of the CEDAW: HKSAR. 3 February 1999. [http://www.unhchr.ch/tbs/doc.nsf/\[Symbol\]/1483ffb5a2a626a980256732003e82c8?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/[Symbol]/1483ffb5a2a626a980256732003e82c8?Opendocument)

114 EOC (2003). Submission from the EOC to the meeting of the Legislative Council Panel on Home Affairs to discuss the Second Report to be prepared by the HKSAR under the ICCPR. LC Paper No. CB(2) 1748/02-03(01), 11 April 2003.

115 Lo, S. H. and Cheung, Y. F. (2001), "The Political Attitude of Village Representatives in the New Territories." Paper presented at the Foreign Correspondents Club in Hong Kong, 12 Dec 2001. <http://www.hkbu.edu.hk/~hktp>

116 Lau Wong Fat (1997), Minutes of Bills Committee, Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 1 April 1997.

117 Planning, Environment and Lands Bureau (1997), Minutes of Bills Committee, Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 1 April 1997.

118 Planning, Environment and Lands Bureau (1997), "Small House Policy. Clause 12 of Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996." LegCo Paper CB(2)2066/96-97(02).

119 Bray, D., personal communication, June 2003.

120 2 HKLRD 286 (Findlay J).





non-indigenous villager to be prevented from being elected as a village representative of a recognised village. The Court further stated that this was not inconsistent with the customs of the indigenous villagers as protected under the Basic Law. This ruling was later upheld by the Court of Appeal and the Court of Final Appeal. This indicates that even Article 40 does not protect certain rights if these are in conflict with other legislation.

While there is a substantive body of opinion that the SHP is indeed discriminatory against women and violates a number of UN treaties to which the Hong Kong Government is party, whether this requires the extension of the SHP to female indigenous villagers or whether the policy should simply be repealed is unclear. Certainly if the SHP were to be extended to women, this would exacerbate many of the other problems of the policy, particularly its fundamental unsustainability. Indeed, this appears to be the government's main objection to any extension of the policy.

*(b) Discrimination against non-indigenous Hong Kong residents*

*"The SHP...can be regarded as a modern form of residential discrimination in favour of a particular class of Chinese people".<sup>121</sup>*

If the principle of equal rights for all citizens of Hong Kong is applied, it has been argued that it is unfair that only indigenous villagers have a right to build small houses in the NT,<sup>122</sup> and that the SHP confers an unfair wealth transfer to the indigenous villager, as a non-villager has no equivalent entitlement.<sup>123</sup> As one author put it, a small house is certainly not small when compared with the size of public housing units (typically 350-500 sq ft) available to non-indigenous inhabitants and represents inequitable preferential treatment.<sup>124</sup> Whether or not the houses are constructed on private or government land, it is argued that the male villager often makes a large profit on the sale of the small house due to the scarcity of land in Hong Kong.<sup>125</sup> In some village expansion areas (VEAs), the land resumed was sold by indigenous villagers to outsiders. The government policy thus uses taxpayers' money to revert such private property compulsorily to the villagers.<sup>126</sup>

During the drafting of the Basic Law some members of the Consultative Committee argued for the deletion of Article 40 on the basis that it is unfair to ordinary inhabitants of Hong Kong and would lead to "one system, two policies".<sup>127</sup> Further, because the concept of the indigenous inhabitants of the NT originates from the original Peking Convention of 1898, it was argued this concept should be done away with following the transfer of sovereignty, these rights and interests being incongruous with modern China. It was also argued that customary laws should be amended in line with social development and that "privileges" should not be given to indigenous inhabitants indefinitely. These arguments do not appear to have been adopted in the final version of the Basic Law.

On the other side, it has been pointed out that many Hong Kong residents who are natives of rural mainland China are similarly entitled to return to their homeland and build houses there. It is thus argued that it is unfair to remove the Hong Kong indigenous villagers' entitlement simply because they are in Hong Kong.

It should also be pointed out that village residents do not enjoy the same types of government-provided infrastructure and municipal works as most non-indigenous residents of Hong Kong. In other words, the lack of proper planning for NT villages has disadvantaged indigenous villagers to some extent and these communities have not enjoyed the same investment in terms of government resources (adequate sewerage, road access, public space, waste disposal areas etc.) as other, more planned, communities in Hong Kong.

Most indigenous villagers would argue that they should be entitled to special privileges by virtue of the fact that the land originally belonged to them prior to 1898 and it was unfairly (or illegally) expropriated from

121 Lai, W.C. and Ho, K. O. (2001), "Low Rise Residential developments in Green Belts: A Hong Kong Empirical Study of Planning Applications." in *Planning Practice and Research*, Vol 16, No. 3-4, pp.321-335.

122 Hansard (1997), Minutes of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 1 April 1997. Hong Kong Legislative Council.

123 Lai (2000), see footnote 33.

124 Nissim (1998), see footnote 31.

125 Lai (2000), see footnote 33.

126 Ibid.

127 There were many other opposing arguments against the retention of Article 40, only some of them are included here. The Consultative Committee for the Basic Law of the HKSAR of the PRC (1998). *The Draft Basic Law of the HKSAR of the PRC (For solicitation of opinions)*. Consultation Report (Volume 5). October 1998, Hong Kong: HKSAR Government.



them. Certainly indigenous villagers receive different privileges from non-indigenous residents of Hong Kong but whether this is their right based on customary law is a matter of some complexity. This will be discussed further in Section 7.

It should be noted that the issue of discrimination is academic if the SHP is to be repealed on other grounds. Clearly if the SHP is wrong in principle, then extending it to women or other groups of people is not a solution.

### **5.11 Change of Community Structure**

Alienation of small houses has led to an influx of non-indigenous village residents, bringing a change in social structure of the villages. The Government does not collect or maintain any statistics on the numbers of non-indigenous villagers living in the existing recognised villages. However, in the case *Chan Wah v Hang Hau Rural Committee* it was noted that 60% of the residents of the plaintiff's village were outsiders. Anecdotally, there are some villages where 100% of the residents are outsiders, others where there are predominantly indigenous inhabitants.

In a 2001 survey of 236 Village Representatives, 40% thought the proportion of non-indigenous villagers in their villages was less than 20%, while 41% thought it was over 40%.<sup>128</sup> However, note that this is an opinion rather than based on any census. While an overwhelming majority of respondents (78%) agreed that there is harmony between indigenous and non-indigenous villagers,<sup>129</sup> the increase in non-indigenous villagers has brought a challenge to the traditional system of village representation that gave indigenous villagers the exclusive right to stand, vote and be elected.<sup>130</sup>

128 Lo, S. H. and Cheung, Y. F. (2001), "The Political Attitude of Village Representatives in the New Territories." Paper presented at the Foreign Correspondents Club, Hong Kong, 12 Dec 2001. <http://www.hkbu.edu.hk/~hktp>

129 Ibid.

130 Indeed, as of 2003 everyone living in an NT village has the right to vote for one of two village representatives.

## ► The Ongoing Government Review

The first comprehensive Government review of the SHP started in August 1995 in response to criticisms by the UN CEDAW. The fact of the review was the main reason given for exempting the policy from the provisions of the SDO.<sup>131</sup>

The SHP was further challenged<sup>132</sup> when the SDO was enacted in 1996 and the Administration again undertook to review the Policy. A Committee was set up prior to the handover, chaired by the then Secretary for Planning, Environment and Lands and attended by representatives from the Finance Bureau, Home Affairs Bureau (HAB), Department of Justice, Lands Department, Planning Department and Home Affairs Department (HAD). The terms of reference for the committee were "to take stock of the latest position on small house demands and consider all relevant issues such as land availability, eligibility criteria, standards for a small house, existing procedures, and options on the way forward for the NT Small House policy".<sup>133</sup> Originally intended to be a one year review, it has since been extended for over seven years.

While records of the Committee meetings are confidential, during the course of the review a number of complex and inter-related issues have been identified. These include the optimal use of land resources and environmental, transport and other infrastructural matters associated with small house developments.<sup>134</sup>

The release of the Audit's report in October 2002 put further pressure on the Administration to address some of the shortcomings of the Policy. Audit made a number of recommendations to address the problems including the following:

- Take prompt action to incorporate in the Lands Administration Office Instruction (LAOI) procedures for verifying the indigenous villager status of the small house grant applicant if his indigenous villager status is in doubt;
- Specify clearly the penalty for making a false declaration in the declaration form and relevant legal documents for the small house grant applications so as to deter false claims of indigenous villager status;
- Amend the small house building licence/land exchange conditions to reflect the Government's intention of using a discounting factor for the calculation of the premium on the removal of the restriction on alienation;
- Specify clearly in the LAOI the criteria for inclusion of additional villages in the Approved List of recognised villages
- Ensure that the NT DLOs keep complete and accurate Small House Registers so as to ensure that an eligible indigenous villager from a village in the Approved List is only given one small house grant in his lifetime;
- Carry out a thorough check of the Small House Registers kept by the NT DLOs with a view to reconciling/rectifying any discrepancies/errors found.

131 Minutes of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 13 January 1995. Hong Kong Legislative Council.

132 Hon. Christine Loh, then Member of the Legislative Council, moved a Private Member's Bill to amend the SDO and the Disability Discrimination Ordinance in 1996. One of her proposed amendments was to remove the exemption of the SHP from the SDO. The views of the then Legislative Council Members were divided on this proposal. The proposed amendment was eventually not carried when Loh's Bill went through the Second Reading Debate stage in the Legislative Council in 1997.

133 Secretary for Planning, Environment, and Lands (1998), Response to Legislative Council Question No. 17 by Hon. Christine Loh Kung-wai, 16 September 1998.

134 Housing Planning and Lands Bureau, personal communication, March/April 2003.



In response, in late 2002 the then Secretary for Housing, Planning and Lands, Michael Suen, pledged to resolve the problem of rising numbers of small house applications within five years.<sup>135</sup> The Policy Agenda for the Chief Executive's 2003 Policy Address also notes that the Government will "*consult various stakeholders with a view to making preliminary proposals on the small house policy for more in depth discussion*".

The Housing, Planning and Lands Bureau (HPLB) has stated that it intends to review the SHP in a comprehensive manner and identify suitable options for resolving those problems associated with the Policy within the tenure of office of the current Secretary.<sup>136</sup> It has indicated that in this process it will consult stakeholders including the Heung Yee Kuk and members of the Legislative Council.

The HPLB has since set up a Special Working Group with the Heung Yee Kuk to discuss how to address the Audit's recommendations. However these meeting discussions are confidential and at the time this report went to press there was no announcement of any amendments to the SHP.





## ► The Rights of New Territories Indigenous Villagers

One of the key issues in any government review of the SHP is that of NT indigenous villager rights. If such rights include the right to build a small house, and these rights are protected under the Basic Law, then any amendments to the Policy could result in legal challenges or legitimate claims to compensation. This gives rise to the questions:

- What is an indigenous villager's traditional right and interest?
- To what extent is the building of a small house an indigenous villager's right?
- What rights does Article 40 of the Basic Law protect?
- If the building of a small house is a right that is protected under the Basic Law what can the Government do (if anything) to amend the SHP? If they amend it are they liable to compensate the villagers?
- If the building of a small house is not a right, has the policy created a legitimate expectation that the Government is obliged to compensate for?

While it is beyond the scope of this paper to provide conclusive answers to these questions, which may only be settled in a court of law, some attempt has been made to address these issues below.

### ***What is an indigenous villager's traditional right and interest and to what extent is the building of a small house a right?***

There appears to be no written or definitive statement in the early Government Gazettes or by the Chinese authorities of what constitutes an indigenous villager's traditional right and interest. The HKSAR Government does not accept that customary rights were carried over when the NT was leased or that landowners have any rights other than those written in the block lease.

While certain pre-1898 customs (eg. traditional burial customs, communal property and rights of inheritance) were explicitly recognised and enshrined in the 1910 New Territories Regulations Ordinance (Cap. 97), there is no such legal recognition of "ding" rights.

When the SHP was set up it was intended to provide indigenous villagers with a once in a lifetime entitlement to *apply* for a concessionary grant of land; however the granting of the land was not in itself guaranteed.

While the small house grant application refers to "rights" (see footnote 44) the Administration has publicly stated that the indigenous villager's right to a small house is not a statutory entitlement and that the policy is administrative in nature.<sup>137</sup> The Administration undertook to seek legal advice on whether a male indigenous villager could take legal action against the Administration if the male villagers' right under the policy was removed<sup>138</sup> but if such advice was taken it was never released to the Legislative Council.

In 1997 the Administration reiterated that the SHP did not confer legal rights on the indigenous villagers.<sup>139</sup> The Administration noted that whether removal of the exception provision for the SHP from the SDO would result in a breach of Article 40 of the Basic Law was a matter for the courts to decide. In the absence of legal precedents, it cannot be said for certain what would constitute "lawful traditional rights and interests of the Indigenous Villagers".<sup>140</sup>

137 Minutes of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 13 January 1995. Hong Kong Legislative Council.

138 Ibid.

139 Minutes of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 1 April 1997. Hong Kong Legislative Council.

140 Letter from Secretary for Home Affairs. Meeting of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 17 April 1997. Hong Kong Legislative Council Paper CB(2)1920/96-97.

When reviewing the history of land administration and customs in the NT (see Appendix 3) it is clear that it was not until after World War II that ding rights were specified. While male indigenous villagers traditionally built houses for themselves within the village areas upon coming of age, there was no entitlement to build such a house, and it was just as common for several generations of families to live together in one house. Whatever "rights" had existed prior to the British taking over the NT were abolished when the Colonial Government established a new system of land registration. The practice of only granting land within village areas to indigenous villagers was an administrative decision introduced in the 1950s to prevent outsiders from buying up land in village areas. (see Appendix 3)

For a practice to be deemed customary law, it must have existed since time immemorial, which in Hong Kong is deemed to be 1874 or the year of legal memory.<sup>141</sup> It cannot be argued that the SHP is a custom dating to 1874. However, in one court case it was held that the Court must recognise and enforce any Chinese custom or customary right affecting the land and for Chinese custom, it did not require the elements of immemorial or reasonableness as required under the English law.<sup>142</sup>

### ***Is the SHP partial restoration of the rights that existed before the British took over the NT?***

When the British Colonial Government took over the NT it promised to respect Chinese customs and make reference to Chinese law in settling claims to land entitlements. Section 13 of the New Territories Ordinance also provides that the courts should recognise and enforce any Chinese custom or customary rights affecting land in the NT.

Prior to 1898, local inhabitants had the right to convert agricultural land into building land without prior permission of the Manchurian Government of the Qing Dynasty. The Heung Yee Kuk has argued that this right was taken away in 1905 by the Block Crown Lease and that the SHP was formulated in 1972 to "restore part of this right".<sup>143</sup> However, no official document refers to this aspect or intention of the SHP.

Although Britain only leased rather than ceded the NT, under international and local law it had full sovereignty over the NT.<sup>144</sup> Hong Kong residents could not have argued before 1997 that the British Government was in breach of the Convention of Peking, because this Convention was never made part of local law.<sup>145</sup> In other words the British Colonial Government was free to act as it wished. As Britain had replaced the old Chinese titles with British titles any 'rights' to build village houses that existed under Chinese law disappeared with the old titles. Villagers who had no land had to buy land from the Government.

### ***What rights does Article 40 of the Basic Law protect?***

Article 40 of the Basic Law states: "*The lawful traditional rights and interests of the indigenous inhabitants of the "New Territories" shall be protected by the Hong Kong Special Administrative Region*".

According to the Administration, whether the removal of the exemption in respect of the SHP in the SDO would result in a breach of Article 40 of the Basic Law would depend upon the court's interpretation of whether the policy conferred a "lawful traditional right and interest" for the purpose of the Article.<sup>146</sup>

141 Robinson, C., personal communication, May 2003.

142 *Kan Fat-tat v. Kan Yin-tat*. [1987] HK 516. Also in the case of *Wong Ying-kuen v. Wong Yi-shi & others* HC MP No. 19 of 1956 it was held that "the correct law to apply is the Ching law and custom as it existed in 1843 with such modifications in custom and in the interpretation in the law as have taken place in Hong Kong since that period" and "any such gloss on Ching law which has occurred in Hong Kong since 1843 must be accepted and followed. Similarly custom becomes modified throughout the years and due regard must be paid to any such change that has occurred in custom in Hong Kong."

143 Lau, W.F. (1996), Paper No. CB(2)1634/96-97(01), Meeting of Bills Committee to discuss the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 1 April 1997.

144 *In re Wong Hon* [1959] HKLRD 601 (vol 43), where a Chinese national was charged with committing a murder in Kowloon Walled City, the judge ruled that Britain had sovereignty and jurisdiction over Kowloon Walled City, which was not part of the leased NT. It therefore follows that Britain should certainly have sovereignty and jurisdiction over the leased NT.

145 *In Pong Wai Ting v. A.G.* [1925] HKLRD 22 (1932), it was claimed by the defendant that the Crown Land Resumption Ordinance was invalid because it was in breach of the Convention of Peking. One argument the Government raised in its defence was that the Convention was a treaty and until it was made part of local law it could not be said that it was breached in law.

146 Minutes of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 1 April 1997. Hong Kong Legislative Council.



The notes of the Consultative Committee for the Basic Law do not make any clearer what was intended by Article 40, with much controversy over the meaning of "traditional rights" and much opposition to the wording and inclusion of this Article.<sup>147</sup> Despite apparent numerous objections, the Article was retained. However, the original draft wording of the Article which was "*the legitimate traditional rights and interests of the indigenous inhabitants of 'New Territories' shall be protected by the Hong Kong Special Administrative Region*", was amended slightly, the difference being the replacement of the word "legitimate" with "lawful".

According to the New Oxford Dictionary of English, "tradition" is long-established custom or belief that has been passed on and "traditional" means existing in or as part of a tradition. It may therefore have a wider meaning than a mere custom and may affect the interpretation of Article 40.

The Heung Yee Kuk has stated that the lawful traditional rights and interests of the indigenous inhabitants of the NT referred to in Article 40 were rights and interests consistent with Hong Kong laws.<sup>148</sup> If this is the case then any small house 'rights' which exist should not be protected under Article 40 if they conflict with Hong Kong law (such as the Bill of Rights or the spirit of the Sex Discrimination Ordinance, see Section 5.10). In cases where existing rights conflict with rights provided for under other legislation, such as the Bill of Rights, it is for the court to decide on how to resolve the conflict.<sup>149</sup>

Whether this also applies to rights which are in conflict with international treaties and conventions is another question. However the Hong Kong Federation of Women Lawyers has argued that discriminatory customary laws will not necessarily be protected from repeal by the Basic Law after 1997 since a law which may be held to contravene the ICCPR or Articles 24 (sic)<sup>150</sup> and 39<sup>151</sup> of the Basic Law may not be considered lawful and could therefore be repealed.<sup>152</sup>

In the absence of any definition on lawful traditional rights and interests, the EOC considers how the rights under Article 40 apply in specific fields, such as housing, elections and property inheritance.<sup>153</sup> The EOC considers these fields important because their related activities impact on lives in respect of property ownership, economic rights, political rights and so forth. The EOC believes that the rights of indigenous villagers should be respected to the extent that they do not encroach on the rights of a particular sex, that is, the rights of any one group of people should not be upheld at the expense of another.<sup>154</sup> In this regard, the Government should clearly define the traditional rights and interests of indigenous villagers to avoid unnecessary conflict and confusion.

***If the building of a small house is a right that is protected under the Basic Law what can the Government do (if anything) to amend it? If it amends the SHP is it liable to compensate the villagers?***

If the courts were to decide that the SHP is a right that is protected under the Basic Law then the Government would either have to amend the Basic Law or continue with the policy until 2047. However, even if the SHP is agreed to be a right protected under the Basic Law, it comes down to what the right under the SHP consists of. If the right under the SHP is the right to apply for a small house only, rather than the right to build, then the Government could still amend the policy substantially without affecting the right to apply. Since many claims for small house grants are routinely rejected, it follows that the right, if any, is to apply and not to build.

147 The Consultative Committee for the Basic Law of the HKSAR of the PRC (1998). *The Draft Basic Law of the HKSAR of the PRC (For solicitation of opinions). Consultation Report (Volume 5)*. October 1998, Hong Kong: HKSAR Government.

148 Hansard (1997), Minutes of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunity (Race) Bill and Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, 1 April 1997. Hong Kong Legislative Council.

149 Equal Opportunities Commission, personal communication, June 2003.

150 It is presumed that this was intended to refer to Article 25, which states: "All Hong Kong residents shall be equal before the law".

151 Article 39 states "*The provisions of the ICCPR, ICESCR and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. The rights and freedoms enjoyed by HK residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article*".

152 Hong Kong Federation of Women Lawyers (1995), Submission on the New Territories Ordinance Cap 97, Legislative Council meeting, 26 May 1995.

153 Equal Opportunities Commission, personal communication, June 2003.

154 Ibid.

***If the building of a small house is not a right, has the SHP created a legitimate expectation that the Government is obliged to compensate for?***

Setting history aside, even if there is no proof that building a small house was a right based on customary law prior to 1898, whether the implementation of the SHP has produced a legitimate expectation is another issue. The doctrine of "legitimate expectation" is well known in case law, but a stated policy is required for the expectation to be made clear.

In the case of the SHP there are few publicly available documents which state the exact purpose of the policy. The speech by Denis Bray when formalising the policy in the Legislative Council in 1972 is the only available official document on the policy from that time. The Executive Council paper which should be released after 30 years was not available at the time this report went to print.

However, from Denis Bray's speech and extracts from his biography, it is evident that the policy was not meant to be a permanent one: "*I do not see these measures as anything more than interim measures which will complement the major job of producing a comprehensive development plan for the rural New Territories*". Further, there is no mention of ding rights or any other form of entitlements. Rather, the policy seems to have been designed with the best of intentions to address the housing, economic and social problems of rural villagers of that time. In addition, in his biography Denis Bray notes that he emphasised to the [Heung Yee] Kuk that "*if the scheme was abused, we should scrap the whole thing*".<sup>155</sup>

This clearly shows that from the beginning, the Government considered the policy a privilege rather than a right.

Although the architect of the policy considers that the SHP may have created a right, based on traditional customs, he also acknowledges that the SHP never guaranteed the villagers a house and it was agreed at the time that it might not be possible to find building space for all applicants.<sup>156</sup> Now that the social structure of villages has changed so dramatically, traditions such as restricting outsiders or female marriage outside the village have changed, so new rules are needed accordingly. To maintain the right to build a small house is a somewhat selective choice of traditions. If the villagers wish to preserve the right to build small houses should they also recreate the social structures in which this right originated?

Customary law experts consulted as part of this study agree that so long as the SHP exists and is administered there exists a legitimate expectation that an indigenous villager can obtain a small house grant. However, if the Government repeals the policy then there is no policy under which villagers can claim a legitimate expectation.<sup>157</sup> Policy changes are not normally retrospective therefore Government would still need to address the backlog of applications which exist now, or would exist the day the policy was repealed. In the UK if a legitimate expectation is not fulfilled because of administrative practice then some compensation is appropriate.<sup>158</sup> Therefore those applications which have not been processed because of administrative practice would likely need to be compensated.

While it would seem that if a legitimate expectation is removed then there are little legal grounds for compensation for villagers who have not already applied for a small house grant, this remains a political problem. The continuation of the policy, despite its shortcomings and despite the changing economic and social conditions of the NT, has led many indigenous villagers to believe that this is an inalienable right. The Administration needs to deal with these political expectations in some way.

155 Bray (2001), see footnote 9.

156 Bray, D., personal communication, May 2003.

157 Robinson, C., personal communication, May 2003.

158 Robinson, C., personal communication, May 2003.





## ► Policy Objectives

Any review of the SHP should really begin with a review of the objectives of the policy to see whether those objectives are still valid or pertinent and whether those objectives are best met by the continuation of the current policy or by other means. In other words, Government needs to acknowledge the original intent of the policy and publicly review whether the need for the policy still exists.

The original intentions of the policy reflect the very different social and economic situation in the rural NT in the 1970s. Indeed many parts of the NT would today be better described as urban fringe rather than rural. Some of the original drivers for the policy which now appear anachronistic include the following:

- Removal of temporary dwelling structures
- Availability of registered architects and contractors
- Upgrading of housing quality
- Upgrading of public health (though some may argue this is still relevant)

In light of the social changes that have made many of the original objectives of the policy redundant, it would seem continuation of the policy in its current form is no longer warranted. In which case, the question arises of what is the policy objective for rural villages in the NT? In the process of consultation for this study, regardless of the views on the merits of the SHP itself, there appeared to be a consensus on the following objectives of a rural village policy:

- (i) Accommodate genuine villagers (indigenous or otherwise) who want to live in the village of their birthplace or ancestors;
- (ii) Ensure villages are developed sustainably (i.e. protect the village's physical and cultural heritage, social environment, ecology and livelihoods of the inhabitants)

There is generally widespread support for rural communities built on long-term ownership that take pride in their village heritage and culture. It is generally felt that the preservation of village culture and heritage and the enhancement of the village environment are beneficial for Hong Kong overall. Villages and their traditional and contemporary low-rise vernacular are a visual relief from the monotony and density of the urban areas. As well as providing a historical context and allowing traditional cultural practices to survive, they provide educational and economic value (in the form of tourism) to the whole community.

In some cases, certain objectives should override the SHP. For example, there may be certain villages which need to be conserved in relation to their environs for their heritage value. In such cases the building of any new small houses in such villages may be undesirable. For this and other reasons it is essential that the SHP is not reviewed in isolation from other government policies. Indeed the review should be part and parcel of an over-arching review of rural landuse and planning policy, including open storage, port back-up uses, agricultural policy and conservation.

## ► Proposed Modifications to the Small House Policy and Implications

In the short term there are a number of measures that the Administration can take to address the problems of the SHP by tightening procedures or introducing other legislation or policies. The following section discusses possible measures in terms of their implications to allow for more rational debate on their overall merits. It is recognised that many of these options are controversial; some have serious and negative implications which render them impractical or politically unacceptable, but are included for the sake of comprehensiveness.

### 9.1 Do-nothing Option - Maintain Status Quo

The easiest option from an Administrative point of view, and one which appears to have been the preferred option over the years, is a do-nothing policy to maintain the status quo. Due to the politically-charged nature of the policy, it has been more expedient to let the policy continue, hoping for a slow natural death as available land for small house development becomes more scarce, than to risk controversy through significant amendments to the policy. The risk in this strategy is that it refuses to die, with rising pressure for village expansion and rezoning. Indigenous villagers' frustrations with the slow pace of processing of applications will continue and the backlog of applications will continue to grow unless dealt with. The recent introduction by the Town Planning Board of the new OU(RU) zone in rural areas also raises concerns that more degraded rural land will be rezoned for development, including small house development in future. Failure to address the myriad problems of the SHP will also lead to continued degradation of village areas and sub-optimal planning for the rural NT, to the long-term detriment of village residents and the Hong Kong community.

### 9.2 Restrict Development to Remaining Village Area Only

In the short term restricting development to the remaining village areas is maintaining the status quo. However, the Government needs to ensure that there is no open-ended commitment, and that pressure does not continue to build once such areas are developed. Land control could be a defensive mechanism to deal with the unlimited growing demand for small houses. It is recognised that the open-ended demand for small houses cannot be accommodated within the Village Environs (VE) or V zone but restricting small house development to village areas provides a cut-off point for the Policy some time in the future.

The Government firstly needs to identify the scale and size of the demand associated with future small house development and conduct surveys of the existing VE and V zones to estimate how much land remains and how many small houses could be accommodated within the existing boundary. There would be numerous benefits associated with conducting a proper land survey, including facilitating better planning and enforcement of layout plans and prevention of illegal occupation of government land. Because the existing V zone would likely be fully occupied under this strategy, a proper layout plan should be created for each village where there will be a specified number of new applications to provide space for parking, children's play areas, communal areas, ecologically valuable features such as fung shui woodland and streams, toilet facilities, etc.

Once the V or VE zones have reached capacity under the layout plan no new applications should be entertained. There should be no new expansion of V zones and the Town Planning Board (TPB) guidelines (see Appendix 1) should be tightened to restrict construction of new small houses outside the V zone except in exceptional circumstances. A key precedent for this strategy is villages within new towns, where the village is physically hemmed in by other development and no new expansion is possible.

### **Implications**

- **Existing indigenous villager rights** - In the short term, the indigenous villagers' right to *apply* for small house grants to enable them to construct a house in their own village would not be affected by this proposal. In the long term, once the V zones are at capacity, the Policy would need to be repealed to prevent unreasonable expectations.

- **Legal barriers** - There are no legal barriers to restricting development within remaining village areas as there is no statutory requirement to expand the V zone or VE areas to satisfy the unlimited demand for land for small house development.
- **Administrative ease** - The task of conducting surveys in all recognised villages, though likely to be contracted out, would require significant management resources of the Survey and Mapping Office staff of the Lands Department. In addition, this option would likely result in a significant increase in applications in the short term, increasing the administrative workload of the Government. However, in the medium term it is likely that it will speed up processing time for applications as there will be a more rational process for allocating houses according to layout plans within properly surveyed village areas. In the longer term, the administrative workload will decrease as the allocated number of small houses within the existing boundary is met and no further applications are entertained.
- **Costs** - In the short term there would be a significant lump sum cost for the survey of remaining land in recognised villages. In the long term, fewer administrative resources would be needed for processing applications. Also, since development would be restricted to within the remaining village areas only, it would save government expenditure on land resumption for village expansion. On the other hand, extra manpower and professionals, such as surveyors, planners and landscape architects, would be required to facilitate this change.
- **Planning and land use** - There would be increasing pressure on rural land within the remaining VE or V zone. *Also, the problem of unsustainable and insufficient land use still remains as the potential demand for village land continues to grow.* Planning problems can be resolved only if a proper layout plan is produced for each village. In the absence of a proper layout plan under this option, it is likely that planning problems will be exacerbated.
- **Environmental and heritage protection** - The limit on expansion of rural land for small house development would help conserve the surrounding ecological habitats and landscape. However, it may cause significant destruction of the natural environment and traditional village buildings within the village area.
- **Political acceptability** - Under this option no more applications would be allowed when the remaining village area is fully developed. This would result in many rejected applications in villages where there is a high demand for small houses, leading to discontent from indigenous villagers. The fact that this option implies a finite end to the development of small houses would likely be strongly opposed by indigenous villagers. However, it should be noted that the precedent of providing a finite boundary to those recognised villages within new towns was accepted by the indigenous villagers at the time.

### 9.3 Permanent Moratorium on Resale to Outsiders

The Audit Commissioner has made a number of recommendations to deal with the abuses of the SHP identified in his October 2002 report. These include the following:

- (i) Include a moratorium clause on the removal of the restriction on alienation [i.e. sale of the house to outsiders is not permitted for the first three years] in the conditions of small house grants made by building licences, land exchanges and private treaty grants (PTGs) not under the village expansion area (VEA) schemes;
- (ii) Provide additional procedures for carrying out further investigations when information on possible breach of licence conditions, misrepresentation by indigenous villagers or abuse of the SHP is received;

The Administration is currently in discussion with the Heung Yee Kuk on the Audit's recommendations.

At present, there is a three year moratorium on the removal of restriction for PTGs for VEA schemes,<sup>159</sup> which represent a very small proportion of total small house grants. After three years an indigenous villager can sell his house but must pay a full market value premium. Introduction of this moratorium in 1987 was found to effectively control the abuse of small house grants under PTG schemes.<sup>160</sup> Extending the moratorium to other types of small house grants would effectively control potential abuse of the SHP for the other types of grant.

<sup>159</sup> This was introduced in 1987 after the first audit review.

<sup>160</sup> Audit Commission (2002), see footnote 20.



The Audit's Report did not make any recommendations on the length of the moratorium for the other types of grant, though three years would probably be a reasonable expectation. However, because the intention of the SHP was to provide housing for villagers in their villages and retain cohesive communities it would make sense to introduce a permanent moratorium on alienation to outsiders in the conditions of small house grants made by Land Exchanges and PTGs (it would be seen as unreasonable to permanently restrict the resale of a small house if it is erected on private land by Building License).

This means that if an indigenous villager is granted a small house through a Land Exchange or PTG, there can be no modification of the lease, so the villager can never sell it but can only assign it to his successors. Sale to other indigenous villagers would also be prohibited to curb speculation among developers who are indigenous villagers.

### **Implications**

- **Existing indigenous villager right** - The indigenous villagers' right to *apply* for small house grants to enable them to construct a house in their own village would not be affected by this proposal. However, there would likely be objections from indigenous villagers who may view this as an unreasonable restriction on their property rights.
- **Legal barriers** - There would be no legal barriers to this amendment since it would be an administrative decision only.
- **Administrative ease** - A permanent (or even short-term) moratorium would significantly reduce or eliminate altogether the speculative development of small houses, and as a result the number of applications would greatly diminish. It would thus be possible for the Lands Department to reduce the outstanding backlog of small house applications.
- **Costs and revenue to Government** - The reduction in applications would substantially reduce the government resources utilised for administration and execution of small house grants. However, there would also be a reduction in land premium revenue from the sale of small houses.
- **Planning and land use** - Strictly, control on resale would be an effective way to prohibit trading of small houses, so demands on rural land and green belt areas would lessen. While the ad hoc nature of small house development would not be affected by this proposal, the reduced intensity of development may result in some planning benefits in the village areas.
- **Environmental and heritage protection** - Ease on land pressure may reduce competition between land for small houses and land for conservation to some extent. However, this option would not prevent ecological impacts within the Village Type Development (V) zone, nor would it prevent destruction of the traditional village pattern and architecture due to small house development.
- **Political acceptability** - Tightening control on resale would be generally opposed by the indigenous villagers. However, it may be supported by a minority of the older and more traditional villagers who want to unify the village and build communities. This option would help to maintain the ancestral land and houses under village ownership and preserve the existing social structure of villages. For non-indigenous Hong Kong residents, the restriction on resale of small houses may provide an acceptable solution in terms of equality as it effectively deals with the abuse of the policy while respecting the traditional customs and legitimate community-building aspirations of the indigenous villagers. Some have raised concerns that by reinforcing the distinction between villagers and "outsiders" it exacerbates the inequality of the policy. However, if resale is restricted to other villagers as well, this distinction should not be reinforced.



## 9.4 Reduction in Space Entitlement

From the previous discussion in Section 3.1 it can be seen that the Gross Floor Area (GFA) of 2100 (700 x 3) sq ft per small house is not sacrosanct and was a somewhat arbitrary figure based on administrative compromise with the Heung Yee Kuk. This should therefore be open to negotiation. In view of changing social conditions, population pressure and demands on land a reduced GFA entitlement (e.g. 700 x 1 sq ft) will allow more applicants to be satisfied for a given land area and give the Administration some breathing space for long term solutions to be negotiated.

A precedent for this option was the practice in Tsuen Wan for Village Expansion Areas (with the agreement of the villagers) to grant one house site to one 'family' but use three entitlements, for example, a father and two sons. This would significantly reduce the outstanding total of entitlements if applied throughout the NT. This also apparently led to a lower level of resales in Tsuen Wan than elsewhere. Villagers took their flat of 700 sq ft primarily for their own use.

- **Existing indigenous villager right** - The indigenous villagers' right to apply for small house grants to enable them to construct a house in their own village would be affected in that they would need to cooperate with other family or clan members to build a communal small house.
- **Legal barriers** - There would be no legal barriers to this amendment since it would be an administrative decision only.
- **Administrative ease** - Provided this does not affect the rate of applications, it would help Lands Department reduce the outstanding backlog of small house applications since three applicants will be able to be accommodated in the same land area as one previous applicant.
- **Costs and revenue to Government** - It should not affect Government costs and revenue significantly. If it reduces the total number of small houses granted it may cause a drop in premium payments.
- **Planning and land use** - Assuming there is no increase in applications, this option should reduce the demands on rural land and green belt areas. While the ad hoc nature of small house development would not be affected by this proposal, the reduced intensity of development may result in some planning benefits in the village areas.
- **Environmental and heritage protection** - if this reduces the number of small houses (assuming it does not change the rate of applications) this will yield positive benefits for the environment and heritage protection.
- **Political acceptability** - this will likely be opposed by some indigenous villagers since it reduces the possibility of speculative resale of the flats. However it may be welcomed by some villagers who are waiting for their applications to be processed, if it can speed up the processing time.

## 9.5 Multi-storey Buildings

The Heung Yee Kuk has previously submitted proposals for building high-rise, 10-storey blocks under the SHP as a means of clearing the backlog of applications.<sup>161</sup>

Purely from a planning perspective, more intense development could be accommodated, with careful planning, in the V zone of certain villages near urban areas. Selected buildings would be permitted to have six to eight storeys to accommodate more claims for small house development. The plot area allocated to one villager could be negotiable, e.g. a six storey building with a 1,000 sq ft footprint could be allocated to six villagers, meaning that they each have a flat of 1,000 sq ft (rather than 2,100 sq ft each). The building could be built by the villagers or the Government (who would add the costs to the premium payable or to the administrative fee or charge rent). However, such a building would not be considered a New Territories Exempted House (NTEH) and would therefore require the submission of building plans to the Building Authority. Most importantly the villagers would be responsible for developing the proposal and allocation plan. Planning permission would also be required.<sup>162</sup>

Because of the increase in intensity of development in villages where multi-storey housing is permitted, Planning Department would have to ensure adequate facilities for the increased population by preparing a layout plan, to include open space, schools, car parks, public facilities, infrastructure, etc.

### Implications

- **Existing indigenous villager right** - The indigenous villagers' right to *apply* for small house grants to enable them to construct a house in their own village would not be affected by this proposal.
- **Legal barriers** - If the building height is extended to more than 3 storeys, the house would no longer be an exempted building under the existing Buildings Ordinance (Application to the New Territories) Ordinance.<sup>163</sup> Thus multi-storey village housing would require full building permission from the Buildings Department, with the associated additional costs. Alternatively, any changes to the 3-storey limits to exempt higher buildings from building permission would entail amendment of the said Ordinance.<sup>164</sup>
- **Administrative ease** - Because multi-storey buildings would require the development of proper building and layout plans this would increase the workload of Buildings Department. On the other hand, because such plans would be developed by building professionals it could help streamline the application process. However, it may also lead to disputes on construction cost, public affairs management and allocation of flats. Also, there may need to be negotiation between the Government and villagers about the reduction of plot area, which could be very time consuming. It would be difficult to obtain agreement in identifying the designated village(s) for multi-storey development and this may also result in conflicts between different villages. This could also be very time-consuming from an administrative point of view.
- **Costs** - If buildings are required to comply with the Buildings Ordinance and planning permission is required, this will significantly increase the construction costs. One suggestion to help gain villagers compliance is to exempt applicants from paying the prescribed fees for building plans submissions, if these plans follow the conventional government specification.<sup>165</sup> Also, there are additional government expenses involved in the provision of public facilities and infrastructure and development of layout plans for each village.

<sup>162</sup> In the court case *Wah Yick Enterprises Co. Ltd. v. Building Authority* [1997] HKLRD 1177 M.P.1623, the Court of First Instance concluded that "in a Village Type Development Zone the use "House" properly construed does not include the 33 storey block of flats which the plaintiff proposes to build." Nissim (1998). see footnote 31. Presumably, a 10 storey block of flats would similarly not be construed by the court as being the same as a three storey village house.

<sup>163</sup> Though it should be noted that an exemption from the Buildings Ordinance only applies where small houses are built on flat land, which is in increasingly short supply. See also footnote 28.

<sup>164</sup> Lands Department, personal communication, June 2003.

<sup>165</sup> Lai, L. W. C., personal communication, June 2003.

- **Planning and land use** - A multi-storey building provides for a more efficient land use than a three storey small house. The need to apply for planning permission for taller buildings within V zones could also result in better planning controls for NT villages. However, it may also lead to adverse consequences for the environment and landscape of the NT unless the buildings are carefully sited with attention to the visual and ecological impact. A 6-storey building (or higher) is generally incompatible with a village environment. With the Government unlikely to reject applications for development that bring in significant revenue to the Government, the damage to the countryside could be significant if development is in sensitive areas. It also may cause further speculative development for small houses unless this option is accompanied by a moratorium on resale to outsiders. There are also concerns that allowing even a trial scheme for this option would open the floodgates for other villages, and would be used as an opportunity to extend the SHP beyond its current restrictions.
- **Environmental and heritage protection** - If the extension of building height is accompanied by a proper layout plan and tighter controls on resale, it should not have a significant impact on the natural environment and conservation of heritage. However, the villages in which multi-storey buildings are permitted would need to be carefully selected to ensure that the overall environment and village character are not adversely impacted.
- **Political acceptability** - As this is a proposal by the Heung Yee Kuk, it is likely this would be widely accepted by the villagers as it could help ease the land problem to some extent and reduce the backlog of applications for small house grants. However, it may also cause conflict between villagers if only some villages are permitted multi-storey development. There would also be significant opposition from green groups and members of the community concerned about the floodgate effect and its potential for damage to the environment and heritage of sensitive areas of the NT.

## 9.6 Centralised Village Development

Centralised village development has been proposed by some indigenous villagers as a transitional arrangement to settle the problems of insufficient land for small house grant applications. In this option, designated villages where there is sufficient land and potential for further development of small houses are used as central facilities for the development of small houses for all indigenous villagers within the same district. The Government would play an active role in planning and coordination of the whole village and would develop a comprehensive and detailed layout plan for the area, taking planning, heritage and environmental aspects into account. The Government would also provide public facilities, infrastructure and environmental enhancement. While selected buildings could be multi-storey the village character would be retained. In effect this would result in village-style New Towns. In many ways this was the concept that was used (for individual villages only) for village areas within new towns, where the Territory Development Department resumed land, prepared layout plans, provided communal facilities, and granted small houses accordingly.

### *Implications*

- **Existing indigenous villager rights** - This would be a departure from the indigenous villagers' right to apply for small house grants to enable them to construct a house in their *own* village, since the right to *apply* would be extended to other places within the same district. While under the current policy it is possible for an indigenous villager to apply for a small house grant in another village, he is required to obtain and demonstrate the agreement of the Village Head of the other village.
- **Legal barriers** - Depending on the amount of land available, the Government may need to resume private land in the designated central village to provide for communal facilities. While land in village areas was resumed for this purpose during the development of new towns, it is not clear whether resumption for village areas alone would be permitted under the Lands Resumption Ordinance since it is technically not a public purpose in the same way as a new town.
- **Administrative ease** - It would be difficult to obtain agreement in identifying the designated village(s) for centralised development and this may also result in conflicts regarding distribution of power and resources between different villages. This could be very time-consuming from an administrative point of view.

- **Costs** - This option would involve a huge amount of government expenditure to make it work, including the cost of land resumption and provision of infrastructure.
- **Planning and land use** - A centralised development would ensure better planning and adequate provision of public facilities and infrastructure in the designated village(s). However, this may lead to further speculative development unless there are additional controls on alienation of small house developments. The impact on land use is not obvious since a layout plan should be provided and the development should be under planning control.
- **Environmental and heritage protection** - If carefully selected, centralised development can prevent the traditional community, character, heritage and ecological value of other surrounding villages being eroded by small house development. The new village development would retain some aspect of village physical and social character though because of the mixing of clans it would inevitably lose some community cohesiveness (though arguably less than the present situation).
- **Political acceptability** - This may not be generally accepted by some indigenous villagers, both those living in the designated village(s) and those that would be prevented from building small houses in their own villages. It may also be perceived by non-indigenous residents as an unfair allocation of land and resources. This option would involve many complex issues such as distribution of public resources and allocation of land and houses.

## 9.7 Other Facilitating Measures

The Government has a multitude of legal and administrative tools it can deploy to improve the administration of the small house policy and address some of the problems noted earlier. These include the following:

### **Planning control**

It is clear that a major flaw of the implementation of the SHP was the failure to draw up a proper plan for all villages. The lack of planning of small house development within most NT villages has resulted in numerous problems, both for the residents and the community at large. Many of the problems, particularly inadequate sewerage, drainage and lack of infrastructure (which leads to construction of illegal roads and carparks) could be avoided in future by proper planning. Some of the most important facilitating measures the Administration (in this case, Planning Department) could and should take therefore involve better planning at both a macro and micro level. These include the following:

- Develop a strategic development plan for the whole of the rural NT, involving a review of rural land use and planning which encompasses village development, open storage, port back up uses, agriculture and conservation. This requires the cooperation of other departments and bureaux, notably the Environment and Food Bureau, to produce clear policies on nature conservation and agriculture. The need for a comprehensive plan for the whole rural NT was highlighted in 1972 (see quotation in Section 5.4). In hindsight, more resources diverted to proper planning 20 or 30 years ago would have prevented many of the current problems and the huge outlay of government funds (e.g. on drainage) to mitigate the problems.
- Review statutory plans and make adjustments to V zones and building guidelines to ensure environmental and heritage features are properly protected;
- Prepare detailed layout plans to facilitate orderly village development. When the policy was first introduced it was intended that detailed layout plans would be provided for all village areas. In practice only a few villages, mainly within New Town areas, have been constructed in accordance with village layout plans. More resources should therefore be allocated to the Planning Department to prepare layout plans. Alternatively, the villagers should be required to appoint independent planners to prepare layout plans before any additional small houses are processed in their villages. The villagers should ultimately benefit from such a proposal since the value of their properties will be enhanced with proper planning;
- Effectively enforce the planning controls within OZPs and prevent abuses such as infilling of wetlands adjacent to village areas;

It is clear that whatever the future of the SHP better planning controls, and the associated resources to deploy these, are needed in existing village areas.



**Environmental control**

- Ensure that a strategic environmental impact assessment is conducted when statutory plans are being drawn up to ensure valuable ecological areas are protected by the appropriate zoning and that the cumulative impacts of small house development are addressed;
- Tighten the small house application guidelines for septic tanks to ensure they have adequate capacity and are properly sited in village areas;
- Ensure that EPD's design and siting requirements on septic tanks are strictly followed (including allowing no septic tanks within water gathering grounds);
- Effectively enforce environmental controls within village areas, including controls on overflow of sewage from septic tanks and illegal discharges into streams and rivers;
- Provide EPD with more flexibility when tendering for the provision of mains sewerage by including the work for connecting to individual houses at the same time. This connection cost would be claimed back from the owners later and would lead to significant cost savings since it would avoid the cost of digging up the roads and pavements twice.<sup>166</sup> Alternatively, the Government could fund the house connections for existing village houses to provide an incentive for villagers to comply.

**Heritage protection**

- Conduct a study of the vernacular architecture and layout of traditional villages to identify character-defining features. Use the results of the study in drawing up planning controls.
- Introduce planning restrictions in the OZP for redevelopment of traditional vernacular houses in V zones or development of new small houses in villages in line with the character defining features identified in the study above;
- Identify fung shui woodlands and village ponds and paddy fields as natural and/or landscape features that are an integral part of village heritage;
- Conduct pilot projects to demonstrate how traditional village houses could be upgraded without detracting from their heritage value;
- Award grants to enable villagers to build in a traditional style or refurbish existing traditional houses to encourage preservation;
- Provide support to villagers who want to strengthen traditional communities, enhance villages and maintain old buildings, in the form of information, technical support and professional advice;
- Promote the understanding and use of traditional Chinese building materials such as grey bricks, etc through the use of grants, as described above;

**Implement Audit's Recommendations**

The Audit Commission made a number of other recommendations in its October 2002 report to limit the scope for abuse of the SHP (see Section 6).<sup>167</sup> The Administration generally agreed with the audit recommendations and is currently in negotiation with the Heung Yee Kuk regarding implementation. These recommendations also include speeding up the processing time for applications. If implemented, these would significantly reduce the scope for speculative development of small houses and reduce the demand accordingly. It would also help reduce the potential for corruption.

**Other suggestions to limit abuses**

Other suggestions to reduce abuses associated with the policy, made by individuals consulted for this report, include the following:

- Proper Government registration of indigenous villagers, similar to an electoral roll, to determine the number of indigenous villagers and those eligible for small houses;
- A change in policy to prevent those who inherit small houses from family members from being entitled to a small house grant;
- Applicants for small houses to employ registered building surveyors to provide plans, and solicitors to provide certificates as to their title;
- Repeal the authorised status of village representatives and chairmen/vice-chairmen of rural committee in certifying the status of indigenous villagers;

<sup>166</sup> This is currently against government policy as it confers an advantage on individual owners, and Government runs the risk of not being able to claim back the money in some cases. It would also add an estimated 10-15% cost to the overall tender. However, it would expedite the sewerage of village areas, would allow most of the costs to be claimed back and would be more efficient economically.

<sup>167</sup> Audit Commission (2002), see footnote 20.

## ► Repeal of the Small House Policy and Implications

Even if the myriad problems and abuses associated with the SHP can be addressed in the short-term, over the long-term the SHP is fundamentally unsustainable. Sooner or later the Government has to make a decision to repeal the policy, and the longer the Government procrastinates, the more intractable the problem becomes for the future. The current Government review, ongoing since 1995, does not appear to be approaching a resolution. While it may be believed that the Policy will die a natural death when there is no remaining vacant land within the village area, it is better to act before then to plan an orderly demise and to address any problems that occur in the meantime.

Firstly, the Government needs to redefine the objectives of the SHP and find ways to meet those objectives without an open-ended housing commitment. While this will require consultation with the Heung Yee Kuk, this is a debate with wider community implications and should not be restricted to a closed-door discussion with a section of the community that has vested interests in maintaining the Policy.

The previous discussion on indigenous villager rights concluded that the SHP does not entitle indigenous villagers or confer a legitimate expectation of the grant of a small house. This means that if Government decided to repeal the policy it should not be legally required to provide compensation. That said, due to the strong lobbying force of the Heung Yee Kuk and the likely strong reaction from indigenous villagers, the Government may feel obliged to provide compensation for political reasons. If that is the case, what would be an appropriate level of compensation? The following have been suggested as options:

1. Full market value of a 2100 sq ft house
2. Full market value of a 700 sq ft flat
3. Market value of a 700 sq ft piece of land
4. Discounted market value of a 700 sq ft piece of land

While the compensation offered could be monetised or in kind, in fairness it would be inappropriate (and prohibitively expensive) to offer compensation based on the market value of a small house or flat, since the most the applicant is entitled to is the grant of a piece of land rather than a house as such. Compensation based on the market value of a house or flat would be tantamount to a subsidy. Thus, any compensation should be related to land value, and perhaps even a discounted land value to reflect the uncertainty of the timing of the grant.

If the Government sets a date to repeal the SHP, it would then be faced with a finite number of claims for compensation from villagers with existing entitlements. No new claims would be entertained after that date.

The Government may offer the following types of compensation in lieu of a small house, either as part of the solution without necessarily repealing the policy or if the policy is repealed altogether. It should be noted that these solutions could also be applied in cases where villages are relocated due to traditional public purposes such as railway and road construction, or for new public purposes, where villages are to be preserved on conservation grounds.

### 10.1 Compensation by Cash/ Coupon

If the claim were to be monetised, the Administration could provide a coupon entitlement, similar to the letter A/B offer<sup>168</sup> which was used when the New Towns were built in the 1970s. This coupon, which would not be freely tradable, could then be used to offset the purchase of a private sector flat or subsidised government housing. Indigenous villagers could be given the option of a grant of a plot within the VE or V zone or a coupon to the value of the agreed level of compensation. The coupon would require that the applicant should live and occupy the unit for at least five years similar to the Home Ownership Scheme (HOS)<sup>169</sup> requirements. While villagers would be able to sell to another villager within that period they would not be able to sell to outsiders, even by paying a premium, within this five year period. While the coupon would be bankable it would not be paid until the person moves in.

<sup>168</sup> From January 1960 to March 1983, instead of giving cash compensation to landowners in New Town Development Areas, the Government issued promissory notes for a grant of development land, to be delivered at an unspecified future date. These promissory notes were known as Letters A/B. Nissim (1998), see footnote 31.

<sup>169</sup> The Home Ownership Scheme was a Government housing scheme introduced in 1978 to assist lower-middle income groups to acquire flats of their own by building Government-subsidised flats for sale. Due to the downturn in the property market the production and sale of HOS flats has ceased indefinitely as of 2003, except for a small number of unsold and returned flats.

The question of whether applications from villagers living overseas should be entertained also needs to be considered. While the restriction to live and occupy a flat for five years should reduce the number of applicants from overseas, it still does not prevent a third generation indigenous villager who was not born or has never lived in Hong Kong from obtaining compensation. This comes back to what objectives the Government is trying to meet through continuation of the policy.

The level of compensation offered is very critical. There may be many indigenous villagers who never intend to apply for a small house grant even though they are entitled. If the compensation offered is too attractive it may cause many more applicants than would have otherwise applied under the SHP. If the Government announces a repeal of the policy it is likely that a large majority of the eligible applicants will apply on a "no lose" basis.

### **Implications**

- **Existing indigenous villager rights** - The right for indigenous villagers to apply for small house grants would be met or compensated by the right to apply for cash/coupon up to a certain date, after which it would be permanently repealed.
- **Legal barriers** - There may be legal challenges from the indigenous villagers that repealing the SHP is in breach of Article 40 of the Basic Law. There is also the question of equality. The EOC has already advised the Administration that any possible options to resolve the matter should not discriminate on the grounds of sex. Thus, if compensation is offered to male indigenous villagers it may also need to be offered to female indigenous villagers to ensure compliance with the SDO. The issue of who will be entitled to claim for compensation will prove complex and time-consuming. Can second or third generation emigres claim compensation? Should all descendants from 1898 village residents be compensated (i.e. including those descended through the female line) or only male and female children of male indigenous villagers? How can the entitlement of female indigenous villagers be proved when females are not recorded in the clan lines and birth certificates may be lost or absent? This could lead to numerous and time consuming legal challenges.
- **Administrative ease** - In addition to the problems of proving claims or identifying who should be eligible for compensation, it will also be difficult to calculate the appropriate level of compensation to avoid a rush of applicants.
- **Costs** - The out of pocket expense for the Administration could be enormous. While the number of male indigenous villagers is unknown, the best estimate is somewhere in the region of 240,000. The number of female indigenous villagers is assumed to be similar. This requires compensating nearly half a million indigenous villagers, some of whom may not live or may never have lived in Hong Kong. The restrictions on living in a flat for five years would likely reduce the number of applications, and some of the applicants may opt to build a small house instead.

The number of indigenous villagers who are eligible for small house grants or who would wish to apply for a grant is unknown. The costs to Government also depend on what level of compensation (or subsidy) is offered. To demonstrate the approximate costs to Government, two scenarios are offered below:

- (1) Compensation based on an assumed market value of a 700 sq ft flat of HK\$500,000, and assuming half a million male and female applicants (double the approximate current number of entitled male indigenous villagers). Total cost to Government approximately HK\$250 billion.
- (2) Compensation based on an assumed land value of a 1000 sq ft plot of land of HK\$50,000, and assuming a total of 56,000 male and female applicants (equivalent to the present backlog of 14,000 with a factor of two applied to allow for excess demand and another factor of two to allow for female applicants). Total cost to Government approximately HK\$2.8 billion.

These scenarios present ballpark figures, since the value of land or flats are highly dependent on many variables including location, type of land, floating price of land and the housing market. However, in either case, significant sums are involved, plus the administrative and legal resources required to investigate cases and process the applications.

- **Planning and land use** - This option may resolve planning problems and release pressure on rural land to some extent. However, it may also increase pressure in the short term as the demand for small houses is likely to peak before the repeal. It also depends on what planning controls are imposed on the village areas after the repeal of the SHP. Even if small houses are no longer permitted in V zones or VE areas, would villagers or even outsiders be permitted to build NTEHs? This question would need to be addressed by the TPB to ensure that the Government is not repealing the SHP to replace it with something worse.
- **Environmental and heritage protection** - The implications for environment and heritage depend on the location of the village. In more accessible areas, the villagers would be free to sell their private land to developers who would then be able to apply for planning permission for villa-type developments.<sup>170</sup> This may even exacerbate loss of habitat and heritage. In the more remote areas, the absence of land for further expansion of small house development might reduce human impact on natural habitats and rural land. On the other hand there may also be further abandonment of old buildings because of the declining rural population under the change.
- **Political acceptability** - Many indigenous villagers may oppose the repeal of the SHP, even if compensation is offered. For those that accept the repeal, it is likely that there will be intense lobbying for higher levels of compensation and this could lead to protracted arguments. Given the possibly huge sums of compensation involved, there will be many objections from the community, since the deficit will need to be met by spending cuts elsewhere or an increase in taxes. Many non-indigenous Hong Kong residents will object to indigenous villagers being 'paid off', particularly if there is no legal obligation to do so. There may also be legal challenges to the fact of compensation itself on the basis that it is unfair to provide a small sector of the community with such compensation. This will be further aggravated if the Government decides to provide compensation to females to avoid legal challenge under the SDO, since the Government will not be able to argue that it is compensation for loss of the ding right as females never had this right in the first place.

## 10.2 Compensation by Provision of Public Housing

One of the original objectives of the SHP was to meet future housing needs in the rural NT and improve housing standards in NT villages. If this objective is still valid, and the SHP is repealed, Government could still provide public housing for those villagers in need by giving them priority on the public housing waiting list within the same district or the district nearest their village.<sup>171</sup> Villagers who are wealthy enough to buy any of the remaining HOS flats can be allocated priority within the district of their village and flats allocated to individual villagers by a random draw. This would be restricted to the existing stock of HOS flats only.

<sup>170</sup> In practice this happens already under the SHP, though technically not permitted, as developers buy up ding rights and develop low-rise villa-type developments.

<sup>171</sup> To be eligible for public housing, the applicants need to meet the following criteria: (1) they should not own any private property, or more than 1% of a collective property; (2) total monthly family income (for a three person family) should be less than HK\$12,200; (3) total savings should be less than \$330,000. As a male indigenous villager can normally inherit part of the collective clan property or land, he may not be eligible for public housing even if he has not applied for a small house grant. Public Enquiry Hotline, Housing Authority.





### **Implications**

- **Existing indigenous villager rights** - The right to apply for a small house grant is converted to the right to apply for public housing or HOS flats on a priority basis.
- **Legal barriers** - There may be legal challenges from the indigenous villagers that repealing the SHP is in breach of Article 40 of the Basic Law.
- **Administrative ease** - It may be difficult to achieve a common agreement on the size of unit provided as compensation to each eligible villager, while allocation within the same or the nearest district may also take time.
- **Costs** - There would be no overt out-of-pocket expenses to Government as for cash payments, but there would be costs associated with the building of additional public housing flats and the ongoing rental subsidies.
- **Planning and land use** - This may resolve planning problems and release pressure on rural land to some extent though it depends on how the land within V zones is dealt with afterwards.
- **Environmental and heritage protection** - No more expansion of land for small house development might reduce human impact on natural habitats and rural land. However, there may be increasing abandonment of old buildings because of the declining rural population under the change.
- **Political acceptability** - It is likely that this would be strongly opposed by indigenous villagers who see this option as removal of their entitlement without any clear compensation.



## ► Conclusions and Recommendations

When the SHP was first introduced in 1972 it was intended to improve the standard of housing in rural areas of the NT. In this regard it was largely successful. However the original circumstances that justified this Policy have long since changed and it is something of an anachronism that such houses are still exempted from the Buildings Ordinance. A review of the objectives of the policy is also long overdue and it is doubtful whether any of these are still valid in the current economic and social climate.

There are numerous problems associated with the SHP, including lack of proper sewerage and drainage, ad hoc landuse, encroachment on green belt areas, insensitive design and loss of heritage. Many of these problems stem from a lack of planning in village areas, which in turn is related to the failure to provide proper layout plans for the majority of villages outside the New Towns. Many of these problems could be dealt with administratively through the provision of layout plans for all villages.

Other problems, highlighted by two audit reports in 1987 and 2002, include the speculative abuse of the Policy, with villagers 'cashing in' on their entitlements. Measures recommended by Audit, which could be taken by the Administration to significantly curb speculation, include introducing a moratorium on resale for all types of small house grants. This would also help to curb the potential for corruption.

Even with such improvements the open-ended commitment to provide housing for every male indigenous villager until at least 2047 means that the policy is unsustainable in terms of landuse. Land is already in short supply within some village areas, though it is surprising that even seven years after the Government initiated a review of the policy, the amount of land available for small house development is unknown. It would seem a rational first step in any policy review to ascertain how much land remains in village areas through a proper land survey. A second step would be to determine how many indigenous villagers are currently, or will become, eligible for small house grants to gauge the extent of demand.

More intractable problems for the Administration are the discriminatory nature of the policy, the motivation behind the Government review, and the question of whether building a small house constitutes a right of male indigenous villagers. The question of rights is key since this will determine what leeway the Administration has in terms of amending or repealing the policy, and the need, if any, for compensation.

From a superficial analysis of the legal situation, it would appear that the SHP indeed discriminates against female indigenous villagers and is in breach of a number of Hong Kong laws and international treaties. There is also a view that the policy discriminates against non-indigenous Hong Kong residents who have no equivalent entitlement, but this argument is less clear cut. While indigenous villagers certainly receive different privileges from non-indigenous residents, whether this is fair or not depends on whether this is indeed their right based on custom.

The question of rights ultimately needs to be settled in a court of law, but the Administration's off-stated view is that the SHP does not confer any rights on indigenous villagers. Whether the policy itself has created a legitimate expectation among indigenous villagers that would need to be compensated is also complex, but this analysis has concluded that compensation is probably only due to those villagers with outstanding applications. If the Administration chose to repeal the policy after a certain date in the future, they would need to decide if and how to compensate, and how to deal with the political expectations of the villagers.

While the policy does appear to have long outlived its original usefulness, the Administration needs to review what its objectives are in terms of continuing, amending or repealing the policy. Although the abuses and problems of the policy need to be addressed there does appear to be merit in accommodating genuine villagers who want to live in the village of their birthplace or ancestors and ensuring that villages are developed sustainably. The rural areas of Hong Kong and the village traditions are part of the community's heritage and provide a welcome relief from the monotony of urban development.



Some of the options suggested by others, and analysed in this report, to improve the policy include the following:

- Permanent moratorium on resale to outsiders
- Restriction of development to remaining village areas only
- Provision of, or permission to build, multi-storey village buildings (the 'tall house' policy) in selected villages
- Centralised village development (village-style New Towns)
- Other facilitating measures including planning, environmental and heritage protection measures

All of these have economic, environmental, landuse, social and political implications which are summarised in Table 4. The list of options shows that some have merits under some conditions, while none is entirely satisfactory. Some are clearly impractical or politically unacceptable. This suggests a composite solution may be the best solution. It is beyond the scope of this report to recommend what that solution or solutions should be as this is best determined through political consensus and may vary depending on village location or classification. A way forward for Government would be to develop an inclusive and public process for key stakeholders to establish individual and societal objectives (within the context of an overall policy on rural landuse and conservation) and develop the optimal combination of options which best meets those objectives.

However, from an overall planning point of view, provision of proper layout plans for all villages where there are small house applications, either by Government or the villagers themselves, should be a prerequisite. In the longer term, should the Administration decide to repeal the policy, it should not, in the author's opinion, be legally required to provide compensation. However, if the Administration feels obliged to provide compensation for political reasons this may be in the form of cash/coupons or in kind, in the form of public housing. Again, each of these options would have significant economic and political implications.

Clearly, the longer the Administration delays making any decision, the harder the problem will be to deal with in the future. Any policy decision that is made should be done through open and public debate based on complete and accurate information.

**Table 4: Summary of the Implications of Different Policy Options for Amending or Compensating for the SHP**

Policy Option	Existing IV rights	Legal barriers	Administrative Ease	Costs/Revenue to Government	Planning/Landuse	Environment/Heritage protection	Political acceptability
<b>Do Nothing</b>	■	◆◆★	■	▲	◆◆	◆◆	▲▲ (●) ◆◆ (non ●)
<b>Amending the SHP</b>							
Restrict development to remaining village area only	■ (short term) ◆◆ (long term)	■	◆◆ (short term) ▲▲ (long term)	◆ (short term) ▲ (long term)	◆◆	?	◆◆
Permanent moratorium on resale	■	■	▲▲	▲▲ (admin costs) ◆◆ (premium)	▲	▲	◆◆ (●) ▲▲ (non ●)
Reduction in space entitlement	◆	■	▲	◆	▲	▲	?
Multi-storey buildings	■	◆	◆◆	◆	?	?	▲▲
Centralised village development	▲	?	◆◆	◆◆	?	?	▲
<b>Facilitating Measures</b>							
Better Planning Controls	■	■	◆	◆	▲▲	▲▲	◆
Better Environmental controls	■	■	◆	◆	▲	▲▲	◆
Better Heritage protection	■	■	◆	◆	▲▲	▲▲	? or ▲
Implement Audit recommendations	■	■	◆	◆	▲	▲	◆
<b>Compensation for the SHP</b>							
Cash/coupon compensation	■ (short term) ◆◆ (long term)	◆◆	◆◆	◆◆	?	?	▲▲ (●) ◆◆ (non ●)
Public housing compensation	◆◆ (long term)	◆◆	◆	◆ (short term)	▲	▲	◆◆ (●)

**Key** ★ = Possible conflict with existing ordinances    ● = indigenous villager    ▲ = slight positive effect    ▲▲ = significant positive effect  
 ◆ = slight negative effect    ◆◆ = significant negative effect    ■ = neutral/no change    ▲ = slight positive effect    ▲▲ = significant positive effect  
 ◆◆ = significant negative effect    ? = undetermined or unclear - could improve and/or worsen



## ► Acknowledgements

The authors are indebted to the following individuals and organisations for providing information and/or advice on a difficult and controversial subject for this report.

**Sir David AKERS JONES**

**Mr Ruy BARRETTO**

**Mr Denis BRAY**

**Mr Nicholas BROOKE** *Chairman*

**Mr Stephen Brown** *Director*

**Mr W K Chan** *Chief Survey Officer*

**Ms Cecilia CHU Wai Sim** *Lecturer*

**Mr Winston CHU** *Director*

**Dr Jeff CODY** *Professor*

**Mr John DAVISON**

**Professor Lynne DISTEFANO** *Professor*

**Dr Patrick HASE** *President*

**Dr Billy HAU Chi Hang** *Assistant Professor*

**Mr Ivan HO Chi Ching** *Lecturer*

**Mr Henry HO Kin Chung** *Environmental Affairs Manager*

**Ms Betty HO S F** *Director*

**Mr Mike KILBURN** *Public Policy Analyst*

**Mr Alex KIU C Y** *Town Planner*

**Mr Anthony KWAN T K**

*Chief Town Planner (Central Enforcement & Prosecution Section)*

**Professor Lawrence LAI W C** *Professor (Reader)*

**Dr Patrick LAI C C** *Senior Conservation Officer (Technical Services)*

**Ms LAM Siu Wai** *Senior Equal Opportunities Officer*

**Hon. LAU Ping Cheung** *LegCo Member*

**Dr LEE Ho Yin** *Assistant Professor*

**Ms Prudence LUI Lai-kuen**

**Mr Iain James MCNAUGHTON** *Assistant Director (H.K.)*

**Mr Chris NG**

**Hon. NG Leung Sing** *LegCo Member*

**Mr Roger NISSIM**

**Mr Gordon ONGLEY**

**Mr Chris ROBINSON**

**Mr Graham ROSS** *Assistant Director (Estate Management)*

**Mr Kevin SINCLAIR**

**Hon. Dr TANG Siu Tong** *LegCo Member/Chair*

**Mr Thomas Tso** *Deputy Secretary/Acting Secretary*

**Mr WAN Tuet Kau** *Member*

**Ms Karen WOO** *Conservation Officer*

**Ms Anna WU** *Chairperson*

Professional Property Services Ltd

Civic Exchange

Building Department, HKSAR Government

School of Design, The Hong Kong Polytechnic University

Civic Exchange

Dept of Architecture, The Chinese University of Hong Kong

Kao, Lee & Yip Solicitors

Dept of Architecture, The University of Hong Kong

Royal Asiatic Society

Dept of Ecology & Biodiversity, The University of Hong Kong

Dept of Architecture, The University of Hong Kong

Friends of the Earth Hong Kong

Conservancy Association

Kadoorie Farm & Botanic Garden

NT District Headquarters,

Planning Department, HKSAR Government

NT District Planning Division,

Planning Department, HKSAR Government

Dept of Real Estate & Construction,

The University of Hong Kong

Agriculture, Fisheries & Conservation Department,

HKSAR Government

Equal Opportunities Commission

Legislative Council Hong Kong

Dept of Architecture, The University of Hong Kong

South China Morning Post

Lands Department, HKSAR Government

Winston K. S. Chu & Partners

Legislative Council Hong Kong

Lands Department, HKSAR Government

South China Morning Post

Legislative Council / Yuen Long District Council

Housing, Planning & Lands Bureau, HKSAR Government

Sai Kung District Council

World Wide Fund for Nature Hong Kong

Equal Opportunities Commission

Agriculture, Fisheries and Conservation Department, HKSAR Government

Antiquities & Monuments Office, HKSAR Government

Buildings Department, HKSAR Government

Drainage Services Department, HKSAR Government

Fire Services Department, HKSAR Government

Home Affairs Department, HKSAR Government

Housing Authority, HKSAR Government

Housing, Planning and Lands Bureau, HKSAR Government

Independent Commission Against Corruption, HKSAR Government

Lands Department, HKSAR Government

Planning Department, HKSAR Government



## ► Glossary

- AFCD** : Agriculture, Fisheries & Conservation Department of the HKSAR Government
- AGR** : Agriculture zoning within an Outline Zoning Plan
- Alienation** : Assignment of the small house to a non-indigenous villager
- Audit Commission** : Audit Department of the HKSAR Government
- Authorised Person** : As defined under Section 3 of the Buildings Ordinance
- Basic Law** : Mini-constitution of the HKSAR
- Block Crown Lease** : the first title documents used in the NT, numerically ordered by lot for each demarcation district
- Building lot** : a land lot in which the lease explicitly permits building
- CEDAW** : the UN Convention on the Elimination of All Forms of Discrimination Against Women
- C of C** : Certificate of Compliance: an administrative measure whereby Lands Department confirms to registered owners that all conditions of the small house grant have been complied with
- C of E** : Certificate of Exemption: an administrative measure whereby Lands Department exempts registered owners of small houses from certain sections of the Buildings Ordinance in respect of building, site formation and drainage works, provided the house conforms to certain rules
- Convention of Peking** : 1898 Convention between Britain and China leasing what became known as the New Territories to Britain for 99 years.
- Crown land** : Prior to 1997, unleased land owned by the HKSAR Government (now referred to as Government land)
- DO** : District Office (of the Home Affairs Department, HKSAR Government)
- DLO** : District Lands Office (of the Lands Department, HKSAR Government)
- DPA Plan** : Development Permission Area plan: A statutory zoning plan
- Ding rights** : Literally 'male' rights. Traditional rights of male indigenous villagers who are eligible for the small house concessionary grants.
- EOC** : Equal Opportunities Commission, an independent statutory body set up in 1996 to implement the SDO
- EPD** : Environmental Protection Department of the HKSAR Government
- EXCO** : Executive Council: The highest decision-making body of the HKSAR Government
- Free Building Licence** : a licence for building a NTEH in a village area with no premium
- GB** : Green Belt zoning within an Outline Zoning Plan
- Ha** : hectares
- Hakka** : one of the 4 main ethnic groups of early settlers in Hong Kong (the others being Punti, Tanka and Hoklo, each distinguished by linguistic and occupational differences)
- Heung Yee Kuk** : The principal representative body of the rural community in dealing with Government.
- HOS** : Home Ownership Scheme - a Government subsidised house purchase scheme for lower-middle income groups
- ICAC** : Independent Commission Against Corruption
- ICESCR** : the UN International Committee on Economic, Social and Cultural Rights
- ICCPR** : the UN International Committee on Civil and Political Rights
- Indigenous Villager** : descended through the male line from a resident in 1898 of a recognised village
- Land Exchange** : exchange of private land for government land. A form of small house grant where private agricultural land is exchanged with government land for building small houses.



<b>Land Premium</b>	: the levy charged by the Government for upzoning land or for modification of a lease.
<b>LandsD</b>	: Lands Department of the HKSAR Government
<b>New Territories</b>	: The land area between Boundary St in Kowloon and Shenzhen River, plus 260 islands.
<b>NTEH</b>	: New Territories Exempted House. A village type house which conforms to certain rules and is exempt from certain sections of the Buildings Ordinance.
<b>OZP</b>	: Outline Zoning Plan. A statutory town plan prepared by the Town Planning Board.
<b>Permanent moratorium clause</b>	: a legal document to authorise the delay payment of premium without deadline.
<b>PlanD</b>	: Planning Department of the HKSAR Government
<b>PTG</b>	: Private Treaty Grant - grant of land by Government to a private owner without public auction. A form of small house grant where indigenous villagers who do not own land can apply for a site on government land at a concessionary premium of two-thirds of the full market value.
<b>Recognised village</b>	: one of the 636 villages that existed in 1898 and recognised by the Colonial Government. Small houses can only built within these villages.
<b>SDO</b>	: Sex Discrimination Ordinance
<b>Small House</b>	: a NTEH which is built by an indigenous villager in a recognised village for a concessionary grant.
<b>Sq ft</b>	: Square feet
<b>Town Planning Board</b>	: an independent appointed statutory board on planning issues.
<b>Village layout plan</b>	: A administrative plan prepared for a village area which is mainly used as a blueprint for engineering development.
<b>Village Environs</b>	: the village area within 300 ft of the edge of the last house built before December 1972
<b>Village Expansion Area</b>	: private land area outside the village environs which is resumed by the government to meet the demands of village housing.
<b>V zone</b>	: Village Development Area zone under an OZP

## ► Appendices

### **Appendix 1: Town Planning Board Interim Criteria for Consideration of Application for New Territories Exempted House/Small House in New Territories**

- (a) sympathetic consideration may be given if the application site is located within the village "environs" ("VE") of a recognised village and there is a general shortage of land in meeting the demand for Small House development in the "Village Type Development" ("V") zone of the village;
- (b) if the proposed NTEH/Small House is located within the "VE" and falling partly within the "V" zone, even if there is no general shortage of land in meeting the demand for Small House development in the "V" zone, favourable consideration may also be given if more than 50% of the proposed NTEH/Small House footprint falls within the "V" zone, provided that the other criteria can be satisfied;
- (c) if the proposed NTEH/Small House is located outside the "VE" but falling partly within the "V" zone, favourable consideration could be given if more than 50% of the proposed NTEH/Small House footprint falls within the "V" zone, provided that there is a general shortage of land in meeting the demand for Small House development in the "V" zone and the other criteria can be satisfied;
- (d) if an application site involves more than one NTEH/Small House, favourable consideration would be given only to individual NTEH/Small House with more than 50% of its footprint falling within the "V" zone, as clearly indicated on the submitted layout plan. Those with footprints falling less than 50% within the "V" zone would not normally be approved;
- (e) development of NTEH/Small House outside both the "VE" and the "V" zone would normally not be approved unless under very exceptional circumstances (e.g. the application site has a building status under the lease or approving the application could help achieve certain planning objectives such as phasing out of obnoxious but legal existing uses;
- (f) the proposed development should not frustrate the planning intention of the particular zone in which the application site is located;
- (g) the proposed development should be compatible in terms of land use, scale, design and layout, with the surrounding area/development;
- (h) the proposed development should not encroach onto the planned road network and should not cause adverse traffic, environmental, landscape, drainage, sewerage and geotechnical impacts on the surrounding areas. Any such potential impacts should be mitigated to the satisfaction of relevant Government departments;
- (i) the proposed development, if located within water gathering grounds, should be able to be connected to existing or planned sewerage system in the area except under very special circumstances (e.g. the application site has a building status under the lease or the applicant can demonstrate that the water quality within water gathering grounds will not be affected by the proposed development\*);
- (j) the provision of fire services installations and emergency vehicular access, if required, should be appropriate with the scale of the development and in compliance with relevant standards; and
- (k) all other statutory or non-statutory requirements of relevant Government departments must be met. Depending on the specific land use zoning of the application site, other Town Planning Board guidelines should be observed, as appropriate.

\* i.e. the applicant can demonstrate that effluent discharge from the proposed development will be in compliance with the effluent standards as stipulated in the Water Pollution Control Ordinance Technical Memorandum.





**Appendix 2: Corruption Cases Investigated and Persons Charged For Involvement in Small House Cases (1998-March 2003)<sup>172</sup>**

	1998	1999	2000	2001	2002	2003 (Jan - Mar)
<b>No. cases investigated</b>	17	14	19	17	15	5
<b>No. cases charged</b>	2	1(a)	1	1(b)	1(c)	-
<b>No. defendants charged</b>	42	1	7	1	11	1
<b>No. defendants convicted</b>	39	1	4	1	1	
<b>Sentences of those convicted</b>	5 yrs jail (1 person) 2 yrs jail (1 person) suspended sentences with fines (35 persons) suspended sentences (2 persons)	Drug addiction treatment centre	6 mo jail (1 person) suspended sentences (2 persons) community service order (1 person)	Pending sentence	Community service order	

- (a) involving 7 defendants (1 was charged in 1999 and 6 others in 2000)
- (b) involving 11 defendants (1 was charged in 2001 and 10 others in 2002)
- (c) involving 2 defendants (1 was charged in 2002 and the other in 2003)

### Appendix 3: A Short History of New Territories Land Administration

#### The Pre-1898 Situation

When the British took over the New Territories (NT) it was a long-established, well-settled, highly stratified and ethnically diverse region, constituting about 60% of the 600 sq miles of what was originally San-on County of Guangdong Province.<sup>173</sup>

The existing private lands were held by inhabitants under title deeds issued by Imperial China. Under Imperial Chinese law, the Chinese inhabitants enjoyed the right to "open up the wilderness and settle in villages" in lands other than those designated for government monopolies.<sup>174</sup> Such possession of land would be recognised by the conferment of land deeds by officials, and land under cultivation would be subject to taxation according to tax laws.<sup>175</sup> In Imperial times taxes were only paid on arable land; there was no tax on waste land (belonging to the Government) or for houses.<sup>176</sup> Land uses on such settled land were determined by custom. Farming and housing were always permitted on settled lands. However local custom usually required that permission for building on agricultural land should be sought from the village elders - who in some cases made a charge in the nature of a fine or premium for grant of such permission.<sup>177</sup>

There was also a system of perpetual leases where dual ownership of land was common. Two different parties, usually landlord and tenant, each claimed rights to the subsoil (tiku, or "skeleton of the land") and topsoil (tipi, or "skin of the land"), respectively. These rights were mutually exclusive in the sense that the landlord, as master of the subsoil, was responsible for paying taxes on land to the Government while the tenant had full rights of cultivation for the land as long as he paid rent in kind to the landlord. Leases of this kind were usually drawn up for long periods of time, in many cases in perpetuity, hence the term perpetual lease.

#### 1898 - Pre World War I

In 1898, the Convention Respecting an Extension of the Hong Kong Territory (the Convention) was signed in Peking, leasing to Great Britain part of San On County of Kwangtung Province for 99 years.<sup>178</sup> That area became known as the NT and was absorbed into the colony of Hong Kong by the British.

In principle the colonial Hong Kong Government claimed that it would administer the territory in conformity with traditional Chinese custom. In his 1899 proclamation, then-Governor Sir Henry Blake stated: "*I would also impress upon you that this territory having been leased by His Imperial Majesty the Emperor of China to Her Britannic Majesty the Queen, as subjects of Her Majesty's Empire, your commercial and landed interests will be safeguarded, and that your usages and good customs will not in any way be interfered with*".<sup>179</sup> In practice the situation was more ambiguous and it has been argued that the colonial Administration radically changed the social structure of the NT.<sup>180</sup>

One of the provisions of the Convention which was of significance to the colonial Hong Kong Government's subsequent land policy in the NT was the no-expropriation clause: "*It is further understood that there will be no expropriation or expulsion of the inhabitants of the district included within the extension, and that if land is required for public offices, fortifications, or the like official purposes, it shall be bought at a fair price*".

173 Chun, A. (1990), "Policing Society: the 'Rational' Practice of British Colonial Land Administration in the New Territories of Hong Kong c. 1900", in *J. of Historical Sociology*, Vol. 3, No. 4, December 1990.

174 Lai (2000), see footnote 33.

175 Ibid.

176 If arable land which was taxed was used to build a house on, it would remain taxed as arable land and the Government would ignore the house on it. Hase, P., personal communication, May 2003.

177 Wesley Smith, P. (1998), *Unequal Treaty 1898-1997. China, Great Britain, and Hong Kong's New Territories*. Oxford University Press, Hong Kong.

178 The extension was considered necessary at the time for defence and protection of the Crown Colony of Hong Kong. Ibid.

179 Blake, H. (1900), "Appendix IX to Sir Henry Blakes Report to Mr J Chamberlain HK," in *Hong Kong Sessional Papers*, p.280.

180 Chun, A (1990), "Policing Society: the 'Rational' Practice of British Colonial Land Administration in the New Territories of Hong Kong c. 1900," in *J. of Historical Sociology*, Vol. 3, No. 4, December 1990.

In international law there was no precedent for international leaseholds of the type under the Convention. While leasing was a common method of acquiring sovereignty over new territory in the 19<sup>th</sup> century, little thought was given to the situation when the lease ran out. Under international law if a country acquires land it acquires sovereignty, meaning it acquires the right to govern but not the right to property.<sup>181</sup> Therefore, the fact that Britain acquired sovereignty over the NT did not mean that it also acquired property.

There was no provision in the Convention regarding property. To ensure proper control over the NT, the British Government decided to take ownership of land and lease it (actually sub-letting the land). Rather than introduce legislation locally they made an Imperial Order in the Privy Council in Britain which declared all the land was now British.<sup>182</sup>

According to one expert, there is no doubt that the 1898 treaty was an unequal treaty, and considered so by China, but this does not mean it was invalid or illegal.<sup>183</sup> While Britain considered the Chinese inhabitants of the NT to be British subjects from 16 April 1899, the NT was Chinese territory, not British, and can be said to have been leased and not ceded.<sup>184</sup> In other words, the NT were not treated in all respects as if full sovereignty had been transferred, and the policy towards the NT was often affected by treaty obligations.

According to Hong Kong Government papers at the time, utter confusion in respect of land had prevailed in the NT under Chinese rule.<sup>185</sup> Therefore one of the first priorities of the Hong Kong Government after the military takeover of the NT was to undertake a thorough survey of all land ownership and tenure for every landowning individual or group in every existing village in the territory. Because it was feared that many inhabitants hoped to obtain titles by fraudulent means under British rule, the colonial Hong Kong Administration established a special court to hear and determine all disputed claims to land.

The New Territories Land Court Ordinance of 1900 declared all land in the NT the property of the Crown and any occupation was considered to be trespassing unless authorised by Government or if a claim presented to the Court was passed.<sup>186</sup> The Ordinance did not settle the question of the appropriate form of title. The title eventually granted was a lease from the Crown for 75 years from 1 July 1898 until 1973, subject to renewal for a further 24 years minus three days.

The main aim of the court was "to provide owners and occupiers of land in the NT with a tribunal to which they can appeal, without incurring the expense of resorting to the supreme court and to arrange amicably questions of disputed titles and land and rent disputes generally".<sup>187</sup>

The members of the Land Court adopted Chinese law as the prevailing law to test the validity of a claim. This could mean official (dynastic, imperial or codified) law or local customary law.<sup>188</sup> Since the two are not always consistent, this allowed the colonial Hong Kong Government to adopt a flexible approach to suit British Government interests.

181 Davison, J., personal communication, June 2003.

182 The Imperial Order was an Act of State which meant that it could not be challenged by Hong Kong residents. In international law a treaty can be enforced only by two contributing parties (not the subject people) unless a treaty is made part of the domestic law of the subject country. Since the Convention of Peking was not made part of the domestic law of Hong Kong the actions of the Colonial Government could not be legally challenged. Davison, J., personal communication, June 2003.

183 Wesley Smith, P. (1998). *Unequal Treaty 1898-1997. China, Great Britain, and Hong Kong's New Territories*. Hong Kong: Oxford University Press.

184 Ibid.

185 Ibid. The San-On County Registry did not register titles to land, only deeds. The deeds did not delineate exact land boundaries, peasants were often not able to document rights to plots of land and in many cases two parties would claim ownership rights simultaneously to what appeared to be the same plot of land. Large clans and wealthy landowners bribed corrupt land officials to underreport actual landholdings.

186 According to Wesley-Smith, in strictly legal terms every owner and occupier in the NT was by virtue of this Ordinance, duly expropriated of his land from the coming into operation of the Ordinance (in 1900) until the setting up of the land court and lodging of claims. Ibid.

187 Wesley Smith, P. (1998), *Unequal Treaty 1898-1997. China, Great Britain, and Hong Kong's New Territories*. Hong Kong: Oxford University Press.

188 Ibid.

While the Colonial Hong Kong Governor had promised to respect Chinese usages, all occupiers of land had to register their holdings. Land rent was to continue, now payable as Crown rent, but all customs duties and other monopolistic dues were to be abolished.<sup>189</sup> The Governor reported to the Lord High Chamberlain that the people had been badly governed, the officials had "squeezed" the people and that clan fights were used to settle disputes.<sup>190</sup>

The land survey of the NT commenced in June 1900 and was conducted by Indian surveyors (known as the Indian Survey). The physical boundaries, land uses and proprietors of all privately or communally held<sup>191</sup> lands in the NT were classified into a number of demarcation or survey districts.<sup>192</sup> Each unit of land was numbered and registered in the name of a person or group that had a claim to the land and could furnish the proper deeds. Upon submission of the deeds the Colonial Government in return issued a Crown Lease or ownership licence (chap-chiu).<sup>193</sup> The demarcation map and the particulars of ownership then provided the basis for the "Block Crown Lease", a land register numerically ordered by lot for each demarcation district, and a Crown Rent Roll, which became the instrument for tax collection.<sup>194</sup>

The Block Crown Leases covered land occupied by cultivation, walled settlements and the clusters of village houses. All other land remained unallocated Crown land. In the schedule to the Block Crown Leases are records of uses which, until judicial clarification in the case of *A.G v. Melhado Investment Ltd* in 1983, were thought to have the effect of restricting land uses to those registered in it. Therefore private lands in the NT are commonly referred to as agricultural or house lots, depending on the uses recorded in the schedule.<sup>195</sup> These lots have been intensively subdivided and are highly irregular in shape and level as is characteristic of the traditional Chinese way of farming.

On lands under Block Crown Leases, lessees have been able to build on house land without Government permission. Where they wish to develop house structures on their private agricultural land, they have to obtain a waiver from the Government. If they wish to build on unallocated Crown land they have to buy from the Government land designated for residential purposes through auctions or tenders (usually along roads or railways developed by the Government). The usual practice has been for villagers to obtain a licence from the Government to build on government land adjoining their village.

The colonial Land Court found a mass of anomalies - many NT residents claimed large tracts of land though they had never paid any rent to Chinese officials; many were found to be paying an annual tax to certain well-to-do families<sup>196</sup> under the impression that these sums were being accounted for to the district treasury, although these families were found to have title to very little area or no title at all.<sup>197</sup> To avoid registration fees and public attention, land had often been bought and sold using unregistered deeds, the vendor continuing to pay the tax. The Land Court found that one claim in 20 was disputed. All unclaimed land was held by the Crown for disposal.

189 Endacott, G. B. (1958), *A History of Hong Kong*, Hong Kong: Oxford University Press.

190 Ibid.

191 This includes tsos and tongs. Clan land (tso) may not be sold or mortgaged without the consent of all the clan members. Such land is held in the name of the ancestor who bequeathed the property and is leased to members of the clan.

192 Lai (2000), see footnote 33.

193 Chun, A. (1990), "Policing Society: the 'Rational' Practice of British Colonial Land Administration in the New Territories of Hong Kong c. 1900," in *J. of Historical Sociology*, Vol. 3, No. 4, December 1990.

194 Ibid.

195 Lai (2000), see footnote 33.

196 Taxlords were perpetual lessors who collected rent from tenant farmers. The Colonial Government evaluated taxlord claims according to Chinese law which meant favouring perpetual lessees (owners of surface rights) over perpetual lessors (owner of subsoil rights), effectively eliminating taxlords as a class. However, it can be argued that taxlords were legitimately acting within the established landlord-tenant relationship and that surface owners seized the opportunity of the British takeover to challenge their position. This raises the question of whether taxlords were expropriated of their lands, contrary to the Convention. Wesley Smith.

197 Endacott, G. B. (1958), *A History of Hong Kong*, Hong Kong: Oxford University Press.



The work of the Land Court was completed in 1903 by which date it had marked out 354,277 lots and determined their ownership.<sup>198</sup> The colonial Hong Kong Government, in a revenue-raising measure, then made a major change to the tax system of the NT and introduced a tax for houses. These were taxed at a higher rate (50 cents per hundredth of an acre) than arable land (1-3 cents per hundredth of an acre) and construction of a house had to be approved by the colonial Hong Kong Government.<sup>199</sup> The Court also abolished the perpetual lease system, ruling in favour of the actual cultivator. This was partly because of the British perception that the lease system was a gross social injustice, but partly out of bureaucratic expediency.<sup>200</sup> This produced an extraordinary social change in the NT as in one stroke all tenant cultivators were registered as owners.<sup>201</sup>

In 1905 new regulations were introduced after the Block Crown Lease was completed. A villager had to apply to the local District Officer (DO) for approval to convert arable land to building or to buy waste land.<sup>202</sup> The DO would then put a stake on the land with a notice seeking objections. If there were no objections the DO would make a change in the register.<sup>203</sup> For practical reasons when villagers applied to convert arable land to building, they would also submit a "letter of no objection" from the village headman.<sup>204</sup> For waste land the same procedure would be followed and if no objections were received the DO would arrange for the land to be auctioned.<sup>205</sup> Typically, the land was sold to the original applicant at the set price. While in theory these auctions were open to non-indigenous villagers, in practice few people other than indigenous villagers wanted to buy land in the NT at this time.

When the Land Court completed the Crown rent rolls in 1905, some inhabitants complained that the rent rates were excessive and that building tax had not been imposed before, implying that the Colonial Hong Kong Government was contradicting its policy of approaching the land question according to Chinese law.<sup>206</sup> The objection was circumvented by a proclamation in July 1906 promising not to raise rents during the term of the lease, even though this deprived the Government of large sums of revenue and was contrary to specific instructions by the then British Secretary of State. Even when Crown leases were renewed in 1973 the Crown rent remained unaltered in most lots in the NT despite enormous increases in the value of the land.

### Between the Wars

During the 1920s and 1930s advancements in public health meant that the population of the NT grew rapidly.<sup>207</sup> Villagers were also becoming wealthier and could afford to build houses for their sons rather than crowding all family members into one house. This led to an increase in applications for building of houses on arable or waste land. In the pre-World War II period ding rights were not specified. However, the DOs developed an administrative practice to allow villagers to apply for and get the land they needed for building houses in village areas.

As the demand for land and houses from outsiders grew in other parts of the NT, particularly New Kowloon, the rules were changed. In areas with a heavy demand for housing by outsiders, particularly Shatin, Tai Po and Tsuen Wan, Government would sell the land by auction. However the DO would not sell to outsiders in villages unless there was agreement from the villagers themselves. If a villager wanted to build a house he was permitted to do so within the vicinity of his villages (as determined by the DO).

198 Ibid.

199 Hase P., (2003), personal communication, May 2003.

200 Chun, A. (1990), "Policing Society: the "Rational" Practice of British Colonial Land Administration in the New Territories of Hong Kong c. 1900," in *J. of Historical Sociology*, Vol. 3, No. 4, December 1990.

201 Ibid.

202 Hase, P., (2003), personal communication.

203 Ibid.

204 Ibid.

205 Ibid.

206 Wesley Smith, P. (1998), *Unequal Treaty 1898-1997. China, Great Britain, and Hong Kong's New Territories*, Hong Kong: Oxford University Press.

207 Up until 1911 half of the children born in the NT died before reaching marriageable age. Disinfection of well water, vaccinations and introduction of midwives resulted in a dramatic drop in the child mortality rate in NT villages in the 1920s and 1930s. People were also living longer due to similar improvements in public health. Hase, P., personal communication, May 2003.

In the 1920s petitioners objecting to the Hong Kong Government's land resumption policy specifically raised the issue of expropriation and the fidelity of the Government to the non-expropriation clause of the 1898 Convention.<sup>208</sup> The claimed resumption of land for development of building land and subsequent sale was not an official purpose under the Convention. The British Secretary of State considered that a fair price should be offered for resumed land, and went further to state that "fair price must mean a fair market price - the value land would fetch in the open market".<sup>209</sup> However, then-Governor Clementi thought a fair price was what would be granted under Chinese law and custom, and the Manchu code made no provision for compensation. The British Colonial Office doubted whether the Hong Kong Government's policy of compensation accorded with the Convention and wrote to the Governor suggesting a fairer method of assessing compensation. An enquiry was ordered, but never took place.<sup>210</sup>

The issue of fair compensation for land resumption continues to the present date. Even as late as 1977, the Heung Yee Kuk sought a legal opinion on the conformity of the Hong Kong Government's land policy with the letter and spirit of the Convention.<sup>211</sup> The then-Chief Secretary's reply declined to comment on whether the Crown Lands Resumption Ordinance conflicted with the Convention.

### The Post-World War II period

World War II and the Japanese occupation proved devastating for Hong Kong's population, economy and infrastructure. After the war NT villages were so poor that it was not until the early 1950s that villagers started to apply in any number to build houses again.<sup>212</sup> However, by this time the first big influx of refugees from the mainland had begun and a large number of outsiders were applying for houses. Prior to the war outsiders could apply for houses in two ways: (1) apply for land from a DO list of land plots available at standard prices for standard lots; or (2) apply for a specific piece of land.<sup>213</sup> Due to the large numbers of people applying it was clear that the pre-war system could not be continued. This was the beginning of the "ding uk". The aim was to restrict outsiders rather than to provide for the villagers.

Sometime in the 1950s an administrative decision was made that only villagers would be allowed to bid for land under the old system.<sup>214</sup> For outsiders, Government would require a more formal competitive bidding system. The "ding" right thus became more formalised.

In the mid-1950s, as villagers started to emigrate to the UK, they chose to sell their houses.<sup>215</sup> It became increasingly common for villagers to apply for houses as far outside the village as they could convince the DO was still within the village boundaries and then sell the house.<sup>216</sup> The rising price of land also meant that by the 1960's land cost more than the average villager could afford.<sup>217</sup> To get around this problem District Officers held public auctions in remote villages at dawn to prevent outsiders from taking part, or issued "temporary structure" permits which could be issued without auction but gave no title to the land.

208 Wesley Smith, P. (1998), *Unequal Treaty 1898-1997. China, Great Britain, and Hong Kong's New Territories*, Hong Kong: Oxford University Press.

209 Ibid.

210 Ibid.

211 Ibid.

212 Hase, P., personal communication, May 2003.

213 Hase, P., personal communication, May 2003.

214 Hase, P., personal communication, May 2003.

215 Traditionally, indigenous villagers view village land as being held in trust by the descendants for their ancestors and not freely saleable outside the family. However, where a house is built on previously barren land it is freely saleable. New ding uk were considered as freely saleable, contrasting with the old inherited houses which are very rarely sold. Hase, P, personal communication.

216 Hase, P., personal communication, May 2003.

217 Gibbs (2001), see footnote 11.

**Cover Design by David Fung**



Printed on recycled Paper



Room 701, Hoseinee House, 69 Wyndham Street, Central, Hong Kong.  
Tel: (852) 2893 0213 Fax: (852) 3105 9713  
Website: <http://www.civic-exchange.org>