

HONG KONG / JUDGMENT

FINE TOWER ASSOCIATES LTD v. TOWN PLANNING BOARD

COURT

Court of First Instance

DECIDED

8 September 2006

CASE / FILE NUMBER

HCAL61/2006

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bjbj HCAL 61/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO.
61 OF 2006

IN THE MATTER of an application by FINE TOWER ASSOCIATES LIMITED for leave to apply for Judicial Review (Order 53 rule 3 of the Rules of the High Court) and IN THE MATTER of the decision made by the Town Planning Board () of Hong Kong under s.6(9) of the Town Planning Ordinance, Cap. 131 (unamended) () on a date some time on or after 10th February 2006 and communicated to the Applicant through Masterplan Limited, its agent, in a letter dated 24th February 2006, rejecting the objection of the Applicant proposing amendment of the Draft Quarry Bay Outline Zoning Plan No. S/H21/18 (the draft OZP) so as would avoid the said land lots being affected thereby or that the said land lots should be resumed

BETWEEN FINE TOWER ASSOCIATES LIMITED Applicant and TOWN PLANNING BOARD
Respondent

Before: Hon Reyes J in Court Date of Hearing: 30 August 2006 Date of Judgment: 8 September 2006

J U D G M E N T

I. INTRODUCTION The Government typically leases land to an owner on certain conditions of exchange or grant. Those conditions may restrict the uses to which the owner can put the land. Suppose that a proposed zoning of the area in which an owner's land is situated would prevent the owner from carrying out any of the uses permitted by the relevant conditions. Can the owner claim that there has been a deprivation of property entitling him to compensation from the Government under Article 105 of the Basic Law? That is the short issue raised by these proceedings.

II. BACKGROUND Fine Tower owns 2 pieces of land (Lots 8590 and 8723) in Quarry Bay. They are subject to Conditions of Exchange (COE) limiting their use. In particular, the COE only permit the lots to be used for industrial and/or godown purposes and buildings on either lot cannot be higher than 85.34 mPD. Further, the initial development on Lot 8723 must be an oil depot. The Town Planning Board published a draft Outline Zoning Plan (OZP) in April 2003. If approved by the Chief Executive, the draft OZP would result in 44% of Fine Tower's lots being zoned as Open Space and the remaining 56% zoned being zoned for Other Specified Uses (OU). The draft OZP also imposes a height restriction of 35 mPD on buildings within the 56% area. An Open Space zoning would not permit use of the 44% area for industrial or godown purposes. Nor do the Explanatory Notes to the draft OZP include industrial and godown purposes among the Other Specified Uses to be allowed within the 56% area. Accordingly, if approved, the draft OZP would mean that Fine Tower could not carry out any of the uses permitted by the COE. Fine Tower objected to the draft OZP. Fine Tower claimed that the draft OZP was equivalent to a deprivation of property without compensation. By a letter dated 17 October 2003 the Board rejected Fine Tower's objections. Fine Tower sought judicial review of the Board's rejection. Fine Tower was successful. Hartmann J held that the Board had not given Fine Tower a fair chance to make representations on evidence which the Board considered when deciding to reject. See *Fine Tower Associates Ltd. v. Town Planning Board* [2006] 2 HKC 507. But, after reconsideration of Fine Tower's objections, the Board once more concluded that the draft OZP did not give rise to a deprivation of Fine Tower's property. The Board so informed Fine Tower by letter dated 24 February 2006. The Board maintains before me that there is no deprivation of property within the terms of Article 105. This is because (the Board says) the lots continue to have commercial value. The lots are not worthless. Further, Fine Tower can negotiate with the Government for modification of the COE upon payment of a suitable premium. Fine Tower, disagreeing, brings this judicial review of the Board's February 2006 decision. Ironically, the draft OZP was the result of an application by Fine Tower's Holding company (Concord) to amend the then existing OZP for the relevant area. Fine Tower bought both lots as open land from China Oil Co. Ltd. in September 1993. The purchase price was \$150 million. Between 1994 and 2005 Fine Tower advanced several proposals to the Government for developing the lots. In 1994 Fine Tower applied to erect an office building. That proposal was rejected. In 1995, Fine Tower applied to put up an industrial-office building complex. That scheme was approved, but Fine Tower did not proceed with its plans despite 3 one year extensions. In 1999 Fine Tower applied to construct an oil depot with refuelling stations and other facilities. That plan was rejected for safety reasons and incompatibility with the COE. In 2001 Fine Tower applied to erect an industrial building. It amended its proposal in

2003 and 2005. But the scheme was not approved. In the meanwhile, in September 2000 Concord requested that the existing OZP be amended to facilitate development of an Old Hong Kong scheme along the Quarry Bay waterfront (including Fine Tower's lots). Concord hoped that this would facilitate a comprehensive hotel, retail, open space and recreation development on the waterfront. Concord proposed that the area in which the lots were located be zoned as Comprehensive Development Area (1). But the Government's Planning Department did not accept this suggestion. Instead the Planning Department submitted the zoning for Fine Tower's lots now contained in the draft OZP. By the Other Specified Uses covering the 56% area, the Planning Department essentially had in mind Cultural and/or Commercial, Leisure and Tourism Related Uses. All of the proposals for developing the lots advanced by Fine Tower and Concord necessitated negotiating a modification of the COE with the Government. Any agreed modification would have entailed the payment of a premium to the Government. The draft OZP, if approved, would not allow Concord or Fine Tower to develop the land along the lines submitted in their Old Hong Kong proposal. Since 1999 Fine Tower has been using the lots as a temporary car park. In order to do so, it has been paying the Government a forbearance fee on terms stipulated in a series of waiver letters.

II. DISCUSSION

A. Law

A.1 General principles

Basic Law Article 105 provides that:- The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Zoning regulations may place restrictions on the uses to which a property might be put. Such regulations may lead to a diminution in the value of property due to the restrictions placed. But Hong Kong law has long recognised that zoning restrictions imposed in the public interest will not normally amount to a deprivation of property within the terms of Article 105. When a person acquires land, he takes the property subject to an implied condition that, for the public good, the Government may by regulation (including OZPs) limit the uses to which such land might be put in the future. The law distinguishes between regulations which restrict the use to which land may be put and regulations which bring about an expropriation of a person's title to land. Mere restriction of user will not generally give rise to a claim for compensation. See *Grape Bay Limited v. Attorney General of Bermuda* [2000] 1 WLR 574, at 583C-F (Lord Hoffmann). This does not mean that restrictions on user imposed by regulations (including zoning laws) can never amount to a deprivation of property. It is possible that, in substance, a law has the effect of so restricting the use to which land can be put that a person's title to land becomes worthless or practically so. In that case, it can be said that there has been a de facto expropriation of an owner's title to land. In such instance, compensation would be payable under Article 105. Whether or not there has been de facto expropriation of title is a question of degree. The Court looks at all relevant circumstances to ascertain whether the substantial effect of a regulation is to remove any meaningful claim of entitlement to a piece of land as a whole. See *Grape Bay* at 583G-584A. I am grateful to Mr. Dykes SC (appearing for Fine Tower) for drawing my attention to a passage in Mulcahy (ed.), *Human Rights and Civil Practice* (2001) (at 16.72). In my view, the passage accurately and succinctly sets out the Court's approach in determining whether there has been a deprivation of title in substance. The passage reads:- A de facto expropriation of this kind can only occur where there has been so substantial an interference with the ownership and use of the

possession concerned that it effectively equates to the total extinction of ownership notwithstanding the fact that the owner retains legal title. Deprivation may thus occur if the owner is deprived of all meaningful use of his property. However, any form of provisional or temporary loss of rights is very unlikely to constitute deprivation. Equally, interferences which do not affect the value of the possession at all, or which affect its value to a severe degree but not so as to render it worthless, are also unlikely to be considered deprivations. A finding of de facto expropriation is accordingly, and is likely to remain, extremely rare. To obtain a feel for how the Court determines whether there has been de facto expropriation, I will now briefly examine 5 cases in which the question of deprivation of property has arisen. The cases are *Sporrong and Lönroth v. Sweden* (1982) 5 EHRR 35 (European Court of Human Rights); *Kowloon Poultry Laan Merchants Association v. Director of Agriculture, Fisheries and Conservation* [2002] 4 HKC 277 (CA); *Donald W. Agins v. City of Tiburon* (1980) 447 US 255; *Lucas v. South Carolina Coastal Council* (1992) 505 US 1003; and *Anthony Palazzolo v. Rhode Island* (2001) 533 US 606. The last 3 cases mentioned are decisions of the US Supreme Court on which (among several others) Mr. Dykes relies. A.2 *Sporrong* Article 1 of Protocol No.1 to the European Convention on Human Rights is in similar terms to Article 105 of the Basic Law. Article 1 (entitled Protection of Property) provides:- Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not however in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties. In 1956 the Swedish Government granted the Stockholm City Council a permit to expropriate land belonging to the *Sporrong* estate. The permit was originally valid for 5 years. The Council, however, repeatedly applied to the Government for extensions of the permit. The land in question was in fact never expropriated and the permit was finally cancelled in 1979. The estate never attempted to sell the land while the permit was in force. Over roughly the same period as the expropriation permit was in force, the *Sporrong* land was also subject to a prohibition on construction imposed by the Stockholm County Administrative Board. The estate applied for an exemption from the prohibition in 1970 in order to widen the front door of a building. Otherwise, it never applied for an exemption while the prohibition was in effect. The majority of the European Court (10 of 19 judges) held that the expropriation permit and its extensions violated the right of peaceful enjoyment in the 1st sentence of the 1st paragraph of Article 1. This was because the Swedish law regulating expropriation permits was disproportionate. It did not strike a fair balance between the public interest and the individual's right. For instance, it made no provision for an individual to seek a reduction in an expropriation permit's duration or to claim compensation for disturbance to his enjoyment of the land. Believing it to be unnecessary at the time, the majority did not proceed to determine whether the estate had actually suffered prejudice as a result of the contravention of the right of peaceful enjoyment. On whether there had been a deprivation of possession within the meaning of the 2nd sentence of the 1st paragraph of Article 1, all 19 judges thought that there had been none. The majority (10 judges) stated (at 63):- In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the

appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are practical and effective, it had to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants. In the Court's opinion, all the effects complained of ... stemmed from the reduction of the possibility of disposing of the properties concerned. Those effects were occasioned by limitations imposed on the right of property, which right had become precarious, and from the consequences of those limitations on the value of the premises. However, although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions. The Court observes in this connection that the applicants could continue to utilise their possessions and that, although it became more difficult to sell properties in Stockholm affected by expropriation permits and prohibitions on construction, the possibility of selling subsisted; according to information supplied by the Government, several dozen sales were effected... There was therefore no room for the application of the second sentence of the first paragraph [of Article 1] in the present case. Eight of the minority judges agreed that there had been no deprivation of property. They acknowledged that the right of peaceful enjoyment of property had been contravened. But they did not believe that the relevant Swedish law was disproportionate. They stated:- It is true that the expropriation permits and building restrictions were maintained in force for a number of years and, in the case of the Sporrong Estate, for more than two decades, which is a long time. But, on the other hand, the Swedish Government has advanced understandable reasons for this. It is also relevant to take into account the legal and factual position of the owners during the period of the restrictions. They remained in ownership and retained the use of the properties in their existing state. They had the right to dispose of their properties, and other owners in a similar situation did so. It was possible for them to apply for permission to reconstruct and improve their properties, at least within the limits inherent in all town planning: both the Sporrong Estate and Mrs. L. nroth in fact applied in 1970 for permission to make alterations and obtained it. Besides, it should be borne in mind that owners of property in a modern society are affected by many other factors than formal decisions of the kind here in question. Indeed, as soon as the authorities make known their intentions regarding the future use of land and properties within their area, the owners may suffer adverse effects such as the applicants complained of in the present case. In a separate opinion, Judge Walsh said that there had been no violation of Article 1. Here Fine Tower does not contend that the draft OZP and the Town Planning Ordinance (Cap.131) on which the draft is premised are disproportionate as legislation. Sporrong is primarily of interest to these proceedings in the guidance it gives on whether or not there has been de facto deprivation of property. It will be noticed that the effect of the expropriation permit and building prohibition order on the Sporrong land was significant. The Sporrong land experienced a diminution in value. Although not valueless, it was not easily marketable. The state of the land at the time when the restrictions were imposed could not be changed without permission from the Government. Such situation lasted over 2 decades. Nonetheless, the 19 judges hearing the case were certain that there had been no deprivation of property. Paragraph 63 of the majority judgment (cited above) suggests that 2 key factors which led to this conclusion were:-

- (1) the fact that the land could be used in its existing state; and,
- (2) the fact that the land was not valueless and could still be sold in the market. These 2 factors are echoed in the minority opinion (albeit in the context of a discussion on the proportionality of the applicable Swedish legislation). The minority then go on to identify a 3rd factor, namely, the fact that it was possible to seek permission to carry out construction or improvement works on the land. Sporrang thus establishes that, in assessing whether there has been actual or de facto deprivation of property within the meaning of Article 105, a Court is entitled to look at the 3 factors identified from the majority and minority judgments. Mr. Dykes submits that neither the continued marketability of land nor the possibility of applying for a modification of the terms on which land is held are relevant factors to be taken into account for the purposes of Article 105. But in my judgment such contention is not supported by Sporrang. I shall consider Mr. Dykes submission in greater detail below when I discuss Lucas. A.3 Kowloon Poultry The bird flu outbreak in December 1997 prompted a regulation requiring chickens to be sold separately from water fowl (ducks and geese). The Government provided a special site for wholesalers to sell water fowl. But the applicant complained that the facility was too far away from customers and hence was impractical. The practical result was that the applicant's members had to close down the duck and geese side of their businesses. Accordingly, the regulation (the applicant said) constituted a deprivation of property, namely, the trade of selling water fowl. At first instance, the applicant was refused leave to apply for judicial review. The Court of Appeal (Mayo VP and Suffiad J) dismissed the applicant's appeal. It held that there had been no deprivation of property or business, as opposed to mere control of the use of land. More importantly, in support of its judgment, the Court of Appeal cited the decision of the European Commission in *Ban r v. Sweden* App. No. 11763 of 1985, 60 DR 128. The latter case applied Sporrang to a claim alleging deprivation of property in fishing rights. It appears then from Kowloon Poultry that the approach in Sporrang outlined above is one endorsed by the Court of Appeal and applicable in Hong Kong. A.4 *Agins v. Tiburon* The 5th Amendment to the US Constitution prohibits the taking of private property for public use without just compensation. But, as in Hong Kong, not every regulation which leads to a restriction in the use of property or a diminution in the value of a land will constitute a taking for which compensation is payable. What constitutes a compensatable taking is a question of magnitude which depends on the facts of particular case. See *Pennsylvania Coal Company v. Mahon* (1922) 260 US 393, at 413 (Holmes J). In *Agins* an owner complained against Tiburon City zoning regulations which were imposed after his purchase of 5 acres of undeveloped land. Under those regulations, the owner could only use his land for single-family homes, accessory buildings and open space. Further, the regulations required prior submission of building plans to the city to determine whether any proposed development preserved the surrounding environment and maintained an appropriate building to open space ratio. The US Supreme Court held that there was no taking. Powell J, speaking for the Court, stated (at II):- Although the ordinances limit development, they neither prevent the best use of appellants land,... nor extinguish a fundamental attribute of ownership,... The appellants

have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential... The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the justice and fairness guaranteed by the Fifth and Fourteenth Amendments... The owner bought the land for the purposes of residential development. Although initially the owner was free to erect whatever he wished on his land, following Tiburon's zoning laws he could only develop his land within certain defined parameters. Even then, he still had to obtain permission for any proposed building. Nonetheless, that the owner's ability to develop was subject to the obtaining of a permission (which might be denied) was not sufficient to give rise to a taking. What I derive then from Agins is that, in determining whether there is a deprivation of property, it is relevant to consider whether land may be used or developed, even if such use or development is contingent on obtaining permission from a public authority. A Court is unlikely to find that there has been total deprivation where land can be used, even if that use is subject to the obtaining of a permission. This principle is consistent with the 3rd factor identified by the minority in Sporrang as discussed above.

A.5 Lucas v. South Carolina The applicant bought land with the intention of building a home. Later, South Carolina enacted a law preventing him from building a habitable structure on his property. The applicant complained. A trial court found that, as a result of the law, the applicant's property had been rendered valueless. After the case had been heard by the state trial court, while the matter was before the South Carolina Supreme Court, the law was amended to allow the South Carolina Council to issue permits for the building of habitable structures on the affected land. At the hearing before the South Carolina Supreme Court, it was suggested that the applicant's proceedings were premature. This was because, as a result of the amended legislation, it became open to the applicant to seek a special permit. But the South Carolina Supreme Court went ahead with the appeal on the merits. It concluded that there was no taking even during the period before the law was amended. The US Supreme Court reversed the South Carolina Supreme Court. Scalia J (delivering the judgment of the Court) held that there had been deprivation. Scalia J stated (at 1A)):- We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. The dictum just quoted re-states what Grape Bay makes clear. If the effect of a regulation is substantively to remove any meaningful claim of entitlement to a piece of land as a whole, there is a deprivation of property. It is no answer to a claim for compensation under Article 105 to say that, though deprived of all meaningful attributes of property-holding, an owner is still left with the bare shell of a legal title. But, that aside, I do not think that Lucas is of much help. First, in Lucas there was an explicit finding by the trial court that the applicant's land became valueless after promulgation of the original, unamended legislation. On that basis,

whatever the position after the law was amended, there must at least have been a deprivation before the amendment was passed. Here, in contrast, Mr. Dykes accepts that Fine Tower's lots retain value. That value may possibly be less than what it was before the draft OZP was issued. But the lots have been and continue to be marketable. Second, Scalia J observes (at II) that the possibility of obtaining a special permit made it premature to determine whether there was deprivation of property following amendment of the South Carolina law. The applicant could always request a special permit. He had not yet done so. It was only if his request for a permit were unreasonably denied that he would be unable to develop his land. Only then could the applicant logically contend that there was a taking of property despite amendment of the law. Here there is the possibility of negotiating a modification of the COE with the Government. Moreover, the possibility of negotiation has always existed, even before issue of the draft OZP. The option was and remains open to Fine Tower. Lucas suggests that, in such circumstance, a claim for deprivation would be (to use Scalia J's word) unripe. The relevant land cannot be said to be economically valueless and the Court cannot conclude that there has been deprivation. Mr. Dykes has attempted to distinguish the possibility from obtaining planning permission to build from the possibility of obtaining a lease modification. Mr. Dykes first points out that, in the former instance, the Government would be acting administratively. In contrast, where negotiating a premium for lease modification is concerned, the Government would be acting purely as a commercial landlord. It might refuse to modify a lease for whatever reason or demand an unreasonable premium. In such event, its decision as commercial landlord refusing a modification would not normally be subject to judicial review. I am not persuaded by the distinction which Mr. Dykes draws. The evidence here is that the Government is prepared to negotiate a modification of the COE. It is Government's policy to modify old lease conditions which severely restrict the development permitted on a lot. Thus, in respect of Fine Tower's lots, subject to the payment of a premium, Government is prepared to consider redevelopment proposals complying with the draft OZP. Unless and until proposals for any redevelopment within the terms of the draft OZP are unreasonably turned down by the Government (whether acting administratively or as a commercial landlord), I do not think that it can be said that Fine Tower's lots are valueless or useless. It seems to me that Fine Tower is in a precisely similar position to the applicants in *Agins* and *Lucas*, both of whom had to obtain some sort of permission in order to develop their land in any way. Nor do I see how the fact that Fine Tower may have to pay a premium for a modification affects the analysis. Fine Tower may not be prepared to pay a premium. But someone else might be willing to do so. The potential for development along the lines in the draft OZP inevitably means that Fine Tower's lots have value. That development potential would be factored into the market value of the lots. Fine Tower could enjoy that factored-in value merely by selling its lots. Much in the same way, if the *Sporrong* estate, Mr. *Agins* or Mr. *Lucas* did not feel that it was worth their while to seek building permission from the public authorities, they could sell their land to persons who were prepared to do so. To bolster the contention that lease modification at a premium was not relevant to deciding whether there has been deprivation, Mr. Dykes offers an analogy. Imagine (Mr. Dykes submits) that a person pays \$1,000 in

advance for a hotel booking. On turning up, the person is told that no room is available. But he may pay an extra \$1,000 for an upgrade to a suite in the hotel annex. In that situation, Mr. Dykes suggests that the right to a room at an agreed price has been lost, even if the person can secure a better room by paying extra. I do not find the analogy compelling. It strikes me as equivalent to comparing apples with oranges. In the hotel analogy, the \$1,000 having been paid, the hotel became contractually bound to provide a room. It cannot avoid that legal obligation by raising the possibility of a suite in an annex in (presumably) some different location. In the present case, the Government is not contractually bound to allow a person to use the land for one or more of the purposes stated in the COE. Fine Tower's acquisition of lots was implicitly subject to the imposition of regulations in the public interest. The question here is not one of assessing whether there is breach of a contractual right owed to Fine Tower. The question is instead one of determining whether in fact the attributes of ownership have been so nullified as to render one's title to land meaningless. In further support of his case against treating lease modification as relevant to the issue of deprivation, Mr. Dykes cited *Director of Lands v. Yin Shuen Enterprises Ltd.* (2003) 6 HKCFAR 1. Yin Shuen concerned the assessment of compensation payable on a land resumption. Such compensation is governed by Land Resumption Ordinance (Cap.124) (LRO) s.12 which provides as follows:- In the determination of the compensation to be paid under this Ordinance:-

- (a) no allowance shall be made on account of the resumption being compulsory; (aa) no account shall be taken of the fact that land lies within or is affected by any area, zone or district reserved or set apart for the purposes specified in s.4(1)(a),(c), (d), (e), (f), (g), (h) or (i) of the Town Planning Ordinance (Cap.131);
- (b) no compensation shall be given in respect of any use of the land which is not in accordance with the terms of the Government lease under which the land is held;
- (c) no compensation shall be given in respect of any expectancy or probability of the grant or renewal or continuance, by the Government or by any person, of any licence, permission, lease or permit whatsoever: Provided that this paragraph shall not apply to any case in which the grant or renewal or continuance of any licence, permission, lease or permit could have been enforced as of right if the land in question had not been resumed; and
- (d) subject to the provisions of s.11 and to the provisions of paragraphs (aa), (b) and (c) of this section, the value of the land resumed shall be taken to be the amount which the land if sold by a willing seller in the open market might be expected to realise. In *Yin Shuen* the Court of Final Appeal held (at 49 (Lord Millett NPJ)) that LRO s.12(c):- excluded from the compensation payable on resumption of land held in Hong Kong under a [Government] lease any element which would reflect the speculative element in the value of land referable to the prospect of obtaining a modification of the user covenant in the lease. LRO s.12(c) thus eliminates development potential from any calculation of compensation payable upon Government resumption of land. By development potential, the Court of Final Appeal means the difference between the value of land subject to restrictions and its open market value

which takes account of the prospects and costs of obtaining a modification of ... the lease . See *Dragon House Investment Ltd. v. Secretary for Transport* (2005) 8 HKCFAR 668 (esp. at 17 and 35), explaining *Yin Shuen*. In light of *Yin Shuen*, the Court cannot (Mr. Dykes argues) have regard to development potential arising from the prospect of a lease modification in evaluating whether or not there is a deprivation under Article 105. If development potential cannot be taken into account in calculating the compensation payable upon resumption, it should not be taken into account (Mr. Dykes reasons) in assessing whether there has been a deprivation for which compensation is payable. I do not accept Mr. Dykes reasoning. Compensation payable on a resumption is governed by the LRO, including s.12(c). But what compensation is payable on a resumption under the LRO is a different question from whether there has been a deprivation within the terms of Article 105. The LRO does not govern the latter question. In the absence of a statute specifically providing that one should ignore development potential in determining whether there is deprivation, I do not see why the Court should disregard the fact that value accrues to land due to the possibility of lease modification. There is no reason to extend the application of LRO s.12(c) beyond its stated ambit. Indeed, but for the stricture to the contrary in LRO s.12(c), development potential would equally be taken account in the assessment of compensation in resumption cases. This would be consistent with general principle (as reflected in LRO s.12(d)). The Court of Final Appeal made this plain in *Yin Shuen* (at 18):- In the absence of s.12(c), therefore, compensation for the subject lands would be based in the first instance on their value subject to the restrictions in the relevant lease. But regard would also have to be paid not only to the likelihood or otherwise of the Government granting a modification of the terms of the lease, without which the development potential of the lands could not be realised, but also to the costs of obtaining such modification, including the payment of any premium which the Government might demand as the price of modification. If someone is prepared to pay something for land because of the possibility of modifying lease restrictions and developing the land along the lines of a draft OZP, then the title to the land is not valueless. The owner can sell the land on the open market and realise its development potential into cash. This would be regardless of the amount which the LRO stipulates would be payable by the Government if it resumed the same land. For the above reasons, I reject Mr. Dykes submission that the possibility of a lease modification upon payment of a premium is an irrelevant factor. I do not think that is consistent with the case law surveyed here. A.6 *Palazzolo v. Rhode Island* Mr. Dykes relied on this case for a dictum which (it was submitted) summarised the operative principle. The dictum from the opinion of Kennedy J (speaking for the Court) was this (at II):- Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. In my view, the dictum is unexceptional. It does not take matters further than what has already been discussed. As seen above, in considering whether there is a taking or deprivation, Courts in the US and elsewhere consistently have regard to an owner investment-backed expectations . Contrary

to what Mr. Dykes suggests, on any reasonable reading, this expression must include the development potential of land subject to a particular regulation. Similarly, Courts in the US and elsewhere consistently look at the economic effect of a regulation on a landlord. If the landlord can sell his property at something more than a purely token value, Courts have regularly held that there has been no deprivation. Palazzolo is itself an example of the last type of situation. There the applicant acquired large parcels of salt marsh which the Rhode Island Council subsequently designated as protected coastal wetland. The Council then rejected all the applicant's proposals to develop his property. The applicant claimed compensation for deprivation of property. The Supreme Court rejected the applicant's claim of a taking. There could be no deprivation because the state trial court had earlier found that the upland portions of the applicant's land could still be improved. The applicant's land as a whole thus retained significant development value of US\$200,000 and could not be described as economically idle. Therefore, Palazzolo does not help Mr. Dykes' argument.

B. Application of law to fact Given the foregoing legal analysis, I do not think that there has been a deprivation here. The fact that the limited uses in the COE are not permitted by the draft OZP cannot be decisive on the issue of deprivation. In particular, I bear in mind 3 matters corresponding to the factors identified in the foregoing discussion of Sporrang, Kowloon Poultry and US case law. First, the draft OZP allows Fine Tower to use its 2 lots in their present state. The lots are presently open land. Nothing has been built on them. Fine Tower is not being asked, for instance, to demolish any structures erected on the land before the draft OZP was issued. Apart from running a temporary car park on the basis of letters of waiver, Fine Tower has not done anything on its lots. Second, Mr. Dykes accepts that the 2 lots have economic value. They are not valueless. They are capable of being sold for more than a nominal sum in the open market. Third, the Government affirms that, subject to payment of a premium, it is prepared to process a lease modification in respect of the lots. Such modification (Government suggests) could be by way of a land exchange on a foot for foot area basis to facilitate implementation of the OU zoning in the draft OZP. In light of these 3 matters, the draft OZP cannot be said to have deprived Fine Tower of all meaningful vestiges of title. The draft OZP does not constitute an actual or de facto taking of property. It follows that there has been no contravention of Article 105.

IV. CONCLUSION Fine Tower's application for judicial review is dismissed. There will be an Order Nisi that Fine Tower is to pay the Board's costs, such costs to be taxed if not agreed.

(A. T. Reyes) Judge of the Court of First Instance

High Court Mr Philip Dykes, SC and Mr K M Chong, instructed by Messrs Chui & Lau, for the Applicant Mr Jat Sew Tong, SC and Mr Abraham Chan, instructed by the Department of Justice, for the Respondent

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