

19 August 2004

**Housing, Planning and Lands Bureau**  
**Technical Circular No. 1/04**

**Environment, Transport and Works Bureau**  
**Technical Circular No. 1/04**

**Protection of the Harbour Ordinance**

**Purpose**

This technical circular sets out the requirements of the Protection of the Harbour Ordinance (PHO) (Cap. 531) and provides guidance for public officers and public bodies to follow in considering and approving reclamation proposals.

**Effective Date**

2. This Circular takes immediate effect.

**Effect on Existing Circulars**

3. This Circular supersedes PELB Technical Circular No. 4/98 on Protection of the Harbour Ordinance and ETWB Technical Circular (Works) No. 32/2003 on Protection of the Harbour. However, the revised administrative arrangements for reclamation works as promulgated under PELB Technical Circular No. 3/97, Works Bureau Technical Circular No. 13/97 and 9/2001 shall remain in force.

**Definition of Reclamation**

4. The guidelines set out in this Circular apply to all reclamation proposals, regardless of scale, initiated by the Government or the private sector within the boundaries of the harbour as defined under section 3 of the Interpretation and General Clause Ordinance (Cap. 1) (see Annex A). According to section 2 of the PHO, reclamation means any works carried out or intended to be carried out for the purposes of forming land from the sea-bed or foreshore. In case of doubt on whether certain works would constitute reclamation, advice of the Department of
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Justice should be sought.

### **Government's Position on Harbour Reclamation**

5. The Government is committed to protecting and preserving the harbour and enhancing it for public enjoyment. Apart from the Central Reclamation Phase III and the reclamation proposals for Wan Chai North and South East Kowloon, the Government will not undertake any further reclamation in the harbour. These guidelines are therefore of particular relevance to the two proposed development projects of Wan Chai Development Phase II and South East Kowloon Development. Small-scale reclamations required for the construction of piers, landing steps, etc. not subject to the revised administrative arrangements promulgated in 1997 should also comply with these guidelines.

### **Protection of the Harbour Ordinance**

6.1 Section 3 of the PHO provides that:

- (a) “The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.”  
[*section 3(1)*]
- (b) “All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them.” [ *section 3(2)* ]

6.2 Section 3(1) of the PHO establishes a statutory principle recognizing the harbour as a special public asset and a natural heritage of Hong Kong people and prescribing it to be protected and preserved.

6.3 Section 3(2) imposes a specific legal duty on public officers and public bodies to abide by the legal principle stated in section 3(1) in the exercise of any powers vested in them. The legal burden to rebut the presumption is a heavy one. To overcome the presumption, all public officers and public bodies must follow the principles prescribed in the PHO and the CFA judgment conscientiously and decide whether it is complied with before coming to a decision.

## **Court of Final Appeal's Judgment**

7.1 On 9.1.2004, the Court of Final Appeal (CFA) handed down its judgment on the Town Planning Board (TPB)'s appeal against the High Court's ruling in respect of the draft Wan Chai North Outline Zoning Plan, clarifying the interpretation of the legal principles behind the PHO. The CFA judgment and its Summary (FACV 14/2003) is viewable at the website of the Judiciary at [www.judiciary.gov.hk](http://www.judiciary.gov.hk).

7.2 According to the CFA, the harbour is a special public asset and natural heritage is declared to belong to Hong Kong people. It is a community asset and is to be enjoyed by the people of Hong Kong. It must be kept from harm, defended and guarded. There must be not merely protection. There must also be preservation.

7.3 Reclamation would result in permanent destruction and irreversible loss of what should be protected and preserved under the statutory principle. The statutory presumption against reclamation was therefore enacted to implement the principle of protection and preservation. It is a legal concept and is a means or method for achieving protection and preservation. Its legal effect is not to impose an absolute bar against reclamation. It does not prohibit reclamation altogether. As a presumption, it is capable of being rebutted.

7.4 The CFA propounded a single and demanding test. The presumption against reclamation can only be rebutted by establishing an overriding public need for reclamation, i.e. "the overriding public need test".

7.5 ***Public needs*** are community needs and include the economic, environmental and social needs of the community.

7.6 A need should only be regarded as ***overriding*** if it is compelling and present and if there is no reasonable alternative to reclamation, as follows:

- (a) a compelling need must have the requisite force to prevail over the strong public need for protection and preservation of the harbour;
- (b) the meaning of present need is that taking into account the time scale of planning exercises, the need would arise within a definite and

reasonable time frame;

- (c) all circumstances should be considered in considering whether there is a reasonable alternative to reclamation, including the economic, environmental and social implications of each alternative, the cost as well as the time and delay involved.

7.7 The extent of reclamation should not go beyond the minimum of that which is required by the overriding need. It is necessary that each area proposed to be reclaimed must be justified.

7.8 The decision that there is an overriding public need for reclamation must be based on cogent and convincing materials.

## **Guidelines for Consideration of Reclamation Proposals**

### **8.1 Considerations in the Decision-making Process**

8.1.1 Based on the CFA judgment, a flow chart highlighting the major considerations that should be taken into account by public officers and public bodies in the decision-making process on reclamation proposals is at Annex B. It applies to all stages of the process covering planning and engineering investigations, preparation of plan and reclamation/road schemes for gazetting, consideration of objections, approval/authorization under relevant ordinances, funding approval and detailed design of a reclamation project. However, it does not apply to the works implementation stage which is basically to implement the project already approved by all relevant authorities.

8.1.2 All public officers and public bodies that are involved from initial project inception to the planning and design stage are required to critically examine the need for the proposed reclamation project. The considerations and any decision on the reclamation project should be recorded fully in writing.

8.1.3 For each area of reclamation, three basic questions will need to be answered. The whole process including the decisions as to whether there is a compelling and present public need, whether there is any reasonable alternative, and whether the proposed reclamation extent is the minimum must be clearly documented and substantiated by cogent and convincing materials. It is the responsibility of the proponents of individual facilities (i.e. the client

bureaux/departments) to prove, with engineering input from the relevant works departments, that the proposals they put forward will meet “the overriding public need test”.

8.1.4 There is no hard-and-fast rule on what materials could be considered as cogent and convincing. It depends on the merit of each case. Provided that one takes account of all relevant matters and does not consider irrelevant matters, one’s decision could not be challenged as perverse, irrational or unreasonable.

***Question 1 – Is there a compelling and present public need?***

8.1.5 In assessing whether there is an overriding public need for providing certain infrastructure or facility which may involve reclamation, it will be necessary to establish that the need is a public need, and is compelling and present.

8.1.6 Public needs are community needs and include the economic, environmental and social needs of the community. The following are some examples of public needs:

*Economic Needs*

- sustain economic growth and prosperity of the economy (e.g. by providing or improving essential infrastructure such as roads, railways, drainage and sewerage facilities, or facilities which require a waterfront location such as cruise terminal);

*Environmental Needs*

- needs which are most substantial/formal (e.g. reclamation for constructing environmental infrastructures like sewage treatment plants);
- needs which are confirmed through proper environmental studies such that they are indeed environmental “needs” rather than ad hoc justifications for reclamation; and
- needs which are backed up by broad community consensus, instead of just some “wants” by the few to justify reclamation. The concepts of “needs” and “wants” are different and should not be mixed up.
- It will be up to the project proponent to carry out studies to justify the environmental needs. When considering the environmental needs for the proposed reclamation, the project proponent may also need to

examine the “net result” after taking into account the possible adverse environmental implications arising from the project or at least the reclamation itself.

*Social Needs*

- Improve quality of life of the community (e.g by providing more public amenities and promoting public accessibility to the harbour-front).

8.1.7 An overriding need must be compelling and justified by cogent and convincing materials. The exact type and extent of supporting materials depend on the nature and purpose of the project/facility. Annex C gives some examples of the materials that may be required for justifying certain projects.

8.1.8 An overriding need must also be present. To satisfy this requirement, there must be a sufficiently concrete programme of implementation and firm commitment from the concerned department and bureau, with endorsement by relevant authorities, where applicable. Annex D is a proforma for confirming the present need for a proposed facility involving reclamation.

8.1.9 In providing cogent and convincing materials to justify the urgent public need for reclamation, it is necessary to set out any adverse consequences of not meeting the public need in time, which may cover various aspects including the economic, environmental and social implications, as well as the time, cost and delay involved.

***Question 2 – Is there any reasonable alternative to reclamation?***

8.1.10 Alternatives to reclamation can be in various forms such as changing the policy choices, siting/reprovisioning a use/facility at an alternative location or adopting an alternative road/rail alignment, and employing different design and construction methods. Annex E gives some sample questions that need to be answered in considering whether there are alternatives to reclamation.

8.1.11 All alternatives, including those put forward by the public, should be clearly set out and carefully examined to assess whether they are reasonable alternatives. A “no reclamation” scenario must be taken as the starting point in considering alternatives. It is imperative to examine if an overriding public need can be met without any reclamation.

8.1.12 All circumstances should be considered in determining whether there is a reasonable alternative to reclamation, including the economic, social and environmental implications, cost and time incurred, and other relevant considerations.<sup>1</sup> The assessments should be properly documented, and where appropriate, subject to public scrutiny. If any reasonable alternative is available, the reclamation proposal should not be considered further. An alternative may be considered as “unreasonable” if it (the following is not exhaustive) –

- (a) could not achieve or substantially achieve the set objectives;
- (b) would have significantly adverse economic, social and environmental implications;
- (c) would cause unacceptable delay to achieving the objectives;
- (d) would result in prohibitively high cost; and/or
- (e) would involve employment of untested technology.

8.1.13 As a general rule, reprovisioning of affected facilities on reclaimed land should be justified on individual basis and should not be taken for granted. All reprovisioning requirements must be justified individually on their own by the concerned departments and bureaux. It is necessary to demonstrate that there is no reasonable alternative but to reprovision an affected facility on reclamation.

***Question 3 – Is the proposed reclamation extent minimum?***

8.1.14 If it can be established that there is no reasonable alternative to reclamation in meeting the overriding public need, the next step is to ensure that

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<sup>1</sup> The range of indicators and criteria may include but not necessarily limit to the following:

- Economic Implications – economic growth and prosperity, overall cost of doing business, and employment opportunity;
- Social Implications – community need and aspiration, community support/consensus, healthy living, heritage preservation, social cohesion, and community identity;
- Environmental Implications – air quality, noise, water quality, waste disposal, energy efficiency, natural resources, landscape and visual impacts, and nature conservation;
- Cost – financial viability, return on investment/economic return, capital cost, and recurrent cost;
- Time – lead time of implementation, and time required to achieve the objectives; and
- Others – effectiveness of achieving the objectives, technical feasibility, and safety consideration.

reclamation must be restricted to only the amount strictly necessary to meet the overriding public need.

8.1.15 The extent of reclamation for each and every component must be fully justified on its own and minimized. Reclamation for a particular element/objective (e.g. reprovisioning of waterfront facilities affected by reclamation) cannot be justified by its association with the reclamation scheme, or individual components in the scheme, proposed for meeting certain overriding public needs (e.g. provision of essential road and railway infrastructure). The extent of reclamation may be considered as minimum if further reduction in reclamation would, for example –

- (a) significantly compromise the effectiveness and efficiency of a particular facility;
- (b) substantially increase the capital and running costs; and/or
- (c) unduly lengthen the construction time and result in unacceptable delay in provision of the required facilities and services.

8.1.16 The consideration leading to the decision of not selecting an alternative that may minimize the extent of reclamation because it does not pass the test of reasonableness should be documented as part of the cogent and convincing materials.

## **8.2 Public Consultation**

8.2.1 It is of paramount importance to gauge the views of the public on the need identified by the Government as an overriding public need. Public consultation should therefore be conducted on any reclamation proposal in the harbour. A proactive approach should be adopted to encourage public involvement in the process to instill a sense of partnership between the Government, stakeholder groups and the community. All relevant parties, including the Legislative Council, Town Planning Board, Harbour-front Enhancement Committee, relevant District Councils, professional institutes, interest groups, relevant advisory committees and the general public, should be consulted as appropriate. The extent of public consultation should be determined with reference to the scale of the reclamation proposal.



8.2.2 To be effective and useful, the public consultation exercise should be well structured and a consultation strategy including the following major aspects should be formulated:

- (a) the scope and timing of consultation;
- (b) the target audience to be consulted;
- (c) the methods of consultation (e.g. informal sounding out; opinion polling/market research/questionnaire survey; exhibition; press conference/briefing/release; publication of consultation materials; presentation to relevant committees/bodies; public consultation forum, etc.);
- (d) the types of consultation and presentation materials to cater for different types of audience and events; and
- (e) the level of representation at various consultation events.

8.2.3 The public should be involved early in the planning process. For any reclamation proposal that requires the carrying out of a comprehensive planning and engineering feasibility study, the public should be consulted at various key stages of the feasibility study, for example, when the inception report is prepared, preliminary findings of the study are available, alternative conceptual schemes are formulated and the preferred scheme recommended under the study, before a final decision is made by the Government. In particular, it is useful to collect public views on whether the facilities proposed on reclamation are generally accepted as meeting “the overriding public need test”, and whether there are any alternatives to reclamation that need to be examined.

8.2.4 Public views gathered from consultation should be carefully analyzed and incorporated, where appropriate. All public views addressed to the Government should be suitably responded to, for example, by way of correspondence or a consolidated consultation report.

### **8.3 Independent Expert Advice**

Where necessary, independent experts from outside the Government should be invited to ascertain if “the overriding public need test” has been satisfied, if the

reclamation are cogent and convincing.

**Annexes**

- Annex A The Boundaries of the Harbour
- Annex B Flow Chart on Major Considerations in Decision-making Process on Reclamation Proposals
- Annex C Examples of Materials to Justify the Overriding Public Need
- Annex D Proforma for Confirming the Present Need for Facility Involving Reclamation
- Annex E Examples of Questions that Need to be Answered on Alternatives to Reclamation



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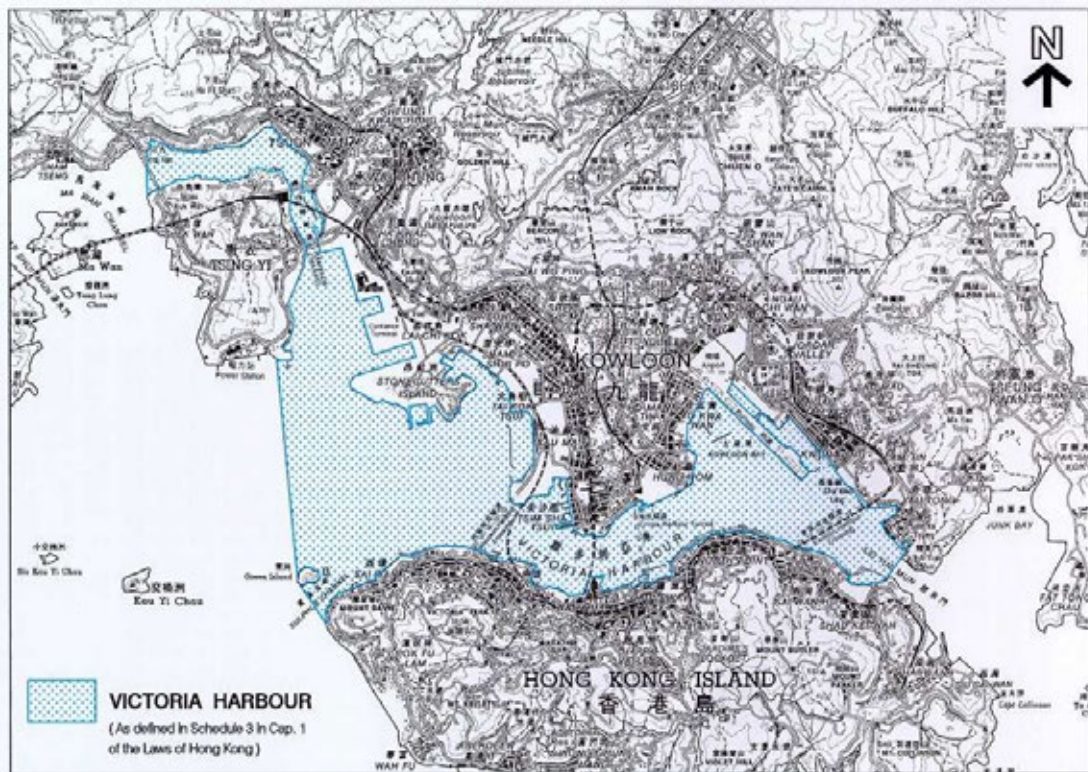
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Secretary for the Environment,  
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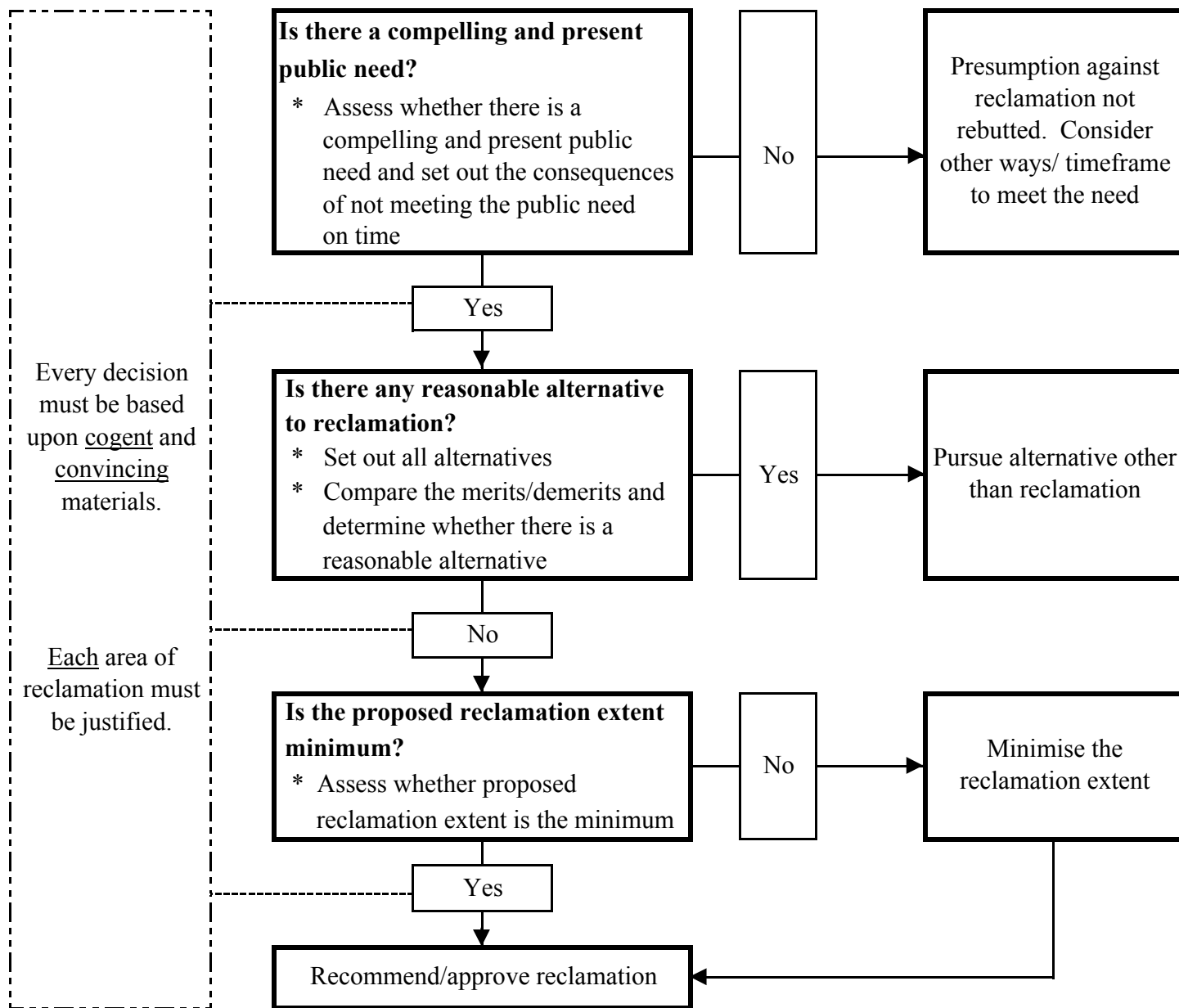
The Boundaries of the Harbour



According to the Interpretation and General Clauses Ordinance, the “Boundaries of Harbour” means the waters of Hong Kong between:

- (a) the eastern limit – a straight line drawn from the westernmost extremity of Siu Chau Wan Point to the westernmost extremity of Ah Kung Ngam Point; and
- (b) the western limit – a straight line drawn from the westernmost point of Island of Hong Kong to the westernmost point of Green Island, thence a straight line drawn from the westernmost point of Green Island to the south-easternmost point of Tsing Yi, thence along the eastern and northern coast lines of Tsing Yi to the westernmost extremity of Tsing Yi, and thence a straight line drawn true north therefrom to the mainland.

**Flow Chart on Major Considerations in Decision-making Process on Reclamation Proposals**



Footnote : The public will be consulted as necessary at various stages.

**Examples of Materials to Justify the Overriding Public Need**

***Case 1: Trunk Road and Railway***

Economic Aspect

- Findings and recommendations of updated transport studies
- Role of trunk road and railway in strategic transport network
- Road traffic forecasts in specific timeframe (e.g. volume/capacity ratios, speed of vehicular traffic)
- Congestion relief to adjacent roads
- Daily boardings, rail ridership, percentage of trips by rail
- Overloading of rail system and critical peak hour loadings
- Journey time
- Cost and benefit analysis
- Economic returns
- Economic loss due to congestion
- Effect on competitiveness of Hong Kong

Environmental Aspect

- Improvement in air quality
- Reduction in noise sensitive receivers exposed to excessive road traffic noise
- Reduction in energy consumption
- Improvements along other roads (by the relief in traffic provided by the new project)

Social Aspect

- Increase in mobility of passengers
- Improvement in living and working environment (may include qualitative assessment)
- Public support (may be established through public consultation)
- Improvement in living and working environment

### ***Case 2: Drainage and Sewerage Facilities***

#### Economic Aspect

- Resident/working population and domestic/non-domestic units to be served by the facilities
- Reduction in flooding risk inland
- Reduction in economic loss due to flooding

#### Environmental Aspect

- Improvement in water quality
- Reduction in expedient connections to stormwater drains

#### Social Aspect

- Improvement in healthy living and working environment (may include qualitative assessment)
- Public support (may be established through public consultation)

### ***Case 3: Promenade***

#### Economic Aspect

- Enhancing the image of Hong Kong as an international city and its competitiveness (may include qualitative assessment)
- Number of tourists visiting the promenade
- Number of major events using the promenade as venue

#### Environmental Aspect

- Improvement in visual quality and landscape character of the waterfront

#### Social Aspect

- Public support and aspiration for a high-quality waterfront promenade and supporting facilities (may be established through surveys and public consultation)
- Improvement in healthy living and working environment (may include qualitative assessment)

**Proforma for Confirming the Present Need for Facility Involving Reclamation**

*(One proforma should be used for each proposed facility)*

<b>Facility:</b>	<i>(Specify the name of facility - e.g. sewage pumping station)</i>
<b>1. Date Required:</b>	<i>(Specify the timing when the facility is required)</i>
<b>2. Justifications:</b>	<i>(Explain why the facility must be provided at the above time)</i>
<b>3. Authority and Decision Date:</b>	<i>(Specify the authority giving the endorsement to the provision of the facility and the date of decision)</i>
<b>4. Public Works/ Building Programme:</b>	<i>(Specify the category of Public Works/Building Programme in which the facility falls, and relevant dates of inclusion/upgrading in the programme)</i>
<b>5. Public Views/ Support:</b>	<i>(Give an account of the public views/support on the provision of the facility, including the dates when the consultations were undertaken)</i>

**Examples of Questions that Need to be Answered on Alternatives to Reclamation**

***Alternative Ways to Meet the Public Need (including policy choices)***

- Should demand management measures be used instead of reclaiming the harbour to provide land for developing new facility?
- Can a change in policy effectively resolve the problem?
- Is there an alternative mode of operation/system that can achieve or substantially achieve the same objectives of the proposed reclamation?
- Can the existing facilities be improved or better utilized to reduce or postpone the need to provide the new facility on reclamation?
- Can cash compensation be paid in lieu of reprovisioning of affected facilities?
- Can pollution problem be controlled at source?

***Alternative Locations of Use/Facility or Alternative Alignments***

- Can a particular use or facility be located outside the proposed reclamation?
- Can an alternative road/railway alignment be adopted to obviate the need for or minimize reclamation?

***Alternative Design and Construction Methods (more related to minimizing extent of reclamation)***

- Can road tunnels be built instead of surface roads?
- Can the size and land requirement of a particular facility be further reduced to minimize reclamation?
- Can staging and work sequence of construction be varied to reduce the reclamation extent?
- Are there alternative construction/foundation methods for waterfront structures to minimize reclamation?